



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

JUDICIAL REVIEW APPLICATION NO. 2 OF 2016

**IN THE MATTER OF ARTICLES 2, 20, 21 22(3), 28,29,47, 73,157,165 & 244 OF THE
CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ALEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 28, 29 & 47 OF THE CONSTITUTION OF KENYA &
VIOLATION OF THE CONSTITUTIONAL DUTIES OF THE RESPONDENTS**

AND

**IN THE MATTER OF KAJIADO PRINCIPAL MAGISTRATE'S COURT CRIMINAL CASE No.
627 OF 2016**

BETWEEN

BENSON MBENI KIBETU.....PETITIONER

VERSUS

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

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

3. THE HONOURABLE ATTORNEY GENERAL3RD RESPONDENT

JUDGMENT

Introduction

1. By Notice of Motion dated 22nd April 2016 and by an amended petition dated 18th May 2016 the petitioner herein, Benson Mbeni Kibetu, seeks the following orders:

- 1) A decision that the decision by the Respondents to charge the petitioner was and remains unfair, unreasonable, arbitrary, unlawful and unconstitutional hence null and void ab initio.
- 2) A declaration that the manner in which the Respondent exercised their powers violated and continues to violate the Petitioner's right to Human dignity.
- 3) A declaration that the manner in which the respondents exercised their powers violated and

continues to violate the petitioner's right to freedom and security of the person.

4) A declaration that the manner in which the Respondents exercised their powers violated and continues to violate the petitioner's right to fair administrative action.

5) An order of prohibition barring the respondents from continuing with prosecution of the petitioner in Kajiado Principal Magistrates Court Criminal Case No. 627 of 2016 on the charge of stealing contrary to section 268 as read with section 275 of the Penal Code.

6) An order of Prohibition barring the Kajiado Principal Magistrates Court from any further proceedings or hearing and or determination of Kajiado Principal Magistrates Court Criminal Case No 627 of 2016 on the charge against the petitioner of stealing contrary to section 268 as read with section 275 of the Penal Code.

7) An order of certiorari to remove to this court and quash the decision by the 2nd Respondent to charge the Petitioner in Kajiado Principal Magistrates Court on the charge of stealing contrary to section 268 as read with section 275 of the penal code

8) An order for compensation for the violation of the Petitioner's human rights as demonstrated in the petition.

9) An order for refund of cash bail of Ksh 50,000 that was paid by the Petitioner and return of all documents that the Petitioner furnished the officers at Kajiado Police station.

10) Costs of this Application

11) Such further and other relief that as this Honourable court may deem fair, reasonable and just.

2. The amended petition was filed together with the application for conservatory orders dated 18th May 2016 which was dispensed with on the first instant with an order of stay being granted.

The Applicant's case

3. The Petition was supported by the Affidavit of Benson Mbeni Kibetu dated 18th May 2016.

4. The Petitioner alleges that he is a director of Benken hygiene services limited which company distributes sanitary bins. That the company took a loan from Kenya Women Finance Bank Limited on condition that the company would get a guarantor to provide security for the loan. The petitioner further alleges he was introduced by a gentleman called Seki to Joshua Parmeres who was willing to be a guarantor for them.

5. It is the Petitioner's case that he went with Joshua Parmeres to the Kayole branch of Kenya Women Finance Bank limited where the said Joshua Parmeres signed the guarantor's deed and left behind his copy of his ID, his PIN number, copy of title and copies of passport size photos. The bank appointed a valuer by the name of Shelter (M) valuers Limited who were given the brief to value the property and prepare a valuation report. The valuers prepared a report indicating that the property was valued at Ksh 9,000,000.

6. The petitioner further alleges that the bank prepared an addendum to the letter of offer wherein the said Joshua Parmeres signed before an advocate and acknowledged that he freely and voluntarily executed the instrument and understood its contents. It is also alleged that Mr. Joshua Parmeres also appeared with his wife before an advocate undertaking the process and they both confirmed that they understood what was happening, signed the charge document and spousal consent and surrendered the original title to the property.

7. Consequently, the security was registered and the title deed was in the bank's custody. The money was

disbursed to the company. On 15th April 2016, the petitioner received a call from Mr. Charles Karuga requesting him to record a statement at Kajiado police station. The Petitioner received another call on 19th April 2016 requesting him to appear before the Kajiado police station the next day. The DCIO explained to the Petitioner that one Joshua Permeres had denied ever signing any document as guarantor for the loan.

