



REPUBLIC OF KENYA



Gikonyo v Chief Magistrate's Court at Milimani & 8 others (Petition E23 of 2023) [2024] KEHC 11392 (KLR) (24 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11392 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

PETITION E23 OF 2023

EC MWITA, J

SEPTEMBER 24, 2024

BETWEEN

PETER GATHUNGU GIKONYO PETITIONER

AND

CHIEF MAGISTRATE'S COURT AT MILIMANI 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

CHARLES KIBANDI KAGUOYA 3RD RESPONDENT

JOE WANYOIKE GICHUHI 4TH RESPONDENT

FRANCIS KIBATTA KAIRU 5TH RESPONDENT

KAGGS INVESTMENT LIMITED 6TH RESPONDENT

KETHIAN INVESTMENT LIMITED 7TH RESPONDENT

CIRKON TRUST COMPANY LIMITED 8TH RESPONDENT

HYPER TRADING LIMITED 9TH RESPONDENT

JUDGMENT

Petitioner's Case

1. The petitioner runs a real estate agency called Afriland Agencies, with offices in Nakuru and Nairobi Counties. Through this entity, the petitioner acted as an agent managing rental properties registered in the names of the 6th 7th 8th and 9th respondents. The petitioner's mandate was to source for tenants, collect rent and remit the rent, less his expenses.
2. The petitioner pleads that he discharged this mandate faithfully for 15 years but the the 3rd respondent instigated a malicious and vengeful campaign to destroy his business and terminate the agency



- relationship. This was after the 3rd respondent caused publication of several advertisements in the newspapers painting the petitioner in bad light. The 3rd respondent also came up with a false and forged property management agreement in furtherance of that scheme.
3. The 4th and 5th respondents then instituted criminal proceedings against the petitioner. The 3rd to 5th respondents went ahead and terminated the agency relationship between the petitioner and the 6th, 7th, 8th and 9th respondents following an audit conducted by MK Eliud & Associates.
 4. The petitioner asserted that the 3rd respondent who had had been his advocate, used confidential documents such as his passport photo, to tarnish the petitioner's name and destroy his business. The 3rd respondent also drew the purported property management agreement and forged his signature.
 5. The 3rd respondent further caused charges to be brought against the petitioner for stealing Kshs. 8, 684,000 and Kshs. 4,390,000 respectively. Particulars of the charges were dated 29th June 2020, the same dates as the property management agreement.
 6. The petitioner stated that although the purported property management agreement provided for arbitration as the mode for dispute resolution, the 3rd respondent commenced civil suit No. E 4962 of 2020 instead, claiming the same amount in the charge sheet in Criminal Case No. E 4026 of 2020. The 3rd respondent obtained an ex parte judgment for Kshs. 8, 684,000 which was however set aside
 7. According to the petitioner, the 3rd respondent did not disclose that he had acted and continued to act for him. Further, despite instituting Civil Suit No. E4962 of 2020, the 3rd respondent again instituted the criminal case with the intention of destroying his (petitioner's) business. The petitioner maintained that he was not given an opportunity to tell his side of the story before being charged in E067 of 2023. The police simply invaded his home brandishing guns in front of his wife and children.
 8. The petitioner maintained that in all the criminal cases, the investigating officer is the same (PC Paul), while the 3rd respondent is a witness for the prosecution in all those cases. He, (the petitioner) was arraigned in Milimani Criminal Case Nos. MCCR E 4026 of 2020; MCCR/E948/2021 and MCCR E067 of 2023, on similar charges. According to the petitioner, the timing of the criminal proceedings was intended to intimidate, frustrate and destroy him and his livelihood.
 9. It is the petitioner's case, that the 3rd to 5th respondents have weaponised the criminal justice system to further a personal vendetta. This is so, because the 3rd respondent through his advocate in Civil Suit No. E 4962 of 2020, wrote a letter dated 17th October 2022 to the Firearms Licensing Board asking the Board to consider withdrawing his (petitioner's) firearm on grounds the petitioner had been put on his defence in one of the criminal cases.
 10. It is the petitioner's case, that the criminal cases have inconvenienced him as he has to travel to Nairobi to attend the cases.
 11. The petitioner relies on decisions in *Kuria & 3 others v Attorney General* [2002] 2 KLR; *Reuben Mwangi v Director of Public Prosecutions & 2 others* [2012] eKLR; *Rosemary Wanja Mwagiru v A.E. and 3 others* [2013] eKLR and *Republic v Chief Magistrate's Court Mombasa Ex-parte Ganijee and Another* [2002] KLR 703, for the argument that although civil proceedings do not bar institution of criminal proceedings on the same facts, the court has powers to intervene where the criminal proceedings are oppressive, vexatious and an abuse of the court process, or amount to a breach of fundamental rights and freedoms.
 12. The petitioner maintained that the criminal proceedings against him are oppressive, vexatious, an abuse of the court process and they contravene his fundamental rights and freedoms.



