



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 62 OF 2016

ANTHONY KIHARA GETHI.....PETITIONER

VERSUS

BEN GETHI.....1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

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

KENYATTA NATIONAL HOSPITAL.....4TH RESPONDENT

NATIONAL REGISTRATION BUREAU.....5TH RESPONDENT

JUDGMENT

Introduction

1. Filed on 17th February 2016, the Petition herein sought orders to restrain “any further victimization of the Petitioner in connection with the allegations noted against him and further to any well meaning businessmen in Kenya who receive funds in the course of doing business and in the process of discharging their ordinary duties”. The Petitioner also sought a declaration that his intended prosecution was unfair and unconstitutional and would offend the rights enshrined under the Bill of Rights’ Articles 22 and 27 of the Constitution.
2. The Petition was pegged on the facts stated in the two affidavits sworn by the Petitioner and filed on 17 February 2016 and 24 March 2016.
3. The Petition was opposed by all the Respondents save the 1st Respondent.

Background facts

4. The Petitioner describes himself as a businessman involved in the importation of motor vehicles. He also describes the 1st Respondent as a businessman. The Petitioner states that his name has been hauled to a scam and he is arousing some eleven (11) suspects facing arrests. He states that he has been asked to and is likely to be forced to answer to charges for crimes he did not commit.
5. The scam in question is an alleged sleaze scheme which was allegedly perpetuated at the National

Youth Service. An amount of Kshs. 791,000,000/= was fraudulently paid out from the national Youth Service accounts. The National Youth Service is a service programme run by the national government with the intention of mentoring and employing young men and women. Apparently, part of the money allegedly stolen went through the Petitioner's account. The Petitioner it is stated acted in good faith and in the ordinary course of business in purchasing two motor vehicles for one John Kago. The two motor vehicles are currently the subject of asset recovery proceedings by the government.

6. The 2nd and 3rd Respondents state that the said John Kago was one of the beneficiaries of the monies received through criminal conduct. As at the time the Petition was urged the Petitioner was yet to be indicted and charged, even though he was indeed subsequently indicted.

The Petitioners case

7. The Petitioner's case may be retrieved from the Petition as well as from affidavits filed by the Petitioner on 17 February 2016 and 24 March 2015. They were both sworn by the Petitioner.
8. The Petitioner states that the Petitioner has been accused of being a brother of the 1st Respondent who is alleged to have been the mastermind of the sleaze at National youth Service (NYS). The Petitioner states that this has caused him mental torture and ridicule. The Petitioner further contends that the allegations against him are unclear and irrelevant as he was receiving money from a client in the ordinary course of business. The Petitioner further states that his rights to natural justice as far as the investigations are concerned were not observed. Accordingly, the Petitioner states the 2nd Respondent has not properly, independently and fairly conducted investigation to link the Petitioner to any crime.
9. Finally, the Petitioner states that as the third party Mr. John Kago did not inform the Petitioner of the source of the funds wired to the Petitioner's account for business purposes and in particular to purchase two motor vehicles, the Petitioner cannot be held culpable.
10. The Petitioner cites Article 27 of the Constitution as the Article of the Constitution presumably affected by the Respondents' actions. In particular, the Petitioner emphasises lack of and want of equality before the law and the right of equal protection of the law as the rights violated. The Petitioner also claims that he has been denied the right to equal opportunities.
11. Further, the Petitioner contends that as the third party individual has admitted in an affidavit that he instructed the Petitioner to import two vehicles, any prosecution initiated against the Petitioner would be an abuse of the 3rd Respondent's prosecutorial discretion and also an abuse of the court process. Finally, the Petitioner contends that based on the evidence he appears "less guilty" and that the evidence exonerates and absolves him from all allegations.
12. Mr. Ham Lagat who appeared for the Petitioner submitted on the basis of the facts and the positional contentions that there is no proper factual foundation upon which the prosecution of the Petitioner could be initiated. According to counsel, the DPP has no material evidence upon which the Petitioner could be prosecuted and if the prosecution is not prohibited there would be an abuse of the discretion process.
13. In these respects, counsel referred to the cases of **Joram Mwenda Guantai –vs- Chief Magistrates Court Nrb [2007] 2 EA**, **Meixner & another –v- Attorney General [2005] 2 KLR 189** and **Kuria & 3 Others –vs- Attorney General [2002] 2 KLR 69** for the proposition that the court had power to prohibit or stay any prosecution if the prosecutorial discretion of the Director of Public Prosecutions was abused or if the motive of the prosecution was an extraneous matter divorced from the goals of justice.
14. Counsel also relied on the cases of **Republic –v- Chief Magistrates Court at Mombasa Ex Parte Ganijee [2002] 2 KLR 703** and **Republic –vs- Attorney General Ex Kipngeno Arap Ngeny High Court Misc. Application No. 406 of 2001** to support the proposition that the Director of Public Prosecutions discretion must be exercised properly and only on the basis of prosecutable evidence and not for a collateral purpose.
15. The Petitioner's counsel also attacked the investigation process. In his oral submissions counsel stated that there had been no proper investigations and the Petitioner stood to suffer much prejudice if prosecuted as his dignity as a professional businessman would be lowered.

