Galot v Kithi (Criminal Appeal 154 of 2016)
[2024] KEHC 11497 (KLR) (Crim) (24 June 2024) (Judgment)

Neutral citation: [2024] KEHC 11497 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL 154 OF 2016

GL NZIOKA, J

JUNE 24, 2024

BETWEEN

MOHAN GALOT ..... APPELLANT

AND

GEORGE KITHI ..... RESPONDENT

(Being an appeal against the decision of Hon. P. M. Mugure (SRM) delivered on 16th November 2016; vide Miscellaneous Cr. Application No. 30 of 2015, at the Chief Magistrate's Court at Milimani)

JUDGMENT

1. By an ex-parte chamber summons application dated 19th October 2015, brought under the provisions of; section 88 and 89 of the Criminal Procedure Code (Cap 75) Laws of Kenya, the applicant (herein "the appellant") sought to be granted leave to commence private prosecution against the respondent.

2. The application was based on the grounds on the face of it and the affidavit sworn by of the applicant on the even date. He averred that, he was the complainant in the Chief Magistrate Criminal Case No. 1686 of 2012: R vs Harry Bob Otieno Mosi. That the respondent was representing the accused person who was charged inter alia with the offence of; obtaining money by false pretences among other charges.

3. That, in the course of the hearing of the aforesaid case, the respondent made strange and wild allegations vide a letter dated 11th July 2013 and an affidavit sworn on 16th July 2013, applying for the learned trial Magistrate to disqualify herself on the ground that, the appellant, had influenced her and prosecution counsels so as to obtain a favourable outcome in the matter.

4. That the learned trial Magistrate held the allegations to be grave and directed investigations to be carried out to ascertain the veracity thereof. That investigation was conducted by the Director of Criminal

Investigations (DCI), County Criminal Investigation Officer and DCIO Central, who vindicated him and recommended that the respondent be charge with; false swearing, conspiracy to defeat justice, perjury and, subordination of perjury.

5. That he was bewildered when the Director of Public Prosecutions recommended that the file be closed despite the glaring evidence to charge the respondent. Further, the Director of Public Prosecutions and the Police have failed and/or refused to act for unknown reasons despite being notified to.

6. The appellant averred that the respondent failed to honour summons to record a statement and/or assist towards the inquiry clearly indicating he had a sinister motive to defeat justice. As such it was in the interest of justice, the application be allowed as prayed.

7. However, the respondent opposed the application vide his replying affidavit dated 16th February 2016 and replying affidavit dated 30th November 2015 sworn by Harry Bob Otieno Mosi.

8. The deponents laid the background facts of the matter to the effect that, Harry Bob Mosi was charged with various offences vide Chief Magistrate Criminal Case No. 1680 of 2012, wherein the appellant is the complainant. That he was represented therein by the respondent as his legal counsel.

9. That the accused confided in the respondent he had information that, the prosecutors in the matter had met the appellant and had received money for themselves and the trial Magistrate in order to secure a favourable outcome in the matter.

10. That the respondent raised the issue with the learned trial Magistrate sought audience to discuss the issue with the learned trial Magistrate in chambers and if it was not possible raise the issue in open court.

11. That the respondent then raised the matter through a letter and an affidavit as directed by the trial court. That subsequently, the learned trial Magistrate recused herself from the case but ordered an investigation into the allegations be carried out.

12. The respondent averred that the subject investigations were carried out but influenced by the appellant, wherein the investigating officer tried to direct him on how to and what to write in his statement so as to exonerate the appellant and threatened him with prosecution but he declined to cede.

13. That the investigation concluded that he be charged. However, when the matter was presented to the Director of Public Prosecutions, the recommendation to charge him was declined and the investigators ordered to close the inquiry file. However, the appellant being desirous to sustain private prosecution against him has sought to do so through private prosecution.

14. The application was canvassed vide filing of submissions and by ruling delivered on 16th November, 2016, the trial court dismissed the application for lack of merit.

15. In dismissing the application, the trial court stated as follows: -

> " The DPP has the mandate to undertake the ultimate decision whether or not to commence the prosecution as against the person concerned. This in itself is not a failure or refusal by the DPP to prosecute and the applicant has also not demonstrated any clear likelihood of a failure of public and private justice.
>
> The basis for the locus standi has also not be shown by the applicant such as, that they have suffered special and exceptional and substantial injury or damage, peculiarly personal to him to warrant private prosecution.
>
> Finally, I find that no demonstrable grounds exist for believing that a grave social evil is being allowed to flourish unchecked because of the DPPs failure to prosecute the respondent.

Given the foregoing analysis the Court finds that the application dated 19.10.2015 lacks merit. The same is hereby dismissed the Court declines to grant leave to the Applicant to institute private prosecution in the case herein".

