



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NO. 55 OF 2017**

**IN THE MATTER OF: ARTICLE NO. 22(1) AND 2 OF THE CONSTITUTION OF KENYA 2010 –**

**ENFORCMENT OF BILL OF RIGHTS OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ARTICLE 50 OF THE CONSTITUTION AND BILL OF RIGHT OF AN ACCUSED**

**AND**

**IN THE MATTER OF: ARTICLE 41 OF THE CONSTITUTION AS READ**

**WITH ARTICLE 47(1-3) ON FAIR ADMINISTRATIVE ACTION AND**

**ARTILE 73(2) A-E, 75 (1-3) ON INTEGRITY AND CONDUCT OF**

**STATE OFFIERS OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**JULIUS OKOTH NUDI.....PETITIONER**

**VERSUS**

**1. DIRECTOR OF PUBLIC PROSECUTIONS**

**2. DCIO MOMBASA**

**3. THE CHIEF MAGISTRATE MOMBASA.....RESPONDENTS**

**AND**

**1. HARON KIPLAGAT & OTHERS**

**2. AFRICA INLAND CHURCH (AIC) TUDOR.....INTERESTED PARTIES**

**JUDGMENT**

**The Petition**

1. By a petition filed herein dated 12<sup>th</sup> October, 2017 the Petitioner prays for prohibitory orders preventing the Chief Magistrate and the Director of Public Prosecutions from prosecuting or proceeding with **Chief Magistrate's Criminal Case No. 1237 of 2017 Republic vs. Julius Okoth Nudi** pending the hearing and determination of this petition. On 17<sup>th</sup> October, 2017 the parties herein consented to a

conservatory order staying the said criminal matter until the determination of this petition.

2. The Petitioner's case is that Article 41 of the Constitution confers the right to fair administration actions to any person affected by it. That Article 157 of the Constitution among others requires the Hon D.P.P to act in a manner that prevents the abuse of the court process and abuse of the powers and privileges of the office of the D.P.P. The Petitioner avers that he has been charged by the Chief Magistrate in Criminal Case number 1237 of 2017. The charge was presented to the court on the 14<sup>th</sup> August, 2017. However, the Petitioner was neither summoned nor brought to court and the court proceeded to issue a warrant of arrest which was again extended on the 29<sup>th</sup> August, 2017. The Petitioner avers that the clandestine manner in which the charges were brought to court was intended to put the Petitioner in a situation where he would be arrested and placed in custody in disregard to the Petitioner's rights under Article 39. The Petitioner thereafter learnt that the charges were laid maliciously and with the intention to embarrassing the Petitioner who is a pastor of the African Inland Church (AIC) Tudor. The Petitioner states that he is aware that some complaints were made purportedly on behalf of the church by some church members which members in fact according to him lacked authority to make any complaint on behalf of the church. The Petitioner's employer the AIC had as early as 5<sup>th</sup> April, 2017 informed the DCIO, Mombasa that they were not aware of any complaints and that the persons allegedly making the complaint did not have authority of the church.

3. The Petitioner avers that the office of the DCIO, Mombasa and the office of the D.P.P have allowed themselves to be used by a section of the church who are only hitting back after the church had taken disciplinary measures against them. The Petitioner avers further that later the DPP was informed by the church to drop the complaints but the DPP insisted in carrying on with the matter. The Petitioner avers that the actions of the DPP are full of malice and the decision to charge the Petitioner was clearly in bad faith.

4. The Petitioner prays for prohibition directing the Chief Magistrate and the D.P.P from prosecuting and further hearing of the matter before the Chief Magistrate and a direction that the matter be terminated. The Petitioner prays that this Petition be allowed and Orders granted quashing the decision to charge the Applicant / Petitioner and directing that the Petitioner be at liberty.

### **The Response**

5. The DPP opposed the petition vide Grounds of Opposition dated 6<sup>th</sup> November, 2017 stating *inter alia* that the Petition, as filed by the Petitioner is grossly incompetent as the same does not contain the grounds upon which it is premised and the reliefs sought; that the petition is bad in the law for it does not set out in sufficient details the alleged fundamental rights that have been infringed or that are likely to be infringed if the criminal matter was to proceed to hearing; that the petitioner is guilty of material non-disclosure and has presented himself before this court deceitfully without making full and frank disclosure of the fact that the learned Honorable Trial Magistrate has dealt with the issue of the suitability of the complaint and made a final determination on the same.

6. The petition therefore is an appeal for all intent and purpose; that the petition is full of conjecture and alleges malice in the decision to charge by the DPP without setting out the particulars of malice thus the same is incompetent, bad in law and ripe for striking out; that the learned Honorable Magistrate, having assumed jurisdiction over the matter, any dissatisfaction on the part of the Petitioner would only avail him a right of appeal which he has deliberately failed or refused to or neglected to pursue; that the petitioner is further guilty of concealing the fact that this matter has been the subject of litigation vide High Court Criminal Application No. 115 of 2017 and that he participated through counsel on 18<sup>th</sup> September, 2017 when he confirmed to the court that he had since been charged, and only sought for time to return to the court and confirm the position to the Honorable Judge for final disposal of the matter.

