



**Kariuki v Director of Public Prosecutions & 3 others; Wangila & 2 others
(Interested Parties) (Petition E240 of 2022) [2024] KEHC 834 (KLR)
(Constitutional and Human Rights) (26 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 834 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E240 OF 2022

M THANDE, J

JANUARY 26, 2024

BETWEEN

DANIEL KIMANI KARIUKI PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

**OFFICER COMMANDING MUTHAIGA POLICE STATION 2ND
RESPONDENT**

THE CHIEF MAGISTRATES COURT (MAKADARA) 3RD RESPONDENT

POLICE CONSTABLE JAMES ANDUKU 4TH RESPONDENT

AND

ALEX WANJALA WANGILA INTERESTED PARTY

SAMUEL MAINA KIARIE INTERESTED PARTY

SYLVIA WAMBUI KARANJA INTERESTED PARTY

JUDGMENT

1. The Petitioner moved this Court by way of an undated Petition seeking the following orders:
 - A. A declaration be and is hereby issued that the petitioner's Fundamental Rights and Freedoms under Article 49(1)(f) of *the Constitution*, 2010 were contravened and grossly violated by the 2nd and 4th respondents who failed to present the petitioner before a court within 24 hours following his arrest.



- B. A declaration that in the investigating officer, the 4th respondent, misrepresented the true nature of the complaints filed against the Petitioner, leading the petitioner to respond to spurious allegations of trespass, the 4th respondent abdicated his constitutional duty as a public officer under article 232(10)(f) of *the constitution* of Kenya, 2010 on need to provide accurate information and was a violation of petitioner's rights to a fair trial and petitioner's constitutional rights article 35(1) of *the constitution* and to that extent comprised the entire investigation, rendering the trial of the petitioner in criminal case no. 1235 of 2022 unfair.
- C. A declaration be and is hereby made that to the effect that the neglect, refusal and/or failure of the 2nd respondent to conduct prompt, effective proper and professional investigations into the petitioner's complaints dated 17th September, 2018, and 20th September, 2018, under the occurrence book numbers OB:35/17/09/2018, OB:44/20/09/2018 and OB:46/20/09/ 2018 was a violation of the Petitioner's fundamental rights and freedoms under Article 27(1)(2) of *the Constitution* of Kenya.
- D. A declaration that the in the prosecution of the petitioner, the Director of Public Prosecution abdicated his constitutional duty under article 157(11) of *the constitution* of Kenya on the need to prevent and avoid the abuse of the legal process
- E. A declaration be and hereby issued that the failure by the 2nd Respondent failure to promptly investigate Petitioner's complaints filed on 17th September, 2018 and 20th September, 2018 under the occurrence book number OB:35/17/09/2018, OB:44/20/09/2018 and OB:46/20/09/ 2018, for more than 41 months is a violation of Petitioner's rights under articles 27(1)(2) and article 47(1) of *the constitution* on Kenya, 2010.
- F. A declaration be and is hereby issued that the decision of the 1st Respondent to institute criminal proceedings against the Petitioner in Makandara Criminal Case no. 1235 of 2022 at (Republic v. Daniel Kimani Kariuki) without addressing the Petitioner's Complaint's detailed in a letter dated 28th September, 2018 was a violation of petitioner's Constitutional rights under article 47(1)(2) of *the Constitution* and therefore unlawful null and void ab initio.
- G. A declaration be and hereby issued that the Conduct of the 2nd Respondent to unlawfully Seize the CCTV hard drive, copies of CCTV film, crowbar and documents, all property of the Bebadis Company limited business Ridgeways Inn The Yard was in violation of Petitioner's rights under Article 31(a)(b) and article 40(1) of *the Constitution* of Kenya, 2010.
- H. A declaration be and is hereby issued that the evidence underpinning the prosecution of the Petitioner in Makandara Chief Magistrate's Court Criminal Case No. 1235 of 2022 (Republic v Daniel Kimani Kariuki) was illegally obtained in a manner that was detrimental to the administration of justice and as such that evidence violates article 50(4) of *the constitution*.
- I. A declaration that investigations on the Petitioner by the 2nd respondent and 4th respondent, and the 1st respondent's institution of criminal proceedings against the petitioner in Makandara Chief Magistrate's Court criminal case number 1235 of 2022, is unlawful and comprise a violation of the petitioner's constitutional rights and is to the extent null and void.
- J. An order of Prohibition directed at the Makandara Chief Magistrate Court, barring and forbidding her or any other judicial officer from hearing and/or proceeding in any Manner with the conduct of Makandara Chief Magistrate's Court Criminal case no. 1235 of 2022, (Republic v. Daniel Kimani Kariukl) on the evidence collected on 20th September, 2018 and 21st September, 2018 by the 2nd and 4th Respondents.



