

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E406 OF 2024

BETWEEN

ALEXANDER FIKSMAN

.....**PETITIONER**

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION.....

.....**1ST RESPONDENT**

THE INSPECTOR GENERAL OF POLICE..... 2ND

RESPONDENT

OCS KAHAWA SUKARI POLICE STATION3RD

RESPONDENT

GABRIEL OSER ALAN..... 4TH

RESPONDENT

J U D G M E N T

Introduction

1. The Petition dated 7/8/2024 was amended on 9/12/2024.

The Petitioner swore two affidavits in support; the affidavit

accompanying the original Petition sworn on 7/8/2024 and the verifying affidavit to the amended Petition sworn on 9/12/2024.

2. The Petitioner challenges the 1st Respondent's inconsistency on the decision to charge, whereby on 8/4/2024; the 1st Respondent declined to charge the Petitioner with the offence of assault causing actual bodily harm relating to a complaint made by the 4th Respondent against the Petitioner concerning an incident which occurred at Peponi School on 28/1/2024 only for the 1st Respondent to subsequently change its position on 1/8/2024 by recommending Petitioner be charged with the same offence without any new or additional evidence to justify its position despite having directed the 3rd Respondent to conduct further investigation.
3. The Petitioner thus contends that the decision to charge is devoid of any factual basis, arbitrary, and constitutes abuse of prosecutorial discretion hence unconstitutional, null and void.
4. Consequently, the petitioner seeks the following reliefs:

1.A declaration that the Directive by the 1st Respondent dated 1st August 2024 to charge the

Petitioner with the offence of Assault Causing Actual Bodily Harm is illegal, unlawful and unconstitutional and null and void ab initio.

2. A declaration that the charging of the Petitioner after investigations were carried out and the police finding that there is was no additional material sufficient to charge the Petitioner is therefore illegal, unlawful, unconstitutional and null and void ab initio.

3. An order of CERTIORARI suspending and/or staying quashing the 1st Respondent's directive to charge the Petitioner with the offence of Assault Causing Actual Bodily Harm as communicated in their its letter dated 1st August 2024 and all subsequent consequential actions thereto including the intended arrest, arraignment and charging of the Petitioner.

4. An Order of PROHIBITION prohibiting the Respondents, whether acting by themselves or their agents, servants or any other persons acting under their instructions or authority, from arresting, arraigning, confining, holding, and

charging and prosecuting the Petitioner with the alleged offence of assault causing actual bodily harm arising from the incident between him and the 4th Respondent which occurred on 28th January 2024 at Peponi School, Brookside, Kahawa Sukari Area in Ruiru SubCounty within Kiambu County.

5. Damages for violation of the Petitioner's constitutional rights.

6. Such other orders or reliefs as may be fair, just, necessary and appropriate in the circumstances.

7. The costs of this Amended Petition.

Petitioner's Case

5. For context, the Petitioner explained that the circumstances leading to the filing of the complaint of assault against him by the 4th Respondent and the subsequent contradictory decisions by the 1st Respondent on decision to charge culminating with the latest of 1/8/2024 in which the 1st Respondent directed the 3rd Respondent to charge him within 7 days as follows.
6. On 28/1/2024, the Petitioner and the 4th Respondent, (complainant in the assault case), had attended the **Hog**

Charge, an event held at the Peponi School where they are both parents (their sons are pupils) to raise funds for conservation.

7. The Petitioner accidentally bumped into the 4th Respondent who complained that he had been injured as a result hence lodged a complaint against the Petitioner with the 3rd Respondent.
8. The 4th Respondent was medically examined and his P.3 form filled. According to the Petitioner, despite the 4th Respondent complaining that the point of impact was the chest, the P3 form (*exhibit AF 5*) which was filled and provided to the 3rd and the 1st Respondent had no documented injuries on the chest.
9. Nevertheless, as a result of the complaint, the Petitioner was summoned at Kahawa Sukari Police Station and arrested on the 23rd February 2024. He was subsequently released on cash bail of Kshs. 50,000.00.
10. The Petitioner deposed that on 8th April 2024, the Office of the Director of Public Prosecution (ODPP), Kiambu County, wrote to the Office of the Director of Public Prosecution in-charge, Ruiru Sub-County (*letter exhibit AF 3*) indicating that the evidence on record was insufficient to warrant

institution of criminal proceedings against the Petitioner and thus directed that the file be closed for lack of sufficient evidence.

11. On 9th April 2024, *via the letter exhibit 4*, ODPP (Ruiru Sub-County) instructed the OCS, Kahawa Sukari Police Station to close the police file with no further action in the light of the findings and direction from the ODPP-Kiambu County.

12. However, on 23rd May 2024, Office of the Director of Public Prosecution, through Senior Principal Prosecution Counsel **Amugo Alenga**, in a letter to the Officer in Charge, Kahawa Sukari Police Station, (*exhibit AF 5*) that made reference to the incident of 28th January 2024 at Peponi School between the Petitioner and the 4th Respondent, directed that further investigations into the matter be conducted and the findings and recommendations be furnished to the DPP.

