



**Republic v Director of Public Prosecution & another; Imbayi
(Interested Party); Bigambo (Exparte) (Judicial Review E187 of 2021)
[2023] KEHC 226 (KLR) (Judicial Review) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 226 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW E187 OF 2021
AK NDUNG'U, J
JANUARY 26, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

AND

COLLINS MUCHERA IMBAYI INTERESTED PARTY

AND

JACK EMMANUEL BIGAMBO EXPARTE

JUDGMENT

1. The ex parte applicant herein is before this court through a notice of motion application dated December 20, 2021. The application seeks the following orders;
 - i. That the applicant be and is hereby granted the relief of *certiorari* to remove into this court the 1st respondent's decision to prefer charges of giving false information to a person employed in the public service contrary to section 129(a) of the *Penal Code*, which decision is based on 2nd respondent's inquiry file number 2 of 2018 for purposes of quashing the same;
 - ii. That the applicant be and is hereby granted relief of prohibition directed at the 1st respondent, its officers and any other authority acting on its instructions from instituting or preferring charges against the applicant on alleged offence of giving false information to a person



employed in the public service contrary to section 129(a) of the Penal Code or any other related charges;

- iii. That costs of this application be provided for.
2. The application is supported by the grounds on its face, a statutory statement dated December 6, 2021 and a supporting affidavit sworn by Jack Emmanuel Bigambo on even date.
3. A brief background of the matter before this court as told by the *ex parte* applicant is that on or about February 26, 2021 he ordered for the importation of a motor vehicle from the interested party herein who is a certified importer of motor vehicles and even paid the purchase price for the said motor vehicle. The motor vehicle is said to have arrived at the port of Mombasa on or about November 1, 2016 (*sic*) and the same registered under his name.
4. Unfortunately, a disagreement having arisen between the interested party herein and his clearing agent, the said motor vehicle registration number KCJ 424Z was not delivered to the *ex parte* applicant necessitating him to make a report at Langata Police station on February 3, 2017. The interested party is said to have written an email to the *ex parte* applicant on or about January 18, 2017 regretting the whole incident and offering to have the matter resolved.
5. The 2nd respondent is said to be carrying out investigations under inquiry number 2 of 2018 ever since the *ex parte* applicant reported on February 3, 2017 and that on December 7, 2021, when the *ex parte* applicant went to Langata police station to follow up on the progress of the inquiry he was arrested and booked by the police on the grounds that he had given false information to an officer employed by the public service.
6. He was released on a cash bail of Kshs 5,000/= with instructions to appear before the Chief Magistrates Court, Kibera on December 7, 2021 to face formal charges of giving false information to a person employed by the public service contrary to section 129 of the Penal Code.
7. The *ex parte* applicant contends that he has been making monthly follow ups on the progress of the inquiry up until December 7, 2021 when he attended the station and threatened to file a suit for the release of the subject motor vehicle that the threats of the present charges emanated. Further that upon due diligence being undertaken by his advocates they discovered that the inquiry file was ready on or about October 20, 2020 and the 2nd respondent has been sitting on it for more than a year.
8. This court notes that there is no response by the respondent's on record despite service having been effected and an affidavit of service filed. Having considered the material before the court as presented by the *ex parte* applicant it is my considered view that only one issue arises for determination and that is whether this court ought to grant the orders sought.
9. The constitutional underpinning of the vast and unfettered powers over public prosecutions vested on the 1st respondent is found under article 157 of the Constitution, 2010. The article provides that the 1st respondent shall not require the consent of any person or authority for the commencement of criminal proceedings and that in the exercise of his or her powers or function, shall not be under the direction or control of any person or authority. Under sub article 11 he or she is required to have regard for the public interest, the interests of administration of justice and the need to prevent and avoid abuse of the legal process.
10. However, the said article does not give the office bearer free reign to commit crimes or violate the law. If the officer behaves in violation of the law or without following due process, the court will be there to provide redress. By definition, the decision to charge is an administrative action that falls under the



Fair Administrative Actions Act's guidelines and is overseen by this court in accordance with article 47 of the Constitution.

