



Ihungi v Inspector-General of Police & 2 others; Namoya (Interested Party) (Constitutional Petition E040 of 2021) [2021] KEHC 129 (KLR) (18 October 2021) (Ruling)

Neutral citation: [2021] KEHC 129 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E040 OF 2021
JM MATIVO, J
OCTOBER 18, 2021**

BETWEEN

PATRICK MUTURI IHUNGI PETITIONER

AND

INSPECTOR-GENERAL OF POLICE 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

HUSSEIN HAMISI NAMOYA INTERESTED PARTY

RULING

Introduction

1. This ruling determines two applications, namely, the Petitioner's application dated 15th July 2021 (herein after referred to as the 1st application) and the Interested Party's application dated 12th August 2021, (herein after referred to as the 2nd application). The two applications seek diametrically opposed orders. The point of divergence is that whereas the 1st application seeks conservatory orders as particularized in paragraph 6 below, the 2nd application seeks to supplant the interim conservatory orders granted on 15th July 2021 in favour of the Petitioner. For sake of brevity, I will summarize the facts and grounds in support of each application separately.

The 1st application

2. In order to put the 1st application into a proper perspective, I will, albeit briefly, highlight the factual matrix which triggered the Petitioner's constitutional Petition dated 15th July 2021. The Petitioner states that the Interested Party has been having an affair with his wife since 2020. He states that in



October, 2020, he pleaded with the Interested Party to end the affair but instead, he responded with contempt, intimidation, and rudeness and sending offensive and threatening text messages to the Petitioner prompting the Petitioner to lodge a complaint at the Makupa Police Station.

3. He avers that the Director of Public Prosecutions (DPP) vide a letter dated 31st March, 2021 decided to charge the Interested Party with the offence of cyber bullying/harassment. He states that he was summoned by the OCPD Urban Police Station, for reasons he did not know where he found the Interested Party and his wife intimately seated at the waiting lobby. He states that upon asking the Interested Party why he wanted to upset him by bringing along his wife, he reacted violently and, in the process, the Interested Party fractured his left index finger.
4. The Petitioner avers that the OCPD and the Interested Party demanded he withdraws the charges against the Interested Party or else they would charge him with assault charges following the said scuffle, but he refused to accede. He states that the OCPD summoned him with an ulterior motive and together with the Interested Party they intended to intimidate and arm-twist him to withdraw the charges for cyber harassment.
5. He contends that that the Interested Party with the full backing of the said OCPD lodged a false complaint against him at the Central Police Station and he was arrested and released on a Kshs. 5,000/= cash bail. He states that on 7th June, 2021, the Interested Party was charged with the offence of cyber harassment in Mombasa Criminal Case Number E1374 of 2021, Republic v Hussein Hamisi Namoya and has learnt that among the witnesses who have recorded statements against him are 2 Police Officers and his wife. He contends that the Respondents intends to press false charges against him even though he was the victim. As a consequence of the foregoing, the Petitioner prays for:
 - a. A declaration that the 1st, 2nd & 3rd Respondents conduct and actions contravene the Constitution and/or are likely to contravene or infringe the Petitioner's fundamental rights and freedoms guaranteed under the Constitution.
 - b. A declaration that the Respondents' investigations into the alleged assault are tainted with mala fides and are being and/or have been conducted with and/or for an ulterior motive or extraneous purpose.
 - c. An order of Prohibition prohibiting the Respondents from carrying out and/or proceeding with any further and/or investigations and/or proceeding with any criminal proceedings or charges against the Petitioner in connection with the alleged assault.
 - d. Costs of this Petition.
 - e. Any other relief that this Court may deem fit and just to grant in the interest of justice.

The 1st application

6. Concurrent with the Petition, the Petitioner filed the application dated 15th July 2021 seeking an interim conservatory order prohibiting the 1st, 2nd and 3rd Respondents from carrying out and/or proceeding with investigations and/or any criminal proceedings or charges against him connected with the events of 4th June, 2021 pending the hearing and determination of this Petition. Prayers (1) & (2) of the application are spent. The applicant also prays for costs of the application.



