



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION**  
**MISCELLANEOUS CIVIL APPLICATION NO. 19 OF 2016**

**REPUBLIC .....APPLICANT**

**VERSUS**

**ANTI-CORRUPTION COMMISSION.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTION .....2<sup>ND</sup> RESPONDENT**

**JENNIFER KARIMI NJAGI ..... EX-PARTE APPLICANT**

**JUDGMENT**

1. The Applicant filed the Notice of Motion dated 25<sup>th</sup> July, 2016 pursuant to leave granted by this Court on 21<sup>st</sup> July, 2016. She seeks the following orders;

*a. That this Honourable Court do grant an order of prohibition by way of Judicial Review prohibiting the Respondents by themselves and or by their agents from harassing, intimidating, threatening, charging and arresting the Applicant in relation to her performing her duties of arresting one Chandreshbhai Bavech for not having travel and work permit.*

*b. That the costs of this Application be provided for.*

The application is supported by her affidavits and statements of facts filed together with the application seeking leave.

2. The Applicant avers that she is a police officer in the employment of the National Police Service holding the rank of corporal under force No. 79490 and attached to the Central Police Station, Nairobi. She stated further that on or about 12<sup>th</sup> July, 2016 she was on normal patrol within the Central Business District with her colleagues **PC Joe Maingi** and **PC Patrick Ndove**. She was in-charge of this team.

3. That they noticed a motor vehicle with suspiciously acting occupants and approached it to interrogate the two occupants. They did interrogate them and sought for work permits from them to prove that they were legally working in the country as they were of Asian origin. One of them did not have the permit and they took him to the Central Police Station as they waited for the second occupant to bring the work permit.

4. She deponed that they waited for him in vain and she eventually booked the culprit going by the name of **Chandreshbhai Bavech** vide OB No. 91/12/7/16. They left the station but she learnt later that her

colleagues PC Joe Maingi and PC Patrick Ndove had been arrested by anti-corruption officers and charged in Milimani Court vide ACC No. 148 of 2016 in respect of the said matter.

5. She was thereafter summoned to the office of the 1<sup>st</sup> Respondent on 18<sup>th</sup> July, 2016 and shown the charge sheet of her colleagues, made to write a statement, her finger prints taken, given a cash bail receipt (***JKM-1***) and advised to appear in court on 21<sup>st</sup> July, 2016 to answer to charges unknown to her.

6. She is therefore aggrieved by the decision to charge and arraign her in court without giving her an opportunity to clear her name. she denies having done anything outside her line of duty to warrant any charges against her.

7. In his written and oral submissions, ***Mr. Ambani*** for the Applicant in referring to the powers of the Director of Public Prosecution (DPP) under Article 157 (11) of the Constitution, submitted that the DPP must defend the Constitution and adhere to the principles of natural justice. That the Applicant simply arrested an individual while acting in her line of duty and should not be punished for that.

8. Secondly, the actions of both Respondents must be exercised reasonably and fairly. He referred to the case of ***George Joshua Okungu & Another –vs- The Chief Magistrate’s Anti-Corruption Court at Nairobi & Another. High Court Petition Nos. 227 and 230 of 2009 [2014] eKLR*** in asking this Court to interfere with the decision of the Respondents. The court in ***George Joshua Okungu case (supra)*** stated thus;

***“Whereas we appreciate the fact that the decision whether or not to prosecute the petitioners, is an exercise of discretion this Court is empowered to interfere with the exercise of discretion in the following situations –***

***a. Where there is an abuse of discretion;***

***b. Where the decision-maker exercises discretion for an improper purpose;***

***c. Where the decision maker is in breach of the duty to act fairly;***

***d. Where the decision-maker has failed to exercise statutory discretion reasonably;***

***e. Where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power;***

***f. Where the decision-maker fetters the discretion given;***

***g. Where the decision-maker fails to exercise discretion;***

***h. Where the decision-maker is irrational and unreasonable .....***”

9. He submitted that there was no rationality and reasonableness in the Respondent’s decision to charge the Applicant after she had recorded a statement. Further, he submitted that there were no reasons given for the decision made by the Respondents and violated the Applicant’s right under Article 47 (2) of the Constitution. He contended that the Respondents did not treat the Applicant with dignity. To support this argument, he cited the case of ***Republic –vs- Commission on Administrative Justice & Another Exparte Samson Kegongo Ongeru [2015] eKLR.***

