



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL PETITION NO. 16 OF 2019

KENNEDY KARUWA BAARIU.....1ST PETITIONER

CPL SALESA GALGALO.....2ND PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

INSPECTOR GENRAL OF POLICE.....2ND RESPONDENT

DIRECTOR CIRMINAL INVESTIGATIONS.....3RD RESPONDENT

IGEMBE SOUTH SUBCOUNTY CRIMINAL

INVESTIGATION OFFICER.....4TH RESPONDENT

INDEPENDENT POLICE OVERSIGHT AUTHORITY.....5TH RESPONDENT

INDEPENDENT MEDICO

LEGAL UNIT (IMLU).....INTERESTED PARTY

RULING

KennedyKaruwa Baariu and Corporal Salesa Galgalo filed this constitutional Petition concurrently with an application dated 27th May 2019 under certificate of urgency seeking that intention to charge the petitioners/applicants with the offence of murder be stayed and that the 1st and 2nd Respondent, their agents and/or servants or anyone acting through them be prohibited and/or refrained from charging and/or arraigning in court the petitioners herein pending the hearing and determination of the application and the substantive petition.

The application is supported by the grounds on the face of application and supporting affidavit of Kennedy Karuwa Baariu. The deponent of the supporting affidavit faulted the decision to charge him and his co-petitioner for reasons, they were 7 Km away from scene of crime;

They also faulted the decision to prefer murder charge against them for reasons investigations and recommendations to charge were allegedly done by 5th Respondent.

That there were a delay in preferring charge of murder was in violation of Article 50 of the Constitution.

That Article 157(11) was also breached and the intended charge is therefore annulity in law.

That to allow the petitioners herein to be prosecuted on the basis of the various recommendation made by the 3rd, 4th and 5th Respondents as well as the Interested Party on the face of documentary inconsistencies and material contradictions is tantamount to sanctioning an illegality or a nullity in law and courts of law do not sanction illegalities.

The petitioner contended that Respondents have failed to inquire into the information given to them by the petitioners in their defence and thus failed to take into account relevant considerations.

The petitioners averred that the steps taken by the 1st Respondent are unreasonable and irrational since the investigations are not complete. They argued that the Respondents had taken action against them before seeking expert evidence including that of a Safaricom Call Data Expert to determine the location of the petitioners at the time of the alleged offence is alleged to have been committed.

The petitioners also argued that the Respondents acted on the basis of Misleading information given to the 5th Respondent as a public entity and the interested party herein. In the affidavit the 1st petitioner has given a chronology that led to them being suspected as persons of interest in the death of the deceased Erick Mwendwa.

The 1st Petitioner says the OCS Maua Police station told him he was not a person of interest into the investigations and the matter, rested until on 3rd May 2019 when he received a phone call from someone who introduced himself as an officer from Maua police station and requiring him at the station on allegations of murder.

That on 4th May 2019 police visited his home and found his wife and ransacked the house. He sought intervention of court and an order was made that he presents himself before the OCS who was ordered to give him reasonable bond terms.

That on 20th May 2019 he managed to serve the OCS and SCCIO Igembe South. That the Sub-county Criminal Investigations officer directed to call the 2nd petitioner since he had a message for both. That they were admitted to cash bail of Kshs 20,000/= each and directed to appear in court on 28th May 2019 for plea taking. Since 1st Respondent had directed that they be charged with offence of murder.

That the Investigation Officer one Njue informed them that recommendation to charge them came from 5th Respondent. The 1st Petitioner protested that 5th Respondent didn't have the mandate to investigate him since he was not a police officer. 1st Petitioner argued that steps taken by 1st Respondent are unreasonable and irrational since the investigations are not complete.

A letter dated 1.5.2019 allegedly written by members of deceased family is annexed to the application withdrawing the charge as they were not clear as to who committed the crime. The letter is not signed by any of the persons who are shown in the ODPP's letter dated November 2018 to have recorded statements which were relied upon to find that there was sufficient evidence to prefer charge against the petitioners.

Ms Mbithe representing the 1st Respondent opposed the application dated 27th May 2019 on behalf of 1st Respondent and all the other Respondent arguing that sub-county criminal investigations officer compiled charge of murder and wrote a letter to ODPP requesting for directions. The officer of DPP wrote back by a letter dated 5th November 2018 directing that petitions be arrested and charged immediately for offence of murder.

That IPOA got involved when the instructions to arrest and charge petitioners was not affected.

They wrote a letter dated 8th November 2018 seeking to know progress of the investigations and by letter dated 21st March 2019 Principal Prosecution Counsel wrote directing immediate arrest and charging of petitioners vide a letter dated 25.4.2019 DCI Igembe South was again directed to proceed and arrest the 2 Petitioner and arraign them in court.

That it is the letter dated 25th April 2019 which prompted arrest of petitioners. That upon learning of impending arrest, 1st Petitioner filed an application for anticipatory bail. Ms Mbithe argued that there was no violation of Articles 27 and 50(11) of the constitution as claimed by the petitioners and that IPOA Act Section 6(c) & (f) gives mandate of monitoring and investigating policing operations affecting members of public. She urged the court to allow the Respondents file information of Murder against the petitioners.

