Michael v Odinga Subcounty Commander, Industrial Area & 7 others; Law Society of Kenya & another (Interested Parties) (Constitutional Petition E169 of 2021) [2025] KEHC 1120 (KLR) (Constitutional and Human Rights) (28 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1120 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E169 OF 2021

EC MWITA, J

FEBRUARY 28, 2025

BETWEEN

TERESIA JERUSAH MICHAEL ..... PETITIONER

AND

TIMON ODINGA SUBCOUNTY COMMANDER, INDUSTRIAL AREA ..... 1ST RESPONDENT

OCS INDUSTRIAL AREA POLICE STATION ..... 2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE ..... 3RD RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 4TH RESPONDENT

NATIONAL POLICE SERVICE COMMISION ..... 5TH RESPONDENT

THE HON ATTORNEY GENERAL ..... 6TH RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 7TH RESPONDENT

NARKISO OLUOCH ALOO ..... 8TH RESPONDENT

AND

LAW SOCIETY OF KENYA ..... INTERESTED PARTY

MILHANI ACCESS CAPITAL LIMITED ..... INTERESTED PARTY

JUDGMENT

1. The petitioner, an Advocate practicing in the name and style of Messrs. T. J Michael & Company Advocates, brought this petition against the respondents alleging violation of her rights and

fundamental freedoms. She also sought to stop the respondents' decision to investigate her with a view to preferring criminal charges against her.

2. The petitioner represented a client (Joe Mwaniki Weru), in Milimani Chief Magistrate's Civil Suit No. E2621 of 2021. On 16th April 2021, she filed a notice of motion application seeking release of motor vehicle registration number KCT 777N (the vehicle) to the client. The application was granted on 4th May 2021.

3. On 5th May 2021, the petitioner, accompanied by the client's driver executed the court order with the assistance of police officers from Industrial Area Police Station. After serving the orders on the 8th respondent who was in possession of the vehicle, the 8th respondent drove the vehicle to Industrial Police Stations where he handed over the car keys and the vehicle to the police officers who in turn handed over the vehicle to the owner's driver.

4. On 7th May 2021, the petitioner was summoned to Industrial Area police station to clarify on the events leading to the release of the vehicle. At the station, she was questioned and made to record a statement in relation to the repossession of the vehicle.

5. The petitioner was thereafter taken to the 1st respondent's office where she was confronted with allegations of theft of the vehicle and was detained for more than four hours. She was later released on a cash bail of Kshs. 30,000.

6. The petitioner stated that during the detention, the 1st respondent harassed, threatened and subjected her to immense emotional and mental anguish. She was denied the right to privacy and dignity; was refused permission to step out to make calls for help or to relieve herself.

7. It was the petitioner's case that as an officer of the court in conduct of the civil case (MCCC E2621 of 2021), she played her role in the repossession of the vehicle in good faith and strictly executed her instructions and duties and, therefore, her actions cannot render her criminally liable.

8. The petitioner asserted that the charge preferred against her for the offence of stealing contrary to section 268(1) of the *Penal Code* is irrational, unreasonable and an abuse of prosecutorial discretion. It was brought in bad faith owing to the fact that the court order was presented to the 1st and 2nd respondents and police officers confirmed its authenticity before execution.

9. The petitioner asserted that as a result of the respondents' actions, she stands to suffer irreparable harm and injury if the respondents' decision to prefer criminal charges against her is not quashed. The petitioner argued that her rights guaranteed under Articles 27(1) and (2), 28, 31 and 50(1) and (2) (a) (b) (c) (j) & (k) of *the Constitution* were violated.

10. The petitioner relied on the decision in Republic v Director of Public Prosecutions & 3 others Ex-Parte Mildred Mbuya Muli [2015] eKLR for the proposition that the criminal proceedings against her are an abuse of the criminal justice system and have been brought to settle scores in the civil proceedings.

11. The petitioner asserted that she is accused of stealing the vehicle, when in fact the vehicle was lawfully released to her client pursuant to a valid court order. The petitioner urged the court to note that in the respondents retracted allegation of theft in the grounds of opposition and were alleging that she improperly obtained a court order and disregarded crucial police procedures while executing the order.

12. The petitioner maintained that she bears no responsibility of managing police affairs; holds no authority over police procedures and cannot be held accountable for police procedures. The petitioner relied on Articles 49 and 50 of *the Constitution* and the decision in Mohammed Feisal & 19 others v Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National

Police Service Commission &another (Interested Party) [2018] eKLR to contend that her arrest and detention was without probable cause.

