



**Republic v Safaris & 3 others; Khaminwa (Exparte) (Judicial Review 107 of 2019)
[2022] KEHC 18064 (KLR) (Judicial Review) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 18064 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW 107 OF 2019
J NGAAH, J
SEPTEMBER 29, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

ROBIN HURT SAFARIS 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

CHIEF MAGISTRATES COURT NGONG 4TH RESPONDENT

AND

TOM KHAMINWA EXPARTE

JUDGMENT

1. The application before court is the motion dated 13 June 2019 which is said to be brought under Article 23 of the *Constitution*, “Order S3(sic) (1), (2)” of the *Civil Procedure Rules* and section 8 and 9 of the *Law Reform Act*, cap 26. The prayers in the motion have been expressed as follows:
 - 1). An order of *certiorari* to(sic) the 4th respondent to bring to the court for the purpose of being quashed the charge sheet registered against the applicant in Criminal Case Number 256/2019 in the criminal proceedings instituted against him in Chief Magistrate’s court at Ngong.
 - 2). An order of prohibition directed to the 3rd and 4th respondent (sic) from commencing in future with any criminal proceedings against the applicant or malicious ground.



- 3). An order of *mandamus* to be directed to the 1st respondent to (sic) Tuk Tuk, Registration Number KAU 443Y to the applicant.
- 4). Costs be in the cause.
2. The application is based on a statutory statement dated 5 April 2019 and a verifying affidavit sworn by the applicant on even date.
3. According to these documents, the applicant was arrested on 19 December 2018 on the basis of a complaint made by the applicant's employer that he had broken into her house and stolen certain properties. The applicant was eventually charged with the offence of stealing by servant contrary to section 281 of the *Penal Code*, cap 63.
4. The applicant's case is simply that the allegations of theft against him were malicious and they were made with the intention of sacking him from the 1st respondent's employment. In any event, no investigations were carried out before the applicant was arrested and charged in court.
5. The application was opposed and a replying affidavit to that effect was sworn by Alexandra Juliet Katherine Mason on 17 June 2019. Mason was the applicant's employer and on whose complaint the police acted and arrested the applicant.
6. The 2nd and 3rd respondents also filed grounds of opposition in which they contended that the application is meant to prevent the respondents from exercising their mandate and to scuttle the criminal justice system. That the applicant has not demonstrated that his prosecution was for no other reason than ulterior motives and that, in any event, the contentions by the applicant are factual matters which can only be dealt with by the trial court.
7. One of the vital components of an application for judicial review is the grounds upon which it is made. They are important because Order 53 Rule 1(2) states in mandatory terms that the statement accompanying the application must contain, among other things, the grounds upon which the application is made. It reads as follows:
 - (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. (Emphasis added).
8. And Order 53 Rule 4(1) states unambiguously that no grounds should be relied upon except those specified in the statement accompanying the application for leave.
9. What are these grounds?
10. The grounds for judicial review were enunciated in the English case of *Council of Civil Service Unions versus Minister for the Civil Service* (1985) AC 374, 410 in which Lord Diplock set out the three heads which he described as "the grounds upon which administrative action is subject to control by judicial review". The learned judge explained what these grounds entail in the following terms:

My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is



subject to control by judicial review. The first ground I would call “illegality,” the second “irrationality” and the third “procedural impropriety.”

11. By “illegality” as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
12. By “irrationality” I mean what can by now be succinctly referred to as “Wednesbury unreasonableness” (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is 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. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court’s exercise of this role, resort I think is today no longer needed to Viscount Radcliffe’s ingenious explanation in *Edwards v Bairstow* [1956] AC 14 of irrationality as a ground for a court’s reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. “Irrationality” by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.
13. I have described the third head as “procedural impropriety” rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all.”
14. These grounds of illegality, irrationality and procedural impropriety are ordinarily regarded as the traditional grounds for judicial review. The court will intervene and grant the remedy for judicial review if any of them is proved to exist. But as Lord Diplock suggested, the list is by no means exhaustive. The learned judge hastened to say that further development of this area of law may yield further grounds on a case by case basis and it is in this spirit that the principle of proportionality as a further ground for judicial review has been developed.
15. Turning back to the applicant’s application, it is not apparent from the statement accompanying the application which of the grounds of judicial review the applicant is relying upon. He has not stated in precise, specific and unambiguous terms the ground or grounds for judicial review upon which he seeks this Honourable Court’s intervention to grant him the orders of certiorari and prohibition.
16. As a matter of fact, the entire statutory statement is under the head of ‘name and description of the parties’. Besides describing the parties, the rest of the contents in the statement are facts that have been deposed in the verifying affidavit.
17. The reliefs sought have not been given but in paragraph 17 of the statement, it is stated as follows:

It is lawful, just, fair and proper

 - a. Leave be granted commence judicial review proceedings for an order of certiorari to quash the criminal proceedings instituted against the applicant.
 - b. Leave be granted for an order of prohibition prohibit (sic) the 1st respondent from instituting malicious cases in order to intimidate and harass the applicant.