13. As directed by the letter of 23rd May 2024, further investigations were conducted but no additional evidence or material was found by the 3rd Respondent to justify a further recommendation for the review of the decision to charge to 1st Respondent.

14. The Petitioner deposed that a letter from Tariq Khan & Associates Advocates dated 16th April 2024 is referenced in the 1st Respondent's directive of 23/5/2024 directing further investigations, hence he believes that it had exerted undue influence to the 1st Respondent to reopen the already closed matter.
15. The Petitioner further deposed that there is a pending civil case ***Milimani Civil Case No. E094 of 2023 - Colleta Sebby Abonyo vs Gabriel Oser & Joanna Block (the Civil Matter)***, between the caregiver of the Petitioner's son and the 4th Respondent and his wife, in Colleta Sebby Abonyo (the Caregiver) has sued the 4th Respondent and his wife - (Pleadings - exhibit "AF-6"). The civil case arose when the 4th Respondent's English bulldogs attacked and severely injured Colleta Sebby Abonyo as she was attempting to shield the Petitioner's son (Desmond Fiksman Lowitt) from an imminent attack from the 4th Respondent's dogs who at the time had visited the 4th Respondent's son, Valentine Oser so that they could play.
16. Following this incident, the 4th Respondent and his wife pledged to settle all the medical expenses for Colleta Sebby Abonyo, which at the date of filing the Civil case stood at

Kshs. 1,290,698 but the 4th Respondent and his wife had only settled Kshs. 1,065,488.60, and refused to pay any further medical bills.

17. The Petitioner thus believes that the 4th Respondent is influencing the reopening of the criminal matter so as to get back at him due to and pile pressure on him in respect of the said civil matter.

18. In the light of the above, the Petitioner avers that 1st Respondent decision to revive the charge against him is unreasonable, irrational and malicious, violates Article 157 (10) of the Constitution that mandates the Director of Public Prosecution in the exercise of his powers or functions, not be under the direction or control of any person or authority, is against the principle of administration of justice, protection of public interest and an abuse of the legal process, observance of democratic values and principles and promotion of constitutionalism.

Respondent's Case

19. In opposition to the Petition, **the 1st Respondent** filed grounds of opposition dated 16th September, 2024 through the **Senior Principal Prosecution Counsel, Amugo Alenga**. The 1st Respondent grounds are as follows:

1. *THAT the Petitioner has not met the threshold for the grant of any of the prayers sought in the instant Petition.*
2. *THAT the Petition is founded on a misapprehension of the law as relates to the powers of the 1st Respondent to institute and undertake criminal proceedings including the power to review investigation and case files vis-à-vis the investigative powers of the 2nd to 4th Respondents.*
3. *THAT the 1st Respondent's power to review investigation and case files is a continuous one and can be exercised at any time depending on the circumstances of the case, and the change thereof.*
4. *THAT the 1st Respondent's review of the decision to charge, and more specifically the change from the decision not to charge vide the letter dated 8th April 2024 to the decision to undertake further investigations vide the letter dated 23rd May 2024,*

and the decision to charge vide the letter dated 1st August 2024, was based on the foregoing continuous power to review investigation and case files.

- 5. THAT legitimate expectation can neither rise nor operate contrary to the law.*
- 6. THAT the Petitioner has neither specifically particularized nor proved how any of his rights and fundamental freedoms have been violated and or threatened with violation as alleged or at all.*
- 7. THAT the Petition is further premised on a misapprehension of the law as the existence of a civil suit is not a bar to the intended criminal charges against the Petitioner.*
- 8. THAT the Petition is further founded on controverted facts which would best be tested, weighed and determined by a trial court, and which this Honorable Court is not best suited to consider and determine. 9.*
- 9. THAT the intended prosecution of the Petitioner is informed by, and will be undertaken in strict compliance and conformity to, the Constitution of Kenya, 2010, relevant Statutes and the Office of the Director of Public Prosecutions (ODPP) Decision to*

Charge Guidelines, 2019, and therefore does not in any way pose any threat of violation of Petitioner's rights and fundamental freedoms.

10. THAT consideration of the instant Petition by this Honorable Court would not only amount to an unjustified interference by the Court in the Respondents' exercise of the 1st Respondent's constitutional mandate but would also amount to an overreach of subordinate courts' mandate to hear and determine the intended criminal case.

11. THAT the Petition is intended solely to derail and or further delay the institution of the intended criminal proceedings against the Petitioner and is therefore vexatious, frivolous and an abuse of the legal process.

12. *THAT it is in the interest of justice and public interest that the prayers sought in the instant application be declined.*

4th Respondent's Grounds Of Opposition

20. The 4th Respondent filed grounds of opposition dated **15th September, 2024** through **Tariq Khan & Associates Advocates.**

21. He objected to the Petition on the following grounds:

1. *THAT the Petitioner has not met the threshold for the grant of any of the prayers sought in the instant Petition.*
2. *THAT the Petition is founded on a misapprehension of the law as relates the powers of the 1st Respondent to institute and undertake criminal proceedings including the power to review investigation and case files vis-à-vis the investigative powers of the 2nd to 4th Respondents.*
3. *THAT legitimate expectation can neither rise nor operate contrary to the law.*
4. *THAT the Petitioner has neither specifically particularized nor proved the manner in which any of his rights and fundamental freedoms have been violated and or threatened with violation as alleged or at all.*
5. *THAT the Petition is further premised on a misapprehension of the law as the existence of a civil suit is not a bar to the intended criminal charges against the Petitioner.*
6. *THAT the Petition is further founded on controverted facts which would best be tested, weighed and*

determined by a trial court, and which this Honorable Court is not best suited to consider and determine.