7. The Respondent's case is that this Petition is brought in bad faith and the Petitioner comes out as a litigant keen on forum shopping, and in view of the grounds set out above, and in order to obviate a situation of conflicting orders being issued by the High Court, this Petition should be dismissed *sua sponte* for want of subject matter jurisdiction upon the high Court gaining sight of the record Criminal Case No. 1237 of 2017 and High Court Miscellaneous Criminal Application No. 115 of 2017.

8. On their part the Attorney General has opposed the petition vide Grounds of Opposition filed herein on 6<sup>th</sup> November, 2017 stating *inter alia* that the application is misconceived, frivolous, vexatious and an abuse of the court process. The Attorney General states that Article 157 (10) of the constitution is clear and this court cannot injunct an institution from carrying out a mandate granted to it by the constitution and that the police are merely carrying out their obligation based on reports made to them and are not in any way acting maliciously.

9. The 1<sup>st</sup> Interested Party also opposed the petition through Preliminary Objection dated 6<sup>th</sup> November, 2017 on the grounds that the entire petition is frivolous and an abuse of court process. The Interested Party states that the issues raised in the petition herein were raised and argued in High Court Miscellaneous Application No. 115 of 2017. In the circumstances the 1<sup>st</sup> Interested Party states that the Petitioner's only recourse lies in an appeal and that by failing to bring before this court the proceedings in the High Court and before the 3<sup>rd</sup> Respondent, the Petitioner is guilty of non-disclosure of material facts.

### **Submissions**

10. The Petition was canvassed through oral submissions in open court. In the submissions parties highlighted their pleadings as stated above. **Mr. Magolo** for the Petitioner submitted that CM Criminal Case No. 1237 of 2017 was filed out of malice by both the Interested Party as complainant, and the DPP and the Attorney General as accomplices. Counsel submitted that the church, which would be the complainant herein, was not aware of the complaints against its pastor and has indeed disowned these proceedings. Mr. Magolo submitted that the criminal action is a mechanism being used by the Respondents to settle individual and personal disputes within the church and that this court should stop that injustice. Mr. Magolo submitted that despite the church writing to the DPP and explaining that they had no complaint against the Petitioner the DPP has insisted to charge and to prosecute the criminal action, thereby taking side in matters of criminal justice.

11. **Mr. Katate** for the church as Interested Party No. 2 submitted that the church is not interested in the criminal proceedings against its

pastor the Petitioner herein, and that the church had its own internal mechanism to settle the matter.

12. On its part **Mr. Muteti** for the DPP submitted that the petition does not meet the constitutional threshold and does not state what exactly it tries to achieve. Further, Mr. Muteti submitted that the Petition is not supported by an affidavit and is therefore incurably defective *ab initio*. Counsel further submitted that allegations of malice and bad faith alleged against the Attorney General and the DPP are not supported by particulars of malice and are therefore mere allegations which the court should discard. Mr. Muteti submitted that the DPP is prosecuting the criminal matter on two grounds. Firstly on the grounds of evidence which counsel said exists, and secondly on the issue of public interest. On the issue of public interest counsel submitted that the public interest is that church funds have allegedly been misused and this fact needs to be established in the criminal case.

13. Mr. Wameyo opposed the petition on grounds of form, stating that it took the form of a plaint and that the petition did not establish a justiciable constitutional cause. Further, counsel submitted that the allegations in the petition had no substance and that this court should allow any grievances in the petition to be addressed in the criminal case in the Chief Magistrate's Court.

### **The Determination**

14. I have carefully considered the petition and submissions. I raise the following issues for determination.

(i) Whether the petition raises constitutional issues.

(ii) Whether the said criminal case action is injurious to the rights of the Petitioner.

### **Whether the petition raises constitutional issues**

15. Both Mr. Muteti for the DPP and Mr. Mwandeje for the Attorney General and Mr. Wameyo for the 1<sup>st</sup> Interested Party submitted that the petition does not reach the threshold required for such petition. It was submitted that the petition does not disclose the rights suffered or threatened to be suffered and that the same is not supported by an affidavit and that the constitutional petition reads like a plaint. Mr. Magolo for the Petitioner refuted this claim and submitted that the petition raises justiciable issues.

16. I have considered the petition. On the face of it it reads like a plaint and indeed it does not clearly spell out the outstanding articles of the constitution which are alleged to have been breached or may be breached. Further, the petition is not supported by an affidavit. On this aspect Mr. Magolo submitted that the lack of Supporting Affidavit could be cured by Article 159(2)(d) which discourages use of technicalities to defeat justice. In my view, there is clear deficiency in the content of the petition which cries out for better pleading. As to whether the same should be struck out, the question this court should ask is what is the purpose of protection of fundamental rights and freedom, and for the benefit of whom? Is it for the best learned or also for the simple? If the answer is the former, then there is no need to have the Chapter for the Protection of Fundamental Rights and Freedoms in the constitution.

