



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
MILIMANI LAW COURTS
CONSTITUTIONAL PETITION NO. 390 OF 2015

BETWEEN

SAMUEL KANJA.....1ST APPLICANT

ALICE KAJUJU.....2ND APPLICANT

PETER OMULO.....3RD APPLICANT

AND

THE ETHICS AND ANTI-CORRUPTION

COMMISSION.....1ST RESPONDENT

THE DIRECTOR OF

PUBLIC PROSECUTION.....2ND RESPONDENT

JUDGMENT

Introduction

1. The Petitioners are Kenyan citizens. They are also officers of the law. They are currently working with the National Police Service in the Traffic department, based at Mto Mawe Police Station along Mombasa Road.
2. The 1st Respondent is the Ethics and Anti-Corruption Commission. It is established under section 3 of the Ethics and Anti-Corruption Commission Act (Cap 65A) of the Laws of Kenya, pursuant to Article 79 of the Constitution of Kenya, 2010.
3. The 2nd Respondent is the Director of Public Prosecutions. His powers are provided for under Article 157 of the Constitution of Kenya. He is responsible for conducting criminal prosecutions in Kenya.
4. It is alleged by the Petitioners that the 2nd Respondent intends to indict the Petitioners based on the recommendations made by the 1st Respondent.

Factual background

5. There is controversy surrounding the facts and events which led to the filing of this Petition. I may narrate the varied positions as follows.
6. On 10th September 2015, while the Petitioners were on routine duty to maintain the orderly flow of traffic, the 1st Respondent's officers descended on the Petitioners and searched the Petitioners as well as the Petitioners' official motor vehicle. The motor vehicle was a land cruiser, registration number is GK B427E.
7. The 1st Respondent's officers who never identified themselves state, which is denied by the Petitioners, that a wad of notes was found inside the Petitioners' motor vehicle following the search on both the Petitioners as well as on their official automobile. The Petitioners deny that the money belonged to them. The 1st Respondent states it did and further that the money was part of the proceeds of dishonest and corrupt dealings that the Petitioners were involved in whilst on duty.
8. The incident was apparently not witnessed by any other person but the Petitioners and the 1st Respondent's officers.
9. In the meantime a bitter argument ensued and not far away too some skirmishes involving some businessmen and officials from local County Government, also raged on. The standoff between the Petitioners and the 1st Respondent's officers subsisted.
10. From the Petitioners' station a contingent of officers in full anti-riot combat gear was sent to quell the skirmish between the businessmen and the County Government officials but the contingent ended up descending on and attempting to intervene in the heated argument between the Petitioners and the 1st Respondent's officers. The Respondents claim the Petitioners invited the alleged peace-makers. The Petitioners, on the other hand, insist that their fellow officers simply confused the two scenes. The Petitioners then moved on and went back to the police station.
11. The media captured part of the occurrence. The incident went viral. The public became aware. The incident involving the Petitioners and the 1st Respondent's officers was roundly featured in the media and met the public's condemnation as the Petitioners were seen to have used their position to chide the 1st Respondent.
12. The Petitioners claim that the Respondents have sought to prosecute the Petitioners without any factual foundation and only upon reliance on media reports.
13. The Petitioners seek a declaratory order that the 2nd Respondent has abdicated its duties to the 1st Respondent. The Petitioners also seek an order to prohibit the Respondents from arresting charging prosecuting the Petitioners in relation to the events of 10th September 2015.
14. The Petition was contested.

The Petitioners' case

15. The Petitioner's case may be obtained from the supporting affidavit of Mr. Samuel Kanja, the 1st Petitioner in this case.
16. The Petitioners aver that there is no evidence to link them to any crime as the wad of notes did not belong to any of the Petitioners. The Petitioners also contend that there was mis-reporting on the part of the media and indeed trial by the media.
17. In the circumstances, the Petitioners' case is that that they are in danger of being arrested and such arrest will be unlawful and malicious. The Petitioners also state that they are likely to suffer irreparable damage in their career.

The 1st Respondent's case

18. The 1st Respondent's case is contained in their Grounds of opposition dated 17th September, 2015 and the replying affidavit of Susan Kinyeki, an investigator with the Ethics and Anti-Corruption Commission, which was deponed on 21st September, 2015.
19. The 1st Respondent contends that the prayers sought by the Petitioners simply seek to bar the 1st Respondent from executing its constitutional and statutory mandate. According to the 1st Respondent it would be contrary to public interest to restrain the 1st Respondent as it is the 1st

- Respondent's mandate to investigate corruption and economic crimes.
20. The 1st Respondent also contends that the Petition is speculative and raises no constitutional questions but only evidentiary issues that can best be determined by a trial court. The 1st Respondent contends that the sting operation established that the Petitioners were involved in criminal activities. The 1st Respondent further contends that it reported the unwarranted interference by other officers of the police service in their operation.

