REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO 651 OF 2017

REPUBLIC.....APPLICANT

VERSUS

OFFICE OF THE DIRECTOR

OF PUBLIC PROSECUTION.....1ST RESPONDENT

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

CHIEF MAGISTRATE KIBERA LAW COURTS.....3RD RESPONDENT

EX PARTE:

SYLVIA WAIRIMU NJUGUNA

ALSO KNOWN AS SYLVIA WAIRIMU MULI

RULING

1. According to the ex parte applicant herein, **Sylvia Mulinge**, the Director-Consumer Business Unit, Safaricom Ltd. by virtue of her said employment she was, as at February, 2015, assigned a motor vehicle registration number KBU 483M, Toyota Prado which vehicle was involved in a road accident on or about 1st February, 2015 at around 11.35 a.m. along the Southern By-Pass as she drove from Ngong Road direction towards Lang'ata Road.

2. According to the applicant she reported the said accident the same day and recorded her statement on 2nd February, 2015. However as a result of the said accident, a female minor aged 8 years old, **Mary Kusa Etale,** died.

3. It was averred that upon recording her statement the applicant was requested to furnish the police with all her contact details for future contacts. It was however her case that the initial investigations revealed that the applicant was not in the wrong since at the point of the accident there was a wall and road barrier preventing pedestrians from crossing over the by-pass and there was an underpass for pedestrian crossing and according to the road signs vehicles were not allowed to stop thereat.

4. It was however averred that the applicant was shocked when two years after the occurrence of the accident, a petition was filed by **International Centre for Policy and Conflict** (hereinafter referred to as

"ICPC" or "the Applicant"), in which it was sought inter alia, an order compelling the Respondents to perform their constitutional duty and investigate and institute appropriate proceedings against the ex parte applicant. It was averred that whereas the ex parte applicant and her employer responded to the petition the 1st and 2nd Respondents despite being aware of the same did not do so though the substantial orders were directed at them.

5. However by a letter dated 19th October, 2017, the 1st Respondent directed the 2nd Respondent to charge the applicant with the offence of causing death by dangerous driving contrary to section 46 of the ***Traffic Act*** and a charge sheet was drawn and circulated to the media in accordance with the 1st Respondent's directions. It was averred hat the 1st Respondent released to the social media all the information relating to the accident before contacting the Applicant on the same.

6. It was the applicant's case that the Respondents' conduct amounts to clear violations of the provisions of the ***Fair Administrative Action Act*** and the applicant's constitutional rights by reopening the case on social media where the applicant has been condemned unheard instead of responding to the petition. To the applicant that decision amount to capricious use of power by the State contrary to Articles 50 and 159 of the Constitution as read with Article 50(1)(e) thereof.

7. It was contended that the charges filed against the ex parte applicant were instigated by third parties such as the International Centre for Conflict and Policy, Suyianka Lempaa t/a Suyianka Lempaa & Co. Advocates and Mike Njeru since there is no evidence of any complaint, fresh or otherwise filed by the family of the deceased. It was however contended that ICPC and/or Suyianka Lempaa t/a Suyianka Lempaa & Co. Advocates did not have the authority of the deceased's parents to lodge Petition 313 o 2017 or any other complaint against the ex parte applicant.

8. It was therefore the ex parte applicant's case that the letter dated 21st September, 2017 must have been written on directions and/or pressure from third parties and is thus not a product borne of the exercise lawful discretion by the 1st and 2nd Respondents having been written long after the e parte applicant had responded to the petition. By filing the Traffic Offence Case, it was contended that the Respondents at the behest of the Petitioner in the said petition or other undisclosed persons, are creating an impression that either the applicant or her employer acted unlawfully in making payment to the parents of the deceased or influenced the closure of the file.

9. It was disclosed that an inquest No. 15 of 2017 was commenced at Kibera Law Courts in order to inquire into the circumstances that led to the death of the deceased but despite that the DPP had now directed that the traffic offence file be opened against the applicant.

10. The application the subject of this ruling is however made by the said ICPC and it is dated 11th January, 2018. By that application the said applicant substantially seeks an order that it be joined to these proceedings as an interested party.

11. The said application, according to the applicant is based on the fact that following the said accident, the applicant filed the said petition after its attempts to the 1st Respondent to prosecute the Applicant fell on deaf ears and upon pressure, the 1st applicant presented an affidavit to which charge sheet indicating that the Respondents intended to charge the applicant with a charge of causing death by dangerous driving against the applicant.

12. It was however the applicant's case that following the tragic road accident, the police or the office of the DPP failed, refused and or neglected to conduct thorough investigation and or take any legal action against the Applicant despite the fact that there was a *prima facie* evidence of causing death of a minor by dangerous driving.

13. It was the applicant's case that after the said accident, the ex parte applicant, in an apparent action of cover up, entered into an agreement with the victims by paying them Kshs 950,000.00 and manipulated them into indemnifying her from criminal liability.

