



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ECONOMIC CRIMES DIVISION

PETITION NUMBER NO. 5 OF 2017

IN THE MATTER OF ARTICLES 22(1), 23(1), (3), 25 (C) OF THE CONSTITUTION OF KENYA

-AND-

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHT TO FAIR TRIAL

BETWEEN

GEORGE MOSETL.....1ST PETITIONER

EDWIN OTIENO ODUOR.....2ND PETITIONER

AND

DIRECTOR OF PUBLIC PROSECTIONS.....1ST RESPONDENT

OFFICER IN CHARGE KABRAS POLICE STATION....2ND RESPONDENT

ECONOMIC AND ANTI-CORRUPTION

CRIMES COMMISSION.....3RD RESPONDENT

CHIEF MAGISTRATES COURT WEBUYE.....4TH RESPONDENT

R U L I N G

1. This application was by Petition dated 13th March 2017. The Petitioners are traffic police officers based at Kabras Sub- base carrying out general duties as directed by the officer in charge Traffic Kabras sub base. On the 23rd December 2016 while carrying out general duties, the Petitioners apprehended the rider of Motor registration number KMDJ 234 K for traffic violation namely riding without a helmet, having an invalid insurance and riding without a reflective jacket. The suspect ran off immediately upon apprehension leaving the motor cycle with the petitioners, who towed it and booked it in the occurrence book.

2. On 30th January 2017, the owner of the subject motorbike went to their office accompanied by officers from the 3rd Respondent office. The officers were holding an envelope containing money which they

claimed had been solicited for, which the Petitioners deny.

PETITIONERS' SUBMISSIONS

3. The Petitioners were arrested and charged and being aggrieved with the circumstances leading to their arraignment in court, filed this petition. They claim that their right to fair trial was infringed as they were presented before the chief magistrate's court at Webuye on several occasions, on defective charges as noted by the Court. The Petitioners state that upon collecting witness statements, they were informed that the complainant was yet to record his statement and as such, investigations cannot be said to be complete although they have since been arraigned in court in criminal case EACC No. 22/2017, before the Chief magistrate court at Webuye.

4. The Petitioners therefore pray that:

(a) The proceedings in Webuye EACC 2/2017 be stayed pending hearing and determination of this petition.

(b) The police file number 973/57/2017 be referred to the DPP for review and directions.

(c) The court be pleased to give any other relief that it may deem fit in the interest of justice and the circumstances of the case.

(d) Costs of the Petition.

5. The Petition was supported by the affidavit and further affidavit of George Moseti, the 1st Petitioner dated 13th March 2017 and dated 5th April 2017 respectively the Petitioner averred that on or about 30th January 2017, the purported owner of the motor cycle subject of this application came to the police station seeking the release of the motor cycle. He was duly informed that the rider had to be availed for purposes of being charged with the offences set out in the occurrence book.

6. The purported owner in turn threw in their direction an envelope and insisted that they accept it and release the motor cycle. The envelope went outside the window and walked out of the office and moments later persons came in and identified themselves as officers from the Ethics and Anti-Corruption Commission (hereinafter the Commission). They carried with them the envelope that had been thrown at the Petitioners by the purported owner of the motor cycle.

7. On 21st February 2017 the court found the charges against the Petitioners to be defective. The Petitioners proceeded to obtain statements as directed by the Court only to be advised that from the complainant, who was a key witness, was yet to record his statement and as such the file was not complete. The Petitioner contended that their right to fair trial had been greatly infringed by the circumstances that led to their arraignment in Court and that it is only fair and just that the proceedings herein be stayed and the DPP do review the prosecution file.

8. In the further affidavit, the Petitioner denied the allegation contained in the replying affidavit of the Commission that there was evidence and or video footage showing the 2nd Petitioner demanding a benefit of Kshs. 5000/= and the 1st Petitioner going into some inner room to throw the money out of the window. The deponent submitted that there was no such footage captured outside their office, showing the Commission officers allegedly recovering an amount of Kshs. 10000/= that he allegedly threw out of the office window.

