



ACR v Director of Public Prosecution & another (Constitutional Petition E007 of 2024) [2025] KEHC 5381 (KLR) (30 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5381 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CONSTITUTIONAL PETITION E007 OF 2024**

EM MURIITHI, J

APRIL 30, 2025

BETWEEN

ACR PETITIONER

AND

THE DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

JUDGMENT

1. The petitioner filed an amended petition dated 6th September, 2024 seeking the following orders:
 - a. A declaration that the action of the Respondents to charge the petitioner herein with the charge of defilement at Kerugoya Law Courts in MCSO E008 of 2024 is unconstitutional and in contravention of Articles 27, 28, 47 and 50 of *the Constitution*.
 - b. A declaration that the actions of the Respondents to charge the Petitioner herein are unconstitutional and ultra vires the provisions of Sections 4 and 26 of the ODPP ACT.
 - c. An order of certiorari to be issued against the Respondents quashing/setting aside the decision of the Respondents to arrest and charge and/or prosecute the Petitioner.
 - d. An order of prohibition to be issued against the Respondents from charging the petitioner herein with defilement of the minor P.W.W.
 - e. An order of Certiorari hereby issues calling, removing, delivering up to this Honourable Court and quashing or revoking the decisions to charge and prosecute ACR in Kerugoya Chief Magistrates MCSO E008 of 2024.
2. The petitioner’s supporting affidavit set out the facts relied on. The petitioner deposed that he is the area chief of Giacong’e Location within Kirinyaga County. He has been the area chief since the year



2021. He started as an assistant Chief in 2009 and has been privileged to be lauded as the best assistant Chief.
3. On or about May 2023, he received several complaints from parents within his location that a bar by the name County Village Inn located in Kiburu was serving underage children with alcohol and the parents sought that action had to be taken against the bar or they would hold demonstrations calling for its closure.
 4. He avers that he later got word that a truant underage girl by the name P.W.W who had been hanging around the area market notably at a stall owned by one MM alias S had been seen entering the bar. He went to the bar and found her elder sister CNW and asked her where P.W.W was and she told him that she had run away when she heard that her mother was coming. That he never met nor interacted with the minor P.W.W. on that particular day or on any other day at County Village Inn.
 5. He avers that on February 2024, he was shocked to hear rumours that had defiled, impregnated, infected the truant minor P.W.W with HIV and helped her procure and abortion. That he sought to know the origin of these vicious and malicious rumors and he spoke to the minor's sister EW on 20th February 2024. That EW told him that she had been influenced to instigate the rumours by some gentlemen known to him as SM alias S, EM and WM alias W. The gentlemen are associated with the Kirinyaga County Women Representative and they had an altercation during the distribution of the Women Rep's relief food within his location in July 2023 because the gentlemen wanted to distribute the food to their friends and acolytes whereas he insisted that the priority should be on the elderly and the vulnerable members of society.
 6. The petitioner deposes that on 21st February 2024, he was on official bar inspection duties with other officials when he received a call from the OCPD Baricho who asked his whereabouts and upon informing, he came and arrested him. He was taken to Baricho Police Station where he was released on a police cash bail of Kshs.30,000.00 at around 1530 hours. Later, his Bail was cancelled at around 2300 hours, he was locked up.
 7. Further, on the 22nd February 2024, the DCI officer who had locked him up went to Kerugoya to see the SCIO and enquire the reasons for the bail cancellation and came back around 1430 hours and reinstated the bail. He was issued with a new receipt. On 23rd Friday, 2024, around 1000 hours, there were demonstrations calling for his removal. The Kirinyaga women representative and County Senator were in attendance alongside other demonstrators who were ferried in by SM alias S, EM and WM alias W.
 8. He avers that he was summoned to Baricho Police Station at 2100 Hours and without any information, he was locked up until 26th February, 2024 when he was taken to Baricho Law Courts and charged with the assault of one EWW in MCCR E278 of 2024 despite being arrested for defilement. She is a witness in Kerugoya Chief Magistrate's MCSO E008 of 2024.
 9. On the same day, he was taken to hospital and one of the three gentlemen namely EM was present when he was presented to hospital for a PITC test. That the allegations were that he had impregnated the minor and infected her with HIV which prompted a Provider Initiated HIV Testing and Counselling (PITC) test and his was negative whereas he was informed the minor's was positive.
 10. Finally, he believes that the investigation into defilement Complaint were not properly conducted and were heavily influenced by external factors and allowing them to proceed will visit a grave injustice on his person which is a breach of his fundamental Rights and freedoms.