14. In his submissions, **Mr Lempaa**, learned counsel for the applicant averred that the applicant who was the one who lodged the complaint with the office of the DPP intends to protect public interest by being allowed to participate in these proceedings. According to learned counsel, it was the applicant's pressure that compelled the office of the DPP to draw the charge sheet and to commence the prosecution. To the applicant, taking into account the Respondents' past inaction, it was apprehensive that the Respondents would not be able to properly protect the interests of the victim.

15. The application was supported by the Respondents. Through their learned counsel **Mr Ashimosi**, it was submitted that the complaint leading to the decision to charge the applicant emanated from the applicant's advocates on behalf of the victim of a crime, an 8 year old child known as **Mary Kusiotoi**. The applicant had also file petition 313 of 2017 in which the Respondents disclosed that a decision had been made to charge the applicant.

16. It was submitted that since several references have been made to the applicant herein making certain allegations against it, the same can only be answered by the applicant hence it is only proper that the applicant be joined to these proceedings.

17. According to **Mr Ashimosi**, the Victim Protection Act recognises the victim as a separate person from the complainant hence the applicant ought to be allowed to participate in these proceedings in order to protect the interests of the victim as opposed to the complainants.

18. The application was however opposed by the ex parte applicant who through her learned counsel, **Mr Njoroge Regeru**, submitted that these being judicial review proceedings the applicant had no role to play or interests in these proceedings. It was his submissions that the applicant was in fact just a busy-body which was attempting to have a closed matter re-opened for malicious purposes.

19. As regards the issue of public interest it was the ex parte applicant's position that the right person to protect public interest is the Attorney General who is the custodian of public interest and not the applicant herein.

20. While acknowledging that there were references to the applicant, it was submitted that these were in the context of giving the background to the matter. However the issues herein are squarely directed at the Respondents and not the ICPC which is neither a victim of crime nor her parents.

Determination

21. I have considered the issues raised hereinabove.

22. Order 53 rule 3(2) and (4) of the ***Civil Procedure Rules*** provides:

> ***(2) The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.***
>
> ***(4) If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct.***

23. Therefore whereas subrule (2) of Order 53 rule 3 aforesaid restricts persons who should be served to those who are "***directly affected",*** subrule (4) on the other hand gives the Court wide discretion to order that the application be served on any other person notwithstanding that that person ought to have been served under subrule (2) or not and the Court's decision to do so is only subject to ***such terms (if any) as***

the court may direct. It is therefore my view that unlike under subrule (2) the Court has unfettered powers under subrule (4) and in my view this power is meant to ensure that justice is done. Therefore where the Court is of the view that a person ought to be joined to the proceedings the Court is properly entitled to direct that that person be joined notwithstanding that such a person has not made an application to Court. Under such circumstances a formal application is not necessary

24. However where an application is made under subrule (2), it is incumbent upon a person who alleges that he or she ought to have been served to show how the proceedings directly affect him or her. The mere fact, however that a person has made such an application does not preclude the Court from invoking its unfettered discretion under subrule (4) to have such a person joined to the proceedings even if the applicant does not satisfy the Court that the person is directly affected thereby. The word "direct" is defined by ***Black's Law Dictionary***, 9th Edn. page 525 as "straight; undeviating, a direct line, straightforward, immediate." It must be kept in mind that judicial review orders are concerned with the decision making process rather than the merits of the decision. Therefore judicial review proceedings ought not to be modified into a vehicle through which matters which ought to be ventilated in other forums are to be determined. This was the position in **John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003,** where it was held that for the Court to require the alternative procedure to be exhausted where the alternative procedures are more convenient and appropriate prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort. Similarly, in **The Republic vs. The Rent Restriction Tribunal and Z. N. Shah & S M Shah Ex Parte M M Butt Civil Appeal No. 47 of 1980** the Court of Appeal held that if there is an equally convenient, beneficial and effective remedy available a Court will generally decline to exercise its discretion in favour of an applicant for a prerogative order.

25. Since judicial review orders are concerned with the decision making process rather than the merits of the decision, a party who contends that he or she is directly affected by the proceedings ought to bring himself or herself within the ambit of the judicial review jurisdiction and ought not to apply to be joined thereto with a view to transforming judicial review proceedings into ordinary civil litigation. In my view, for a party to be joined to the proceedings under Order 53 rule 3(2) aforesaid the applicant ought to disclose to the Court how he or she is directly affected. The Court cannot be expected to act in the dark by joining such a person with a view to satisfying itself as to the effect of the orders sought on the applicant at a later stage of the proceedings.

26. However, the decision whether or not to join a party is an exercise of discretion and if no substantial purpose or benefit will be gained by the joinder of a person to the proceedings and where the said joinder will militate against the expeditious disposal of the said proceedings which by their nature ought to be heard and determined speedily, the Court will be reluctant to join the intended party to the proceedings.

27. In an application of this nature, the applicant ought to adduce some material upon which the Court can determine whether the applicant is directly affected by the proceedings. In judicial review especially where a party's interests can be catered for by another party participating in the proceedings, there would be no reason to join the party intending to join the proceedings as a party thereto. It is therefore upon the applicant to satisfy the Court that the issues it intends to raise, which issues are relevant to the matter for determination before the Court, cannot adequately be canvassed by any of the parties before the Court.

