

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 498 OF 2014

In the matter of Articles 22 (1)

AND

**In the matter of alleged contravention of Fundamental Rights or Fundamental Freedoms under
Articles 27, 47, 48 and 50 of the Constitution of Kenya, 2010**

BETWEEN

Samuel Karana Mbugua.....1st Petitioner

Maria Muia.....2nd Petitioner

versus

The Director of Public Prosecutions.....1st Respondent

Director of Criminal Investigations Department.....2nd Respondent

Cooperative Bank of Kenya.....Interested Party

JUDGEMENT

The petitioners herein seek declarations that the prosecution of Chief Magistrates criminal case number 935 of 2014, *R vs Samuel Mbugua and Mary Muia* is discriminatory and selective and unconstitutional and abuse of the court process, an order of prohibition stopping the said case and a claim for damages interests and costs of the case.

The petitioners who were at the material times procurement manager and procurement officer respectively of the interested party aver that on 26th June 2014, the Respondents caused the petitioners to be arraigned in court in criminal case number 935 of 2014 charged with the offence of fraudulent false accounting contrary to section 330 (b) of the Penal Code.[\[1\]](#)

It is the petitioners case that the procurement committee comprised of themselves and two other persons named in paragraph 7 of the petition and that the process of procurement required the approval of all the four persons in the said committee who included the director of finance and that the responsibility of the first petitioner was limited to confirming recommendations made by the second petitioner and that an LPO could not be prepared unless the committee convened and passed a resolution for the required procurement, hence the interested party made a selective, discriminative and malicious report to the second Respondent notwithstanding that the fact that the petitioners were under the supervision of three other persons, that the second Respondent ignored their aforesaid explanation and charged them in court, hence the interested party acted maliciously and in a discriminatory manner and in violation to articles 27, 47, 48 & 50 of the constitution, and that the charges in question were commenced maliciously.

Respondents case

The first and second Respondents response to the petition is highlighted in the Replying affidavit of Cpl Knocker M. Nyasinga filed on 15 December 2014 who averred inter alia that the petitioners initiated four LPO'S after receiving a requisition from the interested parties stores, that it was their duty upon receipt of the requisition to raise a Tender Analysis Form indicating the tender which is forwarded to the Director of Finance who analyses it and raises a Purchases Reorder Authorization Form which indicates the item required, quantity and last quotation analysis, and the document is then signed by the procurement officer as the analyser and confirmed by the procurement manager who then forwards it for recommendation and approval and that only the form is forwarded without attachments. At this point the procurement officer raises the LPO and the same is forwarded to the chief manager, finance for budgeting, then it is forwarded to the native business systems who does the delivery, then the goods are received upon certifying the quantity and the invoice is raised and the invoices are verified by the petitioners.

It is averred that it was the petitioners duty to confirm the accuracy of the documents since they originated from them and that in the process of the procurement of the items in question ,the interested party lost Khs. 1,210,000/= in that in the purchases in question the cost of the rubber band doubled, that the prices were indicated as Ksh. 220/= instead of Ksh. 110/= and that the purchases were made from Native Business Systems which operated a bank account at Interested parties Upper Hill Branch and that the account holder was introduced to the Bank by the first petitioner and there was evidence that any time payments were made to the said account for supplies, some money would be transferred t the account of a one Titus Ibogo Kiarie account at the Kiambu Branch of the same bank and that the person was introduced to the bank by the first petitioner and a second account was traced to the first petitioners spouse and a minor who is the petitioners child. The police officer formed the opinion that the flow of funds to the said accounts and the relationship between the first petitioner and the account holders lead to a conclusion of possible interest by the first petitioner in the procurement process, hence the police formed the opinion that the petitioners were culpable as opposed to the other persons in the procurement process having been misled by the petitioners.

The interested party filed the affidavit of Edwin Njiru Karuri, the head of its security services who avers *inter alia* that the director of procurement signs the tender analysis for without the supporting documents since it is the duty of procurement officer and manager to verify their accuracy and authenticity since they are the originators of the document and that the bank lost Ksh. 1,210,000/= on various purchases and that the criminal case is premised on credible evidence.

Also on record is a further affidavit by the first petitioner filed on 7 August 2015 in which he averred that all procurement committee members do sign tender analysis and that it is not permissible to sign without the supporting documents. I note that this differs with the contents of the first petitioners statement annexed t the affidavit of Mr. Karuri in which he stated "*I note that at the time of my signing the spreadsheet, the detailed supporting documents are not attached as this is assumed to be the responsibility of analyser nd confirmer..... I state both the analyser and confirmer as the originators of this document have full responsibility to ensure accurate and authenticity.....I thus state that Maria Muia and Samuel Mbugua were learly responsible and it was their duty to ensure that the documents were very accurate before forwarding them for authority to incur expenditure.*"

Hearing proceeded before Onguto J on 3 November 2015 when counsel for the petitioner highlighted his submissions.

