



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 1 OF 2017

IN THE MATTER OF ARTICLE 22 AND 23 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF AN ALLEGED DENIAL, VIOLATION, CONTRAVENTION INFRINGEMENT AND/OR THREATENING OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 50 (1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURES RULES, 2013

AND

IN THE MATTER OF SECTION 42 (1) AND 43 (1) OF THE TRAFFIC ACT CAP 403 LAWS OF KENYA

AND

IN THE MATTER OF SECTION 89 (5) OF THE CRIMINAL PROCEDURE CODE CAP 75 LAWS OF KENYA

AND

IN THE MATTER OF NAIVASHA CHIEF MAGISTRATE’S COURT TRAFFIC CASE NUMBER 5867 OF 2016, REPUBLIC – VERSUS- STANLEY KIHICO MUTUNGU

-BETWEEN-

STANLEY KIHICO MUTUNGU.....PETITIONER/APPLICANT

VERSUS

THE NAIVASHA DIVISIONAL TRAFFIC BASE OFFICE.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

THE NAIVASHA CHIEF MAGISTRATE’S COURT.....3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....4TH RESPONDENT

R U L I N G

1. By a Notice of Motion dated 11/09/2017, the Applicant herein sought the following orders:

“a)

a)

b) That pending the hearing and determination of the Petition filed herein, there be a stay of proceedings in the Naivasha Chief Magistrate's Traffic Case Number 5867/2016, Republic –vs- Stanley Kihiko Mutungu.

c)"

2. The subject of this application is **Traffic Case No. 5867 of 2016** wherein the Petitioner/ Applicant, Stanley **Kihiko Mutungu** faces a charge of exceeding the maximum prescribed speed limit for a class of motor vehicles, contrary to Section 42(1) as read with section 43(1) of the Traffic Act Chapter 403 Laws of Kenya. the applicant swore a supporting affidavit on his own behalf. The Application is premised on grounds on the face of the Application

The Applicant's Case

3. The Applicant swore a supporting affidavit. Therein, he deposed that he was charged for exceeding the maximum speed limit in respect of a motor vehicle, and that, prior to taking plea, his advocate filed a preliminary objection that the charge sheet was fatally defective.

4. He further stated that under Section 70(5)(a) of the Traffic Amended Act No. 37 of 2012 and pursuant to Legal notice No. 163 of 2012, he would not have committed any offence as the law prescribes and creates a tolerance speed allowance of 20 km/h over and above the prescribed 100km.

5. He further stated that his request to the trial court seeking to be furnished with evidential materials was dismissed. Lastly, he averred that if the Respondents are allowed to prosecute the subject case, his rights and liberties as guaranteed under Articles 27, 47 and 50 of the Constitution will be violated.

The 2nd Respondent's Case

6. The 2nd Respondent (the DPP) filed their grounds of opposition stating that the application is misconceived and does not meet the requisite threshold for the court to grant the orders sought and that the orders sought are contrary to the provisions of Article 157 of the Constitution and Section 6 of the ODPP Act both which safeguard the powers of the DPP.

The Parties' Submissions

7. The gist of the Petitioner's application, if I understand it, is double -pronged. It is his position that the charge sheet in the impugned proceedings is defective as it does not disclose an offence. Because, the charge particulars indicate that he was, at the time of the alleged offence, driving a Mercedes Benz, a private saloon car, that is not subject to the provision creating the offence charged. In his view, the correct provision under which the charge ought to have been brought is Section 70 (5A)(a) of the Traffic Act, which is in regard to the violation of the prescribed maximum speed limit on a road.

8. The applicant submitted that his petition has high chances of success and if the prayers sought are not granted, the petition will be rendered nugatory. Besides, he will be exposed to prejudice *via* the abrogation of his constitutional right.

9. Secondly, that the Petitioner's right to a fair trial under Article 50 (2) is in jeopardy, the trial court having rejected his request to be supplied with certain evidentiary material necessary for the preparation of his defence.

10. Thus in his view, if the impugned trial is not stayed, his right to fair trial and to equal protection of the law will be abrogated. He relied on the decision of **Kimaru J in Criminal Revision No. 160 of 2016 Ankush Manoj Shah -Vs- Republic [2016] eKLR**. He argues that he has made a case for the granting of conservatory orders in accordance with Article 23 of the Constitution. He also placed reliance on the case of **Michael Osundwa Sakwa -Vs- Chief Justice and President of Supreme Court of Kenya & Another**.

11. It was submitted that the issues raised in the petition are of great public interest. He quoted the case of **Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another (2016) eKLR** which discusses the question related to the grant of conservatory orders

12. For the **DPP** Mr. Mutinda relied on the Grounds of Opposition and argued that the application does not meet the required threshold for the granting of Conservatory Orders. That the correct exercise of the mandate of the **DPP** under Article 157 of the Constitution and the ODPP Act is not subject to direction regarding prosecution. In his view the Applicant has not demonstrated a prima facie case of prejudice likely to be suffered through the alleged violation of his rights.

