



**Republic & another v Yoma & 11 others & another; Independent Medico-Legal Unit & 2 others (Interested Party) (Criminal Case E074 of 2022 & Miscellaneous Criminal Application E033 of 2023 (Consolidated)) [2024] KEHC 8984 (KLR) (Crim) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8984 (KLR)

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

**CRIMINAL**

**CRIMINAL CASE E074 OF 2022 & MISCELLANEOUS  
CRIMINAL APPLICATION E033 OF 2023 (CONSOLIDATED)**

**K KIMONDO, J**

**JULY 25, 2024**

**[FORMERLY NAIROBI CONSTITUTIONAL PETITION NO. E499 OF 2022]**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**TITUS YOMA & 11 OTHERS ..... SUSPECT**

**AS CONSOLIDATED WITH**

**MISCELLANEOUS CRIMINAL APPLICATION E033 OF 2023**

**BETWEEN**

**VOLKER EDAMBO & 2 OTHERS ..... APPLICANT**

**AND**

**THE INDEPENDENT POLICING & OVERSIGHT AUTHORITY & 6  
OTHERS ..... RESPONDENT**

**AND**

**INDEPENDENT MEDICO-LEGAL UNIT & 2 OTHERS ... INTERESTED PARTY**



## RULING

1. On 18<sup>th</sup> January 2024, the Court dismissed prayer 2 in the 2<sup>nd</sup> suspect's notice of motion dated 20<sup>th</sup> December 2022. That prayer had sought empanelment of an uneven number of judges by the Chief Justice pursuant to Article 165 (4) of *the Constitution*.
2. This ruling now disposes of the remainder of that notice of motion as well as the separate constitutional petition dated 9<sup>th</sup> November 2022 by the 7<sup>th</sup>, 9<sup>th</sup> and 12<sup>th</sup> suspects. The latter petition was originally filed at the Constitutional and Human Rights Division as Petition Number E499 of 2022 Volker Edambo & 2 others v Independent Policing & Oversight Authority & 6 others but was transferred to the Criminal Division and re-numbered as Miscellaneous Criminal Application No. E033 of 2023.
3. The key prayers in the notice of motion are three: Firstly, that the charges disclosed in the Information do not meet the threshold of international crimes based on "command responsibility and [are] hence inadmissible". Secondly, for an order that the suspect be supplied with the evidence the prosecution intends to rely on; and, thirdly, a finding that section 7 (1) (f) of the *International Crimes Act* and Article 28 (b) of the Rome Statute of the International Criminal Court (hereafter the Rome Statute) offend Article 245 of *the Constitution*.
4. The petition on the other hand sought various declarations, prohibition and related orders to restrain the respondents from arresting or prosecuting the suspects on the grounds that the actions violated articles 10, 27, 28, 29, 47, 48, 50, 73 and 232 of *the Constitution*. They also craved an order to quash the Information and for compensation, damages and costs.
5. The background and history of the litigation is material. The Director of Public Prosecutions (hereafter the DPP) brought Information to the High Court dated 26<sup>th</sup> October 2022 charging the suspects with various counts of murder, rape and torture as crimes against humanity contrary to sections 6 (3) (a) & (b) and 7 (1) (f) of the *International Crimes Act* and Article 28 (b) of the Rome Statute of the International Criminal Court (hereafter the Rome Statute).
6. The plea has not been taken but all the suspects, save for the 11<sup>th</sup>, are out on personal bonds of KShs 200,000 each. The 11<sup>th</sup> suspect (Mohamed Baa) failed to honour earlier court summons. A warrant of arrest was issued and still remains in force.
7. The backdrop of this dispute was well captured in the earlier ruling delivered on 18<sup>th</sup> January 2024 at paragraphs 4 to 9:
  - (4) Prior to the filing of the Information, the DPP had applied ex parte to the High Court in Miscellaneous Criminal Application No. E310 of 2022 for leave to redact the identities of the victims or prospective witnesses. The leave was granted on 26<sup>th</sup> October 2022.
  - (5) The offences are alleged to have taken place on diverse dates in the month of August 2017 at Nyalenda, Kisumu East Sub-County, Kisumu County. To put the matter into perspective, following the disputed results of the general election of 2017, violence spread out to the informal settlements in Nyalenda, Kisumu. The suspects are all police officers and are accused of being the commanders or in effective responsibility for police officers under their control in the region.
  - (6) The Information charges them for the murder of Baby Samantha Pendo, and failing to submit the matter to competent authorities for investigation. They are also charged for "widespread