9. The deponent stated that his trouser was tested for APQ substance and their fingerprints swabbed and tested for the APQ substance yet there were no results of the findings in the documents received from the Commission dated 14th March 2017. The deponent contended that a reading of the charge sheet showed that the case against them was one of soliciting a benefit of Kshs. 20000/=, while in the Respondents statements and affidavits, a figure of Kshs. 5000/= is mentioned, and the recovery is said to be of Kshs.

10000/=. He asserts that this was a clear indication that the evidence was concocted and manufactured against them.

10. It was the Petitioners argument that there were exceptional facts that warrant the 1st Respondent to independently review the evidence forwarded, and realize that it was all concocted and avoid a lengthy trial at the risk of the Petitioners losing their jobs. The Petitioners denied that they were trying to advance their defence to the criminal charges and asserted that there were glaring inconsistencies which contradicted the depositions contained in the Commission affidavit. They urged the Court to allow the prayers sought in the Petition.

1ST RESPONDENT'S SUBMISSIONS

11. The 1st Respondent, the Director of Public Prosecutions opposed the Petition and relied on the Replying Affidavit sworn on 22nd March 2017 by Terry Kahoro. It was their submission that **Article 157** mandates the DPP to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed and in so doing the DPP is free from the control and direction of any person or authority. However these powers ought to be exercised in accordance with the Constitution which the 1st Respondent argued was done at all material times.

12. The DPP contended that the essence of the discretion is to enable the 1st Respondent to exercise independent and professional judgment, in making prosecutorial decisions in discharging its functions effectively. Reliance was placed on **Miscellaneous Application No. 658 of 2004, David Njogu vs. The Director of Criminal Investigations Department and the High Court of Kenya at Nairobi Misc No. 249 of 2012 Republic vs. DPP Ex. P Victory Welding Works and Another at page 20**, where the court held that the Office of the Director of the Public Prosecutions was an independent constitutional office, that was only subject to the control of the court based on the principles of *illegality, irrationality and procedural impropriety*.

13. It was submitted that in acting within its legal mandate, the ODPP did receive the investigations file, independently reviewed and analyzed the evidence submitted and determined that there was sufficient evidence to sustain a charge and forthwith directed that the Petitioners answer to the criminal charges before a court of law. It was contended that the decision to prosecute the Petitioners was informed by sufficiency of evidence on record, coupled with a review of the relevant law and was not based on other extraneous factors or considerations.

14. The 1st Respondent relied on the case of **Thuita Mwangi and Others -vs- the Ethics & Anti-Corruption Commission & 3 Others** consolidated petitions No. 153 & 369 of 2013 at page 16 (paragraph 43), where the court decided that it may only intervene where it is shown that the impugned criminal proceedings, are instituted for other means other than the honest enforcement of criminal law, or are otherwise an abuse of the court process.

15. The 1st Respondent also noted that nowhere in the application had the Petitioners challenged the Respondent's decision, that the evidence available met the threshold required by law to institute the intended charges and therefore the decision could not be impugned. It was not for the court to direct the Respondent on how to exercise his constitutional powers, but to intervene in cases where that power was proved to have been unfairly, improperly or unjustly exercised. The court can only check the abuse of prosecutorial powers where evidence is presented. The merits of the Respondents decision ought not to be a concern of the courts. The 1st Respondent cited the case of **Douglas Maina Mwangi vs Kenya Revenue Authority and Another High Court Constitutional Petition No. 528 of 2013** where D.S Majanja J. held that;

“when dealing with the decision as to whether or not to prosecute, the office of the DPP exercises independent judgment and the court cannot interfere unless it is shown that the exercise is contrary to the Constitution, in bad faith or amounts to an abuse of the court process...I do not find any reason or ground to intervene in that decision nor is it the

obligation of the court to supervise the minutiae of investigation and prosecution”

16. It was contended that judicial intervention ought to be limited to acts that are manifestly in breach of the law, or where the court is satisfied that the decision maker reached a wrong decision influenced by other considerations other than the law, the evidence and the duty to serve the interests of justice. Further, it was submitted that the Petitioners failed to demonstrate that the DPP did not review the investigation file independently to warrant the intervention of this Court.

