



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 508 OF 2015

PAUL ONGILI OWINO.....1ST PETITIONER

VERSUS

BERNARD OMONDI ONGINJO..... 1ST RESPONDENT

DIVISIONAL CRIMINAL INVESTIGATION OFFICER.....2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

JUDGMENT

Introduction

1. The Petitioner is a student leader. He is the chairperson of the University of Nairobi's student body. The genesis of this petition was his election or the run down to his election to such position of leadership. The Petitioner is accused of having taken part in a criminal activity. He denies the same and now seeks to challenge his prosecution or intended prosecution by the 3rd Respondent.

2. Claiming that his intended prosecution has no basis, the Petitioner seeks orders to restrain the 2nd Respondent from arresting him. He also seeks orders to prohibit the 3rd Respondent from instituting any prosecution against him. The Petitioner also seeks damages for alleged intimidation.

3. The petition is opposed by both the 2nd and 3rd Respondents but the 1st Respondent apparently opted not to participate in the proceedings.

Factual background and relevant chronology

4. The circumstances in which the matter came before the court appear in the Petition as well as in the Petitioner's affidavits filed on 18 November 2015 and on 8 February 2016 . I state the facts in summary as follows.

5. In February 2015, following a declaration of vacancies in the offices of the officials of the student body of the University of Nairobi ('SONU') and having declared his interest, the Petitioner contested for the seat of SONU Chairperson. The 1st Respondent was also a candidate for the same seat. During one of the

campaign meetings, within the University grounds the 1st Respondent was assaulted. The 1st Respondent pointed an accusing finger at his rivals including the Petitioner. The 1st Respondent also accused the Petitioner's campaign team. The 1st Respondent lodged a complaint with the 2nd Respondent.

6. The complaint was investigated by the 2nd Respondent's officers. The 2nd Respondent's officer then wrote to the 3rd Respondent. The letter dated 23 June 2015 pinpointed the Petitioner's cohort. Three suspects were identified and recommended by the 2nd Respondent for prosecution. The 2nd Respondent did not recommend the Petitioner's prosecution. On 21st September 2015, the 3rd Respondent however decided to have the Petitioner arrested and also charged with a misdemeanor under Section 250 of the Penal Code (Cap 63).

7. The Petitioner then quickly moved to this court.

The Petitioner's case

8. The Petitioner states that the Respondents are using the criminal process to unduly attack, intimidate and threaten him. It is further the Petitioner's case that his intended prosecution has no foundation at all as the 2nd Respondent investigated the entire incident and identified the culprits and further recommended their prosecution whilst also absolving him of any criminal culpability.

9. The Petitioner states that the entire process is likely to infringe on his liberty and dignity and ought to be brought to a halt immediately and absolutely.

Respondents' case.

10. The 1st Respondent did not participate in these proceedings.

11. The 2nd and 3rd Respondents' case is contained in the replying affidavit sworn on 10 December 2015 by Alex Khaemba, an officer with the National Police Service.

12. The Respondents state that following independent investigations of a complaint by the 1st Respondent against the petitioner and others, the conclusion arrived at was that the Petitioner was criminally culpable and warranted being prosecuted. The Respondents state that an independent review of all the documents and evidence availed to the 3rd Respondent revealed that there was merit in preferring charges against all the suspects, including the Petitioner. The 3rd Respondent further states that in preferring criminal charges against the Petitioner, the 3rd Respondent was merely executing his duties as mandated by the Constitution and in particular Articles 157(6) as well as Articles 10 and 3(1) of the Constitution.

13. The Respondents further state that the Petitioner has not shown how the Respondents have acted in excess of their powers as conferred under the law. In these respects, the Respondents further advance the case that the Petitioner is simply seeking to curtail the Respondents powers to enforce the law and prosecute those who act contrary to the law.

The Arguments

14. Both parties filed written submissions which were highlighted before me on 23rd February 2016. Mr Daniel Bosire urged the Petitioner's case while the Respondents' case was argued by Ms. Frida Ombogo.