7. The grounds in support of the application are essentially a replication of the averments in the Petition. It will add no utilitarian value to rehash them here. It will suffice to state that the applicant states that the OCPD's conduct was suspect and tainted with malice and ulterior motive. He states that he cannot in the circumstances get impartial investigations from the 1st and 2nd Respondents and any further investigations and/or resultant trial shall be an infringement of his fundamental rights to a fair and procedural administrative action. He states that he is apprehensive that unless the conservatory orders are granted, he shall be arrested and charged with false charges in breach of his constitutional rights.

The Attorney General's Grounds of opposition

8. The Attorney General filed grounds of opposition dated 30th July 2021 stating that the application is misconceived, frivolous, vexatious and an abuse of court process and that the 1st and 2nd Respondents cannot be estopped from performing their functions under section 49 of the [National Police Service Act](#).¹ He also states that the DPP is mandated to institute and undertake criminal proceedings under Article 157 of the *Constitution* and he should not be estopped from carrying out his duties. Further, he states that the Petitioner has not demonstrated how his constitutional rights have been infringed and it would set a dangerous precedent should the court be inclined to grant the orders sought.

The DPP's Replying affidavit

9. The DPP's response is contained in the Replying affidavit of PC David Wafula. No. 94584 dated 6th August 2021. He deposed that the application is fatally defective, abuse of court process, misconceived and ought to be struck out. He averred that the matter was properly investigated and the process of preferring charges commenced. He also averred that the Interested Party lodged a complaint with the police alleging that the applicant had assaulted him, that statements recorded from witnesses who were at the scene confirmed that the applicant assaulted the Interested Party who was issued with a P3 which was completed by a doctor confirming the degree of injuries.
10. Mr. Wafula averred that it's not sufficient to cite Articles of the Constitution without demonstrating violation of rights, and, that upon conclusion of the investigations, he forwarded the file to the DPP for perusal and advise to institute criminal proceedings once a decision to charge is made. He deposed that for the Petitioner to warrant the prayers sought, he must demonstrate that his fundamental rights are under actual threat and danger and that the rights outweigh public interest. Lastly, he deposed that the issues raised in the application are matters of evidence which can safely be addressed by the trial court.

The Applicant's supplementary affidavit

11. The applicant filed the supplementary affidavit dated 8th September 2021 essentially replicating the averments in the earlier affidavit, so, it will add no value to rehash it here.

The 2nd application

12. The Interested Party filed the application dated 12th August 2021 seeking an order that this court discharges the interim conservatory orders granted on 15th July 2021 against the Respondents. He also prays for costs of the application.
13. The application is founded on the grounds that the Petitioner deliberately failed to disclose to this court all material facts relating to the events of 4th June 2021, so, he misled the court into wrongly issuing interim orders. He states that the Petitioner did not approach the court with clean hands and that the Petition is an abuse of court process. Lastly, he states that the Petitioner and or his emissaries have been trailing him and using rogue police officers to tap his phone calls.

¹ Act No. 11A of 2011.



The Petitioner’s replying affidavit

14. The Petitioner filed the Replying affidavit dated 8th September 2021 in which he averred that the application is an abuse of the court process, baseless, frivolous and vexation and ought to be dismissed with costs. He averred that the Interested Party has not demonstrated the allegations cited in the application, and that the allegations are malicious, baseless and unsupported by evidence.