- K. An order for compensation as provided in article 23(3)(e) of *the constitution*.
2. The Petitioner's case as set out in the Petition and supporting affidavit sworn on even date is that he, the 3rd Interested Party Sylvia Wamboi Karanja (Sylvia) and one Ruth Wanjiru Maigua (Ruth) are directors of Bebadis Company Limited (the Company), which owns and runs the business known as Ridgeways Inn The Yard a bar and restaurant situated along Kiambu Road. The Petitioner and Sylvia cohabited for some time and were set to conduct a traditional wedding (*ruracio*) on 29.9.18. On or about the 09.9.2018, the Petitioner realized that Sylvia had on 4.9.18, without his knowledge and consent, altered the shareholding of the Company, by allocating to herself all the shares and also taking the shares of both the Petitioner and of Ruth. On 13.9.18, the Petitioner obtained orders CMCC 451 of 2018 Daniel Kimani Kariuki v. Bebadis Company Limited, Sylvia Wamboi Karanja and Registrar of Companies, reinstating him as a director of the Company and putting him in control of Ridgeways Inn The Yard. The fraudulent actions of Sylvia and the court case led to the separation of the Petitioner and Sylvia.
 3. On 14.9.23, the Petitioner sought the assistance of 2nd Respondent to enforce the Court order, who refused to do so under the guise it was a commercial dispute involving partners who were in relationship. On 17.9.18, the Petitioner made a complaint at Muthaiga Police Station against Sylvia and others on the fraud, theft and unauthorised seizure of the Company's funds and properties under occurrence book number OB 35/17/09/2018. The complaint has however never been investigated or acted upon to date. On 20.9.18, shortly after the Petitioner reported to work at Ridgeways Inn The Yard at about 7:00 a.m, the 2nd and 4th Respondent and a contingent of 10 police officers, arrived at the business premises. The 2nd Respondent, the Petitioner's advocate, Sylvia's legal advisor, one Mr. Musota unsuccessfully tried to negotiate working arrangements between him and Sylvia. Thereafter, the 2nd Respondent ordered the Petitioner to leave the business premises, despite the court order.
 4. The Petitioner then proceeded to file 2 reports at Muthaiga police station on what had transpired, under occurrence book numbers OB:44/20/09/2018 and OB:46/20/09/2018. On 26.9.18, the Petitioner visited Muthaiga Police station, to enquire on the progress of his complaints. While there, the 4th Respondent demanded he records a statement on why he trespassed the business premises on 20.9.18, which he did. Thereafter he was arrested and detained at the police station. He was arraigned in Makadara Criminal Case 2323 of 2018 on 27.9.18 and was shocked to learn that he was charged with assault and stealing, and not trespass as misrepresented by the 4th Respondent. The following day, the Petitioner filed a complaint with the 1st Respondent against the 2nd and 4th Respondents in regards to their conduct to discriminate against, misrepresent, and threaten him and failure to investigate his complaints, which was acknowledged on 4.10.18 in a letter to the Director of Criminal Investigations. The Petitioner complains that he was not given an honest chance before the criminal charges were preferred by the 1st Respondent.
 5. The Petitioner goes on to state that on 21.11.18, the High Court in Kiambu HCCC E115 of 2018 Bebadis Company Limited, Daniel Kimani Kariuki, Ruth Wanjiru Maigua v. Sylvia Wamboi Karanja & Ridgeward Co. Ltd directed that the Petitioner is the sole person allowed to run the business of the Bebadis Company Limited and Ridgeways Inn The Yard. Thereafter, the Criminal Charges in Criminal Case 2323 of 2018 against the Petitioner were withdrawn by the 1st Respondent and the Petitioner was on 17.3.22 at 10.30 am arrested and was on 21.3.22 charged afresh in criminal case 1235 of 2022. He contends that he was not accorded an honest opportunity to respond or be heard in regards to the allegations in criminal charges in Count IV and V of the Criminal Case 1235 of 2022 before the charges were preferred against him.



