



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

PETITION NO. E009 OF 2021

BENJAMIN KOONO.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

DCI – TRANS NZOIA EAST.....2ND RESPONDENT

FRIDAH ETEBO.....3RD RESPONDENT

RULING

On **21st December 2021**, **Benjamin Koono**, the Applicant herein petitioned the court seeking a declaration that his intended prosecution by the Director Public Prosecutions violated his constitutional right to equality and freedom from discrimination. He further complained that the said decision to charge him denied him the right to fair administrative action. The Applicant sought to permanently restrain the Director of Public Prosecutions from discriminating, victimizing or charging him on the basis of the complaint lodged by the 3rd Respondent who is the Complainant in the case.

Contemporaneous with filing the Petition, the Applicant filed an application pursuant to **Article 21(1), 22(1), 23(1) 50 and 165** of the **Constitution** seeking orders from the court to restrain the Respondents from arresting and charging him for the offence of assault causing actual bodily harm. It is the Applicant's contention that the charge intended to be brought against him was bogus, did not meet the threshold to charge and was further motivated by the desire by the complainant (3rd Respondent) to pressurize him to withdraw another charge that he had succeeded in having the 3rd Respondent brought to court. The Applicant sought orders from this court to restrain the Respondents from charging him. The application is supported by the annexed affidavit of the Applicant and the grounds stated on the face of the Application.

The Application is opposed. The Respondents filed two replying affidavits in opposition to the application. One affidavit was sworn by Eusebius P.O. Omooria, Senior Assistant Director of Public Prosecution and the other by IP Felix Otieno Hongo, the Investigating Officer in the criminal case that is the basis of the Petition before the court.

According to the said affidavits, the Applicant assaulted the Complainant (3rd Respondent) in the presence of fellow police officers who were investigating a case of abducting and defilement of the sister of the Applicant's wife. It was stated that as a result of the assault, the 3rd Respondent sought treatment and was issued with a P3 form. She sustained injuries which were assessed as "harm". They denied the allegation by the Applicant that the charge was brought with a view to pressurizing him to withdraw the criminal charge against the 3rd Respondent. They contended that the two cases were unrelated because the 3rd Respondent had been separately charged and will have her day in court. They denied the allegation that the nature of evidence collected had not met the threshold to have the Applicant charged. They urged the court to dismiss the application.

During the hearing of the application this court heard rival submission made by Mr. Mukabane for the Applicant and Mr. Omooria for the Respondents. This court has carefully considered the said arguments and the affidavits filed herein. **Article 157 (10)** of the **Constitution** provides thus:

“The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”

The Applicant is challenging the Director of Public Prosecutor's power to charge him on the basis that the decision was not informed by the law and by the available facts. The Applicant is asking this court to review the witnesses' statements prepared by the investigators before the

matter has even been tried by the subordinate court. The Applicant is further asking this court to inquire into the legality of the decision of the Director of Public Prosecutions to charge him. This court declines the invitation to do so at this stage of the proceedings. This court cannot evaluate the minutiae of the witnesses' statements which have not been tested by the evidence being adduced on oath and the same being thoroughly scrutinized on cross-examination. This court's perusal of the said witnesses' statement, *prima facie*, leads it to the irresistible conclusion that there was probable cause to investigate the Applicant and further the same meets the threshold to have the Applicant charged. By saying that the threshold to have the Applicant charged has been met, it does not imply or mean that the charge against the Applicant is slam-dunk. Far from it. It will behoove the prosecution to establish its case to the required standard of proof.

The fears expressed by the Applicant is cured under **Article 50(2)** of the **Constitution** which grants him an iron-clad protection from having his right to fair trial threatened or infringed.

In **Bernard Mwikya Mulinge V Director of Public Prosecutions & 3 Others [2019] eKLR**, the court had this to say in regard to the role of the court in superintending the exercise by the Director of Public prosecution of his power to charge and prosecute criminal cases:

“14. As has been held time and time again the court ought not to usurp the constitutional mandate of the Director of Public Prosecution (DPP) to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution. The mere fact therefore that the intended or ongoing criminal proceedings are in all likelihood bound to fail, is not *ipso facto*, a ground for halting these proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but the decision making process. An Applicant who alleges that he or she has a good defence in the criminal process ought to ventilate that defence before the trial court and ought not to invoke the same to seek the halting of criminal proceedings undertaken bona fides since judicial review is not the correct forum where defences available in criminal case ought to be minutely examined and a determination made thereon”

Enough said. The Application herein lacks merit and is hereby dismissed. The Applicant must present himself before the DCI Trans Nzoia East where he will be processed before being charged before the Chief Magistrate's court. The processing and the charging of the Applicant shall be done within the day so that he can have the opportunity to apply for bail pending trial. It is so ordered.

Dated at Kitale this 26th day of January 2022.

L. KIMARU

JUDGE