28. In this case, it is the ex parte applicant's case that the belated decision to prefer traffic charges against the ex parte applicant was informed by collateral factors such as the pressure by third parties one of whom is the applicant herein. That consideration of collateral factors is one of the grounds for prohibiting a prosecution is now old hat. As was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240** while citing **Reg vs. Secretary of State for the Environment Ex Parte NottinghamShire Country Council [1986] AC**:

> **"A power which is abused should be treated as a power which has not been lawfully exercised…*Abuse of power includes the use of power for a collateral purpose, as set out in ex-parte Preston, reneging without adequate justification on an otherwise lawful decision, on a***

lawful promise or practice adopted towards a limited number of individuals. **I further find as in the case of *R (Bibi) vs. Newham London Borough Council [2001] EWCA 607, [2002] WLR 237*, that failure to consider a legitimate expectation is a failure to consider a relevant consideration and this would in turn call for the courts intervention in assuming jurisdiction and giving the necessary relief."**

29. In **Jared Benson Kangwana vs. Attorney General Nairobi High Court Misc. Application No. 446 of 1995** (unreported) **Khamoni, J** noted that:

"The essence of abuse as stated in the case of *Spautz v Williams*...is that:

'the proceedings complained of were (instigated and) instituted and/or maintained for a purpose other than that for which they were properly designed or exist or to achieve for the person (instigating), instituting them some collateral advantage beyond that which the law offers, or to exert pressure to effect an object not within the scope of the process…whether there are circumstances which will make the proceedings an abuse of the process of the court. Acts of such abuse are not restricted to what the prosecution or the State does but extend to acts of any party" and the prosecution or the Respondent should not be telling this court not to rely on anything done by the victim to decide whether there is an abuse...The court should ask whether its process is being fairly invoked…The functions of abuse of the process of the court are not limited to what the prosecution or the State or the court does. They extend to what any other interested party, like the person aggrieved, does and case authorities have shown that it is not the events at the trial that necessarily give rise to the granting of a prohibition on the ground of abuse of the process of the court. They can be events outside the court. They can be events not done by the State but done by the person aggrieved who succeeds in getting the unsuspecting State or Public Prosecutor to prosecute the Accused person."

30. In **George Joshua Okungu and Another vs. Chief Magistrate Court Anti Corruption Court at Nairobi and Another (2014) eKLR** the Court held that:

"It is therefore clear that whereas the discretion to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt. Similarly where the commencement or continuation of the criminal prosecution will result in abrogation of the Petitioner's rights and freedoms enshrined in the Constitution, the Court is under a duty to bring such proceedings to a halt. In so doing, it must be emphasised that the Court is not concerned about the innocence or otherwise of the Petitioner. The Court's duty is only to ensure that the Petitioner's rights and freedoms as enshrined in the Constitution are protected and upheld…Where therefore it is clear that the discretion is being exercised with a view to achieving certain extraneous goals other than those legally recognised under the Constitution and the Office of the Director of Public Prosecutions Act, that would, in our view, constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion. As was held by in *Koinange vs. Attorney General and Others* (supra):

'Under section 26 of the Constitution the Attorney General has unfettered discretion to undertake investigations and prosecute. The Attorney Generals inherent powers to investigate and prosecute may be exercised through other offices in accordance with the Constitution or any other law. But, if the Attorney General exercises that power in breach of the constitutional provisions or any other law by acting maliciously, capriciously, abusing the court process or contrary to public policy the Court would intervene under section 123(8) of the Constitution and in considering what constitutes an abuse of the court process the following principles are relevant: (i) Whether the criminal prosecution is instituted for a

purpose other than the purpose for which it is properly designed; (ii) Whether the person against whom the criminal proceedings are commenced has been deprived of his fundamental right of a fair trial envisaged in the provisions of the constitution; (iii) Whether the prosecution is against public policy.'"

31. **Kuloba, J** in **Vincent Kibiego Saina vs. The Attorney General H.C Misc Appl. 839 and 1088/99** expressed himself as hereunder:

"So, it is not the purpose of a criminal investigation or a criminal charge or prosecution, to help individuals in the advancement of frustration of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other and ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice. No one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth."

32. Since the applicant herein is one of the entities alluded to by the ex parte applicant as having exerted pressure on the Respondents to reopen a closed matter and prosecute the applicant, it is only fair that the applicant be afforded an opportunity to be heard on such allegations otherwise the Court may well be accused of having violated the rights of the applicant.

33. In the premises I allow the application and direct that the **International Centre for Policy and Conflict** be joined to these proceedings as the 1st interested party. I also direct that the parents of the deceased be joined as the 2nd interested parties and be served with the pleadings.

34. The costs of this application will be in the cause.

35. Orders accordingly.

Dated at Nairobi this 22nd day of January, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Njoroge Regeru for the ex parte applicant

Mr Ashimosi for the 1st and 2nd Respondents

Miss Kinema for Mr Lempaa for the applicant

CA Ooko