



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CONSTITUTIONAL PETITION NUMBER 1 OF 2020

IN THE MATTER OF: ARTICLE 2, 10, 19, 20, 21(1), 23(1) & (3), 165(a), (b), (c), (d), (ii) of CONSTITUTION OF KENYA

AND

IN THE MATTER: VIOLATION AND INFRINGEMENT TO RIGHT TO DIGNITY

AND

IN THE MATTER OF: ABUSE OF CRIMINAL JUSTICE SYSTEM

AND

IN THE MATTER OF: IRRATIONALITY & UNREASONABLENESS

AND

IN THE MATTER OF: ABUSE OF POLICE POWER

AND

IN THE MATTER OF: BREACH OF LEGITIMATE EXPECTATION

AND

IN THE MATTER OF: BAD FAITH AND ARBITRARY ARREST

AND

IN THE MATTER OF: ARTICLE 7,9,10 OF THE COVENANT ON CIVIL AND POLITICAL RIGHTS

AND

IN THE MATTER OF: ARTICLES 5, 7, 9 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

BETWEEN

JASON AWINJA.....1ST PETITIONER

WILBERFONCE AWINJA.....2ND PETITIONER

NOAH ASIKONYE.....3RD PETITIONER

JAVAN ATOLWA.....4TH PETITIONER

PETER OKUMBO.....5TH PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....	1 ST RESPONDENT
DIRECTOR OF GENERAL POLICE.....	2 ND RESPONDENT
INSPECTOR GENERAL OF POLICE.....	3 RD RESPONDENT
CHIEF MAGISTRATE OF BUNGOMA.....	4 TH RESPONDENT
CONCEPTA NAKHUMICHA.....	5 TH RESPONDENT

J U D G M E N T

By Notice of Motion brought under Rules 23 (1 & 2) and 24(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms), Practice and Procedure Rules, 2013, Section 3(1) of the High Court Vacation Rules (Practice and Procedure Rules, (Cap 8) and Order 51 of the Civil Procedure Rules, 2010).

The Petitioner approached this court for orders that

- i) That this honourable court do issue conservatory order staying criminal proceedings in Criminal Case No 2065 of 2019 (Bungoma) **Republic Vs Jason Awinja & 3 Others** pending the hearing and determination of this application.
- ii) That this Honourable Court do issue a conservatory order staying criminal proceedings in Criminal Case No. 2056 of 2019 (Bungoma) **Republic Vs Jason Awinja & 3 Others** pending the hearing and determination of this petition.

The application is premised on the grounds that on 29th October, 2019 there was a fracas between the 1st and 2nd petitioners on the one hand and the 5th Respondent, Concepta Nakumincha at the offices of the Registrar of persons over the processing of death certificate. The 5th Respondent reported the alleged assault to police at Bungoma Police Station vide OB No. OB/45/29/10/19. The 5th Petitioner Peter Okumo was thereafter detained by police and later all the 1st – 5th petitioners were arrested and charged with the offence of assault in Bungoma Chief Magistrate’s Criminal Case No. 2065 of 2019, **Republic Vs Jason Awinja & 3 others**. The petitioners aver that by their arrest and arraignment in court, their fundamental rights and freedom were infringed by the Respondent’s as hereunder.

- 1) The 1st Respondent failed to carry out its mandate effectively to investigate the complaint lodged by the petitioners. That the 2nd Respondent acted with impunity against the 5th Respondent by preferring criminal proceedings, and that these proceedings which is a blatant abuse of the criminal justice system. These actions were in contravention in Articles 2, 3, 22 and 10 of the Constitution. He avers that the Respondent action is in contravention of Articles 29, 47, 58 and 238 of the Constitution and several articles in international law to which Kenya is a signatory to.