- 7. THAT the intended prosecution of the Petitioner is informed by, and will be undertaken in strict compliance and conformity to, the Constitution of Kenya, 2010, relevant Statutes and the Office of the Director of Public Prosecutions (ODPP) Decision to Charge Guidelines, 2019, and therefore does not in any way pose any threat of violation of Petitioner's rights and fundamental freedoms.*
- 8. THAT a consideration of the instant Petition by this Honorable Court would not only amount to an unjustified interference by the Court in the Respondents' exercise of the 1st Respondent's constitutional mandate but would also amount to an overreach of subordinate courts' mandate to hear and determine the intended criminal case.*
- 9. THAT the Petition is intended solely to derail and or further delay the institution of the intended criminal proceedings against the Petitioner and is therefore vexatious, frivolous and an abuse of the legal process.*

10. *THAT it is in the interest of justice and public interest that the prayers sought in the instant application be declined.*

SUBMISSIONS BY THE PARTIES

Petitioner's Submissions

22. The Petitioner opened his submission by recapitulating the material facts constituting the basis of his case against the Respondents. I shall not reproduce them here as they are already captured in the review of the respective parties' cases which I have set out in this judgment.

23. The Petitioner picked out and submitted on the following three issues:

- 1. Whether the directive to charge the Petitioner with Assault Causing Bodily Harm violates his rights to fair administrative action under Article 47 of the Constitution,***
- 2. Whether the decision by the 1st Respondent was influenced by external factors, rendering it unconstitutional and in violation of the principle of prosecutorial independence***

***under Article 157(10) of the Constitution,
and***

***3. Whether the pending civil matter between
the parties influenced the 1st Respondent's
decision to prosecute, amounting to an
abuse of the legal process.***

24. On the first issue of whether the directive to charge the Petitioner with Assault Causing Bodily Harm violates his rights to fair administrative action under Article 47 of the Constitution, the Petitioner alluded to Article 47 of the Constitution of Kenya, 2010 which guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. The Petitioner submitted that the 1st Respondent's directive to charge him, after previously deciding that there was insufficient evidence, is irrational and unreasonable.
25. The Petitioner argued that although Article 157 of the Constitution, 2010 gives DPP independence in the exercise of its duties, Article 157(11) enjoins the DPP to have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of the legal process.

26. The Petitioner argued that through the letter of 8th April 2024, the 1st Respondent wrote to the ODPP in-charge, Ruiru Sub-County, informing them of their finding that the evidence on record was insufficient to warrant the institution of criminal proceedings against the Petitioner and directed that the file be closed for lack of sufficient evidence. Further, they recommended that the 4th Respondent, who is the Complainant, and the Petitioner resolve their existing dispute by way of Alternative Dispute Resolution.

27. The Petitioner highlighted the 1st Respondent opinion on the evidence which was outlined in the said letter as follows:

“... The Petitioner and the 4th Respondent have a history of civil litigation and that had clearly brought bad blood between them; The incident of an alleged assault on 28th January 2024 at Peponi School, Brookside, Kahawa Sukari Area occurred at a public function and, while there were many people in attendance, there was no independent witness to corroborate the 4th Respondent's version and that of his wife; It was difficult to reconcile how the chest injury complained on by the 4th Respondent caused stiffness of the neck documented in the P3 form; The

Petitioner is alleged to have hit the 4th Respondent on the chest where no injuries or even pain was documented on the medical documents; The injuries complained of were on the neck which the 4th Respondent himself confirmed to have had a history of injury; It was difficult to answer the question whether the Incident was an intentional assault or an accident; and Therefore, a charge of assault causing bodily harm could not stand as it could not be demonstrated that the 4th Respondent had actually suffered injuries occasioned by the alleged acts of the Petitioner.”

28. As a result, 1st Respondent, the Prosecution Counsel at the 1st Respondent’s Ruiru Sub-County Office on 9th April 2024, instructed the 3rd Respondent to close the police file with no further action based on the findings from the ODPP Kiambu County.
29. The Petitioner submitted that based on the aforementioned letter, that the 1st Respondent’s decision not to charge the Petitioner and consequential instructions to the 3rd Respondent to close the police file created a legitimate expectation in the Petitioner that the Incident had been exhaustively investigated and that no criminal proceedings

in respect thereof would be instituted against the Petitioner hence it was inexplicable that later on 23rd May 2024, the 1st Respondent through Senior Principal Prosecution Counsel Amugo Alenga, wrote a letter to the 3rd Respondent, walking back on its instructions that the police be closed and instead directing the 3rd Respondent to conduct further investigations into the Incident and cover three specific areas:

a) Record statements of the witnesses who had been mentioned and any others that could be availed by the 4th Respondent to buttress his allegations;

b) Record further statements for the 4th Respondent and his wife to ascertain his state before the Incident; and

c) Find out if there is any medical history of when last the 4th Respondent has been treated for the neck injury.

