REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 351 OF 2019

JOSHUA OWOUR ....PETITIONER

VERSUS

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

THE CHIEF MAGISTRATES COURT AT

MILIMANI LAW COURTS.. 2ND RESPONDENT

JUDGMENT

1. The Petitioner, Joshua Owour, is the Member of the National Assembly for Nyakach Constituency. In the year 2011 he was the Director of Legal Affairs in the defunct City Council of Nairobi. The Petitioner is also the accused person in Milimani Law Courts, Chief Magistrate's Court Anti-Corruption Case No. 17 of 2019 in which he faces two counts.

2. In the first count he is charged with conspiracy to commit an offence of corruption contrary to Section 47A (3) as read with Section 4B of the Anti – Corruption and Economic Crimes Act No. 3 of 2003. The particulars disclose that between the 3rd and 4th day of June, 2011 in Nairobi City County within the Republic of Kenya the Petitioner jointly conspired with others before court to commit an offence of corruption to wit defrauding the City Council of Nairobi of the sum of Kshs10 million through fraudulent payment of the said amount to Stephen Kariuki Mburu (deceased) trading as Wachira, Mburu, Mwangi and Company Advocates.

3. In the second count the Petitioner is charged with abuse of office contrary to Section 46 as read with Section 48 of the Anti – Corruption and Economic Crimes Act No. 3 of 2003. It is alleged that the Petitioner between the 17th day of February, 2011 and the 16th day of June, 2011 in Nairobi City County within the Republic of Kenya, being the Director of Legal Affairs, used his office to improperly confer a benefit to Steven Kariuki Mburu (deceased) trading as Wachira, Mburu, Mwangi and company Advocates to wit Kshs10 million by unlawfully authorizing the said payment.

4. The Director of Public Prosecutions (DPP) is the 1st Respondent and the Chief Magistrate's Court at Milimani Law Courts is the 2nd Respondent. Through his petition dated 5th September, 2019 the Petitioner seeks orders as follows:-

> **"1. A Declaration that the preferred Charge in the CHIEF MAGISTRATE'S COURT, ANTI-CORRUPTION CASE NO. 17 OF 2019 against the Petitioner is unconstitutional, illegal abuse of the Honourable Court's and Criminal process.**
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> **2. A Declaration that the preferred Charge in ANTI – CORRUPTION CASE NO. 17 of 2019 against the Petitioner and the Proceedings therein violates Articles 2(1), 19(2), 20(1), (2), (3), and (4), 21(4), 22(4) 23(3), 25, 27, 28, 29 and 47 of the CONSTITUTION in so far as enjoyment and protection of the right to Freedom and Security of the person under Article 29, Enforcement of Bill of Rights under Article 22, fair administrative action under Article 47, Article 157(11) on the powers of the Director of Public Prosecutions, and are hereby quashed.**
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> **3. The Honourable Court be pleased to issue such other Orders or reliefs and give such other directions as it may deem fit to meet the ends of Justice.**
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> **4. The Costs of this Petition be to the Petitioner in any event."**

5. At the time of filing the petition, the Petitioner also filed a notice of motion seeking conservatory orders. I directed the parties to come for *inter partes* hearing of the same on 20th September, 2019. During the hearing of the application, I realized that the advocates were actually arguing the petition and with their concurrence, the petition was heard on that day.

6. The Petitioner's case is that the facts upon which his prosecution is based do not disclose a criminal offence. His view is therefore that prosecution is unconstitutional, in bad faith, and an abuse of process.

7. The Petitioner's case is that in the course of his work in April, 2011 he received summons on behalf of the City Council of Nairobi in respect of **Nairobi High Court Civil Suit No. 875 of 2010, Kyavee Holdings Limited v City Council of Nairobi** in which a claim of Kshs.3,151,700,000 had been made against his employer. Upon consulting the City Council's list of prequalified external lawyers he instructed the law firm of M/s Wachira Mburu, Mwangi & Co. Advocates to represent the City Council and file an appropriate defence to the claim.

