



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 473 OF 2017

ANDREW LAIRD WHITEPETITIONER

VERSUS

DIRECTOR OF CRIMINAL INVESTIGATIONS1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

BETTY TETT.....1ST INTERESTED PARTY

JOHN WACHIRA LINUS2ND INTERESTED PARTY

JUDGMENT

1. The petitioner herein describes himself as an adult male of sound mind residing and working for gain in Nairobi filed this petition against the respondents herein on 25th September 2017 seeking the following orders:

1. A declaration be made by this honourable court that the 1st respondent herein, the Director of Criminal Investigations, has a mandatory duty to investigate any information or allegation of criminal conduct as directed by the Director of Public prosecutions and shall comply with any such direction.

2. A declaration be made by this honourable court that the failure by the Director of Criminal Investigation to comply with the directive of the Director of Public prosecutions as under Article 157(4) of the Constitution and the letter dated 25th January, 2017 under reference number ODPP/CAM/289 is in contravention of the petitioner’s right to equal protection of the law, to access justice and to a fair hearing.

3. A declaration be made by this honourable court that the failure by the Director of Criminal Investigation to comply with the directive of the Director of Public prosecutions as under Article 157(4) of the Constitution and the letter dated 25th January, 2017 under reference number ODPP/CAM/289 is in contravention of the petitioner’s right to security, life, human dignity, freedom of movement and residence; and the right to fair administrative action.

4. An order of mandamus to compel the Director of Criminal Investigation and Inspect General of Police to comply with the directive of Director of Public prosecutions under Article 157(4) of the Constitution and the letter dated 25th January, 2017 under reference number ODPP/CAM/289.

5. An order for compensation of the petitioner for general damages for the distress and mental anguish caused by the infringement of his fundamental rights and freedoms.

6. An order awarding costs of the petition to the petitioner.

7. Any other or further orders, writs and directions this court considers appropriate and just to grant for the purpose of the enforcement of the petitioners fundamental rights and freedoms.

2. The petitioner's case is supported by his supporting affidavit and further affidavits sworn on 25th September 2017 and 17th May 2018 respectively. The petitioner's case is that on 25th December 2014, he was approached by the 2nd interested party herein with the information that "someone high in government" has contracted him (2nd interested party) to assassinate him because of business rivalry.

3. The petitioners states that he reported the matter to the police at Muthangari Police Station on 29th December 2014 whereupon the 2nd interested party was arrested and arraigned in court on 4th January 2015 for the offence of conspiracy to murder with others not before the court which charges were later reduced to the offence of obtaining money by false pretences. He attached copies of both charges sheets to the affidavit as exhibits.

4. The petitioner states that the 2nd interested party recorded a statement in which he confessed that the 1st interested party had hired him to kill the petitioner but that despite the said confession no action was taken against the 1st interested party. He states that he was aggrieved by the respondent's failure to take any action the 1st interested party and decided to hire the services of a private investigator to assist him unravel the mystery of the claims made by the 2nd interested party and the said investigation revealed that there had been telephone conversations between the interested parties which tended to point to the fact that the conspiracy to kill him true. He avers that upon receipt of the information from the private investigators his lawyers wrote to the 1st and 2nd respondents to reopen the investigations with a view to reviewing the decision not to prefer charges of conspiracy to murder against the interested parties.

5. He further states that upon receiving his lawyer's said letter, the 3rd respondent directed the 1st respondent to reinvestigate the case within 21 days but that the 1st respondent defied the 3rd respondent's instructions to reinvestigate the case. The petitioner's case is that as a result of the 1st respondent's failure to reinvestigate the case, he continues to live in fear as his right to life, as guaranteed under Article 26 of the Constitution continues to be threatened by threats and attempts to have him assassinated. He further states that his right to equal protection of the law, human dignity, freedom and security of the person and freedom of movement and residence as guaranteed under Articles 27, 28, 29 and 39 of the Constitution respectively continue to be threatened as a result of the respondents failure to take action on the report of attempts to assassinate him.

