



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL PETITION NO. E009 OF 2025

CLEOPHAS MALALA
PETITIONER

VERSUS

THE INSPECTOR GENERAL OF POLICE 1ST
RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND
RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 3RD
RESPONDENT

THE HON. ATTORNEY GENERAL 4TH
RESPONDENT

WESTERN REGION POLICE COMMANDER 5TH
RESPONDENT

JUDGEMENT

1. Vide a Petition dated 11th August 2025, the Petitioner Cleophas Malala approached this court seeking its protection against the Respondents who he alleged were in contravention of his rights under Articles 27, 28, 29, 33, 47, 49 and 50 of the Constitution.
2. The Petitioner seeks the following orders:-

1. **A DECLARATION** that the threatened arrest, detention, or prosecution of the Petitioner in relation to the alleged helicopter landing is unconstitutional, illegal, null and void.
 2. **A DECLARATION** that the Respondents' actions amount to violation of Articles 27, 28, 29, 33, 47, 49 and 50 of the Constitution.
 3. **A PERMANENT CONSERVATORY ORDER** do issue restraining the Respondents, their agents, servants or any other person acting under their authority, from arresting, charging, harassing, intimidating, or otherwise subjecting the Petitioner and or his associates to any criminal process whatsoever, in relation to or arising from the alleged landing of a helicopter on a football pitch in Mumias Complex Stadium on 2nd August 2025 during the halftime break of a football match.
 4. **AN ORDER** awarding the Petitioner damages for violation of his rights and freedoms guaranteed under the Constitution.
 5. Costs of this Petition be provided for.
 6. Any other relief this Honourable Court deems fit.
3. The Petition is supported by an affidavit sworn by the Petitioner on even date and in which he averred that on 5th August 2025, the 4th Respondent through a presser issued summons requiring his mandatory attendance on purported threat to human life allegedly occasioned by illegal landing of a chopper that ferried him to the

Mumias Complex Stadium during the High School Football Matches held on 2nd August 2025.

4. He further averred that the 4th Respondent, one Mr. Issa Mohamud insisted that failure to attend to the summons would lead to the Petitioner's detention on or before 8th August 2025.
5. The Petitioner stated that the purported press briefing was couched in unjustifiably harsh language, bereft of precision or specificity, and conveyed a tone suggestive of a predetermined outcome thereby negating the presumption of innocence guaranteed under Article 50 of the Constitution and amounting to a threat of harassment or intimidation.
6. The Petitioner contended that the press statement was not a neutral call for investigations but a public pronouncement that exuded bias, demonstrated a foregone conclusion, and signaled malicious intent to harass and politically persecute the Petitioner.
7. The Petitioner further contended that to demonstrate malice the police had thus far, not issued any summons or contacted the Petitioner but that as of that date, they were looking for him, even through proxies, to arrest him.
8. He asserted that the summons related to the alleged landing of a helicopter on a football pitch during halftime of a football match on 2nd August 2025, in which he was merely a passenger and had no control whatsoever over the piloting, navigation or landing of the aircraft.

9. The Petitioner contended that aviation decisions, including where and how to land, are exclusively within the professional competence of licenced pilots, regulated by the Civil Aviation Act, and not passengers and that investigations of the said landing falls under the Civil Aviation authorities and not the National Police Service or the Directorate of Criminal Investigations.
10. The Petitioner posited that by purporting to issue air safety sanctions, investigate flight plan breaches and enforce airspace regulations, the 1st and 4th Respondent were guilty of institutional overreach.
11. It was the Petitioner's contention that the public pronouncement of guilt, suggesting specific charges or initiation of prosecution without involving the ODPP were politically motivated and calculated to harass, intimidate and curtail his liberty and political rights and compromises the separation of powers within criminal justice institutions, prosecutorial independence, and creates a real risk of abuse of power or politically motivated prosecutions.
12. The Petitioner asserted that the 4th Respondent's conduct offends the principles of fair administrative action under Article 47 and the right to dignity and fair hearing under Article 28 and 50 of the Constitution. He averred that he risked imminent arrest and unlawful detention that will culminate in trumped up charges, reputational damage, and violation of his fundamental rights under Article 27, 28, 29, 33, 47, 49 and 50 of the Constitution.

