REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CRIMINAL APPEAL NO. 7 OF 2020

(Being an Appeal from the Ruling in Bomet PMC Miscellaneous

Criminal Number 33"A" of 2020 by Hon. Kibelion – Principal Magistrate)

BISHOP WESLEY NGERECHI.....1ST APPELLANT

BISHOP ZACHARY KIBALIACH.....2ND APPELLANT

VERSUS

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

PAUL WERUNGA.....2ND RESPONDENT

GILBERT KIPYEGON.....3RD RESPONDENT

JUDGMENT

1. The Appellants sought leave of the court to commence private prosecution against the 2nd and 3rd Respondents through an Application dated 20th July 2020 before the lower court. In a Ruling delivered on 2nd October 2020, Hon. Kibelion (PM), dismissed the application in its entirety.

2. Being aggrieved by the decision of the lower court, the Appellants filed a Memorandum of Appeal dated 16th October 2020 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.

(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 applicants placed before him before dismissing the application and/or relying on insufficient evidence.

(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 trial Magistrate erred both in law and fact by framing issues that were outside the pleadings and evidence tendered hence allowing the prosecution to travel beyond its pleadings.

(vi) THAT the learned trial Magistrate erred both in law and fact by adding new grounds that had not been introduced in the pleadings hence basing the trial court's decision on issues not pleaded.

(vii) THAT the trial Magistrate erred both in law and fact by failing to consider that parties are bound by their pleadings and the court's decision in our adversarial justice system is to make decisions based on the evidence adduced by parties.

(viii)THAT the trial Magistrate erred both in fact and in law by introducing new evidentiary burden hence making a decision outside the tenets of applicable law for evidence and burden of proof.

(ix) 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.**

(x) 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.

(xi) THAT the learned Magistrate erred in law and fact in delivering a ruling that is contrary to the provisions of the Criminal Procedure Code and the Kenya Evidence Act.

3. The Appellants prayed that the Ruling delivered on 2nd October 2020 and all consequential orders be set aside and that they be granted leave to commence private prosecution against the 2nd and 3rd Respondents.

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 Applicants' case.

5. It was the Applicants case that the 2nd and 3rd Respondents circulated false information against them which information was posted on various you-tube channels and Facebook websites and that caused them a lot of pain and suffering. As a result, they lodged a complaint at Bomet Police Station on 3rd June 2020.

6. That via Bomet Criminal Application Number 22 of 2020, the 2nd and 3rd Respondents were arrested and arraigned before court awaiting completion of investigations, only for them to be released on 9th July 2020 without being formally charged.

7. It was the Appellants case that the investigations were completed and they were not satisfied by the findings and they had reasons to believe that their case was not well handled by the prosecution. That the investigating officers did not address themselves with the provisions of Section 22 and 27 of the Computer Misuse and Cyber Crimes Act Number 5 of 2018. It was also their case that the investigations and report were predetermined and/or biased as contents of their letter dated 30th June 2020 addressed to the 1st Respondent's office remained unanswered.

8. The Appellants stated that they followed up the matter with the Director of Public Prosecution (DPP) but they declined to prosecute the 2nd and 3rd Respondents. That the failure of the DPP to prosecute the aforementioned Respondents occasioned a failure of public and private justice and further that the DPP had abdicated its role as mandated under the Constitution of Kenya, 2010.

9. The Appellants prayed that they be allowed to commence private prosecution in a bid to ensure that victims of cyber harassment, cyber bullying and spread of false information are assisted by various government officers. That they be allowed to commence the private prosecution if the DPP was not willing to take up its constitutional mandate.

The Appellants' submissions.

10. The Appellants submitted that the trial court erroneously held that they had not met the threshold for grant of leave to institute private prosecution proceedings.

11. The Appellants submitted that section 28 of the Director of Prosecutions Act granted any person the right to institute private prosecution proceedings. The Appellants 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** to support their submission.

12. It was the Appellants submission that they lodged a complaint at Bomet Police Station after an angry mob had advanced to Bomet Kings Outreach to burn it down on allegations that the church was satanic and had caused the death of three people within a year. It was the Appellants contention that they submitted evidence in the form of video recordings, photographs that proved that the 2nd and 3rd Respondents perpetrated the offence of defamation against the Appellants.

13. The Appellants submitted that they had met the criteria for the grant of the order sought. They further submitted that the 1st Respondent (DPP) had no legal and satisfactory reason as to why they could not prosecute the 2nd and 3rd Respondents and that the trial court erred greatly in declining to grant leave for commencement of private prosecution. That unless the court grated the prayer, there would be no justice. They relied on the case of **Nairobi High Court Revision Case of Kimani Vs Nathan Kahara (1983) eKLR**, to support their submission.

14. The Appellants submitted that they met the threshold for grant of leave to commence private prosecution and there was no reason to deny

them the same. That the 1st Respondent's refusal to charge the 2nd and 3rd Respondents was nothing short of it abdicating its constitutional duty and that the Appellants only remedy is to be granted leave to institute private prosecution.