11. The respondents on 3rd February, 2025 deposed to replying affidavit and reiterated the facts in the petition.

Petitioner's submissions

Abuse of the process leading to the Respondents decision to charge the Petitioner

12. The 1st Respondent has the mandate, under Article 157 of *the Constitution*, to institute and undertake criminal proceedings against any person in respect of any offence alleged to have been committed.
13. The ODPP's Decision to Charge Guidelines 2019 at 3.1 recognize the role and duty of the 2nd Respondent to investigate and avail the evidence to the Prosecution counsel for evaluation.
14. Section 26 of the ODPPs Act imposes an obligation on the 2nd Respondent to disclose to the Director all material facts and information collected in the course of an investigation that may be reasonably expected to assist the case of prosecution or defence. This duty requires the 2nd Respondent to:
 - a. conduct thorough investigations;
 - b. (b) compile all evidence; and
 - c. (c) submit all relevant information in relation to any investigation undertaken.
15. The Petitioner was informed that the allegation against him was that he had impregnated and infected the victim with HIV which was the reason for his escort to hospital for a HIV test which found that he was negative. The Petitioner further averred that he suffers from erectile dysfunction caused by diabetes and was thus incapable of defiling the victim. This shows that the allegation was baseless and calculated to attain a certain result.
16. In R v Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001 it was held that:
17. "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.
18. The influence and participation of 3rd parties who had a vendetta against the Petitioner besmirches the process and lends credence to the averment that the only reason the charges were brought, was to settle a personal score against the Petitioner.
19. In Rosemary Wanja Mwangiru & 2 Others V Attorney General & 2 Others, where Mumbi J (as she then was) stated that: - The process of the court must not be misused or otherwise used as an avenue to settle personal scores. The criminal process should not be used to harass or oppress any person through the institution of criminal proceedings against him or her. Should the court be satisfied that the criminal proceedings being challenged before it have been instituted for a purpose other than the genuine enforcement of law and order, then the court ought to step in and stop such maneuvers in their tracks and prevent the process of the court being used to unfairly wield state power over one party to a dispute.
20. Violation of the Petitioner's right to equal protection of the law
21. *The Constitution*, in Article 27, directs that every person has a right to equal protection before the law. Likewise, equality is a national value and principle under Article 10 of *the Constitution*. Article



19(2) states further that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. The right to equal protection and equal benefit of the law must inform constitutional interpretation and application in this case.

22. Article 28 of *the Constitution*, directs that every person has inherent dignity and the right to have that dignity respected and protected.
23. The actions of the 2nd Respondent to grant the Petitioner Cash bail then arbitrarily cancel the same without any justification and to have a person present during his HIV test who was not a law enforcement officer violated his right to dignity, equal protection before the law and fair administrative action.

Respondents submissions

24. Whether a declaration should issue stopping the Respondents in Kerugoya MCSO E-008 of 2024
25. The applicant is yet to take plea in Kerugoya Chief Magistrates MCSO E-008 of 2024. They submit that 1st and 2nd Respondents are opposed to the application by the applicant on the following grounds:
 1. the prayers sought by the applicant are indeed unconstitutional as they seek to prevent the 1st Respondent from exercising its mandate as provided under Article 157 of *the Constitution* of Kenya 2010.
 2. the prayers if granted would result to a greater injustice in criminal justice system and public interest.
 3. under Article 157(10) of *the Constitution* of Kenya 2010, and Section 6 of the office of the director of Public Prosecution Act [2013], the 1st Respondent does not require the consent of any person or authority for commencement of criminal proceedings and in the exercise of the powers or functions conferred to his office, shall not be under the direction or control of any person or authority if anything, the applicant is guaranteed and protected under Article 50(2) (e) of *the Constitution* that provides:
 - “(2) Every accused person has the right to fair trial, which includes the right
 - (e) to have the trial begin and conclude without unreasonable delay”.
26. Section 24 of the *National Police Service Act* mandates the 2nd Respondent to investigate any complaint brought to their attention in order to determine whether a criminal offence has been committed.

Whether the 1st and 2nd Respondent decision to charge the applicant is unconstitutional

27. They submit that the Applicant fails in toto to demonstrate that the Respondents are in any way acting arbitrarily, oppressively or contrary to public policy of in any way with malice that should be considered unconstitutional.



