BO (Minor) & another v Independent Policing Oversight Authority & 2 others (Miscellaneous Criminal Application E026 of 2023) [2023] KEHC 25707 (KLR) (24 November 2023) (Ruling)

Neutral citation: [2023] KEHC 25707 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

MISCELLANEOUS CRIMINAL APPLICATION E026 OF 2023

WM MUSYOKA, J

NOVEMBER 24, 2023

BETWEEN

BO (MINOR) ..... 1ST PETITIONER

PO (FATHER AND PARENT OF THE MINOR) ..... 2ND PETITIONER

AND

INDEPENDENT POLICING OVERSIGHT AUTHORITY ..... 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS ..... 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE ..... 3RD RESPONDENT

RULING

1. This matter arises from orders made in proceedings that are being conducted in Busia CMCCRC No. E117 of 2023, specifically regarding orders that the trial court made on 25th October 2023 and 2nd November 2023. The orders of 25th October 2023 declared the 1st petitioner a hostile witness, and the investigating officer was directed to carry out investigations into whether there was witness intimidation and tampering with by third parties. The orders of 2nd November 2023 declared the 1st petitioner to be a child in need of care and protection, and directed that the Director of Children Services find her a new school, that she be provided with psycho-social support, and that the matter be not discussed in the media.

2. The petition herein, dated 8th November 2023, is brought on the basis that the respondents are violating the rights of the 1st petitioner, by illegally detaining her to coerce her to give evidence, denying her legal representation, robbing her of human dignity, and limiting her freedom of association. The petitioners seek orders of *habeas corpus*, and compensation. The petition was filed simultaneously with a summons, dated 8th November 2023, seeking an order for production of the 1st petitioner in court within 24 hours, and for her release forthwith.

3. The chamber summons was placed before me on 9th November 2023, under certificate of urgency. I made an order for the production of the 1st petitioner in court, nd directed service of the application and the petition on the respondents. The 1st petitioner was produced before me on 10th November 2023. I was informed that she was being held at the Child Protection Unit at Busia. The warrants for her detention were also produced, being court orders in Busia CMCCRC No. E117 of 2023. I thereafter directed that the respondents file their responses to the application, to facilitate argument, on 16th November 2023, on whether the 1st petitioner ought to be set free forthwith or not. I further directed that the 1st petitioner would remain at the protection unit, and that the original trial court records be availed for perusal.

4. The respondents reacted to the application, through the 2nd respondent, vide an affidavit sworn by Shirley Kebut Chepkonga, Principal Prosecution Counsel, on 13th November 2023. She avers that the 1st petitioner was detained on the strength of court orders, made on 25th and 27th October 2023. She stated that allegations had been made of witness interference, and orders were made for investigations, and that the 1st petitioner was being held at the Child Protection Unit to receive psycho-social support, as ordered by the court. She states that the 1st petitioner, according to the charges, was a victim of sexual abuse, who had turned hostile witness at the trial. She cites a social enquiry report, which recommended that she be kept in safe custody, given that she had been established to be truant, exposed to drug abuse and had fallen into bad company. She denies that the child was in illegal detention, and argues that the petitioners ought to have approached the court by way of criminal revision.

5. The application was urged before me on 16th November 2023. Mr. Otieno, for the petitioners, argued that a witness protection order cannot be made against the will of the witness or her guardians, and he cited section 5 of the *Witness Protection Act*, No. 16 of 2006. He submitted that the protection sought should have been requested by the petitioners, and an agreement should have been signed between them and the respondents. He asserted that the 1st petitioner was being held against her will. He further argued that the 1st petitioner was being detained in an effort to coerce her to give evidence in a way that serves the interests of the respondents. He asserted that the 1st petitioner had been visited by children's officers who had gone to counsel her.

6. Ms. Owino, for the 1st respondent, submitted that the detention of the 1st petitioner was sanctioned by the court, vide orders made on 23rd October 2023, 27th October 2023 and 1st November 2023. She stated that the 1st respondent would have been concerned if the detention had been by the police on their own motion, adding that no complaint had been received by the 1st respondent on misconduct by the police with regard to the matter.