15. They further submitted 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 Respondents' case

16. Bernard Onyango of DCI, Bomet County swore a Replying Affidavit dated 29th July 2020 in response to the aforementioned Application.

17. He stated that he conducted investigations relating to the offence of uttering words with the intent to wound religious feelings contrary to section 138 of the Penal Code and established that there was insufficient evidence to charge the 2nd and 3rd Respondents. That this decision was communicated to the court and the Applicants.

18. It was his response that there was no legitimate expectation that all complaints once investigated must lead to prosecution since the decision to charge is exercised by the 1st Respondent and is arrived upon after keen evaluation of the evidence on record.

19. It was the assertion of the police that the Applicants were vexatious and determined to oppress the Respondents at all costs and that was demonstrated by their refusal to participate in the Mediation process as directed by the Honourable Court on 22nd June 2020.

20. The Police attached a Covering Report detailing the findings of their investigations into the complaint and this court has perused it and will refer to it later on in this Judgment.

The 1ST Respondents' written submissions.

21. The 1st Respondent submitted that the Appellants failed to demonstrate that there was wilful failure or refusal on its part to prosecute the 2nd and 3rd Respondents. It further submitted that it was clear from the record that investigations into the case were concluded and it was established that there was insufficient evidence to establish a prima facie case against the 2nd and 3rd Respondents. Specifically that the video recordings were inadmissible in any competent court of law.

22. It was the 1st Respondent's submission that their position was communicated to the Appellants with a clear message that the video recordings were pivotal in the quest to prove the 2nd and 3rd Respondent's guilt. That in the absence of the video recordings, no charges could stand in a court of law regardless of any enabling penal law.

23. 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 and it relied on the Court of Appeal case of **CCK Vs ODPP & 2 Others (2018) eKLR** to support its submission.

24. It was the 1st Respondents submission that the Appellants had a pre-determined/personal position about the case and wanted to impose the same upon the 1st Respondent. That the Appellants filed contemporaneously a defamation civil suit and a complaint report before police in a calculated manner to ensure that the 2nd and 3rd Respondents pay for their alleged misdeeds.

25. The 1st Respondent submitted that the Appellants failed to lay a basis to warrant leave for commencement of private prosecution against the 2nd and 3rd Respondents.

Analysis and determination.

26. I have gone through and considered the Record of Appeal dated 28th January 2021, the Appellants written submissions dated 28th April 2021 and the 1st Respondents written submissions dated 22nd June 2021 and they raise two issue 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

27. 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.

28. 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) discontinue 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."

29. Section 6 of the Office of the Director of Public Prosecution Act, 2013 states 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."

30. The power donated to the DPP by the Constitution and underscored by the law cited above was aptly restated by Mr. Noordin Haji, the current Director of Public Prosecutions during the launch of the Decision to Charge and Case Management Systems at the Prosecution Training Institute on 28th July 2020, thus:-

"The decision to charge is the most significant decision a prosecutor makes in handling of criminal cases. Such power entails considerable discretion on the part of the prosecutor and the decision must, therefore be founded on law, serve the public interest, engrain fair administration of justice and avoid abuse of the legal process."

31. 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."

32. 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. 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."

33. There is nothing on record that to demonstrate that the decision of the 1st Respondent not to charge the 2nd and 3rd Respondent was neither tainted with malice nor ill will. In their explanation to the Appellants, the DPP stated that it had carried out investigations and it decided not to charge the 2nd and 3rd Respondents due to insufficiency of evidence. The Covering Report attached to the Replying Affidavit acknowledged a religious tussle between the Appellants and the 2nd and 3rd Respondents, though the DPP felt that based on the material evidence before them, they would be unable to sustain a charge.

34. The Appellants have failed to show that the results of the investigations contained in the Covering Report was pre-determined and biased.

The Appellants have made allegations that they have not proved and as such, this court will treat and/or consider them as mere allegations.

35. 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 this court will not 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.

36. It is clear to this court therefore that the decision as to whether or not to commence criminal proceedings does not lie with a complainant but with the DPP exercising discretion judiciously, and guided by the evidence available, public interest considerations, as well as the need to prevent and avoid abuse of criminal justice process.

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

37. 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."***

38. 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 High 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."***

39. From the proceedings, it is clear that the Appellants were not satisfied with the decision of the 1st Respondent not to charge the 2nd and 3rd Respondents. They predicated their application on section 88 of the Criminal Procedure Code. In the case of **Shamsher Kenya Limited Vs Director of Public Prosecutions & Another(2017)eKLR**, 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."***

40. I associate myself with the grounds elucidated by Mumbi Ngugi J above as I address the grounds of appeal in relation to the facts and evidence presented in the Appellant's Application dated 20th July 2020.