13. The petitioner again relied on the decision in Ann v Attorney General [2013] KEHC 6004 (KLR), to argue that she had demonstrated through her affidavit the harrowing experience she went through in the hands of the respondents. The 1st respondent's malicious actions and utterances caused her emotional pain, shame and trauma and violated her right to dignity guaranteed under Article 28 of *the Constitution*.

14. The petitioner again relied on the decision in Mohammed Feisal & 19 others v Henry Kandie and others (supra) and Akusala A. Borniface v OCS Langata Police Station & 4 others [2018] eKLR that she is entitled to Kshs. 3,000,000 as general and exemplary damages for violation of her constitutional rights.

15. The petitioner also relied on the decision in Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR that she should be awarded costs of the petition. She sought several declarations and orders to vindicate her rights and fundamental freedoms.

The 1st, 2nd, 3rd, 4th, 5th and 7th respondents' case

16. The 1st, 2nd, 3rd, 4th, 5th and 7th respondents (the respondents) opposed the petition through grounds of opposition and written submissions. They admitted that the petition emanated from Civil Suit No. E2621 of 2021: (Joe Weru Mwaniki v Milhan Access Capital Limited.) They, however, contended that investigations arose due to an irregularly executed Court order issued on 4th May 2021 in the civil case with respect to the vehicle. According to the respondents, some internal police procedures were overlooked resulting into a complaint lodged by the 8th respondent.

17. The respondents stated that by virtue of Articles 245 of *the Constitution* read with section 28 of the *National Police Service Act*, the police are mandated to undertake investigations. Investigations in this matter are still ongoing and had not been concluded. The respondents contended that under Article 157 of *the Constitution* read with section 6 of the *Office of the Director of Public Prosecutions Act* (ODPP Act), the 4th respondent has mandate to institute and undertake criminal proceedings against any person before any court of law. The 4th respondent is yet to receive the police file and has not recommended any prosecution against the petitioner.

18. The respondents urged that the matter be referred to the trial Court in Civil Suit No. E2621 of 2021 for determination of the issues arising and the 8th respondent be joined as a party. The respondents maintained that the petition does not meet the threshold for a constitutional petition.

19. They relied on the decision in Anarita Karimi Njeru v The Republic [1979] eKLR for the argument that the petitioner had not raised any compelling constitutional issue or evidence to demonstrate infringement of the petitioner's rights and fundamental freedoms.

20. The respondents submitted that while the petitioner alleged violation of Article 27 of *the Constitution* based on her age and gender, there was no evidence to support that allegation. They relied on the decisions in Robert Waweru Maina & 4 others v Director of Public Prosecutions & 3 others [2022] eKLR and Mbona v Shepstone and Wylie (CCT85/14) [2015] ZACC 11.

21. The respondents again cited the decision in Christopher White & others v Inspector General of Police & others [2021] eKLR for the argument that the police had a duty to investigate the complaint lodged by the 8th respondent. Further, that whereas a civil remedy might obtain in a claim for sale of motor vehicle, that does not preclude the police from investigating the possible commission of a crime in the process of the parties' dealings.

22. On the allegation of violation of Article 28 of *the Constitution*, the respondents contended that being an advocate did not make the petitioner immune to police investigations following a complaint made by a member of the public. The petitioner ought to prove the manner in which her right to dignity was infringed beyond stating that she is an advocate. Summoning and investigating the petitioner cannot amount to infringement of that right.

23. Regarding Article 50 of *the Constitution*, the respondents maintained that the 4th respondent has not made a decision on whether or not to institute any criminal charges against the petitioner. In any case, the constitutional safeguards available to the petitioner under Article 50 are still available to her and she still enjoys the right to be presumed innocent until proven guilty. They relied on Legal-Aid South Africa v Mzoxolo Magidiwana (1055/13) [2014] ZASCA 141 and Matalinga and Others v Attorney General [1972] E.A. 578.

24. The respondents argued that the decision to commence investigations against the petitioner was consistent with the provisions of Articles 244 of *the Constitution* and the *National Police Service Act*. The decision to institute criminal proceedings by the 4th respondent is discretionary and not subject to the direction or control by any authority. In any case, any of the petitioner's rights that were allegedly limited, were only limited by law in terms of Article 24 of *the Constitution*.

25. The respondents relied on section 193 (A) of the *Criminal Procedure Code* (Cap 75) and the decision in Republic v Director of Public Prosecution & 2 others Ex-parte Francis Njakwe Maina & another [2015] eKLR to argue that the petitioner had not demonstrated the collateral purpose for which the investigations into the alleged criminal conduct was instituted to warrant this Court's intervention by prohibiting the respondents from undertaking their constitutional obligations.

