



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BOMET
CRIMINAL APPEAL NO. 22 OF 2019

[Being an Appeal from the Ruling in Bomet Senior Principal Magistrate’s Court

Miscellaneous Criminal Number 31 of 2019 by Hon. P. Achieng (SPM)]

JENIFER C. TELE.....APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

REUBEN K. NGETICH.....2ND RESPONDENT

CELINA KILEL.....3RD RESPONDENT

ERICA KOECH.....4TH RESPONDENT

JUDGMENT

1. In an Application dated 13th May 2019 before the lower court, the Appellants sought leave of the court to commence private prosecution against the 2nd, 3rd and 4th Respondents. The Application was dismissed by Hon. P. Achieng in her Ruling delivered on 22nd August 2019.

2. Being aggrieved by the decision of the lower court, the Appellants filed a Memorandum of Appeal dated 28th August 2019 expressing their dissatisfaction with the Ruling on the following grounds:-

(i) THAT the Honourable Magistrate erred in fact and in law in exercising her discretion by declining to grant leave for commencement of the intended private prosecution proceedings against the 2nd, 3rd and 4th Respondents.

(ii) THAT the Honourable Magistrate erred in law by failing to take into consideration the relevant law while arriving at her decision.

(iii) THAT the learned Magistrate erred in law and in fact by failing to weigh all the evidence and the written submissions of the appellant herein placed before her in dismissing the application and/or relying on insufficient evidence to dismiss the same.

(iv) THAT the Honourable Magistrate did not exercise her discretion judicially and went against

the principles set out in **Kimani vs. Kihara (1985) KLR 79** wherein the High Court laid down certain rules in form of questions that a magistrate should ask and be satisfied on before granting permission for private prosecution.

(v) THAT the Honourable Magistrate erred in law by failing to take into consideration extraneous factors in refusing to grant leave herein and that he departed from the principles set out in **Floriculture International Limited and others High Court Misc. CIV App No. 114 of 1997**.

(vi) THAT the learned Magistrate erred in law and fact in dismissing the suit when there was sufficient evidence tendered against the respondents thus occasioning a miscarriage of justice.

3. The Appellants prayed that the Ruling delivered on 22nd August 2019 and all consequential orders be set aside, reviewed and/or varied.

4. This court's duty is to evaluate and scrutinize evidence on record and draw its own independent conclusions. The Court of Appeal in the case of **Mark Ouiruri Mose Vs. R (2013) eKLR**, held that:-

“This court has a duty to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter.”

The Applicant's case.

5. It was the Applicant's case that the 2nd, 3rd and 4th Respondents raided her home on 28th February 2019 and stole Kshs.115,000/=.

6. That she lodged a complaint at Bomet Police Station under O.B Number 43/28/2/2019. The Applicant stated that the investigations were completed and she was not satisfied with the findings. She therefore had reasons to believe that her case was not well handled. She further stated that the investigations and the report were predetermined and biased.

7. It was the Applicant's case that the Officer in Charge (OCS) of Bomet Police Station had never shared a copy of the investigations report. She stated that she followed up the case with relevant authorities and that the Officer in Charge of Bomet Police Station wrote to the 1st Respondent indicating that he had no intention of prosecuting the case. It was her case that the OCS wanted to arrest her instead.

8. The Applicant stated that she believed that the duties of the 1st Respondent's office had been taken up by third parties and that the office had never responded to her letters. She further stated that the 1st Respondent declined to prosecute the 2nd, 3rd and 4th Respondents without any good reason.

9. The Applicant prayed that she be allowed to commence private prosecution if the 1st Respondent was not willing to take up its constitutionally mandated duties.

The Appellant's submissions.

10. The Appellant submitted that Section 28 of the Director of Prosecutions Act granted any person the right to institute private prosecution proceedings. The Appellant relied on the cases of **Nairobi High Court Miscellaneous Civil Application No. 114 of 1997 Floriculture International Limited and Others Versus The Attorney General** and **Nairobi High Court Petition No. 339 of 2013 Isaac Oluochier Versus Stephen Kalonzo Musyoka & 217 Others (2013) eKLR** to support her submission.

11. It was the Appellant's submission that they met the criteria for grant of leave to commence private prosecution.

12. The Appellant submitted that the police and the 1st Respondent were in cahoots to ensure that the 2nd, 3rd and 4th Respondents were not prosecuted as evidenced by the deviation from the facts of the

complaint lodged and outright bias in the police report dated 25th April 2019. That a perusal of the said report revealed that the main issue addressed was the offence that the Appellant had been charged with and not the complaint of theft against the 2nd, 3rd and 4th Respondents. It was the Appellant's submission that this amounted to bias.

