



Republic v Director of Public Prosecution & 2 others; Rutto & another (Interested Parties); Toroitich (Exparte Applicant) (Judicial Review Application E105 of 2024) [2025] KEHC 5041 (KLR) (Judicial Review) (28 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5041 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E105 OF 2024
RE ABURILI, J
APRIL 28, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 3RD RESPONDENT

AND

VIOLA CHERONO RUTTO INTERESTED PARTY

RYAN KIPLANGAT INTERESTED PARTY

AND

MOSES KIPLANGAT TOROITICH EXPARTE APPLICANT

JUDGMENT

1. Pursuant to leave granted on 16th May 2024 the Ex parte Applicant filed his substantive notice of motion application dated 22nd May 2024 seeking the following orders;
 1. An Order of Certiorari to quash and remove into this Court hitherto the unreasonable and oppressive acts of the 1st Respondent and 2nd Respondent committed vide their decision made on the 15th April, 2024 to prosecute the Applicant with the criminal offence of assault causing



actual bodily harm contrary to Section 251 of the Penal Code & any other allied criminal offences.

2. An Order of Prohibition prohibiting the 1st Respondent and 2nd Respondent jointly or severally from proceeding with the prosecution of the Applicant in Kibera Magistrate's Court Criminal Case Number E948 of 2024 Republic vs Moses Kiplangat, or undertaking any further proceedings essentially related to the Applicant's criminal prosecution.
3. That the costs of this Application be provided for.
2. The application is supported by the affidavit of Moses Kiplangat Toroitich sworn on even date and a Statement of Facts dated 3rd May 2024.
3. The Ex parte Applicant's Notice of motion seeks to prevent his prosecution for the criminal offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code in Kibera Magistrate's Court Criminal Case Number E948 of 2024 Republic vs Moses Kiplangat. According to him, the case stems from a complaint lodged by the 1st Interested Party who is his estranged wife and the 2nd Interested Party, who is his son.
4. It is the Ex parte Applicant's case is that the 1st Interested Party instituted Kibera Magistrate's Court Criminal Case No. E948 of 2024 with the sole intention of pressuring him to withdraw an earlier case Kibera Criminal Case No. E1733 of 2023 in which she is charged with assault causing actual bodily harm. He claims that the charges against him are fabricated and aimed at frustrating the prosecution of the ongoing case against the 1st Interested Party.
5. He maintains that the decision to charge him late on 14th April 2024 amounts to an abuse of prosecutorial power, pointing out that he is the initial complainant, having reported the incident on 11th October 2023 in relation to a complaint of assault bordering on gender-based violence (GBV) that occurred on the very same day leading to the arraignment of the 1st Interested Party and her Co-Accused person in court on 8th November, 2023.
6. The Applicant also contends that the 1st Interested Party only recorded her complaint on 2nd April 2024, months after the alleged incident which he argues is an afterthought. He asserts that the Respondents accepted the complaint without proper investigations and proceeded to charge him based on false and unsupported allegations.
7. He further claims that the Respondents acted in bad faith and dishonestly, succumbing to undue influence and immense pressure from the 1st Interested Party, who he says used her position as a National Intelligence Service officer attached to State House to manipulate the process. According to him, this interference compromises the independence required under Article 157(10) and (11) of the Constitution.
8. The Ex parte Applicant also argues that the Respondents failed to uphold the principles of fairness, reasonableness and procedural propriety under the Fair Administrative Action Act. He further expresses concern over the involvement of his son, the 2nd Interested Party, alleging that the criminal justice system is being weaponised to serve the 1st Interested Party's personal vendetta.
9. According to the exparte applicant, unless the court intervenes to quash the decision to prosecute him, the Respondents will continue acting under the control of the 1st Interested Party, thereby undermining the rule of law and public confidence in the justice system. He concludes that the prosecution is oppressive, unfair, and constitutes a clear abuse of process and urges the court to allow his Notice of Motion dated 22nd May 2024 and grant the judicial review orders sought.



10. The Ex parte Applicant in his submissions relies on the case of Kuria & 3 Others vs Attorney General [2002] eKLR 69 where the court is said to have observed that the criminal justice system should not be used as a tool for settling personal grudges or pursuing individual revenge.
11. He also relies on the case of Republic vs Chief Magistrate's Court at Mombasa Ex-parte Ganijee & Anor [2012] 2 KLR 703 where the court observed that the aim of criminal investigations, charges, or prosecutions is not to assist individuals in furthering or hindering their civil cases.
12. The Ex parte Applicant further argues that the application and the judicial review orders sought against the 1st and 2nd Respondents' decisions raise important issues of administrative law. Further, that judicial review is the only way for him to challenge the legality of these decisions and seek redress. The Applicant also contends that without urgent intervention from the Court to quash the decision to charge him with assault, the 1st and 2nd Respondents will act under the influence of the 1st Interested Party, compromising their independent discretion and undermining the rule of law, resulting in an unlawful and biased criminal process.
13. It is also his submission that since the 1st Respondent had not embarked on his prosecution, he is entitled to the remedy of prohibition, which is a prospective remedy and not retrospective. To support this position, he relies on Republic vs Chief Magistrate's Court at Mombasa Ex-parte Ganijee & Anor (supra) where the court is said to have held that "If there is anything that remains to be done in those proceedings however, the order of prohibition will issue to stop further proceedings".
14. He urges the court to intervene by issuing judicial review orders, particularly prohibition, to prevent the continuation of an unlawful prosecution that undermines the rule of law and violates his constitutional rights.

Response

15. In response, the 1st Respondent filed two replying affidavits dated 28th May 2024 and 28th June 2024. The affidavits are both sworn by Robert Ogallo. The 3rd respondent also relies on the response filed by the 1st Respondent as intimated by Miss Gathenya before the court on 5th March 2025.
16. This court will address the two affidavits in its analysis below.
17. I also note that there are no submissions on record filed by the Respondents.

Analysis and Determination

18. I have considered the judicial review application before this court, the affidavit in support and the annexures therein and two issues fall for determination;
 - i. Whether the 1st Respondent's replying affidavits are properly before this court; and
 - ii. Whether the Applicant has made a case for grant of the judicial review orders sought.

Whether the 1st Respondent's replying affidavits are properly before this court

19. The Court has carefully examined the two replying affidavits filed by the 1st respondent, both of which are sworn by one Robert Ogolla. Notably, the said affidavits have also been adopted by the 3rd Respondent. A critical issue arises with respect to the inconsistency in the signatures attributed to Robert Ogolla who depones that he is an Advocate of the High Court of Kenya and a prosecution counsel, across the two affidavits.



20. Despite this discrepancy, neither affidavit is accompanied by verifying documentation to confirm the identity of the deponent, nor has counsel for the 1st Respondent clarified which of the two affidavits the party intends to rely on. This inconsistency, appearing on the face of the record, raises a material doubt as to whether both affidavits were personally and properly executed by the same deponent, as required under the law.
21. The law governing affidavits is clear Order 19 Rule 3(1) of the Civil Procedure Rules provides that an affidavit must be confined to facts that the deponent is able to prove of their own knowledge, Affidavits must also be properly signed and attested.
22. Where there is inconsistency in the signature of the deponent, and no accompanying identification or verifying documents are provided to clarify the issue, the Court is entitled to question the authenticity of the affidavits. In the absence of satisfactory explanation or evidence confirming that the documents were duly executed by the same person, the Court is unable to place reliance on either affidavit.
23. In light of the foregoing, the Court finds that the 1st Respondent's replying affidavits cannot be deemed properly before the Court. The unexplained signature inconsistencies and lack of identification documentation go to the root of the affidavits' credibility and admissibility. The two affidavits dated 28th May 2024 and 28th June 2024 are therefore struck out and expunged from the record.

Whether the Applicant has made a case for grant of the judicial review orders sought

24. The Ex parte Applicant alleges that the criminal case against him is a direct reaction to his prior complaint against the 1st Interested Party who is his wife. He supports this argument by referring to the time when the complaint was made and the Respondents made a decision to charge him and his subsequent arraignment on 14th April 2024, despite the incident allegedly having occurred on 11th October 2023.
25. It is not in contention that the National Police Service and the Office of Director of Public prosecutions (ODPP) have constitutional and statutory mandates and powers to respectively investigate and prosecute crimes. However, these powers have to be exercised within the limits of the law and *the Constitution*, as has been judicially noticed and pronounced. A key consideration is whether these institutions act lawfully and fairly in specific cases. Thus, the criminal justice process includes safeguards to ensure fair trials, as outlined in Article 50 of *the Constitution*.
26. In the case of Republic v Director of Public Prosecution & 3 others Ex-Parte Juma Nyatieko & 2 others; Maurice Onyango Oketch (Interested Party) [2021] KEHC 1775 (KLR) observed as follows;

“For this court to prohibit, bring to a halt or quash the intended criminal proceedings against the applicants, it must establish whether the respondents acted within their respective mandates in their investigation and subsequent institution of a criminal charge against the applicant. Concomitant with this issue would be to answer the question of whether the applicants' rights have been violated in the manner that they claim and finally, whether the applicants are deserving of the reliefs sought.

Revisiting the circumstances under which the Court will grant an order quashing or prohibiting the commencement or continuation of a criminal trial process, the factors which a court ought to consider are now well settled in various judicial pronouncements. First, the court ought to be extremely cautious in making its determination so as to avoid prejudicing the intended or pending criminal proceedings. Secondly, the court ought not to usurp the constitutional and statutory mandate of the Director of Public Prosecutions and



neither should it curtail the investigatory mandate accorded to the Directorate of Criminal Investigations. However, the court may intervene where the said discretion is exercised unlawfully and in bad faith, for instance where the discretion is being abused or being used for achievement of some collateral purpose which are not geared towards the vindication of the commission of a criminal offence.

In *George Joshua Okungu & Another v The Chief Magistrates Court, Nairobi & another* [2014] eKLR it was held that:

“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. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore, the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the Petitioner to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognized aim. In the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good administration. See *R vs. Monopolies and Mergers Commission Ex Parte Argyll Group Plc* [1986] 1 WLR 763 and *Re Bivac International SA (Bureau Veritas)* [2005] 2 EA 43 (HCK).”

In *Republic v Commissioner of Police and Another ex parte Michael Monari & Another* [2012] eKLR the High Court 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 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”.

The prosecutorial powers of Director of Public Prosecutions are constitutionally and statutorily provided for under Article 157(10) of *the Constitution* and Section 4 of the *Office of the Director of Public Prosecutions Act* No. 2 of 2013, which provides that the DPP does not require the consent of any person or authority to commence any criminal proceedings and in exercise of his/her powers and functions, shall not be under the direction or control of any person or authority. The exercise of that power is however subject to Article 157(11) and Section 4 of the DPP Act, which provides that in exercise of the said power, the DPP shall have regard to the public interest, the interest of the administration of justice and the need to



prevent and avoid abuse of legal process. Only in circumstances where it is manifest that the DPP acted unlawfully by failing to exercise their own independent discretion; acting under the control and direction of another person; failing to take into account public interest or interest of the administration of justice in all their manifestations; abusing the legal process; and by acting in breach of fundamental rights and freedoms of an individual, will the High Court intervene.”

27. In the instant case, the Ex parte Applicant has stated on oath that the decision to prosecute him way later after the incident had occurred and the 1st Interested Party together with her co-accused is malicious. It has also been urged that the 1st Interested Party is using her position as an Intelligence Officer stationed at State House to influence the malicious prosecution.
28. The Ex parte Applicant also urges that the 1st Interested Party has also dragged their son the 2nd interested party into the said proceedings before the trial court to settle personal scores.
29. While there is no evidence adduced herein of the interference by the 1st Interested Party owing to her position and as such the court cannot make a finding on the same, another thing stands out.
30. This Court upon carefully examining the annexures adduced by the Applicant notes that true to the Applicant’s assertion, the decision to investigate and subsequently charge him was made months after the 1st Interested Party together with her co-accused Obadiah Murgor Kosgei were charged with the offence of assaulting the exparte applicant. The offence allegedly took place on 11th October, 2023. The charge sheet framed against the exparte applicant is dated 15th April, 2024 and the date he is alleged to have assaulted his wife Viola Chrono Rutto is on 11th October, 2023.
31. In summary, the account of the events leading up to the Ex parte Applicant being charged is as follow: On 11th October 2023, the incident which is the subject of the criminal proceedings occurred and on the same day the exparte Applicant filed a complaint at Langata Police Station. The suspects Obadiah Murgor and Viola Cheronon Rutto were arrested on 19/10/2023 and charged in Kibera Magistrates Court Criminal Case Number E1733 of 2023 Republic vs. Obadiah Murgor Kosgei & Viola Cheronon Rutto and arraigned in court on 2nd November 2023, as per the annexed charge sheet.
32. The Ex parte Applicant on the other hand was subsequently arrested on 14/4/2024 and charged on 15th April 2024 in Kibera Magistrate’s Criminal Case Number 948 of 2024 Republic vs. Moses Kiplangat with a similar offence.
33. From my careful observation of the signatures of the ODPP Officer who sanctioned the respective charge sheets against the exparte applicant and that in respect of the Viola Cheronon Rutto and her co accused, it is the same signature of the officer or prosecution counsel.
34. Again, upon examination of the charge sheet wherein the 1st Interested Party together with her co-accused are charged with the offence of Assault Causing Actual Bodily Harm Contrary to Section 251 of the *Penal Code*, wherein the exparte applicant is the complainant, the court notes that the Occurrence Book (OB) number cited in the charge sheet reads OB Number:17/11/10/2023.
35. Correspondingly, the 1st and 2nd Interested Parties statements were taken on 2nd April 2024. This raises credibility issues as to how the decision to charge the exparte applicant was reached five months after the complaint was lodged, over the same facts that led to the said interested parties to be charged with the same offence of assaulting the exparte applicant.
36. It is obvious from the above facts that the report at the police station was allegedly made sometime in November 2023. However, the statements were taken in April 2024.



37. This Court reads in the above account of events a curious and disjointed chronology that casts doubt on the bona fides of the investigative and prosecutorial processes. The belated taking of statements from the 1st and 2nd Interested Parties nearly five months after the alleged report was made and only shortly before the Applicant was charged, raises legitimate questions as to the true impetus behind the decision to prosecute the Exparte Applicant. The apparent temporal connection between the arraignment of the 1st Interested Party and the initiation of proceedings against the Applicant strongly suggests a retaliatory motive or ulterior consideration, rather than an impartial assessment of facts and application of the law.
38. The High Court has the jurisdiction to halt or quash a criminal prosecution where it is evident that the proceedings are being used to achieve a collateral purpose—that is, a purpose other than the proper administration of criminal justice.
39. This principle is grounded in the court’s inherent supervisory jurisdiction, the key concern being abuse of process, where the legal process is misused to harass, intimidate or punish a person for ulterior motives, such as settling personal or political scores.
40. For avoidance of doubt, the High Court may intervene where:
- a. The prosecution is actuated by malice or bad faith.
 - b. There is no evidential basis for the charges.
 - c. The process is intended to harass or intimidate the accused.
 - d. The prosecution violates constitutional rights, such as the right to fair trial.
41. In *Kuria & 3 Others v Attorney General* [2002] 2 KLR 69, the Court held that it can intervene where a prosecution is oppressive or made in bad faith, and not to further the cause of justice.
42. In *R v Horseferry Road Magistrates’ Court, ex parte Bennett* [1994] 1 AC 42 (UK), the House of Lords affirmed that courts have a duty to protect the integrity of the criminal justice system from abuse.
43. In *Githunguri v Republic* [1986] KLR 1, the High Court stopped a prosecution where the Attorney General had previously indicated no charges would be brought, finding the renewed prosecution to be an abuse of process.
44. In the present case, the Court does not seek to evaluate the sufficiency of evidence or determine the guilt or innocence of the accused. The court’s concern is whether the decision-making process was tainted with illegality, irrationality, procedural impropriety, or bad faith. Where the facts disclose selective prosecution or an improper motive, the court is entitled to intervene and restrain the abuse of its process.
45. However, in my humble view, from the facts presented in this case, the prosecution of the exparte Applicant, viewed against the background of the timing, sequence of events and the allegations of vindictive conduct by the 1st Interested Party, bears the hallmark of mala fides. I do not find any independence on the part of the prosecution which overtly appears to be pushed by the 1st interested party in a bid to settle family scores with the exparte applicant, with whom they are estranged couple.
46. The Office of the Director of Public Prosecutions is expected to act independently and dispassionately, not at the behest of parties with vested personal interests meant to vex others. When prosecutorial discretion is exercised in a manner that appears punitive or calculated to settle personal scores, such discretion ceases to be legitimate.



47. Accordingly, this Court finds that the Applicant has demonstrated a prima facie case that the impugned criminal proceedings against him were commenced in bad faith and constitute an abuse of the legal process. The continued prosecution of the Applicant, under the circumstances outlined, undermines the fair administration of justice and offends the principles of non-discrimination and equality before the law enshrined in Articles 27, 47, and 50 of *the Constitution*.
48. Consequently, this court is persuaded that the interests of justice would best be served by halting the impugned criminal proceedings.
49. A judicial review order of certiorari is therefore hereby issued bring into this court for purposes of quashing and I hereby quash the decision by the Director of Public Prosecution and the Director of Criminal Investigations, to charge the exparte applicant herein Moses Kiplangat Toroitich in Kibera Chief Magistrate's Court, Criminal Case Number E948 of 2024, Republic vs. Moses Kiplangat.
50. An order of prohibition is hereby issued prohibiting and restraining the Respondents from further instituting or continuing with any criminal proceedings against the applicant in respect of the events of 11th October 2023, unless and until a fresh, impartial and independently verifiable investigative process is undertaken.
51. Each party shall bear their own costs. Decree to issue.
52. Orders accordingly.
53. This file is closed.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF APRIL 2025

R.E. ABURILI
JUDGE