17. On the issue of whether the 1st Respondent violated any of the Petitioners’ right, it was submitted that he who alleges a breach of fundamental rights and freedoms, must state and identify the rights with precision and how these have been, or will be infringed in their respect. The DPP cited the case of **Anarita Karimi Njeru vs the Republic (1976-1980) KLR 1272** in support of this contention. It was submitted that **Article 24 (1)** of the **Constitution** provided that a right or fundamental freedom in the Bill of Rights could not be limited, except by law and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. The 1st Respondent contended that the Petitioners shall enjoy the right to equal protection in any court of law and fair administrative process as the court decides matters on merit.

18. It was urged that pursuant to the investigations carried out, both the complainant and the Petitioners recorded their statements among other witnesses and therefore the veracity of the evidence gathered by the investigators can only be raised at the trial court which is better placed to assess the sufficiency, truthfulness and or the evidence on record. He urged that the Petition is an abuse of the Court process merely meant to circumvent the criminal justice and prevent the 1st Respondent from discharging its Constitutional mandate and it ought to be dismissed with costs.

3RD RESPONDENT’S SUBMISSIONS

19. In a Replying affidavit dated 27th March 2017 by Emmanuel Kubasu, an investigator with the Commission submitted that the Commission was legally empowered under the provisions of **Section 11(1) (d)** of the **Ethics and Anti-Corruption Commission Act, 2011** to investigate and recommend to the DPP the prosecution of any acts of corruption. That on 19th January 2017, the Commission’s Western Regional Office based at Kisumu received a report from one Mr. Glyde Wemanya that the 2nd Petitioner, a traffic police officer stationed at Kabras Sub-traffic base had demanded for a benefit of Kshs. 20,000/= in order to release a motorcycle registration number 234K make TVS LX which had been detained at Kabras police station for unspecified traffic offences.

20. The Complainant met with the 2nd Petitioner and their conversation was recorded to verify the complaint received by the Commission. Upon analysis of the recorded conversation, it was established that the 2nd Petitioner had demanded from the complainant a benefit of Kshs. 5,000/=. Mr. Patrick Mbijiwe, an officer of the Commission prepared an inventory of Kshs. 10,000/= in denominations of Kshs. 1000/=: photocopied them and appended his signature to the inventory, treated the money with APQ powder and placed it in a half cut blue envelope with his signature appended thereto.

21. The Complainant was shown the inventory of the photocopies of the treated money and the actual money treated with APQ powder and after signing the inventory, he was issued with an envelope containing Kshs. 5000/= of the treated money. He was fitted with recording devices and he returned to Kabras police base to meet with the 2nd Petitioner having been instructed to give him the treated money only upon demand and to call the deponent via mobile phone once the aforesaid officer had received the money.

22. The complainant went to the said police base, he met with both Petitioners who were captured on video demanding from him the aforesaid benefit. The complainant gave the prearranged signal indicating that the suspects had received the treated money. The Commission’s team of investigating officers stormed into the Petitioner’s office and introduced themselves.

23. It was submitted that while introducing themselves to the Petitioners, the 1st Petitioner went into an inner room, hurriedly removed the treated money from his back trouser pocket and threw it out of the window. The money was recovered by Mr. Francis Kidogo, of the Commission in the presence of Mr. Sylvester Kachero, the Officer Commanding Kabras Station and Mr. Simon Kiambi, the Divisional Criminal Investigating Officer.

24. Thereafter the Petitioners were arrested and had their hands swabbed and the swabs placed in separate sealed envelopes. The recovered money was later compared with the photocopies prepared earlier and they tallied. Mr. Nicholas Mulinge, another colleague, prepared an inventory of the recovered treated money, placed it in an envelope and sealed it. The inventory was signed by the Commission's investigators who were present together with the deponent, the Petitioners, the Officer Commanding Kabras Station and the Divisional Criminal Investigation Officer.

