



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. 567 OF 2016**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW  
APPLICATION FOR AN ORDER OF CERTIORARI**

**AND**

**IN THE MATTER OF ARTICLE 23 OF THE CONSTITUTION 2010**

**AND**

**IN THE MATTER OF ARTICLE 157(11) OF THE CONSTITUTION 2010**

**AND**

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

**AND**

**IN ACCORDANCE WITH ORDER 53 OF THE CIVIL PROCEDURE RULES 2010**

**AND**

**IN THE MATTER OF AN APPLICATION**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

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

**AND**

**BENSON KAMAU MUIYURO.....INTERESTED PARTY**

**EX PARTE: LABAN NJUGUNA GICHOHI**

**JUDGMENT**

**Introduction**

1. The subject of this judgment is a Notice of Motion dated the 5<sup>th</sup> day of January, 2017 in which the Applicant herein, **Laban Njuguna Gichohi**, seeks substantially an order of Certiorari **directed to the Respondent, by itself, its servants and/or agents or any other officer acting under their authority to bring to the court for the purpose of being quashed the decision by them made to institute and/or commence criminal proceedings against the ex-parte applicant.** The applicant also seeks an order for provision for costs.

### **The Applicant's Case**

2. The Applicant's case was that him, the applicant, and the interested party herein, **Benson Kamau Muiyuro**, were convinced by one **Beatrice** to buy Turbo Ring bearings (hereinafter "the goods") from the latter upon which the latter would show them where to sell the same at a profit. Pursuant thereto, the applicant and the interested party decided to invest jointly a total of Kshs. 1 million which they gave the said **Beatrice** in exchange for the goods and she connected them to the prospective buyer.

3. It was the applicant's case that the interested party admittedly had the goods by the time the applicant was being arrested and charged. However, the person who had shown interest in buying the goods failed to buy the goods leaving the interested party and the applicant with the goods without a buyer. Accordingly, they were left with the alternative of looking for other buyers after they realized that **Beatrice** had sold to them the goods at a very high price compared to the market price. Attempts to locate her, it was averred, were unfruitful after she went missing.

4. The applicant averred that they reported me to the police but he was arrested and charged with the following count:

*"LABAN NJUGUNA GICHOHI: On the 21<sup>st</sup> day of June 2016 at the Total Petrol Station in Makadara Sub county with intent to defraud obtained from Benson Kamau Muiyuro a sum of Kshs. 1 million by **falsely pretending that you were in a position to sell Turbo ring bearings** numbering to two hundred pieces used by drilling machines, a fact you knew to be false or untrue"*

5. In the applicant's view, the above charge implies that the interested party gave him Kshs. 1 million for telling him that the applicant was in a position to sell Turbo rings which is inconceivable and not consistent with the statements and complaint. In the alternative, the applicant was charged with conspiracy to commit a misdemeanour contrary to section 394 of the **Penal Code** as follows:

*"LABAN NJUGUNA GICHOHI: On the 21<sup>st</sup> day of June 2016 at Total Petrol Station along Outering road in Makadara sub county within Nairobi County conspired with others not before court to commit a misdemeanour namely obtaining money from one Benson Kamau Muiyuro totalling 1 million by **falsely pretending to sell him Turbo ring bearings used by drilling machines, a fact you knew to be false or untrue.**"*

6. In the applicant's view, the alternate charge above is baseless and does not deserve trial because the interested party admits, accepts and acknowledges that he has the goods which were sold to him. Moreover count one is framed showing that the interested party has or had the goods and the applicant's crime is that he failed to provide a buyer; an allegation that is not an offence even if true.

7. According to the applicant, he was released on a cash bail of Kshs. 350,000 causing a big dent in his salon and barber business as a result of which his income has significantly gone down due to debts that he incurred in raising the cash bail yet the charges have no foundation in law, an abuse of prosecutorial power and the court process.

8. In the applicant's view, the interested parties cannot expect the respondent and the criminal court to compel the applicant to find a buyer for the goods more so because he has not employed the applicant as his marketer.