13. The Appellant submitted that the investigating officer did not make any effort to interview her and this meant that the investigation report was predetermined.

14. It was the Appellant's submission that there was no good reason why a private prosecution could not be granted. That a private prosecution is an initiative to neutralize attempts to stifle criminal justice. The Appellant further submitted that the indolence and unwillingness of the police and the 1st Respondent to prosecute was evident in the several complaints made to the 1st Respondent's office by the Appellant through her advocates. That several letters were addressed to the 1st Respondent by the Appellant's advocate but nothing was done.

15. The Appellant submitted that unless the court granted the prayer, there would be no justice. She relied on the case of **Nairobi High Court Revision Case of Kimani Vs Nathan Kahara (1983) eKLR**, to support her submission.

16. It was the Appellant's submission that failure to prosecute made the 1st Respondent culpable. That the decision not to charge was made by the OCS and not the 1st Respondent. It was the Appellant's further submission that this made it clear that the OCS and 1st Respondent had ganged up to facilitate an illegality.

17. The Appellant submitted that the 1st Respondent's refusal to charge the 2nd, 3rd and 4th Respondents was nothing short of abdicating its constitutional duty and that could only be remedied by the court granting leave to commence a private prosecution.

18. It was the Appellant's submission that the court failed to consider the applicable principles in the Floriculture case and that had the court evaluated the circumstances of the case and applied the principles for grant of leave, it would have come to a different conclusion.

The 1st Respondent's case.

19. Derrick Wawire, a prosecution counsel with the 1st Respondent, swore a Replying Affidavit dated 28th May 2019 in response to the aforementioned Application.

20. The 1st Respondent stated that the application was vexatious, brought in bad faith and was meant to abuse the court process as the Appellant had not demonstrated how her complaint met the evidential test against the 2nd, 3rd and 4th Respondents to enable the 1st Respondent make a decision to charge.

21. It was the 1st Respondent's case that the allegations of a raid and theft on the Appellant's home were investigated and were found to be untrue as the 2nd, 3rd and 4th Respondents were enforcing provisions of the law to rid the County of illicit brew. That the 2nd, 3rd and 4th Respondents seized illicit brew in the Appellant's premises and she was charged and convicted in Bomet/SPMCR/PCR/574/2019. The 1st Respondent stated that the Appellant paid the fine and has never appealed the judgment and the sentence.

22. The 1st Respondent stated that there was no legitimate expectation that all complaints once investigated must lead to prosecution since the decision to commence criminal proceedings did not lie with the complainant but was exercised by the DPP according to the well laid down guidelines in the National Prosecution Policy. The 1st Respondent further stated that it was not the work of the DPP to simply give cases a public hearing where there was weak evidence. They stated that if the DPP was not satisfied with the evidence, there would be no prosecution no matter how great the public interest might

seem.

23. It was the 1st Respondent's case that investigations into the allegations of theft of Kshs.115,000 were thorough and not pre-determined. That upon subjecting the police investigation findings to the two-pronged evidentiary and public interest test, the complaint did not have a realistic prospect of prosecution.

24. The 1st Respondent stated that the Appellant was being dishonest when she stated that no investigation report was shared with her as there was correspondence between the police and the Appellant's advocate annexed to the Appellant's own application. It was their case that the allegation of the 1st Respondent's office 'ganging up' with the police was scandalous as the complaint was investigated by the police and the role of the DPP was to direct investigations. That the DPP does not conduct investigations and that the decision not to charge was communicated to the Appellant's advocate.

25. The 1st Respondent stated that it had not abdicated its role as mandated by the Constitution but rather that it was the Appellant's advocate who had abdicated his role as an advocate by failing to do research on various prosecution policies, legislation and case law on the 1st Respondent's decision to charge. It was the 1st Respondent's further position that it was not in the interest of justice to allow an Applicant to commence private prosecution where a matter had been investigated and the investigatory body found that it lacked evidence.

26. The 1st Respondent claimed that the Appellant lived off the proceeds of crime i.e. from the sale of illicit brew and she was out to tarnish the names of public servants and intimidate them so that they would "not touch her lucrative, dark and illicit business".

27. The 1st Respondent stated that private prosecution was a weighty matter that should only be allowed as a safeguard against extraordinary impropriety and capricious failure or refusal to prosecute by the public prosecuting agencies.