25. The recorded video clips of the Petitioners demanding a benefit from the complainant was played to the Officer Commanding Kabras Station and the Divisional Criminal Investigation Officer who both identified the Petitioners from their voices and images captured in the video. That the Petitioners were booked at Kabras police station after their arrest and were later released on a police bond of Kshs. 5000/= each to appear before the Webuye Anti-Corruption Court on 14th February 2017. Upon analysis of the evidence gathered, the Commission thereafter prepared and forwarded a report to the DPP as provided for under **Section 35 of the Anti-Corruption and Economic Crimes Act, 2003** seeking his consent to charge the Petitioners.

26. The said consent was granted by the DPP who directed the prosecution to ensue as recommended by the Commission. The DPP arrived at the decision to prosecute the Petitioners based on an independent review of the evidence gathered by the Commissions investigators.

27. On the 14th February 2017, the Petitioners were arraigned in Court before the Chief Magistrate's Court at Webuye where a plea of not guilty was entered and on the same date the court ordered the amendment of the charges. The deponent submitted that the trial court, under **Section 214 of the Criminal Procedure Code (CAP 75)** is empowered to order the amendment of charges.

28. It was submitted that the Petitioners had not met the criteria for grant of the conservation orders they sought and that an order of stay of criminal proceedings ought to be made sparingly and only in exceptional circumstances. That no exceptional circumstances had been presented before the court as would justify the stay of proceedings against the petitioners.

29. That the Petitioners appear to be advancing their defence to the criminal charges facing them and the trial court was best placed to analyze the evidence gathered by the state in support of the criminal charges and to determine the sufficiency or otherwise thereof.

30. The Commission urged that the Petitioners had not demonstrated to the court that the 3rd Respondent did not have the legal capacity to carry out the aforesaid investigation and make the arrest, or that it discharged its legal mandate as set out under **Article 79 of the Constitution and Section 11(1) (d) of the Ethics and Anti-Corruption Commission Act, 2011** otherwise than in accordance with the law. The Petitioners had not also demonstrated that the 1st Respondent discharged the powers granted to him under **Article 157 (6) (a) and (10) of the Constitution and the Office of the Director of Prosecution Act** otherwise than in accordance with the law.

31. The Commission contended that the Petitioners had not produced any evidence to demonstrate that the 1st Respondent acted irrationally in arriving at the decision to prosecute, or that the intended criminal proceedings were being instituted for means other than the honest enforcement of criminal law, or were otherwise an abuse of the court process.

32. The 1st and 3rd Respondent cannot be restrained from discharging their respective Constitutional and Statutory mandates without any evidence of impropriety on their part. The charges facing the petitioners

are known in law, and the trial court is sufficiently empowered under **Section 89 (5) of the Criminal Procedure Code (CAP 75)** to determine whether or not the intended criminal charges disclose an offence.

33. The Petitioners have failed to plead their complaints with particularity setting out the fundamental rights alleged to have been violated and the manner of violation.

ANALYSIS AND DETERMINATION

34. Having carefully considered the submissions and the arguments that have been raised by the parties, the issues that I have formed for determination are whether there is sufficient material before the Court to warrant interference with the criminal trial in a subordinate court by issuing the orders of injunction sought.

35. I must first look at the power of DPP to prosecute to determine whether he has indeed acted *ultra vires*, or unreasonably in giving the Commission consent to prosecute the Petitioners, based on the report forwarded to him by the Commission under **Section 35** of the ACECA.

36. The office of the Director of Public Prosecution is established under **Article 157** of the **Constitution**, which provides as follows:

Article 157 (6) The Director of Public Prosecution 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.

37. The decision to institute criminal proceedings by the DPP is however discretionary and is not subject to the direction or control by any authority because **Article 157 (10)** stipulates that;

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

These provisions are also reiterated in **Section 6** of the **Office of the Director of Public Prosecutions Act. No. 2 of 2013** as follows;

Pursuant to Article 157(10) of the Constitution, the Director shall-

(a) not require the consent of any person or authority for the commencement of criminal proceedings;

(b) not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law; and

(c) be subject only to the Constitution and the law.