41. The Appellants stated that their case was not well handled as the prosecution and the investigating officers did not address themselves with the provisions of sections 22 and 27 of the Computer Misuse and Cyber Crimes Act Number 5 of 2018 which deal with false publications and Cyber harassment respectively.

42. Based on the evidence on record, this court is unable to pass any comment(s) regarding violation of the aforementioned sections of the Computer Misuse and Cyber Crimes Act as there is no material on record to support their allegations. The Appellants produced their evidence to the police who upon conducting investigations deemed it insufficient and incapable of sustaining a charge. It is my view that at the very least, the Appellants should have attached the said evidence to their pleadings to assist the court in making a decision.

43. I observe that the Application was predicated on section 88 of the Criminal Procedure Code only and failed to include sections 22 and 27 of the Computer Misuse and Cyber Crimes Act which deal with false publications and cyber bullying respectively. Section 22 (4) of the Computer Misuse and Cyber Crimes Act states that the freedom of expression granted under Article 33 of the Constitution is limited if the intentional publication of false, misleading or fictitious data advocates ethnic incitement, vilification of others or incitement to cause harm or to propagate war and incite others to violence. Section 27 of the Computer Misuse and Cyber Crimes Act provides that a person who individually communicates either directly or indirectly with another person and their conduct causes those persons apprehension or fear of violence to them or their property and such conduct is indecent and grossly offensive commits the offence of cyber harassment. Again, I must state that citing the appropriate law without attaching evidence to demonstrate their possible violation, would not have aided the Appellant's case.

44. I have considered whether the failure of the DPP to prosecute the 2nd and 3rd Respondents was unreasonable and without any legally justifiable reason. It is not in dispute that the Appellants lodged a complaint at Bomet Police Station on 3rd June 2020. Investigations were conducted by the Police. The Covering Report attached to the Replying Affidavit sworn by No. 76796 Bernard Onyango of DCI Bomet on 29th July 2020 concluded that the available evidence presented to them could not sustain a charge before a court of law for reason of insufficiency. This decision was relayed to the Appellants through their Advocate in a letter dated 13th July 2020 which has been displayed in this court as 'BWN 1' in the Appellant's Application. From this correspondence, it is clear that there was no delay by the police in conducting their investigations and relaying their findings to the Appellants. It is my finding that the decision of the DPP was reasonable and legally founded.

45. The Appellants stated that failure to prosecute the 2nd and 3rd Respondents would occasion a failure of public and private justice. They further submitted that the 1st Respondent had no legal and satisfactory reason as to why they could not proceed to prosecute the 2nd and 3rd Respondents. They have failed to demonstrate how the DPP's failure to charge would lead to a failure of public and private justice. They have also failed to demonstrate any injury or damage that they will suffer as a result. This court does not have the benefit of analysing any evidence that the Appellants intended to rely on.

46. In accordance with the **National Prosecution Policy 2015**, the 1st Respondent formulated Guidelines on its 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.

47. The Covering Report filed by the Police illustrates and explains the reason for not charging the 2nd and 3rd Respondents. A reading of the Report reveals that the DPP considered the Evidential test and Public Interest test and found the evidence insufficient and the same had no 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."***

48. The Appellants 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?

49. It is clear from the evidence on record that the complaint was made to the police and soon after the DPP was seized of the matter. Investigations were conducted and a decision was reached not to charge the 2nd and 3rd Respondents. The Appellants, Bishop Wesley Ngerechi and Bishop Zachary Kibaliach had locus standi to file the Application dated 20th July 2020 as they stated that the alleged false information posted on various You-tube channels and Facebook websites were directed at them. Regarding whether the Appellants have suffered any injury or danger, they have failed to demonstrate what kind of injury they would suffer or kind of danger they would face. All they have stated is that the publishing of the false information had caused them a lot of emotional pain and suffering.

50. Following the above, and based on the evidence on record, this court is unable to make a determination as to the Appellants' motivation in seeking to institute private prosecution against the 2nd and 3rd Respondents. It would appear to this court that the alleged injury to the reputation, emotional pain and suffering would best be articulated in a civil suit in which the Appellants would also have the advantage of seeking damages for any injury proved.

51. As I conclude on this issue, I reiterate the observation made by Achode J. in the **Isaac Oluochier Case *(supra)***, cited to me by the Appellants 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."***

52. There is indeed no legitimate expectation that all complaints investigated, 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."

53. In conclusion, it is apparent that the Appellants have failed to discharge their burden of proof to show that the DPP abdicated its duty or that the decision not to charge was tainted with malice and ill will.

54. It is my finding that the Appellants have failed to meet the threshold necessary for the grant of leave to institute private prosecution and 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 and 3rd Respondents.

55. Consequently, I uphold the decision of the trial court. The Appeal has no merit and is dismissed with no order as to costs.

56. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED THIS 30TH DAY OF SEPTEMBER, 2021.

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R. LAGAT-KORIR

JUDGE

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