7. Ms. Chepkonga, submitted on behalf of the 2nd and 3rd respondents, largely on the best interests of the child, saying that the right to liberty does not supersede any action taken in protection of the child. She stated that the 1st petitioner was a victim of child abuse, and had been declared a vulnerable witness, under sections 32 and 42 of the *Sexual Offences Act*, No. 3 of 2006. She asserted that being a child, there was need to protect her against intimidation. It was argued that the trial court had noted that she was traumatized. She submitted that the orders made by the trial court were sanctioned by sections 141, 142, 143 and 144 of the *Children Act*, No. 29 of 2022. She submitted that it was in the best interests of the child that she be detained in a safe environment. On the matter of the 1st petitioner being declared hostile, she submitted the State was entitled to cross-examine her, and that cross-examination was yet to be conducted. She further submitted that there were allegations of witness interference, which the State was entitled to investigate. She cited *MAK v RMAA & 4 others* [2023] KESC 21(KLR)(Mwilu DCJ/VP, Ibrahim, Wanjala, Ndungu & Ouko, SCJJ).

8. I will start by saying one or two things about the pleadings. They are the basis upon which a case is presented in court. Of course, substance should trump over process, but that does not stop a court from addressing procedural issues. The principal complaint in the petition is about the detention of the 1st petitioner, which the petitioners urge is illegal, and they seek production of the petitioner, her release and compensation against the respondents. When I looked through the papers filed in support of the petition, as well as the original trial court records, which I perused, for the trial court file was availed to me, it emerged that the police did not at any time arrest and detain the 1st petitioner. She presented herself in court, as the complainant, to give evidence. She was sworn, and gave her narrative, but was declared hostile before she could complete it. It also emerged that she might have been interfered with, as a witness, for she was visited at school by individuals that the trial court had not authorized, and it was directed that investigations be conducted into that matter. After taking into account the entire circumstances, and based on what had transpired before it, and on the basis of a socio-enquiry report that it had commissioned, the trial court was of the view that she was vulnerable, and needed care and protection, hence the order that a safe place for her custody be found. Therefore, the detention or the being held in safe custody of the 1st petitioner had nothing to do with the 1st respondent, neither was it ordered by the 2nd respondent nor the 3rd respondent. It was on the strength of court orders. The said holding in safe custody, having been ordered by the court, cannot be illegal as alleged.

9. Of course, the persons affected by those orders have a right to challenge them, if they feel that the same were not proper, nor lawful, nor correct. Those orders were made by the court, and a challenge on their legality or correctness or propriety cannot be directed at the respondents. The respondents could do no wrong, if they acted on court orders. It can only be something to do with the court. Where a party feels that a trial court, and in this case the Chief Magistrate's court, was wrong, in the orders that it made, it would have 3 options. It can appeal against those orders, or seek their revision, or challenge them by way of Judicial Review, all at the High Court. As framed, the petition filed herein is misconceived.

10. As indicated above, the proceedings herein are about the alleged illegal detention of the 1st petitioner. The principal order sought is for *habeas corpus*, which is for production of the body of the 1st petitioner, and the warrant authorizing her detention, in court. That was done, her body was produced, and I noted that she was alive and well. The warrants that authorized her detention were also produced, and that meant that the detention was lawful, for it was authorized by a court of law. Whether the trial court was justified to make the orders that led to the detention, or made them illegally or improperly or incorrectly, is another matter altogether, which is not before me, for what is before me is not an appeal against those orders, nor an application for revision of those orders, nor an application for me to judicially review the said orders for the purpose of quashing them. What I am invited to do is to find that the respondents herein are illegally detaining the 1st petitioner, which I have found to be not the case.

11. The prayer that was argued before me was for the release of the 1st petitioner forthwith. It should flow from what I have discussed above, that a case has not been made out before me, based on the pleadings filed, for me to grant that prayer. There is no illegal detention of the 1st petitioner by the respondents. So, if they are not illegally detaining her, on what basis would I order that they release her. The Advocate for the petitioners submitted at length on the declaration of the 1st petitioner as a hostile witness, and about her being placed on a witness protection programme. Those orders were not made by the respondents. As stated above, the petitioners can only challenge them in the three ways that I have discussed above.