6. It is the petitioner's further claim that his rights to fair administrative action, access to justice and fair hearing as stipulated under Articles 47, 48 and 50 of the Constitution respectively have also been violated. He maintains that he had a legitimate expectation that the state will accord him necessary protection and security as guaranteed under the Constitution and contends that the respondents have abdicated their statutory duties.

7. Through an application dated 21st May 2018 the petitioner obtained orders of stay of proceedings in Kibera CMCC No. 5868 of 2014 wherein the 2nd interested party was charged with the offence of demanding money by menaces pending the hearing and determination of this petition.

8. At the hearing of the petition, M/S Paul Mwangi & Company Advocates for the petitioner submitted that the state has a clear duty to investigate crime and that failure to do so constitutes a violation of a person's constitutional rights. Counsel relied on the decision in the case of **CK(A child) Through Ripples International as her guardian & Next Friend and 11 Others vs Commissioner of Police/Inspector General of Police & 3 Others** cited with approval in the case of **Republic –vs-Commissioner of Police & 3 Others Exparte Phylis Temwai Kipteyo HCC miscellaneous Application No. 27 of 2008 [2011] eKLR** where the court opined that:

“All the same, the life of the victim and the interests of the family are protected by the Constitution and the statutes. The State through the respondents herein are responsible for security of citizens in the country. It is the duty of the state to inquire into any crime or suspected crime affecting any of its subjects. It is the duty of the state to investigate the disappearance of the victim herein who was its subject and its employee.”

9. Counsel submitted that the respondents had failed to demonstrate to the court how the reinvestigations were conducted and why the new evidence obtained by the petitioner was never examined during the reinvestigations. It was submitted that the respondents had blatantly abdicated their duties and declined to take any action despite having the evidence to prosecute all the perpetrators involved in the conspiracy to kill him.

The respondents' case

10. The respondents opposed the petition through the replying of affidavit of the state counsel, Laura Espira who states that while exercising the powers conferred to him under Article 157(4) of the Constitution, the 3rd respondent vide a letter dated 22nd January 2015 directed the 1st respondent to undertake further investigations so as to ascertain the persons who had allegedly conspired with the 2nd interested party to commit murder and that upon carrying out investigations, the 1st respondent found that there was no evidence to support the conspiracy theory after which a report to that effect was submitted to the 3rd respondent in a letter dated 13th February 2015.

11. She further states that the file was thereafter resubmitted for analysis of new evidence by the 1st respondent and that through a letter dated 7th August 2015 the 3rd respondent directed that the charge of conspiracy to murder preferred against the 2nd interested party be closed for lack of evidence.

12. The respondents' case is that the petitioner's request for reinvestigation was acted upon by the 1st respondent who appointed a new team of investigators to look into the complaint and that the new team found that the earlier decision not file any charges was correct as there was no evidence to support the claim that there was a conspiracy to kill the petitioner.

13. The respondents argued that it is not the petitioner's duty to direct them on how to conduct investigations. Mr. Otieno, learned counsel

for the respondents, submitted that the petitioner did not establish that any of his constitutional rights had been infringed so as to entitle him to the orders sought in the petition.

14. Counsel further submitted that the petitioner is under the provisions of Article 157(6) (b) of the Constitution at liberty to institute private prosecution in the event that he is convinced that he has sufficient evidence against the 1st interested party.

The 1st interested party's case

15. The 1st interested party opposed the petition through the replying affidavit filed on 26th January 2018 in which she states that the petitioner has not demonstrated that the 1st respondent did not discharge its constitutional mandate. She further states that the petitioner has not demonstrated that there was any violation or threatened violation of his constitutional rights.

16. M/S Kaplan & Stratton, advocates for the 1st interested party, submitted that the petitioner's case is factually and legally unsustainable.

2nd interested party's case.

17. The 2nd interested party similarly opposed the petition through his replying affidavit sworn on 26th June 2018 wherein he avers that the petitioners allegations have been investigated severally and have been found to be lacking in merit and hence the 3rd respondent's decision not to prefer any charges against the 1st interested party. He states that the petitioner has frustrated the hearing of criminal case filed against him since 2014 by failing to attend court to table evidence against him and has instead chosen to make unfounded claims without evidence.