In view of the breach of the constitutional provisions, the petition seeks:-

- “a) A declaration that the Respondent’s conduct and actions against the Petitioners are oppressive, unfair, unreasonable, irrational, illegal and an abuse of police power and criminal justice system.***
- b) An order of Certiorari be issued from this Honourable court to quash the criminal proceedings in Criminal Case No. 2065 of 2019; against the petitioners.***
- c) General damages for violations of the Petitioners right and fundamental freedoms.***
- d) Costs and interest of this petition.***

The 2nd, 3rd, & 4th Respondents filed response to the petition denying any of their actions as infringing on the right and freedoms of the petitioners. Mr. Tarus for the Respondents avers that the Respondent conducted investigations which revealed a reasonable and probable cause that the petitioners committed an offence. The Respondent further aver that its actions of arresting and preferring charges against the petitioners were made within the constitutional and legal mandate after the complaint by the 5th Respondent.

By consent of the parties, this petition was canvassed by way of written submissions. Dr. Khaminwa for the petitioners reiterated the brief historical perspective of this petition. That the 1st to 5th petitioners are sons of Wilfred Awinja (deceased). The 5th Respondent Concepta Nakumincha is a step-mother and wife of Wilfred Awinja. On 29th October, 2019 the petitioners went to the office of the Registrar of persons, Bungoma to apply for a death certificate of their late father. At the office of the Registrar they found Kennedy Awinya and Godfrey Oyaro who are the step-brothers and sons of the 5th Respondent, who called the 5th Respondent. When the 5th Respondent arrived she assaulted the 5th Petitioner, Peter Okumbo for the reason that they were in the process of applying for or a processing the death certificate of her husband. The petitioners due to embarrassment left. On the same day the petitioners were arrested by police from Luanda Police station. They were told appear at Bungoma Police station which they did on 30th October, 2019, when the 1st to 4th petitioners were arrested. They were released on cash bail and ordered to attend court on 28th November, 2019 wherein they were charged. Counsel faults the 2nd and 3rd Respondent for carrying out partisan investigations and never gave the petitioners an opportunity to be heard and only relying on the 5th Petitioners version of the story. Counsel noted that there was bad blood between the petitioners and 5th Respondent and that she made the

false allegations to subject them to degrading treatment.

Counsel submitted on 5 issues, counsel submits firstly that the action of detailing the petitioners by 3rd Respondent unheard was in breach was in contravention of Section 3 of the Fair Administrative Action Act and in particular Section 4(3) (b) which requires that where an administrative action is likely to affect the fundamental freedom of one person's, the administrator shall give the person affected by the decision and opportunity of being heard and make representation in that regard. Counsel submits that 3rd Respondent denied the petitioners that right which led to partisan investigations. Counsel referred the court to the decision in Republic Vs DPP e parte **Edwin Harold Darm Dee & 3 Others (2018) eKLR** and **Agnes Ngenesi Kinyua aka Agnes Kinya Versus DPP (2018) eKLR**.

Secondly, counsel submits that the criminal proceedings instituted against the petitioners are purely malicious and an abuse of the criminal process. Counsel alluded to alleged known bad blood between the petitioners and 5th respondent arising from a property dispute which is in courts. This he submits was the motivation by 5th Respondent to lodge a complaint and that the acceptance of 3rd Respondent to prosecute the complaint was an abuse of his prosecution powers, and it was motivated by personal and not public interest.

Thirdly, counsel submitted that by charging the petitioners, the 1st and 3rd Respondent infringed their right to equal protection of the law and equity. He submits that the 3rd Respondents action of carrying out partisan investigations was in violation of the petitioners' right to dignity as it caused them emotional and psychological trauma.

Finally, counsel for petitioners submits that the institution of the criminal proceedings was in bad faith with the sole aim of subjecting the petitioners to degrading treatment. Counsel, therefore, submitted that for those reasons the proceedings in Bungoma Chief Magistrate's Criminal Case No. 2065 of 2019 should be quashed by this court.

Mr. Tarus state counsel for the Respondents filed written submissions on behalf of 2nd, 3rd and 4th Respondents. He submitted that the petitioners, both in the petition and submission have not illustrated in precise terms how their constitutional and rights have been violated by the Respondent preferring charges in against them. In particular, counsel submits that they have not shown which articles of the constitution were contravened by their not being required to record statements. Counsel submitted that all the prosecution have to do is to establish that an offence has been committed to charge an accused. The fact that a prosecution will not result in a conviction is not a ground to halt a criminal proceedings by an order of certiorari.

Finally, counsel submitted that the petitioners have failed to prove that their rights and freedoms under the constitution were violated by them being charged. They have also failed to prove that the 2nd Respondent in effecting arrest and preferring charges acted outside their legal mandate.

Mr. Samwuel Mwangi Thuo, Prosecution Counsel for 1st Respondent DPP submitted that the petition is not founded on material facts. He submitted hat the facts from the available records were: -

- “(i) A declaration that the Respondents’ conduct and actions against the petitioners are oppressive, unfair, unreasonable, irrational, illegal and an abuse of police power and criminal justice system.***
- (ii) An order of Certiorari be issued from this Honourable Court to quash the criminal proceedings in Criminal Case No. 2065 of 2019; against the Petitioners.***
- (iii) General damages for violations of the petitioners rights and fundamental freedoms.***
- (iv) Cost and interest of this petition.***

Counsel for the 1st Respondent submits the facts show a criminal offence which should not be mutated by petitioner into a constitutional issue and due criminal process should be allowed to take its cause. He urged the court not to fender the mandate of other constitutional bodies particularly the office of the Director of Public Prosecutions. Under Article 157 of the Constitution and the Office of Director of Public Prosecution Act No. 2 of 2013. He submitted that the role of the police is to receive complaints, conduct investigations, and if they from reasonable suspicion that an offence has been committed, charge the person in a court of law.

From the petition, respondents' response, affidavits and submissions the issues which call for determination of this petitioner are: -

- a) Whether the investigations were partisan in approach.***
- b) Whether the petitioners’ rights and fundamental freedoms were violated by being charged in Bungoma Criminal Case No. 2065 of 2019.***
- c) What orders should the Court grant.***

From the petition and affidavit, the following is not disputed.

- 1) That the 5th Respondent is the wife of the late Wilfred Awinja.***
- 2) That the petitioners are also children of the late Awinja by another mother and therefore, step-sons of the 5th Respondent.***

3) That there is a properly dispute between the two houses of the deceased Wilfred Awinja between the petitioners on one hand and the 5th Respondent and her children on the other hand in Bungoma ELC Case.

4) That there is in existence Criminal Case No. 2561 of 2016, Republic Vs Kennedy Awinja.

5) It is not disputed that on the material day 29th October, 2019, both the petitioners and 5th Respondent were at the office of the Registrar of Persons.

The events precipitating this petition occurred on 29th October, 2019 as recorded in the OB No. 24/29/10/19. In the Report, the 5th Respondent Concepta Nakuminja reported that she was assaulted by petitioners in the office of Registrar of Persons, Bungoma. She brought 2 witnesses who recorded statements in support of her complaint. As she alleged to have sustained injuries she was referred to Hospital where she was treated and P3 Form filled, where the degree of injury was assessed as harm. It is upon this information that the petitioners were subsequently arrested.

The 5th petitioner Peter Okombo depones in his affidavit that on the material day he was at the Office of Registrar of persons when the 5th Respondent assaulted him. He reported the matter to Bungoma Police station under OB No. 45.29/10/19. He was nevertheless arrested on allegations of assaulting the 5th Respondent. The same is deponed by 2nd – 4th Petitioners.