26. The respondents relied on the decision in Commissioner of Police & The Director of Criminal Investigation Department & another v Kenya Commercial Bank Ltd & 4 others [2013] eKLR and urged the Court to dismiss the petition with costs.

6th respondent's response

27. The 6th respondent informed the court that he had filed grounds of opposition and written submissions. However, the grounds are not in the court file and cannot be accessed on the portal.

28. In the submissions, the 6th respondent argued that the arrest was conducted in discharge of a legal and statutory duty; that the petition does not meet the threshold in Anarita Karimi Njeru v Republic [1979] eKLR and Mumo Matemu v Trusted Society of Human Rights Alliance and 5 others [2013] eKLR.

29. The 6th respondent asserted that the mandate to charge suspect lies with the DPP and relied on Article 157 of *the Constitution* as read with section 6 of the ODPP Act, and the decision Peter Ngunjiri Maina v Director of Public Prosecutions [2017] eKLR.

30. The 6th respondent again relied on the decisions in Republic v Rosemary Wairimu Munene exparte Ihururu Dairy Farmers Cooperative Society Ltd [2014] eKLR and Reuben Njuguna Gachukia & another v Inspector General of the National Police Service & 4 others [2019] eKLR and urged the court to dismiss the petition with costs.

31. The 8th respondent and the 1st interested party did not file responses to the petition and did not take part in the proceedings.

2nd interested party's response

32. The 2nd interested party opposed the petition through a replying affidavit sworn by Gibson Monari on 31st May 2021. The 2nd interested party admitted that the basis of the petition is civil suit CMCC No. E2621 of 2021 in which the vehicle is also the subject matter.

33. The 2nd interested party took issue with how the petitioner conducted herself in the civil suit. It stated that although the petitioner knew that her client's application had been fixed for hearing on 4th May 2021, she sent an email indicating that the matter was fixed for hearing on 4th April 2021. The petitioner and her client also knew that according to the search from NTSA, the vehicle was registered in the name of Pius Wanjiku Githinji who was the highest bidder at a public auction but chose to sue it alone.

34. The 2nd interested party contended that the order issued on 4th May 2021 did not direct any police officer at Industrial Area police station or any other police station to assist in the repossession of the vehicle from the 8th respondent and hand it over to the petitioner's client. There was also no indication that the order was verified by the police as is the practice. The petitioner did not explain why she executed a court order which is the duty of a court bailiff or auctioneer.

35. The 2nd interested party stated that it has no proprietary interest in the vehicle since the loan had been recovered. It had since filed an application seeking to set aside the orders issued on 4th May 2021 for non-service.

Determination

36. I have considered the petition responses and arguments by parties. I have also considered the decisions relied on. The issue that arises for determination is whether the investigations and intended arrest and prosecution should be stopped and whether the petitioner's rights were violated and should she be compensated.

37. The gravamen of this petition is the 1st respondent's decision to investigate the petitioner with a view to charging and prosecuting her over matter relating to the vehicle which is the subject of a civil suit in the Magistrate's court.

38. The facts of the petition are undisputed. The petitioner, an advocate, acted for a client in CMCC E2621 of 2021 at the Chief Magistrate's Court Milimani, Nairobi. The suit related to the vehicle, the subject of this petition. The petitioner filed an application seeking orders for release of the vehicle and to restrain Milhan Access Capital Limited from repossessing the vehicle. The court issued the orders and the petitioner executed those orders with the assistance of the police and the vehicle was released to the petitioner's client.

39. Thereafter, the petitioner was summoned to the police station where she was interrogated concerning the release of the vehicle and is now threatened with arrest and prosecution on allegations of theft of the vehicle.

40. The respondents and the 2nd interested party did not dispute the facts, only stating that investigations were on going on how the petitioner executed the order without following proper police procedures. It was also argued that the DPP had not made a decision to charge and prosecute the petitioner. There was even a suggestion that this issue should be referred back to the Chief Magistrate's Court to be handled in CMCC E2621 of 2021. It was further stated that an application had already been made seeking to set aside the orders.

41. The police have mandate to investigate any complaint over commission of a crime or criminal conduct. On the other hand, the DPP has constitutional mandate and discretion to initiate, continue and, or terminate criminal prosecutions. In doing so, the 2nd respondent does not require consent or

permission from any person or authority. The DPP must, however, exercise its powers in a manner that has regard to public interest, interests of administration of justice and the need to prevent and avoid abuse of the legal process (Article 157(11)). (see also Director of Public Prosecutions v Martin Mina & 4others [2017] eKLR).