### **Respondent's Case**

9. In response to the application, the Respondent averred that one **Benson Muiyoro Kamau**, (the Interested Party) reported a case of Obtaining money by False Pretences Contrary to section 313 of the **Penal Code**, Vide OB 80/24/6/16. It was reported that the Applicant **Laban Njuguna Gichohi** (accused person) introduced and lured the Interested Party (complainant) to his business associate, whom he allegedly claimed to have known for about four years and was well known to him. The Applicant, it was reported, came up with a business idea of buying Turbo rings bearings and the Interested Party contributed Kenya Shillings One Million for the purchase of the aforesaid goods. However, before the transaction was completed the Applicant, his associates and Interested Party were captured by CCTV footage at Ridgeways mall parking lot and also Calito Hotel at the same place. Upon the delivery of the consignment, payment of the same, the Interested Party was at a loss on what to do with the bearings because the Applicant's accomplices went underground severing any kind of communication, unlike before when the suspect had been communicating frequently ad this assertion is supported by call data.

10. In the Respondent's view, the allegation of compelling the Applicant to compensate the interested party are in bad taste, ill-informed basically meant to divert attention from the real issue of a well-organized scheme to defraud the complainant because it beats logic that the suspect could not trace the other accomplices.

11. The Respondent contended that there is no evidence to suggest that the interested party is in the process of abusing or using criminal court to enforce an oral agreement. To the contrary, it's a fact that when the investigations were conducted an audit trail of the money the suspect supposedly contributed towards the realization of transactions he couldn't sufficiently account for the source hence suspected to be from the accomplice which was meant to lure the associate to business. The Respondent disclosed that the Applicant after being arraigned in court, was seen in company of one of the prime suspects the one whom was to purchase the turbo ring bearings, (**Steve Mzungu**) at Buruburu Shopping Centre along Mumias South road and Rabai road round about and that they were captured by CCTV camera while repairing motor cycle puncture on 19<sup>th</sup> July, 2016.

12. It was averred that subsequently, criminal charges were preferred against the applicant vide Makadara Criminal case No. 2142 of 2016. It was the applicant's case that this application has been filed in bad faith, misconceived and abuse of the court process and meant to defeat the cause of justice.

13. The Respondent asserted that the Directorate of Criminal investigations' is established under section 28 of the **National Police Service Act** under the direction, command and control of the inspector General of the National Police Service and its functions include but are not limited to:

- a. Collecting and providing criminal intelligence
- b. Undertaking investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime and cyber-crime among others;
- c. Maintaining law and order;
- d. Detecting and preventing crime;
- e. Apprehending offenders;
- f. Maintaining criminal records;
- g. Conducting forensic analysis;
- h. Executing the directions given to the inspector general by the Director of Public Prosecutions pursuant to Article 157(4) of the Constitution:
- i. Co-ordinating country Interpol Affairs;

j. Investigating any matter that may be referred to it by the independent police oversight authority ;and

k. Performing any other functions conferred on it by any other written law.

14. According to the Respondent, the objects and functions of the National Police Service are set out in Article 244 of the Constitution of the Republic of Kenya and the **National Police Service Act** and in discharge of their duties and functions, the staff of the National Police Service are bound by, do respect, observe and uphold, *inter alia*, the following Constitutional provisions:

a. Regard to public interest, the interests of administration of justice and the need to prevent and avoid abuse of legal process

b. Upholding and defending the Constitution

c. Respecting, observing, protecting, implementing, promoting and upholding the rights and freedoms in the Bill of Rights enshrined in the Chapter Four

d. Accountability to the public for decisions and actions taken and generally observe of Chapter Six (Leadership and Integrity)

e. Accountability for administrative acts and observance of the values and principles of public service under Chapter Thirteen.

15. It was the Respondent's case that the applicant has not demonstrated that in undertaking investigations in the complaint lodged with the National Police Service and in making the decision to prefer Criminal charges against them, either the Director of Public Prosecution or any member of staff of the office of the Director of Public Prosecution or the National Police Service acted without or in excess of the power conferred upon them by the law or have infringed ,violated, contravened or in any other manner failed to comply or respect and observe the foregoing provisions of the Constitution of Kenya 2010 or any other provisions thereof or any other provisions of the law.

