



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION
CRIMINAL APPEAL NO. 1 OF 2017
ISAAC ALUOCH POLO ALUOCHIER.....APPELLANT
VERSUS
THE NATIONAL ALLIANCE & 440 OTHERS.....RESPONDENT
J U D G M E N T

Introduction:

1. This appeal arose out of two applications being ACC 1 of 2013 and ACC 2 of 2013, lodged in the Chief Magistrate's court at Makadara, by the Appellant Isaac Aluoch Polo Aluochier. In the application before the Chief Magistrate the Appellant sought leave to institute private prosecutions under **Section 88** of the **Criminal Procedure Code** and **Article 157** of the **Constitution** against 350 members of the current National Assembly, all the 218 members of the 10th Parliament, the Political Parties and the IEBC.

2. The Chief Magistrate having found that the two matters raised constitutional issues on the prosecution of a case by a private person, framed the following issues for determination and referred the matter to the High Court;

- i) What is the extent and nature of cases that a private person can be permitted to institute against others.
- ii) Whether the Director of Public Prosecutions could be excluded from prosecuting this matter as one member of the National Assembly is his relative.

Constitutional Reference:

3. The matter was argued before Mumbi J in the Constitutional Division on 31st July 2013, by the Appellant and Miss Kahoro of ODPP who opposed the applications. Miss Kahoro relied on the decision of Kuloba J (as he then was) in the case of **Floriculture International Limited and others High Court Misc. CIV App. No. 114 of 1997**, (The Floriculture case), which set out the six requirements to be fulfilled for one to be allowed to carry out private prosecution. Miss Kahoro opined that the Appellant herein had not even attempted to fulfil any of those conditions.

4. In a rejoinder the Appellant distinguished the decision in the Floriculture case by arguing that there had been a change in the law with the promulgation of the Constitution 2010 and that the principles in the

Floriculture case were no longer applicable. He argued that with the new changes, **Article 157(6)(b)** allows the DPP to take over private prosecution but only with the permission of the person prosecuting.

5. Mumbi J considered the rival submissions and rendered herself thus: in reference to the Floriculture case (*supra*):

“I take the view that even under the new constitution, with perhaps the exception of principle No. 5, with regard to *locus standi*, these are reasonable requirements to demand that a citizen who takes the view that a private prosecution is called for must fulfil. They accord, to some extent, with the principles enunciated by the court in the case of Rufus Ridlegarger vs Brian John Robbson [1959] EA 841 also relied on by the respondent in this case. The court observed at page 845 thereof as follows:

This being so, a private prosecution can only be given legitimacy and allowed by the court to be instituted or maintained if it serves as a remedy against a culpable inertia or partiality on the part of the public prosecuting authority. It must be shown to be taken only as a safeguard against extraordinary impropriety, capricious, corrupt or biased failure or refusal to prosecute by the public prosecuting agencies. The court will therefore, require to be satisfied by the private prosecutor, that the private proceedings are necessary because the Attorney General and his officers or the Police, do not wish to act on the complaint; and that they have declined to act or refused to take action, for culpable reasons.” See – Isaac Aluoch Polo Aluochier v Stephen Kalonzo Musyoka & 218 others [2013] eKLR.

6. The court determined that the Chief magistrate’s court seized of the matter should be guided by the said principles in the Floriculture case, in deciding whether or not to allow the Applicant therein to carry out the intended private prosecutions. Thereafter the matter was returned to the Chief magistrate’s court at Makadara for the hearing of the application.

The Trial Court:

7. The matter was heard *interpartes* by the trial court which followed the direction of Mumbi J and placed reliance on the principles enunciated by Kuloba J in the Floriculture case. The court stated that any case once reported must be investigated and there is no limitation to the time within which a criminal case should be brought to court. Further that at the reason for reporting was to allow investigations to be carried out. The Applicant having done his part by involving the office of the public prosecutor he should give them time to conduct investigations and consider whether they had enough evidence to commence criminal proceedings against the proposed accused. The court declined to grant the leave sought.

The Appeal:

8. The ruling of the trial court dated 30th June 2015 prompted the appeal now before me. The Appellant told the court that he had appealed the Makadara judgment because it was per incurium by failing to take into account **Article 50** - on the right to fair trial, **Article 25** - on the illimitable right to fair trial, **Article 159** - on expeditious delivery of justice, and **Article 258** - which permits any member of the public to institute proceedings and is a departure from the Floriculture case that existed before the Constitution 2010.

9. The Appellant complained of factual errors in which the magistrate in the judgment said the DPP had not been informed yet there was evidence on record that the DPP was informed in July 2013 and in August 2014 in accordance with **Section 28 ODPP Act**. That the magistrate took the view that no matter should proceed unless it had been investigated by the DPP and other investigative bodies, notwithstanding the evidence in the file that the matters had been investigated.

