



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 402 OF 2017

ANDREW OKOTH ONANDA.....PETITIONER

VERSUS

THE INSPECTOR GENERAL POLICE.....1ST RESPONDENT

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

THE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. **Andrew Okoth Onanda**, the Petitioner, is an Insurance Agent. He was arrested on 20th July 2017 and charged with the offences of obtaining money by false pretences and forgery in criminal case No.1349 of 2017 which he contends was intended to force him to admit and enforce a civil debt. The petitioner also states that he was detained at Central Police Station beyond the constitutionally permitted period of 24 hours with the aim of forcing him to confess to charges he had no idea about.

2. The petitioner contends that the charges he is facing are non-existent, since the civil transaction took place in 2016 while the charges are based on issues of 2017. He also contends that the charges of forgery could not have been done by him. He avers that he was arrested, harassed and charged before investigations had been conducted; that the complainant's Advocates had sent demand letters with a view to recovering the civil debt and that he is being forced to take plea in charges he was not party to.

3. The contends, therefore, that the respondents' actions violated his fundamental rights and freedoms and based on those facts, he has filed a petition dated 17th August 2017 and sought the following reliefs.

a. A declaration that the inception and the subsequent prosecution of the applicant in criminal case No 1349 of 2017 is unconstitutional

b. An order of permanent injunction prohibiting the respondents either by themselves or their agents from charging, prosecuting, harassment and malignment of the petitioner basing on trumped up charges contained in Criminal Case No 1349 of 2017,

c. An order of compensation directed against the respondents jointly and severally for the gross and egregious violation of the petitioner's fundamental rights and freedoms.

d. Costs of this petition.

e. Any other relief or orders that this honorable court shall deem just and fit to grant.

1st and 3rd Respondents' response

4. The 1st and 3rd respondents filed grounds of opposition dated 6th October 2017 and filed in court on 9th October 2017, contending that the application and petition were instituted in bad faith; that the court's jurisdiction has been abusively and prematurely invoked; that the petition is asking the court to enter with the realm of criminal trial process; that the petition is full of conjecture and unsubstantiated allegations against the respondents and that the petitioner has failed to demonstrate to the required degree which fundamental rights and freedoms had been violated.

5. The respondents further contend that the petitioner has not demonstrated which law had been violated or breached by either the respondents or the trial court and what prejudice he will suffer if he under goes trial. The respondents again contend that there is another ***Petition No 370 of 2017 Andrew Okoth Onanda v The OCS Central Police Station & Attorney General*** which is still pending.

Petitioner's submissions

6. **Mr. Munyua**, learned counsel for the petitioner submits highlighting their written submissions dated 12th March 2018 and filed in court on 13th March 2018, that the 1st respondent has abused his powers and discretion conferred by Article 157(6) of the Constitution; that the DPP has not acted properly and that he is using the criminal process to enforce a civil debt in violation of his mandate.

7. Learned counsel contends that the 2nd respondent has not controverted the averments in the petition and depositions in the supporting affidavit. Counsel relies on several decisions including ***Nakusa v Tororei & 2 others (No. 2)*** (2008) 2 KLR (EP); ***Republic v Chief Magistrate's Court at Mombasa Ex parte Ganijee & another*** [2002] 2 KLR 703, and ***Koinange v Attorney General & others*** [2007] E A 256 among others to support their case. He prays that the petition.

1st and 3rd Respondents submission

8. **Miss Chiringa**, learned counsel for the 1st and 3rd respondents submits also highlighting their written submissions dated 27th July 2018 and filed in court on 30th July 2018, that there are no constitutional issue raised in the petition; that the petition is being used to forestall the criminal case pending before the Magistrate's court; and that the respondents acted within their mandate. According to learned counsel, the issues the petitioner is raising can be decided in the criminal case. She relies on the decisions in ***Surjit Singhunjam v The Principal Magistrate Kibera*** Misc. Appl. NO. 519 of 2005 and ***Republic v Commissioner of Police & another Ex Parte Michael Monari & another*** [2012] eKLR to support their position.

Determination

9. I have carefully considered the petition, the response, submissions by counsel for the parties and authorities relied on. The petitioner challenges the respondent's decision to charge him with criminal offences contending that his arrest and prosecution was done with ulterior motive namely; to force him to settle a civil debt. The petitioner further contends that his fundamental rights and freedoms were violated in that he was held beyond the legally permitted period of 24 hours.

10. The respondents have denied the petitioner's allegations contending that they exercised their mandate under the constitution and the law and that no violation of the Constitution, the Law or Human Rights and Fundamental freedoms has been proved.

11. The law has been long settled that a person alleging contravention, infringement, or threat of contravention of constitutional rights and fundamental freedoms or breach of the constitution, must set out with precision the right(s) infringed or threatened; the particulars of such infringement or threat, the constitutional provisions alleged to be infringed and the jurisdictional basis for it. (See ***Anarita Karimi Njeru v Republic*** [1979] KLR 154, ***Meme v Republic*** [2004]eKLR). That is, it is a fundamental principle of constitutional litigation to require accuracy in the identification of the provisions of the constitution that are said to have been infringed on the basis that the breach is inconsistent with the Constitution. The constitutional challenge should be explicit, with due notice to all those affected thus ensure that all interested parties have an opportunity to make representations and lead relevant evidence, if necessary. (see ***Saili v National Commissioner of South African Police Service & others*** [2014] ZACC19), ***Phillips & others v National Director of Public Prosecutions*** [2005] ZACC 15; 2006(1) SA 505(CC),

12. The Supreme Court shared the same view in ***Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*** [2014] eKLR, observing at paragraph349, that the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

13. The 2nd respondent is an independent constitutional office established under Article 157(6) of the constitution. The 2nd respondent performs his duties and discharges his mandate without consent or direction from any person or authority. In exercising that mandate, he must however observe the principles in Article 157(11) of the constitution by having regard to public interest, interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

14. On the other hand the 1st respondent, the Inspector General of Police, holds a constitutional office established under Article 245(1) of the constitution and exercises independent command over the National Police service. While performing his command duties, the 1st respondent does not receive direction from anyone. The Attorney General is only responsible for defending the government in civil litigation and has nothing to do with investigations and prosecution in criminal cases.