13. The 3rd Respondent opposed the Petition and filed an affidavit sworn by Brian Pratt Modo on 18th August 2025. The other Respondents did not file any response.
14. The 3rd Respondent averred that it was yet to receive an inquiry file from the Directorate of Criminal Investigations in respect to the matter and that no decision had been made by the ODPP to prosecute the Petitioner.
15. The 3rd Respondent affirmed that the National Police was established under Article 243 of the Constitution with the mandate of conducting investigations of any particular offence among other things while the ODPP requires no consent from any person or authority to commence criminal proceedings and in exercise of his powers and functions as provided under Article 157 (10) of the Constitution.
16. It was the 3rd Respondent's contention that the court lacks jurisdiction to stop the Respondents from undertaking their constitutional mandates as provided for under Articles 157 and 243 of the Constitution.
17. The 3rd Respondent contended that the orders sought by the Petitioner were incompetent, speculative, filed in bad faith as a diversion tactic, and an abuse of the process of the court.
18. The Petition was canvassed through written submissions.

Petitioner's Submissions

19. In his submissions dated 20th December 2025, the Petitioner submitted that none of the Respondents had filed an affidavit to controvert the matters of fact raised in the Petition and therefore his Petition stood unchallenged and the Respondents deemed to have conceded to the reliefs sought.
20. He reiterated that he fears arrest, arbitrary detention, malicious prosecution, reputational damage and harassment or fabricated charges and threats unless the court intervenes.
21. The Petitioner identified five (5) issues for the court's determination. On whether the failure by the Respondents to file replying affidavits on matters of fact amounts to an admission, he submitted that the failure to file replying affidavits to controvert, deny or challenge allegations of fact made against them by the Petitioner is deemed to be an admission. He relied on the cases of **Peter O. Nyakundi & 68 others v. Principal Secretary, State Department of Planning & Others [2016] eKLR** and **Gulleod v. Registrar of Persons & another [2025] eKLR**.
22. As to whether the Respondents' conduct violates and threatens the Petitioner's constitutional rights, the Petitioner submitted that the Respondents' decision to issue vague press summons violated the rights to an expeditious, efficient lawful, reasonable and procedurally fair administrative action as provided by Article 47 of the Constitution. He argued that the threats by the 5th Respondent

- to arrest and charge him were unlawful without seeking consent from the ODPP undermines the ODPP's mandate under Article 157.
23. He further submitted that the decisions by the Respondents was irrational and a threat to Article 49 and 50 of the Constitution. He relied on the case of **Republic v. Director of Public Prosecutions & 2 others Ex parte Praxidis Namoni Saisi [2016] eKLR.**
24. The Petitioner asserted that the Respondents' conduct constitutes selective and discriminatory enforcement of the law as other prominent leaders have landed helicopters on football pitches in similar circumstances without sanction. He contended that selective prosecution is an abuse of the process of the court and a threatened violation of his rights under Article 27.
25. The Petitioner further submitted that the public declaration that the Petitioner would "face the full force of the law" before any lawful investigation or charge subjected him to humiliation, stigma and reputational damage contrary to Article 28 of the Constitution. He relied on **Republic v. Director of Public Prosecution & 2 others; Rutto & another (Interested Parties); Toroitich (Ex parte Applicant) [2025] eKLR.**
26. The Petitioner also submitted that the threats of imminent arrest and intimidating language employed by the 5th Respondent subjected him to psychological torture and fear of unlawful detention in breach of Article 29.

