



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

**IN THE MATTER OF ARTICLES 21, 22,27,47,50,157 (11) AND 258 OF THE CONSTITUTION
OF KENYA, 2010**

AND

**IN THE MATTER OF SECTIONS 11(1)(d), 12 AND 13 OF THE ETHICS AND ANTI
CORRUPTION ACT**

AND

**IN THE MATTER OF SECTIONS 13 AND 16 OF THE LEADERSHIP AND INTEGRITY
ACT,2012 ACT**

IN

PETITION No. 15. 16 AND 17 OF 2014

(CONSOLIDATED)

JULIUS OTIENO POLO.....1st PETITIONER

JENIPHER ANYANGO POLO.....2nd PETITIONER

ANDREW AGENG'A ORIWA.....3rd PETITIONER

LUKE OMOLLO MIDAMBA.....4th PETITIONER

ZACHARY NYAIRO OKORA.....5th PETITIONER

MAURICE OTIENO NGETA.....6th PETITIONER

JOHN ODENYO PETERS.....7th PETITIONER

KENNETH MUNGAI NGANGA.....8th PETITIONER

VERSUS

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

ETHICS AND ANTI-CORRUPTION COMMISION.....2ND RESPONDENT

JUDGEMENT

Introduction

These three petitions **Petition Nos. 15, 16 and 17 of 2014** were consolidated as they raise similar issues.

The Petitioners sought the following orders

a. An order of prohibition do issue and directed at the respondents and prohibiting the respondents from pressing for or prosecuting the petitioners with any imagined offences relating to the evaluation, award or execution of tender for the reconstruction of perimeter wall and installation of flood lights at Moi Stadium Kisumu in a manner inconsistent with the Constitution and provisions of the Law

b. An order of prohibition do issue against the 1st respondent prohibiting it from prosecuting and/or removing the petitioners from the list of witnesses with the sole purpose of weakening the cases against the real wrongdoers or in any way acting in violation of Article 157(11) of the Constitution

c. An order of mandamus do issue and directed at the respondents and compelling them to reveal to the petitioners the details of the possible charges with all the facts and pieces of evidence that they intend to use in prosecuting them in compliance with the provisions of the constitution;

d. An order declaring that the 2nd respondent having assured the petitioners of no wrongdoing and that they would be witnesses, and having cleared them to seek and retain positions of Public Service, the 2nd respondent is estopped from preferring charges otherwise it is in violation of the provision of Article 10 of the Constitution as read with Sections 3 and 11 of the Ethics and Anti-Corruption Act

e. A declaration that the respondents are in breach of Articles 10,50,157 and 232 of the Constitution in the manner it has handled and treated the petitioners and that for such violations their actions are null and void to the extent of the violations;

f. A declaration that the 2nd respondent is perpetuating breaches of the law, the Constitution of Kenya and carrying out and legalizing impunity contrary to the Constitution of Kenya, exhibiting arrogance and highhandedness in performance of its duty contrary to the law

g. Damages for violation and infringement of the petitioners rights under the constitution;

h. Costs of the petition be borne by the respondents.

Background

The petitions revolve around the reconstruction of perimeter wall and installation of flood lights at Moi Stadium Kisumu. Sometimes on 21st April, 2009; Julius Otieno Polo and Jenipher Anyango Polo registered a business name, Mijeri Construction & General Supplies. On 29th February, 2012, a tender for the reconstruction of perimeter wall and installation of flood lights at Moi Stadium Kisumu was awarded to Mijeri Construction & General Supplies. Thereafter, several payments were made in favor of Mijeri Construction & General Supplies which sums, it is alleged were speedily withdrawn. Subsequently, questions of integrity arose out of the tender and petitioners were summoned by the 2nd respondent for interrogation and each was released on cash bails of Kshs. 50,000/-.

This decision is about whether the court should intervene and prohibit criminal proceedings intended to be undertaken against the petitioners Julius Otieno Polo and Jenipher Anyango Polo who registered a business name Mijeri Construction & General Supplies; Andrew Ageng'a Oriwa, the District Accountant, Kisumu East District; Luke Omollo Midamba the District Procurement Officer, Kisumu East District;

Zachary Nyairo Okora, the County Director of Sports, Kisumu County; Maurice Otieno Ngeta, the project supervisor; John Odenyo Peters, the Regional Works Officer and Kenneth Mungai Nganga, the County Works Officer who are alleged to have flouted the procurement rules as a result of which the Kenyan Government lost a substantial sum in the transaction.