acts of sexual violence against civilian women” and various acts of torture against civilians in an operation dubbed Operation Post-Election Mipango.

- (7) It is also worth of note that an inquest had been carried out in Chief Magistrates Court Kisumu Inquest No. 6 of 2017. The learned magistrate, B.M.A Omollo, returned a finding that the named police officers “were liable for the death of Baby Samantha Pendo” and forwarded the file to the DPP “to deal with the findings in accordance with the law”. I must point out that not all the suspects now before me were parties to the inquest at Kisumu.
  - (8) On 31st October 2022, I issued directions in chambers that the summons be served upon the suspects to take plea on 4th November 2022. Some of the suspects later appeared before Ogembo J on 14th November 2022 and were granted personal bonds of Kshs 200,000. The plea was deferred to 21st November 2022 with further summons to the 4th, 10th and 11th suspects.
  - (9) On the latter date, the 4th and 10th suspects appeared and were granted personal bonds on similar terms. The 11th suspect (Mohamed Baa) failed to appear and a warrant of arrest was issued.
8. The 1<sup>st</sup> suspect’s case is premised on the supremacy of *the Constitution*. In particular, he contends that the Information is not admissible because it does not rise to the threshold or gravity of international crimes; or, for offences based on command responsibility. In this regard, he avers that there is no evidence that he was “a commander with powers to allocate duties, dispatch, to instruct or authorize police at Nyalenda area or Kisumu County before, during or after the elections”.
  9. He deposes that he testified as a witness (PW22) in the above inquest and “was never mentioned as a commander/superior, a person to be charged or of interest”. It is thus wrong to allege that officers under his “effective authority and control unlawfully killed Baby Samantha Pendo, raped and tortured other victims and he failed to submit the matter to competent authorities”.
  10. Secondly, the *International Crimes Act* and the Rome Statute are impeached for being in conflict with Article 245 of *the Constitution* which was further given effect by sections 8 and 8A of the *National Police Service Act*. Learned counsel argued that since the local statute predates *the Constitution*, there is need to resolve conflicts between it, the Rome Statute and *the Constitution*; and, to define the applicable regulations or procedures for a domestic trial before the High Court.
  11. In his view, the entire prosecution is driven by malicious and biased “civil society organizations to coin crimes that can be prosecuted under municipal laws to be crimes against humanity...in order to attract donor funding...in the name of justice for Baby Pendo and other victims”
  12. Lastly, he argues that having been “arrested” through a summons by the DPP, he is entitled under *the Constitution*, Article 28 of the Rome Statute and other international covenants to a full disclosure of the reasons and the evidence in possession of the prosecutor at the pre-trial stage and before confirmation of the charges.
  13. The principal submissions by the 7<sup>th</sup>, 9<sup>th</sup> and 12<sup>th</sup> suspects, on the other hand, are four-fold: Firstly, that the information is based on the principle of superior command or command responsibility despite the fact that the three petitioners did not hold such positions or authority.
  14. Secondly, that the Information does not meet the threshold of such crimes because “majority of the [suspects] were placed as alternate commanders”. It is argued that alternate commanders “cannot issue orders unless and until the commander is either injured or taken ill” during the operation or is otherwise incapacitated.