13. The petitioner again relied on *Republic v Chief of General Staff & another* [2017] eKLR for the position that since the 3rd respondent did not controvert the contention that he used confidential information obtained in the course of advocate-client relationship, it must be taken to be true.
14. On general damages, the petitioner proposed a global figure of Kshs. 5,000,000. He relied on *MWK & another v Attorney General & 4 others*; *Independent Medical Legal Unit (IMLU) (Interested Party)*; *The Redress Trust (Amicus Curiae) (Constitutional Petition 347 of 2015)* [2017] KEHC 1496 (KLR) (Constitutional and Human Rights) (18 December 2017) (Judgment); *Wanjiru v Machakos University (Petition E021 of 2021)* [2022] KEHC 10599 (KLR) (3 August 2022) (Judgment) and *Mutuku Ndambuki Matingi v Rafiki Microfinance Bank Limited* [2021] eKLR.
15. Based on the above arguments, the petitioner sought the following reliefs:
 - i. A declaration that his arraignment, charge and prosecution is tainted with ulterior motives, bad faith and against public interest.
 - ii. A declaration that his arraignment, charge and prosecution is an abuse of prosecutorial discretion and the court process -the criminal justice process.
 - iii. A declaration that the 3rd, 4th and 5th respondent's criminal complaints were made with ulterior motives and bad faith.
 - iv. An order of certiorari be issued calling into this Court, the proceedings in Milimani Chief Magistrates Court Criminal Case Number CR E4026 of 2020, MCCR/E948/2021, MCCR E067 of 2023, *Republic v Peter Gathungo Gikonyo* for purpose of being quashed.
 - v. A declaration that a 'decision to charge/prosecute or not to charge/prosecute' within the meaning of sections 5(4) (e) and 23 (1) (a) of the *Office of the Director of Public Prosecutions Act*, 2013 amounts to an administrative action within the meaning of section 2 of the *Fair Administrative Action Act*.
 - vi. A declaration that the 2nd respondent's action of charging/prosecuting the petitioner without taking into account the matters raised by the petitioner, as pleaded at paragraphs 19-34, the 2nd respondent failed to take into account relevant considerations and thus subjected the petitioner to an unfair administrative action, and violated article 47 of *the Constitution* and the *Fair Administrative Action Act*.
 - vii. A declaration be issued that the the 3rd, 4th and 5th respondent's act of using the petitioner's photograph and personal details obtained in a confidential agreement is contrary to articles 28 and 31 of *the Constitution* and infringes on the petitioner's rights to dignity and privacy.
 - viii. A permanent injunction be issued prohibiting the 3rd respondent from publishing the face and details of the petitioner in any local daily and or newspaper or national circulation henceforth.
 - ix. An order of mandamus be issued, directing the 3rd respondent to publish an advertisement 12 times in newspaper of nationwide circulation withdrawing the false publications against the petitioner, and an apology.
 - x. Damages for subjecting the petitioner to an unfair administrative action.
 - xi. Damages against the 3rd, 4th and 5th respondents for violating the petitioner's right to privacy and dignity enshrined in articles 28 and 31 of *the Constitution*.
 - xii. Costs of, and incidental to, these proceedings be borne by the 3rd, 4th and 5th respondents.



