



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. E016 OF 2021

FAHMI SALIM SAID.....PETITIONER

-VERSUS-

1. DIRECTOR OF PUBLIC PROSECUTIONS

2. FAHIMA MOHAMED SHALI

3. VIRAL RAMJI

4. ESMAIL ABDULKADER NOORANY

5. SAID SALIM KHAMIS

6. WAHEED ISMAIL

7. VIRAL RAMJI.....RESPONDENTS

J U D G M E N T

1. The matter set to be determined by this court was initiated vide a Constitutional Petition dated 9th March, 2021 praying for judgment, declaration and orders as follows:-

i. A Declaration that the Petitioner's Constitutional Rights have been breached and are being breached.

ii. A Declaration that the Petitioner's continued prosecution in Criminal Case No. 565 of 2020, Criminal Case No. 564 of 2020, Criminal Case No. 553 of 2020, Criminal Case No. 575 of 2020, Criminal Case No. 567 of 2020 and Criminal Case No. 566 of 2020 is a violation of the Petitioner's fundamental rights and freedoms.

iii. An Order that the 1st Respondent has acted unlawfully and against the constitution in prosecuting the Petitioner and has breached its constitutional mandate.

iv. An Order that the Petitioner's Motor Vehicle registration number KCN 515T be released forthwith to the Petitioner by the Investigating police.

v. An Order that the cash bail and bond issued in Criminal Case No. 565 of 2020, Criminal Case No. 564 of 2020, Criminal Case No. 553 of 2020, Criminal Case No. 575 of 2020, Criminal Case No. 567 of 2020 and Criminal Case No. 566 of 2020 be revised downwards by this Honourable Court.

vi. An Order that Criminal Case No. 565 of 2020, Criminal Case No. 564 of 2020, Criminal Case No. 553 of 2020, Criminal Case No. 575 of 2020, Criminal Case No. 567 of 2020 and Criminal Case No. 566 of 2020 be transferred forthwith to be heard and determined by the Chief Magistrate's court at Mombasa Law Courts.

vii. An Order that the Petitioner's passport deposited in court be forthwith released to the Petitioner.

viii. Any other relief this Honourable Court may deem fit to grant.

2. The same was supported by the affidavit of Fahmi Salim Said dated 9th March 2021.

3. A concurrent application was filed by the petitioners vide notice of motion dated 9th March 2021 praying for orders:

a. Spent

b. THAT a conservatory order be issued prohibiting and restraining the 1st Respondent from prosecuting and/or to continuing to prosecute the Petitioner in Chief Magistrates Court in Criminal Cases Nos. Criminal Case No. 565 of 2020, Criminal Case No. 564 of 2020, Criminal Case No. 553 of 2020, Criminal Case No. 575 of 2020, Criminal Case No. 567 of 2020 and Criminal Case No. 566 of 2020 pending the hearing and determination of this application.

c. THAT a conservatory order be issued prohibiting and restraining the 1st Respondent from prosecuting and/or continuing to prosecute the Petitioner in Chief Magistrates Court in Criminal Cases Nos. Criminal Case No. 565 of 2020, Criminal Case No. 564 of 2020, Criminal Case No. 553 of 2020, Criminal Case No. 575 of 2020, Criminal Case 567 of 2020 and Criminal Case No. 566 of 2020 pending the hearing and determination of this suit.

d. THAT the Petitioner's Passport deposited in court be forthwith released.

e. THAT the cash bail and bond terms of the Applicant be reviewed downwards.

f. THAT the motor vehicle KCN 515T be released forthwith to the Petitioner by the Investigating Officer.

g. THAT costs hereof be in the same.

4. This application was supported by the Affidavit of Fahmi Salim Said of even date.

5. The 2nd & 7th Respondents opposed this application vide their grounds of opposition filed on 18th March 2021 and replying affidavit of even date. 2nd & 7th Respondents relied on the Grounds of Opposition Affidavit of Fahma Mohammed Shali.

6. A further Affidavit dated 12th April 2021 by Fahmi Salim Said who in reliance on the positions therein whereas the 1st Respondent filed a reply to petition dated 12th April 2021.

7. The matter was canvassed via written submissions of the Petitioner and the 1st, 2nd and 7th Respondents. All this written submissions were dated 22nd June 2021.

