

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.181 OF 2016

EZEKIEL OCHIENG OGOMA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Ezekiel Ochieng Ogoma is facing two charges of conspiracy to defraud contrary to **Section 317** of the **Penal Code**. He is charged with another who is not a party to this application. The Applicant pleaded not guilty to the charges. The two criminal cases are pending hearing and determination. From the application filed herein, it was apparent that when the Applicant was charged, his case attracted public interest. It was extensively covered by both print and electronic media. The Applicant was aggrieved by the manner in which the media covered the cases. He has filed an application before this court seeking, firstly, to stay proceedings in Nairobi **CMC Criminal Case No.246 of 2014 Republic –Vs- Ezekiel Ochieng Ogoma & Another** and **Nairobi CMC Criminal Case No.805 of 2014 Republic –Vs- Ezekiel Ochieng Ogoma & Another** pending the hearing and determination this application. He further sought an order of the court to essentially secure his rights to fair trial. The Applicant complains that the manner in which the case had been covered by the media has prejudiced his right to be presumed innocent until proven guilty by a court of law. He states that the coverage amounts to libel and defamation of his character in that the media has already prejudged and declared him guilty of the charges before even his trial has commenced. In the circumstances therefore, the Applicant prayed that this court issues an order barring the media from reporting his case until its hearing and determination.

During the hearing of the application, the Applicant reiterated the contents of the application and the supporting affidavit. He submitted that his right to fair trial as captured in **Article 49, 50 and 51** of the **Constitution** had been infringed by the manner in which the media covered his story. He stated that the publication defamed his character and further caused him distress and anguish. He particularly took issue with the fact that some of the print media referred to him as **“a dead man”**. The Applicant reiterated that the coverage by the media prejudiced his right to fair trial and further exposed him and his family to psychological torture. He urged the court to issue appropriate orders to secure his right to fair trial by barring the media from reporting his case until hearing and determination. Ms. Atina for the State opposed the application. She submitted that the Applicant was neither defamed nor was he prejudiced by the coverage accorded to the case by the media. She stated that the Applicant had not advanced any reasons to preclude members of the public, including the media, from participating in the trial. She was of the view that the application lacked merit and should be dismissed.

This court has carefully considered the rival submission made by the parties to this application. That the Applicant has the right to be presumed innocent until the contrary is proved is not in doubt. It is provided under **Article 50(2)(a)** of the **Constitution**. **Article 50(2)(d)** of the **Constitution** requires all criminal trials to be conducted in public. **Article 34** of the **Constitution** grants the media freedom of expression provided that such freedom is not exercised to incite war, violence, hate speech or advocate hatred of certain members of the society or promote discrimination.

In the present application, the Applicant complains that his right to fair trial had been infringed by the extensive coverage both electronic and print media gave to the criminal charges that were brought against

him. In particular, he was irked by the fact that the print media portrayed him as guilty of the offences that he was charged with even before the trial against him had commenced. It was in light of this coverage that the Applicant is asking the court to bar the media from covering the proceedings until the determination of the cases. Ms. Atina for the State is of the contrary view. She submitted that there was no reason to warrant this court to issue the order craved for by the Applicant. This court's view of the matter is that the public right to know (that includes the media's right to disseminate information) when criminal proceedings are conducted as provided under **Article 35** of the **Constitution** is tempered with the discretion of the court to exclude the public and the media if either the accused or the complainant would be prejudiced. This is more so in cases involving children or vulnerable persons.

In the present application, it was evident that what attracted the media is the unique nature of the charges brought against the Applicant and his co-accused. Having carefully evaluated the complaint made by the Applicant in this application, this court is of the view that the manner in which the media covered the court proceedings was not prejudicial to the Applicant. The coverage was fair though the reporters used artistic licence to narrate the story. This court is not persuaded that the Applicant's right to fair trial was in any way infringed by the manner in which the media covered the story. If the Applicant is of the view that he was defamed by the said coverage, he is at liberty to file a civil suit for damages against the media houses.

For the above reasons, it is evident that this application is for dismissal. It is hereby dismissed. The two criminal case files which were brought to this court for the purpose of the hearing of this application shall be returned to the Chief Magistrate for hearing and determination. The Applicant shall appear before the Chief Magistrate's Court today, 28th February 2017 for Mention of the cases with a view to taking appropriate hearing dates. It is so ordered.

DATED AT NAIROBI THIS 28TH DAY OF FEBRUARY 2017.

L. KIMARU

JUDGE