- xiii. Any other relief that this Honourable Court may deem fit and just to grant in the interests of justice and/ or that may become apparent and necessary in the course of these proceedings.

Responses

16. The 1st respondent did not file a response or submissions to the petition.

2nd respondent's case

17. The 2nd respondent (the DPP) opposed the petition through a replying affidavit sworn by CPL Lilian Otieno Muthama. According to the DPP, on 30th September 2020, the 3rd respondent filed a complaint of stealing by agent against the petitioner. After investigations, the petitioner was charged in Criminal Case Number E4026 of 2020.
18. Again, on 31st March 2021, the 5th respondent filed a complaint against the petitioner and after investigations, the petitioner was charged in Criminal Case E948 of 2021. And on 4th November 2021, the 4th respondent filed a complaint against the petitioner which lead to Criminal Case No. E067 of 2023. The common denominator in those complainants was that the petitioner, being their agent, had stolen rent and tenants' deposits.
19. Investigations established that the petitioner being an agent of the respondents stole rent as well as tenants' deposits. Upon perusing the investigation files, the DPP made the decision to charge the petitioner under section 283 (c) of the Penal Code in all the three files.
20. The DPP argued that in CR. Case No. E4026 of 2020, the trial court had delivered a ruling on 16th August 2022, finding that the petitioner had a case to answer and put him on his defence.
21. The DPP took view, that the petitioner had not raised any constitutional issues; had not demonstrated any breach of constitutional rights and there was also no evidence of ulterior motive in initiating the prosecutions. The court should not, therefore, interfere with his mandate.
22. The DPP relied on article 157 (6), (10) and (11) of *the Constitution* for the position that in charging the petitioner, he acted in accordance with his mandate under the law. The decision was arrived at after establishing that evidence gathered met the threshold for prosecuting the petitioner.
23. Regarding the petitioner's complaint on the inconvenience caused to him travelling to Nairobi, the DPP argued that the complaints related to in Nairobi and witnesses are also based in Nairobi. The petitioner had not raised the issue before the trial court, or sought to have the cases transfer to Nakuru.
24. The DPP relied on section 193 A of the Criminal Procedure Code to argue that in determining the concurrency of criminal and civil proceedings, and whether to stay criminal prosecution, the court considers the commonality of the issues raises, the timing of the petition, legal effectiveness of both cases, the public interest and whether the petitioner is intentionally creating an impediment. In the absence of special circumstances, both cases should proceed. The petitioner had not illustrated the common issues between the criminal and civil cases and how the decision to charge him with the criminal offences affected the civil cases.
25. The DPP maintained that under articles 157(6) and 245(4) of *the Constitution*, the petitioner failed to prove that in undertaking the investigations into the complaints and making the decision to charge, he acted in excess of his mandate.



26. According to the DPP, an order of mandamus cannot be granted as it is sought against a private individual as opposed to a public body. Reliance is placed on Republic v The *commissioner of Lands & another Ex-parte Kitbinji Murugu Magere Nairobi High Court Misc. Application No. 395 of 2012*.
27. The DPP further relied on the decisions in Anarita Karimi Njeru v Republic [1979] eKLR and Communications Commission of Kenya & 5 others v Royal Media services limited & 5 others [2014] eKLR, that the petitioner had not met the threshold for allowing the petition. The DPP urged the court to dismiss the petition with costs.

