



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

MISC. CIV. APPLICATION NO. E069 OF 2021

IN THE MATTER OF AN APPLICATION BY MODYPHINE CHEMOS

SAKONG FOR JUDICIAL REVIEW ORDER OF CERTIORARI

=AND=

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

=AND=

IN THE MATTER OF THE PENAL CODE, CAP 63, LAWS OF KENYA

=AND=

IN THE MATTER OF KIMILILI PRINCIPAL MAGISTRATE'S COURT

CRIMINAL CASE NO. 382 OF 2021

=AND=

IN THE MATTER OF KIMILILI PRINCIPAL MAGISTRATE'S COURT CRIMINAL CASE NO. 382 OF 2021

=BETWEEN=

REPUBLIC.....APPLICANT

=VERSUS=

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

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

PRINCIPAL MAGISTRATE'S COURT

KIMILILI LAW COURTS.....3RD RESPONDENT

=AND=

MAURINE CHEBET SAKONG.....1ST INTERESTED PARTY

PC-PAUL KURUI NO. 67699.....2ND INTERESTED PARTY

=AND=

MODYPHINE CHEMOS SAKONG.....EXPARTE APPLICANT

RULING

1. The ex-parte Applicant herein is an adult Kenyan citizen. By a notice of motion dated 29th October, 2021 the ex-parte applicant herein seeks the following orders:

i. THAT the Hon. Court be pleased to grant judicial review order of certiorari to move this court the decision of the 1st, 2nd and 3rd Respondent to charge and prosecute the ex-parte applicant in Kimilili Principal Magistrate's Court criminal case No. 383 of 2021 and Criminal Case No. E382 of 2021 and any other case arising thereof as per the said OB-Report No. 24/20/08/2021 for purposes of the same being quashed.

ii. THAT Costs be borne by the Respondents and the Interested Parties.

2. The application is supported by a verifying affidavit sworn on the same date by Modyphine Chemos Chebus, the ex-parte Applicant, and a Statutory Statement dated 29th October, 2021, and a further affidavit in support sworn by the said deponent on 29th October, 2021.

3. The Respondents filed no response to the application.

4. The ex-parte applicants' case is inter alia; that she was falsely arrested and charged in Kimilili Principal Magistrate's Court vide criminal case No. 383 of 2021, Criminal Case No. E 382 of 2021 and any other arising thereof on the basis of the Kapsokwony Police station OB-Report No. 24/20/8/2021; that she was not aware of the offences which caused her arrest; that concerning the Kimilili Magistrate's Court criminal case E382 of 2021 in particular, the contents on the charge sheet and P52 requisition to compel attendance, she was not served with the said document by the said PC-Paul Kurui and therefore never signed any document in his presence; that the two cases imposed on her was as a result of the OB 28/26/08/2021 being the report of assault of her child by the 1st Interested Party in which she had lodged the complaint with the 1st Respondent.

5. The ex parte Applicant also urged that it is in the interest of justice that the orders sought be granted so that the decision by the 1st, 2nd, and 3rd Respondents to charge her and prosecute her be declared false, malicious and ultra-vires as the contents of the Kapsokwony Police Station OB-Report No. 24/20/8/2021 differ with the contents on the charge sheet and on the statement of one PC-No. 67699-Paul Kurui.

6. The Application was canvassed by way of submissions. The ex-parte Applicant relied on her written submissions dated 23rd November, 2021 while Counsel for the 1st Respondent opted to do oral submissions.

7. It was submitted by the ex-parte Applicant that the Respondents failure to look at the OB-Report No. 24 /20/08/2021 before advancing charges in Kimilili Principal Magistrate's Court Criminal Case No. 382 of 2021 and 383 of 2021 are actions outside the law and thus ultra-vires and that the decision was unreasonable, malafides and in contravention to the law. She relied on the cases of **R v. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** and **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 (2007) 2 EA, 170.**

8. The 1st Respondent's counsel submitted that the application before this court does not meet the threshold for a judicial review as was set in the case of **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001.** Counsel further submitted that the ex-parte Applicant has not demonstrated that there was a flaw in the charges preferred against her and that the 1st Respondent had the power to charge her. Counsel finally urged the court to dismiss the application.

9. I have considered the application, the various affidavits filed in support of the application as well as the submissions filed and presented orally to the court.

10. The ex-parte Applicant's bone of contention in summary is that her being summoned to appear for plea and arraignment in Criminal Case Number 382 of 2021 and 383 of 2021 respectively was an abuse of process and contravened her fundamental rights since the contents of the chargesheet and that of the statement differed.