WRITTEN SUBMISSIONS OF THE PETITIONER

8. The Petitioner in his Written Submissions dated 22nd June 2021, holds the view that the proceedings against him are motivated by bitterness and personal vendetta on the part of the 2nd Respondent and as such, led to the breach of the petitioner's constitutional rights. The petitioner seeks the court to declare that his continued prosecution in criminal case no. 565 of 2020, Criminal Case No. 564 of 2020, Criminal Case No. 553 of 2020, Criminal Case No. 575 of 2020, Criminal Case No. 567 of 2020 and Criminal Case No. 566 of 2020 is a violation of his fundamental rights and freedoms.

9. The Petitioner also argues that the amounts of cash bail and security required of him in the various criminal cases are unreasonably high and were set deliberately in order to deny him bond and not to secure his attendance in court. That the high bond and bail terms are in contravention of Articles 49(1)(h) and 50(2) of the Constitution of Kenya 2010 which provide:-

Article 49(1)(h) -

"An arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released".

Article 50(2) -

"Every accused person has a right to a fair trial, which includes the right-

a) to be presumed innocent till the contrary is proved".

10. It is on this basis that the petitioner prays to have the bond terms revised downwards as he has so far paid Ksh.5,500,000/= in cash bail and bond of Ksh.6,400,000/= while also depositing his passport.

11. The Petitioner also sought that motor vehicle registration no. KCN 515T be released to him as it had no evidential value in proving the charges that are before the court and that the same is being held solely to frustrate him, contrary to Article 40 of the Constitution of Kenya 2010.

12. The 3rd limb of the Petitioner's submission was the prayer for an order that the passport deposited in court be forthwith released to the petitioner. The petitioner relied in paragraph 12 of the further affidavit which averred that the petitioner is a businessman and the situation at hand was causing him immense hardship by curtailing his travels for business purposes despite not being a flight risk. This position was based on the understanding that the sole reason of bond and bail is to secure the attendance of the accused person at trial. The trial Magistrate in his ruling relied on the pre-bail report which stated that the accused/petitioner was not a flight risk.

13. The petitioner further submitted that his right to fair hearing as envisioned in Article 50(1) (2) have been curtailed by parties in the six criminal proceeding more so criminal case no. 553 of 2020. It was his submission that the parties had invaded the proceedings without leave of the court and taken over the role of the prosecutor. The petitioner's submission were concluded by reiterating that criminal proceedings should not be used to settle civil disputes or personal feuds.

WRITTEN SUBMISSIONS OF THE 1ST RESPONDENT

14. The 1st Respondent vehemently opposed this petition and submitted that the petitioner is overreaching. It was submitted that Section 35 of the National Police Service Act mandates the Directorate of Criminal Investigations to investigate any complaint brought to its attention in order to determine whether a criminal offence has been committed. As such, there was no ulterior motive neither was the process used as a tool for settling scores or vilification.

15. According to the submissions of the 1st Respondent, the criminal cases facing the petitioner were properly mounted with several complainants who made the reports and whose cases are genuine. They submitted that the Petitioner has not pointed to any malfeasance on the part of the DPP in the proceedings and the petition lacks merit and is an abuse of the court process.

16. The 1st Respondent pointed out that the Petitioner had not stated which right or fundamental in the Bill of Rights has been denied, violated, infringed or threatened and how the 1st Respondent has breached those rights in the exercise of its powers. It was contended that the criminal cases were properly mounted and that the public interest would not be served by halting the ongoing criminal cases against the Petitioner. The 1st Respondent urged the court to dismiss the Petition with costs.

WRITTEN SUBMISSIONS BY THE 2ND AND 7TH RESPONDENTS

17. The 2nd & 7th Respondents relied on their Replying Affidavits as well as Grounds of Opposition to demonstrate that the Petitioner is unworthy of the Orders sought in his Petition.

18. They submitted that previous criminal cases against the Petitioner were withdrawn under sections 87 (a) of the Criminal Procedure Code on grounds that the 2nd and 7th Respondents had forgiven the Petitioner and therefore the mounting of the current criminal cases against the Petitioner are not an abuse of the criminal justice process and have not breached the Petitioner's constitutional rights in any way.

19. It is also contended that the 2nd Respondent is only a Complainant in one matter- 553 of 2020, and that the 3th – 8th Respondents are Complainants in their respective cases independent of the 2nd Respondent.