3rd, 6th and 7th respondents' case

28. The 3rd, 6th and 7th respondents opposed the petition through a replying affidavit and written submissions. They confirmed that the 3rd respondent introduced the petitioner to the 4th and 5th respondents for purposes of managing houses belonging to the 8th and 9th respondents. The 6th and 7th respondents are the registered owners of various properties in Nairobi, which the petitioner had been managing until in 2020 when his services were terminated.
29. The 3rd respondent stated that he instructed the firm of MK Eliud & Associates to conduct an audit on the petitioner's financial dealings with the 6th and 7th respondents. The audit confirmed that the petitioner was stealing rents and deposits received from tenants.
30. The 3rd respondent asked the petitioner to pay the money he had stolen but the petitioner refused. This necessitated putting up notices in newspapers to inform the public that the petitioner no longer had authority to act on behalf of the 6th and 7th respondents. The matter was also reported to the police, who after investigations, charged the petitioner with a criminal case (No. E4026 of 2020).
31. The 3rd respondent asserted that that the DPP was at liberty to prosecute any person in respect of whom there was sufficient evidence for doing so. In that respect, the petitioner was subjected to normal criminal process allowed by law with all the safeguards guaranteed by *the Constitution*. This did not amount to a violation of his right to dignity.
32. It was the 3rd, 6th and 7th respondents' case, that the accuracy and correctness of the evidence, or facts gathered during investigation, can only be assessed and tested by the trial court. The argument that the prosecution was malicious has no basis. The petitioner's rights had not been violated as he will be accorded an opportunity to defend himself during trial. Further, in CR. Case No. E4026 of 2020, the trial court found the petitioner had a case to answer and put the him on his defence. The petitioner had already testified in his defence, negating any allegation of malice.
33. The 3rd, 6th and 7th respondents argued that the petitioner had not proved that there was advocate-client relationship between him and the 3rd respondent and that such relationship was abused. According to them, the petitioner signed the property management agreement which was properly witnessed, a fact demonstrated in the defence in Civil Case No. E4962 of 2020.
34. The 3rd, 6th and 7th respondents asserted that nothing stops a party from instituting a civil case from the same cause of action where a criminal case has been filed. The petition is, therefore, an appeal against the consolidated civil cases. They relied on Hussein Khalid and 16 others vs Attorney General & 2 others (2019) eKLR to urge the court to dismiss the petition and allow the criminal cases to proceed.



4th and 8th respondents' case

35. The 4th and 8th respondents opposed the petition through a replying affidavit and written submissions. They stated that in 2008, the 3rd respondent introduced the petitioner to the 4th respondent for purposes of managing the 8th respondent's houses.
36. The petitioner managed the houses but his services were terminated in 2020 after he (petitioner) failed to ensure that the properties were well managed; paid recurrent costs; undertook repairs and remitted the deposits paid for onward transmission to tenants once they vacated the properties. Electricity bills were also not paid.
37. The matter was reported to the police who, after investigations, charged the petitioner with CR. Case No. E067 of 2023 for stealing by agent contrary to section 283(c) of the Penal Code. They maintained that the DPP is at liberty to prefer charges against any person in respect of whom there is sufficient evidence to sustain the charges. They relied on Maina & 4 others v Director of Public Prosecution & 4 others (Constitutional Petition E106 & 160 of 2021 (Consolidated)) [2022] KEHC 15 (KLR) (Constitutional and Human Rights) (27 January 2022) (Judgment).
38. The 4th and 8th respondents argued that subjecting the petitioner to standard criminal prosecution allowed by law, did not violate his fundamental rights and freedoms. They maintained that investigations were not malicious; the criminal proceedings are justified and the petitioner has an opportunity to defend himself during trial. In their view, the petition should not be an appeal against the criminal cases otherwise it is an abuse of the court process.
39. The 4th and 8th respondents relied on the Cyrus Shakhlanga Khwa Jirongo v Soy Developers Ltd & 9 others [2021] eKLR, to support the position that the decision to charge and prosecute was not tainted with ulterior motives, bad faith and was against the public interest.
40. The 4th and 8th respondents maintained that termination of the criminal cases would frustrate the rule of law as the petitioner has constitutional safeguards in respect of his rights even when undergoing trial. The petitioner had not shown that the criminal trial is an abuse of the court process, or that his prosecution will infringe articles 28 and 31 of the Constitution. Reliance was placed on Lalchand Fulchand and Shah v Investments & Mortgages Bank Limited & 5 others (2018) eKLR.
41. Further reliance was placed on Maina & 4 others v Director of Public Prosecution & 4 others (supra) for the argument that the decision to charge and subsequent prosecution was not an administrative decision. They urged that the petition be dismissed with costs.

