



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

PETITION NO. 1 OF 2018

IN THE MATTER OF THE ARTICLE 2(1), 4(2), 10, 19, 20, 21, 22, 23, 25, 27, 29,

47, 48, 59, 157, 159, 165, 258 & 259 OF THE CONSTITUTION OF KENYA 2010.

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOM

UNDER ARTICLES 25, 27, 29, 47, 48 AND 50 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE FOODS, DRUGS AND CHEMICALS

SUBSTANCES ACT, CAP 254 LAWS OF KENYA.

AND

IN THE MATTER OF THE EAST AFRICAN COMMUNITY

CUSTOMS MANAGEMENT ACT, 2004

BETWEEN

LINUS KURGAT.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE CHIEF MAGISTRATE'S COURT - CHUKA.....2ND RESPONDENT

R U L I N G

1. **LINUS KURGAT**, the Petitioner/applicant herein has moved this court vide a Notice of Motion dated 30th July, 2018 brought under Articles 1, 2, 4, 10, 19, 20, 21, 22, 23, 25, 27, 29, 47, 50, 157, 159, 258 and 259 of the Constitution of Kenya 2010 asking for the following reliefs.

(i) That this application be certified urgent and heard exparte in the first instance (spent).

(ii) That this honourable court be pleased to issue conservatory order staying proceedings in Criminal Case No.677/2018 (**Republic - vs- Linus Kurgat**) at the **Chief Magistrate's Court Chuka** pending the hearing and determination of this application.

(iii) That this honourable court be pleased to issue conservatory orders staying proceedings in Criminal case No.677/2018 at the Chief Magistrate's court in Chuka pending the hearing and determination of the petition herein.

2. The grounds for this application are as follows:-

(a) That on 22nd June, 2018 the Petitioner was charged before the Chief Magistrate's court at Chuka with the following counts namely;

(i) Count 1- Selling unwholesome food unfit for human consumption contrary to **Section 3 (b)** as read with **Section 36(1)** of Foods, Drugs and Chemical substance Act Cap 254 Laws of Kenya.

(ii) Count 2- Being in possession of uncustomed goods contrary to **Section 200 (d) (iii)** of the East African Customs Management Act, 2004.

(b) That the Kenya Bureau of Standards or any other body has not conducted any tests on the food alleged to have been unwholesome and unfit for human consumption which the petitioner is alleged to have been selling.

(c) That the customs Department of the Kenya Revenue Authority has not claimed duty had not been paid on the goods found in possession of the applicant.

(d) That the criminal charges have therefore been preferred without any investigation or reasonable inquiry rendering the proceedings before the Chief Magistrate's Court at Chuka a gross abuse of the process of court.

3. The applicant has supported the above grounds with his supporting affidavit sworn on 30th July, 2018 where he reiterated the above grounds adding that K.R.A (Kenya Revenue Authority) has not complained that the goods he was dealing with were not customed. He further alleges that no tests have been carried out on the goods to establish if they are unfit for human consumption. He complains that he was arraigned in court on 22nd June, 2018 before investigations in this view were completed.

4. In his view the charges preferred against him are baseless without any justification, unprocedural and a gross abuse of court process. In his view, investigations are to be conducted with a view to sustaining his prosecution which has already began and in the process breach his rights to a due process and equal benefit of the law. In his contention, if the criminal case commences against him before Chief Magistrate's Court Chuka, his right to due process, freedom and security of his person, fair and equality before the law will be violated, infringed and/or denied.

5. In his submissions through learned counsel, the applicant submitted that he would be highly prejudiced if the criminal case proceeds before his petition is heard and determined. It was contended that so far the Respondent has not made any response to the petition herein therefore his chances of success are high because the issues he has raised in his petition are uncontested.

6. The 1st Respondent has opposed this application vide a Replying Affidavit by Cpl Benjamin Some who is the investigating officer in the criminal case against the Petitioner/applicant. The Replying Affidavit was sworn on 13th August 2018 and the investigating officer has deposed that following a tip off on 19th June, 2018 a Multi Agency Team comprising of Kenya Revenue Authority, Kenya Bureau of Standards, Public Health, National Intelligence Services and National Police Services conducted a raid at a business premises within Chuka Town namely Option One Distributors East Africa Ltd where they found 644 bags of 50 Kg of brown sugar, 21 packets of 1 kg of Tupike maize Flour which had an expiry date of 8th April, 2018, and 12 packets of Obama Wheat Flour with an expiry date of 30th April, 2018.

7. The investigating officer has further deposed that the Public Health Officer ascertained in writing that the 21 packets of Tupike Maize Flour and 12 packets of Obama Wheat Flour were unfit for human consumption.

8. The investigating officer has further deposed that officers of Kenya Bureau of standards (KEBS) and Public Health Officials also took samples of the sugar seized for laboratory testing and that they are awaiting results adding that they have not preferred any charges regarding the contents of the samples recovered.