28. It was the 1st Respondent's case that the DPP made an independent decision to charge and was not bound by the findings of the investigation agencies as it was the 1st Respondent who independently evaluated evidence and decided whom to charge. That there was no secrecy in the investigations.

29. The 1st Respondent stated that the Appellant did not prove that she actually had Kshs.115,000 in her possession. That when she was asked where her cash came from she could not account for it therefore making her claim hard to believe. It was the 1st Respondent's case that many people entered her house and hence it was not possible to rely on circumstantial evidence to the exclusion of the many others who entered the Appellant's house.

The 1st Respondent's written submissions.

30. The 1st Respondent submitted that it was not bound by the investigation findings in the police file and it was to exercise its independent decision to charge as envisaged under Article 157 of the constitution.

31. It was the 1st Respondent's submission that the orders sought would fundamentally impact the operations of the Inspector General of Police because the Appellant sought the police file to be handed over to her yet she was not a public servant. That the investigations were being impugned yet the police were neither notified about those proceedings nor enjoined as a party. The 1st Respondent further submitted that that action contravened the rules of natural justice.

32. The 1st Respondent submitted that the Application and the subsequent Appeal was an effort to interfere with the constitutional mandate of the 1st Respondent that was clearly safeguarded under Article 157(10) of the Constitution. They relied on the Court of Appeal case of **CCK Vs ODPP & 2 Others (2018) eKLR** to support this submission.

33. It was the 1st Respondents submission that the Appellant had failed to account how she got the Kshs.115,000 and as such she was unable to establish a case with a reasonable prospect of success to enable the 1st Respondent make a decision to charge.

34. The 1st Respondent submitted that the Appellant had not laid any evidence to show wilful refusal by the 1st Respondent to prosecute. It further submitted that in an application for leave to commence private prosecution, the magistrate must be satisfied that there was sufficient ground to warrant the private prosecution and that the DPP was unwilling to execute his mandate. They relied on the case of **Isaac Aluoch Aluochier Vs National Alliance & 440 Others (2017)** to support this submission.

35. The 1st Respondent submitted that private prosecution was a weighty matter that would only be granted as a safeguard against extraordinary impropriety and capricious failure or refusal by the 1st Respondent to prosecute. That further, no extraordinary failure by the 1st Respondent had been established.

36. It was the 1st Respondent's submission it did not require any consent or authority of any person for commencement of any criminal proceedings and that there was no legitimate expectation that all complaints once investigated would lead to prosecution. That the decision as to whether or not to commence criminal proceedings did not lie with a complainant but with the discretion of the 1st Respondent and was dependent on the evidence available, public interest considerations as well as the need to prevent and avoid the abuse of the criminal justice system.

37. The 1st Respondent submitted that upon subjecting the Appellant's complaint to an evidential test, it failed as it did not meet the threshold of 'realistic prospect of conviction'. For that reason, the 1st Respondent decided not to charge.

Analysis and determination.

38. I have considered the Notice of Motion Application dated 13th May 2019, the Replying Affidavit dated 28th May 2019, the Memorandum of Appeal dated 28th August 2019, the Appellants written submissions dated 28th April 2021, and; the 1st Respondent's written submissions dated 26th July 2021. The following two issues arise for determination:-

- i. The scope of the DPP's powers in its decision to charge.
- ii. Whether the Appellants have met the threshold for grant of leave to institute private prosecution.

i. The scope of the DPP's powers in its decision to charge

39. The Office of the Director of Public Prosecution is governed by the Office of the Director of Public Prosecutions Act No. 2 of 2013. It is an Act of Parliament that gives effect to Articles 157 and 158 of the Constitution.

40. Article 157 of the Constitution of Kenya provides that:-

“157 (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) discontinued at any stage before Judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions under paragraph (b).

7) If the discontinuance of any proceedings under clause (6) 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 court.

9) The powers of the Director of Public Prosecution may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

10) The Director of Public Prosecution shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her 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 Prosecution shall have regard to the public interest, the interests of administration of justice and the need to prevent and avoid abuse of the legal process.”

41. Section 6 of the Office of the Director of Public Prosecution Act, 2013 provides that:-

“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.”

42. The principles and values in prosecution are summarized in the **National Prosecution Policy 2015** at pg. 4 as follows:-

“State powers of prosecution are derived from the people and vest in and shall be exercised by the DPP and the officers subordinate to him or her. Prosecutors therefore, must uphold the supremacy of the constitution and be guided by the national values and principles of governance enshrined in Article 10 of the Constitution. Consequently, the practice of prosecution should uphold respect and promotion of human rights, rule of law, integrity and ethics, independence, professionalism, fairness, impartiality and inter-agency collaboration.