6. The Petitioner claims that the charges against him are commercial in nature. Further that the 2nd Respondent and Sylvia and others carried out several raids in Ridgeways Inn The Yard and carted away documents and business possessions without a court order or authority of the Applicant. In As such, the evidence to be used in the criminal case was obtained illegally.
7. In view of the foregoing, the Petitioner alleges that the Respondents violated his constitutional rights under Articles 49(1)(f)(i), 27(1) and (2), and 47(1) of *the Constitution*. He further contends that the 1st Respondent abdicated his constitutional duty under Article 157(11) on the need to prevent and avoid the abuse of the legal process. He has therefore come to this Court for redress of the said violations.
8. The 1st, 2nd, and 4th Respondents opposed the Petition vide grounds of opposition dated 6.12.22 and replying affidavit sworn on even date by the 4th Respondent. It is their case that the prosecution of the Petitioner in Makadara Criminal Case No. 2323 of 2018 was not actuated by malice but with reasonable and probable cause and after the 1st Respondent independently reviewed the evidence. There was a prospect of or violated any provision conviction and for the Petitioner to be given an opportunity to defend himself in a court of law. As such the 1st Respondent has not abrogated, breached infringed any provision of *the Constitution* or the law or the rights of the Petitioner. Further that the accuracy and correctness of charges can only be tested by the trial court which is best equipped to deal with the quality and sufficiency of the evidence adduced in support of the charges. Some of the issues raised by the Petitioner amount to a defence and ought to be canvassed before the trial court. The Petitioner has failed to demonstrate how the 1st respondent has acted ultra vires his mandate and seeks to curtail the constitutional mandate of the Respondents by attempting to circumvent the trial process against him.
9. The 4th Respondent reiterated the contents of the grounds of opposition and further stated that he is attached to the 2nd Respondent. He is the investigating officer in the criminal case in which the Petitioner is charged with assault causing actual bodily harm, contrary to Section 251 of the Penal Code. The Interested Parties are the complainants in the matter. The Petitioner had initially been charged with assault in Makadara Criminal Case No 2323 of 2018 and was granted bail. The Petitioner violated the bail terms and failed to attend court severally physically and virtually and on 24.2.22, the bail was cancelled and a warrant of arrest issued against him. In light of the Petitioner's habitual absconding from court, the charges were withdrawn under Section 87(a) of the Criminal Procedure Code. The Petitioner was later arrested on 17.3.22 while attending Kiambu Criminal Case No. 1591 of 2018 R v Daniel Kariuki Kimani. He was presented before the Makadara Court on 18.3.22 where he was charged afresh in Criminal Case No. 1235 of 2022 which included a 5th count, namely failing to attend court contrary to Section 131 of the Penal Code. The He was detained at Muthaiga Police Station awaiting arraignment the next court day, Monday 21.3.22 to take plea. Being a flight risk based on past conduct, the Petitioner was detained and presented to court as soon as reasonably possible.
10. The 4th Respondent further deposed that the offences in question are criminal in nature and not commercial disputes as alleged by the Petitioner. The allegation of ulterior motive on the part of the Respondents was also denied. Following the lodging of the complaint, investigations were carried out in an efficient and lawful manner and forwarded to the 1st Respondent who made the decision to charge the Petitioner. In making the decision, the DCI and the 1st Respondent acted in exercise of their mandate under *the Constitution*. As such, this Court should be reluctant to interfere with that mandate if exercised in a reasonable manner. The Petitioner has not demonstrated that he will not receive a fair trial before the trial court which is tasked with establishing his guilt or innocence.
11. On behalf of the Interested Parties, the 1st Interested Party swore an affidavit on 4.12.22 in response to the Petition in which the averments by the 4th Respondent were reiterated. It was deposed that