Respondents' cases

1st Respondent

16. Represented by Mr. J. Wagara, the 1st Respondent simply expressed the position that the Petition had met with his support and approval.

2nd and 3rd Respondents

17. The 2nd and 3rd Respondents case may be retrieved from the Replying Affidavit sworn by PC Joseph Mungathia on 25th February 2016 and filed on the same day.

18. The 2nd and 3rd Respondents contend that none of the Petitioner's fundamental freedoms and rights has been violated. Additionally, the 2nd and 3rd Respondents contend that following a perusal of the investigation inquiry file by the 3rd Respondent and an appraisal of the evidence by the 3rd Respondent, a considered decision was made that the Petitioner be charged with an offence under Section 3 of the Proceeds of Crime and Anti Money Laundering Act (Cap 59B).

19. Factually, the 2nd and 3rd Respondents contend that investigations following a complaint of the theft of Kshs. 791,000, 000/= established that the Petitioner was amongst the suspects who interacted with part of the amount of Kshs. 791,385,000. The investigations, it is stated, also revealed that the Petitioner interacted with some of the suspects who have already been charged with the theft of kshs. 791,385,000/=.

20. While urging the 2nd and 3rd Respondents case, Mr. Mule submitted that the Petitioner has already been charged with the offence of Money Laundering contrary to Section 3 of the Proceeds of Crime and Anti-Money Laundering Act, 2009. Counsel also asserted that the 2nd and 3rd Respondents are enjoined under the Constitution as well as statute to investigate and prosecute criminal conduct respectively. Mr. Mule urged that the alleged defences being raised by the Petitioner to the charges of money laundering are better suited for a trial court and not the High Court.

The 4th Respondent's case

21. The 4th Respondents was presumably impleaded by the Petitioner following the contention that the intended prosecution of the Petitioner was on the basis that the Petitioner was a brother of the 1st Respondent. The 1st Respondent was deemed by the 2nd Respondent as the mastermind of the theft of Kshs. 791,385,000/= from the NYS.

22. The 4th Respondent filed a Replying Affidavit on 25th February 2016. It was sworn by Benard Githae, the 4th Respondent's Deputy Director. The 4th Respondent deponed that it does not undertake DNA tests as sought by the Petitioner. It stated that such services are offered by the Government Chemist, which ironically is housed by the 4th Respondent. The 4th Respondent however contended that the government Chemist is not a unit or department of the 4th Respondent.

23. Accordingly, it was submitted that no orders along the lines sought by the Petitioner could be made or fetched on the 4th Respondent as such orders would only be in vain. For this proposition the 4th Respondent relied on the case of **Mathew Kiptoo & another –v- Ronald Chelangat t/a Yatrin Investments [2015] e KLR**. In any event, it was also submitted by Mr. Otwal that the Petitioner's request for a DNA test had no basis in fact or law.

The 5th Respondent

24. The 5th Respondent did not participate in these proceedings despite service of process having been effected upon it.

Discussion and Determination

Issues

25. Two substantive issues emerge for discussion and determination. The two were well captured by counsel for the Petitioner in the course of his oral submissions. The issues may be stated as follows. First, is there a proper factual foundation for the (intended) prosecution of the Petitioner? Secondly, were the investigations properly undertaken in a manner as not to occasion any prejudice to the Petitioner.

Analysis

26. Certain admitted facts need be outlined first.

27. It is a common cause that the National Youth Service suffered an unexplained loss Kshs. 791,385,000/=. That the matter of the loss is now the subject of determination by a competent court, being Criminal case No. 1905 of 2015 at Milimani Law Courts. More than twenty suspects have been charged with stealing the said amount of kshs. 791,385,000/=. It is also now a common cause that the Petitioner has since been charged with an offence under Section 3 of the proceeds of Crime and Anti-Money Laundering Act, 2009. The Petitioner is one of the eleven accused persons in Criminal Case No. 301 of 2016 at the Nairobi Chief Magistrate's Court.

28. By the Petitioner's own admission it is common cause that the Petitioner interacted with some of the accused persons in Criminal Case No. 1905 of 2015. Finally, by the 2nd and 3rd Respondents' admission, the Petitioner is not related to the 1st Respondents and neither have the 2nd and 3rd Respondents ever contended that the Petitioner and the 1st Respondent are brothers.

29. Evidently, the corollary issue raised vis-à-vis 4th and 5th Respondents as to prove of blood relationship between the Petitioner and the 1st Respondent through Deoxyribonucleic acid (DNA) would be a non-issue. It would be unnecessary to make any findings of either fact or law as to whether the Petitioner is entitled to any orders for purposes of proving that he is not a brother of the 1st Respondent, given that none of the parties is contesting this fact.

30. The starting point with regard to the core issues would be the generally accepted statement that the court has the unlimited jurisdiction to supervise by way of judicial review, either Constitutional or otherwise, the exercise by any person public body or authority of powers, functions or mandate vested in such a person, body or authority by the Constitution or statute. There must not be an excess of or abuse of such powers.

31. With regard to prosecutorial as well as the powers of investigation, it must also be stated, from the onset, that Articles 157 and 245 of the Constitution mandate the 3rd and 2nd Respondents to investigate offences and prosecute offenders without the direction or control of any person. The two provisions of the Constitution are also well promoted by statute. The Office of the Director of Public Prosecutions Act (No. 2 of 2013) and the National Police Service Act (Cap 84) both provide and outline in detail the powers of investigation and the prosecutorial powers of the 2nd Respondent and the 3rd Respondent respectively.

32. Indeed in the case of **Republic –v- Commissioner of Police and another [2012] e KLR**, Warsame J (as he then was) put it as follows:

“The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their mandate to detect and prevent crime”.

33. The same could well have been said of the Director of Public Prosecutions' powers to prosecute.

34. Once the investigations are complete the Director of Public Prosecutions has to make a decision whether or not to initiate criminal proceedings without any “*directions or control of any person or authority*” (per Article 157(10) of the Constitution). He would otherwise be failing in his duties.

35. The powers to investigate as well as to prosecute must however be exercised within the confines of the Constitution as well as the statutory framework. Article 244 of the Constitution dictates that the Police Service, under whom the 2nd Respondent falls, practices transparency and accountability. The same Article also demands of the Police Service compliance with constitutional standards of human rights and fundamental freedoms. Likewise, Article 157(11), enjoins the Director of Public Prosecutions in the exercise of his prosecutorial powers including the decision to prosecute to “*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*". Both the Office of the Director of Public Prosecutions Act (Section 4) and the National Police Service Act demand reasonableness and promotion of constitutionalism.
36. Clearly, where constitutionalism is not observed and the powers are not with reasonableness exercised, the court will interfere not only to ensure that the process of investigation and prosecution is not abused but a person affected (and being investigated or already investigated and being prosecuted) is not prejudiced.
37. That the court will interfere with the investigatory powers of the police or the prosecutorial powers of the Director of Public Prosecutions where appropriate is now settled law: see, for example, **Githunguri –v- Republic [1986] KLR 1**, **Kuria –v- Attorney General [2002] 2 KLR 69**, **Joram Mwenda Guantai –v- The Chief Magistrate Nairobi [2007] 2 EA 170 (CA)** **Meixner & Another –v- Attorney General [2005] 2 KLR 189 (CA)** amongst other cases.
38. Where the prosecution is initiated without good cause or without "proper factual foundation or basis" the court will intervene and bring the prosecution to a halt: see **Republic –v- Attorney General Ex p Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001**. As was stated by Ojwang J (as he then was) in **Thomas Mboya Oluoch & Another –v- Lucy Muthoni Stephen & another NRB, HCC No. 1729 of 2001**:

"I do not expect that any reasonable police officers or prosecution officer would lay charges against any one, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the state's prosecutorial machinery and to engage the judicial process with this kind of litigation is to annex the public legal services for malicious purposes."

39. Much earlier in **Githunguri –v- Republic [1986] KLR 1**, the court had stated thus:

"A prosecution is not to be made good by what it turns up. It is good or bad when it starts".

40. Everything turns on the evidence as assembled by the Police Service and assessed or analysed by the prosecutors. The prosecutor will be deemed to have acted reasonable if it moves to initiate prosecution on the basis of prosecutable and reasonable evidence. The police and the prosecutor "only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court" per Warsame J (as he then was) in **Republic –v- Commissioner of Police & Another Ex p Michael Monari & Another [supra]**.
41. The court must however endeavour to strike a balance between the need to have the constitutionally mandated office of the Director of Public Prosecutions undertake and perform its functions with minimal interference and the need to ensure that the individual rights are also protected by ensuring adherence to the Constitution and also to Statute. Public confidence will then be gained when such balance is struck and more so when any intervention is made to ensure there is no abuse of process.
42. In the instant case, the Petitioner contends that he has not been afforded the equal protection of the law and hence there is violation of Article 27. The Petitioner also states that the 3rd Respondent has abused its office by deciding to prosecute the Petitioner when the evidence is wanting.
43. While I appreciate that the real forum where evidence against suspects and accused persons is to be weighed is before the trial court (see: **Thuita Mwangi & 2 Others –vs- The Ethics and Anti-Corruption Commission [2014] eKLR**), to establish whether or not there existed "reasonable suspicion" or "a factual foundation or basis" for the trial the court must delve into the factual matrix of the Petitioner's case. Caution must however be taken to ensure that I do not play or usurp the role of trial court to determine the Petitioner's innocence or guilt.
44. The Petitioner freely admits having interacted with those suspected and accused of having stolen the amount of Kshs. 791,385,000/= from the NYS. The Petitioner also freely admits to having received monies from such persons but adds that such receipt was in the course of his trade and business. He states that the same was for a specific purpose set to benefit the suspects and not the Petitioner. In these respects, the Petitioner claimed he cannot be linked to any crime. On the other hand, the 2nd and 3rd Respondents state that the investigations and inquiry led them to the

- Petitioner whom they investigated for money laundering and then opted to prefer charges.
45. In my respectful view, the 2nd and 3rd Respondent must be vindicated for their decision.
46. It is clear that there was an inquiry on a complaint made by the NYS of theft at the said Service. The inquiry led to suspects being arrested and arraigned in court. A further inquiry under the Proceeds of Crime and Anti-Money Laundering Act 2009, led the 2nd Respondent to the Petitioner amongst others. The inquiry revealed that the Petitioner had received monies from the suspects in the theft case. That is not denied. The inquiry, as per the affidavit evidence before me, also revealed that the amounts received were part of the monies allegedly stolen from the NYS. What however the Petitioner contests is that he was aware of any such theft. Likewise, the Petitioner also contends that the Respondents cannot link him to the criminal conduct of stealing from the NYS.
47. My view is that the Petitioner seems to have misread and misunderstood charges which the 3rd Respondent intended to prefer against him and which have actually been preferred. The charges were drafted under Section 3 of the Proceeds of Crime and Anti-Money Laundering Act, 2009. Section 3 provides as follows:

3. Money Laundering

A person who knows or who ought to have reasonable known that property is or forms part of the proceeds of crime and

- a. ***Enters into any agreement or engages in any arrangement or transaction with any one in connection with that property whether that agreement, arrangement or transaction is legally enforceable or not, or***
- b. ***Performs any other act in connection with such property, whether it is performed independently or with any other person, whose effect is to:-***
 - i. ***Conceal or disguise the nature source, location, disposition or movement of the said property or the ownership thereof or any interest which any one may have in respect- thereof; or***
 - ii. ***Enable or assist any person who has committed or commits an offence, whether in Kenya or elsewhere to avoid prosecution; or***
 - iii. ***Remove or diminish any property acquired directly or indirectly as a result of the commission of an offence,***
commits an offence.

48. It is evident that knowledge or fact of presumed knowledge on the part of an accused person that the property he gets into an arrangement with, is or forms part of proceeds of crime is an ingredient of the offence. It will be for the prosecution to prove that the Petitioner had knowledge or reasonably ought to have known that the monies received by the Petitioner was part of the Kshs. 791,385,000/= which the prosecution claims was acquired through criminal activity. It will then be for the Petitioner to contest otherwise.
49. The 2nd and 3rd Respondents, in the circumstances of this case in my view, clearly had a reasonable basis and a factual foundation to opt for the Petitioner's prosecution on an offence of money laundering. The lines and dots will have to be connected before the trial court and not before this court. I conclude that the 3rd Respondent did act reasonably in recommending and actually commencing the Petitioner's prosecution. The assessment by the 2nd and 3rd Respondents on the basis of the affidavit evidence before me, appeared objective.
50. The second issue isolated for determination was whether the investigations were properly conducted.
51. On this front, the Petitioner faulted the 2nd Respondent for not having taken out a DNA test to establish the Petitioner's connection, if at all, with the 1st Respondent. If that was necessary then, it could only be deemed to be a flaw on the prosecution's case. In the instant case though it was not necessary. Indeed, the 2nd and 3rd Respondents have expressly stated that they have never made any allegations of a blood relationship between the Petitioner and the 1st Respondent. The

- Petitioner did not draw the court's attention to where the Respondents made such allegations.
52. I have also been unable to discern both from the affidavit evidence before me as well as from the Petitioner's submissions where and how the investigation were so improperly (unconstitutionally and illegally) conducted as to affect the ultimate decision to prefer criminal charges against the Petitioner. The Petitioner himself at paragraph 22 of his Supplementary Affidavit filed in court on 24 March 2016 confirms having been given an opportunity to make a statement to the 2nd Respondent. The opportunity was taken and a statement given by the Petitioner to the Respondent. The contents of the statement were not availed to court but it will suffice to state that the analysis of the statement together with other facts was the recluse of the 2nd Respondent.
53. I am unable to fault the Respondents on the issue of investigations. The Petitioner has not shown that the investigations as conducted blocked or would block the course of justice. I have also not been satisfied by the Petitioner that the investigations and the resultant evidence gathered prejudiced him in any manner save for leading the 2nd and 3rd Respondents to indict him

Conclusion

54. Having considered the factual matrix of this Petition alongside established principles of law, I return the following findings on the issues isolated for determination.
55. On whether the Petitioner's intended prosecution was justified, I find it was. I also find that the decision made by the 3rd Respondent to prosecute had a factual foundation or basis which may only be faulted after trial before the trial court.
56. On whether the investigations were properly conducted, I find they were. There is no evidence of any fundamental flaw or of any flaw or improper process in the investigation or of obtaining evidence that would have any prejudice on the prosecution of the Petitioner.
57. As to whether the Petitioner has shown or established a violation of any of his constitutionally guaranteed rights and or fundamental freedoms, I find that the Petitioner has not.
58. **Disposition**
59. By way of final disposal, I find the Petition lacking in merit. It ought to be dismissed.
60. The Petition is hereby dismissed but with no order as to costs.

Dated, Delivered and Signed at Nairobi this 29th day of June 2016

J.L. ONGUTO

JUDGE