



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

PETITION NO. 1 OF 2016

**IN THE MATTER OF ARTICLES 19, 21, 22, 23, 24, 25, 28, 29, 47, 48, 49, 159,
165, 232, 238, 239, 244, 258 AND 259 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF AN APPLICATION BY JOEL OKOCHA OGILLO

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010**

AND

**IN THE MATTER OF RULE 3(1), 4(a) AND 7 OF THE CONSTITUTION OF KENYA
(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND
PROCEDURE RULES, 2013**

BETWEEN

JOEL OKOCHA OGILLOPETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE..... 2ND RESPONDENT

THE COMMISSIONER OF PRISONS.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

In this Petition brought under Rule 3(1), 4(a) and 7 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 the Petitioner seeks the following reliefs -

“(a) A declaration that the rights of the Petitioner were violated.

(b) An order compelling the in charge Kodiaga Prisons to avail the names of the officers who were in the motor vehicle registration no. GK A 332U on 11th May 2015 and hand them over to the police.

(c) An order compelling the Officer Commanding Kisumu police station to investigate and arrest the suspects.

(d) An order compelling the office of the Director of Public Prosecution to charge and prosecute the suspects.

(e) Damages for violation of rights of the Petitioner.

(f) Cost of the Petition.”

The facts giving rise to the Petition are that on or about 11th May 2015 at around 3PM the Petitioner was travelling on a bicycle, as a pillion passenger, along Oginga Odinga Street in Kisumu town, he was arrested and bungled into a prison vehicle Registration Number GK A 332 U which was ferrying prison warders. He alleges to have been unlawfully assaulted by the prison warders thereby sustaining serious bodily injuries and thereafter dropped near Kodiaga Prison. No charges were preferred against him; Since he had suffered injuries he went to hospital where he was treated. From there he went to Kisumu Central Police Station, made a report and after recording a statement obtained a P3 form. He subsequently went to Kodiaga Prison with police officers and the Officer In-charge promised that the perpetrators would go and record statements at the police station. Later he went back to the station to confirm whether that had been done but it had not and the perpetrators were not brought to book. He therefore instructed the firm of P. D. Onyango Advocates who wrote to Officer Commanding Kisumu Central Police Station and to the Office of the Director of Public Prosecutions here in Kisumu requiring them to act swiftly to ensure that the perpetrators were arrested and prosecuted.

It is his case that the police by failing to act on his report and thereby conducting investigations and arrested the suspects contravened his rights under Article 232 of the Constitution. It is also his contention that his rights under Articles 25, 28 and 29 were violated. He therefore prays that the reliefs sought be granted.

In opposition to the petition the 1st Respondent filed a replying affidavit sworn by Jacinta N. Nyamosi, the Prosecutor In-charge of Kisumu County. She deposes that on 19th October 2016 her office received an inquiry file regarding the complaint lodged by the Petitioner; that she perused the file to ascertain if there was sufficient evidence to charge the suspects and found there was not sufficient evidence to charge the suspects. She deposes that the prayer that the 1st Respondent charges the suspects is not based on facts and moreover the 1st Respondent under Article 157 of the Constitution the 1st Respondent shall not require the consent of any person or authority to commence criminal proceedings and shall not be under the direction or control of any person or authority. She contends that the prayers sought by the Petitioner are an abuse of the Court process, have no merit and the petition should be dismissed.

The 2nd, 3rd and 4th Respondents relied on the replying affidavits of Douglas Luvini Oyekhera sworn on 5th September 2016 and that of Maurice Wakhungu sworn on even date.

