



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

PETITION NO. 38 OF 2019

IN THE MATTER OF: ARTICLE 1, 2(4), 10, 21, 22, 23, 24, 27, 28, 35,47,48,49,50,157,159,258 &259

AND

IN THE MATTER OF: THE 1ST RESPONDENT'S DECISION TO CHARGE THE PETITIONER IN MOMBASA CHIEF MAGISTRATE'S COURT, ANTI-CORRUPTION CASE NO. 10 OF 2011

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE S 29,48 & 50 OF THE CONSTITUTION OF KENYA, 2010 AND THE ADVOCATE ACT CAP 16 LAWS OF KENYA

AND

IN THE MATTER OF: PENAL CODE-CHAPTER 63 LAWS OF KENYA

AND

IN THE MATTER OF: THE POLICE ACT, NATIONAL POLICE ACT & THE DIRECTOR OF PUBLIC PROSECUTIONS ACT

BETWEEN

HADIJA MLAO MLINGO.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION

ETHICS & ANTI-CORRUPTION COMMISSION

THE CHIEF MAGISTRATES' COURT -MOMBASA

DEPUTY REGISTRAR CRIMINAL DIVISION.....RESPONDENTS

AND

WILBERFORCE MALANGA WAMBULWA

MWINYI NAJORO MAPENDELEO

FESTUS NYIRO NGUMA

KAHINDI KINGI EDWARD

ABDI MOHAMED BEGE

AMANI ALI MAKASI.....INTERESTED PARTIES

JUDGMENT

Introduction

1. By a petition herein, dated 11/4/2019 the Petitioner prays for the following orders:

- a. A declaration that the initiation, maintenance and prosecution of Mombasa Chief Magistrate's Court Anti-Corruption Case No. 10 of 2011 against the Petitioner herein is an abuse of the criminal justice process and contravenes the Petitioner's constitutional rights to freedom and security of the person, right to a fair hearing, right to equality and freedom from discrimination.
- b. A declaration that the charges in Mombasa Chief Magistrate's Court Anti-Corruption Case No. 10 of 2011 have no legal or factual background.
- c. A declaration that the institution, maintenance and prosecution of Mombasa Chief Magistrate's Court Anti-Corruption Case No. 10 of 2011 against the Petitioner herein is oppressive, malicious and an abuse of the court process.
- d. An order prohibiting continuance of Mombasa Chief Magistrate's Court Anti-Corruption Case No. 10 of 2011 against the Petitioner herein.
- e. A consequential order to quash the proceedings in Mombasa Chief Magistrate's Court Anti-Corruption Case No. 10 of 2011 against the Petitioner herein.
- f. The costs of the petition.
- g. The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.

2. The Petitioner seeks to challenge the initiation, maintenance and prosecution of criminal proceedings against her in Mombasa Chief Magistrate's Court Anti-Corruption Case No. 10 of 2011. The Petitioner alleges that the 2nd Respondent through its Internal Memo had declared that the Petitioner ought to be a prosecution witness and that the opinion should be shared by 1st Respondent for concurrence. It is further averred that the 1st Respondent further recommended in a brief dated 17/5/2016, that the charges leveled against the Petitioner be terminated so that she can be treated like a prosecution witness. On that basis, the Petitioner avers that she ought not to be part of the criminal proceedings, which are still pending before the court. The Petitioner asserts that as a result of the criminal case and the continued prosecution, she (the Petitioner) is being paid half salary since 2011 and her reputation has been tarnished and the existence of the criminal cause is a violation of her constitutional rights.

3. The Petitioner states that she has attended Court on 15 & 22/1/2016 and on 17/2/2015 for purposes of confirming the directive on withdrawal of the charges against her and even recorded further statements in relation to the case confirming that she did not participate in the alleged offence. The 1st and 2nd Respondents even recommended vide brief dated 17/5/2016 that the charges levelled against her be terminated. However, despite the said confirmation, the criminal case against the Petitioner continues to drag for over 8 years and it is only on the 17/1/2019 that the 1st Respondent's case was closed after their Application for adjournment to avail witnesses was declined.

