



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW APPLICATION NO. 429 OF 2018

BETWEEN

Republic.....Applicant

and

The Director of Public Prosecutions.....1st Respondent

The Director of Criminal Investigations.....2nd Respondent

and

John Ngugi Kabogo.....Interested Party

And

Harrison Wangoro Mwangi & George Maina Gacheru..... Ex parte Applicants

JUDGMENT

Introduction

1. Pursuant to this courts leave granted on 6th November 2018, the applicants moved this court by an application dated 12th November 2018 seeking orders of *Prohibition* to prohibit the Respondents from arresting, charging, arraigning, questioning or investigating them. The applicants also pray for costs of this suit.

Background

2. The applicant’s case is that in July 2018, the Interested Party was charged with the offence of Robbery with violence contrary to section 296 (2) of the Penal Code[1] and assaulting the first Interested Party. The said criminal case is still pending hearing.

3. Apparently, the Interested Party, who is the accused in the above case lodged a complaint against the applicants herein citing alleged assault. Following the said complaint, a one Cpl John Nyamweya summoned the applicants herein to the police station for questioning. The applicant’s case is that the decision to summon them and the impeding arrest and prosecution is illegal because it is tantamount to reopening already concluded investigations which culminated in the Interested Party being charged with the said offence.

4. The applicants wrote to the police through their lawyer stating that they were unavailable on 24th October 2018, the date they were required to appear at Muthaiga Police Station and requested to appear at a later date. They contend that this request enraged the police officers who resorted to trailing them with a view to arresting them. The applicants contend that they are victims/complainants, hence, the impeding arrest, arraignment and prosecution is unlawful, irrational and unreasonable and that its geared to coercing them to abandon the aforesaid criminal prosecution and that it offends the provisions of the Victims Protections Act.[2]

DPP’s failure to file a reply and submissions

5. On 6th November 2018, I granted Miss Mwenda, counsel appearing for the DPP 7 days to file their response. I scheduled the matter for directions on 27th November 2018. On the said date, Miss Spira appeared for the DPP. However, the DPP had not filed a reply as directed. I

granted the DPP a further period of 7 days to comply. I also granted the Interested Party 14 days to file their Reply with corresponding leave to the applicant to file a supplementary affidavit if need be together with submissions within 14 days. I granted the Respondents and the Interested Party a similar period and fixed the matter for mention to confirm compliance on 27th February 2019.

6. Regrettably, when the matter came up next on 27th February 2019, the DPP had not complied. On his part, counsel for the Interested Party stated that he could not file his reply without the benefit of seeing the Respondents' reply. I reluctantly granted the DPP a further 7 days to comply and ordered that in default, the matter would proceed as undefended.

7. On 25th March 2019, counsel for Interested Party stated that he had only filed submissions while Miss Mwenda, counsel for the DPP stated that she was yet to comply. She asked for 10 days which I allowed. On 29th May 2019, Mr. Makori appeared for the DPP and informed the court that they were yet to comply. The court reluctantly granted the DPP 7 more days to comply and fixed the matter for 10th July 2019. Like in the previous occasions, the DPP had not complied. The matter was mentioned before Nyamweya J on 28th October 2019, who fixed it for highlighting on 9th July 2020.

8. On the said date, I ordered that the application shall be determined by way of written submissions and granted the DPP the last opportunity to file their response and submissions within 5 days if they so desired. I also directed all the parties to avail soft copies of their pleadings in word format not later than 3 days before the next mention date. I fixed the matter for mention on 15th July 2020 to confirm compliance and reserve a ruling date. On 15th July 2020, I noted that the DPP had not complied. I scheduled the delivery for judgment on 26th October 2020.

9. In addition to failing to file a reply to the application, the DPP also failed to file submissions. I have therefore proceeded to render this determination without the benefit of a reply and or submissions from the DPP.