The Petitioner's submissions

15. Mr. Bosire stated that the circumstances of the case were and is still special as the main parties involved are students and the court to bear that fact in mind. Counsel then submitted that the Petitioner is about to be charged in court for an offence which he did not commit. It was counsel's contention that the

3rd Respondent ought to be appropriately guided and that in the circumstances of this case the 2nd Respondent had actually stated that there was no evidence upon which the Petitioner could be charged, yet without any further investigations the 3rd Respondent decided to proceed and sanction the Petitioner's prosecution. Counsel urged that the court should read malice in the 2nd Respondent now changing its position and stating that there is evidence to warrant the Petitioner's prosecution.

16. Mr. Bosire for the petitioner posed five questions to be answered by the court. First, was whether the Petitioner for the simple reason of being a student leader could be held vicariously responsible for the acts of other unknown students? Secondly, was whether there had been adequate investigations by the 2nd and 3rd Respondents into the Petitioner's alleged criminal acts? Thirdly, was whether the 2nd and 3rd Respondents had shown that the petitioner was criminally liable? Fourthly, was whether the intended arrest confinement and prosecution of the Petitioner was illegal and an abuse of the office of the 2nd and 3rd Respondents. Finally, was on the issue of costs and who bears the same in this case.

17. It was submitted that the 2nd and 3rd Respondents could not show any culpability on the part of the Petitioner as in the Replying Affidavit it had been admitted by the Respondents that the Petitioner was not at the alleged crime scene when the 1st Respondent was assaulted by persons believed to be the Petitioner's supporters. Mr. Bosire also submitted that in investigating the alleged criminal conduct, the 2nd and 3rd Respondents relied on hearsay evidence and that there was no valid or conclusive evidence to link the Petitioner to any criminal offence. The petitioner's counsel wound up his submissions by stating that as there was no valid or conclusive evidence to link the Petitioner to any crime, his intended arrest and prosecution was illegal and amounted to abuse of office on the part of the 2nd and 3rd Respondents.

18. In support of his submissions, Mr. Bosire relied upon several authorities key amongst them the case of **R -v- Attorney General Ex Parte Kipngeno Arap Ngeny High Court Civil Application 406 of 2001** and **Kuria & 3 Others -v- Attorney General [2002]2 KLR 69**. The Petitioner also relied on the case of **Joram Mwenda Guantai -v- The Chief Magistrate, Nairobi [2007]2 EA 170**

The Respondents' submissions

19. On behalf of the Respondents, Ms. Frida Ombogo submitted that the 3rd Respondent had powers explicitly granted by the Constitution under Article 157 to decide when and who to prosecute and that the intended prosecution of the Petitioner was preferred pursuant to those powers. To grant the Petitioner the reliefs sought, continued Ms. Ombogo, would be tantamount to asking the 3rd Respondent not to discharge his constitutional duties.

20. It was also additionally submitted that in the exercise of his constitutional duties, the 3rd Respondent did not require any consent or authority from any person as he exercises independence in his determination whether to prosecute or not and the mere fact that an investigator recommends that one be prosecuted or not be prosecuted as the case may be does not bind the 3rd Respondent.

21. It was further submitted that it had not been shown or demonstrated that the 3rd Respondent acted in excess of his powers. Further and on the authority of **Beatrice Ngonyo Kamau & 2 Others -v- Commissioner of Police & Another HCCP No 251 of 2012** it was submitted by Ms. Ombogo that the prosecutor need only establish reasonable grounds before preferring criminal charges and that the prosecutor need not prove the charge against the accused person at the beginning of the case.

22. Counsel then added that in the instant case the investigation had been undertaken properly and within the confines of the Constitution and upon review of the evidence by the 3rd Respondent it was clear that the Petitioner was criminally culpable and had to face the law. As to whether the Petitioner would be convicted and held accountable with a verdict of guilty, the Respondents contended that it is not the duty of the High Court but rather the trial court to sieve through the evidence. Counsel also added that the criminal trial will proceed on its merits and the Petitioner accorded all the rights an accused person is

entitled to both under the Constitution as well as statute.