15. To buttress that argument, they aver that following the inquest above, and on 28<sup>th</sup> October 2022, the DPP issued a press statement captioned International Crimes Committed by Police Officers During the 2017 Post-Election Period. Subsequently, they were summoned to appear “which instigated the framing of the charges”.
16. Learned counsel relied largely on the judgment of the International Criminal Court in *Prosecutor v Sefer Halivovic* (2001) ICTY Case No: IT-01-48-I where the following passages appear-
  - [58] ...factors indicative of an accused’s position of authority and effective control may include the official position held by the accused, his capacity to issue orders, whether de jure or de facto, the procedure for appointment, the position of the accused within the military or political structure and the actual tasks that he performed...
  - [60] Command does not arise solely from the superior’s formal or de jure status, but can also be based on the existence of de facto powers of control. In this respect, the necessity to establish the existence of a hierarchical relationship between the superior and the subordinate does not import a requirement of direct or formal subordination...
  - (63) Consistent with the above reasoning, there is no requirement that the superior-subordinate relationship be direct or immediate in nature for a commander to be found liable for the acts of his subordinate. What is required is the establishment of the superior’s effective control over the subordinate, whether that subordinate is immediately answerable to that superior or more remotely under his command...”
17. Thirdly, the 7<sup>th</sup>, 9<sup>th</sup> and 12<sup>th</sup> suspects assert that the charges are discriminatory for failing to charge the Inspector General of Police or regional commanders or other senior officers such as Chief Inspector John Thiringi, Mr. Kimeu Kingaa (County AP Commander, Kisumu) and Mr. Geoffrey Kathurima (CCIO, Kisumu). Learned counsel cited Article 27 of *the Constitution* as well as the decision in *Mohammed Abduba Dida v Debate Media Limited & Another*, Court of Appeal, Nairobi, Civil Appeal 238 of 2017 [2018] eKLR.
18. Fourthly, they submitted that the entire prosecution flies in the face of the principles of natural justice. The 7<sup>th</sup>, 9<sup>th</sup> and 12<sup>th</sup> suspects thus contend that the charges are activated by malice, are an abuse of office of the DPP and are geared towards harassing or intimidating them from performing their duties as police officers. Reliance was placed on, among other decisions, *DPP v Martin Maina & 4 Others*, Court of Appeal, Nairobi, Civil Appeal 270 of 2015 [2017] eKLR.
19. Both the notice of motion and the constitutional petition are fervently opposed by all the 7 respondents and the interested parties either by grounds of opposition, preliminary objections, replying affidavits and written submissions. In the interests of brevity and to avoid repetition, I will deal with those objections globally in the course of this decision.
20. On 23<sup>rd</sup> May 2024, I heard further arguments from all learned counsel for the disputants.
21. I will commence with the objection of misjoinder by the 6<sup>th</sup> and 7<sup>th</sup> respondents (Noordin M. Haji and Jacinta Nyamosi). It is not contested that the two are (or were) officers in the Office of the DPP. Article 157 (9) of *the Constitution* provides that:

The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.



