



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 193 OF 2019

OBADIAH MACHARIA MAINA.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS...RESPONDENT

JUDGEMENT

1. The Petitioner, Obadiah Macharia Maina, has filed the petition dated 23rd May, 2019 against the Respondent, the Director of Public Prosecutions (DPP) in which he prays for orders as follows:-

a) A declaration that the Petitioner's fundamental rights to equal treatment of the law guaranteed by Article 27 of the Constitution of Kenya 2010, right from being subjected to torture in any manner, whether physical or psychological guaranteed by Article 29(d) of the Constitution of Kenya 2010, right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair guaranteed under Article 47(1) of the Constitution of Kenya 2010, and right to a fair hearing guaranteed under Article 50(1) of the Constitution of Kenya 2010 have been violated by the Respondent.

b) An order permanently prohibiting the Respondent from continuing prosecuting the Petitioner in Eldoret Criminal Case No. 505 of 2015, Milimani Criminal Case No. 1790 of 2015 and Milimani Criminal Case No. 107 of 2018 or instituting new prosecutions touching on the dealings of Goodlife Sacco and Fedha Micro Finance.

c) In the alternative to (b) above consolidation of Eldoret Criminal Case No. 505 of 2015, Milimani Criminal Case No. 1790 of 2015 and Milimani Criminal Case No. 107 of 2018 to [be heard] at the Chief Magistrates Court Milimani.

d) General damages for pain, suffering and mental anguish caused by abuse of power by the Respondent.

e) Costs of and incidental to the proceedings herein.

f) Any such other relief as this Honourable Court may deem fit and just to grant.

2. The Petitioner's case is that at the time material to this petition he was the director of two companies namely Goodlife Sacco Company Limited and Fedha Micro Finance Limited. He has been charged in his capacity as director for contractual agreements that the said entities entered into with the complainants in the three criminal cases he seeks to quash through these proceedings. He is accused of defrauding the investors of their money. It is, however, the Petitioner's averment that the complainants deposited money in the said entities as a form of investment and that there are various civil cases filed in an effort to recover the assets of the companies and settle the claim by the complainants in the criminal matters and 23,000 other members.

3. It is the Petitioner's deposition that the Government had, through the Commissioner for Co-operative Development, appointed liquidators vide Gazette Notice No. 10034 dated 12th July 2018. His case is that the complainants in the criminal cases are entitled to recover the money deposited with the two entities through the appointed liquidators. The Petitioner claims to have already served a civil jail term in **Milimani HCCC 280 of 2016** at the behest of some of the investors in the said companies which is indicative of the fact that the engagement was purely contractual.

4. The Petitioner further avers that the Respondent has not instructed the Inspector General of Police to pursue the other directors or employees of the companies which is contrary to the provisions of Article 157(4) of the Constitution. The Petitioner seeks for the matter to be stayed in the interest of justice so as to allow the accused and the liquidator time to work out a means to ensure all the claims are settled. According to the Petitioner, his continued prosecution by the Respondent violates his rights under Articles 47, Article 29(d), and 50 of the Constitution.

5. The Respondent filed grounds of opposition dated 3rd June, 2019 claiming that “*equity aids the vigilant and not the indolent*”. It is asserted that the Petitioner has brought the petition as an afterthought as he was charged in 2015 and the petition was filed five years later. It is further stated that the orders for consolidation sought by the Petitioner cannot be granted by this Court since the same can only be granted by the trial Court. Furthermore, in reference to Article 157 of the Constitution, the Respondent claims that the Petitioner has failed to disclose whether in fact a criminal offence was committed warranting the invocation of prosecutorial powers.
6. The Petitioner filed submissions on 4th November, 2019 in which he asserts as part of the summary of his case, that the companies in which he was a director have acquired assets that are still in existence and the same have been offered to the complainants who have refused to accept them. Further, that his wife has also been sued, despite the fact that there are other directors who have not been pursued proving that the prosecution is driven by malice.
7. The Petitioner refers to Article 157 of the Constitution and asserts that the Respondent’s decision and insistence on continuing to prosecute him is an abuse of the legal process and the powers vested in that office by the Constitution. Reference is made to the holding in **George Joshua Okungu & another v Chief Magistrate Court Anti-Corruption Court at Nairobi & another [2014] eKLR** and **R v Attorney General ex parte Kipngeno Arap Ngeny** (citation not provided) in support of the submission that where criminal proceedings are a clear abuse of process and carried out in breach of constitutional rights the same shall not be allowed.
8. The Petitioner asserts that the three criminal cases against him is indicative of the malice of the Respondent and have resulted in psychological torture hence violating Article 29(d) of the Constitution. It is also asserted that the actions of the Respondent denies the Petitioner a fair hearing under Article 50(1) of the Constitution as the Petitioner cannot adequately prepare for his defence as he is constantly shuttled from one Court to another.
9. The Respondent in response filed submissions dated 3rd June, 2019 and submits that the issues for determination are:-
- i. Whether the Respondent has violated any of the Petitioner’s rights;
 - ii. Whether an order of prohibition is tenable against the Respondent; and
 - iii. Whether this Court can give orders to consolidate the three criminal cases facing the Petitioner.
10. On the first issue, the Respondent submit that the prayers sought are unconstitutional as they seek to prevent the Respondent from carrying out his mandate. It is argued that if the prayers are granted it would result to a greater injustice in the criminal justice system and would insulate the Petitioner from future liability.
11. Making reference to **Anarita Karimi Njeru v the Republic [1976-1980] KLR 1272; Court of Appeal Civil Appeal No. 290 of 2012, Mumo Matemu v Trusted Society of Human Rights Alliance & others; Matiba v A.G [1990] KLR 666;** and Article 24(1) of the Constitution the Respondent argues that where a party alleges a breach of fundamental rights and freedoms the same should be pleaded with precision. It is also claimed that the Petitioner has failed to discharge the burden of proof as required by sections 107 and 109 of the Evidence Act, Cap 80. It is further asserted that the Petitioner enjoys the right to equal protection in any Court of law and fair administrative action.
12. On the second issue, the Respondent submits that an order of prohibition is discretionary and is only tenable where a public body or official has acted in excess of their powers. The Respondent relies on the holding in **High Court Case Miscellaneous Civil Application No. 179 of 2012 Republic v The Chief Magistrate, Milimani & 2 others Ex p. Tusker Mattress Ltd & 3 others, and Kenya National Examination Council v Republic ex parte, Geoffrey Gathenji Njoroge & 9 others** (citation not provided) to demonstrate that such an order is only available where a tribunal or body acts in excess of its jurisdiction or in contravention of the laws.
13. The Respondent relies the cases of **Hon. James Ondichi Gesami v The Attorney General & others, Petition No. 376 of 2011; Mohamed Ali Swaleh v Director of Public Prosecutions & another, High Court Mombasa Petition No. 2 of 2017; Republic v Commissioner of Police and another** (citation not provided) to assert that the decision to require a party to submit to investigations and prosecution does not amount to a breach of their fundamental rights. Furthermore, the Respondent contends that it is not the place of the Court to decide who to be charged and with what offence as such a decision would infringe on the independence of the constitutional offices and organs unless such organs act *ultra vires* or in a manner which contravenes the law. The Respondent therefore asserts that the Court’s intervention in the instant case is not required as the grounds for intervention have not been justified.
14. On the final issue, the Respondent submits that the issue of consolidation of the criminal matters can only be canvassed before the trial Courts.
15. I have carefully considered the arguments and evidence adduced before this Court and conclude that the issues for determination are:-
- a) Whether the Petitioner’s fundamental rights and freedoms have been infringed by the actions of the Respondent; and
 - b) Whether the Petitioner is entitled to the prayers sought.
16. The Petitioner alleges that the fact that the Respondent has not pursued prosecutions against the other directors of the companies and has prosecuted him alone has violated his right to equality before the law. The Respondent did not respond to this allegation, and merely claims that the Petitioner enjoys the right to equal protection in any court of law and fair administrative action.
17. Upon reviewing the charge sheets and witness statements attached to the petition dated 23rd May 2019, it is evident that the complainants

pursued criminal proceedings against the Petitioner and his counterparts who are not before the Court as officials of the companies. According to Section 23 of the Penal Code Cap. 63:-

“Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.”

18. From the above provision it can be gathered that where a company or body corporate commits an offence, all persons involved in the management of the company shall be liable for the act or omission. This means that where prosecution of a crime is pursued, all relevant persons, particularly all directors, shall be pursued. However, in the same breath, the provision waives the liability of persons who prove that they were not aware or involved in the said act or omission.

19. Addressing the meaning of Section 23 of the Penal Code in the case of **Clay City Developers Limited v Chief Magistrate’s Court at Nairobi & 2 others [2014] eKLR**, Odunga, J postulated as follows:-

“28. In conducting the investigations it is upon the Director of Public Prosecutions and the police based on the evidence and material presented before them to decide whether the material justifies the charging of all the Directors of a Company or only some of them. To charge all the Directors of a Company with an offence committed by the Company where the DPP and the Police are in possession of the evidence showing that some of the Directors are not liable would in my view amount to abuse of power since the DPP and the Police are entitled to act bona fide.”

20. The learned judge further held that:-

“29. Under Article 157(11) of the Constitution, the DPP is enjoined in exercising the powers conferred by the said Article 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. Interest of the administration of justice in my view dictates that only those whom the DPP believes have a prosecutable case against them be arraigned in Court. So unless it is manifestly clear to the Court that the DPP is abusing his powers or exercising them in a discriminatory manner in breach of section 4 of the Office of Public Prosecutions Act, No. 2 of 2013, which require that in exercising his discretion he must take into account the principle of constitutionalism, it is not for this Court in judicial review proceedings to minutely examine the evidence before the DPP in order to determine whether or not all the Directors of a Company ought to have been charged.”

21. In view of the cited case, it can be gathered that it is at the discretion of the DPP to pursue a single director of a company in pursuance of the criminal conduct of the company if there is enough evidence that points to that particular director’s guilt. Likewise, where it is the contention of that director that other individuals are culpable, the same should be proven with sufficient evidence. It is not sufficient for a petitioner to state that other directors were left out by the DPP. He can only succeed on this ground if he adduces evidence of selective prosecution. The burden of proof lies on the Petitioner to demonstrate that even though he is facing a criminal trial alone, the act or commission complained of was a decision of the board of directors of the company. The pitiable question “why me alone?” is not sufficient to get the Petitioner out of the dock.

22. In **Clay City Developers Limited (supra)**, the Court determined that:-

“31. In this case there is no material before this Court on the basis of which the Court can find that in making a decision to charge only one Director of the Applicant, the 2nd Respondent did not consider the material before it or that it considered irrelevant matters or that his decision amounts to abuse of his powers or is against the principle of constitutionalism. It was upon the Applicant to place before this Court material on the basis of which this Court could find in its favour. The mere fact that the DPP decides to charge one director while leaving the others is not a ground for interfering with his discretion.”

23. The Petitioner herein has produced evidence of the charge sheets and witness statements which name him as the accused person. He has not produced any evidence of any malfeasance by the other directors which the DPP may have overlooked or omitted. I cannot therefore find that the Petitioner’s right to equality before the law was infringed as the allegation that the right was violated has not been proved.

24. Another provision of the Constitution allegedly violated is Article 29(d) of the Constitution. The Petitioner contends that the three criminal cases against him is indicative of the malice of the Respondent and results in psychological torture thereby violating the said provision. The Respondent on his part contends that the Petitioner has not pleaded the violation of his right with precision.

25. I find myself concurring with the Respondent herein that the Petitioner has failed to state how his right under Article 29(d) of the Constitution was violated and the manner of such violation. The principle that a constitutional petition should disclose the violated provisions and the manner of violation was laid down in **Anarita Karimi Njeru v Republic [1979] eKLR** as follows:-

“...if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

26. The principle in the above case was restated by the Court of Appeal in the case of **Mumo Matemu v Trustees Society of Human Rights Alliance & 5 others [2013] eKLR** where it was held that:-

“We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims.”

27. It is my finding that the Petitioner has failed to meet the threshold laid out in the cases above. He has failed to clearly articulate how the actions of the Respondent have amounted to torture, and in particular psychological torture. The Petitioner has not only failed to clearly state his case in his pleadings but he has also not adduced any evidence in support of the allegation of violation of this particular right. It is for this reason that I find that the Petitioner’s claim of a violation of the right protected by Article 29(d) of the Constitution fails.

28. The Petitioner also seeks a declaration that the Respondent has violated his right to fair administrative action. However, the Petitioner has failed to explicate on how the action of the Respondent has violated this right. As has been stated above, the Petitioner has failed to argue his case to the degree and threshold laid out in the cases of **Anarita Karimi (supra)** and **Mumo Matemu (supra)**.

29. The Petitioner submits that the actions of the Respondent in prosecuting him under three separate criminal trials, one in Eldoret and two in Nairobi, denies him a fair hearing under Article 50(1) of the Constitution as he cannot adequately prepare his defence as he is constantly shuttled from one court to another.

30. According to Article 50(2)(c) of the Constitution every accused person has the right to a fair hearing which entails the right **“to have adequate time and facilities to prepare a defence.”** The Office of the High Commissioner for Human Rights discusses the right to a fair hearing in **General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art 14)** as follows:-

“9. Subparagraph 3 (b) provides that the accused must have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. What is "adequate time" depends on the circumstances of each case, but the facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel. When the accused does not want to defend himself in person or request a person or an association of his choice, he should be able to have recourse to a lawyer. Furthermore, this subparagraph requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications. Lawyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue interference from any quarter.”