10. The casual and careless manner in which the DPP, a constitutional functionary vested with constitutional powers to undertake criminal prosecutions conducted this matter is worrying and unacceptable. The consistent disregard of court orders/directions adds injury to the careless attitude alluded to above. It is an affront to the Rule of Law, one of the founding principles in Article 10 of the Constitution, a principle which cuts across the entire constitutional edifice. The constitutional dictate decreeing that the Constitution binds all persons was not entrenched in the Constitution for cosmetic purposes, but it serves a salutary purpose of hoisting high the principles in Article 10.

Applicant's advocates' submissions

11. The applicant's counsel argued that since the Respondents' counsel failed to file a reply, the applicant's case remains uncontroverted. He argued that the decision to summon the applicant to the police station to inquire into the alleged assault premised on the same facts upon which the Interested Party had been charged is illegal and lacks legal foundation.

12. He argued that the decision to charge the Interested Party was arrived at after exhaustive investigations, hence it can only be reviewed by the DPP under section 5 (4) (e) of the *Office of the Director of Public Prosecutions Act* as read with Article 157 (6) (a) and (11) of the Constitution. He placed reliance on *Republic v National Employment Authority & 3 others ex parte Middle East Consultancy Services Limited*^[3] which held that a decision can be challenged on grounds of illegality, irrationality and procedural impropriety.

13. Counsel argued that the impugned decision is unreasonable, unprocedural, illegal and in excess of the Respondents' legal powers. He argued that the intended prosecution is aimed at coercing the applicant to withdraw and compromise the criminal case against the Interested Party. He cited *Kuria & 3 others v Attorney General*^[4] for the holding that the court has power to stop a prosecution premised on extraneous matters. He also cited *Republic v Attorney General ex parte Kipngeno Arap Ngeny*^[5] which held that a criminal prosecution commenced in absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Lastly, counsel relied on *Kenya National Examinations Council v Republic ex parte Geoffrey Njoroge*^[6] which laid down the tests for granting the writs of *prohibition* and *certiorari* and urged the court to grant the prayers sought.

The Interested Party's advocates' submissions

14. Counsel for the Interested Party argued that in the ensuing melee that led to the applicants' prosecution, an employee of the Interested Party was injured and property was damaged prompting the Interested Party to lodge a complaint against the applicants at the police station. He relied on *Republic v The Commissioner of Police & the Director of Public Prosecutions ex parte Michael Monari & another*^[7] which held that the police have duty to investigate crime.

Determination

15. The gravamen of the applicant's case is that they have been summoned to the police station following an alleged complaint against them by the Interested Party. They argue that the decision to summon them is illegal because it amounts to reopening concluded investigations which culminated in the Interested Party being charged in court.

16. The objective of Judicial intervention is to ensure that the agency remained within the area assigned to it by Parliament. If the agency was within its assigned area then it was *prima facie* performing the tasks entrusted to it by the legislature, hence not contravening the will of Parliament. In such a case, a court will not interfere with the decision. A decision, which falls outside that area, can therefore be described, interchangeably, as: - a decision to which no reasonable decision-maker could have come; or a decision, which was not reasonably open in the circumstances. Differently put, did the Police act illegally by summoning the applicants to question them after the complaint was lodged against them.

17. The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to

determine whether it amounts to a ground for the court to intervene. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a ground for the court to intervene has been established.

18. The exercise of public power is only legitimate when lawful.^[8] A body exercising public power has to act within the powers lawfully conferred upon it. Decision-makers should not pursue ends which are outside the objects and purposes of the statute. Power should not be “exceeded” or that the purposes pursued by the decision-maker should not be “improper,” “ulterior,” or “extraneous” to those required by the statute in question. It is also said that “irrelevant considerations” should not be taken into account in reaching at a decision.

19. As was held in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*^[9] as follows: -

“[95] Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.”

20. So long as a statutory functionary remains within the powers conferred upon it by Parliament, a Judicial Review court will not intervene. What comes to mind is section 24 of the *National Police Service Act*^[10] which provides that: -

24. Functions of the Kenya Police Service

The functions of the Kenya Police Service shall be the— (a) provision of assistance to the public when in need; (b) maintenance of law and order; (c) preservation of peace; (d) protection of life and property; (e) investigation of crimes; (f) collection of criminal intelligence; (g) prevention and detection of crime; (h) apprehension of offenders; (i) enforcement of all laws and regulations with which it is charged; and (j) performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.