4. The Petitioner also avers that in a bid to delay the criminal case, the 1st Respondent filed a Criminal Revision No. 3 of 2017 at the High Court. However, the said revision is yet to be prosecuted by the 1st Respondent thereby delaying the criminal case further.

The Response

5. The 1st Respondent filed Ground of Opposition dated 9/9/2020 to the main Petition, and listed the following grounds:

a. That the Petition is frivolous, vexatious, in bad faith and an abuse of the Court process.

b. That the consent was given independently after the 1st Respondent was satisfied that the evidence was credible under Article 157 of the Constitution and the ODPP Act. Consequently, the decision to prosecute should not be interfered with on such flimsy grounds

6. The 2nd Respondent opposed the Petition vide Replying Affidavit sworn on 4/6/2019 by **Lamek Okun** who is the 2nd Respondent's duly appointed investigating officer. The deponents avers that the Petition is incurably defective, grossly incompetent, and legally untenable and is grounded on generalities, conjectures, and suppositions, since it does not disclose the specific and sufficient details of how and when the Respondents violated the Petitioner's constitutional rights guaranteed under Articles 27, 28, 48, 50 and 157 of the Constitution.

7. The 2nd Respondent states that the charges preferred against the Petitioner and the Interested Parties were as a result of investigations of

allegations of corruption, and pursuant to Section 35 of the Anti-Corruption Commission Act as read with Article 157 of the Constitution the 1st Respondent recommended the institution of criminal proceedings in **Mombasa Chief Magistrate Court Anti-Corruption Case No. 10 of 2011**. This action was independently taken by the 1st, 2nd and 3rd Respondents pursuant to the constitution.

8. The 2nd Respondent states that the instant Petition in respect to the 3rd Respondent offends the provision of Article 160(5) of the Constitution read together by Section 6 of the Judicature Act and as such the petition is untenable in law as it seeks to unduly stifle the expeditious hearing and determination of **Mombasa Chief Magistrate Court Anti-Corruption Case No. 10 of 2011**, when in fact, the Petitioner's culpability if any can only be determined by a criminal Court and that the Petitioner has not demonstrated that she will suffer any prejudice if the criminal case is prosecuted to its logical conclusion.

9. Further, the 2nd Respondent avers that the Petitioner's perceived rights as pleaded in her Petition are not absolute and do not fall under the category of non-derogable rights guaranteed under Article 25 of the Constitution. Therefore, the perceived Petitioner's rights can be limited and qualified in circumstances set out under Article 24(1) of the Constitution.

10. The 3rd and 4th Respondents, and the Interested Parties did not participate in these proceedings.

Submissions

11. **Ms. Kyalo**, Learned Counsel for the Petitioner submitted that the sole issue for determination was whether the Petitioner has met the grounds for the grant of the relief sought. Counsel cited the case of **Director of Public Prosecution v Martin Maina & 4 others [2017] eKLR** where Court of Appeal relied on the Supreme Court of India in **State of Maharashtra & Others v Arun Gulab Gawali & Others** where the said Court outlined grounds upon which orders prohibiting criminal prosecution may be granted. They are as follows:

“(I) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice;

(II) Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction;

(III) Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; and

(IV) Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.”

12. **Mr. Fedha** Learned Counsel for the 1st Respondent submitted that from the investigations conducted by the 2nd Respondent, there was enough evidence to charge the Petitioner and that there was no ulterior motive on the part of the 1st Respondent. Counsel cited the case of **Philomena Mbeti Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR** where the court held that to allow willy-nilly and casual review of the foundational basis of criminal charges would turn judicial review proceedings into criminal mini –trials, a prospect that anyone keen to stop a criminal trial would relish.”

13. **Mr. Makori** Learned Counsel for the 2nd Respondent reiterated the contents of the 2nd Respondent's Replying Affidavit and stated that the instant Petition failed to meet the threshold set in the case of **Anarita Karimi v Republic** since it does not disclose the specific and sufficient details how and when the 2nd Respondent has violated the Petitioner constitutional rights as pleaded.

14. Counsel urged this Court to exercise constitutional avoidance, exercise restraint, and give an opportunity to relevant constitutional bodies or state organs to deal with disputes under relevant provisions of the parent Statute.