the Petitioner seeks to scuttle, cause delay and derail Criminal Case No. 1235 of 2022 against him; that in a bid to mislead this Court into granting orders without merit, the Petitioner failed to disclose material facts, namely that he had been arrested under a warrant of arrest following his absconding court; that has employed numerous tactics to delay and stall his prosecution through filing numerous applications and now the baseless Petition herein; that the Petitioner has also filed Criminal Revision E101 of 2022 seeking revision of the decisions made by the Hon Magistrate in standing firm to have this case prosecuted to its ultimate conclusion; that it is the Petition together with other petitions and applications filed in different courts by the Petitioner and not the criminal case that amount to an abuse of the court process; that as complainants in the criminal case, they are within their rights to oppose the Petition to secure their interests and rights. As such, granting the orders sought would greatly prejudice the Interested Parties as complainants.

12. In a rejoinder vide a supplementary affidavit sworn on 20.12.22, the Petitioner denied having been being served with or informed of the warrant of arrest by the 4th Respondent or police during his arrest; that the 2nd and 4th Respondents acting on the behest of the Interested Parties refused, ignored and neglected to investigate his complaints which are originated from the same transaction, date and time with the information and particulars of charge counts I, II, III and IV of criminal case; that the 4th Respondent did not deny my claim that he conducted investigations into counts I, II, III and IV of the criminal case by duping and tricking him that the complaints were about trespass and made him record a statement on the same; that the 1st Respondent acknowledged vide a letter dated 4.10.22 that the 2nd and 4th Respondents failed to investigate his complaints against the Interested Parties, despite the same having originated from the same transaction with the information alleged in the charges in the criminal case; that in spite of his complaint letter to the 1st Respondent, and several enquiries for progress into the investigations Director of Criminal Investigations never investigated his complaints; that contrary to his contention, the 4th Respondent, made no effort to present him before a court between 17.3.22 and Friday 18.3.22; that the claim that he is a flight risk is false and that he was granted bail by trial court on 24.3.22; that his failure to attend court on 24.2.22 was not out of negligence but that he was not aware the court was sitting on the material day because the normal court's calendar for several months was interrupted by the by Covid-19 pandemic; that there was no communication from the investigation officer or registry when the criminal case was scheduled; that his complaint against the Respondents, is that, he was not accorded an opportunity to be heard or provide my side of the story; that he learnt about the charge when during plea taking on 21.3.22.
13. I have considered the Petition, depositions and the rival written submissions filed. I am keenly aware that my role is to determine whether the Respondents violated the Petitioner's rights by failing to act on his complaint. They neglected to investigate his complaints which are originated from the same transaction, date and time with the information and particulars of charge counts I, II, III and IV of criminal case.
14. The Petitioner's case is that on 14.9.23, he sought the assistance of 2nd Respondent to enforce the court order, CMCC 451 of 2018 reinstating him as a director of the Company and putting him in control of Ridgeways Inn The Yard. The 2nd Respondent however refused to do so under the guise that it was a commercial dispute involving partners who were in relationship. His complaint on 17.9.18 at Muthaiga Police Station against Sylvia and others on the fraud, theft and unauthorised seizure of the Company's funds and properties under occurrence book number 0B 35/17/09/2018 was also not acted upon. Also not acted upon was his complaint under occurrence book numbers 0B:44/20/09/2018 and 0B:46/20/09/2018. In contrast, the Respondents acted upon the complaint of the Interested Parties which led to his prosecution. The Petitioner thus contends that the 2nd and 4th Respondents conducted selective investigations. Further that they discriminated against the Petitioner



thereby infringing on his rights to equality and freedom from discrimination guaranteed under Article 27 of *the Constitution*.

