



**Asif v Director of Public Prosecutions & 2 others (Constitutional Petition  
E054 of 2023) [2025] KEHC 5242 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 5242 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CONSTITUTIONAL PETITION E054 OF 2023**

**OA SEWE, J**

**MARCH 27, 2025**

**IN THE MATTER OF ARTICLES 22(1) AND 23 OF THE  
CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF RULE 4 OF THE CONSTITUTION OF  
KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL  
FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL  
RIGHTS AND FREEDOMS UNDER THE CONSTITUTION OF  
KENYA**

**BETWEEN**

**SARMAD ASIF ..... PETITIONER**

**AND**

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

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

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner, Sarmad Asif, filed the Petition dated 22<sup>nd</sup> November 2023 against the three respondents, namely, the Director of Public Prosecutions, the Inspector General of Police and the Attorney General seeking the following reliefs:



- (a) A declaration that the respondents violated and threatened his fundamental rights and freedoms.
  - (b) A permanent injunction prohibiting the respondents' officers, subordinates, agents, assigns, employees and/or any other person whatsoever from arresting, charging and/or persecuting the petitioner and any employee of the petitioner's company, Sleek Trading Limited on any issue in relation to the complaint by Kenneth Ali Kibira and Charles Munganyi.
  - (c) An order that any further purported investigations, summons and arrests against the petitioner and/or any employees of the petitioner's company, Sleek Trading Limited on any issue in relation to the complaint by Kenneth Ali Kibira and Charles Munganyi or any other person will be an exercise in abuse of the criminal justice system and in contradiction of Chapter 4 of the Constitution of Kenya, 2010.
  - (d) Costs of the Petition and interest thereon at court rates.
2. The facts in support of the Petition were set out at paragraphs 1 to 17 of the Petition. The petitioner thereby contended that he was being harassed, threatened and intimidated through arrests by the respondent on trumped up charges in an orchestrated scheme to unlawfully extort money from him in the guise of enforcing a contract of sale of a motor vehicle dated 18<sup>th</sup> December 2021 between Sleek Trading Limited and one Charles Ovita Munganyi.
  3. The petitioner contended that, by that agreement, Sleek Trading Limited (hereinafter, "the company") sold motor vehicle Registration No. KCZ 942 to the complainant on hire purchase; and that the motor vehicle was involved in a road traffic accident before the completion of the payment of the hire purchase price. The petitioner further averred that the complainant has since been harassing him and the company employees seeking full refund of the instalments paid.
  4. The petitioner also pointed out that the complainants had since filed small claims suits against the company in Mombasa SCCOM/E687/2023: Charles Ovita Munganyi v Sleek Trading Limited and Mombasa SCCOM/E413/2023: Kenneth Ali Kibira T/a Kentech Communications v Sleek Trading Limited. In addition, the petition stated that the complainants had also filed a complaint of assault at the Central Police Station, Mombasa vide OB No. 87/18/07/2022 which was investigated by the Police and the investigation file forwarded to the Office of the Director of the Public Prosecutions (the 1<sup>st</sup> respondent herein); but that the 1<sup>st</sup> respondent declined to prosecute and made its decision known vide a letter dated 12<sup>th</sup> May 2023.
  5. The petitioner now complains that, due to the persistence by the complainants, a decision to prosecute him has since been made in connection with a contract that falls under the realm of civil courts. He contends that the respondents are being used by the complaints to further personal interests; and that they have failed to exercise their autonomy independently, consequently breaching the national values and principles of good governance, transparency and accountability. Accordingly, it was the petitioner's contention that the respondents acted in bad faith for extraneous considerations; and therefore it is only fair and in the interest of justice that the respondents be restrained from violating or threatening his constitutional rights with violation.
  6. The petitioner relied on Articles 3, 10, 22, 23, 29, 49(1), 238(2)(b) of the Constitution as well as Sections 49(1) and (4) the National Police Service Act, 2011. The petitioner also relied on the following international instruments:
    - (a) The 1966 International Covenant on Civil and Political Rights (ICCPR);