Determination

15. I have considered this petition, responses thereto and submissions by the parties. I have also considered the authorities relied on. The issues arising for determination are as follows:

a. What is the mandate of the 1st and 2nd Respondents in relation to investigations and prosecution?

b. Whether the 1st Respondent's powers can be interfered with?

c. Whether the Petitioner has proved violation of her rights by the Respondents.

d. What reliefs are available to the Petitioners; if any.

(a) What is the mandate of the 1st and 2nd Respondents in relation to investigations and prosecution?

16. Institutions created by or under the Constitution have individual mandate spelt out by the Constitution. Courts will rarely interfere with the exercise of the powers and discretion those institutions enjoy under the constitution unless they act beyond their mandate or their actions

violate the constitution or other laws, or infringe upon rights or freedoms guaranteed under the constitution. In this instant, the 1st and 2nd Respondents are on a spot for being accused for not adhering to Article 10 of the Constitution.

17. Under Article 157 (6), (7), (8), (10) & (11) of the Constitution, it is stipulated as follows:

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

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

(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).

(7) If the discontinuance of any proceedings under clause (6) (c) takes place after the close of the prosecution’s case, the defendant shall be acquitted.

(8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.

...

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

(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”

18. The Office of the Director of Public Prosecutions Act, No.2 of 2013, in Sections 5 and 25 provide that:

“[the DPP may] 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”

AND

“The Director may, with permission of the court discontinue prosecution commenced by the Director, any person, or authority at any stage before delivery of judgement. ”

19. Section 6 of the Office of the Director of Public Prosecutions Act states as follows:

“6. Pursuant to Article 157(10) of the Constitution, the Director shall—

(a) not require the consent of any person or authority for the commencement of criminal proceedings;

(b) not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law; and

(c) be subject only to the Constitution and the law.”

20. On investigations, Section 11 (1) (d) & 3 of the Ethics and Anti-Corruption Commission Act provides as follows:

“(1) In addition to the functions of the Commission under Article 252 and Chapter Six of the Constitution, the Commission shall—

(a) in relation to State officers— (i) develop and promote standards and best practices in integrity and anti-corruption; (ii) develop a code of ethics;

(b) work with other State and public offices in the development and promotion of standards and best practices in integrity and anticorruption;

(c) receive complaints on the breach of the code of ethics by public officers;

(d) investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under this Act, the Anti-Corruption and Economic Crimes Act or any other law enacted pursuant to Chapter Six of the Constitution;

...

(3) The Commission may cooperate and collaborate with other State organs and agencies and any foreign government or international or regional organization in the prevention and investigation for corruption.”

21. Section 13 (2) (c) of the Ethics and Anti-Corruption Commission Act provides for the Powers of the Commission, which include:

“(2) Without prejudice to the generality of subsection (1), the Commission shall have the power to—

(a) ...

(c) conduct investigations on its own initiative or on a complaint made by any person;”

22. Section 23 of the Anti-Corruption and Economic Crimes Act provide as follows:

“(1) The Secretary or a person authorized by the Secretary may conduct an investigation on behalf of the Commission.

(2) Except as otherwise provided by this Part, the powers conferred on the Commission by this Part may be exercised, for the purposes of an investigation, by the Secretary or an investigator.”

23. Further, Section 35 of Anti-Corruption and Economic Crimes Act provides as follows:

“(1) Following an investigation the Commission shall report to the Director of Public Prosecutions on the results of the investigation.

(2) The Commission’s report shall include any recommendation the Commission may have that a person be prosecuted for corruption or economic crime.”

24. From the foregoing paragraphs, it is clear that the 1st and 2nd Respondents have constitutional and statutory mandate to carry out investigations and prosecution of offenders independently.

(b) Whether the 1st Respondent’s powers can be interfered with?

25. The 1st Respondent (D.P.P.) is subject to the Constitution and any other written law. Therefore, although the 1st Respondent has the power to independently charge and prosecute, this Court will not hesitate in putting a halt to such a decision where the 1st Respondent appears to act under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution and any other written law. It is however upon the Petitioner to satisfy the Court that the discretion given to the 1st Respondent to investigate and prosecute is being abused and ought to be interfered with.