There is therefore evidence from all the petitioners and 5th Respondent that there was a fracas at the office of the Registrar of persons where both parties had gone to obtain the death certificate of Awinja. The petitioner's grievance is that despite reporting an incident of assault to the police station, the police did not give them an opportunity to state their evidence before a decision to charge them was made. Counsel for the petitioners submits that the fact that the petitioners' version of events was not taken, during investigation, it shows that the investigating was partisan. The fact that the petitioner's version of event was not taken during investigation, it shows that the investigation was partisan.

The Police under Section 24 National Police Service Act of the Police are charged with the mandate of

- i) Crime prevention and
- ii) Investigations of crime
- iii) Maintenance of law and order

Investigation is the act or process of examining, a crime, problem or statement carefully especially to discover the truth. The investigation is, therefore, a progression of activities or steps moving from evidence gathering tasks, to information analysis to theory development and validation and forming reasonable grounds to believe and finally arrest and charge a suspect. (Introduction to Criminal investigation: Processes, Practice and Thinking by Rod Gehl).

Article 157(4) of the Constitution provides: -

“The Director of Public Prosecutions shall have power to direct the Inspector General of the National Police Service to investigate any information or allegation of Criminal conduct and the inspector-general shall comply with any such direction.

In exercising the powers conferred by this Article the DPP shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.”

From the constitutional provisions, there is no doubt that the 2nd Respondent on its own or on direction of the 3rd Respondent have constitutional mandate to conduct investigations. The investigations would involve gathering evidence, from all sources to make a decision that there is reasonable evidence that a crime has been committed. The evidence may include gathering the response of the suspect, to make an informed decision. However, this is not mandatory given that suspects have constitutional protection nor to say anything unless he is willing to make a confession. The fact that the petitioner's version was not taken by the investigating officer does not make the investigations partisan, if the evidence gathered establish reasonable suspicion that an offence has been committed. In arriving at that decision the police must act impartially and independently on receipt of a complaint they should carry out investigations which could include the versions of the complainant and the suspect. The investigations would be well informed if both versions are obtained as an explanation by the suspect may surely show that there is no basis of a complaint for which a charge may proceed. This is more so when the suspect for instance establishes that he was not at the scene of alleged offence and would not have, therefore committed the offence. This will save valuable resources expended in the prosecution and trial.

Where the investigators have through investigations established a reasonable suspicion that a person has committed a crime, they then have the suspect charged in court. Reasonable suspicion does not mean a case where a conviction must be obtained. This is the province to be determined by court. It is only the trial court which will make a finding whether the offence was committed or not. Where the investigations have established reasonable suspicion of Commission of an offence Article 159 (10) enjoins the 1st Respondent.

“10, the DPP shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

11. in exercising the powers conferred by the Article the DPP shall have regard to the public interest and the administration of

justice and the need to prevent and avoid abuse of the legal process.”

The High Court has inherent powers to quash stay or prohibit Criminal proceedings where it is demonstrated that the proceedings by DPP are not in public interest or are an abuse of the legal process. Abuse of legal process can be discerned where there is existence of circumstances where it would be impossible to give the accused a fair trial or where the court’s sense of justice will be manipulated. In **Kuria & 3 others Vs A.G. (2002) 2KLR** the 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 utilisation is far that which the courts indeed the entire system is constitutionally mandated to administer...”

Where it is shown the the prosecution is for other motives other than the Public Interests, and is an avenue for abuse of legal process the court will intervene appropriately. Where it is not, the court will act with restraint and giant the institution charged with the Constitutional mandate to proceed with due execution of their mandate.

In **Kuria & 3 others Versus the Attorney General** (supra) the court held: -

“It is not enough to simply state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an “abuse of process”, is a “manipulation”, “amounts to selective prosecution” or such other processes, or even supposing that the applicants might not get affair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. 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 a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial...In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names.”

In the result, upon considering the petition and submission, I am not satisfied that the petitioners have satisfied this court for the grant of the orders sought. This petition, is therefore, and hereby dismissed with costs.

Dated, signed and delivered at Nairobi this 29th day May, 2020

.....

S N RIECHI

JUDGE