



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL PETITION NO. 1 OF 2017

NGURE KAIRU.....1ST PETITIONER

BOFA INVESTMENT.....2ND PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGEMENT

1. Ngure Kairu and Bofa Investments Ltd, the petitioners herein are claiming that their rights have been violated by the Respondent, the Director of Public Prosecutions (DPP) through the institution of criminal proceedings against them vide Malindi Chief Magistrate's Court's Criminal Case No. 54 of 2017. They state that Articles 2, 10, 23, 27, 28, 29, 41, 47, 50, 157 and 165 of the Constitution, sections 4, 5 and 6 of the Office of the Director of Public Prosecutions Act and sections 7(1) and (2), 8, 9, 10, 11 and 12 of the Fair Administrative Action Act, 2015 have been breached by the respondents. They therefore pray for orders as follows:

“(a) A conservatory order in the nature of certiorari to remove and bring to this court for the purposes of quashing the decision of the respondent to recommend that the petitioners be charged with various offences under the Employment Act and the decision of the respondents directing prosecution of the petitioners contained in the charge sheet in Malindi Criminal Case Number 54/2017.

(b) A conservatory order in the nature of an injunction be issued against the respondents, their servants, agents, employees, and or any other person(s) acting on their behalf, prohibiting them from persecuting, sustaining, proceeding, hearing, conducting or in any manner dealing with or completing the hearing of the charges laid or proceedings conducted in Malindi Chief Magistrate's Criminal Case No. 54/2017 between Republic versus Bofa Investments Ltd & Ngure Kairu.

(c) Costs of the petition.”

2. At the time of filing the petition, the petitioners also filed an application for interim injunctive relief pending the hearing and determination of the petition. The application was granted by consent of the parties.

3. The charges facing the petitioners were brought under the Employment Act, 2007. In the three counts with which the petitioners are charged, they are said to have breached sections 37(2), 51(1) and 20(1) as read together with Section 88 of the said Act.

4. It is pleaded in the petition and averred in the affidavit sworn in support of the Petition by the 1st Petitioner, a director of the 2nd Petitioner, that the petitioners were working on a construction project and hired the services of the three complainants in the criminal case on an on and off basis depending on availability of work. It is the petitioners' case that upon completion of the project in May, 2015, the services of the complainants remained redundant hence they were discharged. According to the petitioners, the complainants who were hired on casual terms were paid all their dues upon discharge.

5. The petitioners assert that on 24th March, 2016 almost a year after the discharge, a labour officer by the name Moses Kirera, paid the petitioners a visit at their premises claiming that they had failed to pay the complainants and had not made the necessary remittances to NSSF. The 1st Petitioner offered an explanation about the NSSF contributions and also denied that they had withheld the complainants' dues. The labour officer then requested for the petitioners' records which were forwarded to him via the letter dated 12th April, 2016. In the said letter, the 1st Petitioner further reiterated his explanation on the alleged unpaid dues and the NSSF remittances. However, the labour officer neither responded to the concerns raised by the petitioners in the letter and neither did he schedule a meeting as requested in the letter. It is the 1st Petitioner's averment that the said officer instead sent him a demand notice via the letter dated 9th June, 2016 detailing the

payments due to the complainants as rest days owed as per Section 37(2) of the Employment Act totaling Kshs. 172,800, which was to be deposited within seven days of the said letter.

6. According to the petitioners, upon receiving the demand notice they engaged a firm of advocates who responded to it through a letter dated 13th June, 2016 denying owing any money and requesting for a return of the employment records, which request was ignored. On 19th January, 2017, the petitioners were served with court summons dated 17th January, 2017 by the said labour officer asking them to appear in court and take plea. The petitioners assert that they **“were not under any investigation or aware of or made aware of any contravention/neglect with criminal ramifications under the Employment Act or any Labour Law before this.”**

7. The petitioners’ position is that counts 1 and 3 of the charges preferred against them are unknown in law and they were not aware of any investigations against them in regard to the second count. That indeed there were no investigations conducted. They averred that they were never called upon to give their side of the story before the charges were preferred against them. They admit having been aware of the complaint of unpaid dues for the rest days but denied knowing anything about the charges preferred.

