



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 223 OF 2017**

**ALFRED NYANDIEKA.....PETITIONER**

**-VERSUS-**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT**

**THE CHIEF MAGISTRATES, MILIMANI.....3<sup>RD</sup> RESPONDENT**

**THE HON. THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner herein, who describes himself as a male adult of sound mind and an advocate of the High Court of Kenya of 23 years standing filed this petition against the respondents on 18<sup>th</sup> May 2017 to challenge the charges and criminal proceedings initiated against him in Milimani Chief Magistrates Court Criminal Case No. 875 of 2017 (**Republic vs Alfred Ongiri Nyandieka**). The petitioner claims that the charges are malicious, ill motivated, vexatious, without merit and are merely calculated to embarrass and demean his character and reputation.

**Factual background of the case**

2. The petitioner's case is that he was on 12<sup>th</sup> May 2017, at about 4pm, leaving the Milimani Court premises in the company of a client, his court clerk and a student when he was accosted by about 5 men who roughed him up and bundled him into a motor vehicle before taking him to the police flying squad offices Nairobi Area. He claims that he was not informed of the purpose of his arrest and that he was later illegally locked up in the cells at Milimani Police station where he was denied access to legal counsel and that all attempts, by his colleagues, to secure his release were rejected by the police who detained him in custody till 13<sup>th</sup> May 2017 at 1pm when he was released on a cash bail of kshs 5000/-. He further states that he was subsequently charged before the Milimani Chief Magistrates Court with the offence of conspiracy to commit felony and forgery in respect to transactions that were undertaken by another law firm for a client (Aero Dispenser Valves) long before the said client engaged his services.

3. Through an order issued on 17<sup>th</sup> May 2017, this court, differently constituted issued a conservatory orders to restrain the 1<sup>st</sup> and 3<sup>rd</sup> respondent's from proceeding with the said criminal case No. 875 of 2017.

**Petitioner's case**

4. The petitioner's case is that the intended charges are malicious, ill motivated, vexatious and without merit as they are only intended to ruin his reputation and character. The petitioner gave a detailed explanation on the circumstances that gave rise to his arrest and prosecution by the 1<sup>st</sup> respondent as follows:-

*a) On or about August 2015, the petitioner was instructed by his clients, Beryl Aluoch Khasinah and Francic Omondi Obure, both directors/shareholders of Aero Dispenser Valves Limited to defend them before the Ethics and Anti- Corruption Commission (EACC). The petitioner's clients had been arrested by EACC officers on allegations of impropriety over tender related issues involving Aero Dispenser Valves Limited and the Kenya Pipeline Company. According to the EACC, investigations are still pending to date.*

*b) The clients mentioned in (i) above were unknown to the petitioner prior to August 2015.*

*c) During the investigation by the EACC, another group of police officers from the Directorate of Criminal Investigations, Nairobi Area arrested Beryl Aluoch Khasinah and her husband John Huba Waka. Similarly, the petitioner herein defended them.*

*d) On or about 6<sup>th</sup> September 2016 one of the petitioner's clients, John Huba Waka, was arrested and detained at Kilimani Police Station after being taken to Nairobi Area by a Mr. Patrick Shiundu and a Mr. Bii. He was coerced to fraudulently pay cash bail on contemplated fraud charges which later turned out to be none-existent. Again, the petitioner defended them.*

*e) By a complaint dated 3rd October 2016, John Huka Waka wrote to various officers complaining against the conduct of PC Patrick Shiundu ranging from extortion, harassment, intimidation, subversion of justice among others.*

*f) When the petitioner was arrested on 12<sup>th</sup> May 2017, it was alleged during interrogation that it is the petitioner who had drawn the complaint against one PC Patrick Shiundu who was one of the arresting officers.*

*g) The offences alleged to have been committed by the petitioner are suspect as the petitioner was unknown to the persons referred therein at the time of the alleged offences.*

*h) Furthermore, the documents alleged to have been made and/or forged by the petitioner were either attested to and/or presented by other persons who have not been summoned, arrested and/or charged with any offence and as such the petitioner herein has been singled out for selective prosecution excluding other persons, who were actively involved in the preparation of the impugned documents. The petitioner submits that such action is discriminatory and amounts to selective application of the law.*