8. The Petitioner further alleges that the DCIO ordered one of his officers to take his finger prints and lock him up in police cells for arraignment in court the next day or pay cash bail of Ksh 200,000. The Petitioner negotiated with the officers and paid a cash bail of ksh 50,000 and was asked to attend court on 26th April 2016 to take plea.

Response

9. The 1st and 3rd Respondent filed grounds of opposition dated 22nd June 2016. The Replying Affidavit was sworn by PC Morris Muli on 16th August 2016. The 1st and 3rd Respondents aver that Joshua Permeres complained that he deposited his title deed for KAJIADO/MAILUA/3462 with his advocates M/S. Sekento & Co. Advocates but the title got lost mysteriously and the said advocate swore an affidavit and advertised the loss in the daily nation of 6th July 2015. On 16th March 2016 the said Joshua conducted a search at the Kajiado Lands registry and found out that it had been charged by Kenya Women Finance Bank to secure a loan of Ksh 6,300,000 and that the charging of the title was without his consent.

10. The deponent stated that investigations then commenced where the officers attached to the Directorate of Criminal Investigations- Kajiado recorded Joshua Parmere's statement and he presented to them a bundle of documents to aid in their said investigations. Specimen signature purported to have been signed by Joshua Parmeres on the original addendum letter of offer dated 12th November 2015 produced by the petitioner herein was found not to belong to Joshua Parmeres. The report from the document examiner indicated that the signature of Joshua Parmeres had been forged.

11. Further the investigations reveal that the person presented by the Petitioner as his guarantors were persons not known to the advocates who took part in the conveyance. The petitioner used a stolen identity card issued to one Caroline Nzangi purporting her to be the wife to Joshua Parmeres.

12. The 2nd Respondent filed grounds of opposition dated 29th July 2016 setting out the response to the Petition and Application amended on 18th May 2016. In a nutshell the 2nd Respondents grounds of opposition were premised on the point that the Petition is incompetent and lacks merit.

The Applicants Submissions

13. The Applicant filed submissions dated 31st August 2016 and filed further submissions dated 10th October 2016. The Applicant submitted that from the replying affidavit sworn by PC Morris Muli, it is clear that the respondents have no case against the petitioner. That the application is based on conjecture, rumors, half-truths and speculation and have not produced evidence of the averments contained in the said replying affidavit.

14. Counsel also submitted that each case should be determined on its own merits and that the court should not judge the petitioner on basis of a case whose facts are not before the court. Counsel directed this court to the case of *Michael Maina Kamami & Anr Vs Attorney General [2016]Eklr* in support of this position.

15. The applicant submitted that the respondents have not recorded statements from some of the witnesses to the transaction before making the decision to charge the petitioner with the offence of stealing. For example, advocates who handled the transaction and the bank officials who sanctioned the transaction.

16. Petitioner has been charged in court for an offence he did not commit and that the 1st & 2nd Respondent in preferring the said charges have fallen short of the standard required of them under the constitution and the National prosecution policy among others.

17. 1st and 3rd respondents only chose to file grounds of opposition and no affidavit was filed to controvert the facts set out in the petitioners supporting affidavit. According to the counsel therefore, the facts in the petitioner's affidavit remain unchallenged. ***Kennedy Otieno Odiyo & 12 others V Kenya electricity generating company limited (2010)eklr*** was offered in support of this position.

18. Counsel submitted two authorities to support the issue of violation of the right to human dignity. He stated that the criminal charges against the petition are meant to intimidate, harass and or humiliate the petitioner as the alleged stolen title deed was in possession of the Kenya Women's micro-finance Bank limited and the same had been taken there and handed over voluntarily to the bank lawyer by Mr. Permeres in the presence of his wife and the petitioner.

19. On right to fair administrative action, counsel submitted that the prosecutor did not adhere to the statutory requirements in sec 14(5)(c) of the DPP Act (No. 2 of 2013) which requires the prosecutor to protect the public interest, act with objectivity, take into account the position of the suspect and the victim and pay attention to all relevant circumstances irrespective of whether they are to the advantage or disadvantage of the suspect''.

20. Additionally, the National police service has not complied with the constitutional standards of human rights and fundamental freedoms as required by Art 244 (c) of the constitution and have failed to ensure equal protection of the law in accordance to Art 27(1) of the constitution.

