



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CONST. PETITION NO. 22 OF 2019

IN THE MATTER OF ARTICLE 23 AND 165(3) (A), (B) & 6 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 19(2), (3), 20(1), (2), (3), (4), 21(1), 22(1), (4), 23(1), (3), 28, 50(2)(B) (C) OF THE CONSTITUTION

BETWEEN

PREMIER FOOD INDUSTRIES LIMITED.....PETITIONER

VERSUS

PUBLIC HEALTH PROSECUTOR – KISUMU.....RESPONDENT

JUDGMENT

The Petitioner, **PREMIER FOOD INDUSTRIES LIMITED**, was charged with the offence of **Packaging and Distributing unwholesome food for sale, with visible suspended particles** contrary to **Section 3(c)** as read with **Section 36(1)** of the **Food, Drugs and Chemical Substance Act (Cap 254)**.

1. The Petitioner has asked this court to make a declaration that;

“... the Respondent’s act of charging the Petitioner with fictitious and baseless charges with no investigations and evidence to support the charges is unconstitutional and therefore a violation of Articles 21 and 28 of the Constitution.”

2. Secondly the Petitioner has asked the court that;

“An order of Certiorari be issued quashing the decision of the Respondent to charge and prosecute the Petitioner in RMCC NO. 34 of 2019 Kisumu – Republic Vs Premier Food Industries Limited.”

3. Thirdly, the Petitioner has asked the court that;

“An order of Prohibition be issued directed to the Respondent prohibiting any further proceedings in RMCC NO. 34 of 2019 and permanently prohibiting the Respondent from instituting any further or future charges against the Petitioner on the same complaint, the subject matter of the criminal charges in the said case.”

4. Finally, the Petitioner sought costs of the Petition.

5. It is common ground that on 16th April 2019, the Respondent, the **PUBLIC HEALTH PROSECUTOR**, acting through Public Health Officers seized **PEP LIME JUICE** products from the Naivas Supermarket, Kisumu.

6. It is further common ground that Summons were served upon the Petitioner requiring it to answer to the charge of;

“Packaging and Distributing Unwholesome food for sale with visible suspended particles contrary to Section 3 (c) as read with Section 36 (1) of the Food, Drugs and Chemical Substances Act Cap 254 Laws of Kenya.”

7. The Petitioner complied with the Summons.

8. Later, on 9th July 2019 and on 30th July 2019, the Respondent served the Petitioner with the Witness Statements of **FLORENCE NANJIRA MWANZA** and **GODFREY ENOS OWILI**.

9. Having given consideration to the Witness Statements, the Petitioner noted that the Respondent does not have any Certificate issued by a Public Analyst, specifying the results of the analysis or the examination of the alleged Unwholesome food.

10. The Petitioner submitted that it was;

“.... a precondition for one to be charged under the said offence, as it is the case of the petitioner herein, as provided under Section 30 (11) of Food, Drugs and Chemical Substances Act, which states

thus;

‘An authorized officer may submit any article seized by him or any sample taken by him to a public analyst for analysis or examination; and a public analyst shall as soon as practicable analyze or examine any sample sent to him in pursuance of this Act and shall give the authorized officer a certificate specifying the result of the analysis or examination and such certificate shall be in such form as may be prescribed by the Minister on the advice of the Board.’

11. In the absence of a certificate from a public analyst, showing that the seized products were unwholesome, the Petitioner submitted that that constituted an acknowledgement by the Respondent that the Respondent had not done any investigations prior to instituting the criminal charges against the Petitioner.

12. It was the Petitioner’s case that subjecting it to a criminal process that has no factual and evidential basis, is a clear infringement of the Petitioner’s Constitutional right to

dignity.

13. In the case of AGNES NGENESI KINYUA aka AGNES KINYWA Vs DIRECTOR OF PUBLIC PROSECUTION & ANOTHER, CONSTITUTIONAL PETITION NO. 6 OF 2018, the Court quoted the following words from the case of REPUBLIC Vs ATTORNEY GENERAL & ANOTHER Ex-Parte KIPNG’ENO ARAP NGENY [2001] KLR;

“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 a criminal prosecution otherwise the prosecution will be malicious and actionable.”

14. The Petitioner made it clear that it is not disputing the fact that the offence with which it had been charged, was duly created by law. However, the Petitioner emphasizes that any prosecution must be done in accordance with the law.

15. Citing the decision of the Court of Appeal in KENYA BREWERIES LIMITED Vs REPUBLIC [1984] eKLR, the Petitioner submitted that prior to the institution of criminal proceedings against it, the Respondent ought to have obtained a Certificate from a Public Analyst, which disclosed the offence that the Petitioner was to be charged with. In that case, the Court looked at **Section 35** of the **Food, Drugs and Chemical Substances Act**, and said;

“That section sets out the procedure to be observed, which procedure is as follows;

(a) the public analyst analyses or examines the article (usually this will have been submitted to him by the authorized officer);

(b) he issues a certificate; and

(c) if the certificate discloses an offence the authorized officer may prosecute the offender.

It is apparent from the wording of the section that the authorized officer can commence legal proceedings only if the public analyst’s certificate shows that an offence under the Act appears to have been committed.”

16. It was the considered opinion of the learned Judges of

Appeal that;

“The certificate of a public analyst is, therefore, a condition precedent to a prosecution under the Act.”

17. The Petitioner submitted that, pursuant to the principle of stare decisis, the decision by the Court of Appeal was binding upon the Court.

18. In answer to that submission, the Respondent pointed out that its decision to commence the prosecution of the Petitioner was founded upon a factual basis.

19. As far as the Respondent was concerned, it was a sufficient foundation upon which the Petitioner could be prosecuted, because the Pep Lime Juice had visible suspended particles within it.

20. Surely, when the Court of Appeal has expressly stated that the Certificate of a Public Analyst was a condition precedent to a prosecution under the Act, it cannot be said that this court can ignore that determination, and thus allow the Respondent to prosecute the Petitioner notwithstanding the absence of the requisite certificate.

21. The principle of stare decisis is alive and well in Kenya, and it is a firm reminder that Judicial pronouncements by the Courts are binding upon all courts subordinate to such Court.

22. It therefore follows that the decision made by the Court of Appeal is binding upon the High Court, as well as upon the Environment and Land Court; the Employment and Labour Relations Court; and the Magistrate’s Courts.

23. In the circumstances, it must be surprising to hear the Respondent making the bold assertion that the judgment in the case of **KENYA BREWERIES LIMITED V REPUBLIC [1984] eKLR** was not binding on this court.

24. The reason cited by the Respondent was that **Section 35(1)**, upon which the Court of Appeal had anchored its decision, had been repealed.

25. As at 5th October 1984, when the Court of Appeal determined that case, **Section 35 (1) of The Food, Drugs and Chemical Substances Act** read as follows;

“Where a public analyst having analyzed or examined any article to which this Act applies or any regulations made hereunder apply, has given his certificate and from that certificate it appears that an offence under this Act has been committed, an authorized officer may take proceedings under this Act before any magistrate having jurisdiction in the place where any food or drug sold was actually delivered to the purchaser or the sample taken.”

26. Currently, **Section 35 (1)** reads as follows;

“An authorized officer may take out proceedings for an offence under this Act or the regulations before any magistrate having jurisdiction in the place where any article sold was actually delivered to the purchaser or where the sample was taken.”

27. It therefore follows that whereas in 1984, the authorized officer could only commence legal proceedings in the public analyst’s certificate showed that an offence had been Committed, the said requirement is no longer a part of our law.

28. Accordingly, I find that the Respondent is correct to say that the decision in the case of **KENYA BREWERIES LIMITED V. REPUBLIC** (supra) is not binding upon this court, as the significant portion of the statute which that court adjudicated upon, is no longer applicable.

29. It is no longer a condition precedent that a public analyst should issue a certificate which discloses an offence, before the Respondent can institute criminal proceedings.

30. In circumstances where there is need for an analysis or examination of a product, so as to determine whether or not the product was wholesome, it would still be imprudent for the authorized officer to institute proceedings before a public analyst issues a certificate indicating that an offence had been disclosed.