Petitioners' Case

It is the petitioners' case that in pushing them to court, the respondents will be violating their Constitutional rights under Article 27 which provides for equality and freedom from discrimination; Article 43 which provides for Economic and Social rights; Article 47 on Fair administrative action and Article 50 (2) (b) and (j) which guarantees a right to be informed of the charge and the evidence that the prosecution intends to rely on. The petitioners' further claim that Article 157 (11) which requires the 1st respondent to have regard to administration of justice; Article 232 (1) (b) which mandates the respondents to ensure efficient, effective and economic use of resources and Article 232(1) (c) that binds the respondents to be responsive, prompt, effective and impartial have been violated.

The petitioners seek conservatory orders on the ground that once they are charged in court, they will be required to step aside from work, a fact that will disentitle them to all their benefits; expose them to mental torture and anguish and damage their reputation.

1st Respondent's case

The 1st respondent's case is contained in replying affidavits sworn by **Douglas Ogoti**, a Senior Assistant Director of Public Prosecutions in charge of Kisumu County. He deposes that the 1st respondent is constitutionally empowered under Article 157(6) of the Constitution to institute and undertake criminal proceedings against any person, before any court, of any offence, alleged to have been committed. That in exercise of this power, the 1st respondent is guided by the principles set out in section 4 of the Office of the Director of Public Prosecutions Act and section 23 of the Act further empowers the 1st respondent to decide to prosecute or not to prosecute in relation to any offence.

It is the 1st respondent's case that by a letter dated 24th June, 2014, the 1st respondent received from the 2nd respondent a report and recommendations in relation to the petitioners herein. That after reviewing the forwarded report, the 1st respondent recommended that there was sufficient evidence to support the charges proposed and subsequently recommended that the petitioners be prosecuted.

It is further the 1st respondent's case that the petitioners were scheduled to appear in court for the purpose of taking plea on 6th August, 2014 in **KISUMU CMC ANTI- CORRUPTION CASE. NO. 5 OF 2014** but they filed this petition before the arraignment in court. Mr. Ogoti deposes that Article 50 of the Constitution is triggered once an accused person is arraigned in court, which has not happened and that the petitioners cannot claim that their rights under Article 50 (2) (b) and (j) of the Constitution have been violated. It is further deposed that the 1st respondent in recommending that the petitioners be prosecuted carried out its statutory function and that the petitioners have not demonstrated how the respondents have failed to execute their mandate in accordance with Articles 47, 232 and 157(11) of the Constitution. The 1st respondent argues that the issues raised by the petitioners can and should be determined during trial.

2nd Respondent's case

The 1st respondent's case is contained in replying affidavits sworn by **Wycliffe Sirengo**, a Forensic Investigator. He deposes that the 2nd respondent is constitutionally empowered under Article 79 of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 (ACECA) and Ethics and Anti-Corruption Commissions Act, No. 22 of 2011 to undertake investigations in corruption and economic crimes. He deposes further that in the month of June 2012, the 2nd respondent received a report alleging irregularities, corrupt conduct and fraud in procurement process and awarding of a contract to renovate and reconstruct Moi Stadium Kisumu to Mijeri Construction & General Supplies and in payment of public works for work not done.

Mr. Sirengo deponed that the 2nd respondent conducted investigations and thereafter forwarded to the 1st respondent a report and recommendations for the prosecution of the petitioners. He deponed that the charges supplied to the petitioners and their advocates are properly drawn and with clarity according to the provisions of Section 137 of the Criminal Procedure Code and as such have sufficient particulars to enable the petitioners to respond to them. According to the deponent, the petitioners were scheduled to appear in court for the purpose of taking plea on 6th August, 2014 in **KISUMU CMC ANTI-CORRUPTION CASE NO. 5 OF 2014** but they pre-empted the criminal procedure by filing this petition on 1st August, 2014 and hence the petitioners cannot claim that their rights under Article 50 (2) (b) and (j) of the Constitution have been violated.

It is the 2nd respondent's case that the petitioners have not demonstrated how the 2nd respondent has violated Articles 10, 27, 47, 73 and 157(11) of the Constitution. It is the 2nd respondent's submission that Article 50 of the Constitution is triggered once an accused person is arraigned in court, which has not happened and that the petitioners cannot claim that their rights Article 50 (2) (b) and (j) of the Constitution have been violated. The 2nd respondent concurs with the 1st respondent that the recommendation that the petitioners be prosecuted was a statutory function and further that the petitioners have not demonstrated how the respondents have failed to execute their mandate in accordance with Articles 47, 232 and 157(11) of the Constitution.

Determination

I have considered the parties' respective cases as well as submissions on record.

