



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**PETITION NO. 37 OF 2015**

MOSES NYABUTO MOREKA.....PETITIONER

VERSUS

ATTORNEY GENERAL.....1<sup>ST</sup>RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....2<sup>ND</sup> RESPONDENT

INSPECTOR GENERAL OF NATIONAL POLICE

SERVICE.....3<sup>RD</sup> RESPONDENT

**JUDGMENT**

**Introduction**

1. By a petition dated 11<sup>th</sup> August, 2015, the petitioner seeks the following orders:

**(i) An order at first instance staying further proceedings in criminal Case No. 346 of 2014 before the Senior Principal Magistrate's Court at Ogembo Law Court pending the substantive hearing of the this petition.**

**(ii) A Declaratory Order do issue that the criminal prosecution of the petitioner in Criminal Case No. 346 of 2014 pending before the Senior Principal Magistrate's Court at Ogembo Law Court violates the petitioner's constitutional rights as particularized hereinabove.**

**(iii) An order of prohibition do issue stopping continuation of the criminal prosecution of the petitioner in Criminal Case No. 346 of 2014 at the Senior Principal Magistrate's court at Ogembo.**

**(iv) An order do issue directing compensation for wrongful arrest and prosecution of the petitioner and for loss of property namely motor vehicle registration number KAT 143D.**

**(v) Such further orders Court shall deem fit and/or just to give effect to the principles of the Constitution.**

**Petitioner's case**

2. The petition is supported by the petitioner's affidavit sworn on 17<sup>th</sup> August, 2013 in which he repeats the contents of the petition.
3. In summary, he depones that police officers from Ogembo police station arrested him on 29<sup>th</sup> March, 2012 and arraigned him before Ogembo Principal Magistrates court in Criminal case no. 609 of 2012 wherein he was charged with the offence of having suspected stolen property contrary to **Section 323 of the Penal Code**.
4. The particulars of the charge were that on 2<sup>nd</sup> March, 2012 at Nyamarambe Town in Gucha South District within Kisii County, having been detained by No. 84612 PC Gideon Mwanda as a result of exercise of the powers conferred by **Section 26 of the Criminal Procedure Code**, had in his possession a motor vehicle registration **number KAT 143D** reasonably suspected to have been stolen or unlawfully obtained.
5. The petitioner states that after attending court at Ogembo several times for the hearing the case never took off but was adjourned by the prosecution several times before being withdrawn under **Section 87 (a) of the Criminal Procedure Code** for lack of sufficient evidence.
6. The petitioner depones that his arrest, detention and subsequent prosecution was malicious, wrongful, unjustified and without reasonable cause and this led him to file a civil case before Ogembo court being Ogembo PMCC 62 of 2014 seeking damages for wrongful arrest, detention and malicious prosecution.
7. He adds that no sooner had his civil case been heard and determined than the police at Ogembo once again arrested him and charged him with the offence of stealing contrary to **Section 278 of the Penal Code** in **Ogembo P.MCRC. No. 346 of 2014**. The particulars of the second charge were that on 27<sup>th</sup> February 2012 at Nyamarambe Town in South Gucha District within Kisii County, stole a motor vehicle **registration number KAT 143D** valued at **Kshs. 300,000/=** the property of **JAMES OMARI THOMAS**.
8. It is this second criminal case that has precipitated this instant petition as the petitioner contends that the police charged him afresh upon realizing that he had filed a civil claim against them for unlawful arrest and malicious prosecution in respect to the initial criminal case and therefore, the fresh charges were intended to threaten intimidate and pressurize the petitioner into withdrawing his civil case he had filed against the police.
9. The petitioner explains the circumstances under which he came to be in possession of the motor vehicle registration number KAT 143D which he is alleged to have stolen. He produced an annexure "**KN5**" a money borrowing agreement he entered into with the owner of the said motor vehicle **Mr. JAMES OMARI THOMAS**, which agreement had a default clause that allowed him to take the said motor vehicle into his custody should the borrower, **JAMES OMARI THOMAS**, fail to pay the debt.
10. In sum therefore, the petitioner contends that the respondents, by instituting criminal charges against him, were not acting in good faith but were intent on shielding the borrower from meeting his contractual obligations in the money lending deal. He contends that the decision to prosecute him was therefore malicious, amounted to abuse of the court process and violated his constitutional rights under Articles 27, 28, 29, 40, 41, 47 and 50 of the constitution.
11. He further contends that his prosecution was merely meant to brow beat and discourage him from pursuing the civil suit he had filed against the state in Ogembo SPMCC no. 62 seeking compensation for malicious prosecution in the earlier criminal case that had been withdrawn.

### **Respondents case**

12. The respondents did not enter any appearance or file any response to the petition despite having been duly served with the petition through the Attorney General's offices situate in Kisii Town consequently

therefore, the petition was unopposed.

### **Submissions**

13. When the petition came up before me for hearing on 9<sup>th</sup> February 2016, Mr. Nyasimi for the petitioner submitted that the petitioner had a money borrowing agreement with one **JAMES OMARI THOMAS** in which he was entitled to seize the motor vehicle Registration No. **KAT 143D** should the borrower fail to pay the debt. He argued that the criminal proceedings were therefore intended to shield the borrower and the state, after withdrawing the initial criminal case under **Section 87 (a) of the Criminal Procedure Code** for lack of evidence, had no reason whatsoever to prosecute him afresh in the view of the fact that he had explained through annexure “**KN5**” the circumstances under which he came to have the said vehicle in his custody.

14. The petitioner therefore prayed for orders declaring the criminal prosecution unlawful and for compensation for unlawful arrest, prosecution and loss of property, to wit, the motor vehicle.

### **Determination**

15. After considering the above petition, the supporting affidavit and the oral submissions of the petitioner’s advocate, I note that the main issue that I need to determine in this case is whether or not the petitioner is entitled to the orders that he seeks.

16. The petition is brought under Articles 22, 23, 27, 40, 47 and 50 of the Constitution.

17. The petitioner alleges the violation of his constitutional rights and the courts have held time and again that where an allegation has been made that a constitutional right has been violated, the petitioner must, in order to succeed, demonstrate, with a reasonable degree of precision, the manner of such a violation. (See **Anarita Karimi Njeru [1976-80] IKLR 1272, and Trusted Society of Human Rights Alliance vs Attorney General & others HC Petition No. 229 of 2012**).

18. From the pleadings and the submissions of the petitioners counsel, it is clear that the initial criminal case against the petitioner was withdrawn under Section 87 (a) of the Criminal Procedure Code and later on, a similar charge initiated against him before the same court.

19. Article 22 of the constitution gives every person a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or is threatened.

Article 23 deals with the court’s jurisdiction to enforce and uphold the Bill of Rights.

Article 27 relates to equality and freedom from discrimination.

Article 40 provides for the protection of the right to property.

Article 47 provides that every person has a right to fair administrative action that is expeditious efficient, lawful and procedurally fair, while Article 50 relates to the right to a fair hearing.

20. It was therefore incumbent upon the petitioner in this instant case, to demonstrate to this court, with precision, which one of the above articles had been violated by the institution of the second criminal case against him.

21. It is my humble view that the withdrawal of the initial criminal case against the petitioner under 87 (a) of the Criminal Procedure Code was not a barrier to other charges being preferred against him.

22. The said Section 87 (a) of the Criminal Procedure Code stipulates as follows:

**87- “if it is made before the accused person is called upon to make his defence, he shall be**

**discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts;”**

23. On the other hand, Article 157 (10) of the constitution gives the Director of Public Prosecution (DPP) the 2<sup>nd</sup> respondent herein, the authority to commence criminal proceedings against anybody and in exercising such authority, the DPP shall not be under the control or direction of any person or authority.

24. From the facts stated in the petition, it is not possible for this court to speculate on the reasons why the 2<sup>nd</sup> respondent preferred to institute fresh charges against the petitioner after the withdrawal of the initial case. Inviting the court to stop the petitioner’s prosecution midstream will, in my view, be tantamount to usurping the powers and discretion vested upon the office of the DPP under article 157 of the constitution.

25. The petitioner has stated that he successfully sued the state in a civil no. 62 of 2013 before the Ogembo court following the withdrawal of the initial criminal case against him. If that is the case, then it is my finding that all is not lost for the petitioner even in the subsequent prosecution because should the latest criminal case that is pending before the lower court meet the same fate of either being withdrawn or ending in his acquittal, then the petitioner will still have the opportunity to once again sue the respondents for damages for malicious prosecution should he deem it necessary.

26. Prosecution in a criminal case perse does not amount to a violation of a constitutional right. In this case, the petitioner has not come out clearly to specify which one of his rights has been violated.

27. In the case of **Geoffrey Muhuzani Anyira vs DPP and 2 others [2016] eKLR, Sitati J.** observed that the DPP and the police are not prevented from continuing investigations or even receiving new evidence once the accused has been charged or in the course of the trial and that the fact that the charge against the petitioner was withdrawn is not an abuse of the court process when reasons are given for such withdrawal.

28. In the instant case, reasons were given for the withdrawal of the initial case and as I have already stated in this judgment, withdrawal under Section 87 (a) of the CPC is not a barrier to future prosecutions.

29. In respect to loss of his property to wit, the suit motor vehicle which the petitioner claims that the police gave to his debtor, I hold that the petitioner still has an opportunity and is at liberty to institute Civil Proceedings against the borrower who he claims he had lent money on the strength of the suit motor vehicle as a security.

30. In the end therefore, I find that the petition dated 11<sup>th</sup> August, 2015 is not merited. I dismiss it with no orders as to costs.

**Dated, signed and delivered in open court this 25<sup>th</sup> day of April, 2016**

**HON. W. A.OKWANY**

**JUDGE**

**In the presence of:**

- N/A for the Petitioner
- N/A for the Respondents
- Omwoyo court clerk