23. For completeness, the Respondent's counsel submitted that the Petitioner had not established that any of his rights had been violated as had been alleged. The Respondents relied on the case of **Anarita Karimi Njeru -v- The Republic [1976-80] KLR 1272** to add that the Petition was also lacking in material particulars and only deserved to be dismissed.

Discussion and determination

24. I have considered the Petition as well as the Reply. I have also paid close attention to the rival submissions by the parties. In my view the core issue is whether the 2nd and 3rd Respondents have abused their powers in the process of investigating alleged offences and also enforcement of the law. I must point out that the Petition as was correctly pointed out by Ms. Ombogo, was lacking in material particulars. The Petitioner failed to plead with the requisite precision the Articles of the Constitution allegedly violated or under threat of violation and further failed to plead with reasonable precision the manner of violation or threat of violation. In these respects, the petition to the extent that the Petitioner seeks to enforce fundamental freedoms and rights fails the competency test as outlined in both The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules,2013 as well as the over-recapped principle established in the case of **Anarita Karimi Njeru v The Republic [1976-80] 1272**.Where that is the case the Petition ordinarily ought to be dismissed.

25. I did not however agonize to identify another constitutional angle that the Petition actually took. The trajectory was ,as already identified above, that the 2nd and 3rd Respondents have abused their powers and as a result of such abuse the Petitioner is about to be prosecuted which may result in his security and freedom of person being impinged.

26. The Constitution enjoins all persons to perform their duties and functions or exercise their powers in accordance with the Constitution. Article 3(1) of the Constitution further obligates every person to respect, uphold and defend the Constitution. The Petitioner seeks, inter alia to defend the Constitution when he alleges that the 2nd and 3rd Respondents acted in total abuse of the constitutional and statutory provisions. It is for that reason that the court is also obligated to interrogate under Article 165(3) (d) whether there has been any contravention of the Constitution or whether anything done under the authority of the Constitution or of any law is inconsistent with the Constitution. The 2nd and 3rd Respondents have contended that their actions were pursuant to the provisions of the Constitution and also statute law, I view it that the court has the remit to interrogate such action notwithstanding the patent flaws in the manner the Petition herein was drafted.

27. There is certainly no doubt that the 2nd Respondent is enjoined under statute through the National Police Service Act (Cap 84) to assist in the enforcement of the law besides the investigation of any alleged offences. Article 245(4) of the Constitution is clear that with regard to the investigation of any particular offence or offences as well as with regard to the enforcement of the law against any particular person or persons, the National Police Service is not to receive directions from anybody. Article 157 of the Constitution on the other hand established the office of the Director of Public Prosecutions as an independent office. He is also not to receive any directions or be controlled by any person or authority in the exercise of his powers or functions: see Article 157 (10).

28. A closer reading of both Articles 157 and 245 of the Constitution would however lead to the conspectus that the National Police Service and the Director of Public Prosecutions must work together to attain the goals and objects of both organs which, in order of precedent, is the investigation of offences and prosecution of offenders according to the law. The law, nay the Constitution, consequently makes exception as to who may give directions to the National Police Service when it comes to investigating crime when under Article 157(4) it mandates and authorizes the 3rd Respondent to be able to give directions to the National Police Service to investigate any allegation of criminal activity or conduct.

29. The rider however is that the Constitution is supreme and the Respondents' powers are constrained by

the principle that they must act in accordance with the Constitution. Where the powers are abused or where the Respondents fail to pay due regard to public interest as well as to the interests of administration of justice then there is abuse and the court will intervene: see Article 157(11) of the Constitution as well as the case of **Ndarua -v- Republic [2002] 1 EA 205** for the additional legal proposition that where the prosecution amounts to nothing more than an abuse of the process of the court, the court has an inherent power to stop it.