13. The **DPP** cited two decisions of the Court of Appeal, namely, **Ramji -Vs- DPP [2014] eKLR** and **Goddy Mwakio & Another -Vs- Republic [2011] eKLR**.

Analysis and Determination

14. The principles that guide the exercise of the court's discretion in granting conservatory orders were eruditely set out in the case of **Kenya Small Scale Farmers Forum -Vs- Cabinet Secretary Ministry of Education, Science and Technology NBI Petition No. 399 of 2015 [2015] eKLR** where the court stated:-

“[21]The principles which govern a court considering an application for interim or conservatory relief [are considered] to be the following:

The applicant ought to demonstrate a prima facie case with a likelihood of success and that he is likely to suffer prejudice as a result of the violation or threatened violation if the conservatory order is not granted: see Centre for Rights Education and Awareness & 7 Others –v- The Attorney General HCCP No. 16 of 2011. It is not enough to show that the prima facie case is potentially arguable but rather that there is a likelihood of success: see Godfrey Mutahi Ngunyi –v- The Director of Public Prosecution & 4 Others NBI HCCP No. 428 of 2015 and also Muslims for Human Rights and Others –v- Attorney General & Others HCCP No. 7 of 2011.

The grant or denial of the conservatory relief ought to enhance constitutional values and objects specific to the rights or freedoms in the Bill of Rights: see Satrose Ayuma & 11 Others –v- Registered Trustees of Kenya Railways Staff Benefits Scheme [2011] eKLR and also Peter Musimba –v- The National Land Commission & 4 Others (No. 1) [2015] eKLR.

If the conservatory order is not granted, the Petition or its substratum will be rendered nugatory: see Martin Nyaga Wambora –v- Speaker of the County Assembly of Embu & 3 Others HCCP No. 7 of 2014.

The Public interest should favour a grant of the conservatory order: see the Supreme Court of Kenya’s decision in Gatirau Peter Munya -Vs- Dickson Mwenda Githinji & 2 Others [2014] eKLR.

The circumstances dictate that the discretion of the court be exercised in favour of the applicant after a consideration of all material facts and avoidance of immaterial matters: see Centre for Human Rights and Democracy & 2 Others -Vs- Judges and Magistrates Vetting Board & 2 Others HCCP No. 11 of 2012 as well as Suleiman -Vs- Amboseli Resort Ltd [2004] 2 KLR 589.

[...]I would perhaps add as was correctly pointed out by Mr. Ngatia that whilst exercising my discretion I must balance the conflicting positions taken by the parties and, as may be necessary, invoke the doctrine of proportionality: see also Odunga J in Kevin K Mwititi & 2 Others -Vs- Kenya School of Law & 2 Others [2015] eKLR.”

15. With these principles in mind, I have examined the material presented by the Applicant in supporting his application. As to whether a prima facie case has been made out, I note that charge sheet in the lower court which the Applicant impugns as defective states that the Applicant stands charged with the offence of Exceeding speed limit for class of vehicle contrary to Section 42 (1) as read with Section 43 (1) of the Traffic Act. The particulars state that:-

“Stanley Kihiko on 3rd day of (October) 2016 at 6.45am along Nairobi – Naivasha road in Naivasha town of Nakuru County, being the driver of Motor vehicle registration number KAG 385T Mercedes Benz drove the said vehicle Exceeding speed limit by Driving at 110KPH instead of 100 KPH.” (sic)

16. The above offence relates to exceeding speed limit set for a class of motor vehicle. From the arguments raised by the Applicant before the trial court during plea, and before this court, it seems that the bone of contention is whether the Applicant’s vehicle has a prescribed tolerance speed limit and related thereto, whether the vehicle stated in the charge is a PSV or a private saloon vehicle. These are matters of evidence and cannot be determined at this stage. It is noteworthy that, contrary to the Applicant’s submissions, the charge sheet does not describe the Applicant’s vehicle as a “mercedez benz saloon car”. Besides whether or not a charge discloses an offence should be self-evident, on the face of the charge sheet itself.

17. For these reasons, I am unable to follow the Applicant’s reasoning for the submission that the charge sheet is defective. Whether the Applicant ought to have been charged under Section 70 (1A) as read with Section 70 (5A)(a) of the Traffic Act is not for this court to decide.

18. Suffice to say that, as drafted, the impugned charge sheet on the face it is properly laid and whether or not the offence is proved will be determined by the trial court based on the evidence adduced at the trial.

19. On the question of the alleged violation of the Appellant’s right to a fair trial, the Applicant has expressed displeasure with the trial court’s statement to the effect that it could not give directions to the DPP concerning the matter of certain evidentiary items sought by the Applicant, for the stated purpose of preparing for the trial.

20. Generally speaking, when the DPP is properly exercising his mandate under Article 157 of the Constitution and the ODPP Act, he is not subject to the direction or control of any person or authority. Thus, it is the responsibility of the DPP to decide on the nature of evidence to call at the trial. However, the Accused may in furtherance of his rights under Article 50 of the Constitution apply to have certain evidence in the possession of the DPP or witness tendered at the trial. Equally, under Section 150 of the Criminal Procedure Code, the trial court has the discretion to call any witness deemed necessary. Article 50 (2) c) provides that an Accused person is entitled to have adequate time and facilities to prepare his defence.