*i) The main motivation behind the intended charges is to intimidate, harass and obstruct the petitioner from carrying on his duties as an advocate. It is an attempt by the Police officers to punish the petitioner for representing and advising his clients appropriately as he is legally mandated to do.*

*j) The petitioner is not aware of any formal complaint lodged by his clients against him with regard to alleged forged documents.*

*k) The rush to arrest the petitioner on a Friday was meant to circumvent the 24 hour rule and the decision to charge him was done without investigations being carried out.*

*l) Despite the fact that one of the arresting officers, PC Patrick Shiundu has his personal contacts and knows where his office is located, it was only deemed fit to subject him to an embarrassing and dramatic arrest. No summons had been made to him that he had failed to honour.*

5. The petitioner contends that his rights and freedoms were violated and are threatened with violation as he was denied his rights as an arrested person under Article 49 as read with Article 50(1) of the Constitution, and further, that he was arrested without warrant and detained without being informed of the reasons for his arrest. He further states that he was denied the benefit of all the rights and freedoms in the Bill of Rights in the Constitution and that the respondents contravened Articles 27, 28, and 29 of the Constitution by subjecting him to psychological torture, inhuman and degrading treatment during the arrest and detention.

6. He further states that he is in danger of being denied a fair hearing and fair administrative action as the respondent failed to conduct proper investigations and to take appropriate legal action that is devoid of malice, ill motive and victimization. He states that even though his statement was recorded he was not informed of the nature of the charges, the complaint and the evidence against him so as to enable him respond to the charges.

7. The petitioner therefore seeks orders for:-

*i. A declaration that the initiation, maintenance and prosecution of Criminal Case No. 875 of 2017 Republic vs Alfred Ongiri Nyandieka at Milimani against the petitioner herein is an abuse of the Criminal Justice System and a contravention of the petitioner's constitutional rights to freedom and security of the person, right to freedom of movement and right to secure protection of the law.*

*ii. A declaration that the institution, maintenance and prosecution of Criminal Case No. 875 of 2017 Republic vs Alfred Ongiri Nyandieka at Milimani herein is oppressive, malicious and an abuse of the court process.*

*iii. An order of prohibiting continuance of Criminal Case No. 875 of 2014 at Milimani Magistrates Court against the petitioner herein.*

*iv. Costs and interests thereof of this petition.*

*v. Such further, other, and consequential orders as this Honourable court may deem fit to make.*

8. At the hearing of the petition, Mr. Kariuki, learned counsel for the petitioner reiterated the contents of the petition and added that the petitioner had legitimate expectation that the respondents would adhere to the provisions of the Constitution in executing their mandate.

9. Counsel relied on several cases where different courts have pronounced themselves on the respondents' exercise of their function and where the said courts have held that prosecutorial powers must be exercised properly, honestly, in good faith and must not be abused.

10. Counsel submitted that the arrest and impending prosecution of the petitioner amounts to a gross abuse of the court is oppressive and an abuse of the court process.

11. Counsel further submitted that the petitioner was not challenging the powers of the 1<sup>st</sup> respondent to prosecute nor the weight of the evidence, if any, against him, but rather, the infringement and/or the likely infringement of his fundamental rights and freedoms and the process leading to the decision to prosecute him in light of the circumstances of the case.

12. It was the petitioner's case that he is entitled to the orders sought in the petition having demonstrated that the initiation and maintenance of the prosecution against him was in breach of his fundamental rights.

### **The respondent's case**

13. The 1<sup>st</sup> respondent did not file any response to the petitioner's case while the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents filed Grounds of Opposition dated 10<sup>th</sup> October 2017 in which they listed the following grounds:-

***1. The petitioner has not demonstrated in any manner whatsoever how the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondent have violated his constitutional rights under the Constitution.***

***2. The petitioner has not cited any provisions of the Constitution that have been violated by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents.***

***3. That the petitioners' interpretation of the Constitution is misleading, misconceived and self-serving as he has opportunity to raise any constitutional issues with the trial court.***

***4. The petition is hapless, presumptive and an abuse of the court process and should be dismissed with costs.***

***5. The grounds set out in support of the petition do not raise any constitutional issue either for enforcement of fundamental rights or interpretation of the Constitution.***

14. At the hearing of the petition, Mr. Sekwe, learned counsel for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents submitted that the office of the Inspector General of Police that heads the National Police Service (NPS) is an independent office established under Article 245 of the Constitution and that the functions of the NPS which includes investigations and the arrest of suspects are clearly outlined under Section 24 of the National Police Service Act.