- (b) The African Charter on Human and Peoples' Rights (ACHPR);
  - (c) Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment;
  - (d) Universal Declaration of Human Rights, 1948
7. The grounds set out herein above, were explicated in the petitioner's Supporting Affidavit sworn on 23<sup>rd</sup> November 2023. He annexed several documents to that affidavit to buttress his assertions. The documents include copies of the Hire Purchase Agreement dated 18<sup>th</sup> December 2021 and the Inspection Report from Xenon Auto Assessors and Valuers Ltd dated 12<sup>th</sup> September 2023, vouching for the estimated cost of repairs for the subject motor vehicle. The petitioner also annexed to his affidavit copies of the pleadings filed in the aforementioned Small Claims suits, a letter dated 13<sup>th</sup> September 2023 from the 1<sup>st</sup> respondent in connection with the subject matter of this Petition as well as an extract of the Occurrence Book, OB No. 87/18/07/2022.
8. The Petition was resisted by the respondents. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed Grounds of Opposition dated 29<sup>th</sup> November 2023, contending that:
- (a) The Petition is misconceived, frivolous and an abuse of the process of the Court.
  - (b) The 1<sup>st</sup> and 2<sup>nd</sup> respondents are empowered by law to investigate and prosecute criminal offences pursuant to the provisions of Section 24 of the [National Police Service Act](#) and Articles 243 and 245 of the [Constitution](#).
  - (c) The petitioner has not demonstrated how the respondents are not going to respect his constitutional rights.
  - (d) It was incumbent upon the petitioner to demonstrate before the Court that the intended police investigations are hinged on illegality or bad faith.
  - (e) That even though the dispute herein is one of a civil nature there is no bar to investigation and prosecution of the petitioner by the 1<sup>st</sup> and 2<sup>nd</sup> respondents by dint of Section 193A of the [Criminal Procedure Code](#).
  - (f) The petitioner merely alluded to constitutional provisions and had not shown with exactitude how his rights and fundamental freedoms will be infringed; and therefore has not met the threshold for the Court's intervention.
  - (g) The 3<sup>rd</sup> respondent is only responsible for defending the Government in civil litigation and has nothing to do with investigations or prosecution of criminal cases.
  - (h) That for the Court to intervene, it would have to be satisfied that the criminal process which has been initiated is being used with a view of forcing the petitioner to settle the civil claim; which evidence has not been brought before the Court.
  - (i) The petitioner failed to bring forth any scintilla of evidence to show that he will not be accorded fair trial.
  - (j) The petitioner failed to identify the police officers and/or police stations he accused of harassment, threats or intimidation; and was therefore guilty of material non-disclosure.
  - (k) The Petition offends the doctrine of constitutional avoidance and should therefore not be entertained.



9. In a Further Affidavit sworn by the petitioner on 30<sup>th</sup> January 2024, he annexed copies of the Judgments rendered in the Small Claims Suits No. E413 and E687 of 2023. They prove that the complainants were successful in respect of their claims against the employees of the company, and were awarded damages for assault.
10. The Petition was canvassed by way of written submissions. To that end the petitioner filed written submissions dated 19<sup>th</sup> July 2024 and thereby proposed the following issues for determination:
  - (a) Whether the petitioner's rights as guaranteed by Article 27(1), (2), 28, 29(a) and 50(2)(b), (j) & (n) of the Constitution stand violated by the 1<sup>st</sup> respondent's decision to charge the petitioner.
  - (b) Whether the Petition is uncontested on account of the respondents' failure to file a Replying Affidavit.
11. The pith of the petitioner's case is that the dispute between the petitioner's company and the complainants is a civil dispute involving breach of contract and does not involve any criminal component. Accordingly, the petitioner submitted that the decision of the 1<sup>st</sup> respondent to prefer charges against him is not only unreasonable and unjust, but is also a well-coordinated and deliberate effort aimed at harassing, intimidating and victimizing him. He accordingly urged the Court to restrain his prosecution pending the hearing and determination of the Petition.
12. The petitioner relied on Commissioner of Police & the Director of Investigations v Kenya Commercial Bank & 4 Others [2013] eKLR, Peter George Anthony Costa v Attorney General & Another, Nairobi Petition No. 83 of 2010, Rosemary Wanja Mwangi & 2 Others v Attorney General & 2 Others, Thuita Mwangi & 2 Others v Ethics and Anti-Corruption Commission & 3 Others and Reuben Mwangi v Director of Public Prosecutions & 2 Others; UAP Insurance & Another (Interested Parties) [2021] eKLR, for the proposition that it amounts to abuse of power for the Director of Public Prosecutions and the Police to involve themselves in what is purely a civil dispute.
13. The petitioner further pointed out that the complainants lodged civil suits before the Small Claims Court in Mombasa and, in a judgment delivered on 25<sup>th</sup> January 2024, Kshs. 102,230 was awarded to Charles Ovita Munganyi and Kshs. 119,895 to the second complainant, Kenneth Ali Kibira for breach of contract. The petitioner relied on Peter George Anthony Costa v Attorney General, Rosemary Wanja Mwangi & 2 others and Thuita Mwangi & 2 others v Ethics and Anti-Corruption Commission & 3 others for the submission that the court process should not be used to settle personal scores or abused for extraneous considerations.
14. The petitioner urged the Court to note that no Replying Affidavit was filed by any of the respondents; and therefore that the facts as asserted by him were not controverted. He relied on Gideon Sitelu Konchellah v Julius Lekateny Ole Sunkuli & 2 Others [2018] eKLR in which the Supreme Court held that, in the absence of a replying affidavit, a party's written submissions are of no effect. The petitioner accordingly prayed that his application be allowed and the orders sought granted.
15. The petitioner also relied on Gulleid v Registrar of Persons & another (Petition E007 of 2021) [2021] KEHC 110 (KLR) (27 September 2021) and submitted that Grounds of Opposition are only deemed to address issues of law and cannot amount to proper or valid denial of allegations made on oath.
16. On behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, Counsel Ms. Rukiya Ibrahim, proposed the following issues for determination:
  - (a) Whether the respondents have violated or are likely to violate the petitioner's constitutional rights.