8. It is the Petitioner's case that the instructed law firm went ahead to file a defence and proceeded to apply for the dismissal of the suit on the ground that the advocate who had filed the same had no practising certificate. The plaintiff faced with the dismissal application opted to withdraw the suit and the court proceeded to tax the defendant's costs at Kshs. 29,830,045.50.

9. The Petitioner's case is that upon receiving the fee note from the instructed lawyer, he directed his deputy to evaluate the same under the relevant provisions of the Advocates Remuneration Order and the deputy recommended payment of Kshs.68,761,189 to the advocate. The Petitioner approved payment of kshs.10,000,000 towards the fee note and soon thereafter left the employment of the City Council to join politics.

10. The Petitioner's case is that his petition should succeed for the reason that there is no allegation that he was not authorized to receive summons on behalf of the City Council of Nairobi; that there is no allegation that upon receipt of such summons he was not allowed to use his discretion to appoint any of the external lawyers to take up the matter; that there is no allegation that the law firm of M/s Wachira, Mburu, Mwangi & Co. Advocates was not at the material time duly pre-qualified by the City Council of Nairobi to represent her in legal matters; that there is no allegation that the said law firm did not enter appearance, file a defence and applied for the dismissal of the case; that there is not dispute that HCCC No. 875 of 2010 was indeed filed and a claim of Kshs. 3,151,700,000 laid against the City Council of Nairobi; and that there is no dispute that the suit was indeed withdrawn and a bill of costs taxed at Kshs. 29,830,045.50 as party and party costs exclusive of value added tax.

11. It is the Petitioner's case that an authorization of payment of Kshs.10,000,000 against a taxed possible amount of Kshs. 44,745,068.25 cannot be termed fraudulent as the same was payment to a lawyer for work lawfully rendered to a client.

12. The Petitioner wonders why the names of his alleged co-conspirators have not been stated in the charge sheet yet they are known and are already in court. The Petitioner points out that the decision to charge him was made despite the fact that the investigating officer never found that he had committed any offence and neither did she recommend that he be charged.

13. The Petitioner accuses the DPP of arbitrarily preferring charges against him without ordering further investigations. It is his case that the investigations conducted by the Ethics and Anti-Corruption Commission (EACC) never disclosed any evidence of any criminal act on his part. He wonders where the *actus rea* and *mens rea* are in his case.

14. Turning to the replying affidavit of Hellen Mutellah sworn on 13th September, 2019 in response to his case, the Petitioner contends that the same has completely failed to respond to the factual issues. Further, that the replying affidavit simply dwells on the powers donated to the DPP by Article 157 of the Constitution.

15. It is the Petitioner's case that the DPP's powers are not absolute and must be based on legal investigations and procedural law. It is the Petitioner's submission that the decision to charge him was unconstitutional, made in bad faith and an abuse of the process of the court in that the decision of the DPP to charge can only be based on investigations. Further, that the DPP is bound by the law and cannot overlook the investigation report without any explanation; that the decision of the DPP to charge him without any due process or any investigation violates his right to fair administrative action as protected by Article 47 of the Constitution and the right to protection of freedom and security as guaranteed by Article 29 of the Constitution; that the powers donated to the DPP under Article 157 of the Constitution are not absolute; that the decision to charge him was for ulterior purposes as the principal prosecution witness, being the investigating officer, had absolved him; that the evidence on record clearly exonerates him; and that there is no basis for his prosecution.

16. The Petitioner rebuffs the DPP's suggestion that he should wait and clear himself before the trial court asserting that where there is no evidence of the commission of a crime an accused person should not suffer damaged reputation, financial ruin and waste of time undergoing a criminal trial.

17. The Petitioner cited the decision in **Petition No. 219 of 2016, Fredrick Otieno Okeyo v The Director of Public Prosecutions & 4 others** for the proposition that criminal proceedings not in initiated in good faith but for ulterior motives should be stayed.

18. The decision by the Court of Appeal in **Civil Appeal No. 274 of 2014 Diamond Lalji v The Hon Attorney General & 4 others** is cited in support of the principle that criminal proceedings commenced in abuse of the court process should be quashed.