5th and 9th respondent's case

42. The 5th and 9th respondents also opposed the petition through a replying affidavit. They substantially reiterated the 4th and 8th respondents' response. They stated that the 3rd respondent introduced the petitioner to the 5th respondent to manage houses belonging to the 9th respondent. Just like the other respondents, the petitioner's services were terminated in 2020 on suspicion of the inaccuracy of the monthly reports, including the expenses on the vigilante fee and electricity bills.
43. In November 2020, an audit was conducted by MK Eliud and associates on electricity and vigilante fee. The report revealed that between January 2013 and June 2020, the petitioner had stolen Kshs. 1,281,464, which was unaccounted balance for electricity bills, and Kshs. 315,000 alleged to be vigilante fee. The matter was reported to the police and after investigations, the petitioner was charged in CR. Case No. E948 of 2021 for stealing by agent contrary to section 283(c) of the Penal Code.



44. The 5th and 9th respondents further reiterated the submissions of the 4th and 8th respondents and urged that the petition be dismissed with costs.

Determination

45. I have considered the pleadings, arguments by parties and the decisions relied on. The gravamen of this petition, is the decision to charge and prosecute the petitioner, thus raising the question whether this court should halt the criminal proceedings in the various cases the petitioner is facing before the trial court(s).
46. The facts of this petition are not in dispute. The petitioner's firm was engaged as real estate agent to manage some properties on behalf of the 6th to 9th respondents within Nakuru and Nairobi Counties. The petitioner was to get tenants; collect rents and remitted it to the principles, less his commissions and expenses.
47. The relationship was terminated, complaints lodged with the police and charges were brought against the petitioner in the criminal cases before the 1st respondent.
48. The petitioner brought this petition challenging his prosecution in those criminal cases, arguing that his prosecution was not only malicious, but also intended to ruin his business. Further, that the criminal justice system had been weaponized to further a personal vendetta against him. According to the petitioner. The 3rd respondent who had also been his advocate, used confidential information against him (petitioner); drew a management agreement and forged his signature. The petitioner's case is, therefore, that the criminal prosecution has been instituted in violation of his constitutional rights and fundamental freedoms thus, calls on this court to halt those prosecutions.
49. The respondents on their part, maintained that there is no violation of the petitioner's fundamental rights and freedoms as alleged; the prosecution is well founded and the DPP properly exercised his discretion under *the Constitution* and the law in instituting and undertaking the prosecutions. According to the respondents, the petitioner had not demonstrated that the decision to charge him was malicious; was not in accordance with the law, or was against public interest.
50. The DPP has constitutional mandate and discretion to initiate, continue and, or terminate criminal prosecutions. (Article 157). In doing so, the DPP does not require consent, or permission from any person or authority (157(10)). The DPP must, however, exercise his powers in a manner that has regard to public interest, interests of administration of justice and the need to prevent and avoid abuse of the legal process (Article 157(11)). (See *Director of Public Prosecutions v Martin Mina & 4others* [2017] eKLR).
51. In that respect, the law is settled that where the DPP has exercised constitutional discretion conferred on his office, courts will rarely interfere with that discretion. This has been affirmed by courts on many occasions. Courts should only interfere where there are justifiable grounds.
52. For instance, in *Republic v Director of Public Prosecution & 2 others Ex parte Francis Njakwe Maina & another* [2015] eKLR, it was observed that courts ought not usurp the constitutional mandate of the Director of prosecutions to undertake prosecution in exercise of the discretion conferred upon that office. A point was however made, that if an applicant demonstrates that the criminal proceedings constitute an abuse of process, the court will not hesitate in putting a halt to such proceedings.
53. Further, in *Paul Ng'ang'a Nyaga v Attorney General & 3 others* (2013) eKLR, it was held that the court will only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that those bodies acted in contravention of *the Constitution* or the law.