42. The law is settled that where the police are investigating a crime as authorised by law, or the DPP is exercising constitutional discretion conferred on that office, courts will rarely interfere with that mandate or discretion. Courts have affirmed this position on many occasions that they will only interfere where it is justified.

43. In Republic v Director of Public Prosecution & 2 others Ex parte Francis Njakwe Maina & another [2015] eKLR, it was observed that courts ought not usurp the constitutional mandate of the DPP to undertake prosecution in exercise of the discretion conferred upon that office. The Court made the point that if a petitioner demonstrates that the criminal proceedings constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.

44. In Paul Ng'ang'a Nyaga v Attorney General & 3 others (2013) eKLR, it was held that the Court will only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that those bodies acted or are acting in contravention of *the Constitution* or the law.

45. Similarly, in Francis Anyango Juma v The Director of Public Prosecutions and another [2012] eKLR, the Court stated that the intention of *the Constitution* was to enable the DPP to carry out his constitutional mandate without interference from any party. The court cannot direct or interfere with the DPP's exercise 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.

46. See also Williams v Spautz [1992] HCA 34; 174 CLR 509; 66 ALJR 585, that "If a stay is sought to stop a prosecution which has been instituted and maintained for an improper purpose, it by no means follows that it is necessary, before granting a stay, for the court to satisfy itself in such a case, that an unfair trial will ensue unless the prosecution is stopped."

47. The Court emphasized in the above case that unless the interests of justice demand it, courts should refrain from exercising the jurisdiction, and persons charged with criminal offences should not obtain an immunity from prosecution.

48. Courts have therefore maintained that the DPP's discretion to charge will only be interfered with where there is evidence of abuse, malice and all the negative instances that blur the exercise of the discretion of that office.

49. It is clear from the decisions referred to above, that courts should be slow to interfere with police investigations or the DPP's constitutional mandate and discretion to prosecute. That is why Article 157(10) shields that discretion, so that the DPP does 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."

50. However, Article 157(11) places a caveat that in exercising those powers, the DPP should have regard to "public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process."

51. A petitioner is required to show that the investigations or intended prosecution is not in public interest or interest of administration of justice, but is based on extraneous matters thus, an abuse of the legal process.

52. The petitioner before this Court, obtained a court order on behalf of her client which was executed with police assistance and the vehicle released, a fact the respondents and interested party did not dispute. Indeed, a copy of that order was attached to the pleadings and there was no suggestion at all that the order was not issued by that Court following an application before that court.

53. There was also no suggestion that the order did not relate to the vehicle that was released or that did not direct release of the vehicle. What I see the respondents argue about, is that the vehicle was released without following proper police procedures and that the order did not direct police assistance.

54. Section 24 of the Police Service Act provides for the functions of the Police Service. They include; investigating crime, maintenance of law and order and protection of life and property. The police are required to exercise their powers and discharge their functions subject to the constitutional safeguards of human rights and fundamental freedoms. Police can investigate any complaints of a criminal nature to ascertain whether a crime was committed or not. Once investigations are concluded, the file is forwarded to the DPP to make a decision whether or not to charge. If investigations conclude that there was no offence committed, the file is closed.

55. In this petition, the respondents argued that investigations were on going and the DPP had not made a decision. As already alluded to, the court will not interfere with the statutory mandate of the police to investigate crime once a complaint has been made to them. The complaint must however be on commission of a crime or offence of a criminal nature.

56. The issue before this court is that the police were dealing with a matter where a court of competent jurisdiction had issued an order for the release of a vehicle and the order was executed. The police were said to be investigating how the order was executed with their assistance without following proper police procedures. That in my view, was an internal matter as opposed to a complaint on commission of a criminal offence. Indeed, that perhaps explains why one of the parties' suggested that this matter be referred to the Chief Magistrate's Court to be delt together with the civil case.

57. It is clear to this Court that the investigations were really not over a criminal complaint, but something else. The court having issued an order which was executed and there being no argument that there was no order, the recourse available to the aggrieved party was to apply to set aside that order. The police could not second guess the court.

58. It will not be proper, in my view, for the police to conduct investigations on execution of a court order when there is no allegation that the order was fake and when the same matter is still pending before that court, including an application to set aside the order. One can only conclude that the respondents' action was being taken in bad faith with the intention of assisting one of the parties in the civil case pending in court, a clear case of abuse of the criminal justice system.

59. Even though section 193A of the *Criminal Procedure Code* permits both criminal and civil proceeding arising from same set of facts to continue concurrently, the facts must, ipso facto, reveal a criminal conduct. In Republic v Attorney General & 4 Others ex parte Kenneth Kariuki Gathii [2014] eKLR, the court observed that facts constituting the basis of criminal proceedings may similarly be a basis for a civil suit and it will not be a ground for staying a criminal process if the same can similarly be a basis for a criminal offence. However, if commencement of the criminal proceedings is meant to force a party to submit to the civil claim, institution of the criminal process would have been for achieving a collateral purpose other than its legally recognised aim.

