

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**JUDICIAL REVIEW NO. E017 OF 2025**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTIONS...1<sup>ST</sup>  
RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup>  
RESPONDENT**

**AND**

**ANTHONY IRUNGU KIHORO.....EX PARTE  
APPLICANT**

**RULING**

1. By Notice of Motion dated 22<sup>nd</sup> October 2025, the *ex parte* applicant seeks the following orders under judicial review:

- 1. THAT an order of CERTIORARI do issue to remove and bring to this Honourable Court for purposes of quashing the entire act and/or purported action of the 1<sup>st</sup> respondent approving the institution of criminal proceedings against the applicant in respect of OB NO. 24/18/8/25;**
- 2. THAT an order of PROHIBITION do issue prohibiting the respondents, their servants, agents, and all persons acting under the authority, from arresting, charging,**

*commencing, continuing, or prosecuting any criminal proceedings whatsoever against the applicant based on the investigation file OB No. 24/18/8/25 and the offence of sexual assault;*

**3. THAT an order of MANDAMUS do issue:**

*a) directing the 1<sup>st</sup> respondent to exercise its statutory duty by formally withdrawing and closing the investigation file OB No. 24/18/8/25;*

*b) compelling the 1<sup>st</sup> respondent to communicate the said withdrawal and closure of OB No. 24/18/8/25 to both the 2<sup>nd</sup> respondent and the applicant's advocate within fourteen (14) days from the date of the order;*

*c) compelling the respondents to furnish the applicant and this Honourable Court with the police investigation file (OB No. 24/18/8/25) and all other relevant documents, including the internal correspondences and the decisions to charge/prosecute;*

**4. THAT a Notice to Show Cause do issue against the Principal Prosecution Counsel, Mavoko Sub-County and the Officer Commanding Station (OCS), Athi River Police Station, to show cause why they should not be cited for contempt of court orders, in default of compliance with Orders 1, 2 and 3 above.**

**5. THAT the costs of the Judicial Review application be awarded to the ex parte applicant;**

2. The application is supported by the verifying affidavit and statutory statement of the *ex parte* applicant, both dated 20<sup>th</sup> October 2025. The gist of the judicial review proceedings is that the applicant's counsel perused the police file on 15<sup>th</sup> September 2025. However, when he sought to peruse the file on 15<sup>th</sup> October 2025, he was denied access. It was thereafter, discovered that the police had concluded their investigations, prompting the 1<sup>st</sup> respondent to approve the prosecution of the applicant for the offence of sexual assault arising from a complaint lodged in OB No. 24/18/8/25. The applicant contends that since the formal decision had not been served upon him, there was imminent threat of arrest hence these proceedings. He further argued that the complainant S.M.A, a minor aged 8 years old, alleged that the assault occurred on Sunday 9<sup>th</sup> March 2025, between 10:00 a.m. and noon, in the applicant's house, where he was alone. The incident, however, was only reported on 18<sup>th</sup> August 2025. In his view, this delay of over five months was unreasonable, unexplainable, non-contemporaneous and fatal to the credibility of the complaint.
3. The applicant contended that his wife provided a sworn statement confirming that she was at home on the material day, together with the applicant, working virtually. This evidence, he argued, directly contradicted the complainant's allegations. That He further asserted that the police investigations ignored this crucial alibi. The complainant

alleged that she delayed reporting for six months because the applicant threatened her, but the applicant argued that these allegations were substantiated.

4. The applicant challenged the medical report dated 18<sup>th</sup> August 2025, from Nairobi Women Hospital GVRC, authored five months after the alleged incident. The report noted that the hymen was healed with a 6 o'clock tear and a widened vaginal opening, concluding that there had been vaginal penetration by use of a finger. The applicant argued that this conclusion was based on delayed history, lacking contemporaneous independent evidence, and was insufficient to overcome the existing alibi and delay in reporting. He further contended that the report implied the victim had not bathed for six months, which was implausible and undermined the reliability of the findings.
5. The applicant also pointed out inconsistencies between the testimonies of the complainant and her mother. For instance, the minor testified that she was hugged and drugged and had no recollection of her mother's version of events, while the mother testified that the victim was escorted inside alone. Secondly, the minor stated that she dashed to the door and took her shoes heading home, whereas the mother claimed that the victim left following threats with a rolling pin. Lastly, the complainant never raised a complaint when she was with the applicant, one month after the alleged offence occurred.

6. The applicant further cast doubt on the complainant's statement, alleging that she recalled the date of the incident only after being shown a photograph by her grandmother. HE argued that the photograph was not preserved in evidence to making it impossible to ascertain its time stamp. On this basis, he accused the respondents of negligence in the conduct of investigations. The applicant therefore contended that the investigations fell below the threshold of credibility necessary to sustain criminal charges against him.
7. The applicant continued that the above actions contravened Articles 47, 50 (2) (j) and 157 (11) of the Constitution as well as section 7 (2) (i) of the Fair Administrative Action Act. He stated that he was arrested and compelled to secure a cash bail of Kshs. 20,000.00 and was further accused of witness tampering. For these reasons, he urged this court to grant the reliefs sought.
8. The application is opposed. The respondents relied on the replying affidavit of PC Linda Kajuju, police officer serving the National Police Service, and the investigating officer assigned to this case, sworn on 7<sup>th</sup> November 2025. She denied the allegations set out in the application, adding that, as admitted by the applicant, he had a son called Jude. The respondent maintained that the procedure followed by the respondents was lawful, procedural and constitutional. Upon conclusion of the investigations, the applicant was arraigned before the Chief Magistrate's Court at Mavoko Law Courts

on 4<sup>th</sup> November 2025 and charged with the offence of sexual assault contrary to section 5 (1) (a) (i) as read with section 5 (2) of the Sexual Offences Act in ***criminal case no. E053 of 2025***. It was observed that no stay orders of prosecution had been issued, and therefore no court orders had been violated.