15. Article 245(1) of *the Constitution*, establishes the office of the Inspector General of Police. Clause (4) confers upon the Inspector General of Police, autonomy in the discharge of its mandate with regard to, the investigation of any particular offence or offences, the enforcement of the law against any particular person or persons, and the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service. It is only the Director of Public Prosecutions who under Article 157(4) of *the Constitution*, may direct the Inspector General of Police to investigate any information or allegation of criminal conduct and he is required to comply.

16. Section 24 of the *National Police Service Act* lists the functions of the Police as follows:

The functions of the Kenya Police Service shall be the –

- a. provision of assistance to the public when in need;
- b. maintenance of law and order;
- c. preservation of peace;
- d. protection of life and property;
- e. investigation of crimes;
- f. collection of criminal intelligence;
- g. prevention and detection of crime;
- h. apprehension of offenders;
- i. enforcement of all laws and regulations with which it is charged; and
- j. performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.

17. The Police have a constitutional and statutory duty to investigate any complaint made to them. This was stated in the case of Republic v Commissioner of Police & another Ex-Parte Michael Monari & Another [2012] eKLR Warsame, J, (as he then was) stated:

It is also clear in my mind that the police have a duty to investigate on any complaint once a complaint is made. In deed the police would be failing in their constitutional mandate to detect and prevent crime.

18. The Petitioner made complaints to the police vide 3 occurrence book numbers. He is aggrieved that no action was taken. One of the core functions of the Police under Section 24 of the Act, is the provision of assistance to the public when in need. It is a given that not every complaint made to the Police, will culminate in a prosecution. However, when the Police do receive a complaint, that are enjoined by law to discharge their mandate in a manner that is not dismissive but inspires confidence in the members of the public. Failure by the Police to investigate and act on the complaints by the Petitioner was clearly a dereliction of their statutory obligation. More so because they that they acted on the complaints against the Petitioner by the Interested Parties. This was clearly discriminative and violated the Petitioner's right to equality and freedom from discrimination, equal protection and equal benefit of the law, as guaranteed under Article 27 of *the Constitution*.



19. In this regard, I concur with the holding of Angima, J. who in the case of *Monica Cyombua Gitari v Director of Public Prosecution & 4 others* [2017] eKLR stated:

There is sufficient material on record to demonstrate that such a report was made. A replying affidavit was filed on behalf of the 2nd respondent but nothing was said on the said report. This complaint was not addressed and the court was not informed if it was ever investigated and, if so, with what result, or it was not investigated, for what reasons. If the Petitioner's complaint was investigated or pending investigations, there would have been nothing easier than informing the court as much. The only reasonable conclusion to be drawn from the 2nd respondent's silence is that it defaulted in undertaking the investigation as required by law. In that case, such failure would constitute an abdication of its statutory obligation under Section 42 of the *National Police Service Act* of 2011. In my view, such dereliction of duty would be a violation of Article 27 (1) of *the Constitution* of Kenya which guarantees every person the right to equal protection and equal benefit of the law.

20. Investigation of complaints lodged with the Police is an administrative action as defined under Section 2 of the *Fair Administrative Action Act*, which provides:

“ administrative action ” includes–

- (a) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
- (b) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

21. Failure by the 2nd and 4th Respondents to act on the Petitioner's complaint is thus a violation of Article 47(1) of *the Constitution* which guarantees to every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

22. I now turn to the claim by the Petitioner that his right under Article 49(1)(f) was violated by reason of the fact that he was detained for more than 24 hours before being presented in Court.