54. Similarly, in Francis Anyango Juma v The Director of Public Prosecutions and another [2012] eKLR, the Court stated:

[T]he intention under the Constitution, was to enable the Director of Public Prosecutions to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the DPP of his power under the Constitution or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a party's rights under the Constitution, or violation of the Constitution itself.

55. And in Williams v Spautz [1992] HCA 34; 174 CLR 509; 66 ALJR 585, it was stated that “If a stay is sought to stop a prosecution which has been instituted and maintained for an improper purpose, it by no means follows that it is necessary, before granting a stay, for the court to satisfy itself in such a case, that an unfair trial will ensue unless the prosecution is stopped.”

56. The Court emphasized that unless the interests of justice demand it, courts should refrain from exercising the jurisdiction, and persons charged with criminal offences should not obtain an immunity from prosecution.

57. Courts have thus, maintained that the DPP's discretion to charge will only be interfered with where there is evidence of abuse, malice and all the negative instances that blur exercise of that discretion. It was emphasised in Kuria & 3 others v Attorney General [2002] 2 KLR 69, that the court has the power and duty to prohibit continuation of criminal prosecution if extraneous matters divorced from the goals of justice, guide their instigation. A stay by an order of prohibition should be granted where compelling an accused to stand trial would violate the fundamental principles of justice.

58. As is clear from the decisions above, the law is settled, that courts should be slow to interfere with the DPP's constitutional discretion to prosecute. Article 157(10) shields that discretion, so that the DPP does 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.” The only caveat is in Article 157(11), that in exercising those powers, the DPP should have regard to “public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”

59. For the petitioner to succeed, he had to show that in deciding to mount prosecution against him, the DPP did not make the decision in public interest or interest of administration of justice, but that the decision was based on extraneous matters and is, therefore, an abuse of the legal process.

60. The petitioner's case, as seen from the pleadings, depositions in his affidavit and submissions, is that the respondents instigated the charges against him vengefully in pursuit of a personal vendetta. Further, the 3rd respondent “manufactured” a management agreement and forged his signature using confidential information having previously acted for him (petitioner) as his advocate. These assertions are matters of fact which can only be established through evidence and not affidavits. For instance, whether the 3rd respondent acted or continues to act as the petitioner's advocate is a matter of fact to be established through evidence. Whether the petitioner's signature on the property management agreement was forged, is also a matter of fact. These matters form the petitioner's defence thus fall within the province of the trial court and not this court.

61. The petitioner again argued that the date on the property management agreement and those in the charge sheets are similar. This issue and its relevance should be raised before the trial court which will have to take evidence and determine the accuracy and relevance of these concerns.