27. It was the Petitioner's submission that the Respondents acted ultra vires their constitutional mandate and relied on **Musyoki Kimanathi v. Inspector General of Police & Another [2014] eKLR**.
28. The Petitioner argued that the inclusion of the ODPP as a Respondent was justified because the ODPP was closing its eyes to the threats to charge him and that he fears that the ODPP would be railroaded into sanctioning a politically motivated prosecution.
29. Regarding the claim for damages, the Petitioner submitted that the Respondents are jointly liable to compensate him for breach of his fundamental rights. He cited the case of **Gitobu Imanyara & 2 others v. Attorney General [2016] eKLR** and urged the court to award him general damages, including aggravated and punitive damages for discrimination in the sum of Ksh. 5,000,000/=.
30. In its submissions dated 24th September 2025, the 3rd Respondent submitted that the ODPP is vested with prosecutorial powers under Article 157 of the Constitution and is not under the direction or control of any person, body or authority as provided by Article 157 (10) of the Constitution.
31. The 3rd Respondent argued that to require the Petitioner to submit to investigations and prosecution does not in any way amount to a breach of fundamental rights and relied on the case of **Hon. James Ondicho Gesami v. attorney General & others Petition No. 376 of 2011, Nairobi**.

32. Citing the **Director of Public Prosecution & Another, Mombasa Petition No. 2 of 2017**, the 3rd Respondent submitted that the primary test in the making of a prosecutorial decision on its part is whether the material gathered meets the evidential and public interest threshold.
33. The 3rd Respondent submitted that it is not for the court to decide who to be charged and with what offence as that would be intermeddling in matters that are purely within the province of the DPP.
34. The 3rd Respondent argued that no sufficient grounds had been advanced to warrant the grant of the orders sought which can only be granted under exceptional circumstances. They argued that the Petitioner's prayers are unconstitutional as they seek to prevent the Respondents from exercising their mandate as provided in law. Reliance was placed on **Republic v. Kenya Revenue Authority & 2 others [2013] eKLR** and **Michael Monari & Another v. The Commissioner of Police & 3 others Ms. Application 68 of 2011**.
35. Relying on **Republic v. Commissioner of Police & Another Ex Parte Michael Monari & Another [2012] eKLR**, the 3rd Respondent submitted that despite the Petitioner claiming that the Respondents acted in bad faith capriciously, unreasonably and in breach of the rules of natural justice hence contrary to the principle of legitimate expectation, the question of legitimate expectation

requires a high degree of proof by showing the specific acts that go against this principle. They argued that the Petitioner had failed to show the alleged acts of bad faith.

36. Finally, the 3rd Respondent submitted that they proved via affidavit that they had reasonable cause that the Petitioner had committed an offence and therefore it was their role to carry out investigations. They submitted that the Petitioner had not demonstrated that the Respondents had acted without or in excess of jurisdiction or against the rules of natural justice and the Petition should be dismissed.

Analysis and Determination

37. This court has considered the Petition, the affidavits on record, and the respective rival submissions by the parties, and finds the following issues for determination:
- a) Whether the failure by the Respondents to file replying affidavits to the Petition amounts to admission of the facts alleged therein.
 - b) Whether the Respondents' conducts violate and threaten the Petitioner's Constitutional rights.
 - c) Whether the Respondents have acted ultra vires their constitutional and statutory mandate.
 - d) Whether the inclusion of the ODPP as a Respondent is justified.
 - e) Whether the Petitioner is entitled to any or all of the reliefs sought.

I. **Whether failure to file Replying Affidavits by the Respondent amounts to an admission of facts**

38. It is a settled principle of law that the burden of proof of violation of ones constitutional rights rests on the person alleging such violation and the standard of proof is on a balance of probabilities.
39. In the context of this petition, the Petitioner bears the initial legal burden to demonstrate by way of existing evidence, on a balance of probabilities that the facts he alleges to have occurred did occur as alleged.
40. As a general rule, where a party adduces evidence by way of an affidavit, any other party who wishes to oppose the allegations laid out in the said affidavit must swear an affidavit and challenge, refute controvert or rebut the allegations of fact therein. The filing of grounds of opposition in response to a petition which is supported by a sworn affidavit is not sufficient to challenge the allegations of facts set out in the petition therefore as grounds of opposition only address matters of law and not of fact. See ***Peter O. Nyakundi & 68 others v. Principal Secretary State Department of Planning, Ministry of Devolution and Planning & Another (2016) KEHC 467 (KLR)*** and ***Philip Tirop Kitur v. Attorney General [2018] KEHC 7492 (KLR)***.
41. In ***Gulleid v. Registrar of Persons & Another [2021] KEHC 110 (KLR)***, the Court held that:-