23. The 4th Respondent explained that following the Petitioner's failure to attend court severally the charges against him in Criminal Case No. 2323 of 2018 were withdrawn. The Petitioner was thereafter arrested on 17.3.18 while attending Kiambu Criminal Case No. 1591 of 2018 against him and taken to Makadara court. He was presented before the Makadara Court on 18.3.22. As he could not be arraigned under the withdrawn case, fresh charges had to be drawn against him namely Criminal Case No. 1235 of 2022. He was thus detained until the next court day which was Monday 21.3.22.

24. Article 49 of *the Constitution* makes provision for the rights of an arrested person. Relevant herein in Clause 1(f) which provides:

- 1. An arrested person has the right
 - (f) to be brought before a court as soon as reasonably possible, but not later than–
 - (i) twenty-four hours after being arrested; or
 - (ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day

25. An arrested person is required to be presented before a court as soon as possible and in any event not later than 24 hours after being arrested. *The Constitution* recognises that it may not be possible for a



person to be presented before a court within 24 hours on account of the period ending outside ordinary court hours or on a day that is not a court day. In such cases, a person shall be presented before a court not later than the end of the next court day. *The Constitution* thus protects arrested persons from arbitrary arrest and detention for a period exceeding 24 hours or the period necessary to secure their production before court on the next court date. In the present case, the Petitioner contends that he was arrested on Thursday 17.3.22 and presented in court on Monday 21.3.24. The Respondents assert that he was presented in Court on 18.3.24 and then again on 21.3.24 after the fresh charge was instituted. From the material placed before me, it is not possible to tell whether or not he was taken to court on 18.3.24.

26. When considering the question of violation or otherwise of the Petitioner's rights and fundamental freedoms under the Bill of Rights, arising from the allegation of failure to present him in Court within the constitutional timelines, this Court must exercise caution in making any pronouncements at this stage. This issue is best raised in the trial court which will then make a determination on the same and the effect thereof on the proceedings before it. Any finding by this Court on the issue at this stage will be prejudicial to the pending proceedings in the criminal case and eventual outcome. Similarly, the issue whether the 4th Respondent disclosed to the Petitioner the actual nature of the complaint against him during interrogation and recording of his statement is best raised in the trial court.
27. I now turn to the prayer for an order for prohibition in respect of the criminal case and the question whether the Petitioner's rights have been violated by reason of instituting the criminal charges against him. As I consider the matter, I am aware that my role is not to test the legality or otherwise of the charges against the Petitioner, or to determine his guilt or innocence. The single constitutional issue for this Court to consider is whether the 1st Respondents' actions of charging the Petitioner are within the law and whether they in any way infringe upon the Petitioners' rights and fundamental freedoms or are an abuse of process.
28. Article 157(1) of *the Constitution* establishes the Office of the Director of Public Prosecution. Clause (6) and Section 5(1) (a) (b) of the Director of Public Prosecution Act provide for the powers to institute and undertake criminal proceedings, take over and continue any criminal proceedings commenced in any court and discontinue any criminal proceedings at any stage before judgment is delivered. Under Clause (10) and Section (6) of the Director of the Public Prosecution Act, 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. Clause 11 however requires the holder of the office 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 in exercising the powers conferred by this Article, the Director of Public Prosecutions.
29. The constitutional independence of the Director of Public Prosecution, was restated in the case of *Republic v The Director of Public Prosecution & 7 Others* [2013] eKLR High Court Misc. No. 249 of 2020 where Odunga, J. (as he then was) stated:

The law is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for interfering with those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process.



The learned Judge went on to state:

It follows that the office of the Director of Public Prosecutions is an independent constitutional office which is not subjected to the control, directions and influence by any other person and only subject to control by the Court based on the aforesaid principles of illegality, irrationality and procedural impropriety.