16. It was averred that the DPP independently reviewed and analysed the evidence contained in the investigations file compiled by the Directorate of Criminal Investigations including the witness statements, documentary exhibits and statements of the applicant as required by the law and it was on the basis of the said review and analysis that the ODPP gave instructions to prosecute the applicant. To the Respondent, the decision to charge the applicant was informed by the sufficiency of evidence on record and the public interest and not on any other considerations. In its view, the accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered and properly adduced in support charges.

17. The Respondent asserted that the contention by the applicant that the case against him is oppressive and malicious and amounts to an abuse of court process is unfounded and bad in law in that :

a. State powers of prosecution are exercised by the Director Of Public Prosecution personally or by persons under his control and directions;

b. It the exercise of such powers, the Director of Public Prosecutions:

i. Is subject only to the constitution and the law.

ii. Does not require the consent of any person or authority

iii. Is independent and not subject to the direction or control of any person or authority; and

c. The high court would be crossing into the line of the independence of the DPP to descend into the arena of finding whether there is prima facie case against the applicant;

d. The applicant has not demonstrated that the DPP has not acted independently or has acted capriciously, in bad faith or has abused the process in a manner to trigger the high court's intervention

18. In this case it was contended that the applicant has failed to demonstrate that the DPP lacked the requisite authority acted in excess jurisdiction or departed from the rules of natural justice in directing that the applicant be charged with offences disclosed by the evidence gathered. Therefore, the application has been filed in bad faith and is an attempt to defeat justice and ought to be dismissed with costs.

### **Determination**

19. I have considered the application, the affidavits both in support of and in opposition to the application, the submissions and authorities relied upon.

20. The general rule is that the Court 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. 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 by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process 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 in 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.

21. This position was upheld in **Meixner & Another vs. Attorney General [2005] 2 KLR 189**, where the Court expressed itself as hereunder:

**“The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. 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 particularly the right to the protection by law enshrined in section 77 of the Constitution...Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it; it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power. Having regard to the law, 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 is correct. 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 examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence and 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.”**

22. In this case the ex parte applicant’s case in summary is that based on the statements recorded by the witnesses in the criminal proceedings they cannot support the charges levied against the applicant. I have perused the said statements and it may well be that the applicant’s contention with respect to the first count may face difficulty in sustaining the same. This is so due to the fact that the complainant has not alleged that he gave the sum to the applicant on the strength of the applicant’s representation to supply the said goods.

23. With respect to the 2<sup>nd</sup> count the same though in the alternative is hinged upon the applicant’s alleged collusion with the perpetrators of the said offence. Under section 20(1)(c) of the *Penal Code*, when an offence is committed, every person who aids or abets another person in committing the offence is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it. Under section 21 thereof, when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence. The alternative seems to be based on these two provisions though it does not come out very clearly. However the Respondent’s case seems to be that if the applicant was not the principal offender, then he was part of the scheme to defraud the interested party.

24. Whether the prosecution would be able to prove that this was in fact the position is not for this Court to resolve. I however cannot say with certainty that the prosecution’s case is farfetched. In my view whereas the applicants may well have formidable defenses based on their averments herein, it is for the trial Court to make a finding on which of the two versions is correct. In this case I agree that the issues which the applicant has placed before me are issues which go to the merit of the impugned criminal proceedings and cannot properly be determined in these proceedings.

25. The applicant has contended that the criminal process has caused a big dent in his salon and barber business as a result of which his income has significantly gone down due to debts that he incurred in raising the cash bail. However as was held in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69:**

**“The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial...”**

26. In the instant case, the Applicants have failed to discharge the burden and must be ready to face their trial as was stated by **Lenaola, J** (as he then was) in the case of **Daniel Ndungu vs. Director of Public Prosecutions & Another (2013) eKLR:**

**“In conclusion, the Petitioner ought to face his accusers, prove his innocence or otherwise and submit to the consequences of the Law should he be found culpable”.**

27. In the premises I find no merit in this application. As was held in **Kuria & 3 Others vs. Attorney General**, (supra):

**“In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal**

**prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names.”**

28. Consequently, the Notice of Motion dated the 5<sup>th</sup> day of January, 2017 fails and is dismissed with costs.

29. Orders accordingly.

**Dated at Nairobi this 27<sup>th</sup> day of March, 2017**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Sore for the applicant**

**Miss Ochieng for the Respondent**

**Cc Mwangi**