



REPUBLIC OF KENYA



KENYA LAW
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**Wanjohi v Director of Public Prosecutions (Petition
E007 of 2025) [2025] KEHC 6854 (KLR) (27 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6854 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PETITION E007 OF 2025**

RN NYAKUNDI, J

MAY 27, 2025

**IN THE MATTER OF: ARTICLES 2(1), 3(1), 10, 19, 20(1), 22, 23, 24, 25, 27, 28,
29, 157, 159, 165, 232, 258 & 259 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES
27, 28, 29, 47 & 50 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF VIOLATION OF THE FAIR
ADMINISTRATIVE ACTION ACT, NO.4 OF 2015**

AND

**IN THE MATTER OF SECTIONS 4, 5(4), 14 & 26 OF THE OFFICE OF
THE DIRECTOR OF PUBLIC PROSECUTIONS ACT, NO. 2 OF 2013**

AND

**IN THE MATTER OF CHAPTER THREE OF THE OFFICE OF THE DIRECTOR
OF PROSECUTIONS GUIDELINES ON THE DECISION TO CHARGE, 2019**

BETWEEN

PETER KIMANI WANJOHI PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT



RULING

1. Before me for determination is the Petitioner's Notice of motion dated 7th March, 2025 in which he seeks orders as follows:
 - a. Spent
 - b. That pending the hearing and determination of this Application inter-partes, this Honorable Court be pleased to issue an order barring the preferment of charges against, or arrest of, the Petitioner pursuant to the advice of the Respondent contained in the letter dated 26th February 2025.
 - c. That pending the hearing and determination of this Petition, this Honorable Court be pleased to issue an order that the preferment of charges against, or arrest of, the Petitioner pursuant to the advice of the Respondent contained in the letter dated 26th February 2025.
 - d. That this Honorable Court issues such orders and gives such directions as may be necessary in the interest of justice.
 - e. That costs of this Application be provided for.
2. The application is anchored on various grounds and an affidavit sworn by the Petitioner. The grounds relied on are that:
 - a. The Petitioner is Member, County Assembly of Uasin Gishu representing Huruma Ward and in that capacity, was, on 23rd December 2024, informed of an attempt to grab a public matatu terminus/stage known as Tagore where vehicles plying the Western Kenya route operate from.
 - b. The Petitioner found that some 3 mabati structures had indeed been built inside the terminus at midnight, without any lawful permit and/or authority, displacing matatu saccos stationed at the terminus. In the circumstances, members of the public proceeded to demolish the structures.
 - c. That in the process of demolition, the Petitioner was attacked and injured by one of the owners of the structures by the name Sarah Sabai.
 - d. The Petitioner was treated at Huruma sub-county Hospital and discharged. He then reported the incident of his attack at Huruma Police Station and a P3 form was filled in that account.
 - e. That despite the fact that investigations were done and statements recorded and the file forwarded to the Respondent, the Respondent has declined to approve charges against the said SARAH SABAI on the ground that the said SARAH SABAI was first in time to report an incident of malicious destruction of property and assault against the Petitioner herein at that the Petitioner was late. Contrarily, the Respondent has approved charges of malicious destruction of property and assault against the Petitioner.
 - f. That in refusing to approve charges levelled by the Petitioner, the Respondent has directed that the Petitioner can use the fact of his attack as a defence in his own prosecution.
 - g. That the Respondent has turned out to be judge, jury and executioner and has usurped the role of a court of law.