In consideration of the application before this court the submissions by the applicant's counsel and the 1st Respondent's counsel this court is to determine whether the applicants have raised prima facie grounds upon which the court can determine that the impending charge of murder against them can be stayed until the substantive petition is heard and determined.

The 1st ground supporting the current application is that the decision to charge the petitioners was wrong because they were not at the scene of crime and they have annexed statements and charge sheets as well as cash-bail receipts showings they were 7 Kilometres away on an arrest mission of a suspect in possession of bhang. This ground is a defence which this court does not have capacity to interrogate when dealing with a constitutional petition or at an interlocutory stage of the petition. It is a defence which only the Criminal Investigations Officer can probe within criminal proceedings or investigations. It is the view of this court that that ground is being raised in the wrong forum. The officer who booked the report in annexure KKB-01 would have to swear an affidavit to that effect and probably the OCS Maua Police Station would also be required to confirm these allegations.

The Petitioners also claimed that the investigations and recommendations to charge them was done by the 5th Respondent in violation of their mandate to provide for civilian oversight over the work of the police. Ms Mbithe submitting on behalf of the 1st Respondent and in concurrence with all the other Respondents and the Interested party said that the investigations were carried out by the Sub-County Criminal Investigation Officer Igembe South who forwarded the file to office of the Director of Prosecutions for advice in consideration that the suspects were Public Servants. By a letter dated 5th November 2018 and received by DCIO Igembe South on 16th November 2018, ODPP Meru gave directions that the Petitioners herein should be arrested immediately and charged with the offence of murder contrary to section 203 as read with section 204 of the penal code.

IPOA's letter reference number IPOA/INV/001841-2018 dated 2nd April 2019 which is referred to by DM Mbithe Senior Prosecution counsel in her letter dated 25th April 2019 therefore comes much later after the directions to charge the petitioners had been made by the ODPP. It cannot be said that investigations and recommendations to prefer charges were led by the 5th Respondent. This court is therefore

satisfied that the 1st Respondent acted in accordance with section 5 of the Director of Public Prosecutions Act and Article 157a) and 10.

The Applicant /petitioners have also claimed that their rights under Article 27 have been violated but they failed to specify which rights under Article 27 have been violated directly or indirectly. In the converse, the Respondents investigated and got evidence making them suspect that Eric Mwenda's life was deprived intentionally and unlawfully and evidence points to these petitioners as suspects. The constitutional court cannot stand on the way of the DPP on its quest to establish the cause of death and perpetrators of that death.

The 1st Petitioner also alleged that his rights under Article 50 had been violated on the ground that failure to promptly decide to recommend or to decline to recommend the petitioners prosecution violated the requirement that they were entitled to an administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair. With due respect, Article 50 of the constitution is only applicable to suspects who have been arrested and arraigned in court. It spells out what the rights to fair trial includes or entails. As already alluded to above the offence was committed on 6th June 2018 and by 16th November 2018 ODPP had already given advice for the arrest and prosecution of the petitioners. The delay to arraign the petitioners in court with the charge of murder cannot be attributed to the 1st Respondent and in any case it is not inordinate delay. Furthermore, there is no law that provides for time limit within which criminal prosecutions can be brought against a suspect. In the case of Nicholas Kipsigei Ng'etich and 6 Others versus Republic (2016) Justice Maureen Odero held

that :-

“whilst it may be true that the state took 2 years to lay charges of attempted murder there is no time limit to a criminal charge”.

When the 1st Petitioner realised that the police were after him, he approached this court for Anticipatory bail claiming that his life was in danger and that he was not aware why the police were looking for him. He has annexed an unsigned letter to this application alleging that the family of the deceased had withdrawn complaints against him. This anonymous letter was only written on 1st May 2019 and there is a possibility that he has also contributed to the delay in the charges herein being laid in court.

In conclusion, this court finds that this application is not meritorious and stay orders cannot be granted to prevent the prosecution of petitioners who were suspected to have committed the murder of Eric Mwenda. The Criminal justice system has processes that safeguards the interests of both the suspects, the victims and in case of death the relatives of the victim. The Petitioners herein will be entitled to enjoy those rights during the prosecution of the charge against them. The application is dismissed.

HON A. ONG'INJO

JUDGE

Before Adwera Ong'injo

C/A: Mr Kinoti

Ms Mbithe for 1st Respondent.

Mr Kiogora Mugambi Advocate for petitioners

2nd Respondent - Ms Mbithe holding brief for

Ms Mbithe holding brief for Igweta for Interested party.

3rd Respondent –No appearance

Ms Mbithe holding brief for Respondent

5th Respondent represented

RULING DELIVERED, DATED AND SIGNED IN COURT ON 29TH DAY OF MAY 2019.

Copies of the ruling to be supplied.

HON A. ONG'INJO

JUDGE

Mr Kiogora: We pray for directions on the hearing of the petition.

Order: Mention 18.7.2019 for pre-trial.

Petitioners counsel to serve Respondents who are not in court.

HON A. ONG'INJO

JUDGE