Validity of charges

The petitioners have raised the issue of validity of charges that the 1st respondent intends to prefer against them. The simple answer to such an invitation was given by the Court of Appeal in **MEIXNER & ANOTHER V ATTORNEY GENERAL [2005] 2KLR 189** when it stated that:

“Having regard to the law, we agree with the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision. The other grounds which the appellants claim were ignored ultimately raise the question whether the evidence gathered by the prosecution is sufficient to support the charge.

The criminal trial process is regulated by statutes, particularly, the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in Section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon an examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence. That is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.”

On the same point, the respondents cited **William S.K. Ruto and Another v Attorney General, Civil Suit No. 1192 of 2005** in which the court stated:-

In our view, it is not for this court to determine whether or not the charges as framed disclose an offence. There are adequate provisions in the Criminal Procedure Code (CPC) for instance Section 89(5) CPC which can be used to address that issue.

From the foregoing; I find that the jurisdiction to test the validity or otherwise of the charges that may be preferred against the petitioners and to determine their guilt or innocence is vested in the trial court.

DPP's powers to prosecute

The office of the Director of Public Prosecutions established under Article 157 is an independent office which is empowered to conduct its duties free from any influence or control by any authority. Article 157(10) empowers the Director of the Office of Public Prosecutions to commence criminal proceedings without consent of any person or authority and in exercise of such powers, he shall not be under the direction or control of any person or authority. However, the Constitution does not grant the DPP a blank cheque in exercise of its powers. The powers are to be exercised with regard to the provisions of Article 157(11) of the Constitution which provides as follows:

“In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to present and avoid abuse of the legal process.”

In **CRIMINAL APPLICATION NO. 271 OF 1985 STANLEY MUNGA GITHUNGURI VERSUS THE REPUBLIC** where the court held that:-

.....the exercise of the power conferred on the Office of the Attorney-General under section 26 (3) should be fair and reasonable and should not be exercised arbitrarily or oppressively.....

Therefore, though the 1st respondent has the power to independently charge and prosecute, the court will not hesitate in putting a halt to such a decision and proceedings if the criminal proceedings intended constitute an abuse of process and interests of justice.

It is however upon the applicants to satisfy the court that the discretion given to the 1st respondent to investigate and prosecute is being abused and ought to be interfered with.

In **KURIA & 3 OTHERS VS. ATTORNEY GENERAL [2002] 2KLR 69** the court stated as follows:

“A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced.

In this case, the petitioners contend that the charges intended to be preferred against them are not in good faith and are contrary to the 2nd respondent’s assurance that the petitioners would be treated as prosecution witnesses. I have considered Article 157(10) of the Constitution which states:-

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of this or her powers or functions, shall not be under the direction or control of any person authority.

As was correctly stated by Counsel for the 1st respondent, the assurance by the 2nd respondent, if any, is not binding on the 1st respondent. The 1st respondent is at liberty to make its own decision based on the facts. The court cannot therefore prohibit the institution of criminal proceedings merely because the 1st respondent did not take heed of the 2nd respondent’s recommendation if the 1st respondent exercised its power in accordance with the constitution. **STANLEY MUNGA GITHUNGURI VERSUS REPUBLIC (SUPRA)**, in which an undertaking not to prosecute had been given through an official public pronouncement by the Attorney General is distinguishable from this case where the assurance not to prosecute has not been proved.

The petitioners have failed to demonstrate that the 1st respondent did not act in line with Article 157(11) of the Constitution.

Breach of Article 27 of the Constitution- Equality and freedom from discrimination.

Article 27 protects the right of equality and prohibits discrimination. It provides *inter alia* as follows;

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

In **STANLEY MUNGA GITHUNGURI VERSUS REPUBLIC (SUPRA)**, the court held that:-

Notwithstanding the powers conferred upon the Office of the Attorney-General by section 26(3) of the Constitution, the High Court (and not any subordinate Court) has an inherent power and a duty to secure fair treatment for all persons who are brought before the Court or a subordinate process of the Court.

These petitions do not specify the nature of discrimination that the petitioners were subjected to so as to bring these petitions within the realm of Article 27 (4) of the Constitution. Accordingly, I find the allegation for discrimination against the petitioners to be unmeritorious.

Breach of Article 43 of the Constitution - Economic and Social rights

Article 43 of the Constitution states:-

(1) Every person has the right—

(a) To the highest attainable standard of health, which includes the right to health care services, including reproductive health care;

(b) To accessible and adequate housing, and to reasonable standards of sanitation;

(c) To be free from hunger, and to have adequate food of acceptable quality

(d) To clean and safe water in adequate quantities;

(e) To social security; and

(f) To education.