In prosecution, prosecutors should be guided by the public interest, the interest of the administration of justice and the need to prevent the abuse of the legal process. Various roles of the prosecutor are aspects of ‘administrative action’ which must be procedurally fair, expeditious, efficient, lawful, reasoned and impartial in decision making as envisaged in Article 47.”

43. It is very clear from Article 157 of the Constitution that the DPP has the sole discretion on the decision to charge as long as the same is founded on law and has regard to public interest and the need to avoid abuse of the legal process. The decision is itself unfettered but must be accountable. In the case of **Peter Ngunjiri Maina Vs Director of Public Prosecutions (2017) eKLR**, the Court held that:-

“The decision of the DPP is unfettered but it must be accountable. The discretion of the part of

the court to interfere with the decision of the DPP is untrammelled but it is not to be exercised whimsically.”

44. It is important to note that if the DPP’s decision to charge is legal and within the bounds of legal reasonableness, the court cannot interfere with that role. If the DPP acts outside the bounds of legal reasonableness, he acts ultra vires and at that point the court can intervene because it is the court’s high responsibility and inherent power to secure fair treatment for all persons brought before it and to prevent an abuse of the court’s process.

45. In the case of **Communications Commission of Kenya Vs Office of The Director of Public Prosecution & Another (2018) eKLR**, the Court of Appeal held that:-

“The decision whether or not to institute criminal proceedings is purely discretionary. That discretion must however be exercised by the DPP within the constitutional limits, that is, with regard to public interest, the interests of administration of justice and the need to prevent and avoid abuse of the legal process.”

46. There is nothing on record in this case to demonstrate that the decision of the 1st Respondent not to charge the 2nd, 3rd and 4th Respondents was tainted with malice or ill will. In their explanation to the Appellant through the Investigation Report, the Police stated that it had carried out investigations and found the allegations made by the Appellant to be very malicious and geared towards defeating justice. The police also stated that the Appellant was found brewing and selling changaa and busaa. That they recommended that she be charged with an offence of giving false information to a person employed in public service contrary to section 129(b) of the Penal Code, Cap 63, Laws of Kenya.

47. The Appellant has failed to show that the results of the investigations contained in the Investigation Report was pre-determined and biased. The Appellant instead alleged that “the prosecution office had been ganged up and its duties taken up by 3rd parties”. While this court is unable to decipher what the Appellant meant by “ganged up”, it is salient to highlight the relationship between the police and the office of the 1st Respondent.

48. The National Prosecution Policy 2015 addresses the above issue and clearly sets out the relationship at pg. 4 as follows:-

“Prosecutors rely on the work done by investigators for their work. This does not imply that investigators are in any sense ‘clients’ or ‘subjects’ of the prosecutors. The functions of prosecutors and investigators are complimentary in nature. In this regard, consultations and collaboration are inevitable in efficient investigations and prosecutions. In the discharge of their respective mandates, prosecutors should direct and guide investigations, while investigators should seek and receive advice from prosecutors in respect of the law, charges and evidence.

The nature of direction and advice will include; appropriate charges that may be preferred, sufficiency of evidence, reliability and admissibility of evidence, the applicable law, disclosure of material, as well as issues relating to appeals and revisions.”

49. The Appellant stated that the 1st Respondent never responded to her letters. This statement is not factual as the Appellant herself had attached the Investigation Report marked as ‘JCT-1’ indicating the results of the investigations by the police. The report made reference to a letter from P. Sang Advocates (the Appellant’s advocate) dated 10th April 2019. The report was copied to P. Sang Advocates and the Sub County Police Commander Bomet Central. It was clear that the Appellant’s request for information relating to her complaint was addressed by the police.

50. Failure to establish any ill will and/or malice or any ultra vires action on the part of the 1st Respondent in its decision to charge means the court cannot interfere with such a decision. Further such a decision is buttressed by the provisions of Article 157 (10) of the Constitution and Section 6 of the Office of Director

of Public Prosecutions Act, 2013.

51. In conclusion, I must restate that the decision as to whether or not to commence criminal proceedings does not lie with a complainant in the first instance, but with DPP exercising discretion judiciously and guided by the evidence available, public interest considerations, as well as the need to prevent and avoid abuse of the criminal justice process.

ii. Whether the Appellants have met the threshold for grant of leave to institute private prosecution.

