



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.412 OF 2014

BETWEEN

ALBERT MOKONO ONDIEKI.....PETITIONER

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS (DPP).....1ST RESPONDENT

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

THE DCIO MAKADARA CID DIVISION.....3RD RESPONDENT

JUDGMENT

Introduction

1. The Petition dated 18th August 2014 was filed by the Petitioner, Albert Mokono Ondieki, an advocate of the High Court, challenging the Respondent's intention to prosecute him for offences relating to alleged purchase of maize from one, Tom Wamunga, in August 2014.

2. In the said Petition he prays for the following orders;

“(1) A declaration that resonating from fundamental rights under the Constitution of Kenya, 2010 particularly the rights to information under Article 35 and right to fair administrative action under Article 47 of the Constitution, the decision of the 3rd Respondent to deny the Petitioner information requested for purposes of statement taking and/or interview the and to intimidate him with criminal charges if he fails to pay up the purchase price, the 3rd Respondent is in violation of the Petitioner's fundamental rights under the Constitution of Kenya, 2010.

(2) A declaration that the Respondents' move to compel the Petitioner to pay up the purchase price to the complainants is unfair, unjust and unconstitutional and abuse of the Respondents' constitutional mandate.

(3) That the intended prosecution infringes on the Petitioner's fundamental rights and amounts to an abuse of the Respondents' constitutional mandate.

(4) A declaration that the Respondents have no jurisdiction to either compel the Petitioner to write a statement in relation to the maize issue without providing any information required and necessary to do so, or to compel him to pay the complainants the debt.

(5) This Honourable Court be pleased to issue an order of prohibition, prohibiting the Respondents from causing the apprehension of the Petitioner, considering and/or preferring any criminal charges against the Petitioner in any Court based on the purchase of maize.

(6) This Honourable Court do issue an order of prohibition, prohibiting the Respondents from applying their constitution or statutory powers on the Petitioner until they have furnished him with particulars and information as may enable him understand in what context they endeavor to interview or take his statement.

(7) Any other relief that this Honourable Court may deem fit and just to grant in the interest of justice.

(8) Costs of the Petition.”

Factual Background

3. From the Petitioner's Affidavit in support of the Petition and the Replying Affidavit of No.85991 PC Daniel Kieng sworn on 4th September 2014, one Tom Wamunga filed a complaint on 4th August 2014 at Industrial Area Police Station in Nairobi claiming that he had sold maize to certain persons who later refused to pay him and instead went underground.

4. According to PC Kieng, the Sale Agreement for purchase of the maize was made at the Petitioner's office at Gilfillan House, Kenyatta Avenue, Nairobi and all that was required of him was to explain to the Investigating Officer the circumstances under which the Sale Agreement was concluded.

5. According to the Petitioner however, when he was summoned by the 3rd Respondent on 6th August 2014, he discovered that while he was in Kisii attending a funeral, his Court clerk, in conspiracy with other people unknown to him, had entered into the sale transaction at his offices, without his knowledge and so he knew nothing of the said transaction. That the 3rd Respondent instead of accepting that explanation ordered him to pay the complainant for the price of the maize or face unspecified criminal charges. He thereafter decided to file the present Petition to protect his constitutional rights.

Petitioner's Case

6. In the Petition, the Supporting Affidavit and in his Written Submissions, the Petitioner's case is that the actions of the 3rd Respondent in threatening to charge him in Court unless he paid the complainant for the price of the maize was an abuse of the Court process as the National Police Service is not a debt collection agency. Further, that the said decision was irrational and malicious because there was no basis in law for it to have been made.