It has been argued that once petitioners are charged, they will be suspended from their positions a fact that will disentitle them to all benefits they get as public servants.

Section 62 of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 states:-

(1) A public officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge

As was correctly submitted by the 1st respondent, the petitioners have not proved how their suspension, at half pay which is by operation of the law, amounts to violation of their Economic and Social rights guaranteed by Article 43 of the Constitution.

Breach of Article 47 of the Constitution-Fair Administrative Action

The State's prosecutorial powers are vested in the DPP under **Article 157** of the Constitution, the pertinent part which provides as follows;

(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may-

a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.

After due consideration of Article 157 of the Constitution, I find that, in recommending that the petitioners be prosecuted, the 1st respondent carried out its statutory function and not an administrative function. The 1st respondent's decision does therefore not fall within the purview of Article 47 of the Constitution.

Breach of Article 50(2) (b) and (j) of the Constitution

The petitioners claim that upon their arrest, their right to be informed of the charges and the evidence that the prosecution intends to rely on as guaranteed under Article 50 (2)(b) and (j) of the Constitution was violated. Under Article 50(2), one of the elements of a fair trial is the right, "to be informed of the charge, with sufficient detail to answer it." Article 50(2) (b) provides that a person charged has the right,

"to have adequate time and facilities to prepare a defence"

While Article 50(2) (j) provides that a person charged has a right,

"to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."

The question is whether or not the requirements of fair trial under the Article 50 as read with the right to access to information under Article 35 contemplate that all prosecution material be availed to the accused before plea taking.

In **DENNIS EDMOND APAA AND OTHERS V ETHICS AND ANTI-CORRUPTION COMMISSION, NAIROBI PETITION NO. 317 OF 2012**, the court observed as follows:-

The Cholmondeley Case does not support the proposition that all the witnesses and evidence must be disclosed in advance of the trial. The case of R v Ward (Supra) cited by the Court of Appeal is clear that the duty of disclosure is a continuing one throughout the trial. Furthermore, the words of Article 50(2)(j) that guarantee the right "to be informed in advance" cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with the other rights that constitute the right to a fair trial. Article 50(2) (c) guarantees the accused the right, "to have adequate facilities to prepare a defence."

The same position was restated in **THUITA MWANGI & 2 OTHERS V ETHICS & ANTI-CORRUPTION COMMISSION & 3 OTHERS [2013] EKL**, where the court observed as follows:

The right to be provided with" material the prosecution wishes to rely on is not a one-off event but is a process that continues throughout the trial period from the time the trial starts when the plea is taken. The reality is that there will be instances where all the information relating to investigation may not all be available at the time of charging the suspect or taking the plea. The disclosure of evidence, both inculpatory and exculpatory, is easily dealt with during the trial as the duty to provide the material is a continuing one and the magistrate is entitled to give such orders and directions as are necessary to effect this right. When the fresh material is provided, the accused is entitled to have the time and opportunity to prepare their defence.

From the foregoing; it is apparent that the provisions of Article 50 deal with the rights of the accused at a trial and recourse cannot therefore be had to Article 35 of the Constitution that protects freedom of information before the person is charged with a criminal offence. Furthermore, the right under Article 50 is one that is properly enforced by the trial court, should the need arise, during the proceedings.

Conclusion

On the issue of the alleged contravention of the petitioners' rights under Articles 27, 47, 50,157 (11) and

258, the court was very clear in the case of ANNARITA KARIMI NJERU V. REP [1979] KLR 154 that the person alleging an abuse or infringement of a right must set out the acts or omissions constituting violations.

In the case of KURIA & 3 OTHERS V ATTORNEY GENERAL (SUPRA), it was observed as follows at pages 79, 80;

“There should be concrete grounds for supposing that the 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, the petitioners have stated that that the intended prosecution by the state is malicious and in breach of their fundamental rights. They have however failed to prove the acts or omissions constituting the violations.

For the reasons I have outlined, I find that the petitioners do not merit the orders sought. The petitions are hereby dismissed with no orders as to costs.

DATED AND DELIVERED THIS 23RD DAY OF FEBRUARY 2017

T. WANJIKU CHERERE

JUDGE

Ms. Ruto holding brief Mr Waudu for 2nd Respondent.

N/A for the 1st Respondent

N/A for petitioners, 1, 2, 3 and 5.

Mr. Opeto for 4th and 6th petitioners.

Mr Maube for the 7th petitioner John Odenyo Peters and 8th Petitioner Mungai Nganga

T. WANJIKU CHERERE

JUDGE

23/2/17