10. The Appellant argued that the law requires DPP to be informed to give him a chance to exercise his constitutional powers, including considering whether to take over and prosecute the matter, or to terminate it as the case may be. That the ODPP Act provides the mechanism the DPP should follow to

take over a matter instituted by someone else, key among which is obtaining permission from the court and from the person who instituted the prosecution.

11. That the DPP who has powers in the constitution to uphold Public interest and ensure there is no abuse of the court process four years later has instituted no action.

12. The Appellant stated that essentially the DPP suffers no prejudice whatsoever if this matter proceeds by way of private prosecution, for at all times he can get involved if he feels there is need to do so. That one of the Floriculture case principles supporting private prosecution is to avoid failure of justice if the matter is not prosecuted in a timely manner. That ideally these matters arising out of misconduct in the last elections, should be determined before the next election, otherwise people will think that they can flout the law and nothing will happen to them.

13. Miss Nyauncho of the ODPP opposed the appeal and submitted that the Chief magistrate was right to dismiss the application for leave to conduct private prosecution. That the right to conduct private prosecution is not absolute as there are conditions that must be met and the Appellant has not met them. One of the conditions as were set out in **Kimani v Nathan Kahara Robinson of [1983] eKLR**, is that the Applicant must have locus standi to prosecute the intended case, in the sense that the applicant has suffered personal injury or damage.

14. Miss Nyauncho submitted that prosecution should not be done for political consideration and that the magistrate did rely heavily on the Floriculture case. She pointed out that the Floriculture case held that an applicant must have suffered special or exceptional injury or damage, peculiarly personal to him. Further that he is not prompted by malice or political, or other ulterior reasons devoid of good faith. She urged that the Applicant did not demonstrate to the court what substantial injury peculiarly personal to him had been done, to warrant being given leave for private prosecution. That the Applicant has not also demonstrated that he has explored all the available avenues in resolving this matter.

15. In assessing the evidence a good starting point is the decision in **Rufus RiddleBarger vs Brian John robbinson [1959] EA 84** to which both Mumbi J and Mr. Okelo the Chief Magistrate referred. In the **Rufus Riddlebarger** case the court observed as follows:

“This being so, a private prosecution can only be given legitimacy and allowed by the court to be instituted or maintained if it serves as a remedy against a culpable inertia or partiality on the part of the public prosecuting authority. It must be shown to be taken only as a safeguard against extraordinary impropriety, capricious, corrupt or biased failure or refusal to prosecute by the public prosecuting agencies. The court will therefore, require to be satisfied by the private prosecutor, that the private proceedings are necessary because the Attorney General and his officers or the Police, do not wish to act on the complaint, and that they have declined to act or refused to take action, for culpable reasons.”

The Appellant herein therefore, needed to demonstrate culpable inertia on the part of the prosecuting authority, the ODPP.

16. Private prosecution is a weighty matter that should only be allowed as a safeguard against extraordinary impropriety and capricious failure, or refusal to prosecute by the public prosecuting agencies. It is not intended to satisfy the whimsical fancy of parties who imagine that they can do the job better by taking matters into their own hands.

17. The intended private prosecutor requires to satisfy the court that leave to institute private prosecution is merited. To demonstrate merit I can find no better authority than the Floriculture case adverted to elsewhere in this judgment. In the said case the following principles were enunciated:

“For all these reasons criminal proceedings at the instance of a private person shall be allowed to start or to be maintained to the end only where it is shown by the private prosecutor;

1. That a report of the alleged offence was made to the attorney General or the police or other appropriate public prosecutor, to accord either of them a reasonable opportunity to commence or take over the criminal process, or to raise objection (if any) against prosecuting; that is to say, the complainant must firstly exhaust the public machinery of prosecution before embarking on it himself; and
2. That the Attorney General or other public prosecutor seized of the complaint has taken a decision on the report and declined to institute or conduct the criminal proceedings; or that he has maintained a more than usual and reasonable reticence; and either the decision or reticence must be clearly demonstrated; and
3. That the failure or refusal by the State agencies to prosecute is culpable and, in the circumstances, without reasonable cause, and that there is no good reason why a prosecution should not be undertaken or pursued; and
4. That unless the suspect is prosecuted and prosecuted at the given point of time, there is a clear likelihood of a failure of public and private justice; and
5. The basis for the *locus standi*, such as, that he has suffered special and exceptional and substantial injury or damage, peculiarly personal to him, and that he is not motivated by, malice, politics, or some ulterior considerations devoid of good faith, and
6. That demonstrable grounds exist for believing that a grave social evil is being allowed to flourish unchecked because of the inaction of a pusillanimous Attorney General or police force guilty of a capricious, corrupt or biased failure to prosecute, and that the private prosecution is an initiative to counter act the act culpable refusal or failure to prosecute or to neutralize the attempts of crooked neutralize the attempts of crooked people to stifle criminal justice”.

18. I have considered these principles against the Chief Magistrate’s ruling and I am satisfied that the learned Chief Magistrate did direct himself to the foregoing principles. The trial court made findings which I shall quote in extensor. On the first, second and third principles as to whether the public machinery of prosecution was exhausted or there was unreasonable reliance on the part of the ODPP, the trial magistrate had this to say:

“In the humble view of this court, even with the new Constitution, these principles still apply and the Applicant ought to have demonstrated them. Even if the Applicants informed the DPP of the intended Private Prosecution, they ought to have been given reasonable time to conduct their investigations. The lack on the part of the DPP to prosecute ought to have been demonstrated. That the Applicant served a notice to the DPP and rushed to court alone does not demonstrate the lack of the DPP to prosecute. In my humble view, there must be a consistency of that Office (DPP) in failing to prosecute cases. That has not been demonstrated in the present case.”

The Appellant has not demonstrated to this court first, that he exhausted the public machinery of prosecution before embarking on it himself. Secondly, has he demonstrated that the reticence on the part of the DPP to commence prosecution was unreasonable or culpable. The court was told that the ODPP received the Appellant’s complaint and wrote to the EACC to commence investigations.

19. On the fourth principle which touches on the timeliness of the prosecution the trial magistrate considered the issue and found as follows:

“There is also the issue on whether the case ought to have started at that particular time. It was observed thus:

“(4) that unless the suspect is prosecuted and prosecuted at the given point of time, there

is a clear likelihood of a failure of public and private justice;

Suffice to say that it has not been demonstrated to this court that this situation prevailed to warrant the private prosecution and more particularly at this particular time without awaiting any investigations from the Police.”

20. The court was told that the investigations have taken a long time because of the huge numbers of the objects of the Appellant’s complaint. They are in excess of five hundred. In any case not all investigations must end in prosecution. In deciding whether or not to prosecute **Article 157(10)** of the **Constitution** gives the DPP unfettered discretion and autonomy. He does not act under the direction or control of any person or authority.

21. The learned trial magistrate considered the fifth principle which requires that there be a basis for locus standi and had this to say:

“There is then the limb of the personal interest, the court observed as follows:

“.....the basis for the locus standi, such as, that he has suffered special and exceptional and substantial injury or damage, peculiarly personal to him, and that he is not motivated by, malice, politics, or some ulterior considerations devoid of good faith,.....”

The Applicant has not demonstrated the ‘substantial injury or damage, peculiarly personal to him’ I have perused the documents presented to court and I must state that I have not seen any damage that is peculiarly personal to the Applicant.”

I have re-evaluated the arguments presented in the trial court and find no reference to any personal injury suffered or peculiar to the Appellant in relation to the intended private prosecution.

22. Under **Article 22(1)** of the **Constitution** every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied. Violated or infringed or is threatened. In addition under **Article 22(2) (c)** such proceedings can be instituted by a person acting in the public interest. The Appellant herein did not specify which of his rights or fundamental freedoms were infringed, violated or threatened by the DPP or in what manner to entitle him pick up the cudgel on behalf of the public.

23. Lastly, the learned trial magistrate considered the sixth principle which requires a demonstration that grounds exist for believing that a grave social evil is being allowed to flourish unchecked and rendered himself thus:

“That demonstrable grounds exist for believing that a grave social evil is being allowed to flourish unchecked because of the inaction of a pusillanimous Attorney General or Police force guilty of a capricious, corrupt or biased failure to prosecute, and that the private prosecution is an initiative to counter act the culpable refusal or failure to prosecute or to neutralize the attempts of crooked people to stifle criminal justice.”

24. The matter was heard *inter partes* by the trial court which followed the direction of Mumbi J and placed reliance on the principles enunciated by Kuloba J in the Floriculture case. The court stated that any case once reported must be investigated and there is no limitation to the time within which a criminal case should be brought to court. Further that at the reason for reporting was to allow investigations to be carried out. The Applicant having done his part by involving the office of the public prosecutor he should give them time to conduct investigations and consider whether they had enough evidence to commence criminal proceedings against the proposed accused. The court declined to grant the leave sought.

25. I have re-evaluated the arguments of both parties presented in the trial court bearing in mind that it is my duty as the first appellate court to remember that the parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law. I therefore weighed the conflicting arguments to

draw my own conclusions.

26. Having therefore subjected the rival arguments of both the Appellant and the DPP to the litmus paper test provided by the principles in the Floriculture case, I am satisfied that the Applicant's application for leave to conduct private prosecution cannot pass muster. In the premise this appeal fails and is accordingly dismissed.

SIGNED DATED and DELIVERED in open court this **26th** of **April 2017**.

L. A. ACHODE

JUDGE