19. Finally, the Petitioner cited **Miscellaneous Application No. 4 of 2013 Peter Macharia Ruchachu v The Director of Criminal Prosecutions & another** in support of the statement that where evidence available does not disclose a criminal offence, the court is bound to permanently stay the prosecution.

20. The 2nd Respondent did not file any response to the petition.

21. The 1st Respondent opposed the petition through a replying affidavit sworn by Hellen Mutellah, a prosecution counsel in the office of the DPP. The averment of Hellen Mutellah is that the DPP received a report dated 11th December, 2018 from the EACC together with the duplicate investigation file on an inquiry into allegations that the City Council of Nairobi made illegal payments amounting to Kshs. 68,000,000 to the law firm of M/s Wachira Mburu, Mwangi & Co. Advocates. After reviewing the file the DPP returned the same to the EACC on 14th December, 2018 recommending that a number of gaps in the investigations be filled before charges could be filed. The EACC undertook further investigations and resubmitted the file to the DPP on 4th April, 2019. Upon perusing the file afresh the DPP concluded that the Petitioner was criminally liable and filed charges against him.

22. It is averred for the DPP that the Petitioner is seeking to curtail the mandate of the criminal justice system actors as enshrined in the Constitution by attempting to circumvent the trial process against him without justifiable reasons as he has not demonstrated in any manner how the DPP has acted *ultra vires* or in bad faith while exercising his constitutional mandate under Article 157. Further, that the Petitioner's averment concerning the insufficiency of evidence or lack thereof are matters for the trial court.

23. On the Petitioner's claim that the decision to charge him was contrary to the recommendation of the investigating officer, the DPP's statement is that by virtue of Article 157(10) of the Constitution he exercises his mandate independently and without the direction, control or authority of any other person and is thus not bound by the covering report of an investigating officer. The DPP also avers that the Petitioner has not adduced any evidence to show that he acted capriciously, in bad faith or in abuse of the legal process thus necessitating the court's intervention.

24. Through the written submissions dated 20th September, 2019 counsel for the DPP reiterated the contents of the replying affidavit stressing that the DPP acted within the constitutional powers donated to him by Article 157 of the Constitution. It was submitted that for quashing orders to issue, an applicant should demonstrate that the decision to prosecute was influenced by irrelevant or extraneous considerations. This burden, it was stated had not been discharged by the Petitioner. The decision in the case of **Republic v Director of Public Prosecutions & Another Mukesh Patel & Another; Exparte Warsama Ismail [2019] eKLR** was cited in support of this particular submission.

25. On the Petitioner's assertion that his prosecution was not based on the recommendation of the investigating officer, the DPP points to Article 157(10) of the Constitution which provides that he shall not require the consent of any person or authority for the commencement of criminal proceedings and that in the exercise of his powers or functions he shall not be under the direction or control of any person or authority. On the strength of that provision, the DPP submits that he is not bound by the recommendations of the investigating officer. Further, that the power to recommend prosecution is discretionary as enshrined under Section 6 of the Office of the Director of Public Prosecutions Act which discretion is exercised based on an analysis of the inquiry file to ascertain the sufficiency or otherwise of the evidence gathered therein.

26. According to the DPP, a perusal of the statement of the investigating officer does not support the Petitioner's assertion that the investigating officer did not find the Petitioner culpable. The DPP examines the statement of the investigating officer, Mulki Umar, extensively and points out that the said statement demonstrates culpability on the part of the Petitioner. I shall return to the statement of the investigating officer later in this judgment. The DPP cites the case of **Republic v Director of Public Prosecutions & 4 others ex-parte Charles Mwiti Mugambi [2019] eKLR** as confirming that the mandate of evaluation of evidence and the decision as to whether to charge or not to charge a suspect falls within his area of jurisdiction.