The 2nd respondent's case

21. The 2nd Respondent's case can be discerned from the Replying Affidavit of Spira Laura, a prosecution Counsel with the 2nd Respondent's office . The Affidavit was sworn on 6th October, 2015.
22. The 2nd Respondent states that the 1st Respondent is mandated by law to investigate and make recommendations to the 2nd Respondent on any prosecutable offences.
23. The 2nd Respondent also contends that it makes independent decisions to prosecute and not even the 1st Respondent's recommendations bind him.
24. The 2nd Respondent additionally asserts that the Petitioners have not shown that any provision of the Constitution has been violated.

THE ARGUMENTS

The Petitioners' submissions

25. It was the Petitioners' submission that under Article 27 of the Constitution, every person is equal before the law and has equal protection and benefit from the law. Additionally, the Petitioners argued that the Respondents are in violation of Article 25 which provides for non-derogation of the right to a fair trial as the Respondents have failed to follow the due process.
26. The Petitioners further contended that their intended prosecution is simply for ulterior motives. For this proposition, the Petitioners relied on the case of **R -v- Attorney General Ex p Kipngeno Arap, High Court Civil Application No. 406 of 2001**, and in particular the holding that:

“A criminal prosecution which is commenced in the absence of a proper factual foundation or basis is always suspect for ulterior motive or improper purpose.”

27. Further, the Petitioners argued that the 2nd Respondent was not exercising its discretion under Article 157 of the Constitution properly and as contemplated. In these respects, the Petitioners contended that it is the obligation of the 2nd Respondent to ascertain the truthfulness of the events leading to the altercation between the Petitioners and the 1st Respondent's officers on 10th September, 2015 before preferring any criminal charges.
28. The Petitioners also submitted that this court has the power to intervene where it is shown that impugned criminal proceedings are instituted for other means other than the honest administration of justice and enforcement of the law. They expounded this submission with the case of **Vincent Kibiego v Attorney General, High Court Misc. Civil Application No. 839 of 1999** where Kuloba, J observed:

“If a criminal prosecution is seen as amounting to an abuse of the process of the court, the court will interfere and stop it....”

29. Finally, the Petitioners contended that the Respondents have violated Article 50(2)(a) of the Constitution which provides for the presumption of innocence until one is proven guilty by a court of law. Reference was made to the various media reports on the issue to illustrate the violation of the constitutional provision. The Petitioner submitted that the media reports would prejudice the trial court.

The 1st Respondent's submissions

30. The 1st Respondent's submissions hinged basically on the Grounds of opposition as well as the Replying Affidavit sworn by Susan Kinyeki on 21st September, 2015.
31. The 1st Respondent submitted that its mandate both under the statute as well as the Constitution were clear. It was to investigate criminal activities involving corruption as well as economic crimes and recommend to the 2nd Respondent persons liable for prosecution.
32. According to the 1st Respondent, the court could not interfere with the exercise of its mandate unless it was established that the same had been abused. The 1st Respondent further submitted that the Petitioners have not demonstrated that the Respondents have acted in contravention of the Constitution or any applicable laws.
33. The 1st Respondent relied on the case of **Paul Ng'anga & 2 others -v- The Attorney General & 3 others [2013]eKLR**, where Lenaola, J held that the court could only interfere with and interrogate the acts of other constitutional bodies where there was sufficient evidence that the Constitution had been violated. The 1st Respondent additionally referred the court to the case of **Total Kenya Ltd & 9 others -v- Director of Public Prosecutions & 3 others [2013]eKLR**, where it was held that:

“Although this court has inherent jurisdiction to stop abuse of its process by prohibiting criminal proceedings, where the same are found to be oppressive or otherwise an abuse of its process, such power must be exercised ever so cautiously so as not to stifle what is otherwise the lawful discharge of a constitutional mandate by the police service and the DPP.”

34. The 1st Respondent wound up by submitting that in the instant case, the 1st Respondent had simply acted in the best interest of the public and of the administration of justice and that there was no extraneous motive involved. The 1st Respondent added that the Petitioner had also failed to show that the Respondents' actions were actuated by malice.
35. Finally and relying on the cases of **Anarita Karimi Njeru v Republic [1976-80] 1 KLR 1272** and **Mumo Mutemu v Trusted Society of Human Rights Alliance & 5 others [2013]eKLR**, the 1st Respondent submitted that the Petitioners had failed to prove that they were entitled to any of the prayers sought as they had not demonstrated how the Respondents acted in violation of the Petitioner's fundamental rights and freedoms.

The 2nd Respondent's submissions

36. The 2nd Respondent in their submissions, relied on the Replying Affidavit of Spira Laura.
37. The 2nd Respondent stated that he had adhered to Article 157 of the Constitution in exercising his powers in relation to the case while also stating that the Petitioners had failed to prove that there had been any ulterior motive in their intended prosecution.
38. As to the sufficiency and veracity of the evidence to make the Petitioners culpable, the 2nd Respondent stated that all that belonged to the trial court as had been pointed out in the case of **R v Commissioner of Police Ex p Michael Monari & Another Misc Appl. No 68 of 2011**. This court it was submitted could not go into the merits of the intended prosecution.

Discussion and Determination

39. I have considered the petition as well as the responses together with the parties' respective submissions.
40. Factually, the dispute revolves around the intended prosecution of the Petitioners for alleged economic or corruption related offences. There is no controversy that prosecution has actually not been instituted. Indeed, the 1st Respondent goes as far as labeling the Petitioners fugitives with a speculative case before this court”.

41. The Petition raises only a singular issue .
42. The issue is whether in the circumstances of this particular case the Respondents failed the necessary constitutional muster in the discharge of their respective constitutional and statutory duties in relation to the Petitioners.
43. I am not convinced that the other issue raised by the 1st Respondent as to the competency of the Petition is worthy of any detailed consideration.
44. The petition appears relatively clear as to what is being challenged and the Respondents certainly also appeared to be clearly aware of the claim they had to answer to. Where the court is painlessly able to identify the issues at hand then the principle enunciated in the case of **Anarita Karimi Njeru v Republic [1976-80] 1 KLR 1272** as to specificity in pleadings ceases to apply. In this case the, petition in my view met the competency test and I need not belabor the point any further.
45. With regard to the core issue as to whether the court may interfere with the constitutional and statutory powers of the Respondents, the starting point is that the court should always be reluctant to interfere with powers and mandate donated to constitutional organs or bodies by the Constitution itself. This principle of the law has severally been applied by the court.
46. With regard to prosecutorial powers, it has been stated that the court ought to only interfere with the discretion to prosecute only in exceptional circumstances: see **Meixner & Another v Attorney General [2005] 2 KLR 189** as well as **Paul Nganga & 2 Others v Attorney General & 3 Others [2013]eKLR**. In this regard, the courts have been consistent that the court will prohibit the continuation or institution of a criminal prosecution where extraneous matters divorced from the goals of justice guide their instigation or where the prosecution has no foundational basis at all : see for example, the cases of **Kuria -v- Attorney General [2002]2 KLR 69**, **R -v- Attorney General Ex p Kipngeno Arap Ngeny HCMisc Appl No. 406 of 2001**.
47. Where there is also evident abuse of the prosecutorial powers then the court is also enjoined to intervene: see **Stanley Githunguri v Republic [1986] KLR 1**, **R -v- Chief Magistrate's Court at Mombasa Ex p Ganijee & Another [2002] 2 KLR 703**, **Joram Mwenda Guantai -v- The Chief Magistrate [2007] 2 EA 170**.
48. In the case of **State of Maharastra & Others v Arun Gulab Gawali & Others Criminal Appeal No 590 of 2007 (27 August 2010)** the Supreme Court of India identified some of the instances when prosecution will be prohibited as:

“ (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 proceedings, eg 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 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”

49. I must hasten to point out that each case however must be looked at independently and on the basis of its unique facts. As this court observed in the case of **Godfrey Mutahi Ngunyi -v- Director of Public Prosecutions & 4 Others HCCP No 428 of 2015 [2015]eKLR**

“[46]...in view of the infinite variety of cases in which the issue as to whether or not to stay prosecution of alleged offenders might arise, it is impossible to provide a rigid classification of the circumstances when stay may issue.”

50. The test ought to be whether on the evidence availed before the court by the Petitioner, the court is satisfied that there are exceptional circumstances which warrant the interference and that the Respondent or prosecutor has acted in contravention of the Constitution.
51. In the instant case, the Petitioners contend that the Respondents have abused their powers to

