



**Hassan v Independent Policing Oversight Authority & 2 others; Community (Interested Party)  
(Criminal Case E081 of 2022) [2023] KEHC 1388 (KLR) (Crim) (3 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1388 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL CASE E081 OF 2022  
K KIMONDO, J  
MARCH 3, 2023**

**BETWEEN**

**SGT RASHID AHMED HASSAN ..... PETITIONER**

**AND**

**THE INDEPENDENT POLICING OVERSIGHT AUTHORITY .... 1<sup>ST</sup>  
RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 2<sup>ND</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**EASTLEIGH BUSINESS COMMUNITY ..... INTERESTED PARTY**

**RULING**

1. On November 24, 2022, the Director of Public prosecutions (hereafter the DPP or 2<sup>nd</sup> respondent) brought information to the High Court charging the petitioner with two counts of murder.
2. The particulars were that on March 31, 2017 at Eastleigh 1<sup>st</sup> avenue in Starehe sub-county within Nairobi county he murdered Jamal Mohamed and Mohammed Dhair Kheri (hereafter the deceased)
3. The petitioner did not appear for plea taking. The court thus issued summons for his attendance on December 8, 2022. In the meantime, the petitioner filed the petition dated November 29, 2022 claiming that his intended prosecution violated his fundamental rights and freedoms guaranteed by articles 10, 25, 27, 28, 47, 48, 50 and 157 of the *Constitution*.
4. He argues that the charges are poorly grounded and ill-motivated. He contends that the two deceased persons were armed thugs killed in the course of a robbery; and, that the decision to charge him before



- taking a statement under inquiry violates his rights to a fair administrative action enshrined in article 47 of the *Constitution*. He takes up cudgels on the respondents for publicizing the matter to the mainstream and social media and breaching his miranda rights.
5. He thus sought an order by way of declaration that the conduct of the respondents was unreasonable and unlawful; for *certiorari* to remove into the High Court and quash the decision made by the DPP to prefer the charges; and, for prohibition to restrain the respondents from “commencing any criminal proceedings relating to the death of the deceased suspects”
  6. Pending the hearing of the petition, he presented a notice of motion praying for conservatory orders to restrain the respondents from charging him with the offence or taking plea in the matter. The motion is predicated upon the affidavit of the applicant of even date and several depositions of members of the Eastleigh Business Community led by their chairman, Ahmed Nur. They all claim that the applicant helped to restore peace and order in their community and should not be unfairly targeted for neutralizing armed gang members.
  7. The motion is contested by the respondents. There are grounds of opposition dated December 7, 2022 and a replying affidavit sworn by Emmanuel Lagat, the director of investigations at the Independent Policing Oversight Authority (hereafter IPOA or the 1<sup>st</sup> respondent), in a synopsis he avers that all the arguments by the petitioner would constitute a defence to the charges of murder. Accordingly, the present motion is a usurpation of the role of the trial court. In any case, he argues, an Information having been presented to the High Court, the criminal charges have already commenced and the petitioner should present himself to take plea.
  8. The DPP has filed a preliminary objection to the motion and petition dated January 27, 2023. He asserts that the High Court lacks jurisdiction to grant any conservatory order by dint of sections 274, 275, 276, and 279 of the *Criminal Procedure Code*.
  9. I should point out at the earliest that motions for joinder as interested parties by the Independent Medico-Legal Unit (IMLU) and Amnesty International Kenya dated February 7, 2023 and February 2, 2023 respectively were withdrawn.
  10. On February 8, 2023, I heard submissions from learned counsel for the petitioner and the respondents.
  11. I take the following view of the matter. There is a caveat because the main petition is pending for hearing. I thus decline the invitation to make conclusive findings on contested facts. But I can safely state the following. The applicant has been a police officer for nearly 22 years and risen through the ranks to the level of sergeant. He claims to be a law-abiding officer who has never misused his firearm.
  12. With regard to the present dispute he avers, firstly, that he has never been summoned by IPOA to record a statement and learnt of the matter through social media. Secondly, he touts his successes in tackling gangs in Eastleigh styled Super Power and Gaza. He said the former had links with Al Shabaab and was being used to conduct grenade attacks within the larger Eastleigh area.
  13. Regarding the incident in issue of March 31, 2017, he insists that the two deceased persons were killed in the course of a robbery; and, that they were dangerous, armed and had attacked police officers. He deposes at paragraph 12 and 13 of his affidavit as follows-
    - (12) That the armed robbers, who were about seven in number shot at the police officers and members of the public. In a bid to protect lives, one robber who was carrying the homemade gun was gunned down in the heavy exchange of gun fire.



