



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CONSTITUTIONAL PETITION NO. 10 OF 2017

1. JOSEPH OMWENGA.....1ST PETITIONER
2. CAREEN NYABOKE NYAKERIGA.....2ND PETITIONER
3. DIANA BONARERI NYANCHOKA.....3RD PETITIONER
4. JAMES MANYARA ATUTI.....4TH PETITIONER
5. AGNES KWAMBOKA MACHINI.....5TH PETITIONER
6. HEZEKIAH OKENYURI ONDIEKI.....6TH PETITIONER
7. RISPER KANINI OMAE.....7TH PETITIONER
8. JANE GESARE ONSENSE.....8TH PETITIONER
9. GLADYS KWAMBOKA ARUGA.....9TH PETITIONER
10. CAREEN OGACHA OKENYURI.....10TH PETITIONER
11. FMM (Suing as next friend of PNM).....1TH PETITIONER

- VRS -

1. DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT
2. THE PRINCIPAL MAGISTRATE COURT AT KEROKA.....2ND RESPONDENT

JUDGEMENT

The petitioners filed this petition after they were arrested and charged with alleged examination teaching. Briefly the background of the petition is that the 11th petitioner who was a student at [particulars withheld] Boys School and who was writing his Kenya Certificate of Primary Examinations (KCPE) in November 2016 was allegedly found with foreign matter suspected of containing answers. The room in which he was sitting the examination had been assigned to the 9th petitioner to invigilate while the 1st to 10th petitioners were assigned as invigilators in that centre. While the 11th petitioner, who it was suspected was cheating, was allowed to continue doing the examination, the 1st to 10th petitioners were substituted. Subsequently when the Kenya Certificate of Primary Examination results were released the 11th petitioner got his results and it is the petitioners' contention therefore that the Kenya National Examination Council (KNEC) did not find the 11th petitioner culpable and the criminal proceedings which were instituted against them should be halted. By the time they filed this petition they had already been arraigned, charged and five witnesses had given evidence. They allege that under Section 32 of the Kenya National Examination Council Act No. 29 of 2012 the 11th petitioner would not have been allowed to continue with the examination if indeed he was caught cheating. It is their contention that in this case Kenya National Examination Council did its own investigation as mandated by the Act and found the 11th petitioner not culpable and that therefore letting the “**pompous and ornate prosecution**” of Keroka Criminal Case No. 1239 of 2016 to continue would amount to breach of the double jeopardy principle, is against public interest and a clear abuse of the court process. They also contend that their prosecution is a violation of Articles 27, 28, 29, 31, 47, 49, 50 and 51 of the Constitution. They also

urge that the 1st respondent's resolve to prosecute them despite knowledge that the 11th petitioner was given a clean bill of health by Kenya National Examination Council (KNEC) is an utter disregard of Article 157 of the Constitution and the Prosecution Policy 2015. They state that none of the 1st to 10th petitioners have been charged with neglect of official duty under the penal laws. They then contend that the 2nd respondent has no jurisdiction to determine whether a candidate has cheated or committed any other examination irregularity as that falls within the mandate of the Kenya National Examination Council (KNEC) under Section 4 of the Kenya National Examinations Council Act No. 29 of 2012. Their prayers therefore are for: -

- “1. A Declaration that the Petitioners’/Applicants’ rights to human dignity as provided by Article 28 of the Constitution have been, are being and are likely to be contravened by the Respondents who have failed to comply with the law regarding investigation and prosecution of alleged offences in Case Number 1239 of 2016 in Keroka Principal Magistrate’s Court.**
- 2. A Declaration that the 1st respondent is obliged to act lawfully, fairly and reasonably in the exercise of its respective Constitutional mandate regarding the investigation of alleged offences on Case Number 1239 of 2016 in Keroka Principal Magistrate’s Court.**
- 3. A Declaration that the 1st to 10th Petitioners protection and immunity as public officers who performed their duties diligently and without any negligence whatsoever on their part has been, is being and is likely to be contravened by the 1st Respondent’s decision to prosecute the Petitioner.**
- 4. A Declaration that the Respondents are obliged by law to observe rules of natural justice in their exercise of their respective Constitutional mandates.**
- 5. An order of certiorari do issue quashing the charge sheet before the Chief Magistrates courts at Keroka Criminal Case No. 1239 of 2016.**
- 6. A declaration that the decision by the 1st Respondent, the Director of Public Prosecutions to present to court and charge the 1st to 10th petitioners with various counts of offences of Aiding and abetting copying at an examination contrary to Section 40 of the Kenya National Examination Council Act No. 20 of 2012 and Conspiracy to commit a felony contrary to Section 393 of the penal code and the 11th Respondent with Copying at an examination contrary to Section 32 (e) of the Kenya National Examination Council Act No. 20 of 2012 in Criminal Case No. 1239 of 2016 as null and void.**
- 7. An order of prohibition to prohibit the Principal magistrate, Keroka and any other magistrate from receiving and or continuing to entertain the counts and charges against the petitioners in Keroka Criminal Case No. 1239 of 2016 alleging criminal culpability various counts of offences of Aiding and abetting copying at an examination contrary to Section 40 of the Kenya National Examination Council Act No. 20 of 2012 and Conspiracy to commit a felony contrary to Section 393 of the penal code and Copying at an examination contrary to Section 32 (e) of the Kenya National Examination Council Act No. 20 of 2012 in Criminal Case No. 1239 of 2016**
- 8. A declaration that charges against the petitioners are unjust as they violate their indemnity under Article 236 of the Constitution indemnifying them of all administrative actions done in good faith.**
- 9. The Honourable court be pleased to issue such order, directions as may be necessary to safeguard and prevent the violation the Petitioners’ rights and freedoms under the Constitution of Kenya 2010.**
- 10. That the Honourable court be pleased to award general and exemplary damages to the petitioners for violation of their fundamental rights and freedoms under the Constitution of Kenya 2010.**
- 11. That the costs of this Application be provided for.**
- 12. All such orders that this Honourable Court shall deem just.”**