15. Under Article 244 the objectives of the National Police Service include to prevent corruption and promote and practice transparency and accountability as well as comply with constitutional standards of human rights and fundamental freedoms. It also has a legal obligation to prevent crime and protect life and property. Section 24 of the National Police Service Act confers on the Police the duty to investigate crime and recommend prosecution. Once that is done, it is then the 2nd respondent's duty to decide whether or not to prosecute. And as is clear from the constitutional text, in making that decision either to prosecute or not, the 2nd respondent does not seek consent or direction from anyone. He must however not use criminal process for purposes other than pursuit of justice.

16. A petitioner must show that the DPP is violating the constitution and the law by using the criminal process for purposes other than those contemplated under the constitution and the law that is, pursuing a cause that has nothing to do with justice or public interest in order the

court to exercise its constitutional powers to intervene. The law in this regard is clear and well settled as can be demonstrated the decisions below.

17. In Meixner & Another vs. Attorney General [2005] 2 KLR 189, the Court of Appeal which was however dealing with the former constitution, held that;

“The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion is acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution.”(emphasis)

18. In the case of Republic v Director of Public Prosecution & 2 others Ex parte Francis Njakwe Maina & another [2015] eKLR it was again stated that;

“The Court ought not to usurp the Constitutional mandate of the Director of prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for halting those proceedings...However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognized aim.”(emphasis)

19. And in Kuria & 3 Others vs. Attorney General [2002] 2 KLR 6 the court held that;

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society’s senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta.” (emphasis)

20. The above decisions are clear on one thing that the DPP exercises independent powers to prosecute but those powers must be exercised within the constitution and the law and that the court has the constitutional and legal duty to intervene where the DPP is exercising the power in violation of the constitution; with a wrong motive or against public interest.

21. Applying the above principles to the present petition, the petitioner has not met the threshold for this court’s intervention. This is because the petitioner has alleged that he was arrested and is being prosecuted with a view to forcing him settle a civil debt. According to the charge sheet attached to his affidavit in support of the petition, the petitioner is charge with the offence obtaining money by false pretences. It is alleged that between 7th January 2017 and 7th March 2017, with intent to defraud, he obtained Kshs72, 000/- from **Florence Nyambura Machira** pretending that he would process for her a motor vehicle insurance policy. There are other counts for forging certificates of insurance and signature.

22. The petitioner contends that the complainant’s advocates had demanded refund of the amount which amounts to a civil debt that could not constitute a criminal case. With due respect, a demand letter does not and cannot constitute a civil claim or be construed as such. Neither is there evidence on record that a civil suit over this matter has been lodged in court and that the civil process is a live matter before court to make it a parallel court process with the criminal prosecution. Even if that had been the case, there is no evidence that the criminal process is being used to force or pressure the petitioner to settle the civil claim.

23. A reading of the charges the petitioner is facing shows that they relate to obtaining money by false pretense and forgery. The petitioner was to assist the complainant(s) obtain insurance policies but it is alleged that the insurance certificates were forged. He would have to show in the criminal trial that indeed he procured insurance policies or not. That in my view, is a matter for the trial court and whether there is a civil claim would not amount to double jeopardy.

24. Furthermore, section 193A of the criminal procedure Code (Cap 75) permits concurrent criminal and civil proceedings and none would be a bar to the other. For the court to interfere, it would have to be satisfied that the criminal process is being used with a view to forcing the petitioner to settle the civil claim. I have carefully read the petition and affidavit but I am not satisfied that the petitioner has succeeded in demonstrating that indeed the criminal process is being used for purposes other than pursuit of justice as required by Article 157(11) of the Constitution.

25. The petition was also under legal obligation to prove that his rights and fundamental freedoms have been violated and show how this is so including the constitutional provisions breached. He has merely alluded to constitutional provisions without showing through concrete evidence how the rights and fundamental freedoms have been violated to meet the legal threshold for the court’s intervention.

27. The petitioner has also contended that he was held beyond the constitutionally permitted period of 24 hours. He has however not

tendered evidence to show when he was arrested and when he was produced in court which is critical in determining the question of violation of the constitutional right to be produced in a court of law as soon as is practically possible as required by Article 49(f) of the constitution.

27. I have perused the charge sheet and what I can discern from it is that the petitioner was arrested on 20th July 2017 and the date of reporting to court is shown as 31st July 2017. It also shows that he was on a cash bail of Ksh20, 000/-. The petitioner has not stated that the information on the charge sheet regarding date of arrest, and appearance before court is false or that he was not on a cash bail before he appeared in court. The petitioner has not therefore shown that the police failed to comply with constitutional standards of human rights and fundamental freedoms.

28. Taking the totality of the facts of this petition into account and in the absence of other material evidence to the contrary, I am unable to agree with the petitioner that he has made out a case for this court's intervention. In the circumstances, the petition dated 17th August 2017 is declined and dismissed with no order as to costs.

Dated, Signed and Delivered at Nairobi this 30th Day of October 2018

E C MWITA

JUDGE