26. In **Diamond Hasham Lalji & Another v A.G. & 4 others [2018] eKLR** the Court of Appeal had this to say on the right of the High Court under Article 165(2)(d)(1) to reverse the said powers: -

“[34] It is also indisputable that the constitutional prosecutorial power of DPP is reviewable by the High Court as Article 165(2) (d) (ii) of the Constitution ordains. However, the doctrine of separation of powers should be respected and the courts should not unjustifiably interfere with the exercise of discretion by DPP unless it is exercised unlawfully by, *inter alia*, failing to exercise his/her own independent discretion; by acting under the control and direction of another person; failing to take into account public interest or interest of the administration of justice in all their manifestations; abusing the legal process; and by acting in breach of fundamental rights and freedoms of an individual.

The DPP is entitled to make errors within his constitutional jurisdiction and the decision will not be reviewed solely on the ground that it was based on misapprehension of facts and the law. (**Matululu and Anor v. DPP [2003] 4 LRC 712**). Further, authority show that courts are generally reluctant to interfere with prosecutorial decisions made within jurisdiction.”

(c) Whether the Petitioner has proved violation of her rights by the Respondents.

27. Courts have also stated in many decisions that whereas the constitution confers on the 1st and 2nd Respondents mandate to institute prosecution and investigate respectively, they must act in good faith or else the Court will interfere with their mandate. The instances where a court may declare a prosecution improper were laid down in **Macharia & Another v A.G. & Another [2001] KLR 448** where the Court held that the Court can declare a prosecution to be improper if: -

a. It is for a purpose other than upholding the criminal law.

- b. It is meant to bring pressure to bear upon the applicant/accused to settle a civil dispute**
- c. It is an abuse of the criminal process of the Court.**
- d. It amounts to harassment and is contrary to public policy.**
- e. It is in contravention of the applicant's Constitutional rights to freedom.**

28. It was the Petitioner's case that she has the right to have the charges levelled against her terminated following the 1st & 2nd Respondents admission that she could be a prosecution witness.

29. The Petitioner produced a copy of a letter dated 23/7/2012 from the 1st Respondent, which was in relation to the trial court case. In the said letter, the Petitioner's request for review of the 1st Respondent's decision to prefer charges against the Petitioner had been rejected. A similar request for review was declined by the 1st Respondent vide letter dated 21/2/2014. The 1st Respondent reiterated that the charges preferred would be maintained. Being dissatisfied, the Petitioner through her advocate Ms. Christine Kipsang vide letter dated 28/8/2015 still sought for a review of the charges preferred against her by proposing that she was willing and readily available to become a prosecution witness and that she has crucial information that will help the 1st Respondent in the Anti-Corruption case.

30. It is noteworthy that the Petitioner has produced a brief dated 17/5/2016 originating from the 1st Respondent's Principal Prosecution Counsel **Mr. Peter Kiprop**, wherein the said officer recommended that the Petitioner ought to have been treated as a prosecution witness instead of being charged, and that the charges against the Petitioner ought to be terminated. Further, the Petitioner produced an Internal Memo Referenced KACC/MSA/FI/INQ/06/2010 ACC10/2011 and dated 22/1/2016, emanating from the 2nd Respondent's investigating office in Mombasa. However, looking at the said Memo, it is noteworthy that the officers of the 2nd Respondent informed the prosecuting counsel that having considered the information in the possession of the accused person and the value addition to the prosecution case, the 2nd Respondent proposed that the Petitioner's proposal be shared and brought to the attention of the 1st Respondent office in Nairobi for concurrence.

31. From the foregoing, this Court is of the view that the question to be answered by this Court is whether the DPP is bound to act on the recommendations of the 2nd Respondent in making a decision of whether to institute charges against a suspect. The Court of Appeal faced with a similar situation in the case of **Michael Sistu Mwaura Kamau v Ethics & Anti-Corruption Commission & 4 others [2017] eKLR** held as follows:

“Article 157(1) of the Constitution establishes the office of the DPP. Under Article 157(10), the DPP does not require the consent of any person or authority to commence criminal proceedings and in the exercise of his powers he is not under the direction or control of any person or authority. Accordingly, the DPP discharges his functions and exercises his powers independently and he has the authority to exercise his discretion on whether to prosecute or not.