20. Regarding the status of the relationship between the 2nd Respondent's daughter and the Petitioner, it was argued that they are still married and there is no evidence of bitterness particularized by the Petitioner. It was also argued that the Petitioner had not given particulars of the influence exerted on the 3rd – 8th Respondents that made them to file charges against the Petitioner. They asserted that it is the duty of the police and the DPP respectively to investigate complaints and to charge suspect in court and that the Complainants are only state witnesses.

21. It was further submitted that the presence of a family dispute cannot stop one from lodging a complaint when they have been wronged by a relative. The 2nd and 7th Respondents urged that the Petition be dismissed for lack of merit.

ANALYSIS AND DETERMINATION

22. Having perused the criminal cases against the Petitioner in Shanzu Magistrates' Court and the pleadings filed by the Petitioner in this Petition as well as in Criminal Revision E011 of 2021, it is apparent that the Petitioner and his wife and in-laws have had long-standing unresolved multiple disputes that have made them stay in the corridors of justice from as early as 2014 as can be shown in Constitutional Petition No. 67 of 2014 where the Petitioner alleged that the criminal charges against him were a breach of his constitutional rights and that the 2nd and 3rd Respondents therein were manipulating the course of justice.

23. The determination by the Honourable Justice Murithi on 6th of March, 2016 was that the DPP had the mandate to prosecute based on material gathered by them and that he could not stop the prosecution of the Petitioner and that each case is based on different set of facts; the particulars thereof showing that the offences were committed on diverse dates. The only finding in favor of the Petitioner therein was that the simultaneous prosecution of criminal charges in different files would be prejudicial and embarrass him in his defence of the charges and that trial should be conducted consecutively-one after the other.

24. It would appear that the Petitioner had also filed Mombasa High Court Criminal Revision No. 72 of 2013 which Ruling appears to have concurred with that of Justice Murithi that he could not order the termination of the Petitioner's prosecution.

25. The Petitioner has followed the same route in regards to the new charges facing him in Shanzu Criminal Case No. 565 of 2020, Criminal Case No. 564 of 2020, Criminal Case No. 553 of 2020, Criminal Case No. 575 of 2020, Criminal Case No. 567 of 2020 and Criminal Case No. 566 of 2020 and the issues for this court to determine are:

- i. Whether the Petitioner has proved that his Constitutional Rights have been breached and/or are being breached.
- ii. Whether the prosecution of the Petitioner in Criminal Case No. 565 of 2020, Criminal Case No. 564 of 2020, Criminal Case No. 553 of 2020, Criminal Case No. 575 of 2020, Criminal Case No. 567 of 2020 and Criminal Case No. 566 of 2020 is a violation of his fundamental rights and freedoms.
- iii. Whether 1st Respondent has acted unlawfully and against the constitution in prosecuting the Petitioner and has breached its constitutional mandate.
- iv. Whether Motor Vehicle registration number KCN 515T should be released forthwith to the Petitioner by the Investigating police.
- v. Whether cash bail and bond issued in Criminal Case No. 565 of 2020, Criminal Case No. 564 of 2020, Criminal Case No. 553 of 2020, Criminal Case No. 575 of 2020, Criminal Case No. 567 of 2020 and Criminal Case No. 566 of 2020 should be revised downwards.
- vi. Whether Criminal Case No. 565 of 2020, Criminal Case No. 564 of 2020, Criminal Case No. 553 of 2020, Criminal Case No. 575 of 2020, Criminal Case No. 567 of 2020 and Criminal Case No. 566 of 2020 should be transferred forthwith to be heard and determined by the Chief Magistrate's court at Mombasa Law Courts.
- vii. Whether the Petitioner's passport deposited in court should be released to the Petitioner.

Whether cash bail and bond issued in Criminal Case No. 565 of 2020, Criminal Case No. 564 of 2020, Criminal Case No. 553 of 2020, Criminal Case No. 575 of 2020, Criminal Case No. 567 of 2020 and Criminal Case No. 566 of 2020 should be revised downwards.

26. The trial Magistrate delivered a Ruling allowing the Petitioner to be released on bond in all the six criminal charges against the Petitioner but deferred giving terms and conditions pending Social Inquiry Report. The Social Inquiry Report was filed by Cliff M. Wathome who concluded that the Petitioner has had never default of terms of bond in his cases and that to avert confrontations between the Petitioner and the Complainants due to events that have bred a feeling of betrayal, the situation needs to be managed very well. Based on the Social Inquiry Report, the trial court imposed bond terms in each of the files but it is not explained why in Criminal case 553 of 2020, the Petitioner is required to deposit cash bail of Ksh. 3, 000, 000/= in addition to a bond of Ksh. 3,000,000/= with one surety of a similar amount as well as deposit his passport in court when the Social Inquiry Report indicates that his residence in Mombasa and Nairobi are known.