The petition proceeded by way of written submissions with both sides relying on the submissions filed in respect to the Notice of Motion by which the petitioners had sought a conservatory order but which this court dismissed in a ruling delivered on 29th July 2019.

In the proceedings giving rise to this petition the 1st to 10th petitioners were charged as follows: -

Count I: Aiding and Abetting copying at an examination contrary to Section 40 of the Kenya National Examinations Council Act No. 29.

Particulars of offence:

On 1st day of November, 2016 at [particulars withheld] Boys Boarding Primary School [particulars withheld] within Borabu Sub-county in Nyamira County being a manager, supervisor and invigilators of the Kenya Certificate of Primary Education at [particulars withheld] Boarding Primary School centre aided a candidate namely PNM Index Number [xxxx] to copy an English language paper at the examination room number two.

Count 2: Conspiracy to commit a felony contrary to Section 393 of the Penal Code.

Particulars of the offence:

On 1st November 2016 at [particulars withheld] Boys Boarding Primary School in [particulars withheld] within Borabu Sub-county in Nyamira County conspired together to commit a felony namely copying at an examination contrary to Section 32 (e) of the Kenya National Examinations Council Act No. 29 of 2012.

The 11th respondent was on his part charged with copying at an examination contrary to Section 32 (e) of the Kenya National Examinations Council Act No. 29 of 2012. The particulars of the said offence were that on the 1st day of November 2016 at [particulars withheld] Boys Boarding Primary School in [particulars withheld] Borabu Sub-county in Nyamira County being a Kenya Certificate of Primary Education Candidate Index No. [xxxx] copied the English Language examination paper from notes that were found in his possession within the examination room number 2.

Counsel for the petitioners framed the issues for determination in this petition as follows: -

“(a) Whether this Honourable court has mandate to interfere with the exercise of discretion of the 1st Respondents where his actions are capricious and not in public interest and amount to abuse of legal process.

(b) Whether the 1st Respondent (“the DPP”) correctly exercised his mandate to prefer criminal charges against the Petitioners fairly and judiciously and by extrapolation;

i. Whether there is a nexus between the 1st to 8th and 10th petitioners and the criminal charges preferred against them by the 1st Respondent.

ii. Whether the decision to charge the 9th and 11th Petitioners was rational/lawful.

(c) Whether the prosecution against the petitioners was malicious and ill-founded and an abuse of Court process actuated by bad faith and ill will and thus in contravention of Article 157 (11) of the Constitution.

(d) Whether the decision to prefer criminal charges against the petitioners violates their fundamental rights.”

Counsel then submitted on each issue separately and supported his arguments with numerous authorities. On the first issue it was his submission that whereas Article 157 (6) of the Constitution vests powers of prosecution in the office of the 1st respondent herein and Article 157 (10) provides that in exercising those powers the 1st respondent shall not be under the direction of any person or authority the courts have the mandate to intervene where the 1st respondent exercises its discretion in contravention of the Constitution and the office of the Director of Public Prosecutions Act, 2013. Counsel submitted that Article 157 (11) of the Constitution places an obligation upon the 1st respondent to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

On the second issue, Counsel submitted that criminal culpability is personal to a suspect and cannot be placed upon an innocent group of individuals in lump sum; that the insensitive and non-discriminatory levelling of charges regardless of the classes the 1st to 8th petitioners and the 10th petitioner were invigilating spells mischief and incompetence on the part of the 1st respondent as no proper or/and sound investigations were carried out and that therefore the case against the petitioners is malicious, capricious, discriminatory and unlawful and is not based on open and legal investigations, is contrary to public policy and public interest outlined in Article 10 of the Constitution. Counsel further urged this court to note that Kenya National Examination Council did not find the 11th petitioner culpable of copying and that this is evident from its having released his results whereupon he was enrolled to [particulars withheld] Secondary School and that the 1st respondent has not sought any clarification from Kenya National Examination Council on this and therefore it should not be allowed to drag the petitioners to court for **“whatever its worthy”**. Counsel submitted that having no foundational basis on which to lay the charges the 1st respondent’s decision was irrational, baseless, abuse of legal process, unconstitutional and in bad faith, and the same ought to be halted.

On the last issue, Counsel submitted that the petitioners’ right to freedom and security provided under Article 29 of the Constitution is likely to be contravened as the respondents have not complied with the law regarding investigations and laying criminal charges. Counsel contended that one is liable as an accomplice only if they give assistance or encouragement or omit to perform a legal duty to prevent the commission of a crime. In conclusion, Counsel for the petitioners submitted that the 1st respondent’s decision to prosecute the petitioners was not only baseless and made on a misapprehension of fact and applicable law but that it was also made in malafides and in total abuse of legal process and that the prayers sought ought to be granted.

For the 1st respondent, it was argued that the big question arising from this petition is whether the decision by the 1st respondent to charge the petitioners was made in bad faith and therefore an abuse of the legal process. Counsel submitted that Article 157 (11) of the Constitution provides the guiding principles that guide the 1st respondent while performing its duties; that in the case of the petitioners the 1st respondent acted upon a complaint lodged at Keroka Police Station which was then thoroughly investigated before the petitioners were charged; that the prosecution was premised on sufficiency of evidence and was not motivated by malice and this court ought therefore not to interfere but to dismiss the petition.

That this court has power to interfere with the exercise of discretion of the 1st respondent where its actions are capricious and not in public interest and amount to abuse of legal process is not in doubt. That duty was spelt out by Wendoh J in the case of **Koinange v Attorney General & others [2007] EA 256** when she held: -

“Under Section 26 of the Constitution the Attorney General has unfettered discretion to undertake investigations and prosecute. The Attorney General’s inherent powers to investigate and prosecute may be exercised through other offices in accordance with the Constitution or any other law. But, if the Attorney General exercises that power in breach of the constitutional provisions or any other law by acting maliciously, capriciously, abusing the court process or contrary to public policy the court would intervene under Section 123 (8) of the Constitution and in considering what constitutes an abuse of the court process the following principles are relevant: -

- i. Whether the criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed;**
- ii. Whether the person against whom the criminal proceedings are commenced has been deprived of his fundamental right of a fair trial envisaged in the provisions of the Constitution;**
- iii. Whether the prosecution is against public policy.”**

The above principles were echoed by Odunga J in **Republic v Director of Public Prosecutions & 2 others Ex-parte Praxides Namoni Saidi [2016] eKLR** when he held: -

“69. It is therefore clear that the terrain under the current prosecutorial regime has changed and that the discretion given to the DPP is not absolute but must be exercised within certain laid down standards provided under the constitution and the office of the Director of Public Prosecutions Act. Where it is alleged that these standards have not been adhered to, it behoves this court to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this court would be an abhorrent affront to judicial conscience and above all, the constitution itself.....

87. In my view to permit the prosecutor to arbitrarily exercise his constitutional mandate based on ulterior criminal motives would amount to the court abetting abuse of the discretion and power and criminality.....

88. This court therefore has the powers and the constitutional duty to supervise the exercise of the Respondent’s mandate whether constitutional or statutory as long as the discretion falls foul of Section 4 of the Office of the Director of Public Prosecution Act and Article 157 of the Constitution.”

That stated as I held in the ruling dated 29th July 2019, I hold and find that the petitioners herein have not demonstrated that the decision to charge them was actuated by malice or is an abuse of the legal process or that the circumstances referred to render it impossible for the petitioners to have a fair trial. I do also reiterate that whether the act of releasing the 11th petitioner’s results while maintaining that he was caught cheating is an admission that he was not found culpable is an issue to be determined at the trial. While I agree with the court’s observation in **Githunguri v Republic [1986] KLR 1** that: -

“A prosecution is not to be made good by what it turns up. It is good or bad when it starts.....” I am also persuaded by the holding in **Republic v Commissioner of Police and Another ex-parte Michael Monari & Another [2012] eKLR** that: -

“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. the predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”

I see nothing to demonstrate that the respondents acted in an unreasonable manner. Moreover, by the time the petitioners brought this petition their trial had commenced and five witnesses had been called and I have not heard them allege or assert that their right to a fair trial was threatened or violated. In the premises my finding is that the petition has no merit and it is dismissed and while costs follow the event, I find that in the circumstances of this case the order that commends itself to the court is that parties shall bear their own costs. It is so ordered.

Dated, signed and delivered in Nyamira this 20th day of February 2020.

E. N. MAINA

JUDGE