22. The officers working under the DPP are protected from personal liability for official acts done in good faith. Section 15 of the [Office of the Director of Public Prosecutions Act](#) provides:
- No matter or thing done by a member of the staff of the Office or any officer, employee or agent of the Office shall, if the matter or thing is done in good faith in the execution of the functions, powers or duties of the Office, render the member, officer, employee or agent personally liable to any action, claim or demand whatsoever.
23. The DPP has been sued as the 5<sup>th</sup> respondent in the petition. In light of the clear and unambiguous provisions of the law that I have set out; and, in the absence of tangible evidence that the 6<sup>th</sup> and 7<sup>th</sup> respondents acted in bad faith, there is irrefutable misjoinder. I accordingly strike out the two officers from the constitutional petition.
24. The respondents have asserted that the petition is neither drawn with precision nor does it disclose violation of any constitutional rights. Reliance was placed on, inter alia, the decision in Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272.
25. My view is that on the face of the pleadings, the suspects expressly relied on Articles 2(1), 2(5), 3, 22(1), 23, 27(1), 28, 29, 47, 48, 50, 157, 238, 244 and 245 of [the Constitution](#). The dispute is also well explained at paragraphs 32 to 55 of the constitutional petition. Regarding the notice of motion, the challenge to the constitutionality of sections 6 (3) (a) & (b) and 7 (1) (f) of the [International Crimes Act](#) and Article 28 (b) of the Rome Statute is clearly set out at grounds (f), (g) and (h) and paragraph 13 of the supporting affidavit.
26. I thus find and hold that in all the circumstances of this case and materials placed before the Court, the suspects have met the threshold for a constitutional action.
27. I will now turn to the question of the substance of the evidence and whether it discloses international crimes. In view of the orders that I propose to make, I decline the invitation to delve deep into matters of the evidence or its veracity. But before proceeding further, it is important to analyze the relationship between [the Constitution](#), the general rules of international law, international treaties and domestic law within the confines of the present dispute.
28. It is a truism that [the Constitution](#) reigns supreme and binds all persons and organs of the State. Article 2 (5) and (6) of [the Constitution](#) on the other hand recognize the general rules of international law and treaties ratified by Kenya as part of our domestic law. Such treaties are however subordinate to [the Constitution](#). Kenya is a state party to the Rome Statute that establishes the International Criminal Court. Fundamentally, and in 2008, Kenya domesticated the Rome Statute through the [International Crimes Act](#).
29. I have then looked at the issue of jurisdiction of the Kenyan High Court or the alleged conflict between the local statute and the Rome Statute for purposes of the present charges. I have found clear guidance in sections 6, 7 and 8 of the [International Crimes Act](#).
30. Section 6 which sets out the offences reads as follows:
- (1) A person who, in Kenya or elsewhere, commits—
    - (a) genocide;
    - (b) a crime against humanity; or
    - (c) a war crime, is guilty of an offence.



- (2) A person who, in Kenya or elsewhere, conspires or attempts to commit, or is an accessory after the fact in relation to, or who counsels in relation to, an offence mentioned in subsection (1) is guilty of an offence.
- (3) A person who commits an offence under subsection (1) or (2) shall on conviction be liable—
- (a) to be punished as for murder, if an intentional killing forms the basis of the offence; or
  - (b) to imprisonment for life or for a lesser term, in any other case.
31. Subsection 4 thereof defines "crime against humanity" as having "the meaning ascribed to it in article 7 of the Rome Statute and includes an act defined as a crime against humanity in conventional international law or customary international law that is not otherwise dealt with in the Rome Statute or in this Act".
32. Section 7 (1) further provides that for the purposes of proceedings for an offence under section 6, the following provisions of the Rome Statute shall apply, with any necessary modifications—
- (a) .....
  - (f) Article 28 (which relates to the responsibility of commanders and other superiors).
33. Any doubt about the jurisdiction of the High Court to try the offences above in Kenya is wiped out by section 8 of the Act which states-
- (1) A person who is alleged to have committed an offence under section 6 may be tried and punished in Kenya for that offence if—
    - (a) the act or omission constituting the offence is alleged to have been committed in Kenya; or
    - (b) at the time the offence is alleged to have been committed—
      - (i) the person was a Kenyan citizen or was employed by the Government of Kenya in a civilian or military capacity;
      - (ii) the person was a citizen of a state that was engaged in an armed conflict against Kenya, or was employed in a civilian or military capacity by such a state;
      - (iii) the victim of the alleged offence was a Kenyan citizen; or
      - (iv) the victim of the alleged offence was a citizen of a state that was allied with Kenya in an armed conflict; or
    - (c) the person is, after commission of the offence, present in Kenya.
  - (2) A trial authorised by this section to be conducted in Kenya shall be conducted in the High Court.
34. The suspects have all been charged under both the *International Crimes Act* and Article 28 (b) of the Rome Statute. The decision to charge was made by the DPP under Article 157 of *the Constitution*. The notice of motion and the petition thus confuse two distinct procedures between a trial at the International Criminal Court (ICC) and a local trial before the High Court. The events the subject matter of the Information all took place in Kenya and all the suspects are Kenyan citizens.
35. The pre-trial motions or prior confirmation of the charges before a trial at the ICC do not thus apply. Fundamentally, there is no general request for assistance by the ICC provided in Part III of the local



- statute. Even assuming that the offences had occurred out of jurisdiction but that the trial was being conducted here, the High Court would still have the same jurisdiction and powers, and would conduct the proceedings in the same manner, as if the persons were charged with an offence alleged to have been committed within Kenyan jurisdiction. See for example section 37 of the Act.
36. From what I have stated, the prayer in the notice of motion by the 2<sup>nd</sup> suspect to be supplied with the evidence the prosecution intends to rely on along the lines of pre-trial confirmation of charges akin to the procedures in the ICC is misplaced. However, and in light of Article 50 (2) (j) of *the Constitution*, the suspects have a right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence when their trial commences.
  37. A key argument by the suspects is that section 7 (1) (f) of the *International Crimes Act* and Article 28 (b) of the Rome Statute offend Article 245 of *the Constitution*. The latter provides for command of the National Police Service. Article 254 (2) clearly states that the Inspector General of Police “shall exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation”.
  38. Whereas the relevant Cabinet Secretary may give a policy direction in writing to the Inspector General, Sub Article 4 provides that no person may give a direction to the Inspector General with respect to—
    - (a) the investigation of any particular offence or offences;
    - (b) the enforcement of the law against any particular person or persons; or
    - (c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.
  39. The interpretation of *the Constitution* is guided by Article 259. For instance, Sub-Article 1 provides:
    1. This Constitution shall be interpreted in a manner that—
      - a. promotes its purposes, values and principles;
      - b. advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
      - c. permits the development of the law; and
      - d. contributes to good governance.
  40. The Supreme Court in *Judges & Magistrates Vetting Board (JMVB) & 2 Others v The Centre for Human Rights & Democracy & 11 Others*, Supreme Court Petition No. 13a, 14 & 15 of 2013 (consolidated) [2014] eKLR, held that “no constitutional provision is “unconstitutional” and that “the historical context is relevant to the accurate interpretation of *the Constitution*”.
  41. The Court also held in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*, Pet. No.14, 14A, 14B & 14C of 2014 (Consolidated) [2014] eKLR) that “*the Constitution* should be interpreted in a holistic manner, within its context, and in its spirit”.
  42. The phrase holistic approach was well explained in *In the Matter of the Kenya National Human Rights Commission*, Supreme Court Advisory Opinion Reference No. 1 of 2012 [2014] eKLR as follows:
 

[26] ...But what is meant by a ‘holistic interpretation of *the Constitution*’? It must mean interpreting *the Constitution* in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what *the Constitution* must be taken to mean in light of its history, of the issues in dispute, and





of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result...

43. The burden of proof fell upon the suspects to demonstrate that sections 6 (3) (a) & (b) and 7 (1) (f) of the *International Crimes Act* or Article 28 (b) of the Rome Statute are unconstitutional. I am afraid they failed to discharge that burden.
44. I find that Article 245 is primarily concerned with the hierarchy of the national command of the national police service and the powers of the Inspector General to control the service. Sections 6 (3) (a) & (b) and 7 (1) (f) of the *International Crimes Act* or Article 28 (b) of the Rome Statute deal on the other hand are penal provisions for individual criminal liability. I find no obvious conflict between those provisions and Article 245 or even Article 157 of *the Constitution*. I dealt earlier with the relationship between *the Constitution*, the general rules of international law, international treaties and domestic law within the confines of the present dispute.
45. I have also kept in mind that the *International Crimes Act* pre-dates *the Constitution* and may need to be aligned to it; or, to be re-aligned with recent legislation such as sections 8 and 8A of the *National Police Service Act*. The *International Crimes Act* was enacted in 2008 and largely informed by the post-election violence that engulfed the Nation earlier that year. I agree with the applicants that the statute and any regulations may not have undergone necessary amendments to conform fully with *the Constitution*.
46. But I am also alive that there is a clear remedy in Section 7 of the Sixth Schedule to *the Constitution* which provides-
  - (1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution. [underlining added].
47. A further argument is that the suspects should have been taken through alternative internal or other disciplinary processes. Again, all those issues are closely tied with matters of evidence which, like I stated, are better left to the trial court. But I also find that they form no legal basis for a preliminary objection to taking of the plea.
48. I will now return to the ground that the evidence does not measure up to international crimes. When you unpack the prayers by the suspects, they are imploring the court to undertake a merit review of the evidence and to find that there is no foundation for the criminal charges. I decline that invitation for the following primary reason: The applicability of the doctrine of superior or command responsibility and whether or not the available materials and evidence establish the elements thereof under Article 28 or any other Article of the Rome Statute falls squarely within the province of the trial court.
49. It will be for the trial court to determine issues of admissibility, relevance or standard of proof. The same may be said of whether the suspects were superiors or placed in a position of command or whether they bear the highest responsibility.
50. In paragraph 55 of the judgment in Prosecutor v Sefer Halivovic [supra], the Tribunal held that “individual criminal responsibility of commanders for failure to prevent or to punish crimes committed by their subordinates is an established principle of customary international law”.
51. At paragraph 56, the Tribunal found that the prosecutor would be required to establish (a) existence of a superior-subordinate relationship; (b) that the superior knew or had reason to know that the criminal act was about to be or had been committed; and, (c) that he failed to take the necessary and reasonable measures to prevent the criminal act or to punish the perpetrator.





52. In the instant motion and the petition, the suspects are trying to argue in advance about the quality of the evidence; or, that the above standards have not been met. It is not lost on me that the Tribunal above in paragraph 63 added the following-

As to whether the superior has the requisite level of control, this is a matter which must be determined on the basis of the evidence presented in each case. [underlining added]

53. I am equally guided by the Court of Appeal in *Uwe Meixner & another v Attorney General, Mombasa*, Civil Appeal 131 of 2005 [2005] eKLR, where the learned judges held-

It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the Judicial Review court to embark upon an examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence. That is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.

54. I thus find that the majority of the arguments now made at this stage are not only premature but may well constitute powerful lines of defences at the trial. I would add to them the claims that the prosecution is actuated by malice; or, that the DPP's decision to charge was not independent or even well founded. The less I say about it the better.

55. I would say the same about the serious charge the DPP did not act in the public interest or abused his powers or was under the control or direction of NGOs and other persons. Paraphrased, did the DPP act in accordance with Article 157 (10) & (11)? Were his actions discriminatory? Why did he leave out persons superior to the suspects including the Inspector General of Police or persons adversely mentioned in the inquest such as Chief Inspector John Thiringi Force No. 234125, Mr. Kimeu Kingaa, (CP) County AP Commander, Kisumu, and Mr. Geoffrey Kathurima, (CP) CCIIO Kisumu?

56. Like I pointed out earlier, all those are profound arguments but better left to be determined by the trial court on tested evidence. In summary, it falls within the province of the trial court to determine whether the charges as framed under sections 6, 7 and 8 of the Act or Article 28 (b) the Rome Statute hold water. The point to be made is that those arguments are not a proper bar to taking of the plea.

57. The Information charges the suspects with offences of murder, rape and torture contrary to the *International Crimes Act*. Some of the key questions will no doubt be whether the allegations meet the threshold of international crimes or whether the suspects were commanders or in effective responsibility of police officers under their control. A related question will be whether Article 28 (b) the Rome Statute contemplates "superior command or responsibility" for personnel in the Police Service. Paraphrased, whether it only applies to military commanders. All those are matters of law and evidence properly within the ambit of the trial court.