8. It is the petitioners’ assertion that their prosecution is not based on fairness and justice but on malice and that there is ulterior motive underlying it. In support of this allegation, they averred that the labour officer was gazetted by the Director of Public Prosecutions (DPP) as a public prosecutor and could therefore not act as an investigator and prosecutor simultaneously. It is the petitioners’ case that it was the labour officer who moved the court on 17th January, 2017 for the issuance of the summons, a move the petitioners termed clandestine.

9. The petitioners further stated that the alleged offences took place seven years ago and no explanation had been offered as to why it took long to charge them. That they had obviously lost some of their employment records that would have aided them in their defence. Additionally, that although the complaint was a simple one, the labor officer had taken a year to press charges without offering any explanation for the delay.

10. On another point, the petitioners asserted that the complaints having been made over three months after the complainants had left employment the same breached Section 47(1) of the Employment Act, as confirmed by the labour officer through his letter dated 8th April, 2016, and it would therefore be discriminatory to prefer charges against them. The petitioners averred that upon realizing that their claim was time-barred, the complainants, through the labour officer, issued verbal threats before inventing malicious charges against them.

11. The petitioners submitted that the Respondent breached Article 10 of the Constitution by preferring charges against them without impartial investigations and by the clandestine move in court by the labour officer thus making their actions unaccountable, devoid of integrity and transparency. Further, that Article 47 entitles them to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair which right the Respondent breached by failing to inform them of the offences under investigation and the reasons for recommending their prosecution.

12. It was the petitioners’ case that Article 10 requires the Respondent to uphold national values of good governance which includes the rule of law; that Article 19(2) guarantees the petitioners protection of their human rights and fundamental freedoms for the preservation of dignity and promotion of social justice; that as per Article 20(1), the Bill of Rights applies to all and binds all state organs and persons; that Articles 28 and 29 entitles them to protection against violence, cruelty, inhuman and degrading treatment; that Article 35 entitles them to information held by the state; that Article 50(1) entitles them to dispute resolution by an impartial court; that Article 73 requires the Respondent to observe the constitutional standards of leadership and integrity including objectivity and impartiality in decision-making free from improper motives and service based on public interest and accountability; and that Article 232 places a duty on the Respondent to uphold constitutional values of public service.

13. The Respondent opposed the petition through a replying affidavit sworn by Moses Kirera, the aforesaid labour officer, on 2nd March, 2017. He averred he was the investigating officer in the matter and had invited the petitioners for a meeting on 24th March, 2016 via the letter dated 17th March, 2016 and for a subsequent meeting scheduled on 21st April, 2016 for investigations. He averred that the investigations were carried out impartially and objectively and statements taken on 23rd January, 2017. It is Moses Kirera’s averment that the offences were committed between 1st October, 2009 and 20th May, 2015 and the complaint was lodged on 3rd June, 2015, 14 days after the termination.

14. Moses Kirera averred that he was the investigator and not the prosecutor and was thus competent to handle any matter under the Employment Act. Further, that the offences as charged under sections 20(1), 37(2) and 88(1) of the Employment Act exist and the DPP did not therefore act arbitrarily or capriciously. It was in addition stated that the court should uphold the rights of the victim in line with Article 50(9) of the Constitution and the Victim Protection Act, 2014.

15. In their further affidavit, the petitioners averred that labour officers cannot act as investigating officers under the law. The petitioners denied receiving any letters save for the one dated 9th June, 2016. Further, that the labour officer did not deny his clandestine actions when he appeared in court as a prosecutor. It is further stated that the notice to prosecute dated 5th July, 2017, as produced in evidence by the Respondent, is unknown in law. Also, that the labour officer demanded payment without according them an opportunity to state their side of the story or requesting a statement from them. Finally, that the labour officer did not aver as to the offence allegedly committed by the petitioners.

16. The parties filed and highlighted their submissions. In brief, the petitioners submitted that the credibility of the information received was never tested before the charges were preferred as the charges were preferred before statements were recorded from witnesses. According to the petitioners, no investigations were carried out as the petitioners were not informed of any investigation nor of any offence they were suspected to have committed. They contended that the complaints mutated from failure to remit NSSF deductions and pay outstanding entitlements to the charges preferred.