16. However, the appellant is aggrieved by the decision of the trial court, and filed the appeal herein vide petition of appeal dated 30th November, 2016 on the following grounds:

    a. That the learned magistrate erred in law and fact in failing to apply the guiding principles and conditions enunciated by the courts in the grant of leave to conduct private prosecution.

    b. That the learned magistrate erred in law and fact in failing to find and rule that there was cogent, substantial, credible and preponderance of evidence warranting the grant of leave to conduct Private Prosecution.

    c. That the learned magistrate erred in law and fact in failing to exercise her discretion judiciously thereby prejudicing the appellants' legitimate expectation to fair and just judicial process.

    d. That the learned magistrate erred in law and fact in failing to appreciate the length of time taken by the police and the Office of the Director of Public Prosecutions in investigating and/or concluding the complaints of the Appellant contrary to the right to fair administrative action as espoused under Article 47 of *the Constitution* of Kenya.

    e. That the learned magistrate erred in law and fact by misapplying the law to the facts whereas the appellant had met all the conditions required for grant of leave to conduct a Private Prosecution.

    f. That the learned magistrate erred in law and fact in failing to appreciate that the office of the Director of Public Prosecution and the Police did not sufficiently discharge their burden of proof in light of the threshold set out in the (Floriculture Case Miscellaneous Civil Appeal NO. 114 of 1997).

17. The appeal was disposed of by filing of submissions. The appellant in submissions dated 30th March 2017 argued that the learned trial Magistrate failed to act judiciously by ignoring and disregarding the evidence before her. That he had satisfied the requirements under law to be allowed to institute private prosecution against the respondent. He relied on the case of; Immanuel Masinde Okutoyi & Others v National Police Service Commission & Another [2014] eKLR where the court stated that a tribunal or authority trusted with the mandate of making a decision must act fairly.

18. He submitted that the learned trial Magistrate in dismissing the application, failed to appreciate that he had demonstrated that the Director of Public Prosecution failed to prosecute the respondent, despite the recommendations to do.

19. Further, *the Constitution* of Kenya 2010 (herein "*the Constitution*") and legislation impose a duty on the court to protect his rights but, the trial court failed to provide appropriate relief as required by Article 23(3) of *the Constitution*. He cited the case of; Severine Luyali vs Ministry of Foreign Affairs & International Trade & 3 Others [2014] eKLR and Republic v The Commissioner of Police and 3 Others [2014] eKLR where it was held that a court would interfere with a decision where an authority or public officer flagrantly ignore or neglect a procedure set out in statute.

20. Lastly, the appellant submitted that, he met the minimum threshold in his application for private prosecution as set out in the Floriculture case and cited the case of Julius Otieno Polo & 7 Others v Director of Public Prosecution & Another [2017] eKLR.

21. However, the Respondent in submissions dated; 12th February 2018 argued that under section 23 of the Office of the Director of Public Prosecution Act (herein "ODPP Act"), the Director of Public Prosecution has discretion to decide whether or not to prosecute a case That, failure to prosecute a matter does not necessarily mean that the it acted unreasonably and arbitrarily.

22. Further section 4 of the ODPP Act sets the parameters within which the Director of Public Prosecution exercises the discretion on whether to institute a suit or not and which must be applied before a decision is made.

23. Furthermore, the report by the Police is not binding on the Director of Public Prosecution as it is merely an opinion. Reliance was placed on the case of; Isaac Aluoch Polo Aluochier vs Stephen Kalonzo Musyoka & 217 & Director of Public Prosecutions Petition *No. 339 of 2013*.

24. The respondent submitted that the appellant failed to demonstrate that the Director of Public Prosecution not only failed to exercise his powers but was motivated by ulterior motives in doing so, acted arbitrarily and unreasonably. He cited the cases of; Republic v Simon Okoth and Melvin Onyuma T/A German Point Complainant Criminal Revision *No. 24 of 2017* and Anne Kamau Macharia & 2 Others vs The *Attorney General and Standard Charted Bank Limited Petition 244 of 2006*.

25. That, under section 30 of the ODPP Act, the appellant was required to give notice to the Director of Public Prosecution before instituting a suit for private prosecution and should have included the Director of Public Prosecution as a party in the application.

26. The respondent submitted that the court should exercise judicial restraint in exercise of its judicial functions to avoid usurping the powers and jurisdiction of other Constitutional bodies exercising their constitutional functions provided they are exercised judicially. He relied on the write up by; Professor Wade in his treatise on Administration 5th Edition quoted in Boundary Commission [1983] 2 WLR 458, 475.

27. The Respondent further submitted that the decision on whether to allow private prosecution or not is discretionary as provided in section 88 (1) of the Criminal Procedure Code and the discretion cannot be interfered with unless the appellant proves that the trial court was hopelessly wrong as stated in the case of, Mbogo vs Shah [1968] EA 93.