21. It is important to mention that Article 245 (4) (a) of the Constitution provides that: “no person may give a direction to the Inspector General with respect to the investigation of any offence or offences.” Just like the constitutionally guaranteed independence of the DPP, this provision is aimed at ensuring that investigations are undertaken independently.

22. A fair and effective investigation is essential to a properly functioning criminal justice system and to the maintenance of law and order. Individuals involved in a crime – the victim, the accused, and the witnesses – as well as society as a whole have an interest in the decision whether to investigate a complaint once made, and in the outcome of the investigation. A wrong decision to investigate and prosecute or, conversely, a wrong decision not to investigate or prosecute, both tend to undermine the confidence of the community in the criminal justice system. For victims and their families, a decision not to investigate or prosecute can be distressing. The victim, having made what is often a very difficult and occasionally traumatic decision to report a crime, may feel rejected and disbelieved. It is therefore essential that the decision receives careful consideration.

23. It is a fundamental principle of law that it is not for this court to determine the veracity or to weigh the strength of the complaint or accused persons defence. This court can only intervene if there are cogent allegations of violation of the Constitution or the law or in clear circumstances where it is evident that a citizen is being interrogated for a non-existent offence or an offence unknown to the law. The court can also intervene where it is clear the police have abused their powers. The inherent jurisdiction of the court to stop police investigations or a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances.^[11]

24. The high court will only prohibit or quash or stop arrest or investigations or prosecutions in cases where it would be **impossible to give the accused a fair trial or where the investigations is illegal**; or where it would amount to a **misuse/manipulation of process** because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.^[12]

25. A police investigation or a criminal prosecution can be stopped if it was commenced in the absence of proper factual foundation. The enquiry is whether there has been an irregularity or an illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial or a police investigation to be initiated or conducted. ^[13] Fair investigations or fair trial entails the interests of the accused and the victim and of the society. As was held in *Republic v Commissioner of Police and Another Ex parte Michael Monari & Another*: - ^[14]

“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.”

26. The above decision aptly summarizes the law in cases of this nature. Provisions of the Constitution conferring powers upon the High Court to grant such remedies as *Certiorari*, *Prohibition*, *Mandamus* or permanent stay of criminal investigations of criminal proceedings are a device to advance justice and not to frustrate it. The saving High Court's inherent powers, both in civil and criminal matters is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame arrest, investigation or prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceedings in the interest of justice.

27. The High Court's inherent powers to quash, stay or prohibit criminal proceedings, police investigations are wide as they imply the exoneration of the accused even before the proceedings have been culminated by way of police investigations and trial. Noting the amplitude of these powers and the consequences which they carry, the Supreme Court of India^[15] revisited the law on the issue and held that 'these powers should be exercised sparingly and should not carry an effect of frustrating the judicial process.' The Supreme Court of India in the said case delineated the law in the following terms: -

“The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and in the rarest of rare cases and the Court cannot be justified in embarking upon an inquiry as to the reliability or otherwise of allegations made in the complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at uncalled for stage nor can it ‘soft-pedal the course of justice’ at a crucial stage of proceedings...The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of the power of the court, but the more the power, the more due care and caution is to be exercised in invoking these powers.” ^[16]

28. As stated above, the power to quash police investigations is immense since it amounts to exonerating a suspect before conclusion of investigations, the decision to prosecute and even before trial. Such power must be exercised with extreme care and caution. It is a power which the court exercises only in exceptional cases where there is clear evidence of abuse of powers, abuse of discretion or absence of factual basis to mount the prosecution.

29. This is a case where there is evidence there was an incident which formed the basis of a complaint against the Interested Party as a result of which he was charged in court. The Interested Party also lodged a complaint against the applicants citing assault. The police in exercise of their powers under the enabling statute summoned the applicants for questioning. The applicant seeks to use this court to prohibit the questioning, the investigations, arrest and prosecution. I have already reproduced section 24 of the *National Police Act*.^[17] A reading of section 24 of the said Act clearly shows the mandate of the police includes investigating crime. There is nothing to suggest that the police acted carelessly, maliciously or abused their powers. It has not been demonstrated that the decision to summon the applicants and to investigate the complaint was influenced by irrelevant or extraneous considerations. It is not enough to argue that the Interested Party was charged in court. The police are investigating his complaint against the applicants. Further, it has not been established that the Police did not act independently in arriving at the decision to summon and investigate the complaint.

30. The applicants have not demonstrated that there was no factual basis to justify police investigations. As stated earlier, it is not the function of this court to weigh the veracity of the complaint. In my view, police investigations should be commenced if there is admissible, substantial and reliable complaint that a criminal offence known to the law has been committed by the accused. It has not been established that the facts presented in this case do not disclose an offence known to the law. The fact that the Interested Party was prosecuted with a criminal offence does not mean that the alleged assault or damage to property was not committed.

31. The Constitutional provision in Article 157 (10) of the Constitution 2010 ensures that the **DPP** has complete independence in his decision-making processes, which is vital to protect the integrity of the criminal justice system because it guarantees that any decision to prosecute a person is made free of any external influences. This court respects this Constitutional imperative and will hesitate to interfere with the functions of the **DPP** unless there is clear evidence of breach of the Constitution or abuse of discretion to prosecute. The DPP will as the Constitution demands make a decision upon the completion of the investigations. No fault has been established on the part of the police or the DPP.

32. It has not been demonstrated that by summoning the applicants to the police station or by deciding to investigate the complaint, the police acted without due regard to traditional considerations of candour, fairness, and justice, nor has it been shown that the investigations would be conducted in a manner different from what is prescribed under the law. The allegations raised by the applicants are in my view, matters they can raise at the interrogation or during the trial if they are prosecuted.

33. The applicants pray for an order of *Prohibition*. The writ of *Prohibition* arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation. However, as stated above, the illegality of the impugned decision has not been established nor has it been established that the Respondents acted illegally or in excess of their powers nor has the decision been shown to be illegal, irrational or a nullity.

34. In view of my above reasoning, the conclusion becomes irresistible that the applicants' Notice of Motion dated 12th November 2018 does not satisfy the threshold to warrant the orders sought. I dismiss it with no orders as to costs.

Orders accordingly

Signed, Dated and Delivered electronically at Nairobi this 24th day of September, 2020

John M. Mativo

Judge

[1] Cap 63, Laws of Kenya.

[2] Act No. 17 of 2014.

[3] {2018} e KLR.

[4] {2002}2 KLR 69.

[5] High Court Misc App No. 406 of 2001.

[6] Civil Appeal No. 266 of 1996.

[7] Misc. App No. 68 of 2011, Nairobi.

[8] See *Fedsure Life 11 Assurance Ltd vs Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 56).

[9] 2012(4) SA 618 (CC).

[10] Act No. 11A of 2011.

[11] See Attorney General's Reference (No 1 of 1990) [1992] Q.B. 630, CA; Attorney General's Reference (No 2 of 2001) [2004] 2 A.C. 72, HL.

[12] See *Bennett vs Horseferry Road Magistrates' Court and Another* [1993] 3 All E.R. 138, 151, HL; see also *R vs Methy Tydfil Magistrates' Court and Day ex parte DPP* [1989] Crim. L. R. 148.

[13] Interpreting similar provisions in the constitution of South Africa, the South African Constitutional court (Nicholas AJA), *Shabalala & 5 others vs A.G of Transvaal & Another* CCT/23/94.

[14] {2012} e KLR.

[15] See *Maharashtra vs Arun Gulab Gawali*.

[16] See *State of West Bengal & Others vs Swapan Kumar Guha & Others*, AIR, 1982, SC 949, *Pepsi Foods Ltd & Another vs Special Judicial Magistrate & Others* AIR 1998, SC 128 & *G. Ugar Suri & Ano vs State of U.P & Others*, AIR 2000 Sc 754.

[17] Act No. 11A of 2011.