9. The 1st Respondent through learned counsel contended that contrary to the applicants submissions, the investigations regarding the two counts facing the applicant are complete and were completed before charges were preferred in count 1 and 2 adding that the foods were found to be unfit for human consumption and that the same disclosed that a crime had been committed and whether the evidence they have is weighty or not will be determined by the trial court and that the applicant will have his day in court.

10. The 1st Respondents has denied breaching any constitutional right of the applicant and contends that he was treated with respect and arraigned in court within 24 hours upon his arrest. They have also denied that that action was prompted by malice and that proceeding with the trial will not prejudice the applicant in anyway.

11. This court has considered the application the grounds upon which it is brought and the opposition made. This court has been called upon to intervene in criminal case facing the applicant in ***Chuka Chief Magistrate's Criminal Case No. 677/2018*** on account of alleged infringements of constitutional rights of the applicant. This court well aware that there is a pending petition will be a bit guarded in its pronouncements in order to protect the rights of the applicant and the 1st Respondent in the petition pending for hearing. Suffices to say that while in the past a party could only challenge a decision reached or made by a public body or a statutory body through Judicial Review, the Constitution of Kenya 2010 under **Article 23** has expanded remedies that were hitherto only available only through Judicial Review to include remedies available through constitutional petitions. These remedies are available to a party who feels that any of his constitutional rights has either been violated or likely to be violated.

12. In this application the applicant feels that his constitutional rights were violated in that he has been unfairly prosecuted over case the prosecution has in view no evidence, a claim that has been denied in equal measure by the Respondent. It is trite that the office of Director of the Public Prosecution is constitutionally mandated under **Article 157** to institute criminal proceedings against anyone and does not

require consent of any person or authority to commence such prosecution. Of course the decision to arraign one to court should be in accordance with the law and not capriciously made with ulterior motive other than to attain a lawful end. This court has a discretion to intervene if a party can establish that indeed the prosecution is actuated by malice or is made with ulterior motives.

13. It is always incumbent upon a party alleging infringements of constitutional right or any legal right to satisfy the court that the discretion given to the Director of Public Prosecution to prosecute has been abused and ought to be interfered with. This was expounded in the case of **KURIA & 3 OTHERS -VS- ATTORNEY GENERAL [2002]2 KLR** where the court held as follows:-

" The court has power and indeed duty to prohibit the continuation of the criminal prosecution if extraneous matters devolved from the goals of justice guide their instigation..... A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should be only granted where there is an abuse of the process of the law which will have the effect of stopping the prosecution already commenced there should be concrete grounds for supposing that continued prosecution of a criminal case manifests an abuse of the judicial procedure much that the public interest would be best served by the staying of the prosecution..... In the instant case there is no evidence of malice, no evidence of unlawful actions no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial as provided"

14. The applicant herein has stated that he was arraigned in court to face the cited criminal charges but he has not alleged that his rights as an accused person were, violated or that he is unlikely to get a fair trial. His fears that the prosecution are still conducting investigation to get sufficient evidence to nail in the criminal trial has been allayed by the prosecution who have stated that in so far as the charge facing the applicant, is concerned, investigations are complete and have exhibited a report from public health officer certifying that the food samples taken from the applicant revealed that they were unfit for human consumption. In my considered view the veracity or the quality of the evidence to be used by the prosecution against the applicant will be determined by the trial court because that is the court competent to try the same. It is not in the public interest to halt the criminal trial at this stage because the applicant has not satisfied this court that any of his constitutional right will be violated in the trial. The investigating officer has deposed that they carried out a raid in the applicant's store and came up with what they believe is sufficient evidence to sustain a criminal charge in court. In **Republic -vs- Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR**, it was held;

"..... the police have a duty to investigate on any complaint once a complaint is made, indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court..... As long as the prosecution and those charged with the responsibility of making the decision to charge act in a reasonable manner, the High Court could be reluctant to intervene."

It is common knowledge and indeed this court takes judicial notice of the recent trends regarding hue and cry about the influx of contraband goods and substandard good into Kenyan market with most goods being found to be contaminated and unfit for human consumption. When the police and other government agencies act in the interest of the public they should be allowed to go ahead with their job unless someone shows that the powers or discretion conferred by law have been abused. Based on what has been presented before me this court does not find any basis to warrant its intervention in the ongoing trial. As submitted by the Respondent, there is no basis to find that the rights of the applicant as enshrined in the constitution have been violated or are likely to be violated in the criminal trial. I also find that he will suffer no prejudice if the prosecution proceeds as he pursues his rights to be heard in the main petition pending. He will have his day in court in both instances.

In the premises, this court finds no merit in the Notice of Motion dated 30th July, 2018. The same is dismissed with costs.

Dated, signed and delivered at Chuka this 31st day of October, 2018.

R.K. LIMO

JUDGE

31/10/2018

Ruling dated, signed and delivered in the presence of Machirah for Respondent and in the absence of the applicant and his counsel.

R.K. LIMO

JUDGE

31/10/2018