9. The deponent further stated that the applicant failed to demonstrate illegality, irrationality or procedural impropriety on the part of the respondents in handling of the matter, to warrant the orders sought. It was urged that the application was unmerited, amounted to an abuse of the court process, and was intended to circumvent the course of justice. In any event, the respondent argued that the application had been overtaken by events rendering it nugatory. They prayed that the application be dismissed.
10. The application was canvassed by way of written submissions. The applicant filed written submissions and list of authorities dated 5<sup>th</sup> February 2026. He argued that the decision to charge him contravened Articles 24, 47, 50 (1) and 157 of the Constitution as well as paragraph 4 (B) (1) and (2) of the National Prosecution Policy because there was no reasonable prospect of a conviction. He submitted that the charges preferred against him were based on shoddy investigations that ignored evidence supporting his innocence. In his view, the charges contravened public policy and amounted to an abuse of the legal process. He

complained that the failure to consider his alibi and the five-month delay in reporting violated the principles of fair administrative action. Finally, the applicant submitted that the fact that he had already been arraigned in court to answer to the charges did not preclude this court from considering the legality of the decision to charge, and therefore the matter was not overtaken by events. For these reasons, he prayed that the judicial review application be allowed.

11. The respondents filed their written submissions dated 9<sup>th</sup> February 2026. They submitted that the application was moot, as the orders sought had already been overtaken by events given that the applicant had been charged in court. They justified the decision to charge the applicant as being grounded in law, citing Articles 50, 157 (6) (a) and 245 (4) of the Constitution and argued that the charges were supported by cogent investigations. They prayed that the application be dismissed with costs.
12. I have considered the application, the affidavits, and the submissions, and analyzed the applicable law. The *ex parte* applicant seeks to quash the decision of the 1<sup>st</sup> respondent to charge him with the offence of sexual assault and to halt any further proceedings arising therefrom. In **Republic vs. Maurice Onyango Oketch (Interested Party)** [2021] KEHC 1775 (KLR), the court held that:

***“For this court to prohibit, bring to a halt or quash the intended criminal proceedings against the applicants, it must establish whether the respondents acted within their respective mandates in their investigation and subsequent institution of a criminal charge against the applicant. Concomitant with this issue would be to answer the question of whether the applicants’ rights have been violated in the manner that they claim and finally, whether the applicants are deserving of the reliefs sought.***

***Revisiting the circumstances under which the Court will grant an order quashing or prohibiting the commencement or continuation of a criminal trial process, the factors which a court ought to consider are now well settled in various judicial pronouncements. First, the court ought to be extremely cautious in making its determination so as to avoid prejudicing the intended or pending criminal proceedings. Secondly, the court ought not to usurp the constitutional and statutory mandate of the Director of Public Prosecutions and neither should it curtail the investigatory mandate accorded to the Directorate of Criminal Investigations. However, the court may intervene where the said discretion is exercised unlawfully and in bad faith, for instance where the discretion is being abused or being used for achievement of some collateral purpose which are not geared towards the vindication of the commission of a criminal offence.***

13. The court emphasized that judicial review in criminal matters requires caution to avoid prejudicing pending proceedings, and that intervention is only warranted where prosecutorial discretion is exercised unlawfully, in bad faith, or for collateral purposes
14. In **George Joshua Okungu & Another vs. The Chief Magistrates Court, Nairobi & another** [2014] eKLR, the court reiterated that the High Court ought not to usurp the constitutional mandate of the Director of Public Prosecutions. The mere likelihood that criminal proceedings may fail is not a ground for halting them. A good defence is to be raised before the trial court. However, where proceedings constitute an abuse of process or breach constitutional rights, the court will intervene.
15. Similarly in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another** [2012] eKLR the court held that the police have a duty to investigate complaints and only need to establish reasonable suspicion before preferring charges. The trial court is the proper forum to test the sufficiency of evidence.
16. The powers to charge a suspect with a criminal offence lies with the 1<sup>st</sup> respondent as provided under Article 157 (10) of the Constitution and section 4 of the Office of the Director of Public Prosecution Act. This is an independent autonomous office that does not require the consent of any person or authority. In exercise these powers, Article 157 (11) of the

Constitution and section 4 of the Office of the Director of Public Prosecution Act requires the 1<sup>st</sup> respondent to have regard to public interest, the interest of the administration of justice and the need to prevent abuse of legal process.

17. An application of this nature will therefore only succeed if it is demonstrated that the decision to charge fell outside the parameters set out in the Constitution and statute. The court will not interfere with the prosecutorial powers unless it is plainly clear that there has been a violation of its mandate, abuse of discretion, or breach of constitutional rights.
18. In the present case, the *ex parte* applicant argued that the investigations were not holistic and that he had a proper alibi. It is my finding that, these are defences that the *ex parte* applicant can raise before the trial court. To make a determination in his favor, at this stage would place this court in an awkward position, as the criminal proceedings are already underway. Such allegations are best tested in the trial process, putting the court in a position where evidence can be examined and credibility assessed, rather than in the judicial review proceedings.
19. None of the issues raised by the applicant demonstrate illegality, irrationality, or procedural impropriety sufficient to warrant this court's intervention. Accordingly, I find that the notice of motion dated 22<sup>nd</sup> October 2025 lacks merit. It is hereby dismissed with costs to the respondents.

It is so ordered.

Dated, signed and delivered at Machakos this 9<sup>th</sup> day of April 2026.

**RHODA RUTTO**

**JUDGE**

**In the presence of;**

.....Applicant

.....Respondent

Selina Court Assistant