The Petitioner’s submissions

15. In support of the 1st application, the Petitioner’s counsel submitted that the Respondents have breached the Petitioner’s fundamental rights under Articles 10, 27, 47, 50 of the Constitution. He submitted that the investigation process is an administrative function which ought to be conducted in accordance with the values and principles set out under the above Articles. Additionally, he argued that Article 47 and 50 accords every person the right to a fair hearing and administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. He submitted that Article 27 guarantees equal protection and benefit of the law; the right to equality and freedom from discrimination. He argued that the Respondents in conducting their investigations were required to adhere to the said constitutional edicts and cited *Hassan Ali Jobo v Inspector-General of Police & 3 others*² for the proposition that the DPP is duty bound to interrogate investigations presented to him and ensure that they comply the constitutional threshold.
16. Counsel dismissed the investigations as selective, one sided, unfair, questionable and partisan and argued that they will result in an unfair trial and breach of Articles 27, 47 and 50 of the Constitution. He cited *Anthony Murimi Waigwe v Attorney General & 4 others*³ which held that the police are expected to be professional in the conduct of the investigations and ought not to be driven by malice or other collateral considerations which can either be express or can be gathered from the circumstances surrounding the prosecution, that the mere fact that a complaint is lodged does not justify institution of criminal proceedings.
17. He also cited *Republic v Director of Public Prosecutions & 2 others Ex parte Zablon Agwata Mabea*⁴ which citing previous decisions held that where the prosecution has been commenced or is being conducted in an arbitrary, discriminatory and selective manner it amounts to abuse of the legal process. He relied on *Republic v Director of Public Prosecutions & 2 others; Evanson Muriuki Kariuki (Interested Party); Ex parte James M. Kabumbura*⁵ for a similar proposition. Also, counsel cited *Geoffrey K. Sang v Director of Public Prosecutions & 4 others*⁶ for the holding that if the court finds that the discretion vested in the Respondents is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence, the court will not hesitate to bring such proceedings to a halt. He also cited *Republic v Director of Public Prosecutions & 2 others Ex parte Zablon Agwata Mabea*⁷ which held that the High Court has inherent jurisdiction to grant an order of prohibition where the accused is a victim of oppression and that the Petitioner has demonstrated that his rights to a fair trial have been or will be infringed if the prosecution proceeds.

² {2017} e KLR.

³ {2020} e KLR.

⁴ {2017} e KLR.

⁵ {2019} e KLR.

⁶ {2020} e KLR.

⁷ {2017} e KLR.



18. Regarding the Interested Party's application, he submitted that the applicant has not demonstrated what material facts are untrue and/or have been withheld by the Petitioner. He argued that the application is frivolous, vexatious and an abuse of court process and it ought to be dismissed with costs to the Petitioner.

The DPP's submissions

19. Counsel for the DPP submitted that the conservatory orders sought can only issue if the Petitioner demonstrates that the Respondent's conduct has been unlawful, unreasonable, contrary to public interest or the administration of justice or abuse of the legal process. He submitted that the applicant has not met the threshold to warrant the orders sought. He submitted that the instant application as framed is intended to usurp the constitutional and statutory powers of the Respondents. He argued that he alleged breach of constitutional rights or constitutional provisions have not been proved. He cited *John Harum Mwau v IEBC & another*⁸ which underscored the tests for proving breach of Article 27 of the Constitution.

20. In addition, he cited *R v Commissioner of Police & another ex parte Michael Monari*⁹ which held that the police have a duty to investigate a complaint once it is lodged, and that the police only need to establish reasonable suspicion before preferring charges and the rest is left to the trial court. He submitted that under Article 157 (10), the DPP has the right to make the decision to charge based on evidence or even order closure of investigations if the evidence is insufficient. He submitted that under section 6 of the *Office of the Director of Public Prosecutions Act*,¹⁰ while exercising his powers under Article 157 (10), the DPP does not require the consent or direction of any person or authority. He cited *Justus Mwenda Kathenge v DPP & 2 Others*¹¹ which held that courts cannot interfere with the exercise of the DPP's powers unless he has acted contrary to or he has acted against the interests of the administration of justice or in abuse of court process.

21. Further, counsel argued that under Articles 244 and 245 (4) of the Constitution, the National Police Service has a duty to comply with constitutional standards of human rights and fundamental freedoms in the performance of its duties, nor can the National Police service be directed as suggested. He submitted that the only avenue for determining the weight of evidence is through trial process. He cited *Commissioner of Police & the Director of Criminal Investigation Department & another v Kenya Commercial Bank Limited & others*¹² for the holding that investigation powers conferred to the police are designed to serve a salutary purpose. Lastly, he cited *Joram Mwenda Guantai v The Chief Magistrate, Nairobi*¹³ for the holding that judicial review is concerned with decision making process.