52. The law on private prosecution is set out in section 88(1) of the Criminal Procedure Code. It states:-

“A magistrate trying a case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorized by the Director of Public Prosecution in this behalf shall be entitled to do so without permission.”

53. Leave must be sought under section 88(1) of the Criminal Procedure Code from a magistrate to conduct a private prosecution. In the case of **Otieno Clifford Richard Vs Republic (2006) eKLR**, the Court stated that:-

“Section 85 to section 88 of the Criminal Procedure Code deals with ‘Appointment of public prosecutors and conduct of prosecution’. On the other hand, section 89 to section 90 of the Criminal Procedure Code deals with the ‘Institution of proceedings and making of a complaint’. We think that in the case of a private prosecution an application must be first made under section 88(1) of the Criminal Procedure Code for the Magistrate trying the case to grant or refuse to grant permission to the Plaintiff to conduct a private prosecution.”

54. From the proceedings, it was clear that the Appellant was not satisfied with the decision of the 1st Respondent not to charge the 2nd, 3rd and 4th Respondents. They predicated their application on section 88 of the Criminal Procedure Code.

55. The grounds upon which leave to institute a private prosecution were elucidated by Kimaru J. in the case of **Shamsher Kenya Limited Vs Director of Public Prosecutions A& Another(2017) eKLR**, where the Court held that:-

“There is no dispute that any person may be granted leave to institute private prosecution provided that such person is able to establish certain conditions precedent. These conditions were set out in the case of Floriculture International Limited & others vs. the Attorney General Nairobi High Court Miscellaneous Civil Application No. 114 of 1997 and were reiterated with modifications in Nairobi High Court Petition No. 339 of 2013 Isaac Oluochier vs. Stephen Kalonzo Musyoka & 217 others. In this case, Mumbi Ngugi J citing Kuloba J (as he was then) in the Floriculture Case held that for a person to be granted leave to institute private prosecution he must establish that he had made a complaint to the police and had accorded reasonable opportunity for the police to investigate the case; that the Director of Public Prosecutions had been seized of the case and declined to institute or conduct criminal proceedings; that failure by the state agencies to prosecute is culpable, unreasonable and without any legally justifiable reason; that unless the suspect is prosecuted there is likelihood that there will be failure of public and private justice; that the person instituting private prosecution has suffered special, exceptional and substantial injury or damage that is personal to him and not motivated by malice, politics or some other ulterior consideration devoid of good faith and finally, that there was demonstrable ground that grave social evil will occur if the police and the Director of Public Prosecutions have acted capriciously, corruptly and in a biased manner that the only remedy is to grant leave to the aggrieved party to institute private prosecution.”

56. I now proceed to consider the aforementioned grounds in relation to the facts and evidence presented in the Appellant’s Application dated 20th July 2020.

57. It was not in dispute that the Appellant made a complaint to Bomet Police Station under O.B Number 43/28/2019. The same was investigated by the police who then forwarded their report to the Appellant and the 1st Respondent.

58. The police also found that the circumstances under which the allegation of theft of Kshs.115,000 was false and malicious. That to the contrary, the Appellant was found brewing and selling changaa and busaa and that she had been a habitual offender. The police recommended that the Appellant be charged with an offence of giving false information to a person employed in public service contrary to section 129(b) of the Penal Code, Cap 63, Laws of Kenya.

59. According to the Investigation Report, the administrators, in this case herein the 2nd, 3rd and 4th Respondents went to the Appellant's house to arrest her for engaging in illegal liquor trade but she escaped. She thereafter alleged that the 2nd, 3rd and 4th Respondents had stolen her money. The police stated that the Appellant did not prove that she had the Kshs.115,000 as she did not have any Mpesa transactions or banking slips from any bank. That no one among the witnesses saw the 2nd, 3rd and 4th Respondents take any money.

60. According to the National Prosecution Policy 2015, the 1st Respondent has formulated Guidelines to assist prosecutors on their decision to charge. The key feature of the Guidelines is the two-stage test which comprises of the Evidential and Public Interest test. Under the Evidential test, prosecutors have to ascertain the reliability, credibility, admissibility, sufficiency and the strength of the rebuttal evidence with a realistic prospect of conviction. Under the Public Interest test, prosecutors will consider the culpability of the suspect, the impact, or harm to the community or victim, the suspect's age at the time of the offence and whether prosecution is a proportionate response.