30. This Court has supervisory jurisdiction over subordinate courts which include the power to stay or quash proceedings in such courts. This jurisdiction is entrenched in Article 165(6) of the Constitution which provides:

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

31. While the power of this Court to quash or stop proceedings in a trial court is not in question, it must be exercised very sparingly with circumspection and that too in the rarest of rare cases. This was the holding in the case of Director of Public Prosecution v Praxidis Namoni Saisi & 2 others [2020] eKLR wherein the Court of Appeal stated:

In the Indian Supreme Court case of State of Maharashtra & Others vs. Arun Gulab & Others, Criminal Appeal No. 590 of 2007 the court in acknowledging the fragility of the parameters of interference stated:

“The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. (Emphasis ours).

32. The grounds upon which the power of this court may be exercised to stop prosecution were considered in *Erick Onchoke v Republic* [2019] eKLR, where, Njagi, J. stated as follows:

14. The situations in which the court can intervene in reviewing the exercise of discretion by the DPP were summarized by Prof. Ngugi J. in *Peter Ngunjiri Maina –Vs- DPP & 2 Others* (2017) eKLR where he stated that:-

“It is now clear that even in the exercise of what may appear to be prima facie absolute discretion conferred on the executive, the court may interfere. The court can only intervene in the following situation:

1. Where there is an abuse of discretion;
2. Where the decision-maker exercises discretion for an improper purpose;
3. Whether decision-maker is in breach of the duty to act fairly;
4. Whether decision-maker has failed to exercise statutory discretion reasonably;
5. Where the decision-maker fetters the discretion given;
6. Where the decision-maker fails to exercise discretion;



7. Where the decision-maker is irrational and unreasonable.”

33. This Court may stop or quash criminal proceedings in the lower courts, where it is demonstrated inter alia that there is failure to exercise discretion or abuse of discretion or discretion is exercised in an improper manner. The Court may quash proceedings if there is breach of duty to act fairly or the decision-maker is irrational and unreasonable. Proceedings may also be stopped or quashed in the interests of the ends of justice or where the proceedings are an abuse of the court process or that the quashing of the impugned proceedings would secure the ends of justice. What is evident from the cited provisions of the law and case law, is that, the mandate of the Respondents should not be interfered with, unless there is justifiable reason to do so. The Court will only intervene where the actions of the Respondents are tainted with unreasonableness, illegality, irrationality and procedural impropriety.

34. This position was emphasized in Nairobi High Court Miscellaneous Application No. 1769 of 2003 Republic vs. Ministry of Planning and Another ex-parte Professor Mwangi Kaimenyi, where the court stated:

So, where a body uses its power in a manifestly unreasonable manner, acted in bad faith, refuse to take relevant factors into account in reaching its decision or based its decision on irrelevant factors the court would intervene that on the ground that the body has in each case abused its power, The reason why the court has to intervene is because there is a presumption that where parliament gave a body statutory power to act, it could be implied that Parliament intended it to act in a particular manner.

35. In the present case, the Petitioner contends that the 2nd and 4th Respondents acted as conduits for the Interested Parties and compromised their independent judgment. Further that the criminal investigations were commenced to achieve collateral and extraneous purposes and to render the Petitioner’s complaints useless.

36. In a petition such as the one before me a claimant must avail tangible evidence to support his claims of malice and ill intention on the part of the Respondents. No evidence was however placed before the Court to support the claim by the Petitioner that the Respondents were compromised and not independent in the conduct of investigations and in preferring charges against him. His claim that the criminal case was commenced for collateral and extraneous purposes and to render the Petitioner’s complaints useless, is not supported by evidence and is not sufficient to persuade the Court that his fundamental rights have been violated by the Respondents.

37. It is well settled that a party claiming that *the Constitution* has been violated must state with precision the exact provisions violated and the manner in which they have been violated. This was the holding in the case of Anarita Karimi Njeru v Republic [1979] eKLR, where the Court stated:

We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

38. The Petitioner herein has not demonstrated how the Respondents in discharging their constitutional and statutory mandate, to investigate, arrest and prosecute the Petitioner, violated his rights. Other than stating that the charges and his complaint in the listed Occurrence Book numbers arise from the same facts relating to a commercial dispute, and that his complaint was not acted upon, the Petitioner did not prove that the Respondents acted outside and beyond their constitutional and statutory



mandate. The question as to whether he has been charged on the basis of evidence illegally obtained is a matter of evidence to be canvassed before the trial Court.