22. The Attorney General did not file submissions

The Interested Party's submissions

23. The Interested Party's counsel submitted that the ex parte applicant's application is misconceived, bad in law and an abuse of court process because the applicant approached the court with unclean hands by

⁸ {2013} e KLR.

⁹ {2012} e KLR.

¹⁰ Act No. 2 of 2013.

¹¹ {2014} e KLR.

¹² {2013} e KLR.

¹³ {2007} 2 EA 170.



failing to disclose material facts. Further, that the Petitioner is hiding behind the conservatory orders to evade the investigations. Also, he submitted that no tangible evidence was tendered and urged the court to discharge the orders.

Determination

24. It does not escape the courts attention that the Petitioner's counsel's submissions (including the authorities cited) are substantially, if not wholly in support of the Petition as opposed to establishing the tests for granting conservatory orders pending hearing and determination of the Petition. For starters, Article 23 of the Constitution engrains the authority of courts to defend and enforce the Bill of Rights. It provides that the High Court has jurisdiction, to hear and determine applications for violation or infringement of, a right or fundamental freedom in the Bill of Rights. It states that in any proceedings brought under Article 22, a court may grant appropriate relief, including- (a) A declaration of rights; (b) An injunction; (c) A conservatory order.
25. Pursuant to Article 22(3) *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*¹⁴ was promulgated. Rule 23 provides that despite any provision to the contrary, a Judge before whom a Petition under 4 is presented shall hear and determine an application for conservatory or interim order.
26. Conservatory orders are by definition decisions arrived at by a court of law to maintain status quo to ensure that circumstances do not change while a matter is before a court of law pending judgement. Basically, conservatory orders ensure that nothing changes circumstantially in a matter, pursuant to the existence of other factors to be determined by the court. In granting a conservatory order, the danger looming over the realization of rights must be imminent, real and not theoretical. It is important to note at this point that in the determination of whether a conservatory order should be granted, the court is not invited to make any conclusive findings of fact or law on the dispute before it. The jurisdiction of the court at this point is limited to examining and evaluating the materials placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of a conservatory order. The applicable principles for the grant of conservatory orders as highlighted in *Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others*.¹⁵ Briefly, the principles are that: -
- a. The Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he/she is likely to suffer prejudice.
 - b. The Court should decide whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
 - c. Whether if an interim conservatory order is not granted, the Petition or its substratum will be rendered nugatory.
 - d. Lastly, that the court should consider the public interest and relevant material facts in exercising its discretion.
27. Clearly, a party seeking a conservatory order is mandated to demonstrate that should the court fail to grant a conservatory order, there is a high probability of him/her suffering prejudice as a result

¹⁴ Legal Notice No. 117 of 2013.

¹⁵ {2015} e KLR.



of the violation or threatened violation of the constitution. However, this must be weighed against public interest. From the foregoing, it is evident that conservatory orders are a unique instrument in the protection of the Bill of Rights. However, they may only be granted by courts of law upon the satisfaction of several pre-requisite conditions and are therefore distinct from remedies almost similar in nature such as injunctions.

