



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 97 OF 2015

REPUBLIC.....APPLICANT

VERSUS

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

INSPECTOR GENERAL, KENYA POLICE SERVICE.....2ND RESPONDENT

CHIEF MAGISTRATE'S COURT,

MILIMANI LAW COURTS.....3RD RESPONDENT

EX-PARTE

LAWRENCE MWAZONGA BOKORO

JUDGEMENT

1. In these judicial review proceedings, the Lawrence Mwazonga Bokoro is the ex-parte Applicant. The Director of Public Prosecutions is the 1st Respondent. The Inspector General of Police is the 2nd Respondent and the Chief Magistrate's Court, Milimani Law Courts is the 3rd Respondent.

2. From the papers filed in court by the Applicant, his case is that he is the accused person before the 3rd Respondent in **Criminal Case No. 1311 of 2012** in which he is charged in connection with fraudulent transactions involving 189 cheques which occurred at Agricultural Finance Corporation (AFC) where he was working.

3. Through the statutory statement filed together with the application for leave on 27th March, 2015 the Applicant contends that the fraud which occurred between 27th March, 2007 and 22nd September, 2009 started long before he was employed by AFC. Further, that most of the fraudulent cheques were drawn and cashed long before he was employed.

4. The Applicant asserts that he was not a payee of any of the fraudulent cheques. His case is that the cheques that were allegedly used to perpetuate the fraud were found by the document examiner to have been forged and were used long before he was employed. In addition, the Applicant contends that some of the alleged fraudulent cheques are missing and have not been availed before the trial court.

5. The Applicant's opinion is that his arrest and prosecution is premised on a non-existent report of the investigating officer. It is the Applicant's position that the available evidence does not support the alleged theft of Kshs.34, 403, 171.80. The Applicant contends that he was not involved in the approval of the payment vouchers which led to the theft and neither was he involved in the signing of the majority cheques and bank schedules. Further, that the officers who were in the employ of AFC at the time the fraud is alleged to have occurred have never recorded statements with the police.

6. It is the Applicant's case that the decision to arrest and charge him is arbitrary, malicious, discriminatory, and aimed at maligning him. He contends that his prosecution is an illegal abuse of power which contravenes his constitutional rights and is also *ultra vires* the Constitution.

7. Through the notice of motion application dated 27th April, 2015 and filed in court on 7th May, 2015 the Applicant therefore pray for orders as follows:

“1. Judicial review by way of an order of prohibition prohibiting the Respondents, their servants, agents, any other person, body or authority under the direction/command of the Respondents from continuing with the criminal prosecution of the Applicant vide Criminal Case Number 1311/12: Republic versus Lawrence Mwazonga Bokoro for the alleged offence of stealing by persons in the public service or with any other offence whatsoever arising or relating to an alleged fraud which allegedly took place between 26th March, 2007 and 22nd September, 2009 at the Agricultural Finance Corporation.

2. Judicial Review by way of an order of certiorari to remove to this Honourable Court to be quashed the proceedings in criminal case number 1311/12: Republic versus Lawrence Mwazonga Bokoro.

3. That the costs of this application be provided for.”

8. The 1st and 2nd respondents through grounds of opposition dated 14th April, 2015 opposed the application on the grounds that:

“1. The application herein is misconceived, frivolous, vexations, incompetent, improperly before court and an open abuse of the court process.

2. The application herein is intended to curtail the statutory obligations and mandatory duties of the 1st and 2nd Respondents.

3. The orders sought by the application seek to prevent the Director of Public Prosecutions and the Inspector General of Police from exercising their mandates as provided under Article 157 & 245 of the Constitution of Kenya 2010 and National Police Service Act.

4. Further the Ex-parte Applicant has not demonstrated that he has an arguable case. His allegations are mere speculations which cannot be substantiated. The prayers if granted would result to greater injustice in the criminal system and public interest. Stay and conservatory orders sought should not be granted.

5. Under Article 157(10) of the Constitution the Director of Public Prosecutions does not require the consent of any person or authority for the commencement of criminal proceedings and in exercise of the powers or functions, shall not be under the direction or control of any person or authority.

6. Section 24 of the National Police Service Act mandates the police to investigate any complaint brought to their attention in order to determine whether an offence has been committed and prefer appropriate charges thereafter.

7. It is in the public interest that the perpetrators of crimes are prosecuted. In any event, the Ex-parte Applicant has not adduced any evidence to show that the purported arrest and prosecution is in bad faith, *ultra vires* and abuse of the court process.

8. The Ex-parte Applicant must demonstrate in a precise manner how injustice would otherwise result or how his constitutional rights may continue to be violated if the criminal proceedings proceed.

9. The Ex-parte Applicant's averments in his affidavit verifying the facts relied on matters of evidence that can be canvassed in the trial court.

10. The Ex-parte Applicant has not demonstrated that he has a prima facie case and this application is intended to delay prosecution and subvert justice.

11. The application is without merit and should be dismissed with cost."

9. The grounds of opposition were reiterated through the replying affidavit sworn on 12th May, 2015 by Sergeant Julius Musoga the lead investigating officer.

10. From the replying affidavit, it emerges that vide a letter dated 1st December, 2010, the Acting Managing Director of AFC one Zakayo Magara alerted the Banking Fraud Investigations Unit that on 19th November, 2010 he had learned that for a period spanning two years, the corporation had lost the sum of Kshs.34, 403, 171.80 through fraudulent activities involving falsification of 178 cheques by staff based in the finance department.

11. Sergeant Musoga and his team conducted investigations which disclosed that the Applicant had signed fraudulent cheques amounting to Kshs.27, 594, 225.15. The investigations also revealed that the Applicant who was the General Manager in charge of the Finance Department did not ensure that reconciliation of accounts was up to date. Further, that although the cheques had been marked in the register as cancelled, the Applicant had nevertheless gone ahead to sign them.

12. Following the evidence unearthed during investigations, the Applicant and another were charged. It is the respondents' position that the Applicant was charged after investigations disclosed that offences had been committed and not as a result of the audits conducted by the office of the Auditor General.

13. At paragraph 18 of the replying affidavit Sergeant Musoga avers that the orders sought by the Applicant should not be granted for reasons that:

"a) That the orders sought by the Ex-parte Applicant are an afterthought given that he was arraigned in court long time ago and he did not take any step of seeking the orders he is seeking now.

b) Order 53 Rule 2 is very clear as regards leave to apply for order of certiorari as the proceedings in the trial court commenced in the year 2012.

c) That the Ex-parte Applicant is seeking to curtail the mandate of the criminal justice system actors as enshrined in the Constitution of Kenya.

d) That the Respondents carry out their investigations independently and does not rely on audit reports to prefer charges.

e) That the Ex-parte Applicant has not adduced sufficient evidence before this Court on the merit of each case to show that prejudice has been occasioned.

f) That the accuracy and correctness of the evidence or facts gathered in any investigation can only be assessed and tested by the trial Court which is best equipped to deal with the

quality and sufficiency of evidence gathered and properly adduced in support of the charges.

g) That the 1st Respondent does not require the consent of any person or authority for the commencement of criminal proceedings.

f) That the 1st Respondent does not act under the direction or control of any person or authority and as such Article 249(2) of the Constitution, provides that an independent office is subject only to the Constitution and the law and is not subject to the direction or control by any person or authority.

i) That the allegation by the Ex-parte Applicant is without merit, legal reason or backing.”

14. The 1st and 2nd respondents therefore urged this court to dismiss the Applicant’s case.

15. This case is about prohibition of a criminal trial. Under Article 157 of the Constitution, the Director of Public Prosecutions (DPP) is given prosecutorial powers. In exercising those powers he/she shall not require the consent of any person or authority and shall not be under the direction or control of any person or authority.

16. There is a caveat to the exercise of that power in Article 157(11) of the Constitution which states that:

“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.”