28. In Mililani Misc Cr. Application No 20 of 2017, Republic vs DPP & 2 others, the Court held:
- “It is not for the Court to direct the 1st Respondent on how to exercise his Constitutional powers. However, the Court can intervene in cases where that power is proved to have been unfairly, improperly, or unjustly exercised’
29. They submit that this Court is mandated to check the abuse of the 1st and 2nd Respondents where evidence is presented as proof.
30. In the instant case, the 1st and 2nd Respondents are only performing their statutory functions and the Applicant should therefore not seek to bar as the applicant has failed to prove the manner in which the actions of the Respondents amount to abuse of the legal process.

Issue

- a. Whether the 1st and 2nd Respondent decision to charge the applicant is unconstitutional.
- b. Whether a declaration should issue stopping the Respondents decision to charge in Kerugoya MCSO E-008 of 2024.

Analysis

Whether the 1st and 2nd Respondent decision to charge the applicant is unconstitutional

31. The petitioner is charged with the offence of defilement contrary to Section 8(1) (3) of the *Sexual Offences Act* No. 3 of 2006. The Particulars are that on diverse dates between the months of May 2023 at Kiburu Township in Kirinyaga Township defiled P.W.W. a minor aged 15 years.
32. The petitioner argues that there was abuse of the process leading to the Respondents’ decision to charge him. The 1st Respondent has the mandate, under Article 157 of *the Constitution*, to institute and undertake criminal proceedings against any person in respect of any offence alleged to have been committed.
33. Further, Section 26 of the ODP’s Act imposes an obligation on the 2nd Respondent to disclose to the Director all material facts and information collected in the course of an investigation that may be reasonably expected to assist the case of prosecution or defence.
34. The Petitioner submits that he was informed that the allegation against him was that he had impregnated and infected the victim with HIV which was the reason for his escort to hospital for a HIV test which found that he was negative. Further, he averred that he suffers from erectile dysfunction caused by diabetes and was thus incapable of defiling the victim, and this shows that the allegation was baseless and calculated to attain a certain result.
35. In *R v Attorney General exp Kipngeno Arap Ngeny* High Court Civil Application No. 406 of 2001 it was held that:
- “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.



36. The respondents submit that they are only performing their statutory functions and the Applicant should, therefore, not seek to bar them. Further, he has failed to prove the manner in which the actions of the Respondents amount to abuse of the legal process.

37. In Milimani Misc Cr. Application No 20 of 2017, Republic vs DPP & 2 others, the Court held:

“It is not for the Court to direct the 1st Respondent on how to exercise his Constitutional powers. However, the Court can intervene in cases where that power is proved to have been unfairly, improperly, or unjustly exercised’

38. This Court has had previous occasion to consider the powers of the police and the DPP, respectively to investigate and prosecute criminal cases. In Meru HC Misc. Civil Appl. JR No. E003 of 2023 Japheth Kobiah Maranya and Gabriel Mwenda Muingi v. The Director of Public Prosecutions and The Inspector General of Police, the Court said:

“5. As regards the powers of the police to conduct criminal investigations and the DPP to institution criminal proceedings I held in Christopher Mbugua Kiiru v Inspector General of Police & 3 others [2015] eKLR, as follows:

“17. While considering a similar application for stay of criminal prosecution, this court dealt with the discretion of the DPP and the impact of Articles 25 and 50 of *the Constitution* in Mombasa HC Misc. Application No. 77 of 2013, Republic v. Inspector General of Police and 2 Ors. Ex Parte Zelea Jakaa Akiru held that-

“34. The Director of Public Prosecutions (DPP) has constitutional duty to prosecute offences under Article 157 of *the Constitution* and in the exercise of such mandate, the DPP may use the police investigators and prosecutors as may have happened in this case, and I would, therefore, find that the 2nd respondent acted within his powers to file criminal prosecution. The Prosecution would, of course, be expected to bring charges only where the investigations reveal an offence. However, whether the investigations leading to the arrest and charge of the applicant were properly done, if at all, will be established before the trial court in its decision whether the applicant has a case to answer or whether the prosecution proves the case beyond reasonable doubt upon full hearing in accordance with section 215 of the Criminal procedure Code.



The court cannot, in exercise of its judicial review jurisdiction of Order 53 of the Civil Procedure Rules, consider the merits of the criminal charges facing the applicant and determine whether proper investigations were conducted in the alleged offence, and consequently, whether the applicant is guilty or not guilty as charged.

35. Under the criminal trial the applicant will be afforded all the Article 50 rights including the right to a fair trial which is, in accordance with Article 25 of *the Constitution*, not subject to limitation. If the rights of the applicant are breached in the criminal trial setting, the accused will be at liberty to lodge an appeal on the merits or file a constitutional application for their enforcement and protection. Such is not the application before the court.”