- (13) That one of the robbers, upon realizing that he was cornered tried to snatch a firearm from a police officer. In the ensuing scuffle, he was also shot and neutralized.
14. The rebuttal from IPOA is that it conducted independent investigations in accordance with its mandate under sections 6, 7, 25 and 29 of the *Independent Policing Oversight Authority Act*. Upon review of “eye witness evidence, ballistic evidence and documentary evidence” it recommended to the DPP that the petitioner be charged with murder. The DPP concurred in that recommendation leading to the Information before the High Court. IPOA’s case is that the evidence will be available at the trial; and, that the issues now raised by the petitioner should be presented in his defence.
15. The jurisdiction of the High Court to grant the type of orders sought by the petitioner is not in doubt. But it has to be restrained and tempered. The point was succinctly captured by the recent decision of the Supreme Court in *Saisi & 7 others v DPP & 2 others*, Petitions nos 39 & 40 of 2019 (consolidated) [2023] KESC 6 (KLR).
16. Article 157 of the *Constitution* grants the office of the DPP the mandate to prosecute criminal matters. Under the *Independent Policing Oversight Authority Act*, IPOA is bestowed power to conduct investigations of the type of case in issue and to make recommendations to the DPP. From the letter annexed as EL-1 to the replying affidavit, that seems to be the case and the DPP concurred in that recommendation.
17. For obvious reasons I cannot second guess why the DPP accepted the recommendation. This court cannot extend its tentacles to supervise the manner in which IPOA carries its investigative duties under its parent Act or to encroach upon the constitutional independence of the DPP ordained by article 157 of the *Constitution*.
18. There is of course a caveat: those two respondents must act in a reasonable manner. A question has lingered in my mind. The petitioner says, and it has not been controverted, that IPOA has never summoned him to record a statement. Is it material to the investigation that such a statement be taken and the petitioner’s version be taken into account? Two lives were lost in circumstances IPOA believes the petitioner is culpable. But the petitioner is still entitled to due process of the law.
19. Learned counsel for the petitioner, Mr Omari, questioned the validity of the charge or veracity of the evidence. That may be jumping the gun. In *William Ruto & another v Attorney General* Nairobi, High Court Civil Suit 1192 of 2005 [2010] eKLR, the court had this to say-
- The petitioners have questioned the competence of the charges that they face. In our view, it is not for this court to determine whether or not the charges as framed disclose an offence. There are adequate provisions in the *Criminal Procedure Code* (CPC) for instance section 89 (5) *CPC* which can be used to address the issue.
20. The petitioner and indeed any accused person is deemed innocent until proved otherwise and entitled to equal protection before the law. From the averments by the petitioner that I set out above, he seems to have a robust defence to the charge of murder. Considering the main petition has not been heard, and the anticipated charge, the less I say about it the better.
21. Like I stated at the beginning, an information charging the petitioner has already been presented before the court. A date for plea was in fact set for December 8, 2022. It must follow that the prayer for a conservatory order to stop “the commencement” of criminal proceedings has been overtaken by events. That said, the petitioner has a right to object to or challenge the validity of the information before the trial court for instance under sections 275 and 276 of the *Criminal Procedure Code*.



22. The following passage in *James Gesami v Attorney General & 2 others* Nairobi, High Court Petition 376 of 2011 [2012] eKLR is apt-

With respect, I do not find anything discriminatory in the preferment of criminal charges against the petitioner. The DPP is at liberty to prefer charges against any party in respect of whom he finds sufficient evidence to prefer charges. I do not know of anything in the law that would require that all members of the CDF Committee for West Mugirango constituency be prosecuted for alleged misappropriation of funds unless there was evidence against them.

23. Upon review of the materials annexed to the motion and my analysis of the law and authorities, I have reached the conclusion that the notice of motion dated November 29, 2022 is not merited. It is hereby dismissed. The main petition may be heard on priority.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF MARCH 2023.**

**KANYI KIMONDO**

**JUDGE**

**Ruling read virtually on Microsoft Teams in the presence of: -**

**Mr Omari and Mr Omaiyo for the applicant instructed by Musyoki, Mogaka & Company Advocates.**

**Ms Gichuhi, Ms Kigira and Ms Mulama and also holding brief for Mr Monda for the 2<sup>nd</sup> respondent instructed by the office of the Director of Public prosecutions.**

**Mrs Nzwii holding brief for Mr Kinoti for the 1<sup>st</sup> respondent instructed by the Independent Policing Oversight Authority.**

**Messrs Aboubakar, Kiprono, Gichuki and Obara watching brief for the victims' families.**

**Ms Fatuma, Court assistant.**