60. In Wamburu *v Director of Public Prosecution & another (Petition E430 of 2023*) [2024] KEHC 11496 (KLR), this court observed that "the Court will intervene in a case where a petitioner shows that the

criminal prosecution is being used for improper purposes, ulterior motive, or to coerce one to admit a civil claim."

61. This court is alive to the position that matters of fact should be left to the trial court. However, where it is clear from the facts that the issues raised in the petition which are the basis of the intended prosecution are of a civil in nature and will be properly and conclusively determined in the civil case, the court should not allow investigations or prosecution to commence or continue where it will interfere with the court processes in the civil case.

62. Flowing from the above observations and considering the material placed before this court, I agree with the petitioner that the investigations and indeed any intended prosecution is not being done in the interest of criminal justice system. It is being undertaken to serve ulterior purpose and perhaps influence or interfere with the civil case pending before the Chief Magistrate's Court given that the petitioner merely discharged her professional mandate on her client's instructions, obtained a lawful court order and had it executed. If there was anything untoward, the court that issued the orders would be able determine any issues regarding the propriety of the order or otherwise.

Violation of rights

63. The petitioner claimed that her rights and fundamental freedoms were violated and sought compensation. Article 23(3) gives the court power to grant appropriate relief to redress denial, violation or infringement of, or threat to a right or fundamental freedom. The essence of such relief must be to ensure that the rights enshrined in *the constitution* are protected and enforced. (Fose v Minister of safety and Security 1997 (3) SA 786 (CC)).

64. A petitioner has to demonstrate to the satisfaction of the court, violation of the rights and fundamental freedoms in order for the court to find violation and invoke Article 23(3) of *the Constitution*. This is so, because as the Constitutional Court of Uganda stated in Tinyefuze v Attorney General of Uganda (Constitutional Petition No. 1 of 1996) [1997] UGCC 3, "if a petitioner succeeds in establishing breach of a fundamental right, he is entitled to the relief in exercise of constitutional jurisdiction as a matter of course."

65. In have considered the petition, responses and arguments by parties on this issue. The petitioner stated that she was detained at the police station, threatened with arrest and prosecution and insulted. The respondents on their part, argued that the petitioner had not demonstrated that her rights were violated.

66. The petitioner's main complaint was that she was detained at the police station, threatened and her dignity infringed. Detention is a fact to be deduced from the circumstances of the case where there is no direct evidence. In the petitioner's case, the issue of detention is contained in her pleadings. There is no other evidence apart from what was pleaded. The petitioner stated that she received a call asking her to report at the police station which she did. She was interrogated over the vehicle that had been released and later released the same day but, according to her, after her rights were violated.

67. The record shows that the petitioner was released on cash bail on the same day 7th May 2021 to appear in court on 12th May 2021. There was no evidence of the time she reported at the police station and when she was release. However, what is clear is that the police released her on cash bail which is a lawful way of releasing a person in police custody and she was to appear in court later. In the circumstances of this case, this court is not satisfied that the petitioner discharged the burden of proof that her rights and fundamental freedoms were violated.

Conclusion

68. Having considered the pleadings and arguments by parties and the decisions relied on, the conclusion I come to, is that the petitioner has demonstrated that the police were not acting in the interests of criminal justice when they purported to investigate and arrest her. The issue the police were purporting to investigate was live before a civil court which had issued orders directing release of the vehicle the subject of that case.

69. Any irregularities regarding the issuance of the order or execution of that order is a matter to be raised before the civil court. The respondents could not convert a purely civil matter and repackage it into a criminal offence against an advocate who was only implementing a client's instructions and executing orders issued by the court in favour of her client.

70. The petitioner did not however prove that her rights and fundamental freedoms were violated. Violation is a fact that has to be proved to the required standard of balance of probabilities. This, the petitioner fell short.

Disposal

71. Based on the above conclusions, the court makes the following orders that it considers appropriate.

    1. An order is hereby issued restraining the Inspector General of Police and the Director of Public Prosecutions whether by themselves, their agents, servants and or whomsoever is acting on their instruction or authority from arresting, charging, prosecuting or continuing any criminal proceedings against the petitioner in relation to matters relating to motor vehicle Registration Number KCT 777N.

    2. Each party will, however, bear their own costs of this petition.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF FEBRUARY 2025

E C MWITA

JUDGE