30. That even after further investigations were conducted as directed by the 1st Respondent no evidence or material that could warrant a review of the initial decision not to charge.

That the subsequent decision to charge the Petitioner with Assault Causing Bodily Harm was not supported by any new finding, yet the 1st Respondent in its letter dated 1st August 2024, directed the 3rd Respondent to charge the Petitioner with the offence of Assault within Seven (7) days.

31. The Petitioner contended that the reversal of the decision to charge was made in the circumstances that did not satisfy the standards of objectivity as required by the Decision to Charge Guidelines as there was no new evidence or material that could have warranted a review of the earlier decision by the 1st Respondent not to charge the Petitioner. He argued that a reasonable prosecutor acting on the facts presented by the 3rd Respondent would not have arrived at the decision to charge the Petitioner the decision to charge him did satisfy the evidential test as defined by the Guidelines. The Petitioner referred to the **'Decision to charge guidelines'** which state thus:

" ... The decision to charge is the Prosecution Counsel's determination as to whether evidence availed by an investigator or investigative agencies is sufficient to warrant the institution of prosecution proceedings against an accused person

in a Court of law. Due to its intrusive nature and potential adverse effect of the decision on the life, liberty or property of an accused person, it is the most important decision that is made by any prosecutor. The independence of the DPP and other institutions of prosecution revolves around this decision. Prosecutors are required to, and must exercise, due care in making the decision to charge.... The decision to charge or not to charge requires an objective and independent analysis of the case. Whilst the roles of the investigator and prosecutor are complementary, ultimately the decision to charge rests with the prosecutor, who must assess whether it is appropriate and what charges to prefer for a court to consider. It is the duty of a prosecutor to ensure that the right person is prosecuted for the right offence, properly applying the law and ensuring that relevant evidence is submitted before the court and that disclosure obligations are complied with..."

32. The Petitioner further submitted that the 1st Respondent was influenced by the 4th Respondent thereby contravening

the principle of prosecutorial independence in violation of Article 157(11) of the Constitution as read together with Section 4 and 6B of the Office of the Director of Public Prosecution Act rendering the decision unlawful and unconstitutional. He argued that in revising the initial decision not to charge dated 9/4/2024 and substituting it with the decision to charge dated 1/8/2024; the 1st Respondent was influenced by the 4th Respondent's legal counsel, a fact that is apparent in the 1st Respondent's letter of 23rd May 2024, where the 1st Respondent mentions the intervention by the 4th Respondent's Advocate. The Petitioner submitted thus:

“... Though the Petitioner does not know or had sight of the contents of the mentioned letter of Tariq Khan Advocate dated 16th April 2024 in the 1st Respondent letter dated 23rd May 2024 (annexure marked “AF5” in the Petitioner's Supporting Affidavit), we suspect that the same might have had some kind of influence, some authority that might have had some kindle in the issuance of the directive to charge the Petitioner...”

33. Counsel underscored the critical significance of the independence of the Director of Public Prosecution by citing an excerpt in the case of **Thuita Mwangi & Anor vs. The Ethics and Anti-Corruption Commission & 3 Others Petition No. 153 & 369 of 2013** in which the Court observed thus:

“The decision to institute criminal proceedings by the DPP is discretionary. Such exercise of power is not subject to the direction or control by any authority as Article 157(10) ...These provisions are also replicated under Section 6 of the Office of the Director Public Prosecutions Act, No. 2 of 2013...”

34. Additionally, the case of **Regina v Director of Public prosecution ex parte Kebeline and others [1999] 4 All ER** which emphasized that the DPP’s decision to institute charges is rarely interfered with unless actuated by dishonesty, bad faith, or exceptional circumstances.

35. Concerning the pending civil case (Milimani Civil Case No. E094 of 2023) between the Petitioner’s caregiver and the 4th Respondent, the Petitioner submitted that the actions of the 4th Respondent were motivated by ulterior motives and the intended criminal prosecution is a retaliatory measure

designed to pressure the Petitioner in the pending civil matter hence abuse of the legal process. He urged the Court to reject attempts to allow the criminal justice system to be used for personal vendettas.

1st RESPONDENTS' SUBMISSIONS

36. The 1st Respondent filed written submissions dated 7th November, 2024 through **Victor John Owiti**, the **Principal Prosecution Counsel**.

37. He reiterated that the Petition was opposed by the Respondents through the Statement of Grounds of Opposition dated 16th September 2024.

38. He identified and submitted on the following issues:

(a) Whether the Petition is founded on a misapprehension of the law.

(b) Whether the Petitioner can properly claim legitimate expectation as a bar to the intended criminal charges against him.

(c) Whether the existence of a civil suit is a bar to the intended criminal charges against the Petitioner.

(d) Whether controverted facts can be the basis of a Petition seeking the prohibition of the exercise of Respondents' respective mandate.