- c. Leave be granted to operate as stay of the criminal proceedings requiring the applicant to appear before the chief magistrate court at gong on 2 July, 2019.
- d. Leave be granted for an order of mandamus be issued against the first respondent compelling him to transfer the ownership of Tuk Tuk to the applicant.”
18. Order 53 Rule 1(1) and (2) does not contemplate that leave will be sought in the main motion and therefore the relief sought and which has to be stated in the statutory statement is not a prayer for leave but relief that the applicant for leave intends to seek once leave has been granted. This rule reads as follows:
- Order 53 Rule 1(2) states as follows:
- 1.
- (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.
- (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. (Emphasis added).
19. The relief sought here refers to the substantive prayers for judicial review and not leave for such prayers. To the extent that the applicant sought in the statement for leave to commence proceedings for the judicial review orders instead of the substantive prayers for these orders, the application is incompetent and fatally defective.
20. But even if the applicant’s application was properly before court, I would be hesitant to grant it because I am not satisfied that the decision to arrest and prosecute him is tainted by any of the grounds of judicial review.
21. An affidavit filed by the applicant has an exhibit in the nature of a statement to the police by one Hurt Janet Elizabeth. In the statement Elizabeth stated that the applicant was her gardener. She left for a holiday on 16 December 2010 and locked her house. On 17 December 2018 her cook, one Purity Kagendo called her to say that when she reported to work she found the applicant in the bedroom area. He was climbing a ladder in an attempt to gain entry into the safe store. When she went to call the security officers the applicant ran away. The applicant is said to have arrived at work much earlier than usual. When Elizabeth returned on 2 January 2019 she found her store had been broken into and several items missing including 1950 Euros, jewellery and a DVD player. She then reported the matter to the police.
22. The applicant did not return to work after 17 December 2018. He was arrested by the police on the following day and subsequently arraigned on a charge of theft by servant contrary to section 281 of the *Penal Code*.
23. What the applicant has presented in support of his case are matters of fact that would ordinarily be properly interrogated by the trial court. The police and investigative agencies cannot be faulted for acting on suspicion that the applicant committed the crime for which he has been charged. It has been held that:

Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: ‘I suspect but I cannot prove’. Suspicion arises at or near the starting point of an investigation



of which the obtaining of prima facie proof is the end." (Per Lord Devlin in Hussien v Chong Fook Kam [1970] AC 942, 948.

The learned judge explained further:

Prima facie [proof] consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all. ... Suspicion can take into account also matters which, though admissible, could not form part of a *prima facie* case."

24. It follows that it is not out of the ordinary for the police or other investigative agencies to act on suspicion as long as it is reasonable suspicion. If it is reasonable suspicion it would be the starting point of an investigation and if, in the course of investigations, the police gather what they think is sufficient evidence to mount a prosecution, so be it. The evidence will of course be tested at the trial and not in a judicial review court.
25. A judicial review court would be concerned with the process culminating in the decision to charge the suspect. If it can be demonstrated that decision is tainted by any of the grounds of judicial review of illegality, irrationality and procedural impropriety, the court will intervene and quash it or, otherwise, grant any of the other orders of judicial review.
26. As far as I can see, none of the grounds of judicial review have been demonstrated in the present application. It has not been demonstrated that any of the respondents did not understand correctly the law regulating their decision-making power and that they failed to give effect to it.
27. Neither can it be said that the decision to prosecute the applicant is 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.
28. Finally, there is nothing to suggest procedural impropriety in the process leading to the arrest and prosecution of the applicant. There is every reason to believe and nothing to the contrary has been proved, that he was accorded procedural fairness before he was eventually charged with the offence of theft by servant.
29. Besides being incompetent and defective, I find the applicant's application, for reasons I have given, to be without any merit. It is hereby dismissed. Parties will bear their respective costs. It is so ordered.

SIGNED, DATED AND DELIVERED ON 29 SEPTEMBER 2022.

NGAAH JAIRUS

JUDGE

