



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NUMBER 478 OF 2016**

**IN THE MATTER OF ARTICLES 10, 22, 23, 157(11) & 165 OF THE CONSTITUTION OF KENYA AND**

**IN THE MATTER OF AN ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS UNDER ARTICLES 27, 48, 49 & 50 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF SECTIONS 4, 5, 6, 14 & 23 OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION ACT 2013**

**BETWEEN**

**MOHAMMED SEIF OMORO.....PETITIONER**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

**AND**

**HIMIAR HASSAN OMAR SHERMAN.....1<sup>ST</sup> INTERESTED PARTY**

**SUDI JUMA MWAWANGO.....2<sup>ND</sup> INTERESTED PARTY**

**JANET WAHIGA MIROBI.....3<sup>RD</sup> INTERESTED PARTY**

**FARIDAH HUSSEIN BAMRAGA.....4<sup>TH</sup> INTERESTED PARTY**

**JUDGMENT**

In a petition dated 15<sup>th</sup> November, 2016, and filed in court on the same day, **Mohammed Seif Omoro, the Petitioner**, sought a declaration that the respondent has contravened his rights under **Articles 27, 49,50 and 157(11)** of the constitution, and an order to quash proceedings in **Nairobi Criminal Case No. 1498 of 2016, Republic vs. Mohammed Omoro**. The petitioner sought an alternative prayer to compel the respondent to charge or prosecute the interested parties, that the respondent be restrained from charging the petitioner in relation to mobile telephone number **0704\*\*\*\*\*** registered and associated with **Justine Kamau, and** an order compelling the respondent to release the petitioner’s identity card. He also

sought costs of the petition.

The petition is supported by the petitioner's affidavit sworn on the same day, 15<sup>th</sup> November, 2016. The facts of the case as can be seen from both the petition and affidavit are that the petitioner was arrested on 28<sup>th</sup> September, 2016 at Manyoni in Kakamega County by police officers in plain clothes; he was brought to Nairobi and booked at Muthaiga Police Station. He was later charged with the offence of obtaining money by false pretence. His arrest and charging in court was covered by the media. The petitioner states that the witness' statement given to him showed that money had been sent to cell phone No. **0704\*\*\*\*\*** in the name of **Justine Kamau**. The Money had been sent by the interested parties on alleged promise that they would be assisted to secure appointment in Parastatals.

The petitioner denies having received money from the interested parties and says that the statements by the interested parties are full of hearsay. He therefore wants the court to stop his prosecution and order that the interested parties be charged instead for giving bribes. In the petitioner's view, it is the interested parties who should have been charged and prosecuted. He says that his rights under **Article 49** were violated since he was not informed reasons for his arrest and why he was charged in Nairobi; that his rights under **Article 50** were also violated and that the principle of Natural Justice was violated too.

The respondent filed a replying affidavit sworn by **Felix Karisa**, a police officer and the Investigating officer in this case. The affidavit was sworn on 31/1/2017. He deposed that the interested parties reported to have been swindled money with a promise that they would be appointed to parastatal positions. On investigations, he found that money was sent to cell phone No. **0704\*\*\*\*\*** and immediately after transferred to cell phone No. **0723\*\*\*\*\*** registered in the petitioner's name. Investigations further revealed that the two cell phones were in the same location and at times Sim cards for the two cell phones were used in either of the two hand sets. The petitioner was arrested and charge in court. He stated that the truth of any evidence adduced in court can only be tested by the trial court.

The respondent also filed grounds of opposition in which it was contended that the matters raised in the petition should be raised before the trial court, that the petition is misconceived, incomplete and frivolous.

During the hearing of the petition when counsel for the parties highlighted their written submissions, Mr. Sore learned counsel for the petitioner, informed the court that he had filed written submissions on behalf of his client, but they could not be traced on record during the preparation of this judgment. Counsel told the court that the interested parties had admitted giving money which is a crime and therefore, they should have been charged for that. Counsel also submitted that the petitioner had been discriminated against because the discretion to charge him had not been properly exercised.. He took issue with the affidavit which was sworn by a police officer rather than an officer from the office of the **DPP**. Counsel relied on the cases of **Ronald Musengi vs. DPP & 3 Others 2015 eKLR** where the Court stopped prosecution because the petitioner had been given assurance that he would not be prosecuted, but three years later, the DPP embarked on prosecution, and **DPP & Others Ex-Parte Job Kigen Kangogo**, where the court stopped prosecution because the complainant had asked that prosecution be dropped but the **DPP** for no apparent reason declined and proceeded with the prosecution.