“As stated earlier the respondents did not file any replying affidavit to challenge and/or controvert the sworn averment by the petitioners that they were victims of the post-election violence. Ground of Opposition which were filed are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath. (See *Mereka & Co Advocates v Unesco Co Ltd* 2015 eKLR, *Prof Olaka Onyango & 10 others v Hon Attorney General Constitution Petition No 8 OF 2014* and *Eliud Nyauma Omwoyo & 2 others v Kenyatta University*). . The respondents have failed to refute specifically the allegations in the petitioner’s sworn affidavit in support. Failure to file a replying affidavit can only mean that those facts are admitted...”

II. On whether there was an alleged violation of constitutional rights

42. The Petitioner alleges violations of several constitutional rights, including equality before the law under Article 27.
43. Article 27(1) provides: ***“Every person is equal before the law and has the right to equal protection and equal benefit of the law.”***
44. In his argument, the Petitioner avers that other political leaders had previously landed helicopters in football stadiums without consequences.

45. However, selective enforcement must be proven through clear evidence. The mere allegation that others were not prosecuted does not automatically establish discrimination.

46. The Court of Appeal addressed this issue in **Godfrey Mutahi Ngunyi v Director of Public Prosecutions & 4 others [2015] KEHC 2135 (KLR)**, where it held:-

“Secondly, the Applicant alleged selective and discriminatory prosecution. The Applicant has, however, not stated how the discrimination arises. During oral submissions, I however understood counsel for the Applicant Mr. Conrad Maloba in his endeavour to demonstrate discrimination, to reason as follows. That the Applicant is not the first to make comments or express views, the likes of which he is now being indicted. Others have done so previously and are yet to be charged, including those who posted and re-posted or reacted to the Applicant’s tweets. To the Applicant that amounted to discrimination under Article 27 of the Constitution. I am not aware of any law that dictates that all participants in a twitter trail must be charged together. In the absence too of any specifics and particulars of those selectively not prosecuted, I am not satisfied that the Applicant has, on a prima facie basis, demonstrated any favoritism or discrimination.”

47. Regarding the right to fair administrative action, Article 47 of the Constitution provides, **“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”**

48. However, the mere issuance of summons or statements by police during investigations does not necessarily amount to unfair administrative action. In **Republic vs Commissioner of Police and Another ex parte Michael Monari & Another [2012]** eKLR:-

“The police have a duty to investigate any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot, therefore, be said to have been the vindication of the criminal justice system. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”

49. The High Court in **Republic v Director of Public Prosecutions & 2 others Ex-parte Praxidis Namoni Saisi [2016] KEHC 5698 (KLR)** held: **“The mere fact that a person has been subjected**

to criminal investigations does not of itself amount to violation of constitutional rights.”

III. Whether investigations or intended prosecution violate the Constitution

50. The core complaint by the Petitioner is that the police threatened to arrest and prosecute him over the alleged helicopter landing incident at Mumias Complex Stadium on 2nd August 2025, which he claims violates his constitutional rights.

51. The National Police Service, under whom the 5th Respondent serves is established under Article 243 of the Constitution and is expected, by virtue of Article 239 to promote and guarantee national security in accordance with the principles espoused in Article 238. In discharging its mandate, the National Police Service is guided by Article 239 (3) of the Constitution which provides:-

“(3)In performing their functions and exercising their powers, the national security organs and every member of the national security organs shall not—

(a)act in a partisan manner;

(b)further any interest of a political party or cause; or

(c)prejudice a political interest or political cause that is legitimate under this Constitution.”