28. Further, the trial court in considering the appellant's application for private prosecution applied the test as set out in the case of; Floriculture International Limited & Others (Supra) and found that there was no compelling reason to allow the application.

29. That in order for the appeal herein to succeed, the appellant needs to demonstrate that the learned trial Magistrate misdirected herself and considered irrelevant facts in coming to her conclusion. That the appellant has failed to discharge its obligation and prove that he is deserving of the orders sought. The respondent urged court to dismiss the appeal for lack of merit and award him costs.

30. Upon considering the appeal, I note that the role of the 1st appellant court is to re-evaluate the evidence adduced before the trial court afresh and arrive at its own conclusion taking into account the fact that, it did not benefit from the demeanour of the witnesses as held by the Court of Appeal in the case of; Okeno vs. Republic (1972) EA 32.

31. In that matter, the court stated as follows: -

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate

court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that, the trial court has had the advantage of hearing and seeing the witnesses"

32. In considering the arguments by the respective parties and the submission herein, I find the issues for determination are whether the appellant met the threshold required for grant of the order sought in the application and whether the trial court arrived at the correct decision in dismissing his application.

33. The entire matter herein rests on the mandate to institute a criminal case. In that regard, the provisions of Article 157 (6) of *the Constitution* empowers the Director of Public Prosecutions to institute and prosecute criminal cases and states that, in exercising that powers of prosecution it may--

a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority;and (c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

34. In addition, the provisions of Article 157 (10) states as follows:

> " The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority". (emphasis added)

35. However, in exercising the powers conferred by this Article, the Office of the Director of Public Prosecution is implored under Article 157 (11) 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.

36. Further section 23(1) of the *Office of the Director of Public Prosecutions Act* 2 of 2013 states that: -

> " Notwithstanding the provisions of any other law, it shall be the function of the Director to —
>
> a. decide to prosecute or not to prosecute in relation to an offence;
>
> b. institute, conduct and control prosecutions for any offence;
>
> c. carry out any necessary functions incidental to instituting and conducting such criminal prosecutions; and
>
> d. take over and conduct a prosecution for an offence brought by any person or authority, with the consent of that person or authority" (emphasis added).

37. The afore constitutional provision vests upon the Office of the Director of Public Prosecution the full mandate to decide whether to institute criminal proceeding without control from any person or authority save for compliance with article 157 (11).

38. Be that as it may, where the Office of the Director of Public Prosecution does not institute criminal prosecution, private prosecution may be instituted by any person and in that respect, section 28 of the afore Act provides that: -

1. Notwithstanding any provision under this Act or any other written law, any person may institute private prosecution.

2. Any person who institutes private prosecution shall, within thirty days of instituting such proceeding, notify the Director in writing of such prosecution.

3. In accordance with Article 157 of *the Constitution* and this Act, the Director may undertake, takeover or discontinue any private prosecution" (emphasis added).

39. The plain reading of the afore provisions is that, any person may institute private prosecution but shall notify the Director of Public Prosecution within thirty days of institution of the proceedings. The rationale of such notification is provided for under sub section (3) so that the Director of Public Prosecution can decide whether to take over or discontinue the proceedings.

40. However, to give effect to the afore constitutional provisions, section 89 (1) and (2) of the Criminal Procedure Code (Cap 75 Laws of Kenya) states that; -

(1) Proceedings may be instituted either by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without warrant.

(2) A person who believes from a reasonable and probable cause that an offence has been committed by another person may make a complaint thereof to a magistrate having jurisdiction.

41. The afore provisions must however be read together with the provisions of section 88 of the Criminal Procedure Code that provide:

> "(1) A magistrate trying a case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorized by the Director of Public Prosecutions in this behalf shall be entitled to do so without permission". (emphasis added)

42. Pursuant to the aforesaid, to allow private prosecution, the person seeking to institute such prosecution must first obtain permission from the Magistrate court that will try the matter. The case of; Otieno Clifford Richard vs Republic High Court at Nairobi (Nairobi Law Courts) Misc Civil Suit No. 720 of 2005 refers.

43. The question is; what are the guiding principle in determining whether to grant or decline to grant permission for private prosecution or not. The subject principles were well set out in the case of; Floriculture International Limited & Others –vs- The Attorney General Nairobi High Court Miscellaneous Civil Application No.114 of 1997 (Floriculture case) as follows:

i. That for a person to be granted leave to institute private prosecution, he must establish that he had made a complaint to the police and had accorded reasonable opportunity for the police to investigate the case;

ii. That the Director of Public Prosecutions had been seized of the case and had declined to institute or conduct criminal proceedings;

iii. That the failure by the State agencies to prosecute is culpable, unreasonable and without any legally justifiable reason;

iv. That unless the suspect is prosecuted there is likelihood there will be failure of public and private justice;

v. That the person instituting private prosecution has suffered special, exceptional and substantial injury or damage that is personal to him and is not motivated by malice, politics or some other ulterior consideration devoid of good faith, and

vi. Finally, that there was demonstrable ground that grave social evil will occur if the police and the Director of Public Prosecutions have acted capriciously, corruptly and in a biased manner that the only remedy is to grant leave to the aggrieved party to institute private prosecution.

44. In the instant matter, it is evident that the trial court was aware of the subject principles and referred to them in the ruling delivered by the court. The trial court went further and analysed the matter before it and observed as follows:

> "With regards to the case, the Applicant has demonstrated that the authorities are sufficiently seized of the matter given the reports of the investigations having been carried out and the conclusions thereof recommending criminal action against the Respondent clearly satisfying the first principle.
>
> Secondly, the Director of Public Prosecution has also been made sufficiently aware of the complaint and has come to a conclusion on the matter deciding not to pursue it further as evidenced in the Supporting Affidavit of the applicant disposing of the second and third principle.

45. In regard to the other principles above the trial court stated as follows: -

> "The DPP has the mandate to undertake the ultimate decision whether or not to commence the prosecution as against the person concerned. This in itself is not a failure or refusal by the DPP to prosecute and the applicant has also not demonstrated any clear likelihood of a failure of public and private justice".

46. In evaluating the findings of the trial court, I note that the trial court was well guided in the interpretation of the mandate of the Office of Public Prosecution under Article 157 of *the Constitution*. However, apart from evaluating the first two principles above the ria court did not fully analyse the others.

47. However, before I delve into the subject matter of the appeal, there is an issue that has been raised by the respondent in the submissions but which not addressed by the trial court and although it is raised at appellate stage, it is an issue of law and has bearing to the matter herein and therefore I wish to address it first.

48. The issue is whether the Director of Public Prosecution should have been enjoined in the proceedings as a party or respondent. In my considered opinion, as already stated herein, the mandate to institute criminal proceedings rests on the Office of the Director of Public Prosecution. From the averments in the affidavit of the appellant in support of his application in the trial court, he faults the Director of Public Prosecution for abdicating its responsibility to institute proceedings against the respondent.

49. As such, it was only fair, just and reasonable for the Office of the Director of Public Prosecution to have been made a party or respondent to the proceedings so that it could explain the reasons why it declined

to institute criminal proceedings against the respondent. Therefore, in the absence of the Director of Public Prosecution the trial court nor this court, cam ascertain whether it acted unreasonably or without any legally justifiable reason when they declined to charge the respondent.

50. It suffices to note that the respondent has no power to institute criminal proceedings and more so, against himself and cannot give reasons for the decision taken by the Director of Public Prosecution.

51. The other ingredient to prove was whether failure to grant an order for private prosecution caused failure of public and private justice. The matter herein involves private parties, in that the appellant accuses the respondent of making false allegations against him which injured his reputation.

52. The next question therefore is, does the appellant have any other recourse under the law to address his claim? Can he institute a civil suit which does not require a court order to claim for damages? If that is the case, will he suffer prejudice as a result of the failure by the Director of Public Prosecution to institute proceeding against the respondent or the decision of the court denying him permission to institute private prosecution? I find the answer in the negative.

53. The next issue is whether the request for permission to institute private prosecution was made out of malice or ill motive. The investigations that gave the decision to charge the respondent negates that presumption.

54. However, the respondent averred that, the appellant has been charged vide Chief Magistrate Court Criminal Case No. 1551 of 2012 and that he wanted to influence the decision in the subject matter herein to his advantage in the other matter.

55. The court has the benefit of the two charge sheets in those matters and it is clear that both relate to the subject matters; LR No. 209/2663, L.R No. 12867/14. In that regard, it does appear that there was bad blood between the parsons charged in those criminal case and that could create a perception of lack of good faith in seeking for an order to privately prosecute the respondent.

56. The last ingredients the appellant was required to establish was that he had demonstrable ground that grave social evil will occur if the police and the Director of Public Prosecutions acted capriciously, corruptly and in a biased manner that the only remedy is to grant leave to the aggrieved party to institute private prosecution.

57. The court has already found the matter herein is private and not public, as the appellant was seeking to institute proceedings against another person and not the public. Further, there is no proof that the Director of Public Prosecution acted capriciously, corruptly and in a biased manner. Furthermore, the appellant has an alternative remedy in civil litigation.

58. The upshot of the aforesaid is that the appellant did not meet the threshold of grant of the order sought and the trial court was well guided in the decision to dismiss the application. The resultant order herein is that the appeal is dismissed with costs to the respondent.

59. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 24TH DAY OF JUNE, 2024.

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Kimani for the Appellant

Ms. Katana holding brief for Mr. Kithi for the Respondent

Ms Ogutu: Court Assistance