17. The petitioners submitted that the Respondent did not deny the facts alleged namely: that the labour officer was not mandated to prosecute under the Employment Act and by so doing usurped the powers of the DPP; that the said officer purportedly investigated the matter and acted clandestinely as a prosecutor in court; that no explanation was offered for the delay in preferring the charges and the petitioners had likely lost records that would have formed the basis of their defence; that the complaints were filed in contravention of Section 47(1) of the Employment Act; that the Respondent acted discriminatively; and that the charges were malicious and non-existent save for the 2nd count which was however bad for lack of investigations.

18. It was in addition submitted that the investigations were procedurally unfair hence contravening Articles 47 and 157 of the Constitution and sections 4 and 29(1) of the Office of the Director of Public Prosecutions Act.

19. The petitioners asserted that the labour officer who was gazetted as a public prosecutor by the DPP exhibited malice, conflict of interest and partiality when he purported to investigate and prosecute the matter at the same time. That he failed to inform the petitioners of the investigations and charged them without informing them or getting their side of the story. Further, that the trial is likely to be unfair as the investigator is also the prosecutor.

20. It was the petitioners' submission that the notice to prosecute was never served upon them and its purpose was to compel them to pay up and that malice was exhibited when the records, though requested for, were never returned. The petitioners concluded that had they been allowed to state their case, the labour officer would have reached a different conclusion.

21. The petitioners cited the decisions in **George Joshua Okungu & another v Chief Magistrate's Anti-Corruption Court at Nairobi & another [2014] eKLR** and **Josephine Akoth Onyango & another v Director of Public Prosecutions & 4 others [2014] eKLR** to buttress their case.

22. On his part, the Respondent submitted that Section 35 of the Labour Institutions Act does not exclude the petitioners from being subjected to criminal proceedings. According to the Respondent under the powers donated by Article 157(6) and (10) of the Constitution and sections 3, 33, 35(1) and 36 of the Labour Institutions Act, the labour officer had powers to investigate while the DPP recommends the charges.

23. It was the Respondent's assertion that he exercised his constitutional obligation and acted within the scope of the law as the matter was investigated and relevant statements recorded. The due process was followed and the petitioners' rights were not violated. It was in addition submitted that the allegation of bribery was not substantiated and neither was it reported to the relevant agency. Finally, the Respondent submitted that the issues raised in the petition can be canvassed before the trial court.

24. The global issue for the determination of this court is whether the Respondent breached the Constitution in investigating and charging the respondents.

25. It is not in issue that the labour officer was appointed by the DPP as a public prosecutor on 5th July, 2013 pursuant to Section 85(1) of the Criminal Procedure Code and Section 35(1)(K) of the Labour Institutions Act.

26. Section 85(1) of the Criminal Procedure Code empowers the DPP to appoint public prosecutors **"either generally or for any specified case or class of cases."**

27. Section 35(1)(K) of the Labour Institutions Act provides that:

"A labour officer may, for the purpose of monitoring or enforcing compliance with any labour law –

...

(K) without prejudice to the powers of the Attorney General, institute proceedings in respect of any contravention of any provision of this Act or for any offence committed by an employer under this Act or any other labour law."

28. The law must be read in conformity with Article 157 of the Constitution so that the reference to the Attorney General is read as a reference to the DPP who is clothed with state prosecutorial powers.

29. The power bestowed on the DPP to delegate his prosecutorial powers is also traced to the Constitution which provides at Article 157 (9) that the powers of the DPP may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

30. The petitioners submitted that the labour officer was not gazetted to prosecute offences under the Employment Act and he exceeded his authority in prosecuting them. Their submission has no foundation. It must be noted that the phrase **"any other labour law"** in Section 35(1) (K) of the Labour Institutions Act in its ordinary meaning would include the Employment Act, which falls into the labour laws regime. It follows therefore that the labour officer was not only gazetted to prosecute offences under the Labour Institutions Act, but was also empowered to prosecute all offences under the labour laws. To that extent, instituting proceedings under the Employment Act was therefore not in excess of his powers and neither did he usurp the authority of the donor.

31. Was the decision to investigate and prosecute within the scope of the Constitution and the law? It is not in issue that the office of the DPP is a state organ bound by the Bill of Rights. By virtue of Article 157(6)(a) the DPP has powers to **"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."** In doing so the DPP, as per Article 157(10) **"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.”