61. The 1st Respondent subjected the investigation report to the two pronged evidentiary and public interest test outlined above and declined to prosecute the complaint as it did not have a realistic chance of prosecution. I agree with the decision in **Kuria & 3 Others Vs Attorney General (2002) 2 KLR 69**, that:-

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting criminal prosecution otherwise the prosecution will be malicious and actionable.”

62. This court must determine whether the failure of the 1st Respondent to prosecute the 2nd, 3rd and 4th Respondents was unreasonable and without any legally justifiable reason. The Appellants lodged a complaint at Bomet Police Station on 28th February 2019. Investigations were conducted by the Police and the Investigation Report was forwarded to the Appellant and the 1st Respondent on 25th April 2019. From this correspondence, it is clear that there was a two month period between the date of the complaint and the date when investigations were completed and relayed to the Appellant and 1st Respondent. This court finds that the two month period as timely and reasonable.

63. The Appellant stated that failure to prosecute the 2nd, 3rd and 4th Respondents would occasion a failure of public and private justice. She further submitted that the 2nd, 3rd and 4th Respondents would escape from liability having inflicted economic loss to the Appellant. The Appellant has failed to demonstrate how the 1st Respondent's failure to charge would lead to a failure of public and private justice. She has also failed to demonstrate any economic loss that she would suffer as a result. The Appellant's pleadings did not contain any evidence of possession of the alleged Kshs.115,000 or its source. It is my finding that the decision of the 1st Respondent was reasonable and legally founded.

64. The Appellant stated that the trial Magistrate went against the principles set out in **Kimani Vs**

Kahara (1983) KLR 79, where the High Court laid down certain rules in form of questions that a Magistrate should inquire on. I have gone through the cited case and I summarize the questions as follows:

- (i) Whether the complaint has been made to the DPP, if so what was the result?
- (ii) Does the party involved have locus standi?
- (iii) Has the party suffered any injury or danger?
- (iv) Is the party motivated, actuated, impelled by malice or political consideration?

65. It is clear from the evidence on record that the complaint was made to the police and soon after the 1st Respondent was seized of the matter. Investigations were conducted and a decision was reached not to charge the 2nd, 3rd and 4th Respondents. The Appellant, Jenifer C. Tele had locus standi to file the Application dated 13th May 2019 as she claimed that the 2nd, 3rd and 4th Respondents stole Kshs.115,000 from her. Without proof of possession or the source of the alleged Kshs.115,000, the Appellant had failed to prove the economic loss that she would suffer. Based on the evidence on record, it was clear that the Appellant's motivation in seeking the private prosecution was to recover Kshs.115,000 allegedly stolen from the 2nd, 3rd and 4th Respondents.

66. There is no legitimate expectation that once complaints are investigated, they must lead to prosecution. In the case of **Communications Commission of Kenya (supra)**, the Court of Appeal stated that:-

“We only wish to add that whereas generally speaking a complainant would ordinarily expect the DPP to prosecute a suspected offender based on the evidence availed to or gathered by the police, the DPP, in exercise of the discretion conferred upon him by the Constitution and statute, cannot be accused of having breached a complainant's legitimate expectation if he chooses not to institute criminal proceedings.”

67. In conclusion, the Appellant has failed to discharge her burden of proof to show that the 1st Respondent abdicated its duty or that the decision not to charge was tainted with malice and ill will.

68. As I conclude under this judgment, I associate myself with the reasoning in **Isaac Oluochier Case (supra)**, cited to me by the Appellants, where Achode J. held that:-

“To argue that a Magistrate's Court must accept every case that is presented before it as a private prosecution, whether or not the institutions charged with the investigation of the alleged offence, and whether or not the institutions charged with the investigation and prosecution of the offences have exercised their mandate with regard to the alleged offences that the private prosecutor intends to prosecute, is to invite chaos in the criminal justice system.”

Conclusion

69. It is my finding that the Appellant has failed to meet the threshold necessary for the grant of leave to institute private prosecution. In the absence of evidence of any wrongdoing by the 1st Respondent, this court cannot interfere with the 1st Respondent's decision not to charge the 2nd, 3rd and 4th Respondents. Conversely, this court has found no basis to grant leave to the Appellant to mount a private prosecution.

70. Consequently, I uphold the decision of the trial court. The Appeal has no merit and is dismissed.

71. Orders accordingly.

Judgment delivered, dated and signed this 30TH day of September, 2021.

.....

R. LAGAT-KORIR

JUDGE

Judgment delivered in the presence of Mr. Mugumya for the Appellant, Mr. Wawire holding brief for Mr. Murithi for the Respondents and Kiprotich (Court Assistant).