21. In his address before the trial on 20th March, 2017, the Applicant had through his counsel sought *inter alia* “**witness statement documents, evidence of prescribed maximum speed limit of the motor vehicle registration number KAG 385T, evidence of a mark in the prescribed form indicating maximum speed permitted speed, traffic regulations authorizing erection of speed limit signage, photographic evidence of erection of road signage, speed gun, KBS specification in respect of speed gun, print out of speed gun.....gazette notice(s)(in respect of) operationalizing the use of speed gun and road block.....and appointment of police officer incharge of a road block.....”**

22. Obviously taken aback by the nature of the request, the prosecution responded by stating that whereas they would supply witness statements and print outs intended for the case, the defence could not dictate the evidence the prosecution would be relying on as it was not their business to help the defence make its own preparation. In the ruling delivered on 15th May 2017, the court agreed with the position taken by the **DPP** and observed that the **DPP** can only supply the material they intended to rely on. She declined to order the production of the speed gun as it would hamper the operation of the traffic officers. She however ordered the prosecution “**supply witness statements and any extractible evidence**” which they would be relying on.

23. It is not clear exactly what evidentiary material had been supplied to the defence by the time of approaching this court in September 2017 and how it falls short of the constitutional minimum in Article 50(2)(c). Have the witness statements and extractible material been supplied? I must say that even upon a cursory interpretation of Article 50 (2) of the Constitution, and without determining the matter, the interpretation pressed by the Applicant appears rather lavish. From the list of demands made in the lower by the Applicant, it is not clear what material exactly was necessary and required beyond what the court directed be supplied, its relevance or even whether it was in existence. For instance, *‘evidence of prescribed maximum speed limit of the motor vehicle registration number KAG 385T, evidence of a mark in the prescribed form indicating maximum permitted speed, traffic regulations authorizing erection of speed limit signage’*.

24. The latter appears to anticipate an offence of exceeding maximum speed *on a road* rather than an offence relating to the violation of *specified vehicle tolerance speed*, which is the charge in this case. And what is the justification for an Accused person who is represented by counsel in a trial to demand that the DPP provides him with traffic regulations on the erection of speed limit signage and a speed gun for purposes of preparing for a trial?

25. The trial court correctly observed that the Accused was entitled to any material which the DPP proposed to rely on in the trial and ordered that witness statements and extractible evidentiary material be supplied to the defence. Under the constitutional guarantee to fair trial, the **DPP**’s duty of full disclosure remains throughout the trial; he cannot introduce any material in the trial without supplying it to the defence and in advance. The test in Article 50 (2) c) is whether material furnished is adequate for preparation of a defence. There is no *prima facie* evidence at this stage that witness statements and extractible material provided to the defence or to be provided in line with the trial court’s order may not be adequate for the preparation of the defence. In my view, the Petitioner’s claims appear tenuous and contrived.

26. It must be stated, finally, that a criminal trial always entails a degree of inconvenience and burden to the Accused person. However, a criminal trial is the method by which the guilt or innocence of the Accused person is established. This is a constitutional prescription. The key rationale being that, it is in the public interest that those suspected of committing offences are called upon to answer for their actions, as provided in the Constitution and the law. An Accused person is however vindicated when the court eventually pronounces him not guilty, and if the prosecution case was one so frivolous as to be malicious, the affected person has a right to sue the state for damages.

27. There is no *prima facie* demonstration in the instant case that the Applicant herein will suffer any undue prejudice beyond what is expected in a normal trial. The direction by the trial court, declining to compel the **DPP** to supply the entire list of items demanded at the trial by the defence, cannot in the circumstances of this case be taken at *par* value as proof of likely prejudice; the danger of prejudice must be real not conjectural or farfetched. See the judgment of Mwongo J in **Martin Nyaga Wambora vs County Assembly of Embu and Others (2014) eKLR**. As always, public interest must be borne in mind as exhorted by the Supreme Court of Kenya in **Gatirau Peter Munya -Vs- Dickson Mwenda Kithinji & 2 Others SCK Case No.2B of 2014; [2014] eKLR**.

28. The Supreme Court the **Munya** case urged caution where a conservatory order is sought against a public agency carrying out functions in the normal course of its business, to avoid undue interference with and interruption of lawful functions of such a body. I have said enough, I think, to demonstrate that this application has no merit and is for dismissal. It is so ordered.

Dated and signed at Kiambu this 6th day of July, 2018

C. MEOLI

JUDGE

Delivered and signed at Naivasha, this 25th day of July, 2018

R. MWONGO

JUDGE

In the presence of: -

For the Petitioner/Applicant - Ms Kithinji holding brief for Stanley

For the 1st Respondent – Mr. Koima

For the 2nd Respondent – Mr. Koima

For the 3rd Respondent – Mr. Koima holding brief for Attorney General

Court Assistant – Ogutu