32. It therefore follows that the labour officer exercising prosecutorial powers granted to him by the DPP was only required to comply with Article 157(11) of the Constitution and Section 4 of the Director of Public Prosecutions Act which demands that in exercising his powers the DPP should act impartially, observe the rules of natural justice, ensure the need to serve the cause of justice, avoid abuse of the legal process, protects the public interest and promotes constitutionalism.

33. The petitioners submitted that the labour officer acted both as a prosecutor and an investigator at the same time. The Constitution establishes the National Police Service which is mandated to, among other things, investigate offences.

34. That the DPP has no investigative powers is confirmed by Section 2 of the Office of the Director of Public Prosecutions Act which defines an investigative agency as:

““Investigative Agency” in relation to public prosecutions means the National Police Service, Ethics and Anti-Corruption Commission, Kenya National Commission on Human Rights, Commission on Administration of Justice, Kenya Revenue Authority, Anti-Counterfeit Agency or any other Government entity mandated with criminal investigation role under any written law.”

35. The labour officer having been clothed with prosecutorial powers could not again perform investigative duties. The labour officer averred that he was only an investigator and not a prosecutor but his disposition contradicts the Kenya Gazette Notice dated 12th July, 2013 which gazetted him and others as public prosecutors for the purpose of all cases arising under the Labour Institutions Act, 2007. The court proceedings of 17th January, 2017 also shows that he was the prosecutor as he is the one who applied for summons to issue to the petitioners. The labour officer’s claim that he was only but an investigator is contradicted by the clear evidence on record. In denying that he was not a prosecutor, the labor officer was running away from the obvious fact that his case was deemed to fail for he could not act both as the investigator and the prosecutor in the same matter. The roles of an investigator and a prosecutor are different and cannot be performed by one person in respect of a given case. In the instant case therefore, the labour officer’s decision to investigate the alleged offences and then proceed to prosecute them amounted to an abuse of the legal process. The labour officer being the investigator could only be a witness and not a prosecutor. This should put to the sword the Respondent’s case before the magistrate’s court.

36. There was also the submission by the petitioners that apart for count 2, the other two charges are unknown to the law. The Respondent’s case is that these are issues that ought to be addressed before the trial court.

37. The Respondent’s submission does not hold water since the Constitution provides at Article 50(2)(n) that:

“50(2) Every accused person has the right to a fair trial, which includes the right to –

...

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not –

(i) an offence in Kenya; or

(ii) a crime under international law.”

38. Where a person is charged for committing an offence unknown to the laws of the land, such a person is, as a matter of right, entitled to move this court to protect his constitutional liberties by discharging the yoke of undesired criminal proceedings. The DPP cannot then say that the trial court will determine whether such an offence exists. In fact it is an affront to the rule of law for the DPP to charge a person with a non-existent offence and require the person to undergo a full trial only for the trial court to hold that the charge is not premised on any law. In such an instance, this court will hold that the DPP has abused the legal process thus acting in contravention of Article 157(11) of the Constitution.

39. The question then is whether the provisions under which the petitioners were charged created any offence. In count 1 the charge framed is that of **“failing to provide an employee to whom the provisions of the Employment Act 2007, Laws of Kenya applies, with a condition of employment as prescribed in sections 37(2) of the Employment Act 2007, Laws of Kenya as read together with Section 88 of the same Act.”** In count 2 the petitioners are charged with **“failing to provide an employee to whom the provisions of the Employment Act 2007, Laws of Kenya applies with a condition of employment as prescribed in sections 51(1) as read together with Section 88 of the same Act.”** Finally in count 3 they are charged with **“failing to provide an employee to whom the provisions of the Employment Act 2007, Laws of Kenya applies, with a condition of employment as prescribed in Section 20(1) as read together with Section 88 of the same Act.”**

40. Section 37 of the Employment Act, 2007 states:

“37. Conversion of casual employment to term contract

(1) Notwithstanding any provisions of this Act, where a casual employee—

(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

(b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.

(2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.

(3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.

(4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.

(5) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 87 of this Act shall apply.”

41. Section 51 provides that:

“51. Certificate of service

(1) An employer shall issue to an employee a certificate of service upon termination of his employment, unless the employment has continued for a period of less than four consecutive weeks.