Douglas Luvini Oyekhera has deponed that he is an Inspector of Prisons at Kisumu Main Prison (Kodiaga); that on the material day at about 3PM he together with P.C. Onduso Otieno, P.C. Bonneventure O. Marucha, P.C. Benson Nttusi Muange, Rael Anyango Otieno and Constable Munyolo were rushing back to the prison in an ambulance GK A 332 U to respond to an emergency when they were obstructed by a motor cycle in which the Petitioner was a pillion passenger; That their driver hooted and braked to avoid hitting the motor cycle but it did not give way. Instead the cyclist and the Petitioner made obscene gestures at them. Thereafter the Petitioner alighted and approached the motor vehicle and grabbed the deponent by the sleeves and said prison officers are foolish and stupid. He depones that the

officers who were at the back noticed this and alighted but not even their intervention would calm the Petitioner down. A crowd started milling around the vehicle and it was then that they decided to apprehend the Petitioner and take him to the police station. They therefore requested him to get in the vehicle which he did. However before they could turn to take him to the police station the Petitioner beseeched the officers to forgive him. They did so and as they were rushing to attend to an emergency they dropped him off at Obote Road. On 4th June 2015 they were summoned to Kisumu Police Station to record statements and they duly recorded statements. He deposes that the allegation that the Petitioner was assaulted are totally untrue and contends that the space in the ambulance is such that it could not have enabled an officer to use a G3 rifle to hit the Petitioner as the same is long and could have easily damaged the vehicle. He further deposes that the Petitioner has not demonstrated any violation of his rights as the matter was investigated by the police. He has annexed a copy of the motor vehicle's Daily Work Ticket L 746645 and copies of the statements he and his colleagues recorded at the police station.

Maurice Wakhungu a Police Constable attached to Kisumu Police Station has deposed that a report concerning this incident was indeed made at the police station by the Petitioner; that he booked the report and issued the Petitioner with a P3 form to be filled at Kisumu County Hospital; that the Petitioner had the P3 form filled and returned it to the police station whereupon his statement and that of a witness were recorded. Thereafter the prison officers involved were summoned to record their statements. He deposes that upon the officers doing so he opened an inquiry file No. 8 of 2015 but given the evidence by both sides he recommended that the file be closed and also warned the Petitioner. Thereafter the inquiry file was forwarded to the Office of the Director of Public Prosecutions for further directions. He deposes that the Petitioner's prayer that the Officer Commanding Kisumu Police Station investigate this matter and arrest the suspects has been overtaken by events as that was done and it is only upon further directions from the Office of the Director of Public Prosecutions that the police can arrest and charge the suspects. The O.B. Extract, bearing the report, the P3 form, and the statements recorded by the deponent are annexed to his affidavit.

The petition was canvassed by way of written submissions. Of the prayers sought by the Petitioner in his petition, amended on 28th January 2016, the ones for orders compelling the In-charge Kodiaga Prisons to avail the names of the officers who were in GK A 332 U on 11th May 2015 and hand them to the police and for an order compelling the Officer Commanding Kisumu Police Station to investigate and arrest the suspects have been overtaken by events. The affidavit of Douglas Luvini Oyekhera lists the names of all the officers who were in the vehicle and the statements they recorded at the police station on 4th June 2015 a fact that is confirmed by Police Constable Maurice Wakhungu, the officer detailed to investigate the matter.

As for the declaration that the rights of the Petitioner were violated that can only be determined upon hearing evidence from both the Petitioner and the officers concerned and putting it to the test through cross-examination. As it stands now what we have is but the Petitioner's word against that of the officers. The Petitioner has also urged that this Court do compel the Director of Public Prosecution to charge and prosecute the suspects. The Petitioner's Advocate has invoked this Court's supervisory powers under Article 165(6) of the Constitution and has also relied on **Kenya Commercial Bank Limited & 2 Others V. Commissioner of Police & Another NBI Petition No. 218 of 2011** a copy of which was not supplied, where the Court held that whereas the Officer of the Director of Public Prosecution is independent the Court is entitled to interfere where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the Constitution.

He submitted that the manner in which the Officer of the Director of Public Prosecution arrived at her decision is mysterious, unfair, unjust and without consideration of the law and as the 1st and 2nd Respondents herein are public bodies accountable to the public and as no crime should go unpunished this Court should interfere to protect the victim and to deter such conduct. On damages Counsel proposed an award of Kshs.2,000,000/= and urged this Court to be persuaded by the decision of Lenaola J in **Petition NO. 248 of 2013** between **Arnacherry Limited V. Attorney General** (not attached).

On her part Ms Nyamosi for the Office of the Director of Public Prosecution the 1st Respondent maintained the position that the Office of the Director of Public Prosecution cannot be directed in the

exercise of the functions of his office and that in this case she perused the file and came to the conclusion that there was no sufficient evidence to arraign the suspects. She based her arguments on Article 157 of the Constitution and two cases -

1. Republic V. Director of Public Prosecutions & Another Ex-parte Communications Commission of Kenya [2014]eKLR

2. Thuita Mwangi & 2 Others V. Ethics & Anti-corruption Commission & 3 Others [2013]eKLR.

In **Republic V. Director of Public Prosecutions & Another Ex-Parte Communications Commission of Kenya [2014]eKLR** my brother Korir J dealing with a similar issue stated -

“Although the Court has powers to review the Respondent's decision that power must be exercised sparingly – see the decision of the Privy Council in *SHARMA v BROWN-ANTOINE AND OTHERS [2006] UKPC 57*. In the Kenyan context there is a strong reason why the courts should, only in very extreme cases, intervene with decision of the Director of Public Prosecutions not to prosecute. The reason is that a complainant aggrieved by the decision of the DPP has the remedy of commencing private prosecution and that prosecution can only be taken over by the DPP with the permission of the complainant – *Article 157(6)(b) of the Constitution*. A person dissatisfied with the decision of the DPP not to prosecute is therefore not left without a remedy. However, the Court cannot altogether abdicate its supervisory powers over the exercise of the prosecutorial mandate by the Respondent. Where an applicant demonstrates that judicial review is the best remedy for checking abuse of prosecutorial powers by the Respondent, I do not see why the Court should not grant appropriate orders to such an applicant.”

I agree fully with my brother Korir J and also with my sister Mumbi Ngugi J, who in **Samuel Kamau Macharia & 2 Others V. Attorney General & Another [2013]eKLR** stated -

“39 Further, one of the functions of the DPP under section 5 of the Act is to *“implement an effective prosecution mechanism so as to maintain the rule of law and contribute to fair and equitable criminal justice and the effective protection of citizens against crime.”*

40 Under section 5(4)(e) of the Act, the DPP is mandated to review a decision to prosecute or not to prosecute, any criminal offence. The DPP has an obligation to prosecute any party, regardless of its or their status, and should not be seen to fail in its duty when confronted with a situation that suggests wrong doing on the part of a party like the bank which in the words of the petitioners, is a strong economic actor because of its economic status.”

Ms Nyamosi for the 1st Respondent has in her affidavit as well as in the submissions intimated that she perused the statements that were placed before her by the police and she came to the conclusion that there was not sufficient evidence to arraign the prison officers. I do not understand how this Court can compel her to reach a different conclusion. The Petitioner has not demonstrated that this is one of those extreme cases where the Court can intervene; he has not shown that the 1st Respondent exercise of discretion was so unreasonable or irritational as to amount to flagrant breach of her duty. The fact that the persons concerned were prison warders hence public officers perse is not sufficient to warrant this Court to come to the conclusion that the 1st Respondent acted contrary to the law. However all is not lost to the Petitioner as under our law it is open to him to bring a private prosecution.

As for damages the decision of Lenaola J, as he then was, was not annexed and it is difficult for this Court to confirm the circumstances under which damages were awarded. In this case and as I have stated before the Petitioner complaint is based on a tort and liability would have to be proved before damages can be awarded. This Court therefore declines to award damages.

In the end this Petition is dismissed but with no orders as to costs.

Signed, dated and delivered at Kisumu this 13th day of April 2017

E. N. MAINA

JUDGE

In the presence of:-

Mr. Odhiambo for Petitioner H/B for Mr. P.D. Onyango

Miss Chelang'at for 1st Respondent

N/A for 2nd Respondent

N/A for 3rd Respondent

N/A for 4th Respondent

Court Assistant – Serah Sidera