



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**MISC CRIM APPL.NO. 75 OF 2019**

**MARGARET WANZA WAMBUA.....APPLICANT**

**VERSUS**

**KELVIN MUTIE MUINDE.....RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS.....INTERESTED PARTY**

**RULING**

1. The background of this case as gleaned from the application dated 4.5.2019 as supported by the affidavit deponed by the applicant on 1.5.2019 is that the deceased one Josephine Kalekye Wambua died on 14<sup>th</sup> August, 2014 and an inquest into the cause of her death was held in Kangundo vide Inquest 1 of 2015. The court at Kangundo found that the Respondent was the prime suspect and the DCIO Kangundo was directed to investigate the matter with a view to preferring charges against the respondent. Letters dated 8.3.2017, 29.9.2017, 6.4.2017 and 26.2.2019 were addressed to the DCIO with regard to the matter and the deponent averred that there was no response. It was averred that vide letters dated 8.1.2019 and 7.2.2019 the interested party was requested to prefer charges against the respondent and comply with the orders of the Kangundo court but there was no response and hence the instant application.

2. In the instant application that is brought under Article 47(1) and (2), 48 of the Constitution and Section 88(1) and (3) of the Criminal Procedure Code where the applicant sought permission to prosecute the respondent, to admit a charge sheet as drawn and to have the respondent arrested. The respondent in reply to the application vide his affidavit deponed on 25.6.2019 denied responsibility in the death of the deceased and averred that he was arrested and released on personal bond of Kshs 100,000/- vide miscellaneous application 26 of 2017 at Kangundo. He averred that he had been dutifully reporting to Kangundo Police station without fail for the last two years and wishes that the matter be concluded without any further delay.

3. In reply to the application, the interested party filed grounds of opposition dated 28.3.2019 where it was felt that the application is premature as investigations are not complete. The interested party is of the view that the application is being brought in bad faith and without proper foundation or basis and seeks that the same be dismissed. Vide replying affidavit deponed on even date, Felisters Njeru averred that it had been difficult to record statements from witnesses and that intense investigations have commenced in the Homicide Division in Nairobi and seeks that they be given time to carry out investigations and bring the matter to its logical conclusion. The interested party feels that it would be premature to hand over the matter to a private prosecutor in view of the fact that investigations are still ongoing.

4. The issue to be determined is whether the court may grant the orders sought. Section 88(1) and (3) of the Criminal Procedure Code under which the application is brought reads as follows:

***“88(1) Any magistrate trying any case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorized by the Director of Public Prosecutions in this behalf shall be entitled to do so without permission.***

***(3) Any person conducting the prosecution may do so personally or by an advocate”***

5. The powers of the DPP are to be found in Article 157 (6) of the constitution which reads as follows:

***“(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; and*

*(c) subject to clauses (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).*

6. Section 89 of the Criminal Procedure Code expressly confers the right to institute criminal proceedings on any person by means of complaint or bringing the person who has been arrested without warrant to a magistrate and section 88 confers the right to any person to conduct the prosecution subject to the permission of “any magistrate trying the case.”

7. In *Gouriet v Union of Post Office Workers* [1978] AC 435 Lord Wilberforce (at p.477) briefly considered the right of private prosecution in England.

*“The individual, in such situations, who wishes to see the law enforced has a remedy of his own;” he said, “he can bring a private prosecution. This historical right which goes right back to the earliest days of our legal system, though rarely exercised in relation to indictable offences, and though ultimately liable to be controlled by the Attorney-General (by taking over the prosecution and, if he thinks fit, entering a nolle prosequi) remains a valuable constitutional safeguard against inertia or partiality on the part of authority.”*

8. With respect to section 88 of the Criminal Procedure Code Forbes Ag. P said in *Riddleschager v Robson* (1959) EA 841 at p. 845

*“On the basis of those cases the Crown is the prosecutor in law; but the Crown must, of course, act through someone. Normally the Crown acts through a “public prosecutor” as defined in section 2 of the code – see section 86 of the Code. But special provision is made in section 88 to enable the Crown to act through a complainant in cases in which a public prosecutor does not wish to act. In such case the consent of the magistrate must be obtained before the complainant can “conduct” the prosecution.”*

9. The right of private prosecution is a constitutional safeguard. In the words of Lord Diplock in the *Gouriet* case (*supra*) at p 498:

*“It is a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of [Police forces and the office of Director of Public Prosecutions] to prosecute offenders against the criminal law.”*

10. Having considered the pleadings, I would need to be satisfied that the interested party has taken no action and that the applicant is ready to proceed.