17. While this court retains the view that a constitutional petition must be clear and must spell out the rights suffered or to be suffered, this court will still listen to a party with a weaker voice who can still demonstrate to the satisfaction of the court, that apart from form, his rights are being abrogated and that indeed he has or is likely to suffer breach of a fundamental right or freedom. Now, in this case, the Petitioner at the same time came to court with an application seeking for conservatory orders pending the hearing of the petition. Those orders were given on 17<sup>th</sup> October, 2017 and subsist to date. That application was supported by affidavit of the Petitioner in which the Petitioner laid bare to this court how his fundamental right and freedom were allegedly being breached by the Respondents through the aforesaid criminal case. Mr. Mwandeje for the Attorney General has submitted that since the application was spent upon it being granted, the affidavit in support thereof should not be used to support the petition herein.

18. Mr. Magolo objected, rightfully in my view, stating that the said supporting Affidavit is part and parcel of the petition. Further in my view the said affidavit is the premise upon which the conservatory orders herein were granted, making it necessarily one of the legs upon which the petition rests. This court will therefore rely on the said Supporting Affidavit.

19. From the pleadings in this matter, it is clear that the Petitioner works as a Pastor at the Africa Inland Church, Tudor and the church is a bit divided on many issues. There is evidence that in the month of June, 2017, the church conducted a Clinic sponsored by the Africa Inland Church International Hospital (CURE). To pay for the cost, money was sent to the Petitioner directly as the Pastor in charge which money was used to pay for the expenses in the clinic. Later it appears that some members of the church claiming to represent the church went and made a report to the DCIO, Mombasa claiming that money should not have been sent through the Petitioner's account and that there could have been a misappropriation. The Petitioner alleges that he only learnt of this when he was informed by the Police who were looking for him. In the meantime, the church council met and resolved that a letter be written to the DCIO indicating that the church had no complaints and any report made by individual church members may have been misguided. However, it appears that the police had not acted on the letter because later a letter had been written by the DCIO, Mombasa claiming theft of funds and asking why payment was made directly to the Petitioner and not to the church. What is also notable is that the said police request was not made regularly but instead emailed through the account of Haron Kiplagat who is one of the complainants in the said criminal case and also one of the Interested Parties herein.

20. The evidence attached in the Supporting affidavit of the Petitioner indicates that there was an intention to have Petitioner arrested and rushed to court to seek bond. However, as the Petitioner was attending before the High Court, a charge had been stealthily registered before the Chief Magistrate and a Warrant of Arrest issued without notifying the Petitioner and with the aim of having him arrested and placed in custody. See the Charge Sheet marked 'JON-8' and Court Proceedings marked 'JON-9'. The Petitioner then later informed the court that he had all along been on bond to the knowledge of the D.P.P and the Police and that the issue of Warrant of Arrest was clearly obtained without disclosure. Further, the Petitioner informed the Office of the DPP about the irregularities of the complaint made against him. See letter to the D.P.P marked "JON-10".

21. It is clear that the person who complained against the Petitioner had also been subjected to Disciplinary Proceedings of the church. See the letter confirming the disciplinary together with the minutes marked 'JON-11' and 'JON-12'. All these issues were brought to the attention of the D.C.I.O. See a copy of the letter marked 'JON-13' addressed to D.C.I.O. by Petitioner's advocate. In the meantime, the complainants made an Application to the High Court and in the file where the Petitioner had been granted bond, seeking to not only have the terms of the bond altered but also an injunction to prevent the Petitioner from proceeding with his work. See a copy of the Application marked 'JON-14'.

22. From the above it is clear that the persons complaining simply wanted to use the Court to have the Petitioner suspended or interdicted or sacked from his work. It is clear also that this is a matter where the court and the Office of the D.P.P and the Police are being used for the purposes of personal vendeto and to settle scores in church.

23. It is the finding of this court that the aforesaid criminal matter before the Chief Magistrate Court was not well conceived. In every criminal matter there must be a complainant. In the said criminal matter the complainant is not the church. Instead, the complainant is a member of the church whom the church itself had disciplined, and is indeed under discipline. It is not clear to me how the DPP could in all fairness proceed with prosecuting the matter when clearly the issue involved warring parties in a church and the complainant is himself under the discipline process of the church. This was one prosecution which was not well thought out. Even after the church asked to be allowed to solve the matter in house, the DPP still insisted on proceeding with the matter. If the Chief Magistrate's Court Criminal Case No. 1237 of 2017 were to proceed, the end result would be a denial of right to fair trial. The said criminal case cannot guarantee the right to fair trial. That case must be and is hereby terminated.

24. Parties in this matter had all the opportunity to settle this matter in-house. They all refused, even after the court gave them time to consider that option. They have vigorously prosecuted and defended the petition. This is why I have no option but to give costs of the petition to the Petitioner to be paid by the Respondents and the 1<sup>st</sup> Interested Party.

Orders accordingly.

**Dated, Signed and Delivered at Mombasa this 24<sup>th</sup> day of July, 2018.**

**E. K. OGOLA**

**JUDGE**

In the presence of:

Mr. Magolo for Petitioner

Mr. Mwanjeje for 3<sup>rd</sup> Respondent

Mr. Jami for 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Mr. Wameyo for Interested Parties

Mr. Kaunda Court Assistant