- (b) Whether the petitioner is deserving of the orders sought.
17. Counsel submitted that the 2<sup>nd</sup> respondent has an obligation to investigate criminal complaints according to Section 24(e) as read with Section 35 of the *National Police Service Act*, No. 11A of 2011. In her submission, the 2<sup>nd</sup> respondent has been acting pursuant to bona fide complaints made by ordinary citizens. She relied on *Republic v Commissioner of Police & Another, Ex Parte Michael Monari & Another* [2012] eKLR to support her argument that it is the duty of the police to investigate any complaint once made and therefore that the High Court should be reluctant to intervene in that process.
18. On the threshold for a constitutional petition, the respondents relied on the *Robert Waweru* case and submitted that, in line with the decision of the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & others* and *Anarita Karimi Njeru v Republic* [1976-1980] KLR 1272, the Petition does not meet the requisite threshold. Thus, in the submission of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, all the petitioner did was to allege violations of the *Constitution* without stating the exact manner of violation. Hence, they urged for the dismissal of the Petition dated 22<sup>nd</sup> November 2023 with costs.
19. I have given careful consideration to the Petition and the averments set out in the Supporting Affidavit. I have likewise considered the response filed on behalf of the respondents as well as the written submissions filed herein by the parties. The first issue for consideration is whether whether the Petition meets the threshold set in *Anarita Karimi Njeru*. In this regard, it is now well settled that a petitioner must do more than simply alleged a violation. Thus, in *Anarita Karimi Njeru v Republic* it was held:
- if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”
20. The same position was reiterated by the Court of Appeal in the case of *Mumo Matemu* (supra) thus:
- ... (42) It was the High Court’s observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in *Anarita Karimi Njeru* (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the *Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (Cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of *Thorp v Holdsworth* (1876) 3 Ch. D. 637 at 639 holds true today:

The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow



the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

21. Similarly, in the case of *Robert Amos Oketch v Andrew Hamilton & 8 others (Sued in their Personal Capacities and as Trustees of the National Bank of the Kenya Staff Retirement Benefit Scheme) & 4 others* [2017] eKLR, the court held: -

63. First, this being a constitutional petition, the petitioner is required to show with precision that it meets the test set in the case of *Anarita Karimi Njeru v Republic* (supra). In that case, the court stated that a party who wishes the Court to find in his favour must plead with a reasonable degree of precision the rights he claims to have been violated the constitutional provisions allegedly violated and the jurisdictional basis for it...

65. Applying the above principles to this case, I have considered the petitioner’s pleadings, the evidence as well as submission by his counsel and in my respectful view this is not a proper constitutional petition challenging violation of fundamental freedoms. I say so because although the petitioner has pleaded provisions of the *Constitution*, he has not demonstrated to the required standard how his rights and fundamental freedoms have been violated infringed or are threatened to come within the ambit of Article 23(1) of the *Constitution* for redress...”

22. In the instant matter, the petitioner set out the facts upon which his Petition is founded at paragraphs 1 to 17 of the Petition. Then at paragraphs 18 to 24 the petitioner set out the applicable provisions of the *Constitution* underpinning his Petition. He also made reference to certain provisions of international instruments. Since those provisions cannot be read in isolation from the factual basis set out in paragraphs 1 to 17 of the Petition, it is my finding that the Petition is sufficiently compliant. Indeed, in *Mumo Matemu* the Court of Appeal pointed out that:

...precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”

23. Under Rule 23(1) of the Mutunga Rules, the Court has powers to grant such interim measures as may be necessary to meet the ends of justice. The provision states:

Despite any provision to the contrary, a Judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim orders.”

24. With the foregoing in mind, I have given consideration to the Petition and note that the petitioner’s complaint is that the respondents acted in breach of Articles 10, 29 and 49(1) of the Constitution of Kenya. The petitioner essentially contended that the decision to arrest, charge and prosecute him was made for collateral reasons. In the premises, the two issues arising for consideration are:

- (a) Whether the petitioner has demonstrated alleged violations or threatened violations of his constitutional rights; and
- (b) Whether the petitioner is deserving of the orders sought.

25. First and foremost, the mandate of the 2<sup>nd</sup> respondent to investigate crime and effect arrest of suspects was aptly captured in *Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others* [2016] eKLR as follows:



42. ...the police are clearly mandated to investigate the commission of criminal offences and in so doing they have powers inter alia to take statements and conduct forensic investigations. In order for the applicant to succeed he must show that not only are the investigations which were being done by the police being carried out with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence.
26. Similarly, in *Republic v Commissioner of Police & Another, Ex Parte Michael Monari & Another* (supra), it was held:
- The police have a duty to investigate on 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 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.”
27. In the same vein, the mandate of the 1<sup>st</sup> respondent is not in dispute. It is hinged on Article 157 of the Constitution and was well discussed by the Supreme Court in *Jirongo v Soy Developers Ltd & 9 others* (Petition 38 of 2019) [2021] KESC 32 (KLR) (16 July 2021) (Judgment), as hereunder:
81. Under article 157(6) of the *Constitution*, the DPP is mandated to institute and undertake criminal proceedings against any person before any court.
- Article 157(6) provides as follows:
- (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.”
- Article 157(4) provides that:-
- (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.”
- However, Article 157(11) stipulates that:
- (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.”
82. Although the DPP is thus not bound by any directions, control or recommendations made by any institution or body, being an independent public office, where it is shown that the expectations of article 157(11) have not been met, then the High Court under article 165(3) (d)(ii) can properly interrogate any question arising therefrom and make appropriate orders.”
28. Likewise, in the case of *Anthony Murimi Waigwe v Attorney General & 4 others* [2020] eKLR, the court held: -



48. It is no doubt clear that under Article 157 (1) of the Constitution the ODPP is enjoined in exercising the powers conferred by the aforesaid Article to have regard to public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process. Interest of the administration of justice dictates that only those whom the DPP believes have a prosecutable case against them be arraigned in Court and those who DPP believes have no prosecutable case against them be let free. This is why Article 159(2) of the Constitution is crying loudly everyday, every hour that “justice shall be done to all, irrespective of status”. Justice demands that it should not be one way and for some of us but for all of us irrespective of who one is or one has.
49. The Petitioner in support of interest of administration of justice Dictates referred to the National Prosecution policy, revised in 2015 at page 5 where it provides that: "Public Prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction. In other words, Public Prosecutors should ask themselves; would an impartial tribunal convict on the basis of the evidence available?"
50. In the case of Republic v. Director of Public Prosecution & Another ex parte Kamani, Nairobi Judicial Review Application No. 78 of 2015 while quoting the case of R vs. Attorney general ex Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001; the Court held;
- A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable.”
29. There is no gainsaying, therefore, that the 1<sup>st</sup> respondent is vested with the prosecutorial function under Article 157 of the Constitution. It is also indubitable that the discretion is not absolute; for Article 157(11) of the Constitution dictates that it be exercised with due regard to the public interest, the interests of the administration of justice, and the need to prevent and avoid abuse of the legal process. Similarly, the 2<sup>nd</sup> respondent has the obligation to investigate crime and effect arrests where justified. Therefore, the burden of proof was on the petitioner to show that, in this instance, the decision to investigate the subject complaint with a view of prosecution by the 1<sup>st</sup> respondent was taken for extraneous reasons. That burden must be discharged irrespective of whether or not the respondents adduced evidence in proof of their assertions in response to the Petition.
30. In respect of the burden of proof, the Supreme Court pronounced itself in *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] eKLR, as follows:
- (47) It is a timeless rule of the common law tradition, Kenya’s juristic heritage, and one of fair and pragmatic conception, that the party making an averment in validation of a claim, is always the one to establish the plain veracity of the claim. In civil claims, the standard of proof is the “balance of probability”. Balance of probability is a concept deeply linked to the perceptible fact-scenario: so there has to be evidence, on the basis of which the Court can determine that it was more probable than not, that the Respondent bore responsibility, in whole or in part.



31. The position was reiterated by the Supreme Court in *Wamwere & 5 Others v Attorney General* (Petition 26, 34 & 35 of 2019 Consolidated) [2023] KESC 3 (KLR) (Constitutional and Human Rights) (27 January 2023) thus:

A petitioner bore the burden to prove his/her claim of alleged threat or violation of rights and freedoms to the requisite standard of proof, which was on a balance of probabilities. Such claims were by nature civil causes. The onus of proof was on the 1<sup>st</sup> appellant to adduce sufficient evidence to demonstrate that she owned or erected or lived in the alleged properties; and that State agents interfered or deprived her of the subject properties. That was the import of section 107 of the *Evidence Act* on the burden of proof.”

32. As to what the petitioner was required to demonstrate, certain guidelines were given by the Supreme Court in the *Jirongo Case* (supra), in which the Supreme Court relied on a decision rendered by the Supreme Court of India, namely *RP Kapur v State of Punjab* AIR 1960 SC 866. Hence, the Supreme Court held that the Court can only intervene:

- (a) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice; or
- (b) Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction; or
- (c) Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; or
- (d) Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.

33. In support of his allegations of violation or threats of violation of his rights under Articles 10, 29 and 49(1) of the Constitution, to show that the decision to investigate and prosecute him was made for extraneous reasons. He annexed several documents to his affidavit to buttress his assertions, such as copies of the Hire Purchase Agreement dated 18<sup>th</sup> December 2021 and the Inspection Report from Xenon Auto Assessors and Valuers Ltd dated 12<sup>th</sup> September 2023, vouching for the estimated cost of repairs for the subject motor vehicle. The petitioner also annexed copies of the pleadings filed in the aforementioned Small Claims suits, a letter dated 13<sup>th</sup> September 2023 from the 1<sup>st</sup> respondent in connection with the subject matter of this Petition as well as an extract of the Occurrence Book, OB No. 87/18/07/2022.

34. He likewise annexed to his Further Affidavit documents to show that the complainants already had judgments in their favour against the company. It is noteworthy however that the annexed documents, including the judgments were in respect of the complaints of assault against certain employees of the company and not the underlying hire purchase contract, which appears to be the basis of his Petition.

35. Having given consideration to the evidence presented by the petitioner, it is manifest that the petitioner is yet to be arrested, charged or arraigned before court. In fact, no action has been taken so far in furtherance of the alleged decision to prosecute; and therefore it is impossible to tell at this point in time whether or not there is sufficient evidence to back up that decision. Indeed, authorities abound to show that the best forum for testing the validity of a charge including the sufficiency of evidence is the trial court itself.



36. In the circumstances, it is my considered view that the best forum for testing the soundness of the decision to prosecute the petitioner, if indeed one has been made, would be the trial court. Authorities abound for this position. For instance, in *Erick Kibiwott & 2 Others v Director of Public Prosecution & 2 Others* [2014] eKLR it was held that:

...In determining the issues raised herein the Court will therefore avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial court. In dealing with the merits of the application, it is trite that the Court ought not to 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 under Article 157 of the *Constitution*. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings...”

37. Additionally, and more importantly, Article 50(1) of the Constitution provides that:

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

38. Needless to mention that the essence of Article 50(1) of the *Constitution* is the concept of a fair hearing; and that it envisages the context of the fair hearing to be a public hearing before “...a court or, if appropriate, another independent and impartial tribunal or body...” in which the accused is afforded all the safeguards set out in Article 50(2) of the Constitution. It is for the foregoing reasons that it is always preferable that disputes about facts, such as those raised herein by the petitioner, be ventilated before the trial court, which is itself a creature of the *Constitution* pursuant to Article 162 and 169 of the Constitution.

39. The applicant also impugned the decision to charge and prosecute him contending that the prosecution is hinged on what he considered to be a purely civil matter. There is however no bar to the same facts forming the basis of simultaneous prosecution of criminal and civil cases. Section 193A of the *Criminal Procedure Code* is explicit in this regard. It provides:

Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

40. Again, the Supreme Court had occasion to pronounce itself on the implications of Section 193A above in the *Donde Case* and held:

From section 193A of the *Criminal Procedure Code*, both civil and criminal jurisdictions could run parallel to each other and neither could stand in the way of the other unless either of them was being employed to perpetuate ulterior motives or generally to abuse of the process of the court in whatever manner.”

41. In the premises, on the basis of the material placed before the Court by the petitioner, there is no proof of any wrongdoing on the part of either the 1<sup>st</sup> or 2<sup>nd</sup> respondent. In fact, there is no justification at all as to why the 3<sup>rd</sup> respondent was impleaded in this matter as no evidence at all was availed as to the role played by him in the alleged violations.



42. I therefore adopt the decision taken in *Michael Sistu Kamau & 12 Others v Ethics and Anti-Corruption Commission & 4 Others* [2016] eKLR, by a three-judge bench that:

The trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words, unless the Petitioners demonstrate that the circumstances of the impugned process render it impossible for them to have a fair trial, the High Court ought not to interfere with the trial ... “

43. The Supreme Court reiterated the foregoing in *Saisi & 7 others v Director of Public Prosecutions & others*, (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment), as follows:

88. It is our considered opinion that these are not issues concerning the propriety or otherwise of the decision by the DPP to charge them. These appear to be serious contentions of fact, evidence and interpretation of the law better suited to be examined by a trial court. Certainly, not for the High Court while exercising its judicial review jurisdiction. In *Hussein Khalid and 16 others v Attorney General & 2 others*, SC Petition No 21 of 2017; [2019] eKLR this court held that it was not for the High Court as a constitutional court to go through the merits and demerits of the case as that is the duty of the trial court. Similarly, and as we have held hereinabove, it not for the judicial review court to undertake the merits and demerits of a matter based on controverted evidence and contested interpretations of the law.

89. We are emphatic that the High Court, whether sitting as a constitutional court or a judicial review, may only interfere where it is shown that under article 157(11) of the *Constitution*, criminal proceedings have been instituted for reasons other than enforcement of criminal law or otherwise abuse of the court process. We reproduce the words of this court in *Hussein Khalid and 16 others v Attorney General & 2 others* [supra] as follows;

(105) It is not in dispute that every statutory definition of an offence comprises ingredients or elements of the offence proof of which against the accused leads to conviction for the offence. Inevitably, proof or otherwise of elements of an offence is a question of fact and that largely depends on the evidence first adduced by the prosecution and where the accused is placed on his defence, the accused evidence in rebuttal. This in our view is an issue best left to the trial court as it will not only have the benefit of the evidence adduced but will weigh it against the elements of the offence in issue. It is not automatic that once a person is charged with an offence (s) he must be convicted. Every trial is specific to the parties involved and a blanket condemnation of the statutory provisions is in our view overreaching. The presumption of innocence remains paramount.” [Emphasis added]

44. For the foregoing reasons, it is my considered view that the Petition is premature and is accordingly struck out on that account and the interim orders discharged. Each party to bear their own costs.

It is so ordered.



**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27<sup>TH</sup> DAY OF MARCH \*2025.**

**OLGA SEWE\*\***

**JUDGE\*\***