- h. That the Respondent's decision in refusing to approve the charges arising from the Petitioner's complaint is actuated by malice, is illegal and manifestly biased against the Petitioner.
 - i. That the Petitioner is a very vocal and active representative of his constituents and has on many occasions successfully mobilized members of the public to oppose attempts at grabbing the Tagore matatu terminus, a fact that has not sat very well with those who instigate the grabbing within the Uasin County Government. For that reason, the Petitioner has been a target of harassment, arrests and has also been physically attacked due to the public stance he has taken against illegalities in Uasin Gishu County especially within his constituency.
 - j. That the refusal to approve charges arising from the Petitioner's complaint while pushing for the arrest and prosecution of the Petitioner is amongst the many tactics that have been used to harass and intimidate the Petitioner in the hope that he will tone down his opposition to illegal activities in Huruma Ward.
 - k. That at the moment, the Petitioner is facing imminent or circumstances that are clearly biased and intended to achieve some nefarious objective, outside of the law.
 - l. That it is therefore critical that this court moves with extreme urgency to forestall an arrest and prosecution whose bona fides are questionable and not intended to pursue a genuine complaint.
 - m. That the Petitioner verily believes that the criminal prosecution is in bad faith and is intended to achieve ulterior motives. The Respondent acted capriciously, recklessly and in utter abdication of his constitutional mandate in preferring the charges against the Petitioner, a fairly well-known and vocal opponent of many attempts to grab public land in Huruma and Uasin Gishu at large.
 - n. That in refusing to approve charges arising from the Petitioner's complaint, the Respondent acted as judge and jury and did not conduct clear and unbiased assessment of facts to justify the refusal to charge decision.
 - o. That the charges against the Petitioner are a clear vendetta to hit back at the Petitioner who has previously resisted attempted grabbing of public land in Huruma Ward.
 - p. That it is the Petitioner's case that the decision to charge him and the decision to not charge his assailant amounts to an abuse of court process in which the Respondent is employing its power as a means of vexation and oppression for ulterior purposes and not as an avenue to litigate a genuine complaint or achieve any justice.
3. In response to the application, the Director of Public Prosecution filed a replying affidavit in which one Lucas Tanui made the following: -
- a. That, I am a Senior Assistant Director of Public Prosecutions and currently in-charge of the Office of the Director of Public Prosecutions Uasin Gishu hence competent to swear this affidavit on behalf of the respondent.
 - b. That, I exercise delegated powers of prosecutions under Article 157 of *the constitution* as an officer subordinate to the Director of Public Prosecutions.
 - c. That, in the course of my duties I received a file from OCS Eldoret Police Station for Malicious Damage to Property and a statement against the Petitioner, I also received another file by the



OCS Huruma Police Station where the Petitioner/applicant was the complainant against the complainant in the case reported at Eldoret Police Station for Assault.

- d. That, I perused both files and found out the incident complained about happened on 21/12/2024 at Tagore stage where the Petitioner applicant had hired a group of people to demolish some temporary structures at the stage.
- e. That, on 28/1/2025 I directed the police upon perusal of the files to record a statement from the suspect the Petitioner herein, for him to respond to the issues raised against him and confirm with the County Government if the demolition were sanctioned.
- f. That, the file was returned to the office with indication that the Petitioner refused to record a statement.
- g. That, I further directed the police to confirm from the County whether the demolitions were sanctioned.
- h. That, I received the file back from the police with the confirmation that demolition carried out was not sanctioned by the County Government.
- i. That, on 26th February 2025 after reviewing the file and the evidence on record, I found the evidence on case reported under OB No. 78/1/2/24 to be sufficient to prefer the charge against the suspect the Petitioner herein.
- j. That, I also perused the file where the Petitioner for assault reported on OB 29/15/01/2025 and found out that the evidence was inconsistent and insufficient since according to the statements by the Petitioner, it was alleged that the incident occurred on 23rd December 2024 yet it was confirmed by evidence on record that the incident occurred on 21st December 2024. Further the incident was reported on 15th January 2025, an action that was perceived as an afterthought, hence the decision not to approve the charges.
- k. That, subsequent to approving the charges against him, the Petitioner visited our office to find out the basis for us to approve charge against him and rejection of his complaint and I explained to him the basis to charge under the Decision to Charge guidelines.
- l. That, the Petitioner later wrote a letter to our office requesting that we withhold the prosecution file as the parties engage in negotiation for settlement of the matter.
- m. That, the Petitioner is an elected member of County Assembly of Huruma Ward within Uasin Gishu County and therefore cannot carry out enforcement activities which is duty for County Executive. Therefore, the Petitioner acted beyond the scope of his duties and responsibilities.
- n. That, the Petitioner admitted in his statement hiring people to carry out the demolitions hence admitting to the offence.
- o. That, the Petitioner was accorded a fair hearing before a decision was made, the evidence on record was well analyzed before a decision not to charge was made in accordance with the decision to charge guidelines 2019.
- p. That, if the Petitioner was dissatisfied with the decision made by the office, he had an option to petition the DPP for review of the decision and therefore the decision to move the Court is manifestly premature.