10. On irrationality/gross unreasonableness, he relied on the case of ***Republic –vs- National Water Conservation & Pipeline & Pipeline Corporation & 11 Others [2015] eKLR*** where the High Court cited the words of ***Lord Diplock*** in the famous case of ***Council of Civil Service Unions –vs- Minister for the Civil Service (1984) 3 ALL ER 935*** when he stated thus;

***“By ‘irrationality’ I mean what can by now be succinctly referred to as ‘Wednesbury***

*unreasonableness’ (Associated Provincial Picture Houses Ltd. –vs- Wednesbury Corporation [1948] IKB 223. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that Judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.”*

11. The 1<sup>st</sup> Respondent filed a Replying Affidavit through **Bernard Juma** an investigator with the Commission. He annexed an undated statement recorded from the Applicant (**JB2**) plus a copy of the charge sheet in respect of the Applicant’s colleagues (**JB1**). In this replying affidavit, he explains the report received and the investigation undertaken. At paragraph 7 – 11 he states;

*7. That investigations undertaken then revealed that officer Joe Maingi and officer Patrick Ndove were heavily implicated in the commission of offences as provided within the charge sheet attached herewith and marked as exhibit JB;*

*8. That the charge sheet was registered and the officers therein arraigned in court.*

*9. That it is noteworthy that the exparte Applicant was also placed at the scene by the witnesses during the investigations.*

*10. That investigations revolving her involvement in the matter have commenced which further included recording a statement from her which is hereby attached and marked as Exhibit JB2.*

*11. That investigations as to her involvement have not yet been concluded as such no charges have been registered against her.*

This replying affidavit was sworn on 9<sup>th</sup> September, 2016.

12. Mr. Opondo for the 1<sup>st</sup> Respondent opposed the application relying on the submissions and authorities. He submitted that the Applicant was not entitled to an Order of Prohibition as the same is issued in respect of a person charged yet the Applicant has not been charged. He cited the case of **Republic –vs- Attorney General and 4 Others Exparte Kenneth Kariuki Githii [2014] eKLR**, and argued that since the Applicant had not been charged, there were no reasons to be given to her, by any of the Respondents.

**13. Mr. Ndege** for the 2<sup>nd</sup> Respondent associated himself with the submissions by Mr. Opondo for the 1<sup>st</sup> Respondent. He contended that since the Applicant had not been charged, she had no action against the 2<sup>nd</sup> Respondent. Further that Prohibition could not be issued since no action had been taken against her.

### **DETERMINATION**

14. I have considered the application, affidavits, annexures both written and oral submissions. The single issue falling for determination is whether the Applicant has demonstrated that she is deserving of the Order sought.

15. It is clear from what has been presented before this Court that the 1<sup>st</sup> Respondent has not recommended the charging of the Applicant. It is also clear that the 1<sup>st</sup> Respondent has not filed any report or recommendations to the 2<sup>nd</sup> Respondent in respect of the Applicant as required under Section 35 Anti-Corruption and Economic Crimes Act (ACECA) which provides;

Section 35

*“(1) Following an investigation the Commission shall report to the Director of Public Prosecutions on the results of the investigation.*

***(2) The Commission's report shall include any recommendation the Commission may have that a person be prosecuted for corruption or economic crime."***

16. There is no dispute that the Applicant is a police officer and that she was on patrol duty on the material day. The incident, the subject matter of this case occurred on 12<sup>th</sup> July 2016. The two officers who were with the Applicant were arrested on the same 12<sup>th</sup> July, 2016. From the charge sheet (JB1) it is not clear when they appeared in court. However, in view of the 24 hour court appearance rule, there is no doubt the latest they could have appeared in court was 13<sup>th</sup> July, 2016 afternoon.

17. On 18<sup>th</sup> July, 2016, the Applicant was summoned and appeared before the 1<sup>st</sup> Respondent's offices and paid a cash bail of shs.40,000/= to appear at the Anti-Corruption Court on 21<sup>st</sup> July, 2016 8 am to answer a charge of corruption. This can clearly be gleaned from the cash bail receipt No. 1013805 (JKN2). With this kind of details from a receipt issued by the 1<sup>st</sup> Respondent, what would make the Applicant not believe that she had been charged? What was this cash bail and the details in the receipt all about?

18. In the case of *Republic –vs- Commissioner of Police & Another, Exparte Michael Monari & Another [2012] eKLR*, the court held;

***"The police have a duty to investigate any complaint once a complaint is made. Indeed, the police would be faulting in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decision to charge act in a reasonable manner, the High Court would be reluctant to intervene."***

19. In *Republic –vs- Commission on Administrative Justice (supra)* the High Court while quoting the decision in *RE Pergamon Press Ltd. [1971] Ch. 388* stated;

***"It is true, of course, that the Inspectors are not a court of law. Their proceedings are not judicial proceedings. They are not even quasi-judicial for they decide nothing; they determine nothing. They only investigate and report. They sit in private and are not entitled to admit the public to their meetings. They do not even decide whether there is a prima facie case. But this should not lead us to minimize the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations and careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about winding up of the company, and may be used as material for the winding up ..... Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, but are only administrative. The Inspectors can obtain the information in any way they think best, but before they condemn or criticize a man, they must give him a fair opportunity for correcting or contradicting what is said against him."***

20. The Applicant filed her first application in this matter on 20<sup>th</sup> July, 2016. This court granted her leave but declined to order the leave to operate as stay against any criminal proceedings against her. There was an indication vide the receipt "JKN2" that the Applicant was charged which was not correct.

It is now eight (8) months down the line and since the occurrence of this incident, yet the 1<sup>st</sup> Respondent still claims to be investigating the case. What is it about the Applicant that they are still investigating? Just as police investigators, the 1<sup>st</sup> Respondent ought to act fairly as its officers investigate crime.

21. It is nowhere indicated not even in the submissions the reasons for delay. I would have expected the 1<sup>st</sup> Respondent to clearly come out and state what they are investigating and why it was taking too long.

Such a process must be expeditious as provided for under Article 47 of the Constitution which states;

**(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

**(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

22. From what has been presented before this Court, the complaint against the police officers was not a complicated one. If the two male officers were arrested the same day why has it taken the 1<sup>st</sup> Respondent eight (8) months to complete investigations if indeed there was any incriminating evidence against the Applicant? I have read her recorded statement (JB2) and it has no incriminating element in it.

23. The 1<sup>st</sup> Respondent's action and antics have not been justified at all. It amounts to holding the Applicant in servitude and abusing her dignity which violates her rights under Article 28 and 30 of the Constitution. The 1<sup>st</sup> Respondent has a duty to investigate cases and this must be done expeditiously unless there are good reasons for delay. In this case, there is no reason given for the manner this matter has been handled by the 1<sup>st</sup> Respondent, especially the delay in coming up with a decision after the alleged investigations.

24. At paragraph 7 of his replying affidavit, **Juma Bernard** is clear on who was implicated. On 9<sup>th</sup> September, 2016 he avers that investigations revolving around the Applicant's involvement in the matter had commenced. On 28<sup>th</sup> February, 2017 when this matter was heard, the 1<sup>st</sup> Respondent was still investigating the involvement. Maybe, the witnesses went out of the country, who knows?

25. I find that the 1<sup>st</sup> Respondent has abused its power in the manner it has handled the matter involving the Applicant. This is a real departure from the rules of natural justice and it amounts to harassment and intimidation and requires the court's immediate intervention.

26. I am satisfied that the Applicant has demonstrated that the 1<sup>st</sup> Respondent has failed to comply with the rules of natural justice, fair administration and thereby exposing the Applicant to ridicule, harassment and intimidation. I hereby allow her application and issue the following orders;

A. Order of Prohibition prohibiting the 1<sup>st</sup> Respondent by itself and or by its agents from harassing, intimidating, threatening and arresting the Applicant in relation to her arresting one **Chandreshbhai Bavech** while discharging her official duty.

B. The 1<sup>st</sup> Respondent to refund to the Applicant shs.40,000/= paid as cash bail on 18<sup>th</sup> July, 2016.

C. Costs to be paid by the 1<sup>st</sup> Respondent.

**Signed, Dated and delivered** this 23<sup>rd</sup> day of **March 2017** at **Nairobi**

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**HEDWIG I ONG'UDI**

**HIGH COURT JUDGE**