27. The purpose for which bond is granted is to secure the Accused person's attendance in court and not to punish as an accused person is supposed to be presumed innocent until proven guilty and bond terms are supposed to be reasonable as provided under Article 49 (1) (h) of the Constitution of Kenya, 2010.

28. The multiple terms imposed on the Petitioner herein makes this court conclude that the Petitioner was meant to fail to raise the required securities so as to remain in custody during trial. I find that unjustified and in breach of his constitutional rights to liberty.

29. This court finds that the Petitioner should have been given the option of providing security or cash bail and not both. The Petitioner should therefore opt for one of the terms and appear before the Chief Magistrate for withdrawal of one of the securities of his choice.

30. Regarding the issue of his passport, the Petitioner should-as and when necessary, move the trial court for release of the passport if he wants to travel out of the jurisdiction of the court but with authority of the court. The other terms of bail/bond should remain force pending the trial therein.

31. Based on the above finding, I do hereby make an Order that:

- a. In Criminal Case No. 564 of 2020 bond terms are substituted to a bond of Ksh. 100, 000/= with a surety of a similar amount or cash bail of Ksh. 50, 000/=. The other terms remain in force.
- b. In Criminal Case No. 565 of 2020 the bond terms are substituted to a bond of Ksh. 2,000, 000/= with a surety of a similar amount or cash bail of Ksh. 500,000/=.
- c. In Criminal Case No. 567 of 2020 the bond terms remain the same as those issued on 13th July, 2020.
- d. In Criminal Case No. 575 of 2020 the bond terms issued on 13th July, 2020 remain in force.
- e. In Criminal Case No. 566 of 2020 the bond terms are substituted with a bond of Ksh. 250, 000/= with a surety of a similar amount or cash bail of Ksh. 100, 000/=.

32. In regards to whether the Motor Vehicle Registration No. KCN 515T should be released to the Petitioner, the court finds that it will be necessary for evidence to be adduced to establish the right of the Petitioner in the said vehicle.

33. On issues (i), (ii) and (iii) this court has looked at the charge sheets in all the criminal cases against the Petitioner as well as the Replying Affidavits of the 1st, 2nd and 7th Respondents coupled with the Submissions by respective parties, I find that there are issues that require the adjudication of the trial court in each matter to determine the rights of each and every Complainant as well as the Petitioner and that can only

be done in the trial court. The Petitioner will then have an opportunity to interrogate the claims against him during those proceedings which this court is not capable of doing as it does not have the conduct of the trial.

34. As was held in Constitutional Petition No. 67 of 2014, this court makes a finding that in order not to prejudice, harass or embarrass the Petitioner, the prosecution should either consolidate the charge sheets and have the trial in all the files conducted in one file to avoid hardship on occasioned in terms of coming to court frequently and wasting time and resources or expeditiously prosecute the charges consecutively one after the other for the ends of justice to be realized.

35. As to whether the prosecution of the Petitioner should be transferred to the Mombasa Chief Magistrates' Court, no submissions were made towards that end and the same is not allowed. However, this court hereby orders that the Chief Magistrate-Shanzu Court should assign the same files to other Magistrates in the station for hearing and determination in the manner specified in paragraph 34 above.

36. In conclusion, the Petitioner's petition partially succeeds and there shall be no Orders as to costs.

DATED, SIGNED AND DELIVERED THIS 21ST DAY OF OCTOBER, 2021

HON. LADY JUSTICE ANNE ONG'INJO

JUDGE

In the presence of:

At. 4.06pm

Ogwel- Court Assistant

Mr. Mulamula for DPP

Petitioner- present in person thr' **Online (Ms TEAMS)**

Respondents- No appearance

Respondent's Advocate- Ms. Wamotsa Wangila Advocate - N/A

Petitioner's Advocate - Mr. Magolo Advocate - N/A

- Representative - present

Court

Mention - 4/11/2021 before Chief Magistrate - Shanzu.

Hon. Lady Justice A. Ong'injo

Judge