



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 186 OF 2016**

**IN THE MATTER OF ARTICLES 3, 10, 22, 23 (10, 25 (C), 28, 50, 165 (3), 258 AND 259 (1) OF  
THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES CONTROL  
ACT, CAP 245, LAWS OF KENYA**

**AND**

**IN THE MATTER OF CRIMINAL PROCEDURE CODE CAP 75**

**AND**

**IN THE MATTER OF CRIMINAL CASE NUMBER 1264 OF 2016 AT THE CHIEF  
MAGISTRATES COURT, KIBERA**

**CARLITO EMELSON.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The background information relevant to this determination is that the Petitioner was charged with the offence of trafficking Narcotic Drugs contrary to Section 4 (a) of Narcotic Drugs and Psychotropic Substances (Control) Act<sup>[1]</sup> in criminal case number 3773 of 2010 at the Chief Magistrates Court, Kibera, Nairobi in which he was fined **Ksh. 12,013,200/=**. In addition he was sentenced to life imprisonment.

2. His appeal against both conviction and sentence was partly successful.<sup>[2]</sup> The High Court quashed the conviction and ordered a retrial.<sup>[3]</sup>

3. The Petitioner was charged afresh at the Senior Principal Magistrates Court at JKIA Court, Nairobi in

criminal case number **118** of 2016. His application to be released on bail was declined. The learned Magistrate ruled that he remains in custody pending trial. Hearing commenced on 2<sup>nd</sup> November 2016 when one prosecution witness testified and on 3<sup>rd</sup> November 2016 a second witness testified.

4. On 13<sup>th</sup> February 2017, the court adopted a consent by the prosecution and the defence counsel whose terms were:- **(a)** since there is an indication that high court constitutional Petition No. **186** of 2016 has similar issues pending for determination, the consent reached by both sides is adopted as an order of this court, **(b)** the executive officer to have the proceedings typed, **(c)** mention on 23.2.2017. Remanded in custody.

5. Evidently the above consent referred to this Petition. But more significant is the fact that the consent had the effect of "staying" the criminal trial. On 27<sup>th</sup> March 2017, both counsels informed this court that there was an "order by the magistrate referring the matter before the lower court to this court." My reading of the consent is that the Magistrate never referred the matter to this court.

6. It is evident that it is the counsel for the Petitioner and the prosecutor who informed the magistrate that there was a similar matter in the High Court. The effect of the consent was to "technically stay" the proceedings in the lower court. On the strength of the same information presented to this court by both counsels on the same day, that the Magistrate had referred this matter to this court because it raised constitutional issues, I directed that Criminal Case Number **118** of 2016 be stayed, which orders I would not have granted had the correct picture been presented to me.

### **The Petitioners case**

7. This Petition is premised on the footing that the grounds upon which the retrial was based violate Article **50 (2)** of the Constitution, and section **74A** of the Narcotic Drugs and Psychotropic Substances (Control) Act.<sup>[4]</sup> Clearly, this challenges the High Court Judgement referred to above and ought to be raised as a ground of appeal. This court is not and cannot sit as appellate court against the High Court decision.

8. The Petitioner pleaded a list of issues in this Petition among them whether the grounds upon which an order for retrial was rendered was sufficient for an acquittal as the entire trial allegedly violated his rights to a fair trial. Again, this is an attack on the High court judgement. If the Petitioner was aggrieved by the High Court decision, the proper course of action would have been to appeal to the Court of Appeal against the said decision.

9. At the hearing of this Petition, the Petitioner highlighted his written submissions which I have carefully considered. The core arguments raised are essentially grounds of appeal among them, questioning the veracity of evidence in the lower court, the exhibits produced and alleged false affidavit by the investigating officer only to mention but some. The Petitioner also stated that the charge sheet in the lower court is defective. All these are matters for the trial court and/or grounds for appeal.

10. The Respondents response is that the petition is misconceived, it does not disclose any constitutional issues and urged the court to dismiss the Petition.

### **Determination**

11. This court has an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power to 'stay' an indictment (or stop a prosecution) if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court or infringement of the petitioners fundamental rights. The facts before me do not suggest that the retrial is an abuse of court process nor is there anything to show that the Petitioners' right to a fair trial have been infringed or threatened.

12. Abuse of process has been defined as something so unfair and wrong with the prosecution that the

court should not allow a prosecutor to proceed with what is, in all other respects, a perfectly supportable case.[5] Whether a prosecution is an abuse of court process, unfair, wrong or a breach of fundamental rights, it is for the court to determine on the individual facts of each case. I am afraid, from the material before this court, there is nothing to show that the prosecution is unfair or an abuse of court process or abuse of police powers or judicial process.

13. In my view, the arguments raised in this case, seem to blame the decision of the High Court which as stated above are matters of appeal. The other issues raised relate to the nature or veracity of the evidence tendered in the lower court which is a matter for the trial court and not this court.

14. The concept of a fair trial involves fairness to the prosecution and to the public as well as to the accused.[6] It is in the public interest as well as the Petitioner that the trial process be undertaken expeditiously. This Petition has only served the purpose of delaying the trial in the lower court.

15. The inherent jurisdiction of the court to stop or quash a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances.[7] The essential focus of the doctrine is on preventing unfairness at the trial through which the accused is prejudiced in the presentation of his or her case or where there is clear breach of fundamental rights to a fair trial. Courts should first consider whether or not there is anything in the trial to prevent 'a fair trial' and if there is, then the court ought to stop the prosecution.