27. On whether the decision to charge the Petitioner violated his rights and fundamental freedoms, the DPP submits it did not. According to the DPP, the Petitioner has not demonstrated that any provision of the Constitution or the laws of this country had been breached in arriving at the decision to charge the Petitioner. The decision in the case of **Republic v Director of Public Prosecutions & another ex-parte Justus Ongera [2019] eKLR** is cited in support of the proposition that the DPP has discretion to decide whether to prosecute or not and the courts should sparingly interfere with the exercise of that discretion. The DPP therefore urged this court to dismiss the petition.

28. I will start by acknowledging that there was some discussion as to whether the Petitioner's anti-corruption case should be consolidated with **Milimani Chief Magistrate's Court ACC. No. 8 of 2019 Republic v Dr. Evans Odhiambo Kidero & 15 others**. I suspect this discussion was necessitated by the fact that what was initially before the court was an application for conservatory orders. Be that as it may, it is necessary to state that whether the two anti-corruption cases should be consolidated or not is a matter for determination by the trial court.

29. In this matter, the Petitioner has invited the court to carry out an analysis of the evidence the prosecution intends to adduce at the trial and agree with him that there was no basis for prosecuting him. The DPP is of the opinion that analysis of evidence should be left to the trial court.

30. In **Meixner & another v Attorney General [2005] 2KLR 189** the Court of Appeal affirmed the DPP's position by stating that:-

> **"As the learned judge correctly stated, judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through *certiorari* on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power.**
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> **Having regard to the law, we agree with the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision. The other grounds which the appellants claim were ignored ultimately raise the question whether the evidence gathered by the prosecution is sufficient to support the charge.**

The criminal trial process is regulated by statutes, particularly, the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in Section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon an examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence. That is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court."

31. However, sometimes the court is called upon to interrogate the evidence in order to decide whether there was sufficient reason to warrant commencement of the prosecution. This is necessary because where there is no iota of evidence the court is duty-bound to stop the prosecution. That a prosecution mounted without any evidence can be quashed was affirmed by the Supreme Court of India in the case of **State of Maharastra & others v Arun Gulab Gawali & others Criminal Appeal No. 590 of 2007 (27 August, 2010)** when it held that :-

"In R.P. Kapur Vs. State of Punjab AIR 1960 SC 866, this Court laid down the following principles:-

(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 or evidence adduced clearly or manifestly fails to prove the charge."

32. Apart from the grounds cited in the above case, other grounds for reviewing prosecutorial powers were enumerated in **Mohit v The Director of Public Prosecutions of Mauritius (Mauritius) [2006] UKPC 20 (25 April 2006)** where the Privy Council cited the decision of the **Supreme Court of Fiji in Matalulu v DPP [2003] 4 LRC 712** and held that:-

"It is not necessary for present purposes to explore exhaustively the circumstances in which the occasions for judicial review of a prosecutorial decision may arise. It is sufficient, in our opinion, in cases involving the exercise of prosecutorial discretion to apply established principles of judicial review. These would have proper regard to the great width of the DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits. This approach subsumes concerns about separation of powers.

The decisions of the DPP challenged in this case were made under powers conferred by the 1990 Constitution. Springing directly from a written Constitution they are not to be treated as a modern formulation of ancient prerogative authority. They must be exercised within constitutional limits. It is not necessary for present purpose to explore those limits in full under either the 1990 or 1997 Constitutions. It may be accepted, however, that a purported exercise of power would be reviewable if it were made:

1. In excess of the DPP's constitutional or statutory grants of power-such as an attempt to institute proceedings in a court established by disciplinary law (see s 96 (4) (a)).

2. When, contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion–if the DPP were to act upon a political instruction the decision could be amenable to review.

3. In bad faith, for example, dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe.

4. In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved.

5. Where the DPP has fettered his or her discretion by a rigid policy – e.g. one that precludes prosecution of a specific class of offences.

There may be other considerations not precisely covered by the above in which judicial review of a prosecutorial discretion would be available. But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the consideration, to which the DPP may properly have regard in instituting or discontinuing proceedings. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice."