Counsel for the respondent for on his part submitted that there had not been any violation of the petitioner's rights, that they are not undertaking selective prosecution, and that the **DPP** is exercising his discretionary power on the reasonable basis that a crime was committed. Counsel referred to the case of **Thuita Mwangi & Others vs. the EACC & 3 Others Petition No. 153 of 2013**, where it was held that the *DPP is at liberty to prefer charges against any party in respect of whom he finds sufficient evidence to prefer charges.*

Counsel went on to submit that the constitution empowers the **DPP** to institute and undertake prosecutions without direction or consent from anyone. Counsel referred to the case of **Macharia & Mother vs. Republic {2001} KLR** on the parameters of improper prosecution such as; if the prosecution is undertaken for reasons other than upholding the criminal justice; if the prosecution is meant to bring pressure to bear upon the accused; if it is harassment; or if it is in contravention of one's constitutional rights. He also referred to the case of **Republic vs. Attorney General Ex-Parte Ngenyi Misc. App. No**

**448 of 2003** where it was stated that the *accuracy and correctness of evidence or facts gathered in an investigation can only be assessed and tested by the trial court*. Counsel asked that the petition be dismissed.

On behalf of the 3<sup>rd</sup> and 4<sup>th</sup> interested parties, it was submitted that the prosecution carried out investigations and established that there were reasonable grounds to charge the petitioner. Counsel went on to submit that there is no ground for allowing the petition since the petitioner had not in any way connected the interested parties with whoever the petitioner was alleging wanted to scuttle his political ambitions. He asked that the petition be dismissed.

I have considered this petition, the responses thereto and submissions by counsel for all the parties. I have also considered the authorities cited in this petition. The petitioner seeks to stop his prosecution on what he perceives to be violation of his constitutional rights contrary to **Articles 27, 48 and 50** of the constitution. **Article 27** provides that Sub-Article 2 every person is equal before the law and has the right to equal protection of the law. **Sub Article 2** provides that equality includes the full and equal enjoyment of all rights and fundamental freedoms.

The petitioner's complaint is that he was arrested and charged on allegations that he had conned some people money yet those people allege that they offered bribes hence they should have been charged for giving a bribe which is a crime. To the petitioner, this is discrimination.

The respondent's view is that there is no discrimination and that the **DPP** exercised his discretion properly in mounting the impugned prosecution. The response by the investigating officer is that he traced the petitioner and arrested him after complaints had been made by the interested parties and upon investigations being conducted which investigations established that a crime may have been committed.

The **DPP** has been given power by the constitution to be in charge of prosecutions in this country. **Article 157(6)** states that the Director of Public Prosecutions has power to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed. **Article 157(10)** is to the effect that the DPP shall not require consent of any person or authority for the commencement of criminal proceedings, and in the exercise of that power, shall not be under the discretion or control of any person or authority.

The **DPP's** office is an independent constitutional office, and exercises its prosecutorial powers independently. In deciding whether to prosecute or not, the **DPP** does not require any direction. He considers the evidence and makes an independent decision either to charge or not to. He must however, act on reasonable grounds. That is the import of **Article 157(11)** which provides that in exercising the powers conferred by this Article the Director of Public Prosecutions shall have regard to the public interest the interests of administration of justice and the need to prevent and avoid abuse of the legal process. The DPP has a constitutional mandate to do justice and avoid abuse of his discretion

The petitioner's submission that he was discriminated against because he was charged alone does not have any basis. For the court to interfere, the petitioner must show that the prosecution is being carried out for purposes of achieving results other than the cause of justice. The interested parties made reports which were acted upon and after investigations, it was found that there were reasonable grounds to charge the petitioner leading to his arrest and prosecution. The fact that interested parties were not charged cannot in itself amount to discrimination.

In the case of **Hon James Ondicho Gesami vs. the Hon. Attorney General & 2 Others Petition No. 376 of 2011**, where the issue of discrimination had been raised, the court stated that *it did not find any discrimination in the preferment of criminal charges against the petitioner*. The court went ahead to state that the DPP is at liberty to prefer charges against any party in respect of whom he finds sufficient evidence to prefer charges.