58. I have also kept in mind that the suspects have already been charged with the offences under the Information dated 26<sup>th</sup> October 2022 and presented to the High Court on 27<sup>th</sup> October 2022. On 31<sup>st</sup> October 2022, I directed that the summons be served upon the suspects to take plea on 4<sup>th</sup> November 2022. Some of the suspects later appeared before Ogembo J on 14<sup>th</sup> November 2022 and were granted personal bonds of Kshs 200,000. The plea was deferred to 21<sup>st</sup> November 2022 with further summons to the 4<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> suspects.

59. So much so that the trial of the suspects has commenced at the High Court and many of the arguments now presented in opposition to the plea are best left to the trial court. Paraphrased, save for the



proceedings in the Inquest and the decision thereof, I am ill placed to determine the quality of evidence that the DPP may finally present. It may or may not fall short of the legal and evidential quality for these categories of offences.

60. On that point, I am again well guided by the Supreme Court in *Praxidis Namoni Saisi and others v DPP & others*, Petition 39 & 40 of 2019 [2023] KESC 6 (KLR) (Civ), where the court held-

(88) It is our considered opinion that these are not issues concerning the propriety or otherwise of the decision by the DPP to charge them. These appear to be serious contentions of fact, evidence and interpretation of the law better suited to be examined by a trial court. Certainly, not for the High Court while exercising its judicial review jurisdiction. In *Hussein Khalid and 16 others v Attorney General & 2 others, SC Petition No 21 of 2017*; [2019] eKLR this court held that it was not for the High Court as a constitutional court to go through the merits and demerits of the case as that is the duty of the trial court. Similarly, and as we have held hereinabove, it not for the judicial review court to undertake the merits and demerits of a matter based on controverted evidence and contested interpretations of the law.

61. For all those reasons, I find that the suspects have failed to prove that their rights under Articles 27, 28, 29, 47, 48, 50 and 73 have been violated merely by the decision to charge or by the nature of the charges now preferred against them.

62. It follows that the remainder of the notice of motion by the 2<sup>nd</sup> suspect dated 20<sup>th</sup> December 2022 and the original constitutional petition dated 9<sup>th</sup> November 2022 by the 7<sup>th</sup>, 9<sup>th</sup> and 12<sup>th</sup> suspects are hereby dismissed with no order on costs.

63. In the upshot all the suspects shall now proceed to take plea on a date that I shall now grant. It bears repeating that the suspects are deemed innocent and retain all the rights to equal protection of the law. In view of the substance of the materials that have come into my hands so far; the multiple applications that have been made before me; the rulings so far delivered and especially my findings on this constitutional petition; and, in the interests of justice and a fair trial, it is no longer tenable for me to conduct the criminal trial.

64. I direct instead that the criminal trial shall now be conducted by the next senior judge in the Division but except A. Muteti J, who previously served as a prosecutor in the criminal matter.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JULY 2024.**

**KANYI KIMONDO**

**JUDGE**

Ruling read virtually on Microsoft Teams in the presence of-

All the suspects except the 11<sup>th</sup> suspect.

Ms. Arunga and holding brief for Mr. Monda & Mr. Owiti for the Republic and the 3<sup>rd</sup> to 7<sup>th</sup> respondents instructed by the office of the Director of Public prosecutions.

Mr. Makundi for the 1<sup>st</sup> suspect.

Mr. Munoko for the 2<sup>nd</sup> suspect.

Ms. Jerono for the 4<sup>th</sup> & 6<sup>th</sup> suspects.

Ms. Kiget for the 5<sup>th</sup> suspect.



Ms. Nambale holding brief for Mr. Nzaku for the 7<sup>th</sup>, 9<sup>th</sup> & 12<sup>th</sup> suspects.

Ms. Achieng holding brief for Mr. Miyale for the 8<sup>th</sup> suspect.

Mr. Kinoti for the 1<sup>st</sup> respondent.

Mr. Osman for the 2<sup>nd</sup> respondent.

Ms. Aoko holding brief for Mr. Otieno for the 2<sup>nd</sup> interested party.

Mr. Mbanya for the 3<sup>rd</sup> interested party.

Mr. E. Ombuna, Court Assistant.