33. The Petitioner herein alleges that the evidence was insufficient to warrant recommendation that he be prosecuted. In the recent case of **Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR; Nairobi High Court Petition No. 295 of 2018** a bench of five

judges after analyzing various authorities on the question as to the extend this court should analyze the evidence held that:-

> **"243. We agree that there is a real danger of courts overreaching if they were to routinely question the merit of the DPP's decisions. However, there are circumstances where the type of scrutiny set out in the majority decision of Njuguna S. Ndungu (supra) is called for. Should there be credible evidence that the prosecution is being used or may appear to a reasonable man to be deployed for an ulterior or collateral motive other than for advancing the ends of justice, then a scrutiny of the facts and circumstances of the case is not only necessary but desirable. This is because it would enhance the administration of justice if the challenged charges were to be properly tested so that any fears of ill motive are dispelled.**
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> **244. To be underscored is that judicial review of the foundational basis of a charge should only be undertaken when an applicant has first established that there are reasonable grounds that the challenged proceedings are a vehicle for a purpose other than a true pursuit of criminal justice. To allow a willy-nilly and casual review of the foundational basis of criminal charges would be to turn judicial review proceedings into criminal mini-trials, a prospect that anyone keen to stop a criminal trial would relish."**

34. In **Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR ; Civil Appeal No. 274 of 2014** (Nairobi), the Court of Appeal conceded that there was room for scrutiny of facts when it held that:-

> **"[45] In considering the evidential test, the court should only be satisfied that the evidence collected by the investigative agency upon which DPP's decision is made establishes a prima facie case necessitating prosecution. At this stage, the courts should not hold a fully-fledged inquiry to find if evidence would end in conviction or acquittal. That is the function of the trial court. However, a proper scrutiny of facts and circumstances of the case are absolutely imperative**. **State of Maharashtra Ors v Arun Gulab Gawall & Ors – Supreme Court of India – Criminal Appeal No. 590 of 2007** para 18 and 24**, Meixner & Another v Attorney General [2005] 2 KLR 189**."

35. There is however a danger that comes with the route that the Petitioner has taken. It gives this court room to make comments that may prejudice him at the trial if this petition fails. I will, however exercise utmost care so as not to make any prejudicial comments against any of the parties.

36. It is important to affirm that as was stated by the Court of Appeal in **Diamond Hasham Lalji (supra)** the **"society has an interest in both the lawful exercise of prosecutorial powers and in employing fair procedure that does not amount to oppression and persecution."** Any exercise of power by the prosecution which is inconsistent with the values of the Constitution attracts the intervention of this court **"regardless of the seriousness of the alleged offence or the merits of the case."** – see **Diamond Hasham Lalji (supra).**

37. A perusal of the investigation report of Mulki Umar dated 28th March, 2019 discloses that she did not recommend that the Petitioner be charged. However, as correctly submitted by the DPP the power to prosecute or not to prosecute solely belongs to him. The recommendations of the investigating officer are not binding on the DPP. The DPP can reject a recommendation to prosecute. He can also decide, upon independent review of the evidence, to prosecute a person that the investigator has not recommended for prosecution.

38. A perusal of the investigation report discloses that the decision to pay the firm of Wachira Mburu Mwangi & Company Advocates the sum of Kshs.68,761,169 was made under the Petitioner's watch. The report confirmed that he authorized the payment of Kshs10 million.

39. At pages 2 and 3 of the 14-page report it is disclosed that the Petitioner also authorized payment of the balance of Kshs. 58,761,169 through three vouchers but the payments were stopped by the Director of Internal Audit. It is not disputed that the Kshs.58,761,169 was eventually paid in 2014 after the Petitioner had left office. However, the person who recommended the payment of the money was the Petitioner. He is therefore in the mix of things and it is only the trial court which will decide, after hearing the evidence, if the Petitioner is criminally culpable. This court will be descending into the trial arena were it to proceed to analyze the statements of the witnesses, which in any case are untested by way of cross-examination, and conclude that the Petitioner is not guilty.

40. Having reached the finding that the DPP had reason for prosecuting the Petitioner, it follows that his petition is without merit. The petition is therefore dismissed with no orders as to costs.

Date, Signed and Delivered at Nairobi this 26th day of September, 2019.

W. Korir,

Judge of the High Court