However, while exercising his mandate, the DPP must, under Article 157(11) of the Constitution as read with section 4 of the Office of the Director of Public Prosecutions Act No. 2 of 2013, have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. Upon receiving the report and recommendations of the EACC, the DPP is expected to exercise his discretion either to prosecute or not to prosecute independently, guided only by the Constitution, the law, and the evidence. He is not a rubber stamp, to mechanically approve the recommendations of the EACC.”

32. Having gone through the evidence tendered by the Petitioner, it is this Court's view that the Petitioner's argument that there was consensus that the charges against her be terminated and that she be treated as a prosecution witness is misguided and bereft of merit. This is because no evidence has been submitted to the effect that there was concurrence between the 1st Respondent and the 2nd Respondent on the issue of terminating the charges against the Petitioner and converting her to a prosecution witness. Therefore, the 1st Respondent decision on the request for review communicated vide letters dated 23/7/2012 and 21/2/2014 stands.

33. The Court of Appeal in **Diamond Hasham Lalji & Another v A.G. & 4 others (supra)** stated thus:

“[42] The burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision.”

34. Courts should be very reluctant to interfere with the exercise of discretion by the 1st Respondent under Article 157(10) of the Constitution, unless it is demonstrated that in making a decision to prosecute, the 1st Respondent was not guided by the provisions of Article 157(11) of the constitution. Nevertheless, the 1st Respondent is entitled to make errors within his constitutional jurisdiction, and the decision will not be reviewed solely on the ground that it was based on misapprehension of facts and the law. In this case the Petitioner has failed to demonstrate that there was an abuse of discretion by the 1st Respondent in making the decision to prosecute.

35. What is before this Court is evidence where the Petitioner is determined to arm twist the 1st Respondent into terminating the charges against her and converting her into a prosecution witness vide the various requests for review. And when the same came to a cropper, the Petitioner decided to approach this Court vide this instant Petition, to have the charges against her terminated. If this Court were to terminate the charges against the Petitioner on the basis of her having crucial information that will help the 1st Respondent if she is converted to a

prosecution witness, then this Court will be interfering with the 1st Respondent's independence guaranteed in the constitution.

36. The other issue raised by the Petitioner is that of inordinate delay. The Petitioner avers that for more than 8 years, the Anti-Corruption cause has been consistently adjourned by the trial Court at the behest of the 1st Respondent, thereby violating her right to fair hearing. Article 50 of the Constitution provides for the right to fair trial and under Article 50(1), (e) fair trial includes the right to have the trial begin and conclude without unreasonable delay. Therefore, both the commencement and the conclusion of the trial must be conducted without an unreasonable delay. The petitioner avers that on 17/1/2019, the prosecution case was closed and their application for adjournment denied. However, the 1st Respondent being dissatisfied by the trial court ruling filed a Criminal Revision No. 3 of 2017, which is still pending determination.

37. Having gone through the Criminal Review No. 3 of 2017 that was annexed in the Petitioner's Petition, I find that the main issue for determination in Criminal Revision No.3 of 2017 is the issue of delay in the prosecution of **Mombasa Chief Magistrate Court Anti-Corruption Case No. 10 of 2011**. Therefore, in my view the Revision Court is best placed to rule on the issue of delay and any further discussion of the issue of delay will amount *sub-judice*.

(d) What reliefs are available to the Petitioners?

38. From the foregoing paragraphs of this Judgment the Petition herein lacks merit and does not deserve any of the remedies sought. Accordingly, the petition herein is dismissed. There shall be no order on costs.

Orders accordingly

DATED, SIGNED & DELIVERED AT MOMBASA THIS 16TH DAY OF MARCH, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Mr. Makori for 2nd Respondent

Mr. Fedha for 1st Respondent

Mr. Makuto for 3rd Respondent

No appearance for Petitioner

Ms. Peris Court Assistant