- investigate as well as to prosecute.
52. It is not in dispute that the 2nd Respondent is under a constitutional compulsion to cause the investigation of possible offenders and also to institute criminal prosecution of suspected offenders. The parties do not also contest the fact the 1st Respondent is also under a statutory compulsion to investigate crimes which have an economic and unethical trajectory. The Petitioners contend that the investigations by the 1st Respondent were driven by ulterior motives. This they contend was exhibited in the negative media publicity that has been given to the duel between the Petitioner and the 1st Respondent.
53. The 1st Respondent has a mandate under Section 11 of the Ethics and Anti-Corruption Act as well as Section 42 of the Leadership and Integrity Act to investigate and recommend to the 2nd Respondent the prosecution of any person for any acts of corruption or violation of ethics. That is apparently what the 1st Respondent did in the instant case. The sting operation that led to the botched up attempt to arrest the Petitioners was part of the mandate to investigate. I have not seen, and neither has the same been pointed out to me, any instances of malice on the part of the 1st Respondent.
54. The 1st Respondent, in my view, acted in accordance with procedure following informal complaints by members of the public who had encountered the Petitioners.
55. The contention by the Petitioners that the investigations by the 1st Respondent was a publicity stunt intended and designed to win public confidence seems to have no limb at all. The 1st Respondent has explained the genesis of the investigations which were prompted by tip offs by members of the public. I am satisfied that the investigations by the Respondents were above board and did not transgress any law or the Constitution for that matter.
56. With regard to the 2nd Respondent, it would appear that the Petitioners have indeed jumped the gun. The 1st Respondent has relayed its findings to the 2nd Respondent who is yet to determine whether on the evidence available, the Petitioners should be prosecuted. It is certainly premature and baseless for the Petitioners to complain that the 2nd Respondent has abused its discretion.
57. It is to be noted that a recommendation by the 1st Respondent or any other investigating organ does not bind the 2nd Respondent. He is expected to exercise the functions of his office without any external influence or control or any other persons consent. The Office of the Director of Public Prosecutions Act, No 2 of 2013 has indeed sought to promote the independence of the 2nd Respondent. The Petitioners in this case have not pointed to any evidence, direct or circumstantial, of any interference with the 2nd Respondent's independence. There is nothing, in short, upon which I can hold that the 2nd Respondent has or is about to abdicate his duties and obligations.
58. The Petitioners also contended that the intended prosecution has no factual basis. The Petitioners' stand in this respect is that there are two versions of what really transpired on the material day. They claim they never tried to resist their arrest by calling their colleague officers to come to their rescue. The Petitioners also state that they were never found in possession of cash as alleged by the 1st Respondent. The Petitioners however do not deny that the 1st Respondents officers were with them on the material day. The Respondents contend that the Petitioners are culpable and ought to be prosecuted.
59. The big question must be : who is to balance and interrogate the apparently symmetrical versions? The answer must be that it cannot be this court. If there are any charges to be preferred against the Petitioners then it is for the 2nd Respondent to decide whether or not to indict the Petitioners.
60. The trial court will then go into the merits and demerits of the charge(s) as well as the veracity and adequacy of the evidence. It should not be the court to make a determination for the 2nd Respondent as to whether or not the intended charges can be sustained. It is for the 2nd Respondent to alone sieve through the evidence and reflect on the two versions- that of the investigator and that of the intended accused where a statement has been made by the latter-and decide whether to proceed with the prosecution or not.
61. In any event and based on the facts as placed before this court , I am not prepared to find that the Respondents do not have a factual basis to investigate and prefer criminal charges against the Petitioners.
62. Finally, there is the contention that the Respondents have tried the Petitioners through the media

and this has undermined the Petitioners' rights under Article 27 of the Constitution which guarantees the Petitioners the right to equal protection and benefit of the law. The Petitioners did not exhibit the alleged offending media articles. In the absence of the same it would be pretty trying ,if not difficult, for this court to adjudge whether the media reports have in any way had any influence on the entire events herein including the decision whether or not to prosecute the Petitioners.

63.I must also point out that the court should always move with caution and a lot of stealth before heaping blame on the media critically because of the universal right to know which right the media has from the days the memory of man runneth to the contrary sought to promote through the equally universal freedom of the media.

Conclusion

64.I come to the conclusion that the Petitioners have not established that the 2nd Respondent has abdicated his responsibility and mandate. I also come to the conclusion that the Petitioners have not established that they are entitled to have their intended arrest and ultimate prosecution stayed and or prohibited. Neither have the Petitioners established that any of their constitutionally guaranteed fundamental freedoms and rights have been violated or are threatened with violation.

Disposal

65.There are no exceptional circumstances to warrant this court's interference and to grant the stay or prohibition being sought. The only special aspect of this Petition is that the Petitioners are themselves law enforcement officers. The hunter is now being hunted.

66.I would tend to agree with the 1st Respondent's counsel Ms. Charity Kiget that the Petitioners are now fugitives from the same justice system that they ought to be promoting and protecting. In the circumstances, the public interest would also wish to it that the Petitioners face the criminal justice process through a trial court if the 2nd Respondent so decides and where possibly the Petitioners may be vindicated.

67.This Petition ought to be dismissed. It is so dismissed.

Costs

68.As to costs, let each party bear its costs.

Dated, signed and delivered at Nairobi this 29th day April, 2016

J.L.ONGUTO

JUDGE