52. The National Police Service, whose objects and functions are laid down in Article 244 of the Constitution is an independent entity whose mandate, including investigation of offences and

enforcement of the law against any person is not subject to any direction save for the Director of Public Prosecution. The autonomy enjoyed by the National Police Service is subject to the discretion of Director of Public Prosecutions. In ***James Musa Tapoyo v. OCS Kapenguria Police Station & 5 others [2023] KEHC 22297 (KLR)***, Mrima J. stated:-

“45. Flowing from the foregoing, a key distinction in the functions of the National Police Service and the DPP is that whereas the National Police Service is limited to undertaking investigations on criminal culpability and may even recommend charges against the suspects, the DPP then receives and reviews the evidence from the National Police Service and has the sole discretion over the decision on the way forward. The DPP may agree or disagree with the recommendations made. Further the DPP has the unfettered power to direct the National Police Service over any investigations.

46. In other words, once the National Police Service conducts and completes any investigations and makes recommendations then, unless sanctioned by the DPP to arrest suspects or to undertake further investigations over the matter, that is the end of the role of the National Police Service in the criminal justice system. The matter is then taken over by the DPP.

47.It is the DPP to decide on whether or not to prefer any charges against the suspects, if any, since the DPP is not bound by the recommendations made by the National Police Service. Therefore, as long as the DPP is acting within the Constitution and the law, it has the discretion of making any appropriate order in a matter including closure of the police file.”

53. It has been severally pronounced that in exercising its mandate, the National Police Service must act within the limits of the law and the Constitution and must act fairly. In ***Republic v. Commissioner of Police and Another Ex parte Michael Monari and Another [2012] eKLR***, the Court held that:-

“...the police have a duty to investigate on any complaint once a complaint is made. In deed the police would be failing in their constitutional mandate to detect and prevent crime. The Police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said not to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”

54. The Petitioner's claim is predicated on a presser by the Western Region Police Commander in which he is said to have made the following statement:-

“We have launched investigations, and those who facilitated the landing of that chopper will be dealt with firmly. That includes the Pilot, the one who hired the aircraft, the one who authorized it to land, and anyone else involved...

That landing endangered lives, disrupted a public event, and we cannot allow such impunity. Those responsible will face the full force of the law...

We are watching. Anyone who thinks they can use money or influence to bypass protocol should be ready to face consequences. We are not joking.”

55. Article 27 (1) of the Constitution provides:-

“Every person is equal before the law and has the right to equal protection and equal benefit of the law.”

56. Regarding the claim that the Respondent's conduct constitutes selective and discriminatory enforcement of the law, the Petitioner relies on media reports to support his claim which is founded on the doctrine of selective enforcement. This was a claim based on allegations of facts and the Petitioner was under duty to prove that the landings by the dignitaries he named were under similar factual and legal circumstances as his. The court is unable to determine merely on the basis of media reports, from the generalized

averments in paragraph 8, 9 and 10 whether the dignitaries named were operating under the same conditions and in like manner as the Petitioner yet did not attract criminal investigations.

57. The Petitioner did not adduce any evidence to prove how he lost his dignity from the police investigation or public mention as this does not automatically infringe upon the right to dignity. There was no evidence that the public utterances were made to defame or publicly shame him.
58. Regarding the claim that the Petitioner's right to freedom from psychological torture was violated, the Petitioner was required to prove deliberate intentional infliction of severe mental or physical suffering for purposes like intimidation or punishment. It is my considered view that an announcement of a pending investigation cannot be considered psychological torture unless it is part of a pattern of extreme punishment.
59. Article 157 of the Constitution provides the framework within which the Director of Public Prosecutions can exercise his powers. Article 157(6) provides: ***"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...
(b) take over and continue any criminal proceedings...
(c) discontinue criminal proceedings."