38. The basis of the above provisions is that the office of the DPP is an independent office and the Court will in an ideal situation, exercise its powers with great circumspection before interfering with any decisions made by the Director of Public Prosecutions. The court will only do so in the clearest of cases. See - **Republic V Chief Magistrates Court, Nairobi Director of Public Prosecutions and Martin Maina Right End Properties Limited ex-parte Stephen Oyugi Okero (2015) eKLR**, in which the court observed that, the power to prohibit criminal prosecution should be exercised with great care. It should be remembered that in the first place the people of Kenya bestowed prosecutorial power upon the DPP and in accordance with Article 157 of the Constitution granted him or her decisional autonomy. The DPP and his officers are expected to use their expertise in determining which case to prosecute and which

one not to prosecute.

39. In an earlier case in **Investments & Mortgages Bank Limited (I & M) vs Commissioner of Police and 3 others, Nairobi HC Petition No. 104 of 2012**, Majanja J remarked as follows:

"I agree with the respondents that it is within their mandate to investigate crimes where there is reasonable basis of commission of offence and that in performance of their duties, they are independent institutions. The Office of the Director of Public Prosecutions established under Article 157 is an independent office which is empowered to conduct its duties free from any influence or control by any authority. Its actions must be within the law and in accordance with what the Constitution dictates. One such dictate is that in the exercise of their powers, it is to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process."

There is no doubt therefore that the office of the DPP should be left to exercise its mandate and discretionary power to prosecute guided by circumscribed only by the constitutional limits.

40. Prima facie case I see no basis to the allegation made by the Petitioners that their right to fair trial as provided for under **Article 50 of the Constitution** has been infringed in the circumstances that led to their arraignment in court. From the submissions the DPP received a report from the Commission which investigated allegations of corruption received from a complainant and recommended the prosecution of the Petitioners.

41. The DPP made his decision to prosecute upon reviewing the report and evidence forwarded by the Commission. The decision by the DPP to prosecute the Petitioners, therefore was within the law, and within his mandate. The Courts have stated times without number that they will not interfere with the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the mandate and discretion conferred upon that office under **Article 157 of the Constitution** without sound basis.

42. The mere fact that the intended ongoing criminal proceedings are in all likelihood bound to fail because of the prosecution not availing to the Petitioners all the evidence it seeks to rely on in the criminal trial as alleged by the Petitioners, is not ground enough for halting or stopping those proceedings by way of directing the DPP to review the evidence relied on by the prosecution. Judicial Review is not concerned with the merits of the case in the trial court but with the decision making process in that case. The fact that the Petitioners may have a good defence in the criminal process is also not a ground that ought to be relied upon by a Court in order to stop criminal proceedings undertaken in good faith. That defence is open to the Petitioners in those criminal proceedings.

43. The issues raised in the Petition are all matters of evidence that are within the purview of the trial court to evaluate. Whether or not the material to be placed before the trial court will pass muster is not a question to be dealt with by any other court other than the trial court which is better placed to consider the evidence and decide whether or not, to place the accused on their defence, or acquit them under **Section 210 of the Criminal Procedure Code**.

44. The Petitioners are before this court seeking an interlocutory injunction pending the hearing and determination of the application dated 4th June 2013, and a review of their case by the DPP. The conditions for the granting of an injunction have not been satisfied. The principles upon which an injunction may be granted are first, that the Applicant has shown a prima facie case with a probability of success. Secondly, that he might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages if the injunction does not issue. Lastly, if in doubt the court will normally decide on the balance of convenience – See **Adalja v Hilton International (K) Ltd & Anor (1987) KLR pg. 624**.

45. The Commission urged that it has demonstrated that the intended prosecution has a factual foundation and the Petitioner's right to fair trial as articulated under **Article 50 of the Constitution** has not been

violated. There is no evidence that the Petitioners had not been denied their fundamental right under **Article 50 (2) (j)** to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence.

46. It is my considered view that the Petitioners have not shown a prima facie case with a probability of success. Neither does the balance of convenience tilt in their favour. This court cannot second guess the DPP if he says he considered the report forwarded to him by the Commission and determined that there was sufficient evidence to require the Petitioners to stand trial.

47. Those being my views in the matter, I hold that this application lacks merit and is accordingly dismissed with costs to the Respondent.

SIGNED DATED and DELIVERED in open court this **27th day of June, 2017.**

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L. A. ACHODE

JUDGE