15. Counsel further submitted that the office of the Director of Public Prosecution established under Article 157 of the Constitution is similarly an independent office whose mandate is also outlined in the Constitution. It was submitted that the petitioner had not demonstrated that the Director of Public Prosecution and the NPS acted outside their constitutional mandate so as to justify the granting of the orders sought in the petition.

16. Counsel maintained that since the matter is still pending before the magistrates court, the petitioner will be granted the opportunity to defend himself before the said court and that the trial court will reach a verdict on his guilt or innocence in accordance with the law and the facts as he had not stated that he will not be accorded a fair hearing before the said court.

### **Petitioner's rejoinder**

17. In response to the respondents' submissions, Mr Ochieng Oginga, learned counsel for the petitioner submitted that the respondents had not placed any replying affidavit before the court to rebut the assertions made by the petitioner in the petition and that the facts of the case therefore remain unchallenged.

18. Counsel submitted that the respondents are under an obligation to observe the constitution and the highest standards of competence from the onset of the investigations upto the time that the suspect is arrested. He further argued that the actions of the police must at all times be within the four corners of the law and that the court is under Article 23 of Constitution empowered to intervene and prohibit the continuation of criminal proceedings where it has been shown that the said proceedings are founded on ex-traneous matters that are divorced from the goals of pursuit of justice. It was the petitioner's case that the respondents had not demonstrated that they had a reasonable and probable cause to maintain the criminal prosecution against the petitioner.

### **Analysis and determination**

19. I have considered the petition filed herein, the respondent's Grounds of Opposition and the rival submissions made by the parties' respective counsel and the authorities that they cited. The main issue for determination is whether the petitioner has made out a proper case for the granting of the orders sought in the petition, which orders are basically geared at prohibiting the continuance of the criminal proceedings instituted against him in Milimani C. M. Criminal Case No. 875 of 2017.

20. In determining this petition, the starting point will be to highlight the powers and functions of the Director of Public Prosecution and National Police Service as stipulated under Articles 157 and 245 of the Constitution respectively. The said Articles stipulate as follows:-

21. Article 157 of the Constitution :-

*There is established the office of Director of Public Prosecutions.*  
*(2) The Director of Public Prosecutions shall be nominated and, with the approval of the National Assembly, appointed by the President.*  
*(3) The qualifications for appointment as Director of Public Prosecutions are the same as for the appointment as a judge of the High Court.*  
*(4) 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.*  
*(5) The Director of Public Prosecutions shall hold office for a term of eight years and shall not be eligible for re-appointment.*  
*(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may--*

*(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;*  
*(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority;*  
*(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).*

*(7) If the discontinuance of any proceedings under clause (6) (c) takes place after the close of the prosecution's case, the defendant shall be acquitted.*  
*(8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.*  
*(9) The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.*  
*(10) The Director of Public Prosecutions 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 this Article, the Director of Public Prosecutions shall 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.*  
*(12) Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions.*

22. Article 245 (1) (2),(3) and (4) on the other hand stipulates as follows:-

*(1) There is established the office of the Inspector-General of the National Police Service.*  
*(2) The Inspector-General--*

*(a) is appointed by the President with the approval of Parliament; and*  
*(b) shall exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation.*

*(3) The Kenya Police Service and the Administration Police Service shall each be headed by a Deputy Inspector-General appointed by the President in accordance with the recommendation of the National Police Service Commission.*  
*(4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to--*

*(a) the investigation of any particular offence or offences;*  
*(b) the enforcement of the law against any particular person or persons; or*  
*(c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.*