60. Further Article 157(10) provides: ***“The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and shall not be under the direction or control of any person or authority.”***
61. However, it is well settled that the prosecutorial power of the Director of Public Prosecutions is not infinite but is limited by virtue of Article 157(11) which provides: ***“In exercising the powers conferred by this Article, the Director of prosecutions shall have regard to public interest, the interest of the administration of justice and the need to prevent and avoid abuse of legal process.”***
62. The effect of these provisions is that investigations by the police and prosecutions by the DPP are constitutionally protected functions which must be discharged independently by the respective office bearers subject to the constitutional limits that underlie the exercise of the discretion.
63. In the ***Republic v Director of Public Prosecutions & 2 others Ex parte Praxidis Namoni Saisi [2016] KEHC 5698 (KLR)***, the court stated:-
- “It is therefore clear that the terrain under the current prosecutorial regime has changed and that the discretion given to the DPP is not absolute but must be exercised within certain laid down standards provided under the***

Constitution and the Office of the Director of Public Prosecutions Act. Where it is alleged that these standards have not been adhered to, it behoves this Court to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and, above all, the Constitution itself. I associate myself with the sentiments expressed in *Nakusa vs. Tororei & 2 Others* (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565 to the effect that: “the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system..... In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend.”

64. According to the 5th Respondent, he was investigating the matter due to the fact that lives were endangered and a public event disrupted. The subject of the investigation was a matter of public interest which called for investigations and absent sufficient evidence that the decision was made without any basis or was

arbitrary, the court cannot fault the decision to commence investigation as all the National Police Service needs to do is to establish a reasonable suspicion that an offence has been committed in order to undertake investigations.

IV. Whether the Court should prohibit investigations or prosecution

65. Courts have consistently held that they should only intervene in criminal investigations or prosecution in exceptional circumstances.

66. This was underscored by the court in **Republic v. Director of Public Prosecutions & 2 others Ex parte Praxidis Namoni Saisi (Supra)** when it held that:-

“...the Attorney General has unfettered discretion to undertake investigations and prosecute. The Attorney Generals inherent powers to investigate and prosecute may be exercised through other offices in accordance with the Constitution or any other law. But, if the Attorney General exercises that power in breach of the constitutional provisions or any other law by acting maliciously, capriciously, abusing the court process or contrary to public policy the Court would intervene...”

67. In **Ramalingam Ravinthran v. Attorney General[2012] SGCA 2**, the Court of Appeal of Singapore said at para 53:- ***“The***

Attorney General is the custodian of prosecutorial power. He uses it to enforce criminal law not for its own sake but for the greater good of society, i.e., to maintain law and order and to uphold the rule of law. Offences are committed by all kinds of people in all kinds of circumstances. It is not the policy of the law under our legal system that all offenders must be prosecuted, regardless of the circumstances in which they have committed offences. Furthermore, not all offences are provable in a court of law. It is not necessary in the public interest that every offender must be prosecuted, or that an offender must be prosecuted for the most serious possible offence available in the statute book. Conversely, while the public interest does not require the Attorney General to prosecute any and all persons who may be guilty of the crime, he cannot decide at his own whim and fancy who should or should not be prosecuted and what offence or offences a particular offender should be prosecuted for. The Attorney General's final decision will be constrained by what public interest requires."

68. Similarly, in ***Diamond Hasham Lalji & Another v Attorney General & 4 Others [2018] eKLR***, the Court of Appeal held:-
"The exercise of prosecutorial discretion by the Director of Public Prosecutions is a constitutional power which should not lightly be interfered with by the courts unless it is

- shown that the same is being exercised unlawfully, maliciously or in abuse of the court process.”***
69. The Court of Appeal equally affirmed the independence of the Office of the Director of Public Prosecutions in ***Director of Public Prosecutions v Martin Maina & 4 Others [2017] KECA 93 (KLR)***, observing: ***“The Constitution deliberately insulated the office of the Director of Public Prosecutions from external influence so as to ensure independence and impartiality in criminal prosecutions.”***
70. In ***John Swaka v the DPP & 2 others [2013] eKLR***, the High Court cited its earlier decision in ***Francis Anyango Juma v DPP & another, Petition No. 160 of 2012***, where it was held: ***“Clearly the intention under the Constitution was to enable the DPP to carry out its constitutional mandate without any interference from any party. This Court cannot direct or interfere with the exercise of 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 right under the Constitution, or violation of the Constitution itself.”***
71. In ***Commissioner of Police & Director of Criminal Investigation Department & another v Kenya Commercial Bank Ltd & 4 others (Civil Appeal 56 of 2012) [2013] KECA 182 (KLR)*** the Court of Appeal stated that:-

“By the same token and in terms of Article 157 (11) of the Constitution, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution.”

72. In the celebrated Court of Appeal decision of ***Githunguri v Republic [1986] KLR 1***, the court held that the High Court has inherent jurisdiction to stop a prosecution where it amounts to an abuse of the process of the court or is oppressive and vexatious. However, the threshold for such intervention is very high.
73. The Court of Appeal reiterated this principle in ***Lalji & another v Attorney General & 4 others (Civil Appeal 274 of 2014) [2018] KECA 856 (KLR) (19 January 2018)***, stating: ***“Courts should be slow to interfere with the constitutional mandate of the Director of Public Prosecutions unless there is clear***

evidence of abuse of power, bad faith or violation of the Constitution.”

74. Similarly, in ***Kuria & 3 Others v Attorney General [2002] 2 KLR 69***, the Court held: ***“A criminal prosecution which is commenced in the absence of proper factual foundation or for ulterior purposes may be stopped by the court.”***
75. In the present matter, the Petitioner has not demonstrated any violation of his constitutional rights were his file is to be handed to the DPP. In any event, the 3rd Respondent further stated that the investigative file has not even been forwarded to the Office of the Director of Public Prosecutions. The Petitioner therefore seeks to pre-empt investigative processes before they are concluded.
76. The Petitioner alleges that the intended prosecution is politically motivated. However, no cogent evidence has been placed before this Court demonstrating a concrete intention to prosecute, malice, bad faith or abuse of prosecutorial discretion.
77. The courts have held that in exercising their discretion to charge a person, both the police and the DPP’s office must take into account and must exercise the discretion on the evidence of sound legal principles.
78. In ***Thomas Mboya Oluoch & Another v Lucy Muthoni Stephen & Another Nairobi HCCC No. 1729 of 2001*** Ojwang, J (as he then was) held that:- ***“...policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or***

malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense...I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State's prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes."

79. The Court must also caution against prematurely halting investigative processes. Investigations are intended to establish whether an offence has been committed and who bears responsibility.
80. This court's interference with prosecutorial discretion is warranted only where it is shown that criminal proceedings were instituted for purposes other than enforcing the criminal law, or in abuse of the court process. However, it is my view that the Petitioner has failed to prove that there is an abuse of the court's process by the Respondents.

V. Whether the Petitioner is entitled to damages

81. The Petitioner seeks general, aggravated and exemplary damages.

82. The principles governing constitutional damages were articulated by the Court of Appeal in ***Imanyara & 2 others v Attorney General [2016] KECA 557 (KLR) (19 May 2016)*** where the Court stated:-
- “An award of damages for constitutional violations is meant to vindicate the rights that have been violated and to deter future infringements.”***
83. However, damages can only be awarded where an actual violation of rights has been established.
84. In the present case, the Court finds that no constitutional violation has been demonstrated. The Petitioner approached the Court prematurely largely out of apprehension that he might be arrested or prosecuted.
85. The Court cannot issue constitutional remedies based on speculative or hypothetical violations.
86. Upon careful consideration of the Petition, the affidavits on record, and the applicable constitutional and statutory provisions, this Court finds that the investigative and prosecutorial functions of the Respondents are constitutionally mandated under Articles 157 and 243 of the Constitution. The Petitioner has not demonstrated that the Respondents have acted in bad faith, maliciously or in abuse of their constitutional mandate.
87. Consequently, the Court finds that the Petition lacks merit. The same is hereby dismissed with no order as to costs.

Dated, signed and delivered at Kakamega this 27th day of April 2026.

**A. C. BETT
JUDGE**

In the presence of:

Mr. Tonje holding brief for Mr. Busiega for the Petitioner

No appearance for the 1st, 2nd, 4th and 5th Respondent

Ms. Chala for the 3rd Respondent

Court Assistant: Polycap

COPY