12. Of course, I can act on them in exercise of the revisionary powers of the High Court, which empower me to revise orders of the subordinate court even on my own motion. I am alive to the fact that the

matter in Busia CMCCRC No. E117 of 2023 is live. It was due for an appearance on 22nd November 2023, when a children's officer was expected to appear, to explain the circumstances under which she sent other officers to visit the 1st petitioner in school, ahead of her court appearance as a witness, and without the sanction of the trial court. I am alive to the fact that the 1st petitioner is a witness in that case, she did not complete her testimony, for, after she was declared hostile, the 2nd respondent was entitled to cross-examine her, which is yet to happen. I will invoke the revisionary powers vested in the High Court, to assess or evaluate whether the impugned orders were made legally, or properly, or correctly.

13. From my understanding of the material before me, the order to detain the 1st petitioner was not prompted by the fact that she recanted her statement to the police, and turned hostile, but rather the emergence of proof that some individuals paid her a visit, at school, prior to her appearing in court as a witness, and that it was after that visit that she recanted her statement to the police. The individuals who visited her were identified as children's officers from Bunyala, a fact conceded by the petitioners. What prompted the trial court to order investigations, into the possibility of witness interference, was the fact that no order had been made for anyone to visit the 1st petitioner, least of all children's officers. The matter of the alleged defilement of the 1st petitioner was before the trial court. The trial court was seized of it, and the 1st petitioner had, the moment the matter was filed in court, become a ward of the trial court. The trial court had, on 16th October 2023, made orders to restrict visits to the 1st petitioner in school without the authority of the court. The order by the trial court reads as follows: "Court directs restrictions from visiting the minor in school without the authority of the court." Once the criminal proceedings were initiated, and the trial court got seized of the matter, no one, with the exception of her parents, was authorized to visit the 1st petitioner, unless on the strength of an order of the trial court. So, when it emerged that some individuals flouted the orders, and visited the 1st petitioner without the authority of the court, the trial court was justified in ordering investigations, which were carried out, and which revealed that children's officers visited the 1st petitioner, and the person who directed them to do so was due to appear in court on 22nd November 2023, to explain herself.

14. Court proceedings are conducted under the direction of the judicial officer presiding over them. The presiding judicial officer has an obligation to keep vigilance, to ensure that the court proceedings are respected, are not undermined, and that any orders made or directions given are obeyed or complied with; and that the proceedings are not turned into a farce or a circus. Court proceedings are not some sort of dramatic staging, to provide entertainment or comic relief to the general public. They are solemn proceedings in pursuit of justice. There must be a high level of seriousness attached to them. So that when it is ordered that a witness should not be visited by anybody without the authority of the court, then that order must be respected and adhered to. When there is some evidence that it has been flouted, then there must be some consequences, for, in making that order, the trial court would not be joking, or jesting, or trifling, or engaging in some child play. The consequences, in the instant case, were that investigations had to be conducted, to establish whether there were attempts to thwart the course of justice, by way of witness tampering; to identify the persons involved; and to hear from them. The investigations were ordered by the trial court, they were conducted, the culprits were identified, and they have been summoned to court to explain themselves. The petitioners themselves concede that indeed the 1st petitioner was visited, allegedly for counselling purposes, but no proof has been provided that that visit had been sanctioned by the trial court, in terms of its order of 16th October 2023. The second consequence was that the 1st petitioner, as the ward of the trial court, had to be secured, in her best interests as a child, not only to facilitate the investigations to establish the circumstances under which the children's officers visited her, despite a court order restricting such visits, but also to guard against her being sexually abused and exploited, and to keep her out of mischief, and bad company and influences.