23. Having regard to the above provisions of the Constitution, courts have held the view that they ought not to usurp the constitutional mandate of the Director of Public Prosecution and the National Police Service to investigate crimes and initiate criminal proceedings. Courts have further taken the position that the mere fact that the intended or ongoing criminal proceedings are in all likelihood, doomed to fail or that the petitioner has a good defence in the said criminal case cannot be relied upon as grounds to stop the criminal process if the same is undertaken bona fides as such grounds will form a defence to the petitioner in those proceedings. If on the other hand, the petitioner establishes that the ongoing criminal proceedings constitute an abuse of process, are actuated by malice, and are being conducted in breach of the petitioner's constitutional rights, then the court will not hesitate but halt such proceedings. The above position was adopted in the case of **Michael Monari & Another V Commissioner Of Police & 3 Others, Misc. Application No. 68 Of 2011**, where Warsame, J. (as he then was), held 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 for the trial court. .... As long as the prosecution and those charged with the responsibility of making decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”***

24. In the instant case, the petitioner contended that he was at the time of his arrest denied his rights as an arrested person as provided for under Article 49 of the Constitution. He also stated that he was denied the benefit of the all the rights and freedoms in the Bill of Rights and that the respondents contravened Articles 27, 28, and 29 of the Constitution by subjecting him to psychological torture and inhuman and degrading treatment at the time of his arrest and detention.

25. On the above claims, I find that the issue of whether or not the petitioner's rights were violated at the time of the arrest cannot be a ground to stop the proceedings or take away the mandate of the Director of Public Prosecution to initiate charges /prosecution against the petitioner if the Director of Public Prosecution has reason to believe that a criminal offence has been committed.

26. My take is that the violation of rights, during and after arrest is an issue that can appropriately be addressed in a claim seeking damages and/or a declaration of such violation. The instant petition only seeks orders to stop the intended prosecution and therefore, going by the adage that parties are bound by their pleadings, I find that the alleged violation of rights cannot form a basis for halting the criminal proceedings.

27. The petitioner further argued that he is in danger of being denied a fair hearing and fair administrative action as the respondent had failed to conduct proper investigations so as to take appropriate legal action that is devoid of malice and ill motive. On the claim that the petitioner was in danger of being denied a right to fair hearing, I note that this court, differently constituted, on 17<sup>th</sup> may 2017 issued conservatory orders staying the intended prosecution pending the hearing and determination of this petition. It is instructive to note that the said conservatory orders were issued at the very nacent stage of the criminal proceedings even before the petitioner appeared before the criminal court to take plea. Under the above circumstances, I find that it will be an act of pure speculation to hold that the trial court will not be able to grant the petitioner a fair hearing. I further find that no material was placed before me to show that the trial court will be biased and therefore incapable of granting the petitioner a fair hearing.

28. Similarly, on fair administrative action, I find that the petitioner conceded that his statement was recorded before the criminal charges were preferred against him and one cannot therefore say that the adverse action of charging him in court was taken without hearing his side of the story. I further find that the mere fact that the 2<sup>nd</sup> respondent may not have conducted proper investigations before preferring charges against the petitioner is not a sufficient ground for halting the criminal proceedings as the weight or lack of evidence to support the criminal charges are matters that can only be determined by the court that will try the criminal case. In **Director Of Public Prosecutions V Martin Maina & 4 Others [2017] eKLR**, the Court considered the grounds upon which criminal prosecution may be prohibited. The Court cited with approval the decision by the Supreme Court of India in **State Of Maharashtra & Others V Arun Gulab Gawali & Others, Criminal Appeal No. 590 of 2007**. The grounds are as follows:

*“(i) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice;*

*“(ii) Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction;*

*“(iii) Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; and*

*“(iv) Where the allegations constitute an offence alleged but there is either no legal evidence adduced clearly or manifestly fails to prove the charge.”*

The court went further to state that:-

*“The power of quashing criminal proceedings has to be exercised very sparingly with circumspection and that too in the rarest of rare cases.”*

29. Having regard to the above cited authorities over the power of the court to quash/prohibit the institution of criminal proceedings, I will now turn to address the petitioner's claim that the charges preferred against him were actuated by malice, ill motive and were infact intended to ruin his reputation and character. It was the petitioner's case that the criminal case was founded on services certain events and services rendered by another law firm long before he was instructed to appear in the matter. This court notes that the petitioner's claim is not remote or farfetched as it cannot be ruled out that there are instances where criminal proceedings may be instituted with the sole purpose of destroying people's careers and reputations. It is for the above reason that the courts have held that they will not hesitate to halt such misconceived proceedings. This was the position taken in the case of **Regina vs Ittoshat [1970] CRNS 385** wherein it was held that:-

*“this court not only has a right but a duty to protect citizens against harsh and unfair treatment. The duty of this court is not only to see that the law is applied but also, which is of equal importance, that the law is applied in a just and equitable manner.”*

30. In this case, the petitioner gave a detailed explanation on the circumstances that gave rise to his arrest and intended prosecution. Indeed, the petitioner's position was that he was implicated in an alleged a crime in which he played no role whatsoever as the documents that were allegedly forged thereby giving rise to the charges before the trial court were drawn and executed by a totally different law firm long before he was instructed to act in the matter.