18. He further states that the instant petition is intended to delay the fair hearing of the criminal case against him for no apparent reason as the petitioner has obtained a stay of the said proceedings pending the hearing and determination of this petition. He further states that he did not conspire with anyone to kill the petitioner as alleged in the petition.

19. Mr. Odera Were, learned counsel for the 2nd interested party submitted that under Article 157(10) the 3rd respondent is an independent office that does not require the consent of any person or authority in order to commence any criminal proceedings. Counsel argued that it is not the purpose of criminal investigations or a criminal charge or prosecution to help individuals in the advancement of their frustrations and that no one should be allowed to use the justice system to cause an injustice.

20. For this argument, counsel relied on the decision in the case of **Republic –vs Attorney General Exparte Kipngeno Arap Ngeny HC Civ. Application No. 406 of 2001** wherein it was held:

“A criminal prosecution which is commenced in the absence if proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise he prosecution will be malicious and actionable.”

21. The court went on to state:

“The function of any judicial system in civilized nations is to uphold the rule of law. To be able to do that, the system must have power to try and decide cases brought before the courts according to the established law.”

Analysis and determination

22. I have considered the pleadings filed herein the parties' respective submissions together with the authorities that they cited.

23. The main issues for determination are as follows:

a) Whether the respondents discharged their constitutional mandate.

b) Whether the petitioner has demonstrated that his constitutional rights have been violated or are threatened with violation.

c) Whether the petitioner is entitled to the orders sought in the petition.

Respondent's constitutional mandate

24. The crux of the petitioner's case was that the contention that the 1st respondent did not perform its constitutional duty to reinvestigate the claim that there was a conspiracy between the interested parties to kill him. The respondents' case, on the other hand, was that there was full compliance with the directions given by the 3rd respondent to reinvestigate the case and a conclusion made that there was no evidence to warrant any charges being preferred against the 1st interested party.

25. Article 157 of the Constitution stipulates as follows:

- (1) 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.

26. Article 244 of the Constitution states as follows on the objects and functions of the National Police Service

The National Police Service shall--

- (a) strive for the highest standards of professionalism and discipline among its members;
- (b) prevent corruption and promote and practice transparency and accountability;
- (c) comply with constitutional standards of human rights and fundamental freedoms;
- (d) train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and
- (e) foster and promote relationships with the broader society.

27. Article 245 of the Constitution establishes the office of the Inspector General of Police, the 2nd respondent herein who may be given directions in writing by the 3rd respondent under Article 157(4) of the Constitution as already stated herein above.

28. Section 24 of the National Police Service Act stipulates as follows

The functions of the Kenya Police Service shall be the—

- (a) provision of assistance to the public when in need; CAP. 84 National Police Service [Rev. 2014] [Issue 3] N18 - 20
- (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.

29. In the present case, it was not disputed that the 3rd respondent wrote to the 1st respondent directing him to reinvestigate the petitioner's claims that there was a conspiracy between the interested parties to eliminate him. The respondents' case, as shown in their replying affidavit to the petition, is that the allegations were reinvestigated and a report/findings forwarded to the 3rd respondent which report concluded that there was no evidence to support the claim that the 1st interested party conspired with the 2nd interested party to murder the petitioner.

30. From the facts of this case, it is apparent that the petitioner is dissatisfied with the findings of the reinvestigations and now seeks the orders of this court to have another go at the investigations with the hope that the outcome thereof will be the outcome that he desires which is to have both the interested parties charged with the offence of conspiracy to murder him. The question which then arises is whether in the circumstances of this case, the court can engage in the issuance of the kind of orders sought by the petitioner.

31. The answer to the above question is to the negative. My finding is that it was established the 1st respondent discharged its mandate of investigating the allegations made by the petitioner after which he filed his report and forwarded the file to the 3rd respondent. I further find that the mere fact that the 1st respondent's findings were not favourable to the petitioner does not mean that the respondents did not discharge their constitutional mandate. No evidence was presented before me to show that the respondents were either unwilling or unable to discharge their constitutional mandate.

32. The petitioner also faulted the respondents for conducting the said reinvestigations without contacting him so that he could assist them in the reinvestigations process. My finding is that it is not a mandatory legal requirement that the police must contact a complainant in the exercise of their investigative duties and that the mere fact that the petitioner was not contacted does not in take away the fact that the said investigations were carried out.