18. In my view, the High Court must in determining an application for stay or striking out of criminal proceedings consider four significant matters, namely:
- (a) the rule of law principle underpinning the discretion of the DPP to prosecute criminal cases without undue influence, direction or control by any other authority;
 - (b) the need to protect accused persons from violation of their fundamental rights and freedoms through unwarranted criminal prosecution;
 - (c) the need to ensure that the criminal process of the court is not abused to further or defeat private interests which are, or should be, the subject of civil proceedings or for other improper purposes; and
 - (d) as, an over-arching principle, the existence of fair trial guarantees for accused persons in the criminal process by virtue of Articles 25 and 50 of *the Constitution* of Kenya, 2010.



19. I have respectfully noted the concurring views of Waki, J. as he then was in *Republic vs Chief Magistrate's Court, Mombasa ex parte Ganijee & Another* [2002] 2 KLR 703, *Mulwa, J. in Kuria & 3 Others vs AG* [2002] 2 KLR 69 and *Odunga J, in Republic vs Attorney General & 4 Others ex parte Kenneth Kariuki Gathii* (2014) eKLR.”
6. In *Director of Public Prosecutions v. Justus Mwendwa Kathenge & 2 others* [2016] eKLR the Court of Appeal restated the principle that the powers of the DPP to prosecute are not absolute, and may be halted in cases of abuse of process, as follows:

“From the days of *Githunguri* [(1986) KLR 1], the prosecutorial powers, then exercised by the Attorney General, was held to have limits; that it must never be abused, never exercised oppressively, maliciously or against the public interest. The Court in that decision emphasized that, where it was clear that the power to prosecute was being misused, the court, under its inherent jurisdiction would stop such prosecution as it would amount to an abuse of the process of the court. This holding has since been consistently followed. See also *Mohammed Gulam Hussein Fazal & another v The Chief Magistrate Court, Nairobi & another H.C. Misc Application No 367 of 2005*, and *Peter George Antony D’costa v A.G & Another, Petition No. 83 of 2010*.”
7. See also this court’s decision in *Nairobi Petition No. 523 of 2014, Christina Gakuhi Kubai v. DPP & 2 Ors.* observing that:

“39. Although both powers of investigations and prosecution are to be exercised independently without direction or control from any person, this does not preclude the High Court as a constitutional court from terminating investigations and prosecution undertaken in breach of rights and fundamental freedoms, public interest or in abuse of the legal process. The position was first established in Kenya by the High Court (Madan Ag. CJ., *Aganyanya & Gicheru, JJ.*) in *Githunguri v. Republic* (1986) KLR 1 and affirmed subsequently by the Court of Appeal (*Tunoi, Githinji & Deverrel, JJA.*) in *Joram Mwenda Guantai v The Chief Magistrate, Nairobi*[2007] eKLR....”
39. The Petitioner may also have a good defence to the charges before the trial court. It is not a ground to stay criminal prosecution because the accused has a good defence to the charges as criminal prosecution is the process for determination of this of guilt or otherwise of the accused. It may only be relevant in as situation where the prosecution is shown to have been instigated by malice, without reasonable cause and with intention to achieve a purpose other than genuine prosecution and punishment for crime.



40. In *George Joshua Okungu & Another V The Chief Magistrates Court, Nairobi & Another*, Petition No. 227 and 230 of 2009 [2014] eKLR (W Korir and G.V. Odunga, JJ. as they then were)) held as follows:

“ 50. The law is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions or the authority charged with the prosecution of criminal offences to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. 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. That a petitioner has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is always open to the Petitioner in those proceedings. However, if the Petitioner demonstrates that the intended or ongoing criminal proceedings constitute an abuse of process and are being carried out in breach of or threatened breach of the Petitioner’s Constitutional rights, the Court will not hesitate in putting a halt to such proceedings.”

See also *Republic v Grace Wangari Bunyi (Sued as the Administrator of the Estate of the Late Obadiah Kuira Bunyi) & 7 others ex parte Moses Kirruti & 28 others* [2018] eKLR and *Eunice Khalwali Miima v Director Public of Prosecutions & 2 others* [2017] eKLR.

41. In all this, it the applicant who pursuant to sections 107, 108 and 109 of the *Evidence Act* who has the burden of proof to show that the prosecution is being maintained against him in an oppressive manner and in beach of his constitutional rights or in abuse of the criminal process. As observed in the case of *Geoffrey K. Sang v Director of Public Prosecutions & 4 Others in Petition No. 19 of 2020* (Machakos), (Odunga J. as he then was -

“ [I]t is upon the person who seeks to terminate or quash a criminal process to satisfy the Court that the discretion given to the 1st and 2nd Respondents to investigate and prosecute ought to be interfered with.”