11. The principles which guide the grant of the orders in the nature sought herein are now well crystallised in this jurisdiction. What is essential is the application of the same to the facts of each case. Several decisions have been handed down which, in my view, correctly set out the law relating to circumstances in which the court would be entitled to prohibit, bring to a halt or quash criminal proceedings. However, while applying the said principles to a particular case, the court, must always be cautious in its findings so as not to prejudice the intended or pending criminal proceedings so as not to transform itself into a trial court. The court in judicial review proceedings is therefore not allowed to delve into the merits or otherwise of the criminal process as that would amount to unnecessarily trespassing into the arena specially reserved for the criminal or trial court. This court in determining the issues raised therefore shall not usurp the constitutional and statutory mandate of the Respondents to investigate and undertake prosecution in the exercise of the undoubted discretion conferred upon them.

12. As was reiterated by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001:**

“The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision...”

13. According to **Judicial Review Handbook, 6th Edition** by **Michael Fordham** at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting victims against abuses of

power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority/power.

14. Under the Constitution, this court is empowered to invoke its judicial review jurisdiction in the proceedings of this nature in order to grant appropriate orders including the orders sought herein. In other words, judicial review jurisdiction has now been fused with the remedies under the Constitution and this is clearly perceptible from the remedies arranged under **section 11** of the **Fair Administrative Action, Act 2015**. Referring to the South African Constitutional Court in **Pharmaceutical Manufacturers Association of South Africa & Another vs. Minister of Health Case CCT 31/99** where the court held that:

“The common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of the Constitution and the legal order that it proclaims — thus, the command that law be developed and interpreted by the courts to promote the “spirit, purport and objects of the Bill of Rights.” This ensures that the common law will evolve within the framework of the Constitution consistently with the basic norms of the legal order that it establishes. There is, however, only one system of law and within that system the Constitution is the supreme law with which all other law must comply. What would have been ultra vires under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality. In this respect, at least, constitutional law and common law are intertwined and there can be no difference between them. The same is true of constitutional law and common law in respect of the validity of administrative decisions within the purview of section 24 of the interim Constitution. What is “lawful administrative action,” “procedurally fair administrative action” and administrative action “justifiable in relation to the reasons given for it,” cannot mean one thing under the Constitution, and another thing under the common law...Although the common law remains relevant to this process, judicial review of the exercise of public power is a constitutional matter that takes place under the Constitution and in accordance with its provisions. Section 167(3) (c) of the Constitution provides that the Constitutional Court “makes the final decision whether a matter is a constitutional matter”. This Court therefore has the power to protect its own jurisdiction, and is under a constitutional duty to do so. One of its duties is to determine finally whether public power has been exercised lawfully. It would be failing in its duty if it were to hold that an issue concerning the validity of the exercise of public power is beyond its jurisdiction.”

15. It is clear that our Constitution is progressive in its language and supports the grounds for the grant of judicial review relief which ought to be developed and expounded and expanded so as to meet the changing needs of our society so as to achieve fairness and secure human dignity.

16. Therefore, a mere allegation that the intended or ongoing criminal proceedings are in all likelihood bound to fail, does not merit the grant of judicial review relief in the nature of either prohibiting or quashing criminal proceedings. In other words, if the ex-parte Applicant demonstrates by way of credible evidence that the criminal proceedings that the police or the Director of Public Prosecutions intends to carry out constitute an abuse of process, the court will not hesitate in putting a halt to such proceedings.

17. In the case of **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170**, the Court of Appeal held:

“It is trite that an order of prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”

18. In **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69**, the High Court held:

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society’s senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court’s) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilization is far from that which the courts indeed the entire system is constitutionally mandated to administer.....”

19. In **Republic vs. Chief Magistrate’s Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703**, it was held:

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole

purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth... For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in..."

20. As was explicitly put in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR:**

"The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court...As long as the prosecution and those charged with the responsibility of making the decisions to charge or act in a reasonable manner, the High Court would be reluctant to intervene."

21. Normally, these types of proceedings focus on the procedure rather than the substance of the case. In other words, these proceedings determine, among other things, whether the decision makers had jurisdiction, whether the persons affected by the decision were heard before the decision was made, whether the decision maker considered relevant or irrelevant factors in making the decision, whether the decision to initiate criminal charges is contrary to the ex-parte Applicant's legitimate expectation, and whether the Respondents' decision to charge the ex-parte Applicant is contrary to the ex-parte Applicant's legitimate expectation. As a result, if the ex-parte Applicant brings such proceedings with the intent of resolving disputed facts and effectively asks the court to decide the merits of two or more different versions presented by the parties, the court will lack jurisdiction to do so and will leave the parties to resort to the courts. In other words, such processes are not the right forum for determining the petitioner's innocence or otherwise, and a party should not bring such proceedings with the intention of having the court assess his innocence or otherwise. To do so, in my opinion, is an abuse of the legal system. In these types of cases, the court is primarily concerned with the question of fairness to the applicant in the institution and continuation of criminal proceedings, and whether such proceedings amount to a violation of his or her rights and fundamental freedoms. Once the court is satisfied that this is not the case, the High Court should not usurp the jurisdiction of the trial court and trespass into the arena of trial by determining the sufficiency or otherwise of the evidence. Where, on the other hand, it is evident that the contrary is sought to be achieved, the High Court will intervene and quash the proceedings or issue an order of prohibition where appropriate.