I must also point out that the petitioner is presumed innocent throughout his trial and that he does not even have to prove his innocence as provided for under **Article 50(2) (a)** which provides that every

person has a right to be presumed innocent until the contrary is proved.

I have seen the grounds in support of the petition. The petitioner says that the cell phone that was used to receive the money was not his but belonged to someone else. That is a defence that the petitioner can raise before the trial court. The petitioner has also stated that evidence in the witness' statements is full of hearsay. That again is a question of fact. As I have stated, the trial court being a court of law will assess the evidence adduced before it and make a determination based on that evidence and the law.

In the case of **Thuita Mwangi & 2 others vs. Ethics and Anti-corruption Commission & 3 Others [2013] eKLR**, the court stated that any defect in the process of investigation including incompetence of investigators, cannot be attributed to the DPP's decision to charge the petitioner in the circumstances the petitioner had not demonstrated that the DPP had not acted independently, or that he had acted capriciously, in bad faith, or had abused the process in the manner to trigger the court's intervention. I do not find substance in the allegation by the petitioner to this effect.

This court is not sitting on the trial of criminal case or appeal. The court has been moved on the basis that constitutional rights of the petitioner have been violated, and its duty is to check and find out whether or not indeed his rights have been violated.

On the allegation of breach of **Article 49**, the petitioner stated that he was not informed of the reasons for his arrest and charging at Nairobi, and that he has been threatened by the police for further arrest. It must be understood that **Article 49** is on the rights of accused persons. The petitioner did not adduce evidence to show that his rights were violated. What is before court is an allegation without substantiation. Any declaration of breach of constitutional rights must be based on sound evidence and proof.

The petitioner further complains that he was charged in Nairobi instead of Kakamega. I have read the petition and the reliefs sought. There is no prayer that he should not be tried in Nairobi. All the prayers are to the effect that he should not stand trial at all. That is an indication that the petitioner is not keen to undergo trial at all. That is not the purpose of a constitutional petition.

On the allegation that **Article 50** was violated, the petitioner simply alluded to the fact that police officers indicated that they would call the media to cover his arraignment in court and indeed it was covered, and he says it is being used by his political opponents against him. **Article 50** is on the fair hearing which has many facets. **Article 50(2)** is on criminal trials. The petitioner has not indicated which of the rights under the Article has or have been violated. The assertion that the police officers called the media to cover his being charged in court cannot be what amounts to violation of rights under **Article 50**. It is not enough to say that **Article 50** has been violated. One needs to show which provision of **Article 50** has been violated and the manner of violation. See **Mumo Matemo vs. Trusted Society of Human Rights Alliance & 5 Others [2013]eKLR**,

The Court has inherent powers to stop prosecution where circumstances permit, if the petitioner can show that the prosecution is not being carried out in good faith, that it is malicious or that it is aimed at settling a score rather than to do justice. In **Kuria & 3 others vs Attorney General**, quoted in it was held:-

*“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 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 petitioner has not shown how his constitutional rights have been violated, and in his petition, he has not demonstrated that there are sufficient grounds for interfering with the discretion of the DPP to prosecute him. It is not in every case where there are allegations that a petitioner is being prosecuted in violation of his/her constitutional rights that courts will intervene. There must be a basis for doing so.

Where a petitioner alleges that his rights under Article 49 were violated, that complaint must be made at the earliest opportunity and as a matter of fact, immediately he is produced before court so that the court can record his complaint.

Having carefully considered the petition and materials placed before me, I am not satisfied that the petitioner has made a case for intervention. I also note that one of the prayers sought is an order directing that his identity card be released. This court was not informed why the identity card is being held. The petitioner never submitted on it and the respondent too. However, I am of the view that that is a matter that can be raised before the trial court so that the prosecutor and investigating officer can deal with it. The trial court has power to make any orders that it may deem fit including an order for release of the petitioner's identity card if it is not part of exhibits. I will decline to interfere.

For the reasons stated above I do not find merit in this petition. Consequently the petition dated 15<sup>th</sup> November, 2016 is declined and is hereby dismissed. Each party do bear their own costs.

**Dated and Delivered at Nairobi this 28<sup>th</sup> Day of March 2017**

**E. C. MWITA**

**JUDGE**