39. On whether the petition is founded on a misapprehension of the law; the 1st Respondent argued that the Petition challenges the powers of the 1st Respondent to institute and undertake criminal proceedings *vis-à-vis* the investigative powers of the 2nd to 4th Respondents. He submitted that the 1st Respondent is vested with State powers of prosecution including the power to institute criminal proceedings from which flows the power to make the decision to charge, and to continuously review the such decisions depending on the circumstances of the case, in accordance with the Constitution, the Office of the Director of Public Prosecutions Act, and the Office of the Director of Public Prosecutions Decision to Charge Guidelines.

40. The 1st Respondent submitted that its power of review can be exercised at any time depending on the circumstances of the case.

41. In regard to the 1st Respondent's review of the decision to charge, from the decision not to charge communicated through the letter of 8th April 2024 to the decision to

undertake further investigations as conveyed in the letter dated 23rd May 2024, and subsequently the decision to charge as directed in the letter dated 1st August 2024, the 1st Respondent submitted that it was based on the ongoing continuous power to review investigation and case files in which the 1st Respondent established that there, in fact, existed sufficient factual and legal basis for the institution of criminal proceedings against the Petitioner.

42. On the question of whether the existence of the civil suit is a bar to the intended criminal charges, the 1st Respondent, citing Section 193A of the Criminal Procedure Code, submitted that the existence of a civil suit is not a bar to the concurrent criminal proceedings

43. On whether the petitioner can properly claim legitimate expectation as a bar to the intended charges; the 1st Respondent submitted that legitimate expectation can neither rise nor operate contrary to the law. To buttress this position, the 1st Respondent relied on

Risk Africa Innovatis Limited v. Smartmatic

International Holdings B.V.A & 3 Others, where the

Court of Appeal stated inter alia that:

“... We do not agree with the appellant’s counsel assertion that the mere listing of the appeal for hearing created a legitimate expectation that the appeal would be heard and determined on its merits. It is trite law that legitimate expectation cannot operate contrary to the law...”

44. Further the Mombasa High Court decision of Republic v. **Kenya Revenue Authority ex parte Proto Energy Limited** the Court found holding that the applicant had not satisfied the tests for the doctrine of legitimate expectation, stated inter alia that:

“Statutory words override an expectation howsoever founded. A decision maker cannot be required to act against clear provisions of a statute just to meet one’s expectations otherwise his decision would be out rightly illegal and a violation of the principle of legality, a key principle in Rule of Law. There cannot be legitimate expectation against the clear provisions of a statute...”

45. On the issue of whether controverted facts can be the basis of the prayers sought urged the Court to reject the invitation to undertake a merit-review of the controverted

evidence, and exercise deference to the trial court which is supposed to analyze the merits of the disputed facts in a trial after hearing testimony, cross-examination of witnesses and examining evidence adduced.

46. The 1st Respondent submitted that the Petitioner has attempted to characterize the criminal matter as a civil dispute by providing alternative facts from those relied on by the Respondents. Counsel submitted this variance between the relied upon the Petitioner and Respondents means there are controverted facts which should best be tested, weighed and determined by the trial court, which this Honorable Court is not best suited to consider and determine.

47. The 1st Respondent relied on the Supreme Court in **Praxidis Namoni Saisi & 7 Others v. DPP** in which the court in emphasized that such controverted facts are not suited for determination by a Judicial Review Court but by a trial court, by inter alia stating thus:

“ In order for the court to get through this extensive examination of Section 7 of the FAAA, there must be some measure of merit analysis. That is not to say that the court must embark on merit

review of all the evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly “in the circumstances of the case”, without examining those circumstances and measuring them against what is reasonable or fair, and arriving at the conclusion that the action taken was within or outside the range of reasonable responses. However, it is our considered opinion that it should be limited to the examination of uncontroverted evidence. The controverted evidence is best addressed by the person, body or authority in charge... Be that as it may, it is the Court’s firm view that the intention was never to transform judicial review into to full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First, the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself

on the merits or demerits of a case. More so on technical or specialized issues, as the specialized institutions are better placed to do so. Second, the courts are limited in the nature of reliefs that they may grant to those set out in Section 11 (1) and (2) of the Fair Administrative Actions Act. Third, the Court may not substitute the decision it is reviewing with one of its own. The court may not set about forming its own preferred view of the evidence, rather it may only quash an impugned decision. This is codified in Section 11(1)(e) and (h) of the Fair Administrative Action Act. The merits of a case are best analyzed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced.”

48. Further, the 1st Respondent relied on **Kenya Vision 2030 Delivery Board v. The Commission on Administrative Justice, the Attorney General and Eng. Judah Abekah, SC Petition 42 of 2019; [2021] eKLR**, in which the Court held that in matters involving the exercise of judgment and discretion, a public officer or public agency can only be

directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised.

49. The 1st Respondent submitted that this Petition is intended to derail and further delay the institution of the intended criminal proceedings against the Petitioner, and is therefore an abuse of the legal process yet he would have the opportunity to present his case and defend himself before the trial court. The 1st Respondent thus argued that the grant of the prayers sought would amount to an unjustified interference by this Honorable Court in the exercise of the 1st Respondent's constitutional mandate.

4th Respondent's Submissions

50. The 4th Respondent filed his final submissions dated 25/2/2025 through **Makambo Makabila & Company Advocates.**

51. The 4th Respondent provided a concise summary of the Petitioner's case which he restated that he had opposed by filing Grounds of Opposition dated 15th October, 2024.

52. According to the 4th Respondent, there are only two (2) issues for determination.

i. Whether the decision by the 1st Respondent to charge the Petitioner with the offence of Assault

Causing bodily harm is unlawful and/or unconstitutional; and

ii. Whether the Petitioner is deserving of the prayers sought

53. On the question of whether the decision by the 1st Respondent to charge the Petitioner with the offence of Assault Causing bodily is unlawful and/or unconstitutional; the 4th Respondent cited Article 157(1) of the Constitution, Article 157(6) and Section 5(1)(a) & (b) of the ODPP Act which empowers the Director of Public Prosecution to institute and undertake criminal proceedings, take over and continue any criminal proceedings commenced in any court and discontinue any criminal proceedings at any stage before judgment is delivered. Further, Article 157(10) and Section 6 of the ODPP Act which provide that the DPP shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

54. Furthermore, the 4th Respondent placed reliance on the case of **REPUBLIC V THE DIRECTOR OF PUBLIC**

PROSECUTIONS & 7 OTHERS (2013) eKLR, where the

Court held thus:

"The law is that the Court cannot usurp the constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing proceedings are in all likelihood bound to fail is not a ground for interfering with those proceedings..."

55. Correspondingly the 4th Respondent submitted that the office of the Inspector General of Police is established under Article 245 of the Constitution and Article 245 (2) (b) provides that the IG shall exercise independent command over the National Police Service, and perform any functions prescribed by national legislation. That Article 245 (4) emphasizes the independence of the office by barring any person from giving direction to the IG with respect to the investigation of any particular offence or offences or the enforcement of the law against any particular person or persons except the Director of Public Prosecution who under Article 157(4) has power to direct the Inspector

General to investigate any information or allegation of criminal conduct and the Inspector General is required to comply with any such direction.

56. Counsel argued that it is now settled that constitutional bodies such as the Director of Public Prosecution and the Inspector General must be given space to discharge their mandate and to exercise their discretion; hence this Court can only intervene where it is demonstrated that they have acted ultra vires or in breach of the Constitution or the Law. To support this submission, he cited the case of **KIPOKI OREU TASUR V INSPECTOR GENERAL OF POLICE & 5 OTHERS (2014) eKLR** where the Court held:

"The Criminal Justice system is a critical pillar of our society. It is underpinned by the Constitution, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should with no interference from any quarter, or restraint from the superior courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals is demonstrated."

57. Further, Counsel for the 4th Respondent argued that the act of charging the Petitioner does not in itself constitute a violation of the Petitioner's rights without evidence of malice, gross abuse of discretion, manifest injustice or excess of jurisdiction by the 1st to 3rd Respondent being demonstrated. He argued that acts of arrest, institution of Criminal proceedings and prosecution do not in themselves constitute violation of constitutional rights, unless they have been done maliciously or in excess of jurisdiction. He cited the case of **CAPE HOLDINGS LIMITED V ATTORNEY GENERAL & ANOTHER (2012)** eKLR where the Court held thus:

"My understanding of the law is that the responsibility to investigate, determine the credibility of the complaint and prosecution is solely left for the police under the direction and control of the Director of Public Prosecutions. The predominant factor being that they must act in accordance with the law and so long as they do not exceed the limits, then a Court should not prohibit the prosecution of an individual. The investigation of a criminal offence or complaint cannot be easily prohibited or stopped

unless there is credible and reasonable evidence to show the same is mounted for ulterior purpose or objective. The applicant has failed to demonstrate that the police lack or acted in excess of jurisdiction or have not complied with the rules of natural justice. In my view, it is outside the jurisdiction of this Court to supervise how the police should conduct investigations."

58. Consequently, Counsel submitted that the decision to charge made in exercise of constitutional mandate in the circumstances did not amount to a violation of the Petitioner's rights and is therefore lawful.
59. On the issue of whether the Petitioner is deserving of the prayers sought, the 4th Respondent contended that it was incumbent upon the Petitioner to discharge the burden of proof. The 4th Respondent submitted that there is no evidence of malice, gross abuse of discretion, manifest injustice or excess of jurisdiction presented before this court as evidence of the 1st to 3rd Respondent's malice.

Analysis and Determination

60. Having regard to the submissions and pleadings of the parties herein, this Court is of the considered view that the following are the issues for determination:

1) Whether, in the circumstances of this case, the 1st Respondent properly exercised its powers under Article 157 of the Constitution, Section 5 (4) (e) of the Director of Public Prosecution Act, 2013 and the Decision to Charge Guidelines by reviewing and reversing its earlier decision of 8/4/2024 (declining to charge the Petitioner with assault causing actual bodily harm for lack of evidence) and subsequently directing institution of the same charge on 1/8/2024.

2) Whether the Petitioner is entitled to the reliefs sought.

Whether, in the circumstances of this case, the 1st Respondent properly exercised its powers under Article 157 of the Constitution, Section 5 (4) (e) of the Director of Public Prosecution Act, 2013 and the Decision to Charge Guidelines by reviewing and reversing its earlier decision of 8/4/2024 (declining to charge the Petitioner with assault causing actual bodily

harm for lack of evidence) and subsequently directing institution of the same charge on 1/8/2024.

61. The Director office of the Public Prosecutions is established by Article 157 (1) which also proceeds in subsequent sub-articles to spell out the constitutional mandate of the office, in the instant case, the following Sub-Articles are relevant:

(4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—

a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

- b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and**
- c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).**

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

62. Apart from the above Constitutional provisions, Parliament enacted the Office of the Director of Public Prosecutions Act, 2013 to give effect to Article 157 and 158 of the Constitution as declared in its preamble. Of significance in respect of this Petition is Section 5 which amplifies the functions and powers of the Director of Public Prosecutions. In particular, **Section 5 (4) (e)** provides:

“The Director shall....

(e) review a decision to prosecute, or not to prosecute, any criminal offence”

63. Turning to the Decision to Charge Guidelines, 2019 that were developed and published by the Office of the Director of Public Prosecutions to govern prosecution policy, the then Director of the Public Prosecutions in the forward captures the core foundation of those guidelines as follows:

“The Decision to charge Guidelines are anchored on Article 157 of the Constitution 2010, National prosecution Policy and the General Prosecution Guidelines. It provides the framework of exercising the state powers of prosecution ensuring justice is served to all and sundry. The Guidelines have been developed with the mind of ensuring the quality of prosecutorial decisions, accountability of the prosecutors and transparency of prosecutorial processes to the right holders.”

64. In regard to the process of making the decision to charge, the guidelines state in part as follows:

“3.1.1 -Making the decision.

The decision to charge or not to charge requires an objective and independent analysis of the case.

Whilst the roles of the investigator and prosecutor are complementary, ultimately the decision to charge rests with the prosecutor, who must assess whether it is appropriate and what charges to prefer for a court to consider. It is the duty of a prosecutor to ensure that the right person is prosecuted for the right offence, properly applying the law and ensuring

that relevant evidence is submitted before the court and that disclosure obligations are complied with. When making charging decisions, prosecutors must be fair and objective ...

65. In regard to the specific question of the review of decision not to charge, the Guidelines provide guidance as follows:

4.6.3 Review of the decision not to charge

Occasionally there are cases where the prosecutor will overturn a decision not to prosecute or to deal with the case by way of an out-of-court disposal. This will usually be triggered by further evidence or information that comes to light. These cases include:

- ***Cases where a further review of the original decision shows that it was wrong and, in order to maintain confidence in the criminal justice system, charges should be instituted.***
- ***Cases which charges were not filed for lack of sufficient evidence but where more significant evidence is discovered later; and***
- ***Cases involving a death in which a review following the findings of an inquest concludes that a prosecution should be brought.***

66. Courts have underscored consistently the critical significance of upholding the constitutional independence of the Director of Public Prosecution as enshrined in the Constitution (Article 157 (10) but also insist that judicial intervention will always be available if there is clear abuse of prosecutorial discretion such as where the decisions are made arbitrarily or oppressively against any person.

67. In **Denis Joseph Shijenje & another v Kenya Revenue Authority & 2 others [2021] KEHC 12572 (KLR)** the Court underscoring this point held:

“37. I find that the office of the Director of Public Prosecution being an independent institution established under the Constitution, the court can only interfere with or interrogate its actions where there is contravention of the Constitution. In the case of Paul Ng’ang’a Nyaga v Attorney General & 3 others (2013) eKLR, it was held that “this court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient

evidence that they acted in contravention of the Constitution.”

68. Further in **Francis Anyango Juma vs The Director of Public Prosecutions and another [2012] KEHC 2618 (KLR)** the Court observed as follows:

“Clearly, the intention under the Constitution was to enable the Director of Public Prosecutions to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the DPP of his power under the Constitution or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a party’s rights under the Constitution, or violation of the Constitution itself.”

69. The issue before this Court is the manner the 1st Respondent exercised the power of review of the decision to charge against the Petitioner. In the initial letter dated 8/4/2024, the 1st Respondent outlined 4 key reasons why it did not consider the evidence that had been collected sufficient to prosecute the Petitioner for the alleged assault

of the 4th Respondent on the 28/1/2024. Those reasons were:

- ***The complainant and the suspect have a history of civil litigation and that had clearly brought bad blood amongst themselves***
- ***The alleged assault happened at a public function. There were many people there but only the complainant and his wife and the investigating officer have recorded a statement. There is no independent witness at all to collaborate the complainant and his wife. No explanation is offered to this.***
- ***The complainant claims to have been hit on the chest using his shoulder. The P 3 form details no injuries on the chest. The only injuries complained of are stiffness of the neck the complainant admits had been injured before. It is difficult to reconcile how the chest injury not documented caused stiffness of the neck.***
- ***The suspect in his plain statement indicates that he accidentally collided with the complainant as they were walking in the***

opposite direction within Peponi school. He blames the accident on his phone which he was glued to as he walked.

- ***The question that begs is whether there was intentional assault or an accident? Based on the above, it is our finding that the evidence on record is not sufficient to warrant institution of criminal proceedings against the suspect....”***

70. According to the Petitioner, even after the 1st Respondent directed the 3rd Respondent to conduct further investigation on 23rd May, 2024 there was no additional evidence that was found. This deposition contained in the affidavit of the Petitioner was not rebutted by the 1st Respondent as it did not swear any affidavit with any contrary position regarding this assertion or explain why it considered it necessary to direct that despite the investigator not supplying any fresh or additional evidence, it decided to recommend prosecution thereby resiling from its earlier position taken in declining to charge to charge as per its letter of 8/4/2024.

71. To revise a decision not to charge, the Decision to charge Guideline envisage existence of reasons to justify the change ; these reasons as per clause 4.6.3 include:

- **Cases where a further review of the original decision shows that it was wrong and, in order to maintain confidence in the criminal justice system, charges should be instituted.**
- **Cases which charges were not filed for lack of sufficient evidence but where more significant evidence is discovered later; and**
- **Cases involving a death in which a review following the findings of an inquest concludes that a prosecution should be brought**

72. It thus behoved the 1st Respondent to at the bare minimum demonstrate that there existed reasonable grounds which necessitated the review of the 'decision not to charge' to 'the decision to charge'. The DPP cannot merely claim that the law confers him the power to review the decision to charge, he must demonstrate there existed reasonable grounds behind the review decision. To insist the DPP can exercise the discretion to review the decision to charge

howsoever is simply to throw away the rule of law. The power of the DPP under the constitution must be exercised in conformity with the national values and principles of governance under Article 10 (which includes the rule of law in Article 10 (2) (c) which binds all organs of State and all persons. It does not permit unfettered exercise of discretion, and is thus required decision made be grounded on reasonable basis, not caprice, bias or extraneous considerations

73. How would the Court, for instance determine, if there was objectivity in revising the impugned decision that changed from decision not to charge to decision to charge if what is thrown at the Court is that the DPP is or was entitled to exercise his continuous power of review without any basis being provided?
74. The action of the DPP in this case reeks arbitrariness. The decision to revise the decision to charge can only be made objectively with sufficient justification which was not demonstrated by the 1st Respondent in vacating its decision not charge of 8/4/2024 to the unsupported decision to charge of 1/8/2024

75. In the instant case, the 1st Respondent despite having directed the 3rd Respondent to conduct further investigations and notwithstanding those investigations yielded no additional evidence, and further without even identifying any flaw in its earlier decision (which had determined there was insufficient evidence) went ahead and arbitrarily reviewed the decision.

76. The Court finds that not only did the the 1st Respondent violate its own Decision to Charge Guidelines by making its latest decision 1/8/2024 but also violated the principles of Article 10 (2) (c) of the Constitution. Further the decision undermines the interests of the administration of justice and constitutes abuse of the legal process thus violated Article 157 (11) of the Constitution.

77. Whether the Petitioner is entitled to the reliefs sought.

78. The Court has found the decision to change the decision from not charging the Petitioner to charging him with assault was erratic, unlawful and unconstitutional hence it must now consider the appropriate relief to grant.

79. The Court of Appeal in **Gitobu Imanyara & 2 others vs Attorney General [2016] eKLR** had the following to say about nature of reliefs in Constitutional litigation:

“...the South African Case of Dendy v University of Witwatersrand, Johannesburg & Others - [2006] 1 LRC 291 where the Constitutional Court of South Africa held that:

“...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.

“...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief

required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy."

80. In this case, the Court has found that there was of abuse of prosecutorial discretion and thus such a decision cannot be allowed to stand. Allowing such prosecution to continue would be to condone abuse of the criminal justice process.

81. Consequently, the Court grants the following reliefs to the Petitioner:

- a) A declaration is hereby issued that the directive by the 1st Respondent dated 1st August 2024 to charge the Petitioner with the offence of Assault Causing Actual Bodily Harm is illegal, unlawful and unconstitutional, null and void ab initio.***

b) An order of CERTIORARI is hereby issued quashing the 1st Respondent's directive to charge the Petitioner with the offence of Assault Causing Actual Bodily Harm as communicated in their its letter dated 1st August 2024 and all subsequent consequential actions thereto including the intended arrest, arraignment and charging of the Petitioner.

c) An Order of PROHIBITION is hereby issued prohibiting the Respondents, whether acting by themselves or their agents, servants or any other persons acting under their instructions or authority, from arresting, arraiging, confining, holding, and charging and prosecuting the Petitioner with the alleged offence of assault causing actual bodily harm arising from the incident between him and the 4th Respondent which occurred on 28th January 2024 at Peponi School, Brookside, Kahawa Sukari Area in Ruiru Sub-County within Kiambu County.

d) Each Party shall bear its own costs

***Dated, signed and delivered virtually at Nairobi this 23rd
day of April, 2026***

.....

L N MUGAMBI

JUDGE

ORIGINAL