62. In this petition, the petitioner does not argue that the decision to prosecute him is against public interest or that it is not in furtherance of interest of administration of justice. What I see the argument to be, is that there is a personal vendetta, vengefulness and that the respondents have weaponised the criminal justice system, thus the decision charge is an abuse of the legal process. On the other hand, the respondents argue that they laid complaints with the police on stealing, investigations were conducted and prosecution was initiated against the petitioner.
63. A careful review of the concerns raised by the petitioner in this petition, do not in my respectful view, fall within the caveat in Article 157(11). That is, the petitioner has not demonstrated that the decision to charge and prosecute him is against public interest and thus, does not further interest of the administration of justice. The argument that respondents have weaponized the criminal justice system making the decision to charge an abuse of the legal process must be weighed against the facts which have been placed before this court.
64. Similarly, whether the property management agreement was manufactured and the petitioner's signature forged, whether the charges are vengeful and a personal vendetta will not, on their own, be a basis for halting the prosecution as this will depend on the evidence to be adduced during the trial.
65. It was in this regard that the Court of Appeal stated in *Director of Public Prosecutions v Martin Mina & 4 others* [2017] eKLR, that it is not "the duty of the High Court ... to evaluate the sufficiency of the evidence in the envisaged criminal proceedings, that is the function of the trial Court, or the High Court in a criminal appeal. A Judicial Review Court should not usurp the functions of a trial court, except in the clearest of the cases."
66. Whether or not the evidence was sufficient for making the decision to prosecute the petitioner; the document was manufactured and whether there is vendetta will be answered by the trial court after hearing and evaluating evidence and not this court. Further, it is my respectful view, that it is the DPP's mandate, if he is satisfied that there is sufficient evidence to sustain criminal prosecution, to initiate and continue such prosecution. The DPP can also after reviewing the evidence, discontinue such prosecution with permission of the court. This court would only interfere if the petitioner demonstrated to its satisfaction, that the DPP was exercising his discretion contrary to letter and spirit of Article 157(11) of *the Constitution*.
67. In the present petition, the petitioner has not pointed out how the DPP has abused his discretion in making the decision to prosecute him, in violation of Article 157(11) to call on this court's review jurisdiction to halt the prosecution(s).
68. There was the further argument that there are civil proceedings concurrent with the criminal prosecutions thus, a ground for halting the prosecution. According to the petitioner, civil suits were filed against him claiming the same amount in the charge sheets.
69. Section 193A of the Criminal Procedure Code allows concurrent criminal and civil prosecutions, providing:
- "Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings."
70. A reading of the section, yields a plain fact that where a matter in issue in criminal proceeding is also directly or substantially in issue in pending civil proceedings, that alone is not a bar to the commencement of criminal proceedings. In this respect, the view I take, is that where there are



concurrent criminal and civil proceedings based on similar set of facts and circumstances, the criminal proceedings should be allowed to run its course unless it is shown clearly that proceeding with the criminal case will infringe on the petitioner's rights and fundamental freedoms, thus a contravention of *the Constitution*. That has not been demonstrated to be the case here.

71. The DPP exercised his mandate donated by *the Constitution*. As this court observed in *Mwani v DPP & another: JNM (Interested Party Petition No. 118 of 2018*[2024] KEHC 7282(KLR) (14 June 2024) (Judgment):

The 2010 Constitution dispersed power and identified organs to exercise which power and the limit of exercise of that power. In that regard, organs of state and institutions must be allowed to exercise power assigned to them by *the Constitution* and the law. This Court will interfere only where there is clear evidence that the power is not being exercised as contemplated by *the Constitution* and the law. In other words, this court would only interfere if it was shown that the criminal prosecution was being used for ulterior or improper purpose.

72. From the material placed before this court, the petitioner has not satisfied the threshold that would persuade the court to exercise its judicial review jurisdiction and halt the criminal proceedings in the magistrate's court. I also note, that in one of the criminal cases, the petitioner was found to have a case to answer and put on his defence. He may have already testified in his defence, making it difficult for this court not to appear to be interfering with the trial court's mandate. It is also not clear the stage the other case had reached at the time of hearing this petition.

Conclusion

73. Having considered the petition, responses, submissions, *the Constitution* and decisions relied on; noting the fact that the petitioner will have an opportunity to respond to the charges and cross-examine witnesses, I do not find sufficient reasons to intervene and halt the criminal prosecutions before the magistrate's court.

Disposal

74. The petition is declined and dismissed with no order as to costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF SEPTEMBER 2024

E C MWITA

JUDGE