In their submissions, the petitioners' counsel submitted that the prosecution is discriminatory and selective hence contrary to article 27 of the constitution, that it is an abuse of court process and a violation of the petitioners constitutional rights and relied on the decision rendered in *Ronald Leposo Musengi vs DPP*^[2]

Counsel for the first and second Respondent submitted that upon conclusion of the investigations the evidence available was analysed without bias and the decision was arrived at indecently without bias and having to the provisions of article 157 of the constitution and the principles enunciated in Office of the

Director of Public Prosecutions Act[3] and that courts ought not to usurp the powers of the Director of Public Prosecutions and the Inspector General of Police and cited that case of *Kenya Commercial Bank Ltd & Two Others vs Commissioner of Police & Another*[4] and summarized the circumstances which ought guide a court to interfere with the DPP's constitutional mandate as enumerated in the case of *George J. Okungu & Another vs Chief Magistrates Court, NBI & Another*[5] where it was held that the fact that a prosecution is bound to fail is not a ground to terminate a prosecution because that defence is always open to the petitioner in the proceedings nor is the fact that the facts may constitute a civil proceedings a ground to warrant stay.

However, if the prosecution oppressive and vexatious as was held in the court of Appeal in *Joram Mwendwa Guantai vs The Chief Magistrate, Nairobi*[6] then that is a ground to stay criminal proceedings or where the prosecution is a violation of fundamental rights, then the High court can stay the proceedings.[7] It was also correctly submitted that the High court has powers to stay criminal proceedings if they are commenced on extraneous matters divorced from the goal of justice[8] or where the prosecution was commenced in absence of proper factual foundation or basis.[9] Counsel also submitted that the police have a duty to investigate on any complaint once the complaint is made[10] and that the courts duty is to ensure that the petitioners rights and freedoms are upheld[11] and concluded by stating that there is public interest in every litigation.[12]

Counsel for the interested party adopted the submissions of the first and second Respondents.

The issue for determination is whether or not the petitioner has demonstrated a case to warrant this court to grant the reliefs sought in the petition. The basic principle is that it is for the prosecution, not the court, to decide whether a prosecution should be commenced and, if commenced, whether it should continue. In *Environment Agency v Stanford*,[13] Lord Bingham LCJ said:-

"The jurisdiction to stay, as has been repeatedly explained, is one to be exercised with the greatest caution ... The question of whether or not to prosecute is for the prosecutor....."

The DPP is required to act independently in the discharge of his duties. Article 157 (10) of the Constitution of Kenya 2010 provides that 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 his powers or functions, shall not be under the direction or control of any person or authority. This position is also replicated under Section 6 of the Office of the Director of Public Prosecutions Act.[14] I have carefully examined the facts of this case and the excerpts from the first petitioners statement reproduced above and I find that the police were acting on a complaint and acted within the mandate prescribed under the law. I also find nothing to suggest even in the slightest manner that in charging the petitioners, that the DPP did not act independently in arriving at the decision to prosecute.

Section 24 of the *National Police Service Act*[15] sets out functions of the Kenya Police Service. In my view, the petitioners have not demonstrated that the investigations and prosecution in question constitute an abuse of process or police powers, nor has the petitioner proved malice or bad faith. The duty and mandate of the police was appreciated in *Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another*[16] where it was held that **the police have a duty to investigate any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime if they fail to act. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. 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.**

However, the courts have an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power to 'stay' an indictment (or stop a prosecution in the magistrates' courts) if the High court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court or infringement of the petitioners fundamental rights.

Abuse of process has been defined as something so unfair and wrong with the prosecution that the court

should not allow a prosecutor to proceed with what is, in all other respects, a perfectly supportable case. [17] Whether a prosecution is an abuse of court process, unfair, wrong or a breach of fundamental rights, it is for the court to determine on the individual facts of each case. I am afraid, from the material before this court, there is nothing to show that the prosecution is unfair, wrong, baseless or an abuse of police powers or judicial process. The concept of a fair trial involves fairness to the prosecution and to the public as well as to the accused.[18]

The inherent jurisdiction of the court to stop a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances.[19] The essential focus of the doctrine is on preventing unfairness at trial through which the accused is prejudiced in the presentation of his or her case or where there is clear breach of fundamental rights to a fair trial. Courts should first consider whether or not there is anything in the trial to prevent 'a fair trial' and if there is none, then the court ought to allow the prosecution to continue.