7. Although **Articles 1, 2(2) and 2(5), 3(1), 10(1), 28, 35, 38(3), 157(11) and 159(2)** were cited in the body of the Petition, no further mention of them, including in submissions, was made and it is unclear to me how they apply to the circumstances of this Petition. As regards **Article 47 of the Constitution**, it is the Petitioner's case that ***“the 3rd Respondent in his decision to threaten and/or compel the Petitioner to write to pay providing the contrary and failure to inform the Petitioner of the nature of the involvement is a violation of the Petitioner's right to fair administrative action that is unreasonable and not procedurally fair contrary ... (sic)***

8. For the above reasons, he has sought orders as hereinabove stated.

Respondent's Case

9. By the Replying Affidavit of PC Kieng and Submissions of Mr. Gitonga Murang'a, learned Prosecution Counsel, the Respondents have argued that the Petition was made without basis, is premature and no constitutional rights that the Petitioner is entitled to, were violated. That in fact no decision has been made to prosecute him and if such a decision is to be made, the Petitioner would be entitled to know any charges to be preferred against him.

10. The Respondents also submitted that under **Section 52** of the **National Police Service Act**, a police officer is at liberty to require any person, in writing, to give information that may assist in the finalization of any pending criminal investigation. That the Petitioner was therefore obligated to give any information that he had regarding the failed maize transaction and no constitutional rights would be violated in the giving of such information.

11. Lastly, that both the National Police Service and the Director of Public Prosecution are obligated to act within the bounds of the Constitution and in the present case, there is no evidence that they have not done so meaning that the Petition is one doomed for dismissal with costs.

Determination

12. From my rendition above, it is clear that the Petitioner's sole complaint is that whereas he is innocent of any allegations of complicity in the maize transaction in issue, he is apprehensive that he may be arrested and charged unless he pays the purchase price to Tom Wamunga, the initiator of the criminal complaint.

13. The Respondents on the other hand have argued that the Petition is premature and all that was required of the Petitioner was a statement detailing out any information he may have regarding the maize transaction.

14. It is not denied that on 6th August 2014, the Petitioner was summoned to appear before the 3rd Respondent and in obedience, he did so. It is also not denied that the Petitioner did not record any statement on the maize transaction neither can it be denied that no decision has been taken to prosecute the Petitioner. I say so because I believe PC Kieng's statement that investigations were ongoing by the date this Petition was filed and the Petitioner obtained orders to stop his arrest.

15. In the above context, is the Petition premature as alleged by the Respondents and have any constitutional rights of the Petitioner been violated as alleged?

Prematurity of the Petition

16. The **Constitution 2010** presupposes in **Articles 22(1)** as read with **Article 165(3)(d)** that a party may approach this Court claiming that his rights have been violated or are threatened with violation. In the latter case, one ought to show that the threat is real and not hypothetical for proceedings to be properly brought. That fact necessarily begs the question whether the present proceedings are premature because the Respondents have argued that the Petitioner has not shown any real threat of violation and therefore his Petition is premature.

17. **Article 244** of the **Constitution** sets out the objects and functions of the National Police Service and I agree with Mr. Murang'a that **Section 52** of the **National Police Act** is pertinent to these proceedings. That **Section** for avoidance of doubt proves as follows;

“(1) A police officer may, in writing, require any person whom the police officer has reason to believe has information which may assist in the investigation of an alleged offence to attend before him at a police station or police office in the County in which that person resides or for the time being is.

(2) A person who without reasonable excuse fails to comply with a requisition under subsection (1), or who, having complied, refuses or fails to give his correct name and address and to answer

truthfully all questions that may be lawfully put to him commits an offence.

(3) A person shall not be required to answer any question under this Section if the question tends to expose the person to a criminal charge, penalty or forfeiture.

(4) A police officer shall record any statement made to him by any such person, whether the person is suspected of having committed an offence or not. But, before recording any statement from a person to whom a charge is to be preferred or who has been charged with committing an offence, the police officer shall warn the person that any statement which may be recorded may be used in evidence.

(5) A statement taken in accordance with this Section shall be recorded and signed by the person making it after it has been read out to him in a language which the person understands and the person has been invited to make any correction he may wish.

(6) Notwithstanding the other provisions of this Section, the powers conferred by this Section shall be exercised in accordance with the Criminal Procedure Code (Cap. 75), the Witness Protection Act (Cap. 79) or any other written law.

(7) The failure by a police officer to comply with a requirement of this Section in relation to the making of a statement shall render the statement inadmissible in any proceedings in which it is sought to have the statement admitted in evidence.”

18. In the above context, one of the complaints by the Petitioner is that he was being compelled to record a statement against the law but it is obvious, and logically so, that such a statement is both lawfully necessary and important to assist in any police investigation. There are also sufficient safeguards in the above Section against self-incrimination and protection other rights that the giver of a statement is entitled to under the law.

19. Having so said, is there any substance to the allegation that the Petitioner was being coerced to pay the price of the maize or face criminal charges? Save for the Petitioner’s word, there is nothing to back that allegation but even if the threat had been made, **Section 52(6)** and **(7)** above was designed to protect any person from whom a statement was required in any investigation. In addition, **Article 157** of the **Constitution** grants the DPP and not the Police the ultimate authority in the prosecution of any person so that before any charges are preferred against anyone, **Article 157(11)** of the **Constitution** must be complied with. It provides as follows;

“(1) ...

(2) ...

(3) ...

(4) ...

(5) ...

(6) ...

(7) ...

(8) ...

(9) ...

(10) ...

(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall 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.”

20. No evidence has been laid before me that the DPP was even aware of the on-going investigation and so any claim of abuse of Court process cannot be justified.

21. From the foregoing, it is obvious that the Petitioner has come to this Court prematurely as all that has been asked of him is the recording of a statement and whether or not an offence allegedly committed by him has been disclosed is a matter of pure speculation and his apprehensions are at this stage wholly unwarranted. I also see no threat of violation of any of his fundamental rights and freedoms.

Whether any Constitutional Right has been violated

22. Elsewhere above, I stated that only **Article 47** of the **Constitution** was properly cited in the Petition and all other Articles were cited without any evidential basis and justification. If that be so, **Article 47** provides as follows;

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.”

It is the Petitioner’s case in the above context that the decision to demand a statement from him was unfair and unlawful.

23. What is the threshold for any claim under **Article 47** and where procedural fairness has been questioned? In **Justice Amraphael Mbogholi Msagha vs Chief Justice & 7 Others Nairobi HCMCA No.1062 of 2004, [2006] 2 KLR 553**, the High Court expressed itself as follows;

“A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared to be no decision.” (Empasis added)

24. I agree with the above statement and in the present Petition, I have stated that what the 3rd Respondent required of the Petitioner was lawful and within his mandate. I have also stated that the question whether a prosecution would be mounted against him is purely speculative. How then does **Article 47** apply? It is not the role of this Court to enter into the realm of police investigations and superintend such an investigation unless it can be shown that contrary to **Article 244(c)** of the **Constitution**, the National Police Service in its investigations is not complying **“with constitutional standards of human rights and fundamental freedoms”**. It has not been shown that this is true in the Petitioner’s circumstances.

25. Further, I agree with Majanja J. when he stated as follows in **Douglas Maina Mwangi vs DPP & Anor, Petition No.528 of 2012;**

“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”

26. In the end, I find no reason to hold that Article **47** of the **Constitution** nor any other Article in the Bill of Rights has been violated.

Conclusion

27. The Petitioner is an advocate of this Court and is apprehensive that he may be improperly charged with offences relating to a maize transaction he knows nothing about. I have said that his apprehensions are misguided and he ought to co-operate with the on-going investigations if only to make that exact point. He knew or ought to know the right moment to properly seize this Court’s jurisdiction under **Articles, 22, 23 and 165(3) (d)(ii)** of the **Constitution**. As it is, he has jumped the gun and I have said why.

Disposition

28. For the above reasons, the Petition dated 18th August 2014 is dismissed and the Consent Orders entered into on 25th March 2015 are discharged.

29. As for costs, although Mr. Murang’a has asked for costs to be paid to the Respondents the nature of the case necessitates that each party should bear its own costs.

30. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JANUARY, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Manana for Petitioner

Mr. Murang’a for Respondent

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE