



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO. 16 OF 2017

IN THE MATTER OF: FUNDAMENTAL RIGHTS AND FREEDOMS

UNDER ARTICLES 22, 23 (1), 25 (c), 27, 28, 29, 47, 50, 159, 258 & 259 OF THE CONSTITUTION OF KENYA;

AND

IN THE MATTER OF: THE CONTRAVENTION AND FURTHER THREATENED CONTRAVENTION OF ARTICLE 22, 23 (1), 25 (c), 27, 28, 29, 47, 50, 159, 258 & 259 OF THE CONSTITUTION OF KENYA

FATMA NABHANY.....1ST PETITIONER

EDDAH MWAKE NGWATU.....2ND PETITIONER

AND

DIRECTORS OF PUBLIC PROSECUTION.....1ST RESPONDENT

SENIOR PRINCIPAL MAGISTRA

COURT MOMBASA.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

RULING OF THE COURT

Application

1. The application before the Court is a Notice of Motion dated 3rd April 2017 filed under Articles 3(1), 23, 50 (1), 159 (2) (a) and (e), 258 (1) of the Constitution of Kenya and Rule 5 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 by the Applicants who seek for orders:-

a) THAT this Honorable Court be pleased to stay proceedings in Criminal Case No. 2140 of 2016 against the Petitioners/Applicants pending the hearing and determination of this application.

b) THAT this Honorable Court be pleased to stay proceedings in Criminal Case No. 2140 of 2016 against the Petitioners/Applicants pending the hearing and determination of the Constitutional Petition filed herewith.

c) THAT the costs of this application be provided for.

2. The application is premised on the grounds sets in the application and is supported by the affidavit of **FATMA NABHANY** sworn on 3rd April 2017.

3. The Applicants allege that the 1st Respondent prepared and filed charges in the **Senior Principal Magistrate's Court in Mombasa, CMCC 2140** against the Applicants and others. The Applicants allege that the basis of the charges emanated from a multiagency task force made up of Kenya Revenue Authority, Kenya Ports Authority, the 1st Respondent and the Ethics and Anti-Corruption Commission investigating an alleged un-procedural release of One Hundred and Twenty One (121) containers from the Port of Mombasa where the Applicants work; the 1st Applicant being Head of Information and Communications Technology and the 2nd Applicant serving in the ICT Department as the Principle Corporate Applications Officer (Operations).

4. The Applicants further allege that the sole reason for the charges were that the Applicants did not respond to summons that had been earlier issued by the 1st Respondent to clarify pending issues involving the un-procedural release of the 121 containers from the Port of Mombasa.

5. The Applicants allege that they filed **Constitutional Petition No. 55 of 2016** and the Hon. Justice Emukule (Rtd) quashed the warrants of arrest by the 2nd Respondent and asked the 1st Respondent to review the case against the Applicants.

6. The Applicants claim that after a review of the evidence presented against them, the 1st Respondent made a clear and unequivocal intention to withdraw charges against the Applicants and a communication was given by the 1st Respondent to have the Applicants serve as witnesses in the case as they were already witnesses in **Cr Case No. 1705 of 2016**.

7. The Applicants further allege that when the matter came up for hearing on 22nd November before the 2nd Respondent, Hon. Kyambia, the 1st Respondent through their representative Mr. Wangila indicated that they were going through the internal process of reviewing the case and requested for two weeks to finalize their review. Despite this, the Applicants allege that Hon. Kyambia insisted on the Applicants taking plea on the charges.

8. The Applicants allege that the matter was mentioned before Hon Kyambia on 13th December 2016 as the 1st Respondent had finalized its review and intended to withdraw the charges as was indicated in their letter dated 13th December 2017, but the court was not sitting that morning. The Applicants allege that the matter was again set for mention on 15th December but the court did not sit that morning.

9. The Applicants further claim that the matter was set for mention on 23rd January 2017 and on that day the 1st Respondent requested for more time to consult on the withdrawal of the charges for certain accused persons. The Applicants claim that matter was differed to 22nd February 2017 and on that day the Hon. Kyambia was not present and the matter was mentioned before another magistrate where the 1st Respondent sought a further mention to consolidate **Criminal Case No. 2140 of 2016 and Criminal Case No. 1705 of 2016**.

10. The Applicants allege that they were taken aback by the turn of events and that the matter was set down for mention on 28th March 2017 and the hearing date was set for 3rd April 2017. On 28th March 2017, the applicants claim that the 1st Respondent indicated that they were not ready to consolidate the two files and did not give a definitive way forward on the withdrawal of charges against the Applicants.

11. The Applicants allegedly then sought the intervention of Hon. Kyambia to give directions as they had raised serious constitutional issues in as far as their rights were concerned, but the court refused to give them audience and to record their representations.

12. The Applicants' case is that the Respondents in sustaining and perpetrating the filing of charges against them are in breach of the Applicants' legitimate expectations. The Applicants further allege that the charges are unfair, unprocedural, premature, unreasonable and unconscionable.

Response

13. The Application is opposed by the 1st Respondent through a replying affidavit sworn by Chief Inspector **MARY WANJIKU KAMAU** on 18th April 2017. The deponent alleges that she is the investigating officer in this matter and that the Application was in direct conflict with provisions of Articles 245 (2) (b).

14. The Deponent further alleges that they have recorded statements from all the relevant witnesses and the same have been forwarded to the Applicants together with all the documents that the prosecution intends to rely on during the trial. The deponent further alleged that the Applicants have been given ample time to prepare their defense in line with Article 50 of the Constitution.

15. The Deponent claims that the last time the matter was adjourned was due to the second Applicant being absent as she was indisposed. On that day the deponent claims that the prosecution was ready to proceed with five witnesses.

16. The deponent alleges that **Criminal Case No. 2140 of 2016** was instituted pursuant to Article 157 of the Constitution and upon satisfying the evidentiary threshold required by law and that the application is meant to defeat the said Article as read together with Section 87 (a) of the Criminal Procedure Code.

17. The deponent further claims that **Constitutional Petition No. 55 of 2016** was dismissed by **Hon. Justice Emukule** contrary to the allegation by the Applicants that the Judge in that Petition instructed the 1st Respondent to review the case against the applicants.

18. The deponent claimed that the Application is meant to delay the due process and urged this Court to dismiss the application.

Hearing

19. When the application came up for hearing on 18th May 2017 the parties agreed to canvass it by way of written submissions. Mr. Anami for the Applicants and Mr. Wangila for the 1st Respondent highlighted their written submissions in court on 5th June 2017.

20. **Mr. Anami** submitted that the court can scrutinize decisions made by the Office of Director of Public Prosecution to prosecute or not to prosecute a case, and referred the court to the case of **Republic versus ODPP and Victor Maina Ngunjiri and 4 Others Ex Parte Victory Welding Works Limited and Another Misc. Civil Application Case No. 249 of 2012, Nairobi** where **Odunga J** took cognizance of Article 157 of the Constitution of Kenya and observed that:

“it follows that the office of the Director of Public Prosecutions is an independent constitutional office which is not subjected to the control, directions and influence by any other person and only subject to control by the court based on the aforesaid principles of illegality, irrationality and procedural impropriety.”

21. Counsel submitted that the Applicants do not wish to have this court dictate to the ODPP what to do but rather would like the ODPP to effect a decision already made by ODPP, or in the alternative to indicate in no uncertain terms their intention to prosecute the Petitioners. Mr. Anami cited the case of **R**

versus ODPD and Royal Media Devices Ltd Ex Parte Communications Commission of Kenya, JR Case No. 2221 of 2013 where **Korir J** observed:

“I have perused the cited judgment and I do not get the impression that my brother, G.V. Odunga, J is of the view that the Director of Public Prosecutions is beyond the reach of this Court whenever he exercises the discretion bestowed upon his office by the Constitution...My opinion is that the DPP has discretion in deciding whether to prosecute an alleged offender. However, that discretion must be exercised legally and reasonably. Where the Respondent exercises his powers for extraneous purposes, the Court can, and does have the authority to intervene.”

22. Mr. Anami submitted that the two cases cited demonstrate that this court can exercise its supervisory powers over the prosecutorial mandate of the 1st Respondent. Counsel submitted that this being the case there is no reason as to why the 1st Respondent should not effect its earlier decision to withdraw the charges against the Applicants. Counsel further submitted that the consequence of the 1st Respondent prevaricating has allegedly resulted in the infringement of the Applicants’ Constitutional rights including right to a fair trial and right not to be tortured including psychologically. Counsel referred the Court to the case of **Communications Commission of Kenya (supra)** where **Korir J** further observed that the test applicable in deciding whether or not to prosecute is laid down in the Commonwealth case of **R Versus ODPD Exp Manning [2001] QB 330**:

“...5.1 Crown Prosecutors must be satisfied that there is enough evidence to provide a “realistic protection of conviction” against each defendant on each charge. They must consider what the defense case may be and how that is likely to affect the prosecution case. A realistic prospect of prosecution is an objective test. It means that a jury or bench of magistrates, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged. When deciding whether there is enough evidence to prosecute, Crown Prosecutors must consider whether the evidence can be used or is reliable. If it is not satisfied there should be no prosecution, no matter how great the public interest might seem in having the matter aired in court”.

Counsel submitted that the 1st Respondent had not received all evidence prior to instituting this case and upon receiving exculpatory evidence from the Applicants, the 1st Respondent on its own motion determined that there is not enough evidence to prosecute the Applicants and that instead they would be used as witness.

23. Mr. Anami submitted that the prosecutorial process cannot be speculative and the 1st Respondent has to be sure of the charges prior to instituting them as the consequences in many instances are irreversible.

24. Mr. Anami further submitted that the 2nd Respondent has wittingly or unwittingly infringed on the rights of the Applicants by failing to censure the conduct of the 1st Respondent and indulging their evasions to actuate their decision not to prosecute the Applicants. Counsel submitted that the latitude the 2nd Respondent has given the 1st Respondent has invariably led to the Petitioner’s legitimate expectations to have the matter determined expeditiously being infringed upon.

25. Mr. Anami submitted that the 1st Respondent does not face any commensurate harm in effecting the contents of its letter dated 13th December 2016 in which the 1st Respondent indicated its intention to withdraw charges preferred upon the Applicants and urged this Court to grant the orders prayed for.

26. **Mr. Wangila** counsel for the 1st Respondent submitted that Article 157 of the Constitution gives the Director of Public Prosecutions (DPP) powers to commence/ or terminate criminal cases and the court cannot be employed to direct the DPP on how these powers can be applied. Counsel submitted that the Applicants are attempting to use the Court to order the DPP to execute the contents of the letter dated 13th December 2016 which Counsel submitted had at the time been written to investigative authorities

directing them on areas to cover and informing them that the case against the Applicants was to be withdrawn under Section 87 (a) of the Criminal Procedure Code.

27. Counsel submitted that the decision to discontinue any criminal trial by the DPP is not cast on stone and the same can be reversed at any stage of the process. Counsel referred the Court to the case of **Fatma Nabhany & Another Versus Criminal Investigation Department & 4 Others [2016] eKLR** where Emukule J stated as follows:

“It is thus clear to me that this court has no mandate to arrest a prosecution at its infancy. There is no suggestion, and there was no material to show either that the Director of Public Prosecutions was acting unlawfully, in excess of his authority or powers, or had taken into account irrelevant matter or consideration, or that the decision of the Respondents as a whole is unreasonable in the WEDNESBURY principles of unreasonableness that the decision was so devoid of logic that no person, properly exercising his mind and decision to charge the Petitioners or Applicants in Mombasa Chief Magistrate’s Criminal Case No. 2140 of 2016.”

Determination

28. Having considered the above submissions, the question before this court is whether the proceedings before the 2nd Respondent in **Criminal Case No. 2140 of 2016** should be stayed pending the hearing and determination of this Petition.

29. Articles 157 (6), (10) and (11) of the Constitution of Kenya provide:

“(6) The Director of Public Prosecutions shall exercise state powers of prosecution and may-

- a) Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;**
- b) Take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and**
- c) Subject to clause (7) and (8) discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).**

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in exercise of his or her powers or functions shall not be under the direction or control of any person or authority.

(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interest of administration of justice and the need to prevent and avoid abuse of the legal process.”

30. The above provisions make it clear that the Director of Public Prosecutions, in this case the 1st Respondent, has the discretion to determine whether to institute criminal proceedings as against any person. In addition, the 1st Respondent is not required to seek consent from any person or authority before commencing criminal proceedings.

31. The 1st Respondent therefore properly and within its constitutional mandate preferred criminal charges against the Applicants and went ahead to begin criminal proceedings against the Applicants.

32. The Applicants allege that the 1st Respondent had communicated their intention to withdraw charges

against them vide a letter dated 13th December, 2016. The 1st Respondent does not deny existence of this letter but contends that the Applicants were not the intended recipients of the letter. In the said letter the 1st Respondent states that the case against the Applicants was to be withdrawn under Section 87 (a) of the Criminal Procedure code. Section 87 (a) of the Criminal Procedure code provides:

“In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Director of Public Prosecutions, at any time before Judgment is pronounced withdraw from the prosecution of any person...”

The 1st Respondent was again within his mandate when he wrote the letter dated 13th December, 2016. However, the 1st Respondent did not withdraw the charges and as of now the charges against the Applicants still remain.

33. It would then be against the mandate of this court to interfere with the discretion of the 1st Respondent in **Criminal Case No. 2140 of 2016**. This court agrees with the sentiments of **Emukule J** in the case cited by the 1st Respondent – **Fatuma Nabhany & Another vs. Criminal Investigation Department & 4 Others [2016] eKLR** that a court cannot arrest a prosecution at its infancy where there is no material to show either that the Director of Public Prosecutions was acting unlawfully, in excess of his authority or powers, or had taken into account irrelevant matter or consideration. The Applicants have not proved that their prosecution is unlawful or unreasonable, what they seem to be doing is speculating that the 1st Respondent has no evidence against them to sustain the charges. The Applicants have prematurely made this conclusion instead of waiting for the prosecution to adduce its evidence, if any, and challenge it in the ongoing trial.

34. The claims against the 2nd Respondent are also unfounded. The 2nd Respondent has carried out its duty under the law and has in no way infringed on the rights of the Applicants.

35. For the foregoing reasons, this court finds that the proceedings before the 2nd Respondent in **Criminal Case No. 2140 of 2016** are warranted and merited and not an abuse of process and cannot therefore be stayed.

36. With regard to the complaint by the Applicants that there have been too many adjournments in the said criminal case, the court finds this to be true and orders that **Criminal Case No. 2140 of 2016** be set down for hearing. In that regard the said **Criminal Case No. 2140 of 2016** will be mentioned on 18th July 2017 for the purposes of fixing it for hearing, which should proceed, if possible on day to day basis.

Dated, Signed and Delivered in Mombasa this 29th day of June, 2017.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Mutiso h/b for Mr. Anami for Petitioners

Mr. Makuto for Chief Magistrate

Mr. Kaunda Court Assistant