In my view, the high court should prohibit or quash prosecutions in cases where it would be **impossible to give the accused a fair trial; or where it would amount to a misuse/manipulation of process** because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.[20] These categories are not mutually exclusive and the facts of a particular case ought to determine whether to allow the orders sought or not.[21]The power to stay or stop a prosecution should only be exercised if exceptional circumstances exist which would result in prejudice to the accused which cannot be remedied in other ways.

As correctly submitted by counsel for the first and second Respondent, a criminal prosecution can be stopped if it was commenced in the absence of proper factual foundation. There is nothing to suggest that there was no proper factual foundation in undertaking the prosecution in question.[22] The decision whether or not to prosecute is very important. It can be very upsetting for a person to be prosecuted even if later found not guilty. However, a decision not to prosecute can cause great stress and upset to a victim of crime. I find nothing in the material before me (even mere reasonable suspicion) to suggest that the DPP acted in violation of article 157 (10) of the Constitution and Section 6 of the Office of the Director of Public Prosecutions Act[23] cited above.

The Constitution contains, in material respects, a fundamental commitment to human rights. Interpreting similar provisions in the constitution of South Africa, the South African Constitutional court (Nicholas AJA), stated that:-[24]

"..... The enquiry is whether there has been an irregularity or an illegality, that is a departure from the formalities, rules and principles of procedure according to which our law required a criminal trial to be initiated or conducted..."[25]

The right to a fair trial is guaranteed by Article 50 of the Constitution. The prosecution of an accused person must be conducted with due regard to traditional considerations of candour, fairness, and justice. In the Indian Case of *Pulukiri Kotayya Vs Emperor*[26] the court held that where a trial is conducted in a manner different from what is prescribed under the law, the trial is bad.

In all honesty, I find nothing in the material before me to show that the petitioners right to a fair trial has been hampered or threatened in the criminal trial in question nor is there is tangible evidence to demonstrate that the police acted maliciously or outside their powers or that the prosecution in question was commenced without proper or reasonable foundation. It is my view that the petitioner has not demonstrated even in the slightest manner that his rights to a fair trial have been or will be infringed if the prosecution in Criminal case number 935 of 2014 proceeds nor has it been shown that the said trial is an abuse of court process or it will inherently violate his rights to a fair trial as enshrined in the constitution. I also find it disturbing that a 2010 criminal trial is still pending awaiting trial.

The petitioners also pray for damages. In all honesty, I find no basis for awarding damages nor has evidence been adduced to demonstrate any basis for awarding the damages sought.

I find that this petition has no merits. Consequently, I dismiss this petition with costs to the Respondents and direct that Chief Magistrates Criminal case Number **935** of **2014** proceeds for hearing and determination.

Orders accordingly

Signed, Dated and Delivered at Nairobi this 27th day of March 2017

John M. Mativo

Judge

[1] Cap 63, Laws of Kenya

[2] Pet No 436 of 2014

[3] Act No. 2 of 2013

[4] {2013}eKLR

[5] {2014}eKLR

[6] {2007}2 EA 170

[7] *Mexiner & Another vs Attorney General*{2005}2KLR 189 cited

[8] *Kuria & 3 Others vs A.G* {2002}2KLR 69

[9] HCC App No. 406 of 2001

[10] *R. vs Commissioner of Police & Another ex parte Michael Monari & Another* {2012}eKLR

[11] *Koinange vs A.G & Others* {2007}2EA 256

[12] *Kuria & Others vs A.G* {2002}2KLR

[13] {1998} C.O.D. 373, DC

[14] Act No. 2 of 2013

[15] **No 11 A of 2011**

[16] **{2012} eKLR**

[17] *Hui Chi-Ming v R* [1992] 1 A.C. 34, PC

[18] *DPP v Meakin* [2006] EWHC 1067.

[19] See Attorney General's Reference (No 1 of 1990) [1992] Q.B. 630, CA; Attorney General's Reference (No 2 of 2001) [2004] 2 A.C. 72, HL.

[20] See *Bennett v Horseferry Road Magistrates' Court and Another* [1993] 3 All E.R. 138, 151, HL; see also *R v Methyr Tydfil Magistrates' Court and Day ex parte DPP* [1989] Crim. L. R. 148.

[21] *R v Birmingham and Others* [1992] *Crim. L.R.* 117

[22] Republic vs Attorney General ex-parte Arap Ngeny HCC APP NO. 406 of 2001

[23] *Supra*

[24] *Shabalala & 5 others vs A.G of Transvaal & Another* CCT/23/94

[26] *L.R.* 74 *Ind App* 65