(2) A certificate of service issued under subsection (1) shall contain—

(a) the name of the employer and his postal address;

(b) the name of the employee;

(c) the date when employment of the employee commenced;

(d) the nature and usual place of employment of the employee;

(e) the date when the employment of the employee ceased; and

(f) such other particulars as may be prescribed.

(3) Subject to subsection (1), no employer is bound to give to an employee a testimonial, reference or certificate relating to the character or performance of that employee.

(4) An employer who willfully or by neglect fails to give an employee a certificate of service in accordance with subsection (1), or who in a certificate of service includes a statement which he knows to be false, commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding six months or to both.”

42. Finally, Section 20(1) states that:

“20. Itemised pay statement

(1) An employer shall give a written statement to an employee at or before the time at which any payment of wages or salary is made to the employee.

(2) The statement specified in subsection (1) shall contain particulars of—

(a) the gross amount of the wages or salary of the employee;

(b) the amounts of any variable and subject to section 22, any statutory deductions from that gross amount and the purposes for which they are made; and

(c) where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment.

(3) This section shall not apply to a casual employee or an employee engaged on piece-rate or task-rate terms or for any period not exceeding six months.

(4) The Minister may exclude any category of employees or employees employed in any sector from the application of this section.”

43. In order to further understand Section 37, it is important to reproduce section 87 referred to in that Section. It states:

“87. Complaint and jurisdiction in cases of dispute between employers and employees

(1) Subject to the provisions of this Act whenever—

(a) an employer or employee neglects or refuses to fulfill a contract of service; or

(b) any question, difference or dispute arises as to the rights or liabilities of either party; or

(c) touching any misconduct, neglect or ill-treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court.

(2) No court other than the Industrial Court shall determine any complaint or suit referred to in subsection (1).

(3) This section shall not apply in a suit where the dispute over a contract of service or any other matter referred to in subsection (1) is similar or secondary to the main issue in dispute.”

44. Section 88 provides the general penalty for offences committed under the Act by stating that:

“88. General penalty and offences under other laws

(1) A person, other than a child, who commits an offence under this Act, or contravenes or fails to comply with any of the provisions of this Act for which no penalty is specifically provided shall be liable to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding three months or to both.

(2) Nothing in this Act shall prevent an employer or employee from being proceeded against according to law for an offence punishable under any other law in force.

(3) No employer or employee shall be punished twice for the same offence.”

45. As correctly submitted by the petitioners, sections 37(2) and 20(1) of the employment Act do not create any offences. Section 3 of the Interpretation and General Provisions Act, Cap. 2 defines an offence as:

“a crime, felony, misdemeanor or contravention or other breach of, or failure to comply with, any written law, for which a penalty is provided.”

46. One of the components of an offence is a penalty. In the said two sections, no penalty is provided and neither is there a statement that failure to comply with the provisions will amount to the commission of an offence.

47. Although Section 51 does indeed create an offence as admitted by the petitioners, the said provision is self-contained as sub-section (4) provides the punishment. In citing the general penalty provision (Section 88(1)) the prosecutor ended up confusing the petitioners as that provision has a different penalty from that provided by Section 51(4). The charge as drafted was therefore defective.

48. The end result is that the petitioners’ prosecution was commenced in contravention of the Constitution. The prosecution was not brought in the public interest and to sustain it will lead to the distrust of state organs by members of the public.

49. Although the petitioners prayed for conservatory orders it is clear that they seek judicial review orders. These are orders available under the Constitution. An order of certiorari shall thus issue removing to this court and quashing the proceedings in Malindi Chief Magistrate’s Court Criminal Case No. 54 of 2017 in which the petitioners are named as the accused persons. The Respondent is prohibited from commencing any other prosecution based on the investigations conducted by Moses Kirera against the petitioners.

50. The petitioners’ prosecution was not necessary in the first place. Had the Respondent taken time to review the evidence, he would have found that the alleged indiscretions on the part of the petitioners did not amount to criminal offences and ought to have been dealt with using the other avenues provided by the law. The Respondent’s actions must be discouraged and the only way to do that is by ordering that the Respondent meets the petitioners’ costs. It is so ordered.

Dated, signed and delivered at Malindi this 23rd day of May, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT