Republic v Chief Magistrates, City Court, Nairobi & 3 others; Kariuki (Exparte) (Application 117 of 2019) [2022] KEHC 11695 (KLR) (Judicial Review) (22 February 2022) (Judgment)

Neutral citation: [2022] KEHC 11695 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION 117 OF 2019

J NGAAH, J

FEBRUARY 22, 2022

BETWEEN

REPUBLIC ..... APPLICANT

AND

CHIEF MAGISTRATES, CITY COURT, NAIROBI ..... 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION ..... 2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATION ..... 3RD RESPONDENT

GUT SPENCER ELMS ..... 4TH RESPONDENT

AND

AGNES KAGURE KARIUKI ..... EXPARTE

JUDGMENT

1. The applicant's application is the motion dated 24 April 2019, brought under Sections 8 and 9 of the *Law Reform Act* and Order 53 Rule 1 of the *Civil Procedure Rules*. The motion seeks orders framed as follows:

    1. The ex-parte applicant be granted an order of certiorari to remove into the High Court and quash the entire decision of the 1st Respondent made on 20{{^}} March 2019 directing the withdrawal of Criminal Case Number 1537 of 2017 at City Court Nairobi.

    2. The ex parte applicant be granted an order of prohibition, prohibiting the 2nd and 3rd Respondent from proceeding with the nolle proseque in regard to Criminal Case No. 1537 of 2017 at City Court Nairobi or making any decision in that regard at the behest of any individual institution.

3. The ex parte applicant be granted an Order of Mandamus to compel the 2nd and 3rd Respondent to proceed and prosecute Criminal Case Number 1537 of 2017 to its logical conclusion in compliance with the Law.

4. The costs of this Application be provided for.

5. Any other order that is just and equitable"

2. The background of the application is apparent on the face of the motion.

3. On 7 September 2017, the 2nd respondent preferred five counts of forgery related charges against one Guy Spencer Elms in City Court Chief Magistrates Criminal Case No. 1537 of 2017. The complainant in the case was the applicant in the instant application. The accused denied the charges and so a plea of not guilty was entered in that behalf.

4. The hearing commenced in earnest on 4 January 2018 when the applicant testified in court. However, when the matter came up again for further hearing on 13 June 2018, the state sought to withdraw the charges. Objections against the intended withdrawal were raised by both the learned counsel for the accused and the complainant.

5. On 10 August 2018, when the court was set to hear the application for withdrawal of the charges, the state withdrew the application and so the case was fixed for further hearing on 27 February 2019. Rather than proceed with the case on the material date, the state, for the second time, applied to withdraw the case under section 87 (a) of the *Criminal Procedure Code,* cap. 75 and Article 157 (6) (c), (8) and (10) of *the Constitution*.

6. Once again, the applicant objected to the application and her learned counsel made submissions in that regard. This time round, the accused's counsel supported the state's bid to have the case withdrawn.

7. In a considered ruling rendered on 20 March 2019, the court allowed the application to withdrew the charges. It is this decision that applicant seeks to impeach in the instant application.

8. The 1st respondent did not file any response to the application. On his part, the 2nd respondent filed grounds of objection in which he urged that his decision to withdrew the criminal case against the accused was made after consideration of Article 157 (11) of *the Constitution* and after a careful consideration of the case file. In making that decision, he took into account the public interest, the interest of the administration of justice and the need to prevent the abuse of the due process of law.

9. In any event, before he invoked Article 157(8) of *the Constitution* and sought the permission of the court to withdraw the charges, the applicant was given a hearing and it is only after both sides had been heard that a decision was made by the court.

10. Again, it was urged, withdrawal of a case under section 87(a) of the Criminal Procedure Code is not absolute since the applicant can lodge a subsequent complaint over the same facts.

11. The Director of Public Prosecutions also contended that according to Article 157 (10) of *the Constitution* and Section 6 of the Office of Director of Public Prosecutions Act (2013), the Director does not require the consent of any person or authority to commence any criminal proceedings and in exercise of his powers and functions, he is not under the discretion or control of any person or authority.

12. Like the 1st respondent, the 3rd respondent did not file any response to the application.

13. I understand that the Honourable Attorney General who is supposed to have represented them was not served with the application.

14. The accused who is named in the present application as an interested party opposed the application and filed a preliminary objection dated 3 June 2019. In the objection he has urged that the applicant's application is fatally defective since it contravenes section 9(1) (2) (3) and (4) of the *Fair Administration Actions Act* No. 4 of 2015. According to the interested party, the applicant ought to have invoked the internal mechanisms for appeal or review before moving this Honourable Court. To the extent that he has not done so, her application is not only defective but also, for the same reason, this Court lacks the jurisdiction to entertain it.

15. Besides the preliminary objection, the interested party also filed a replying affidavit in which he has stated that the applicant has suppressed material facts from the Court. He has stated that, immediately after the magistrates' court rendered the impugned decision, the applicant sought for and was granted leave to lodge an appeal against the decision. The filing of the instant application instead of the appeal is, according to the interested party, an afterthought.

16. The interested party deposed further that, in any event, the decision to charge him was erroneously made because the 2nd respondent had not considered all the relevant evidence before coming to the decision to charge him. Again, it was alleged, the prosecution of the interested party was being misused to assist the applicant not to comply with the orders which had been issued in the interested party's favour in Nairobi ELC No. 80 of 2015 and which orders directed the applicant to vacate suit premises (apparently the subject matter of that suit) and stop any further developments on the property pending the hearing and determination of the suit.

17. Much of what I gather from the submissions filed by the learned counsel for the applicant is that in allowing the application to have the charges withdrawn against the interested party, the learned magistrate either misapprehended or misapplied the law and therefore reached the wrong conclusion.

18. For instance, the learned counsel for the applicant urged that the decision was made contrary to sections 9, 23 and 26 of the Victims Protection Act and also Article 50(9) of *the Constitution*. It was urged that under section 4 (2) of the *Victims Protection Act* the 1st and 2nd Respondent ought to have obtained the views of the applicant before applying to discontinue the proceedings.

19. I have had the opportunity to read the impugned ruling of the lower court. It is fairly detailed. The learned magistrate started by saying that the accused had been charged of various offences and that he pleaded not guilty on 7 September 2017. She also set out what transpired in court on diverse dates culminating in the state's application to withdraw the case against the accused on 27 February 2019. She stated the provisions of *the Constitution* and the C*riminal Procedure Code*, cap. 75 upon which the state relied to make the application and the reasons given by the second respondent for the withdrawal of the case.

20. The learned magistrate also captured the submissions by the learned counsel for the accused who supported the withdrawal and the learned counsel for the applicant who vehemently opposed the application.

21. The learned magistrate then proceeded as follows:

> I have considered the application made by the prosecution and the submissions on record made by the respective counsels (sic) and I framed the following points that required my determination;

1. Is the complainant a victim: Need the DPP consult her before withdrawal under section 87 (a)?

2. Is the DPP in making the application acting arbitrarily?

3. Are the reasons that, new conflicting evidence needs (sic) to be looked into, sufficient to allow a withdrawal?

4. Must the DPP present the conflicting evidence to court before the withdrawal? Would that be a sneak peek view of their evidence by the court and hence influence the court to make up its mind?

5. Is the withdrawal absolute or temporary and as such would the complainant be prejudiced?

6. Whose rights, between the complainant and the accused, should the court guard in this application?"

22. The learned magistrate proceeded to address each of these issues and, in doing so, she made references to the submissions made by the learned counsel in support of their respective positions. She also referred to both statutory and constitutional provisions that had been invoked and also took into account the decisions that had been cited in answer to the framed issues.

23. For example, on the specific question of withdrawal of a criminal case by the prosecution, the learned magistrate referred to the decision in ***Geoffrey Muhuzani Anyira versus Director of Public Prosecutions & 2 Others*** **(2016) eKLR** where it was held that the withdrawal of a case under section 87(a) of the *Criminal Procedure Code* is not an abuse of the court process when the reasons are given for that withdrawal.

24. The learned magistrate continued:

> It is not in dispute that there has to be reasons given to warrant a withdrawal as seen in the above cited authority and the court reserves the discretion to allow or disallow the same by virtue of Article 157 (8).

25. In the instant case the reason given is the existence of conflicting evidence that may adversely affect the prosecution's case. The prosecution reserves the duty to prove a case in criminal proceedings to the required standard. Any reservations towards this endeavour, in my view are sufficient reasons to apply for the withdrawal as it avoids wastage of judicial time. The prosecution can then retreat and assemble their case in order to properly discharge their duty/obligation."

26. Ultimately, the learned magistrate concluded her decision as follows:

> I find that it is fair and reasonable to allow the case to be withdrawn under section 87(a) of the *Criminal Procedure Code* and Article 157(11) of *the Constitution* accordingly. Right of appeal 14 days."

27. This decision is impugned basically on the grounds that the learned magistrate misapprehended or misapplied law. The crux of the applicant's case is that the learned magistrate did not interpret and apply properly the relevant statutory and constitutional provisions with respect to withdrawal of criminal cases by the Director of Public Prosecutions. This is what the grounds raised by the applicant boil down to although they have been camouflaged as the traditional grounds for judicial review.

28. It would appear from the proceedings in the magistrates' court that indeed the applicant was keen to pursue an appeal from the word go. I say so because the record of that court shows soon after the learned magistrate rendered her decision, the applicant's counsel applied for proceedings specifically to enable him file an appeal against the learned magistrate's decision. The court granted him fourteen days to file the appeal.

29. I would not take anything against the applicant for applying to appeal yet she ended up filing an application for judicial review. Nevertheless, looking at the applicant's application and submissions filed by the applicant's learned counsel though couched as a judicial review application, it is effectively an appeal.

30. Now, it is not to business of this honourable court, sitting as a judicial review court, to interrogate the decision of the learned magistrate to establish whether it is legally sound or not. All that the court would be concerned about is the process by which the impugned decision was reached. It has so been held time and again; being a beaten path, I can do no better than cite some the decisions where this principle has been posited.

31. In the English case of *Chief Constable of the North West Police vs Evans* (1982) 3 ALL ER 141 at 154 it was held that:

> Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."

32. And in *OJSC Power Machines Limited, TransCentury Limited, and Civicon Limited (Consortium) v Public Procurement Administrative Review Board Kenya & 2 others* [2017] eKLR Civil Appeal No. 28 of 2016 the Court of Appeal reiterated that in an application for judicial review orders, the court should not assume appellate jurisdiction. It noted as follows:

> Save for a limited scope, which we shall return to later, the court, considering a judicial review application, must never consider its role as appellate court and must avoid any temptation to go into the substance of the impugned decision itself or to ask questions, whether there was or there was no sufficient evidence to support the decision of the public body concerned. It is not for the court or individual judges to substitute their opinion for that of the public body constituted by law to decide the matter in question. See *Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited* (2008) Misc. Civil Appl. No. 374 of 2006. In judicial review proceedings, the mere fact that the public body?s decision was based on insufficient evidence, or on misapplication of evidence, cannot be a ground granting judicial review remedies. Whether that decision was right or not, the affected party ought to challenge it on appeal. In reaching its determination, it must, however, be recognized that a tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts. Whereas a decision may properly be overturned on an appeal, it does not necessarily qualify as a candidate for juridical review. *See East African Railways Corp. vs. Anthony Sefu Far-Es-Salaam (1973) EA 327*."

33. I am minded that the availability of an appeal as an alternative to judicial review does not necessarily bar an applicant moving the court for judicial review orders in appropriate cases particularly where the judicial review course would be the more convenient avenue. However, it is apparent from the statute

that the only course open to the applicant and which he was bent on taking initially before abandoning it was to seek for either an appeal under section 349 as read with section 350 of the *Criminal Procedure Code* or revision of the order under Section 362 of the *Criminal Procedure Code*; this latter section reads as follows:

> 362. Power of High Court to call for records
>
> The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

34. While, under this provision of the law, the Court may move suo motu to call for records, it can also be moved by a party aggrieved by an order made by the subordinate court for revision of the impugned order. If the High Court was moved in accordance with this provision of the law, it would have the option of altering or reversing the order in accordance with section 364(1) (b) of the *Criminal Procedure Code*. That section reads:

> 364. Powers of High Court on revision
>
> (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—
>
> (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
>
> (b)) in the case of any other order other than an order of acquittal, alter or reverse the order. (Emphasis added).

35. In my humble opinion, either of the available options of appeal or revision was equally convenient, beneficial and effective against the order of the learned magistrate. It follows that, in the absence of any satisfactory reason or sufficient cause, there was no point in the applicant moving this Honourable Court for the judicial review orders.

36. In *R vs Peterkin, ex parte Soni*, 18 (1972) Imm AR 253 Lord Widgery CJ said of this appellate course as follows:

> Where parliament has provided a form of appeal which is equally convenient in the sense that the appellate tribunal can deal with the injustice of which the complaint complains this court should in my judgment as a rule allow the appellate machinery to take its course. The prerogative orders form the general residual jurisdiction of this Court whereby the court supervises the work of inferior tribunals and seeks to correct injustice where no other adequate remedy exists, but both authority and common sense seem to me to demand that the court should not allow its jurisdiction under the prerogative orders to be used merely as an alternative form of appeal when and adequate jurisdiction exists elsewhere."

37. One other important consideration to be made is that of the exercise of the discretion by the prosecutor in his decision to withdraw the case and by the court in consenting to the application for withdrawal. This element of discretion is prominent both in Article 157 (6) (c) of *the Constitution* and section 87(a) of the *Criminal Procedure Code* which, as noted, are the provisions under which criminal proceedings may be discontinued. It is necessary I reproduce them to illustrate my point.

38. Article 157 (6) (c) of *the Constitution*, on the other hand, reads as follows:

(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—

(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). (Emphasis added).

39. Section 87(a) of the *Criminal Procedure Code*, on the other hand, reads as follows:

87. Withdrawal from prosecution in trials before subordinate courts

(a) In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Director of Public Prosecutions, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal— (emphasis added).

40. The exercise of discretion here is at two levels; that exercised by the prosecutor or the Director of Public Prosecution and that exercised by the court to reject or allow the discontinuance of criminal proceedings. Whichever level the discretion is exercised a judicial review court will be hesitant to intervene and interfere with the exercise of the discretion unless it can be demonstrated that the discretion was exercised whimsically or capriciously rather than judiciously. The court emphasised this point in *Chief Constable of the North West Police vs Evans* (supra) where it was stated as follows:

> The remedy by way of judicial review under RSC...is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and ...administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner...and not to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law." (Per Lord Hailsham at 1160E-H)."

41. Similar observations were made by Lord Diplock in *Secretary of State for Education and Science v Tameside Metropolitan* BC [1976] 3 All ER 665 at 695, [1977] AC 1014 at 1064 where he noted:

> "The very concept of administrative discretion involves a right to choose between more than one possible course of action on which there is room for reasonable people to hold differing opinions as to which is to be preferred."

42. Courts may intervene to review a power conferred by statute on the ground of unfairness but only if the unfairness in the purported exercise of the power be such as to amount to an abuse of the power. See *Preston v IRC* [1985] 2 All ER 327, [1985] AC 835, per Lord Templeman.

43. In conclusion, therefore, I am not satisfied that the applicant has demonstrated that the learned magistrates' decision is tainted by any of the grounds of judicial review of illegality, irrationality or procedural impropriety. (See the *Council of Civil Service Unions versus Minister for the Civil Service* (1985) A.C. 374,410).

44. There is absolutely no evidence that in reaching her decision, the learned magistrate did not understand correctly and give effect the relevant constitutional and statutory provisions relating to her exercise of discretion to allow or reject the Director of Public Prosecution's bid to discontinue criminal proceedings against the interested party. She properly understood the extent of her powers in making

the decision she made but, as noted earlier in this judgment, whether she correctly interpreted the law in reaching that decision is a question that can only be resolved by an appellate court and not a judicial review court.

45. Again, there is no basis upon which it can be urged that the respondent's decision was so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

46. It has been noted that the learned magistrate laid out the background of the applicant's case and then considered the submissions of all the parties involved. She then spelt out the issues for determination and answered each of those issues before coming to the conclusion that it was open to the Director of Public Prosecution to withdraw the charges against the interested party under section 87 (a) of the *Criminal Procedure Code* and Article 157 (11) of *the Constitution*.

47. For this reason, and considering that the applicant was given a fair chance to present her case and contest the position taken by the Director of Public Prosecution to discontinue criminal proceedings against the interested party, the propriety of the proceedings culminating in the impugned decision is beyond doubt. In other words, there is no case for procedural impropriety.

48. In the ultimate, I am not convinced that the applicant has made out a case capable of persuading me to exercise my discretion and grant the orders for judicial review. The applicant's motion is thus dismissed with costs. Orders accordingly.

SIGNED, DATED AND DELIVERED ON 22 FEBRUARY 2022

Ngaah Jairus

JUDGE