11. In *Floriculture International Limited & Others –vs- The Attorney General Nairobi High Court Miscellaneous Civil Application No.114 of 1997*, the court set out the six requirements to be fulfilled for one to be allowed to carry out private prosecution:

*“For all these reasons criminal proceedings at the instance of a private person shall be allowed to start or to be maintained to the end only where it is shown by the private prosecutor;*

*1. That a report of the alleged offence was made to the attorney General or the police or other appropriate public prosecutor, to accord either of them a reasonable opportunity to commence or take over the criminal process, or to raise objection (if any) against prosecuting; that is to say, the complainant must firstly exhaust the public machinery of prosecution before embarking on it himself; and*

*2. That the Attorney General or other public prosecutor seized of the complaint has taken a decision on the report and declined to institute or conduct the criminal proceedings; or that he has maintained a more than usual and reasonable reticence; and either the decision or reticence must be clearly demonstrated; and*

*3. That the failure or refusal by the State agencies to prosecute is culpable and, in the circumstances, without reasonable cause, and that there is no good reason why a prosecution should not be undertaken or pursued; and*

*4. That unless the suspect is prosecuted and prosecuted at the given point of time, there is a clear likelihood of a failure of public and private justice; and*

*5. The basis for the locus standi, such as, that he has suffered special and exceptional and substantial injury or damage, peculiarly personal to him, and that he is not motivated by, malice, politics, or some ulterior considerations devoid of good faith, and*

*6. That demonstrable grounds exist for believing that a grave social evil is being allowed to flourish unchecked because of the inaction of a pusillanimous Attorney General or police force guilty of a capricious, corrupt or biased failure to prosecute, and that the private prosecution is an initiative to counter act the culpable refusal or failure to prosecute or to neutralize the attempts of crooked neutralize the attempts of crooked people to stifle criminal justice”.*

12. From the evidence on record, a report was made to the DPP in 2018 and in 2019 with the result as indicated in the reply by the DPP that the matter is at advanced stages of investigation. It appears that from 2017 complaints had been addressed to the DCIO who has no mandate to institute criminal proceedings against the respondent. In addition there is no charge sheet on record annexed to the application though

mentioned by the applicant and this court cannot establish which court the matter is to be tried. It follows that though the applicant has sufficient interest in seeing that the respondent be prosecuted I am not satisfied that she had demonstrated she has a sufficient interest and capabilities in conducting the prosecution.

13. The DPP on the other hand has indicated that what they need is time to institute criminal proceedings against the respondent and in this regard it is premature to allow private prosecution whilst the constitutionally mandated body is willing to take action. The interested party has confirmed that the matter is under active investigations as per the several letters attached to the replying affidavit. The applicant upon being served with the reply seems to lament that the said correspondences were not copied to her lawyers. It would thus seem that had they received the same the present application would not have been made. It is clear that the interested party is ready to prosecute once investigations are wrapped up and they ought to be given more time. It will not serve the applicant or interest of justice to rush the matter only for it to collapse in court. Again the applicant might not have the tools with which to conduct investigations and sustain the prosecution alone without the input of the interested party. Further the respondent has confirmed that he has been reporting to the police station as directed awaiting the conclusion of the investigation.

14. A reading of Section 88 and 89 of the Criminal Procedure Code indicates that it is not for this court to grant or refuse permission as the said sections refer to the magistrate trying the case. See **Isaac Aluoch Polo Aluochier v Stephen Kalonzo Musyoka & 218 others [2013] eKLR** where it was observed that a private citizen can only institute private prosecutions in those cases where he or she satisfies **the Magistrate's Court before whom he or she wishes to carry out the prosecution** that there has been a failure by the bodies charged with prosecution to carry out their mandate."

15. It is now clear that the application is rather premature. The applicant should exercise some patience as the interested party concludes the investigations. The trial court that conducted an inquest made recommendations one of which is that the interested party was directed to obtain statements from two witnesses and then proceed to charge the respondent with an offence of murder. That order is still in force and the applicant has the extra option of instituting contempt proceedings against the interested party for non-compliance.

16. In light of the above reasoning, I find that the application lacks merit. The same is dismissed.

It is so ordered.

**Dated and delivered at Machakos this 18<sup>th</sup> day of December 2019.**

**D. K. Kemei**

**Judge**