11. The Court of Appeal in the case of Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR, extensively considered in detail the applicable law and circumstances under which the court could interfere with the exercise of prosecutorial discretion by the DPP. Among the guiding principles outlined in section 4 of the ODPP's Act No 2 of 2013 and the National Prosecution Policy formulated by the DPP pursuant to section 5(1)(c) of the ODPP Act are that; “The decision to prosecute as a concept envisages two basic components namely; that the evidence available is admissible and sufficient and that public interest requires a prosecution to be conducted.”
12. Paragraph 4 (B)(Z) of the said policy provides; “the evidence test- public prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction. In other words, public prosecutors should ask themselves; would an impartial tribunal convict on the basis of the evidence available.”
13. In the *Diamond's* case (*supra*), the court held at para 42 as follows;

“The burden of proof rests with the person alleging unconstitutional power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision.”
14. In para 45 the court went further to state thus;

“(45) In considering the evidential test, the court should only be satisfied that the evidence collected by the investigative agency upon which DPP's decision is made establishes a prima facie case necessitating prosecution. At this stage, the courts should not hold a fully-fledged inquiry to find if evidence would end in conviction or acquittal. That is the function of the trial court. However, a proper scrutiny of facts and circumstances of the case are absolutely imperative.”
15. It is trite that the standard of review of the discretion of DPP to prosecute or not to prosecute is high and courts will interfere with the exercise sparingly and Lenaola J (as he then was) summed it up aptly in *Patrick Ngunjiri Muiruri v DPP* [2017] eKLR where he stated;

“The law and practice, then, are quite clear; while the discretion of the DPP is unfettered, it is not unaccountable. While the authority to prosecute is entirely in the hands of the DPP, it is not absolute. On the other hand, while the power of the court to review the decisions of the DPP are untrammelled, they are not to be exercised whimsically. While the court can review the DPP's decisions for rationality and procedural infirmities, it cannot review them on merit.”
16. In the matter before court, it is common ground from the evidence adduced before this court by the ex parte applicant that indeed a transaction to import a Toyota Axio was entered into between the ex parte applicant and the Interested party and that a sum of Kshs 500,000.00 was deposited to the interested party's bank account.
17. Further, it is also evident that Mr Collins Muchera Imbayi ran into problems before delivering the vehicle to the ex parte applicant and this led to the *ex parte* applicant filing a report at Langata police



station. I also note that a copy of the log book of the said Toyota Axio vehicle bearing number plate no KCJ 424Z shows that the said motor vehicle is registered in the name of the ex parte applicant. There being no challenge to the authenticity of the said documents this court is only left to believe that the same are authentic and that indeed the *ex parte* applicant was justified in filing the report before Langata Police Station.

18. I also note that there is a cash bail receipt of Kshs 5,000/= produced by the ex parte applicant proving that indeed he had been arrested on grounds that he had given false information contrary to section 129 of the [Penal Code](#). The respondent and interested party have not filed any responses. In those circumstances, the basis for the preferred charges is not explained. That leaves the *ex parte* applicant's challenge to the charges well founded.
19. The prosecutorial powers of the respondents must be exercised in an accountable manner. Whereas the burden of proof rests with the person alleging unconstitutional power, in our instant suit, the *ex parte* applicant has discharged that burden. There is sufficient evidence to establish that the process and the decision to charge the *ex parte* applicant is tainted with irrationality and procedural impropriety. The evidential burden shifts to the respondents who, for their own known reasons, have not found it necessary to explain and justify the basis of the charges facing the *ex parte* applicant.
20. From the foregoing and for reasons above stated, the notice of motion dated December 20, 2021 is wholly successful. I allow the same in its entirety and make the following orders;
 - i. An order of certiorari be and is hereby granted quashing the 1st respondent's decision to prefer charges of giving false information to a person employed in the public service contrary to section 129(a) of the [Penal Code](#), against the ex parte applicant which decision is based on 2nd respondent's inquiry file number 2 of 2018.
 - ii. An order of prohibition is hereby issued directing the 1st respondent, its officers and any other authority acting on its instructions from instituting or preferring charges against the *ex parte* applicant on the alleged offence of giving false information to a person employed in the public service contrary to section 129(a) of the [Penal Code](#) or any other related charges;
 - iii. The *ex parte* applicant shall have the costs of the application.

It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY, 2023.

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A. K. NDUNG'U

JUDGE