42. In *Samson Kabuthiuri Akotha v Ethics and Anticorruption Commission & 5 others* [2021] KEHC 7082 (KLR). this court observed that the Prosecution will be required to justify the prosecution if the Petitioner discharges his burden and casts doubt as to the lawfulness of his Prosecution, and cited *Diamond Hasham Lalji & Another v Attorney General & 4 others* Civil Appeal No. 274 of 2014 [2018] eKLR where the Court of Appeal (Githinji, Okwengu & Mohamed, JJA.), said:

“42. The burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision.

In *Ramahngam Ravinthram v Attorney General* (Supra) the Court of Appeal of Singapore said at p. 10. Para 28:

“however, once the offender shows on the evidence before the court, that there is a prima facie breach of fundamental liberty (that the prosecution has a case to answer), the prosecution will indeed be



required to justify its prosecutorial decision to the court. If it fails to do so, it will be found to be in breach of the fundamental liberty concerned. At this stage the prosecution will not be able to rely on its discretion under Article 35(8) of *the Constitution* without more, as a justification for its prosecutorial decision.”

(Article 35(8) of *the Constitution* gives Attorney General of Singapore power exercisable at his discretion to institute, conduct or discontinue any proceedings for any offence).”

The application was based on the broad grounds of abuse of power by DPP by re-opening the closed file and abuse of criminal process.

- (43) In *Jago v District Court (NSW)* 168 LLR 23, 87 ALR 57) Brennan J said in part at p. 47-48-

“An abuse of process occurs when the process of court is put in motion for purposes which in the eye of the law, it is not intended to serve. The purpose of criminal proceedings, generally speaking, is to hear and determine finally whether the accused has engaged in a conduct which amounts to an offence and on that account is deserving of punishment. When criminal process is used only for that purpose and is capable of serving that purpose, there is no abuse of process.”

- (44) The categories of abuse of process are not closed. Whether or not an abuse of power of criminal process has occurred ultimately depends on the circumstances of each case. One of the important factors at common law which underlie a prosecutorial decision is whether the available evidence discloses a realistic prospect of a conviction. In *Walton v Gardener* [1993] 177 CLR 378, the High Court of Australia said at para 23 –

“The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all categories of cases in which the process and procedures of the court which exist to administer justice with fairness and impartiality may be converted into instruments of injustice and unfairness. Thus, it has long been established that regardless of the person responsible for their institution and maintenance, proceedings will constitute an abuse of process if they can be seen clearly to be foredoomed to fail..., if that court is in all circumstances of the particular case a clearly inappropriate forum to entertain them..., if, notwithstanding that circumstances do not give rise to an estoppel their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate a case which has already been disposed of by earlier proceedings.”

- (45) In considering the evidential test, the court should only be satisfied that the evidence collected by the investigative agency upon which DPP’s decision is made establishes a prima facie case necessitating prosecution. At this stage, the courts should not hold a fully-fledged inquiry to find if evidence would end



in conviction or acquittal. That is the function of the trial court. However, a proper scrutiny of facts and circumstances of the case are absolutely imperative. *State of Maharashtra Ors v Arun Gulab Gawall & Ors* – Supreme Court of India – Criminal Appeal No. 590 of 2007 para 18 and 24, *Meixner & Another v Attorney General* [2005] 2 KLR 189.

- (46) In *William v Spautz* [1993] 2 LRC 659, the court distinguished the duty of the court to prevent a prosecution which will result in an abuse of process and a prosecution which will result in a trial which is unfair, and said at p.667 c – e as follows:

“If a permanent stay is sought to prevent the accused from being subjected to unfair trial, it is only natural that the court should refrain from granting a stay unless it is satisfied that unfair trial will ensue unless the prosecution is stayed. In other words, the court must be satisfied that there are no other available means, such as directions to be given by the trial judge of bringing about a fair trial...., If, however, 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.”

Later at page 659 para h, the court said –

“In our view, the power must extend to the prevention of an abuse of process resulting in oppression, even if the moving party has a prima facie case or must be assumed to have a prima facie case.”

The case of *Jago (supra) Martin V Tauranga*, District Court [1995] 2 LRC 788 *Sanderson v Attorney General – Eastern Cape* [1988] 2 S.A 38 which concerned abuse of process by denial of speedy trial, fall in the first category, in the above quotation, also in the same category is the case of *Githunguri v Republic* [1986] KLR 1.”

43. The applicant sets up a case of a vendetta by his nemesis who arrested him without informing him the reason for his arrest, denied him bail and proceeded to charge him with the offence of defilement without involving the complainant and he alleged the complainant denies having been defiled as she was already pregnant from another person, as set out in the detailed affidavit set out in full as follows:

“Supporting Affidavit

I, ACR, residing and working for gain within Kirinyaga County and of P. O. Box 35 Baricho within the Republic of Kenya do hereby make oath and state as follows:

1. That I am an adult of sound mind and the Petitioner herein hence competent to swear this affidavit.



2. That I am the area chief of Giacong' e Location within Kirinyaga County. I have been the area chief since the year 2021.
3. That I started as an assistant Chief in 2009 and I have been privileged to be lauded as the best assistant Chief. {Annexed Herein and marked ACR1 is the commendation.}
4. That I serve the Public diligently upholding the national values enshrined in Article 10 of *the constitution* of Kenya 2010 and all the laws of Kenya like every other citizen.
5. That I ordinarily receive complaints from persons within my location regarding any matters that affect their day to day lives.
6. That on or about May 2023, I received several complaints from parents within my location that a bar by the name County Village Inn located in Kiburu was serving underage children with alcohol.
7. That the parents stated that action had to be taken against the bar or they would hold demonstrations calling for its closure.
8. That I told them to alert me should it come to their attention that an underage child was being served at the bar.
9. That I later got word that a truant underage girl by the name P.W.W who had been hanging around the area market notably at a stall owned by one MM alia S had been seen entering the bar.
10. That I rushed to the bar and searched for the truant minor but I did not find her downstairs.
11. That I went upstairs in further search and found her elder sister known to me as CNW and asked her where P.W.W was and she told me that she had run away when she heard that her mother was coming.
12. That I never met nor interacted with the minor P.W.W on that particular day or on any other day at County Village Inn.
13. That in February 2024, I was shocked to hear rumors that I had defiled, impregnated, infected the truant minor P.W.W with HIV and helped her procure and abortion.
14. That I sought to know the origin of these vicious and malicious rumors and I spoke to the minor's sister EW on zo- February 2024.
15. That EW told me that she had been influenced to instigate the rumors by some gentlemen known to me as SM alias S, Ephrairn Maina and WM alias W.
16. That the gentlemen are associated with the Kirinyaga County Women Representative and we had an altercation during the



distribution of the Women Rep's relief food within my location in July 2023 because the gentlemen wanted to distribute the food to their friends and acolytes whereas I insisted that the priority should be on the elderly and the vulnerable members of society.

17. That I stamped my authority and prevailed but they told me that they would deal with me.
18. That after the conversation with EW, I told her to let me know when the gentlemen were around so that I could confront them and enquire on the baseless allegations.
19. That I was driving home on 20th February 2024 when two men I didn't immediately recognize stopped my car.
20. That when I stepped out of the car, men came towards me in a menacing manner and roughed me up asking me what I was doing in town at that time to which I answered that I was enforcing the governments directive on the closure of bars within Kirinyaga County following the death of 17 people after consuming illicit liquor.
21. That they asked me why I beaten up a small girl. They shoved me towards the roadside where I noticed EW standing. They told me that I had beaten her the previous night.
22. That I told them that no such thing had happened and asked her 3 times in their presence when I had beaten her and on the 3rd time she said I hadn't.
23. That they told me that they knew that I had 5 more years till I retired but they would make sure I lost my job before that and they told me that was a promise.
24. That on 21st February 2024, I was on official bar inspection duties with other officials when I received a call from the OCPD Baricho who asked about my whereabouts and I informed him. He asked me to wait for him and he came and arrested me.
25. That I was taken to Baricho Police Station where I was released on a police cash bail of Kshs.30,000.00 at around 1530 hours.
26. That on the same day at around 2050 hours, I received a call from the Deputy County Commissioner Kirinyaga West saying that the County Commissioner wanted to meet me at Baricho Police Station.
27. That I went and met the Deputy County Commissioner Kirinyaga West alone who wanted me locked up but the DCI Officer was wondering why he would lock me up when I was out on cash bail.
28. That, ultimately, my Bail was cancelled and at around 2300 hours, I was locked up.



29. That on nnd February 2024, the DCI officer who had locked me up went to Kerugoya to see the SCIO and enquire the reasons for the bail cancellation and came back around 1430 hours and reinstated the bail. I was issued with a new receipt. (Annexed herein and marked as ACR2 is the police cash bail receipt)
30. That on 23rd Friday 2024, around 1000 hours, there were demonstrations calling for my removal. The Kirinyaga women representative and County Senator were in attendance alongside other demonstrators who were ferried in by SM alias S, EM and WM alias W.
31. That I was called to Baricho Police Station at 2100 Hours and without any information, I was locked up until 26th February 2024 when I was taken to Baricho Law Courts where I was surprisingly charged with the assault of one EWW in MCCR E278 of 2024 despite being arrested for defilement.
32. That the said EWW who is the complainant in Baricho Law Court MCCR E278 of 2024 is a witness in Kerugoya Chief Magistrates MCSO E008 of 2024 (Annexed herein and marked ACRJ is the charge sheet in Kerugoya Chief Magistrates MCSO E008 of 2024).
33. That my cash bail paid at Baricho Police Station was refunded after I took plea in Baricho Law Courts.
34. That on the same day, I was taken to hospital and one of the three gentlemen namely EM was present when I was presented to hospital for a PITC test.
35. That I came to learn from my neighbour AMM that the 3 aforementioned gentlemen had visited him on nnd February 2024 at night and promised him a good amount of money should he say that I was responsible for his daughter's pregnancy but he turned them down saying that he knew the person responsible for his daughter's pregnancy and he wouldn't be involved in untruthful schemes.
36. That I was informed that in the course of the investigation, the DCIO Baricho called the minor's mother who stated that the Minor had been cohabiting with a man known as S who lived in Karatina and she is in the habit of running off to go to Karatina on Fridays to see the said S.
37. That the minor's mother further stated that the minor was in the habit of disappearing off and she had previously reported her disappearance to the police.
38. That the minor's mother stated that she had traced where S lived and had once gone there accompanied by her friend C to retrieve the minor.



39. That the allegations were that I had impregnated the minor and infected her with HIV which prompted a Provider Initiated HIV Testing and Counselling (PITC) test and mine was negative whereas I was informed the minor's was positive. (Annexed here and marked ACR4 is my PITC test result.)
40. That I have never defiled the minor nor met her in private at County Village in or anywhere as alleged.
41. That I was diagnosed with Diabetes Mellitus in 2011 and since 2021, it has caused Erectile dysfunction rendering me unable to engage in sexual intercourse.
42. That it is clear that the 2nd Respondent has not concluded their investigations and the decision to charge me by the 1st Respondent was hurried and influenced by other factors.
43. That I verily believe that the investigation into defilement Complaint were not properly conducted and were heavily influenced by external factors and allowing them to proceed will visit a grave injustice on my person which is a breach of my fundamental Rights and freedoms.
44. That the charges are being used to settle personal scores and fulfil the promise made to me of losing my job.
45. That I swear this affidavit in Support of my Petition and do Pray that the orders and prayers sought are granted.
46. That I verily believe that my application has merit as the Petition raises serious issues of Public Interest as it touches on the independence of the National Police Service and their conduct with respect to the investigative process and that of the 1st Respondent in its duty with regard to deciding which cases should be prosecuted.”

44. The question is whether the police and the prosecution had reasonable cause to commence criminal prosecution on the evidence as it does not follow that because a child has been impregnated by another person, she is incapable of being defiled another person. Upon the facts set out in the Supporting Affidavit the evidential burden shifted to the DPP to show reasonable cause to institute the prosecution.
45. The Respondents, in their Replying Affidavit sworn by the prosecution Counsel Mr. Mamba on 3/2/2025 set out in full below, do not respond to any of the factual basis of the petition and merely asserts the investigation and prosecutorial mandates of the police and the DPP:

“Replying Affidavit.

I, Mamba Vincent of P.O. Box 1224-10300, Kerugoya in the Republic of Kenya do hereby make oath and state as follows: -



1. That I am the Prosecution Counsel in the office of the Director of Public Prosecution and one of the counsels who has conduct of this matter hence competent to swear this affidavit.
2. That the Applicant {ACR} is facing the charges for the offence defilement Contrary to Section 8(1) as read with Section (3) of the *Sexual Offences Act* No 3 of 2006.
3. That the Applicant is yet to take plea which that was scheduled for on 21st March 2024.
4. That the applicant being a Chief for Giachong'e Location within Kirinyaga County and in his capacity interacts often with area citizens.
6. The applicant sometime in May 2023 came to his attention that a bar christened [Villa Inn] was selling alcohol to minor.
6. That sometime on 21st February 2024, he was arrested on allegations of defilement with the minor now being pregnant with HIV infection.