31. This right is provided by the African Union in its **Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa** in which it is stated in Part N Section (3) (c) that:-

“The accused has a right to adequate time for the preparation of a defence appropriate to the nature of the proceedings and the factual circumstances of the case. Factors which may affect the adequacy of time for preparation of a defence include the complexity of the case, the defendant’s access to evidence, the length of time provided by rules of procedure prior to particular proceedings, and prejudice to the defence.”

32. In the case of **Republic v Raphael Muoki Kalungu [2015] eKLR** it was held that:-

“In interpreting Section 77(2)(c) of the former Constitution of Kenya which is similar to Article 50(2)(c) of the current Constitution in reference to the right of an accused to a fair hearing, the High Court in the George Ngodhe case had this to say:

“..... In general terms, it means that an accused person shall be free from difficulty or impediment, and free more or less completely from obstruction or hindrance, in fighting a criminal charge made against him. He should not be denied something, the result of which denial will hamper, encumber, hinder, impede, inhibit, block, obstruct, frustrate, shackle, clog, handicap, chain, fetter, trammel, thwart or stall, his case and defence, or lessen and bottleneck his fair attack on the prosecution case.”

33. What is established above is that the right to a fair trial and particularly the right to prepare one’s defence is an important right which is at the heart of criminal procedure and human rights law. As such, this right must be upheld and nothing should be done to abrogate or hinder the full enjoyment of this right. This means that no matter the circumstances, an accused person must have all reasonable time to prepare their defence.

34. The Petitioner herein claims that the multiple cases against him means that that he is transported from one court to another, including a court in Eldoret and therefore he does not have sufficient time to prepare his defence. I am, however, not convinced that by dint of the multiple cases against the Petitioner he does not have sufficient time. For there to be insufficient time to prepare the Petitioner would, in the least, establish that the time between the cases does not leave him with sufficient time to prepare for the cases. However, the Petitioner has failed to put forward any facts or evidence to fully argue this allegation, and this Court cannot begin to fill in the blanks on behalf of a party. Therefore, I find that the Petitioner has failed to properly prove that his right to a fair hearing has been violated on the basis that he does not have enough time to prepare his defence.

35. Is the Petitioner entitled to the orders sought? The Petitioner alleges that the Respondent’s decision and insistence on continuing to prosecute him is an abuse of the legal process and the powers vested in his office by the Constitution, and therefore he is entitled to the prayers sought. In response to this assertion, the Respondent submits that an order of prohibition is discretionary and only tenable where a public body or official acted in excess of their powers. It is further asserted that the orders for consolidation sought by the Petitioner cannot

be granted by this Court and can only be granted by the trial courts.

36. According to Article 23 (3) of the Constitution, the High Court of Kenya is granted power to grant reliefs including a declaration of rights; an injunction; a conservatory order; a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; an order for compensation; and an order of judicial review.

37. According to the Court of Appeal in **Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR:-**

“What does an ORDER OF PROHIBITION do and when will it issue? It 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 for 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.”

38. Furthermore, in the case of **Republic v Commissioner of Police & another ex parte Michael Monari & another [2012] eKLR** it was held that:-

“It is therefore clear that this Court has the power and indeed the duty to bring to a halt criminal proceedings where the same are being brought for ulterior motives or for achievement of some collateral purposes notwithstanding the constitutional and legal powers conferred upon the DPP and the police. In 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 an 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.”

39. The Courts in the above cases established that an order of prohibition is well within the jurisdiction of this Court to grant where it is established that an inferior tribunal or body has acted in excess of its legal mandate or infringed the provisions of the law including the Constitution. It is true that the Respondent’s mandate entails the institution and undertaking of criminal proceedings. The question that is raised therefore is whether he acted beyond its legal mandate in prosecuting the Petitioner in three separate criminal proceedings. It has been established in the analysis above that the Respondent has not acted beyond his legal mandate in any manner, and has not infringed upon the rights or freedoms of the accused person. For the stated reasons, I agree with the Respondent that an order of prohibition is not available in the circumstances of this case as it has not been established that the Respondent acted *ultra vires* in executing his mandate.

40. On the prayer for an order of consolidation, I find that it is only the trial courts which can determine whether the three criminal cases should be consolidated. For instance, the information about the location of the witnesses has not been placed before this Court. The Court cannot issue orders based on insufficient facts. I therefore decline to allow this particular prayer.

41. In conclusion, I find that the Petitioner has not established violation of his rights by the Respondent. He has also not justified the prayer for consolidation. The petition is therefore bereft of merit in its entirety. It is therefore dismissed but with no order as to costs.

Dated, signed and delivered through video conferencing/email at Nairobi this 28th day of May, 2020

W. Korir,

Judge of the High Court