21. Counsel submits that the petitioner's right to freedom and security was violated as there was no basis of arrest by the petitioner as at first, he was informed that he would be charged with the offence of forgery of a title to land but was charged with stealing contrary to section 268 as read with section 275 of the penal code and therefore the police with the 2nd respondent instituted the charges for ulterior motives.

22. The conduct of the National Police Service falls below the constitutional standards set out in Art 244 of the constitution.

23. Counsel submitted various authorities touching on the independence of the DPP and instances where the court must intervene in cases where there is a violation of a fundamental rights and further submitted that the prosecution of the petitioner is an abuse of the criminal process and it is meant to settle personal differences between the complainant and the petitioner.

1st & 3rd Respondents submissions

24. The 1st & 3rd Respondents filed written submissions dated 5th October 2016. Counsel for the 1st & 3rd Respondents submitted that there are two issues for determination. The first is whether the Respondents conduct constitutes a violation & contravention of the Constitution of Kenya, 2010 and second is whether the Honourable court should issue the orders sought in the petition.

25. On infringement of the Petitioners rights by the Respondents, counsel submitted that the petitioner has not identified the specific rights that have been infringed and directed the courts to the case of ***Anarita Karimi Njeri Vs R (1976-1980) KLR 1272*** in support of this position.

26. Counsel further submitted that Sec 35 of the National Police Service Act provides for the functions of the 1st Respondent and that in investigating the alleged crime of fraudulent transfer of funds, then the 1st respondent is well within his rights. On the same issue, counsel submitted that the right to a fair hearing under Art 50 of the constitution on the basis of which the court has been moved will be available to the petitioner during trial should the respondents deem it fit to prosecute the petitioner.

27. On issuance of order of certiorari and prohibition, counsel submitted that the trial courts are better placed to consider the evidence and decide whether or not to place the accused on their defence and even after placing the accused on their defence, the court may proceed to acquit, the High Court should not therefore interfere with the petitioner's trial. The petitioner can appeal if he is aggrieved by the decision of the trial court or file a claim for malicious prosecution. Counsel used Odunga J's authority (***Erick Kibiwott Tarus & 2 others Vs DPP & 7 others [2014]Eklr***) to support this position.

2nd Respondent's Submissions

28. Advocate for the 2nd Respondent filed written submissions dated 14th December 2016. The counsel submitted that the petitioner has failed to prove that the respondent's actions were unconstitutional and infringed on his fundamental rights and freedoms under the Constitution, 2010 as required by the Evidence Act, CAP 80 Laws of Kenya.

29. Counsel submitted that the police have not only established a reasonable suspicion but have established sufficient evidence that establishes a prima facie case against the petitioner and that the 2nd Respondent's decision to prosecute was reasonable and in the best interest of justice.

30. Counsel further submitted that with the gaps, inconsistencies and untruths by the petitioner, the prosecution had made a prima facie case and this formed the legal basis to prosecute the petitioner. He proceeded to state that the trial court is the best arena to canvas and challenge the evidence obtained by the respondents in order to accord all the parties a fair trial. The court was invited to the decision in ***Republic V Chief Magistrates Court Nairobi & 3 others Ex parte Stephen Oyugi Okero [2015]eKLR*** to support the later position. Counsel further submitted that the rival averments between the petitioner and the Respondents are best dealt with at the trial court and not in the instant position.

31. On the constitutional mandate to prosecute, the counsel submitted that Article 157 of the Constitution and the ODPP Act, the 2nd respondent is charged with the mandate to decide which charges the accused ought to face upon perusal of the police file. Counsel submitted that the precedent in ***Republic V DPP & three others EX parte Bedan Mwangi Nduati & Anor [2015] eKLR*** protects the powers of the DPP in exercise of his powers under the constitution.

Determination

32. Two issues arise before me for determination. The first is whether the Petitioner's rights were violated by the conduct of the Respondents and the second is whether the orders sought by the Petitioner should be granted.