17. There are many decisions where the DPP has been stopped from exercising prosecutorial powers. For example in **Commissioner of Police & the Director of Criminal Investigation Department & another v Kenya Commercial Bank & 4 others [2013] eKLR**, the Court of Appeal concurring with the decision of this Court (Majanja, J) to prohibit the prosecution of the respondents stated that:

“Clearly, the company and the guarantor through their directors were employing criminal process to assist them in resolving their civil dispute. While the law (Section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that that power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of the administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court. This is a case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations. We have no doubt in our minds that the belated involvement of the police in this purely civil dispute is an abuse of their power. The police should direct their energies and resources to prevention of crime which we all know is rampant in this country and is about to get out of control.”

18. The use of the criminal justice process to settle civil disputes will attract prohibitory orders. The powers granted to the DPP and the Police must be exercised in accordance with the laws of Kenya and in good faith.

19. In the case of **State of Maharashtra & others v Arun Gulab Gawali & others Criminal Appeal No. 590 of 2007 (27 August, 2010)**, the Supreme Court of India at paragraph 13 of its judgment outlined the circumstances that may lead to the quashing of criminal proceedings as follows:

“In R.P. Kapur Vs. State of Punjab AIR 1960 SC 866, this Court laid down the following principles:-

(I) where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice;

(II) where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction;

(III) where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; and

(IV) where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.”

20. As was stated in **Kuria & 3 others v Attorney General [2002] 2 KLR 69** the court in exercising this jurisdiction must balance between the public interest of ensuring that crime is detected and punished and the rights of the accused individual. The Court observed that:

“The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means..... Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence.”

21. It is not sufficient for an applicant to present an application for stopping a criminal trial. The applicant must go ahead to prove that the prosecution is one in which orders should be granted. The need for evidence was emphasised in **Kuria** (supra) thus:

“There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution.”

22. The question therefore is whether the Applicant herein has established a ground or grounds for the grant of the orders sought.

23. In summary, the Applicant’s case is that there is no sufficient evidence upon which to convict him with the offences with which he is charged. He also claims that he was not an employee of AFC at the time the offences with which he is charged were committed.

24. On the claim by the Applicant that there is no sufficient evidence to prosecute him, I will refer to the statement of the Court of Appeal in **Meixner & another v Attorney General [2005] 2KLR 189** that:

“As the learned judge correctly stated, judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through *certiorari* on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power.

Having regard to the law, we agree with the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision. The other grounds which the appellants claim were ignored ultimately raise the question whether the evidence

gathered by the prosecution is sufficient to support the charge.

The criminal trial process is regulated by statutes, particularly, the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon an examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence. That is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.”

25. Whether or not certain exhibits have been produced before the trial court is a matter to be addressed by the trial court. The laws governing production of exhibits and assessment of the quality of the evidence adduced will guide the trial court in reaching a decision. An attempt by this court to make a finding that the Applicant was not an employ of AFC when the offences were committed or to decide that crucial exhibits have not been produced will amount to short-changing the prosecution and denying it an opportunity of proving its case through the established rules contained in the Evidence Act, Cap. 80 and other relevant laws. This court will be exceeding its judicial review mandate.

26. The question as to whether the Applicant was an employee of AFC at the time the offences were committed will also be addressed by the trial court. It must be remembered that the alleged crimes for which the Applicant is charged were committed over a period of time and it is only the trial court which will determine whether the Applicant was present when some of the cheques were drawn and encashed.

27. What the Applicant is attempting to do through these proceedings is to invite this court to go through the exhibits and return a verdict of not guilty on his behalf. Unfortunately that is not the work of the judicial review court. The arena for testing the veracity of witnesses and the sufficiency of evidence still remains the trial court.

28. Looking at the material placed before this court, I find that the Applicant has failed to establish a case for the grant of the orders sought. His application therefore fails and the same is dismissed. There will be no orders as to costs.

Dated, signed and delivered at Nairobi this 26th day of Feb , 2016

W. KORIR,

JUDGE OF THE HIGH COURT