- q. That, under Article 157(10) of *the Constitution* the DPP shall not require consent of any person or authority for commencement of criminal proceedings and in exercise of his powers or functions.
- r. That I exercised the delegated powers with due regard to public interest and fair administration of justice and the applicant has not demonstrated single instance of the abuse of the process.

Analysis and determination

- 4. The instant application presents what is essentially a challenge to prosecutorial discretion, with the Petitioner alleging selective and biased prosecution. The Petitioner, Peter Kimani Wanjohi, a Member of the County Assembly representing Huruma Ward, finds himself in the undesirable position of being charged with malicious destruction of property and assault while his complaint against one Sarah Sabai for allegedly attacking him has been declined for prosecution by the Director of Public Prosecutions.
- 5. The factual matrix reveals a dispute over the Tagore matatu terminus where, according to the Petitioner, unauthorized structures were erected at midnight on 21st December 2024. In his capacity as an elected representative opposing what he perceived as land grabbing, the Petitioner organized the demolition of these structures. During the demolition exercise, he alleges he was attacked and injured by Sarah Sabai, one of the structure owners. However, the DPP has taken the position that Sarah Sabai was first to report the incident and has approved charges against the Petitioner while declining to prosecute his complaint.
- 6. The Petitioner's grievance centers on what he perceives as biased and selective prosecution calculated to silence his vocal opposition to alleged illegal activities in his constituency. He is therefore desirous to have interim orders to prevent his arrest and prosecution pending the determination of his constitutional petition, arguing that the DPP's decision was actuated by malice, bias, and ulterior motives designed to harass and intimidate him.
- 7. The central question before this court is whether the DPP's exercise of prosecutorial discretion in this matter was so fundamentally flawed, biased, or motivated by extraneous considerations as to warrant judicial intervention.
- 8. Article 157 of *the Constitution* establishes the Office of the Director of Public Prosecutions. It also stipulates the scope of the mandate as follows in sub-articles (4), (6), (10) and (11) as follows: -
 - “(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.
 - (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;
 - (b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and



- (c) subject to clauses (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).
- (10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.
- (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.”
9. While Article 157(10) guarantees prosecutorial independence, Article 157(11) provides the constitutional framework within which such independence must be exercised, requiring the DPP to 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.
10. Regarding the exercise of prosecutorial discretion by the Director of Public Prosecutions, the Court of Appeal in *Diamond Hasham Lalji & another v Attorney General & 4 others* [2018] eKLR stated as follows: -
- “(41) Thus, the exercise of prosecutorial discretion enjoys some measure of judicial deference and as numerous authorities establish, the courts will interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases. However, as the Privy Council said in *Mohit v Director of Public Prosecutions of Mauritius* [2006] 5LRC 234:
- these factors necessarily mean that the threshold of a successful challenge is a high one. It is however one thing to conclude that the courts must be sparing in their grant of relief to seek to challenge the DPP’s decision to prosecute or to discontinue a prosecution, and quite another to hold that such decisions are immune from any such review at all..
- In *Regina v. Director of Public Prosecutions ex-parte Manning and Another* [2001] QB 330, the English High Court said partly at para 23 page 344:
- At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the tests were too exacting, an effective remedy could be denied.
- Although the standard of review is exceptionally high, the court’s discretion should not be used to stultify the constitutional right of citizens to question the lawfulness of the decisions of DPP.
- (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.”

11. In *Anthony Murimi Waigwe v Attorney General & 4 others* [2020] eKLR the Court held that the Prosecutor has a duty to analyze the case before prosecuting it and it should let free those whom there is no prosecutable case against them. It expressed itself thus: -

- “48. It is no doubt dear that under Article 157 (1) of *the Constitution* the ODP 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 whom DPP believes have no prosecutable case against them be let free. This is why Article 159 (2) of *the Constitution* is crying loudly every day, 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 ... 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.

51. In a democratic society like ours, no one should be charged without the authorities conducting proper investigation. The prosecutor on the other hand is under duty to consider both incriminating and exculpating evidence, In the case of Republic v. Director of Public Prosecutions & Another ex parte Kaman/ Nairobi Judicial Review Application Nog 78 of 2015 (supra), the court expressed itself as follows:

this court appreciates that the court should not simply fold its arms and stare at the squabbling litigants/disputants parade themselves before the criminal court in order to show-case dead cases. The seat of justice is a hallowed place and ought to be reserved for those matters in which the protagonists have a conviction stand a chance of seeing the light of the day. In my view the prosecution ought not to institute criminal cases with a view of obtaining an acquittal. It is against the public interest as encapsulated in section 4 of the Office of the Director of Public Prosecutions Act to stage-manage criminal proceedings in a manner intended to obtain an acquittal. A criminal trial is neither a show-biz nor a catwalk.”

12. The Respondent, through the affidavit of Lucas Tanui, a Senior Assistant Director of Public Prosecutions, has provided a comprehensive account of the decision-making process that led to the contested prosecutorial decisions. Upon careful examination of the evidence presented, a clear pattern emerges that supports the DPP's exercise of prosecutorial discretion.
13. In relation to the charges preferred against the Petitioner, the evidence establishes that on 21st December 2024, the Petitioner organized and hired individuals to demolish structures at the Tagore matatu stage. Importantly, subsequent investigations confirmed that these demolitions were carried out without any authorization from the County Government. The Petitioner's own admissions in this regard provide compelling prima facie evidence of malicious destruction of property. The fact that the Petitioner refused to record a statement when given the opportunity further undermines his position.
14. Conversely, the DPP's decision to decline prosecution of Sarah Sabai for the alleged assault on the Petitioner was based on substantive evidential deficiencies. The investigation revealed significant inconsistencies in the Petitioner's account, most notably his claim that the incident occurred on 23rd December 2024 when the evidence clearly established that it took place on 21st December 2024. Additionally, the complaint was only reported on 15th January 2025, nearly a month after the alleged incident, which the DPP reasonably perceived as an afterthought rather than a genuine contemporaneous complaint. These evidential gaps rendered the case against Sarah Sabai insufficient to meet the threshold for prosecution under the established prosecutorial guidelines.
15. The decision in Hon. James Ondicho Gesami vs The Attorney General & Others, Petition No. 376 of 2011, held that: -

“...The DPP is at liberty to prefer charges against any party in respect of whom he finds sufficient evidence to prefer charges...In my view, requiring that the petitioner subjects himself to the normal criminal prosecution process mandated by law where he has all the



safeguards guaranteed by *the Constitution* does not in any way amount to an attack on his human dignity in violation of his constitutional rights.”

16. The Petitioner’s argument that he was acting in his official capacity as an elected representative lacks legal foundation. As correctly noted by the Respondent, a Member of County Assembly cannot unilaterally carry out enforcement activities, which fall within the mandate of the County Executive. The Petitioner exceeded his constitutional role and cannot claim immunity for actions taken beyond his lawful authority.
17. The Petitioner alleges that the DPP’s decision was motivated by malice and designed to harass him for his vocal opposition to land grabbing in his constituency. However, mere allegations of bias are insufficient without concrete evidence demonstrating that the prosecutorial decision was influenced by extraneous considerations rather than the merits of the case.
18. The evidence shows that the DPP conducted a thorough review of both files, issued multiple directions to police for further investigations, and made decisions in accordance with established prosecutorial guidelines. The fact that the Petitioner subsequently requested the DPP to withhold prosecution while parties engaged in settlement negotiations undermines his claim of malicious prosecution and suggests recognition that the charges have merit.
19. In light of the foregoing analysis, this Court finds that the Petitioner has failed to discharge the burden of proving that the DPP’s exercise of prosecutorial discretion was so fundamentally flawed as to warrant judicial intervention. The evidence demonstrates that the prosecutorial decisions were made after careful consideration of available evidence and in accordance with established guidelines.
20. This court’s jurisdiction to grant prerogative writs of prohibition, certiorari and mandamus against the Director of Public Prosecution as provided under Article 157 (6) & (7) of *the constitution* is limited in scope and can only be exercised sparingly and in very rare exceptional circumstances. The rationale which underpins this constitution imperative is to insulate the prosecutorial decision-making process ringfenced within Article 157 of *the constitution* to give that office some kind of absolute independence to apply its professional expertise and professional touchstone.
21. The court should take cognizance the principles in R VS DPP vs Ex-parte Manning & Another (2001) QB 330 where it was held that “ In most cases the decision will turn not on an analysis of the relevant legal principle but on the exercise of an informed judgement of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial before a jury. This exercise of judgement involves an assessment of the strength, by the end of the trial, of the evidenced against the defendant and of the likely defences. It will often be impossible to stigmatise a judgement on such matters as wrong even if one disagrees with it. So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere”
22. What this court is being asked to do in this petition is to rule in favour of the Petitioner by substituting the decision by the Director of Public Prosecution to initiate criminal proceedings and have that decision set aside by way of review to dismiss the charge sheet. This is what the law both the letter and the spirit does not empower the High Court to exercise such jurisdiction in excess of the provisions of *the constitution*. The comparative case in A-v-R (2012) EWCA Criminal No. 434 the court observed inter-alia “It is element, but it has become necessary to emphasize, that Guidance issued by the Director of Public Prosecution does not and, as a matter of law cannot create any immunity or defence. The guidance and any policy documents publicly reflect the considerations which in an individual case of the kind under consideration, are considered to be relevant to the exercise of the prosecutorial discretion not to bring an individual case to trial notwithstanding admissible evidence which would



otherwise justify a prosecution if however, this exercise has been conscientiously undertaken, the sole question for the court is whether the offence has been committed. It is not the function of the court to substitute its own view for that of the Crown about whether there should be a prosecution...the decision whether or not to prosecute in most cases requires a judgment to be made about multiplicity of interlocking circumstances. Therefore, even if it can be shown that in one respect or another part or parts of the relevant guidance or policy have not been adhered to, it does not follow that there was an abuse of process, indeed, it remains open to the prosecution in an individual case, for good reason, to disapply its own policy or guidance”

23. This is the category of the petition given its facts and the affidavit evidence is not worthy to invoke the judicial review remedy where the decision has been taken to prosecute the petitioner. It could be enormously disruptive if suspected offenders already charged in court or about to be charged by the Director of Public Prosecution were permitted to adjourn proceedings due before the Magistrate’s Courts under the guise of a petition for judicial review of the decision to prosecute is heard and determined by the High Court. The Rights of the suspect or an accused person for that matter in a Criminal trial, is able to argue that the evidence presented by the prosecution is insufficient to establish a motion of no case to answer and therefore be entitled to an acquittal. This judicial review court does not have that advantage. That is the position I take of this case docket as filed by the petitioner.
24. The application therefore lacks merit and is hereby dismissed. The Petitioner’s request for interim orders to prevent his arrest and prosecution is declined. The Petitioner should face the criminal charges through the normal court process where he will have full opportunity to present his defense.
25. Each party shall bear its costs.
26. Orders accordingly.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 27TH DAY OF MAY 2025

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R. NYAKUNDI
JUDGE