33. I further find that courts have held the view that they do not have the power to direct the 1st respondent in the manner in which it should conduct its investigations or direct the 3rd respondent on how to perform its prosecutorial duties unless justifiable reasons are advanced to necessitate such interventions. I am guided by the decision in the case of **Republic –vs- District Criminal Investigations Officer, Trans Mara & 3 Others [2017] eKLR** wherein it was held:

“I find that the provisions of the above Article 245(4) of the Constitution is very clear on the independence if the 4th respondent herein when dealing with investigations of a certain offence or in the enforcement of the law....The independence granted to the 4th respondent by the constitution is akin to the independence granted to the 3rd respondent under Article 157(10) of the Constitution....Having regard to the above provisions of the constitution, I am of the view that this court is precluded, by the said provisions, from making the orders sought by the ex-parte applicant.....However, even assuming for argument sake, that the court had powers to direct the respondents in the performance of their investigative functions. The facts, which have not been disputed by the ex-parte applicant, clearly show that the said investigations were properly carried out, concluded and recommendations made as shown in the 1st respondent's replying affidavit and the attachments thereto. In effect therefore, the orders sought by the ex-parte applicant have already been overtaken by events in view of the fact that the investigations that he seeks orders to compel the respondents to conduct have already been concluded.”

Violation or threatened violation of constitutional rights.

34. My findings on the issue of whether or not the respondents discharged their constitutional mandate would have been sufficient to dispose of this petition but I am still minded to consider the question of whether the petitioner established that his constitutional rights were violated or are threatened with violation. The petitioner's case was that his rights under Articles 27, 28, 29, 39, 47, 48 and 50 of the Constitution were violated or are threatened with violations as a result of the respondents' failure to take action against the interested parties.

35. Having found that the respondents duly performed/discharged their constitutional function of investigating the petitioner's allegations, it goes without saying that the petitioners claim that his rights were violated or threatened with violations cannot be sustained by this court. The respondents did not find evidence to sustain the petitioners claim that there was a conspiracy to eliminate him. I note that even though the petitioner's case was that the 2nd interested party informed him that the 1st interested party had engaged his services to eliminate him, in a strange twist of events, the 2nd interested party swore a replying affidavit in opposition to the petition wherein the denied all the petitioners allegations. At paragraph 12 of his said replying affidavit the 2nd interested party states as follows:

“That as I stated in my affidavit before Kibera Law Courts that the petitioner gave me his number himself and he was the first one to call me; a fact which he cannot deny since records can be obtained from Safaricom and in the event I had stated well that I did not conspire with anyone as alleged by the petitioner.”

36. Taking into account the 2nd respondents averments in the replying affidavit and these courts findings that the respondents discharged their constitutional mandate, I further find that the allegations of infringement of rights are unsupported by any evidence and must fail.

Courts have held the view that it is not enough to merely cite a violation of the constitution and maintained that there must be concrete evidence relating to the alleged breaches and real concrete and direct loss damage or injury arising out of the violation. (see **Josephat Koli Nanok & Another –vs Ethics & Anti- Corruption Commission [2018] eKLR**).

37. In the instant case, I hasten I find that not only has the petitioner not furnished this court with concrete evidence pointing towards the violation of his rights but that he has also not provided cogent evidence of the loss/injury that has arisen out of the alleged violation.

38. On whether the petitioner is entitled to the prayers sought in the petition especially the prayer for damages, this court finds that such prayers are not merited in view of the above findings on the violation of rights and the discharge of the respondents' mandate.

39. My finding is that in the circumstances of this case, there would be no basis for allowing any of the prayers sought in the petition. Consequently, I find that the petition is unmerited and I therefore dismiss it with orders that each party bears its own costs.

40. The interim orders issued on 13th June 2018 are hereby vacated.

Dated, signed and delivered in open court at Nairobi this 30th day of April 2019

W. A. OKWANY

JUDGE

In the presence of:

Miss Wathuti for Mwangi for Petitioner

Mr Ouma for 1st interested party

Court Assistant - Ali