39. In this regard, I associate with the sentiments expressed in the Michael Monari case (supra) by Warsame, J. (as he then was) who stated as follows:

It is not the duty of the court to go into the merits and demerits of any intended charges to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and the merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment.”

40. It bears repeating that this Court has inherent powers to quash, stay or prohibit criminal proceedings in a trial court where it has been demonstrated that there is manifest injustice or where the proceedings are laced with malice. It is however well settled that as the Court exercises this jurisdiction, it must be mindful not to interfere with, but allow proceedings in the trial court to take their natural course where no exceptional circumstances exist, to warrant for the Court’s intervention.
41. After considering the grounds set forth by the Petitioner I find with respect, that it is not enough for the Petitioner to state that because the dispute giving rise to the prosecution is originated from a commercial transaction, the criminal proceedings against him violate his constitutional rights and are thus null and void. The Petitioner was required to show how the process of the court is being abused or misused and further demonstrate how the criminal prosecution has jeopardised his rights or placed his rights under serious threat of violation, which he failed to do.
42. The upshot is that I find no impropriety on the part of the Respondents in conducting the investigations, charging and prosecuting the Petitioner, to warrant the grant of the judicial review order of prohibition. Given that every criminal prosecution has an underlying public interest, it would be in the interest of the public at large that the criminal prosecution be allowed to proceed to its logical conclusion.
43. The Petitioner seeks compensation against the Respondents. Article 23(3) of [the Constitution](#) provides the following remedies;

In any proceedings brought under Article 22, a court may grant appropriate relief, including

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- (a) a declaration of rights;
- (b) an injunction;
- (c) a conservatory order;
- (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
- (e) an order for compensation; and



(f) an order of judicial review.

44. This is a case of constitutional violation, which does not call for an award of compensatory damages in the traditional sense. Further, the award of damages is a secondary remedy, as was stated by the Constitutional Court of South Africa in the case of *Dendy v University of Witwatersrand, Johannesburg & Others* - [2006] 1 LRC 291 as follows:

[T]he primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.

45. I also derive guidance in the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR in which the Court of Appeal spoke to the issue of award of damages for infringement of constitutional rights and stated:

The relevant principles applicable to award of damages for constitutional violations under *the Constitution* was explained exhaustively by the Privy Council in the famous case of *Siewchand Ramanoop v The AG of T&T, PC Appeal No 13 of 2004*. It was held that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense.

Per Lord Nicholls at Paragraphs 18 & 19:

When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

46. The Court of Appeal went on to state:

Consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is "appropriate and just" according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration.

47. The Court has found that the 4th Respondent infringed upon the Petitioner's rights under Article 27 and 47 Petitioner of *the Constitution* for failure to act on his complaints. Duly guided by the dictum in the cited cases and having regard to the circumstances herein, I find that the justice of this case does not favour the grant of an award of damages. My view is that a declaration of violation of rights would



be the appropriate remedy. In any event, the Petitioner has not demonstrated the damage suffered as a consequence to warrant a claim for damages.

48. In the end, I find that the Petition partly succeeds and I make the following orders:

1. A declaration be and hereby issued that the failure by the 2nd Respondent failure to promptly investigate Petitioner's complaints filed on 17th September, 2018 and 20th September, 2018 under the occurrence book number OB:35/17/09/2018, OB:44/20/09/2018 and OB:46/20/09/2018, for more than 41 months is a violation of Petitioner's rights under articles 27(1)(2) and article 47(1) of *the constitution* on Kenya, 2010.
2. There shall be no order as to costs.

DATED AND DELIVERED VIA MS TEAMS THIS 26TH DAY OF JANUARY 2024

M. THANDE
JUDGE

