



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION- MILIMANI

CRIMINAL CASE NO. E035 OF 2021

REPUBLIC.....PROSECUTOR

VERSES

SIMON MUTIA MWONGELA.....ACCUSED

RULING

1. Upon arraignment **Simon Mutia Mwangela**, the Accused, was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal code following an allegation that he murdered **Lapaja Topiwo Laizer**.

2. By a letter dated 5th July, 2021, G. W. Gichuhi head of the Homicide Division, Office of the Director of Public Prosecutions (DPP), wrote to the Court seeking adoption of the Independent Policing Oversight Authority (IPOA) investigation file and the Investigation Officer so as to replace the Director of Criminal Investigations (DCI) file to enable the IPOA officer to swear an affidavit opposing bail in the matter.

3. Following the stated letter, an oral application was made by Office of the Director of Public Prosecutions (ODPP) seeking to have IPOA take over investigations from DCI to enable its officer rely upon an affidavit in opposition of bail sought by the Accused. Ms. Ogweno, learned counsel for the State urged that initially the DPP had directed the Inspector General (IG) to carry out investigations following the provisions of **Article 157(4)** of the Constitution. That in the course of investigations some evidence was not collected prompting IPOA to intervene upon being directed by the DPP under **Article 157(11)** of the Constitution so as to ensure there was no abuse of the legal process.

4. Further, learned Counsel, Mr. Naulikha, for the State submitted that IPOA is mandated by the Constitution to carry out investigations in case of police misconduct including shooting which makes investigations conducted by it legal and constitutional. That the DPP proceeded on the basis of prima facie evidence compiled to form an opinion following limited timelines set in gathering of information and materials but also invited IPOA to investigate.

5. Learned Counsel, Mr. Wairegi, representing the family of the deceased called for a just and speedy resolution of the matter.

6. Learned Counsel for the deceased's employer, Mr. Kalwa urged that statements had been recorded by IPOA and in as much as the Accused had a right to a just and speedy resolution of the matter, it was equally important that proper and impartial investigations be carried out which involves investigation by an independent person. That the case involves the DCIO who is being investigated by officers from the same Division; whereby there is a possibility of vital information being left out or compromised. That no prejudice will be suffered by the Accused as justice will be seen to be done.

7. Learned Counsel for the Accused, Mr. Danstan Omari urged that all accused persons who appear before the court are equal. That the Accused being a DCIO is a man of immense influence, but, the DCI can investigate him. He drew an analogy of Judges appearing before judicial officers who try them, prosecutors who are prosecuted by the State and argued that the Accused is being discriminated by virtue of his rank. He called upon the court to take notice of the bad blood between the DCI and DPP. That IPOA is being brought into the matter because DCI and the Investigation Officer rejected an affidavit to oppose bail. That the Office of the Director of Public Prosecutions (ODPP) is acting out of malice.

8. Mr. Magara, learned counsel for the Accused argued that the application was made in bad faith with the intention of ensuring that the Accused does not get bail. That neither **Article 157(4)** nor **Article 157(11)** of the Constitution grants DPP power to invite or direct IPOA to conduct investigations. That **Article 157(11)** of the Constitution only talks of the DPP having due regard to public interest of administration of justice to prevent abuse of the legal process. That as admitted by the prosecution the Accused was charged in court presumably after investigations were completed by the IG.

Therefore, to seek to substitute, the question will be on what basis will the charges be standing upon? That the application is prejudicial to the Accused meant to discount issue of the Accused being given bail.

9. I have considered arguments by the Prosecution/State, Victims' advocates and the Accused. Taking into consideration the prayer sought informally by the DPP, the question would be; whether the file compiled by IPOA can substitute that of the DCI?

10. The Director of Public Prosecutions derives his powers from the Constitution. **Article 157(4)** and **(11)** of the Constitution provide that:

(4) Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

(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.

11. The DPP prosecutes cases that have been investigated by either the DCI or other agencies with constitutional mandate. The decision to prosecute is made in accordance to the discretion bestowed upon the office and in doing so there should not be direction from elsewhere.

12. **Section 7** of the Independent Policing Oversight Authority **Act, 2011(Act)**, gives the authority to the IPOA to carry out investigations against any police officer who may be accused of causing any death or any other offence. The relevant provision of law provides thus:

(1) The Authority shall have all the powers necessary for the execution of its functions under this Act, and without prejudice to the generality of the foregoing, the Authority shall have the power—

(a) To investigate the Service on its own motion or on receipt of complaints from members of the public, and for that purpose, to gather any information it considers necessary by such lawful means as it may deem appropriate, including by—

(ix) Recommending to the Director of Public Prosecutions the prosecution of any person for any offence;

(x) Investigating any death or serious injury occurring or suspected of having occurred as a result of police action.

(b) To take over on-going internal investigations into misconduct or failure to comply with any law if such investigations are inordinately delayed or manifestly unreasonable;

13. It is not clear as to what prompted IPOA to act, as the DCI was already seized of the matter, but, what is evident is the fact of death in issue having been alleged to have occurred as a result of police action that was part of the mandate of IPOA to investigate. Upon conclusion of its investigations it made recommendations to the DPP. Having examined the evidence presented it is the view of the DPP to have the evidence used in court. The defence however argues that the application is made in bad faith and is prejudicial to the Accused. This court must therefore determine whether the application was made with the intention to violate the Accused person's rights? The bone of contention seems to be the issue of an affidavit in opposition of bail having been deposed by one of the investigators from IPOA. Being released on bail is an accused person's constitutional right, unless proven otherwise. This is a question to be determined on merit, such that swearing an affidavit in that regard cannot be alleged to have been made in bad faith.

14. The most important issue is therefore whether the prosecutorial discretion can be interfered with by the court? In the case of **Chibungu Sanga Vs. Republic (2017)eklr** the court was confronted by a similar issue and it had this to state:

“The office of the Director of Public Prosecutions (ODPP) once it receives the recommendations from any investigating body and after examining the evidence is at liberty and has the discretion to choose the best evidence that can lead to a conviction provided that this discretion is exercised legally and is not motivated by ill will or ill motive....”

15. In the case of **Director of Prosecutions -V- Crossly Holdings Limited & 2 Others, Civil Appeal No.1 of 2013** the Court of Appeal opined that constitutional prerogative to institute criminal proceedings against any person, the prosecution ought not be interrupted unless the DPP is abusing his powers.

16. There is no evidence to establish presence of an illegality in what IPOA did. Statements were filed by the DCI for preparation of the case and the set of statements recorded by IPOA should be availed to the Accused who will be able to interrogate the prosecution's case on that basis. In the circumstances, the Accused will not be prejudiced.

17. The upshot of the above is that it is the duty and responsibility of the Director of Public Prosecutions to decide on which evidence to use, and in doing so, this court cannot control it. Therefore, the application by the State is allowed.

18. It is so ordered.

Dated, Signed and Delivered Virtually this 29th Day of July 2021.

L. N. MUTENDE

JUDGE.