15. The parties addressed me at length on the best interests of the child. This principle is provided for under the *Children Act* and the *Constitution*. The best interests of the child are paramount. They supersede anything and everything else. It is the court which determines what would be the best thing for the child, the ward of the court, at any given time. The trial court had a set of circumstances before it, and reports, from which it determined what it considered to be the next course of action in the best interests of the 1st petitioner. It was a scenario where a Form One student, 14 years old, disappears from the custody of her parents, goes on a trip to Bumala, some 60 or so kilometres away from home, on a frolic not sanctioned by her parents, goes on to make another trip to Busia, which was further away, within that same period, without her parents knowing, and was away from home for a week. All that happened while she was meant to have gone back to school. Does that not suggest that her parents were not in or had lost control of her? Does that not suggest that she defied their authority, if she could travel so far away from home without their authority, and stay away for a whole week? The report placed before the trial court suggested that she was truant, was probably engaged in sexual irresponsibility, and was in bad company, all of which were fertile grounds and reasons, under sections 141, 142, 143 and 144 of the *Children Act*, for a declaration that such a child needed care and protection, and for the trial court to make such orders as it deemed were in her best interests. Added to that was the issue of her being paid a visit at school by unauthorized individuals, despite pendency of a court order blocking such visits, followed by her recanting what she had recorded with the police. Other than dealing with the perceived witness interference, the trial court was justified in also focusing on its ward, because the alleged interference targetted her, and her subsequent conduct, of recanting her statement, seemed to confirm it. The 1st petitioner is a child. If she was interfered with, and if that led to her recanting her statement, any responsible court would be concerned about the welfare of a child who would find herself at the centre of such a murky affair. Surely, such a child deserved to be cared for and protected from whatever was happening. Orders for care and protection, of necessity, entail interference with rights to liberty, association, and the like. That is sanctioned by the *Constitution*, in Article 53(1)(d)(f), in terms of protection from abuse and neglect, and to be detained where need arises. The petitioners have not demonstrated that the said orders were made without authority, have not proved that discretion was exercised improperly or wrongly, and have not shown that the decisions contravened or violated or threatened to violate or contravene the provisions of the *Constitution*. Rights and freedoms are not absolute. They are to be enjoyed subject to certain conditions. The conditions, that prevailed in the instant case at the material time, dictated that the trial court make decisions in the best interests of the 1st petitioner, to ensure that she was in a better environment. It was not for the petitioners, in all cases and circumstances, to decide what would be best for the 1st petitioner, the court could make those decisions, when the circumstances merited it, and, in this case, it did it, for the reasons given in the rulings on record.

16. An attempt was made to link the custodial care and protection order with an attempt to coerce the 1st petitioner to testify in a particular manner. The issue of coercion does not arise, for the 1st petitioner has already been declared hostile, rendering her testimony worthless. She will only be required for cross-examination, essentially to completely destroy any remaining credibility in her testimony. Is she being punished for recanting her statement? I have not seen any proof of that. It cannot be that a child tells the police one thing, and when she is presented in court, to testify based on the police record, tell the court a different thing. Something would not be adding up. A red flag has to be raised, when it is considered that that happened not so long after some individuals made an unauthorized visit to her. The circumstances, surrounding this matter, are very troubling, considering that a child is at the very core of it. The whole drama about it should make any court, sensitive to the need to protect the child from the trauma likely to be visited upon her, by the turn of events, to make such orders as were made in this case. These are criminal proceedings. This is a matter of public interest. It is about the

rule of law and administration of justice. It is not just a small matter between the accused and the 1st petitioner. There is a wider societal interest, to ensure that offenders are prosecuted and made to pay for their crimes, and minors are protected through the criminal justice system, hence the investment of public resources in the prosecution of the matter. The trial court has a duty to get to the bottom of any attempts to subvert the course of justice, through interference with witnesses. Such attempts must be resisted, and firmly dealt with. Letting the issue go unattended, by treating it lightly, would not bode well for the rule of law and administration of justice in Kenya. The court also has a duty to care for and protect children, and to intervene in all cases where child abuse, neglect and exploitation are apparent. To do so, it does not require prompting from anyone, so long as it has material before it, pointing in that direction. Needless to say that sometimes those expected to move or prompt the court, to take a position, in the best interests of the child, are themselves either complicit or complacent, in the abuse or exploitation of the child, or are guilty of child neglect, or dereliction of duty with regard to the welfare of the said child.

17. I believe I have said enough, to demonstrate that there is no merit in the prayer, that the 1st petitioner should be freed from the care and protection order made by the trial court. There was a background to, and justification for, that order, and I find no basis for interfering with it. I, accordingly, dismiss the said prayer. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 24TH DAY OF NOVEMBER 2023

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Otieno, instructed by MC & Company, Advocates for the petitioners.

Ms. Owino, Advocate for the 1st respondent.

Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the 2nd and 3rd respondents.