16. The high court can prohibit or quash prosecutions in cases where it would be **impossible to give the accused a fair trial; or where it would amount to a misuse/manipulation of process** because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.[8] This test has not been established in this case.

17. The power to stay or stop a prosecution should only be exercised if exceptional circumstances exist which would result in prejudice to the accused which cannot be remedied in other ways. To me, this is not a deserving case where the prosecution ought to be halted or declared void for the interests of justice.

18. A criminal prosecution can also be stopped if it was commenced in the absence of proper factual foundation. This has not been alleged or proved in this case. From the material before me, there was proper factual foundation to warrant undertaking the prosecution in question.[9]

19. The Constitution contains, in material respects, a fundamental commitment to human rights. The enquiry is whether there has been an irregularity or an illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted. [10] These have not been shown to exist in this case.

20. The provisions of the Constitution conferring powers upon the High Court to grant such remedies as certiorari, prohibition, Judicial review, mandamus or permanent stay or prohibition of criminal proceedings are a device to advance justice and not to frustrate it.

21. The saving of the High Court's inherent powers, both in civil and criminal matters is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. It has not been shown that the criminal trial has been used as a weapon of harassment or persecution.

22. The High Court has inherent powers to quash, stay or prohibit criminal proceedings. These powers are wide as they imply the exoneration of the accused even before the proceedings have been culminated by way of trial. Noting the amplitude of these powers and the consequences which they carry, the Supreme Court of India[11] revisited the law on the issue and held that '*these powers should be exercised sparingly and should not carry an effect of frustrating the judicial process.*' The court delineated the law in the following terms:-

*"The power of quashing criminal proceedings has to be exercised very sparingly and with*

circumspection and in the rarest of rare cases and the Court cannot be justified in embarking upon an inquiry as to the reliability or otherwise of allegations made in the complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at uncalled for stage nor can it 'soft-pedal the course of justice' at a crucial stage of proceedings.....The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of the power of the court, but the more the power, the more due care and caution is to be exercised in invoking these powers” [12]

23. The leading case on the application of abuse of process remains *Bennet vs Horseferry Magistrates Court & another*. [13] The court confirmed that an abuse of process justifying the stay of a prosecution could arise in the following circumstances:-

- i. *Where it would be impossible to give the accused a fair trial; or;*
- ii. *Where it would amount to a misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.*

24. **Chris Corns** in his Article entitled '*Judicial Termination of Defective Criminal Prosecutions: Stay Applications*' [14] argues that the grounds upon which a stay will be granted have been variously expressed in the cases. These grounds can be classified under three categories:-

- i. *When the continuation of the proceedings would constitute an 'abuse of process,'*
- ii. *When any resultant trial would be 'unfair 'to the accused, and*
- iii. *When the continuation of the proceedings would tend to undermine the integrity of the criminal justice system.*

25. Criminal proceedings commenced to advance other gains other than promotion of public good are vexatious and ought not to be allowed to stand. The word "vexatious" means "harassment by the process of law," "lacking justification" or with "intention to harass." This has not been alleged in this case.

26. In view of my analysis above, I find that this Petition has no merits at all and does not raise any constitutional issues. Accordingly I hereby order as follows:-

- a. ***That*** this Petition be and is hereby dismissed with no orders as to costs.
- b. ***That*** Senior Principal Magistrates Court Criminal Case Number 118 of 2016, JKIA, **Republic vs Carlito Emelson** proceeds for hearing and determination.
- c. ***That*** a copy of this Judgment/Order be served upon the DPP and the Senior Principal Magistrate, JKIA Courts.

Orders accordingly

Signed, dated and delivered at Nairobi this 20<sup>th</sup> day of December, 2017

**John M. Mativo**

Judge

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[1] Act No. 4 of 1994

[2] High Court of Kenya, Criminal Appeal Number 138 of 2013

[3] In a judgement delivered on 9<sup>th</sup> March 2016

[4] Ibid

[5] *Hui Chi-Ming v R* [1992] 1 A.C. 34, PC

[6] *DPP v Meakin* [2006] EWHC 1067.

[7] See Attorney General's Reference (No 1 of 1990) [1992] Q.B. 630, CA; Attorney General's Reference (No 2 of 2001) [2004] 2 A.C. 72, HL.

[8] See *Bennett vs Horseferry Road Magistrates' Court and Another* [1993] 3 All E.R. 138, 151, HL; see also *R vs Methy Tydfil Magistrates' Court and Day ex parte DPP* [1989] Crim. L. R. 148.

[9] Republic vs Attorney General ex-parte Arap Ngeny HCC APP NO. 406 of 2001

[10] Interpreting similar provisions in the constitution of South Africa, the South African Constitutional court (Nicholas AJA), *Shabalala & 5 others vs A.G of Transvaal & Another* CCT/23/94

[11] See *Maharashtra vs Arun Gulab Gawali*

[12] See *State of West Bengal & Others vs Swapan Kumar Guha & Others*, AIR, 1982, SC 949, *Pepsi Foods Ltd & Another vs Special Judicial Magistrate & Others* AIR 1998, SC 128 & *G. ugarSuri & Ano Vs State of U.P & Others*, AIR 2000 Sc 754

[13] {1993} All E.R 138, 151, House of Lords

[14] Chris Corns, *Judicial Termination of Defective Criminal Prosecutions: Stay Applications*, 76 *University of Tasmania Law Review*, Vol 16 No. 1, 1977