30. The circumstances when the court will interfere with the powers of independent constitutional organs and offices are various. Caution must however be exercised to ensure that the powers donated to such organs or bodies are freely exercised by them without the feeling of ‘big brother forever watching over them’.

31. The court ordinarily ought not interfere with or usurp the powers of the Director of Public Prosecutions to investigate and undertake prosecution in exercise of the discretion donated to that independent office by the Constitution. Consequently, the fact that the intended prosecution is likely to fail or that there is insufficient evidence to obtain a conviction are not grounds for halting the commencement of a prosecution, if the prosecution is being undertaken in good faith and there is no apparent or proven abuse of the process. The court needs to take into consideration the public interest that there is need to ensure that persons accused of criminal offences actually face the criminal justice system. In these respects, the court takes into account the need for a proper administration of justice: see **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)**

32. The court will however interfere and prohibit any prosecution where there is outright or apparent abuse proven: see **Githunguri v Republic [1986] KLR 1** and also **Joram Mwenda Guantai v Chief Magistrate, Nairobi [2007] 2 EA 170**. The court likewise will interfere and prohibit any prosecution where the prosecution is not being undertaken for purposes of achieving the object of criminal law but rather to help force the settlement of a civil dispute or as was stated in **Kuria & 3 Others v Attorney General [2002] 2 KLR 69** for

“...personal score-settling or vilification on issues not pertaining to that which the [criminal justice] system was formed to perform.”

33. The use of the criminal justice system for other purposes amounts to an abuse and manipulation of the justice process itself: see the Court of Appeal decision in **Republic -v- Chief Magistrates’ Court Mombasa Ex Parte Ganijee & Another [2002]2 KLR 703** where the court was clear that criminal investigation or a criminal charge or prosecution should never be allowed to stand if the predominant purpose is to further some other ulterior motive.

34. Finally and more critically, the court will also interfere where the criminal prosecution is commenced in the absence of proper factual basis: see **R -v- Attorney General Ex Parte Kipngeno Arap Ngeny High Court Civil application No 406 of 2001** and also **Kenya Commercial Bank Limited & 2 Others -v- Commissioner of Police & Another HCCP No 218 of 2011 (NBI)**. The rationale is that a prosecution ought not be simply commenced on the basis of some suspicion.

35. The 2nd Respondent has under the auspices of the National Police Service Act, a statutory duty to investigate any criminal activity or conduct and lay a foundation for any subsequent prosecution but it is not simply to be left to court to determine criminal culpability even where there is no basis.

36. In sum, the process of investigation as well as prosecution must be used and applied expeditiously, properly, transparently and in good faith.

37. As may be gleaned from the various case law cited above, it is now neatly established in law that the 2nd and 3rd Respondents have the discretion to investigate and prosecute. The court should also not lightly interfere with such discretion unless it is being abused or used to achieve some other ulterior or collateral purpose and not to achieve the objectives of criminal law. The court will interfere in such instances on the basis that they amount to exceptional circumstances.

38. In the instant case the Petitioner has contended that his prosecution is being pursued by the 3rd Respondent notwithstanding the fact that the investigations established that he is not criminally liable. The Petitioner contends that there was no incriminating evidence and the investigating officer told the 3rd Respondent as much. Reliance was placed on a letter written by the 2nd Respondent's officer to the 3rd Respondent on 23rd June 2015.

39. I have read the letter.

40. The letter is partly to the effect that the Petitioner is not to be charged. The letter however placed the Petitioner at the scene of crime at the time when the alleged offences were committed. The letter constituted both findings and recommendations by the 2nd Respondent's officers. The letter also states that the investigations are still on-going. It is to be noted that letter also forwarded a file of records of the investigation to the 3rd Respondent.

41. The 3rd Respondent states that having reviewed the evidence as availed, it formed the independent opinion that the Petitioner ought also be charged alongside the other suspects. The question is how binding the 2nd Respondent's letter was upon the 3rd Respondent.