28. Guided by the foregoing principles, I now examine the applicant's application. A special feature in our Constitution is the establishment of an independent office of the DPP. His independence is provided under Article 157 (10) which declares that the DPP shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his powers or functions, shall not be under the direction or control of any person or authority.
29. The above position is replicated in Section 6 of the *Office of the Director of Public Prosecutions Act*.¹⁶ The provision provides that pursuant to Article 157 (10) of the Constitution, the Director of Public Prosecutions 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 powers or functions under constitution, this Act or any other written law; and (c) be subject only to the Constitution and the law. It is also important to mention that under Article 245 (4) (a) of the Constitution, "no person may give direction to the Inspector General with respect to the investigation of any offence or offences." Just like the constitutionally guaranteed independence of the DPP, this provision is aimed at ensuring that investigations are undertaken independently.
30. The Constitution vests the DPP with the sole Authority, power and responsibility to exercise control over the prosecution of all criminal matters except the institution of cases at the Court-Martial.¹⁷ Individuals involved in a crime – the victim, the accused, and the witnesses – as well as society as a whole have an interest in the decision whether to prosecute and for what offence, and in the outcome of the prosecution. In short, the proper and effective administration of the criminal justice system is a matter of great public interest. The decision to prosecute or not to prosecute is of great importance. It can have the most far-reaching consequences for an individual. Even where an accused person is acquitted, the consequences resulting from a prosecution can include loss of reputation, disruption of personal relations, loss of employment and financial expense, in addition to the anxiety and trauma caused by being charged with a criminal offence.
31. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system. For victims and their families, a decision not to prosecute can be distressing. The victim, having made what is often a very difficult and occasionally traumatic decision to report a crime, may feel rejected and disbelieved. It is therefore essential that the prosecution decision receive careful consideration.
32. Courts have an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power to stop police investigations (or stop a prosecution) if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court or infringement of a citizens' fundamental rights. Abuse of process has been defined as something so unfair and wrong with the prosecution that the court should not allow an investigator or prosecutor to proceed with what is, in all other respects, a perfectly supportable case.¹⁸ Whether an investigation

¹⁶ Act No. 2 of 2013.

¹⁷ Article 157 of the constitution.

¹⁸ *Hui Chi-Ming vs R* {1992} 1 A.C. 34, PC.



or a prosecution is an abuse of court process, unfair, wrong or a breach of fundamental rights, it is for the court to determine on the individual facts of each case.

33. The Petitioner concedes that there was a scuffle involving him and the Interested Party. He claims that he was injured in the said scuffle. Following the incident, the Interested Party lodged a complaint with the Police alleging assault. Some witnesses recorded statements attesting to the incidence. The police now seek to charge the Petitioner. The DPP is mandated to independently review the evidence and be satisfied that an offence known to the law has been committed.
34. It not for this court to determine the veracity or to weigh the strength of the evidence or accused persons' defence. That is a function for the trial court hearing the criminal trial. This court can only intervene if there are cogent allegations of violation of constitutional rights; or threat to violation of the Rights; or in clear circumstances where it is evident that the accused will not be afforded a fair trial; or the right to a Fair Trial has been infringed or threatened; or where the prosecution is commenced without a factual basis. The allegations cited by the Petitioner do not pass this threshold. It is not enough to recite Articles of the Constitution. There must be clear evidence that the Respondents acted in total disregard of the law. The Petitioner is inviting this court to determine the sufficiency of the evidence (which is constitutionally ordained to the DPP) or weigh the veracity of what ought to be his defence in the lower court which is not the function of this court.
35. The initial consideration in the exercise of the discretion to prosecute is whether the evidence is sufficient to justify the institution or continuation of a prosecution. This is a decision constitutionally vested on the DPP. Where discretion is conferred on the decision-maker the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.¹⁹ The DPP is mandated to independently evaluate the evidence and make the decision to prosecute independently.
36. The inherent jurisdiction of the court to stop investigations or a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances.²⁰ The enquiry is whether there has been an irregularity or an illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted. The provisions of the Constitution conferring powers upon the High Court to grant such remedies as conservatory orders are a device to advance justice and not to frustrate it.
37. Applying the tests discussed above to the facts and circumstances of this case, I find that the Petitioner has failed to satisfy the tests for granting the conservatory orders sought. The upshot is that the Petitioner's application dated 15th July 2021 (the 1st application) is unmerited. Consequently, I dismiss the said application. Having so found, it will serve no purpose to consider the Interested Party's application dated 12th August 2021, (the 2nd application) because the interim orders sought to be set aside lapse with the dismissal of the 1st application.

Orders accordingly

SIGNED, DATED DELIVERED AND ELECTRONICALLY AT MOMBASA THIS 18TH DAY OF OCTOBER 2021.

JOHN M. MATIVO

JUDGE

¹⁹ Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, *Statute Law in New Zealand*, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

²⁰ See *Attorney General's Reference (No 1 of 1990)* [1992] Q.B. 630, CA; *Attorney General's Reference (No 2 of 2001)* [2004] 2 A.C. 72, HL.