Sworn at Kerugoya

By the said Mamba Vincent

This 3rd day of February 2025”

Whether an order should issue stopping the Respondents decision to charge in Kerugoya MCSO E-008 of 2024

46. On the ground of violation of his rights, the Petitioner seeks for the respondents to be stopped from charging him. He is yet to take plea. The respondents are opposed to the application. They argue that article 157 (10) of *the Constitution* mandates the 1st Respondent to commence criminal proceedings against an individual.
47. On a balance of probability, in the absence of any evidential rebuttal of the facts relied on by the petitioner, who had the burden of proof that the intended prosecution amounts to violation of his constitutional rights, and which burden shifted to the Respondent upon the evidence of the Petitioner, the Court finds it more likely than not that the Prosecution is motivated by vendetta as deponed to by the petitioner and it is, consequently, driven to serve ulterior motives and, therefore, an abuse of the process of the criminal justice and a violation of the Petitioner's fair trial rights under Articles 25 and 50 of *the Constitution*.
48. Section 26 of the ODPP Act provides for the operational relationship of the Prosecution and the Police investigators as follows:

“ 26. Duty of disclosure

- (1) The Inspector-General or any other investigative agency shall disclose to the Director all material facts and information collected in the course of an investigation that may be reasonably expected to assist the case of prosecution or defence.
- (2) The Inspector-General or any other investigative agency shall—
 - (a) conduct thorough investigations;



- (b) compile all evidence; and
 - (c) submit all relevant information in relation to any investigation undertaken.
 - (3) The duty of disclosure under this section shall—
 - (a) include privileged information; and
 - (b) continue until the determination of the case.
 - (4) In this section "privileged information" means any information or material that would be exempted from production in court or disclosure, by any written law or for any other lawful or justifiable reason."
49. The alleged failure of compliance with Section 26 of the ODPP's Act is a really a cause of action for the Director of Public Prosecution, who in this case, is comfortable to proceed with the prosecution on the basis of the evidence given to him upon investigations. In the absence of particulars as to how the alleged lack of compliance affected the decision of the DPP to charge and in the absence of any complaint from the DPP, the Court does not make any finding or take any action on the issue.
50. It has not been shown how proceeding with a criminal case in accordance with the process of the court reserved by law for such trial is offensive against the petitioner's right to protection of the law under Article 27; human dignity under Article 28 and to Freedom and Security of the person under Article 29 of *the Constitution*.
51. The Court has not been served with full argument on the matter of the alleged violation of the Petitioner's rights to equal protection of the law, dignity and freedom and security of the person in the subsection of the Petitioner to HIV test for purposes of the criminal case to be able to make a finding on the matter as a violation of rights to equal protection before the law, dignity and freedom and security of the person under Articles 27, 28 and 29 of *the Constitution*, respectively.
52. The Court finds merit, however, in the complaint that the prosecution was being pursued for purposes ulterior to the genuine prosecution of crime and in a manner oppressive to the petitioner, there being no rebuttal evidence, as required of the Respondent after the shifting of the burden of proof, as discussed in *Diamond Hasham Lalji & Another v Attorney General & 4 others*, supra, to the Petitioner's detailed averments as to vendetta motivation to his prosecution. Without any evidence forthcoming from the Prosecution, even without conducting a trial of the merits of the case, this Court is not able to conduct "the evidential test, [where] the court should only be satisfied that the evidence collected by the investigative agency upon which DPP's decision is made establishes a prima facie case necessitating prosecution."

Orders

53. Accordingly, for the reasons set out above, the Court finds the Petitioner's Petition dated 3/6/2024 has merit and it is granted in terms that:
1. A Declaration is granted that the Respondents' decision to charge the Petitioner for the offence of defilement in Kerugoya Chief Magistrate's Court MCSO E008 of 2024 contravenes the petitioner's right to a fair trial under Articles 25 and 50 of Constitution and an abuse of the process of the Court.



2. An Order of Certiorari is granted to remove to this court and quash the decision to charge the petitioner in Kerugoya Chief Magistrate's Court MCSO No. E008 of 2024 for the offence of defilement in respect of minor P.W.W.

54. There shall be no order as to costs.

Order accordingly.

DATED AND DELIVERED THIS 30TH DAY OF APRIL 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S. Wangui Githere & Co. Advocates for the Petitioner.

Mr. Mamba for the DPP.