31. As I have already stated in this judgment, the petitioner's case is that he is a lawyer of more than 23 years standing. Having practiced law for the said number of years, it therefore goes without saying that the petitioner has built his name and reputation over a long period of time which reputation may be dented irreparably should he be charged in the intended case before the magistrates court. I am of the humble view that, as a lawyer, the petitioner's reputation as a custodian of justice is one of his greatest assets and tool of trade. The last thing that should happen to a lawyer of the petitioner's repute and standing is to be charged in court with any criminal case not to mention a criminal case involving forgery of client's documents as was the claim in the intended criminal case. Kimaru J. had the following to say on the importance of reputation for any professional in the case of **Sabina Mandere v Republic [2018] eKLR**.

*“This court agrees with the proposed Interested Party that a person's professional reputation is sacrosanct and where the same*

*is adversely mentioned, it is only fair and just to give opportunity to the affected person to respond to the allegations,”*

32. In the instant case, the petitioner made very damning revelations and claims against the police officers who were involved in the investigations of the criminal case whom he accused of bribery, extortion, harassment, intimidation and subversion of justice. This court is of the view that considering the nature of the said allegations, it was expected that the respondents would make a substantive response to them, through a replying affidavit, in order to satisfy this court that they had a basis to institute the criminal charges against the petitioner and that they were therefore acting in good faith and were justified in preferring criminal charges against the petitioner. It is however quite surprising to note that apart from filing grounds of opposition, the respondents did not rebut the petitioner's allegations of fact tending to show that there was nothing but malice and ill motive in their actions. This court finds that grounds of opposition cannot be construed to be a response to the weighty averments of fact made by the petitioner in his affidavit in support of the petition and that the respondent's failure to sufficiently and satisfactorily explain the reasons for preferring charges against the petitioner can only mean that the petitioner's claims are unchallenged and therefore true. The failure to rebut the petitioner's averments further lends credence to the petitioner's claim that the respondents were driven by other reasons, other than the pursuit of the truth and justice in initiating the charges against him. In the case of Joram Mwenda Guantai V The Chief Magistrate [2007] 2 E.A. 170, where the court held:

***“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 process of the court and is oppressive and vexatious, the judge has the power to intervene and the High Court has an inherent power and duty to serve fair treatment for all persons who are brought before the court or to a subordinate court to prevent an abuse of the process of the court.”***

33. Needless to say, this court is alive to the fact that every criminal case must have a complainant and in this case nothing would have been easier than for the respondents to avail, before this court, the complainant's affidavit or that of the investigating officer to rebut the petitioner's claim of innocence.

34. For the above reasons, and having regard to the findings that I have made in this judgment, I find that the instant petition is merited and I allow it in the following terms:-

***i. A declaration is hereby issued that the initiation, maintenance and prosecution of Criminal Case No. 875 of 2017 Republic vs Alfred Ongiri Nyandieka at Milimani against the petitioner herein is an abuse of the Criminal Justice System and a contravention of the petitioner's constitutional rights to freedom and security of the person, right to freedom of movement and right to secure protection of the law.***

***ii. A declaration that the institution, maintenance and prosecution of Criminal Case No. 875 of 2017 Republic vs Alfred Ongiri Nyandieka at Milimani herein is oppressive, malicious and an abuse of the court process.***

***iii. An order of prohibiting continuance of Criminal Case No. 19 of 2014 at Milimani Magistrates Court against the petitioners herein.***

***iv. I make no orders as to costs.***

**Dated, signed and delivered in open court at Nairobi this 24<sup>th</sup> day of January 2019.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr Lempaa and Mr Ondabu for the petitioner

No appearance for respondent

Court Assistant -