42. The 3rd Respondent, as already pointed out, is an independent office. The holder is also independent and acts or performs his functions and duties independently. He needs no other person's consent or authority to commence or proceed with any prosecution. He reviews facts and determines whether there is a reasonable ground to initiate the prosecution. He, in my view, then does not need a forte of a case. Article 249 of the Constitution as read together with Article 157 grants the 3rd Respondent that independence.

43. In my view, recommendations by the 2nd Respondent or any investigator mandated by the 3rd Respondent do not bind the 3rd Respondent. He acts free of such shackles. In the instant case too, the recommendations of the 2nd Respondent did not bind the 3rd Respondent. He was entitled to review the record or file of evidence and that is precisely why the record or file of evidence was sent to the 3rd Respondent. He could have opted to prefer no charges against any of the suspects including the Petitioner, he could also have opted to prefer charges. The discretion was his and could be exercised on the basis of the information availed or any other additional information.

44. In my view, the plain reliance by the petitioner on a line in the letter by the investigator to the 3rd Respondent does not advance with any stretch of success the petitioner's case. Instead, I would agree with the Respondents that this is not a case where the court should interfere with the exercise of the Director of Public Prosecutions powers.

45. The Petitioner claims that the evidence reveals that he was never at the scene of the alleged criminal activities. The record reveals otherwise. As to whether he participated in the alleged assault and malicious damage of the 1st Respondent's property, it should be for the trial court and not this court to determine. The trial court is better placed in , in any event, than this court to act as the evidence-sieve. The safeguards are also available including terminating the criminal case where the trial court is of the view that no prima facie case is shown or proven. I return the verdict that as far as the sufficiency of evidence is concerned the court will not intervene. It would be different, if it was shown that there is no evidence at all.

46. The Petitioner also urged that the special circumstances of the case dictate that the intended prosecution be prohibited. In this regard, it was submitted that at the time of the alleged criminal conduct both the petitioner as well as the 1st Respondent were prospective student leaders with followers and they were both campaigning for an elective post.

47. My view is simple. The rule of law applies to all persons. In the eyes of the law every person is equal.

The same applies to enforcement of the law. The 1st Respondent was entitled as a grievant to lodge a complaint. He did. The 2nd Respondent was under a constitutional compulsion to investigate the complaint and they did. The 3rd Respondent too is under a constitutional compulsion to act and institute a prosecution; he should do so if he deems it fit without the court's interference. In my view, there are no exceptional or special circumstances established to warrant an intervention as has been sought by the Petitioner.

48. I also do not find that the Petitioner has shown that the 2nd and 3rd Respondents were influenced in any way by the 1st Respondent in the exercise of their constitutional and statutory compulsions. Nothing of course would prohibit the 3rd Respondent from encouraging an amiable settlement in the case of personal misdemeanors.

Conclusion

49. This court has stated previously that it is always in the interest of the public that persons accused of criminal conduct are made to face the criminal justice process without hindrance. Further, that the same public interest also dictates that such offenders are fairly treated and not subjected to prosecutors' misconduct which would bring the criminal justice system to disrepute: see **Godfrey Mutahi Ngunyi -v- Director of Public Prosecutions & 4 Others [2015]eKLR**. I come to the conclusion that the wider public interest would favour the Petitioner facing the criminal justice system once the 3rd Respondent gives his nod. I also hasten to add that the criminal justice system has enough constitutional and statutory safeguards to protect the Petitioner's rights even as the 3rd Respondent institutes prosecution. This however does not stop the 3rd Respondent or even the trial court from encouraging a roundtable discussion between the parties.

Disposal

50. In the end, I find that the Petitioner has not made a case for the reliefs sought.

51. I hold that the Petition has no merit. It ought to be dismissed and is hereby dismissed but with no order as to costs.

Dated, signed and delivered at Nairobi this 30th day of March 2016

J.L. ONGUTO

JUDGE