31. In this case, the particulars of the charge were that the food was unwholesome because it had;

“..... visible suspended particles contrary to Section 3 (c) as read with Section 36 (1)”

32. Pursuant to **Section 3 (c)** of the **Food, Drugs and Chemical Substances Act**, it is an offence for;

“any person to sell any food that consists in whole or in part of any filthy, putrid, disgusting, rotten, decomposed or diseased substance or foreign matter.”

33. It was the Respondent's case that the Petitioner has acknowledged the presence of some foreign matter in the product in issue.

34. But the Petitioner submitted that the issue about the unwholesomeness of food can only be established through analysis, tests and examination. The Petitioner is convinced that a mere visual examination of a product cannot determine whether or not a product was unwholesome.

35. In my understanding, the question as to whether or not a visual examination of a product was sufficient to establish if the said product was unwholesome, is a question as to the sufficiency or otherwise evidence to support the charge preferred against the Petitioner.

36. That is therefore, a question regarding the merits of the decision made by the Respondent, and not about the legality of the decision-making process.

37. In the case of AGNES NGENESI KINYUA aka AGNES KINYWA Vs DIRECTOR OF PUBLIC PROSECUTIONS & ANOTHER [2019] eKLR, the court emphasized;

“..... that a constitutional petition challenging prosecution does not deal with the merits of the case but only with the process. The court in such proceedings is mainly concerned with the question of fairness to the petitioner in the institution and continuation of the criminal proceedings, and once the court is satisfied that the same are bona fides, and that the same are being conducted in a fair manner, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of the trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant.”

38. I find that the possible insufficiency of evidence does not constitute an abuse of the process of the court.

39. In the case of REPUBLIC Vs ATTORNEY GENERAL Exparte KIPNG'ENO ARAP NGENY, HIGH COURT CIVIL APPLICATION NO. 406 OF 2001, the Court said;

“The general principle enunciated by the Court in the Githunguri case [Stanley Munga Githunguri V. Republic NBI High Court Criminal Application No. 271 of 1985] is that the Court cannot curtail the State's constitutional power to prosecute criminal offences but the mode of the exercise of the power can be checked and balanced.”

40. In the case of WILSON OLAL & 5 OTHERS Vs ATTORNEY GENERAL & 2 OTHERS [2017] eKLR, the Court held as follows;

“The law enjoins the DPP to be scrupulously fair to an alleged offender and to ensure fair investigation and fair trial and also to ensure that the citizens constitutional and fundamental rights are not violated.”

41. If the Court found that there was reasonable and probable cause for instituting criminal proceedings against the

Petitioner, the court would not stop the said proceedings.

42. In the case of WILSON OLAL & 5 OTHERS ATTORNEY GENERAL & 2 OTHERS (Supra), the court expressed itself thus;

“What is reasonably justifiable in a democratic society is an elusive concept – one which cannot be precisely defined by the courts. There is no legal yardstick save that the quality of reasonableness of the decision under challenge is to be judged according to whether it arbitrarily or excessively invades the enjoyment of a constitutionally guaranteed right.”

43. In the case of STEPHEN GACHAU GITHAIGA & ANOTHER Vs ATTORNEY GENERAL [2015] eKLR the court said;

“Reasonable and probable cause has been defined to mean the existence of facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified.”

44. In this case, the Respondent continues to hold the belief, which he has held from the time when the Petitioner was charged: and that is, that the presence of foreign matter in the product was sufficient to prove that the said product was unwholesome.

45. In the case of KURIA & 3 OTHERS Vs ATTORNEY GENERAL [2002] 2 KLR 69 at page 81, the Court held as follows;

“However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is manipulation, abuse or misuse of the court process or that there is a danger to the right of the accused person to have a fair trial.”

46. In this case I find that the Petitioner has not provided proof that there has been any manipulation or abuse or misuse by the Respondent, in the process of making the decision to charge the Petitioner.

47. There is also no evidence that the Petitioner's right to a fair trial has been or will be compromised or violated in any manner.

48. In the result, I find no merits in the Petition: It is therefore dismissed.

49. The Petitioner shall pay to the Respondent, the costs of the Petition.

DATED, SIGNED and DELIVERED at KISUMU

This 29th day of April 2020

FRED A. OCHIENG

JUDGE