22. As a result, the outcome of this case must be considered in light of the preceding decisions. However, it is up to the ex parte Applicant to persuade the court that the Respondents' power to investigate and prosecute should be curtailed.

23. In this case, the Applicant claims that the intent behind the criminal procedures was to attain some secondary goals in addition to the vindication of a criminal offense. To put it bluntly, the ex-parte Applicant claims that the Respondents started the criminal proceedings because she had made a report of assault of her child by the 1st Interested Party only for the police to turn tables against her instead of investigating the assault allegations. Obviously, report of assault is not one of the grounds for initiating criminal proceedings, and if it is the primary reason for initiating criminal proceedings, this court will not hesitate to dismiss the case.

24. In exercising their discretion to charge a person both the police and the DPP's office must take into account and must exercise the discretion on the evidence of sound legal principles. As was held by **Ojwang, J** (as he then was) in **Nairobi HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another:**

"...policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense...I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State's prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes".

25. Therefore, the police and prosecutors are expected to be professional in the conduct of their investigations and prosecutorial duties and ought not to be driven by malice or other collateral considerations. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution.

26. In this case, the ex-parte Applicant's damning evidence on oath that the inconsistency between the chargesheet and the 2nd Interested Party's contents of statement implied two different things. From the OB-Reports, the contents of statement by the 1st Interested Party and the charge sheet, it is clear that there is a discrepancy on who exactly was being accused of a crime and who was the accuser.

27. In my view, to permit the prosecutor to arbitrarily exercise his constitutional mandate based on ulterior motives as is alleged in these proceedings would amount to the court abetting abuse of discretion and power and criminality. It was therefore held in **Regina vs. Ittoshat [1970] 10 CRNS 385 at 389** that:

"This court not only has the right but a duty to protect citizens against harsh and unfair treatment. The duty of this court is not only to see the law is applied but also, which is of equal importance, that the law is applied in a just and equitable manner."

28. This court therefore has the powers and the constitutional duty to supervise the exercise of the Respondents' mandate whether constitutional or statutory as long as the discretion falls afoul of section 4 of the Office of the Director of Public Prosecution Act and Article 157 of the Constitution.

29. It is clear that, while the Respondents' discretion to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the court finds that the discretion is being abused or is being used for purposes other than the vindication of the commission of a criminal offence, such as forcing a party to submit to a criminal act in order to satisfy it, the court must intervene. As was held in **Githunguri vs. Republic KLR [1986] 1:**

“A prosecution is not to be made good by what it turns up. It is good or bad when it starts. The long and short of it is that in our opinion it is not right to prosecute the applicant as proposed.”

30. In the premises, it is my view and I hold that the 1st and 2nd Respondents' decision to prosecute the ex-parte Applicant in light of the uncontroverted malicious motives amounts to an abuse of the legal and court process. It is instructive that the ex-parte applicant has given the history of her tribulations after lodging a complaint of assault upon her child by the 1st interested party and was shocked to be made a suspect instead of a complainant by the investigating officer Pc Paul Kurui whom she accused as having threatened to teach her a lesson due to some previous differences the two had. It is further instructive that the respondents and the said interested parties have suspiciously failed to file a response to the applicant's averments. The court is left with no option but to believe the version of the applicant to be the truth of what is alleged. The fact that the respondents proceeded to prosecute the applicant and fail to work on the applicant's complaint of assault on her child is a clear manifestation of an abuse of the court process and thus the decision to charge the applicant was intended to achieve an ulterior motive other than achieve a criminal process which is in the public interest.

31. In the result, it is my finding that the Ex-parte applicant's application dated 29/10/2021 has merit. The same is allowed in the following terms:

i. An order of Certiorari removing into this court for the purposes of being quashed proceedings in the Criminal Case No. 383 of 2021 and 382 of 2021 at Kimilili law courts and based on the facts contained in the OB-Report, contents on the statement of one PC-NO. 67699- Paul Kurui and contents of the charge sheet dated 20th September, 2021 which proceedings are hereby quashed.

ii. Costs of this application are awarded to the applicant to be borne by 1st and 2nd Respondents.

32. It is so ordered.

DATED AND DELIVERED AT BUNGOMA 16TH THIS DAY OF DECEMBER, 2021.

D. Kemei

Judge

In the presence of:

Modyphine Chebus Ex-Parte Applicant

No appearance for 1st Respondent

Miss Mulianga for 2nd Respondent

No appearance for the 3rd Respondent

No appearance for 1st Interested Party

No appearance for the 2nd Interested Party

Wilkister Court Assistant