33. In ***Lameck Okeyo & another v Inspector General of Police & 2 others [2016] eKLR*** Odunga J stated as follows;

“In this case the effect of the grant of the orders sought would be to restrain the police from undertaking their investigatory powers. In my view the decision by a Court to halt investigations from being conducted ought to be exercised very cautiously and in very clear cases where the Court is satisfied that the continued investigations are likely to render the proceedings before it an academic exercise. In other words the Court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the Court which may eventually be called upon to determine the issues hence the Court ought not to make determinations which may affect the investigations or the yet to be conducted trial. It is upon the ex parte applicant to satisfy the Court that the discretion given to the relevant authorities to investigate allegations of commission of a criminal offence ought to be interfered with. The word “investigate” is defined in the Black's Law Dictionary 9th Edition as: “To inquire into a matter systematically; to make an official inquiry.” An inquiry in my view involves a consideration of both the complainant's version and that of the person against whom the complaint is made. Barring the existence of exceptional circumstances, the rules of natural justice dictate that the applicants herein make their statement for consideration by

the investigators in order for the investigators to arrive at an informed determination.”

34. He proceeds to note that

“It is trite that the Court ought not to usurp the Constitutional and statutory mandate of the police to investigate any matter that, in the view of the police raises suspicion of the occurrence or imminent occurrence of a crime. Just like in cases of prosecution, the mere fact that the allegations made are likely to be found worthless, is not a ground for halting investigations into the complaints made or brought to the attention of the police since the purpose of a criminal investigations conducted bona fide is to consider both incriminating and exculpatory material and not just to collect evidence on the basis of which a criminal charge may be laid. It must always be noted that judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence to the complaint is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is open to the applicant to bring to the attention of the investigators in the course of the conduct of the investigations. However, if the applicants demonstrate that the investigations that the Respondents intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such investigations since investigations must be carried out independently and must be carried out in good faith without malice or for the purpose of achieving some collateral goal divorced from the purpose for which the investigatory powers are given to the Respondents.”

35. I would now like to point out *Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR* where 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. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”

36. I cannot resist but emphasize Justice Odunga’s views in the earlier quoted *Lameck Okeyo* case where he observes that;

“In order for the applicant to succeed it must show that not only are the investigations which were being undertaken are laced with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the predominant purpose is to further some other ulterior purpose and as long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”

37. Allegations of violations of constitutional rights are viewed seriously by courts which are enjoined to enforce such rights. Indeed, this Court is enjoined to vigorously enforce the fundamental rights and freedoms of the individual guaranteed by the Constitution which is the voice of the people of Kenya. The Constitution is the supreme law and it binds all persons and all State organs. There is no limitation in the enforcement of fundamental rights and freedoms.

38. In the this case, although it was alleged that the criminal investigations were commenced with a view to compel the petitioner to settle his disagreement with one Joshua Parmeres I am not satisfied based on the evidence on record that this is so.

39. I have noted that during his submissions, the petitioner has consistently stated that proper

investigations were not conducted before he was charged. I wish to remind the petitioner that it is not his business to claim that proper investigations were not done. If anything, the Petitioner should rejoice that the authorities have allegedly done such a shoddy job and use it to his advantage as this may well be his road to acquittal.

40. The petitioner was summoned to appear for interrogation on 20th April 2016 and recorded his statement on the same day. On 3rd May 2016, he was arrested and charged before court. It noteworthy that the Petitioner was accorded the due process upto the point he was presented before court including his right to bond.

41. Throughout this petition and in the evidence adduced, the court has noted that there are glaring inconsistencies, gaps and uncertainties which can only be canvassed in a trial court as this court is not required to interrogate evidence.

42. It is trite law that Courts ought not to usurp the constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution, or interfere with the jurisdiction of the Courts to hear and determine cases, unless there is clear evidence that the said bodies have acted in abuse of process. No such evidence has been provided in the present Petition.

43. Lastly, as correctly submitted by counsel for the 1st & 3rd Respondent, a trial court is better placed to consider the evidence and decide whether or not to place the accused on their defence and even after placing the accused on their defence, the court may proceed to acquit. Should the petitioner feel aggrieved, the right of appeal is still available to him. Therefore approaching this court should have been a measure of last resort.

44. I am satisfied that there is no violation or threat of violation of the petitioner's Constitutional rights demonstrated that would justify the grant of orders as prayed in his petition.

Order

45. I therefore dismiss the petition dated 18th May, 2016 with no order as to costs.

46. The stay orders issued in respect of Chief Magistrate Criminal Case No. 627 of 2016 are hereby lifted.

47. It is so ordered.

Dated at Kajiado this 31st day of January, 2017.

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R NYAKUNDI

JUDGE

Delivered in the presence of:

Mr. Akula for the Director of Public Prosecutions – present

Ms Chibole – present

Mr. Mateli Court Assistant - present