



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. APPLICATION NO. 32 OF 2014

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CHAPTER 26 LAWS OF KENYA

IN THE MATTER OF ARTICLE 19, ARTICLE 20, ARTICLE 21(1) AND (4), ARTICLE 22(1), ARTICLE 25 (a) and (c), ARTICLE 28, ARTICLE 29 (a), (c), (d),(e),(f) ARTICLE 47, ARTICLE 48, ARTICLE 49, AND ARTICLE 165 AS READ WITH ARTICLE 20 AND ARTICLE 23(1) and (3) (a), 9e),(f) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF SECTION 14A (2) AND (3) OF THE POLICE ACT CHAPTER 84 LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF MANDAMUS

BETWEEN

KENNETH CHARO KARISA.....APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

COMMISSIONER OF POLICE.....2ND RESPONDENT

RULING

THE APPLICATION

0. By a Chamber Summons dated the 11th day of June 2014, the applicant **KENNETH CHARO KARISA** sought leave of court to file judicial review proceedings for the following orders;
- a. **THAT this Honourable court grant an order of Mandamus directing the 1st Respondent to carry out his statutory obligations as provided for under Article 157(6) of the Constitution of Kenya.**
- b. **THAT costs of this application be provided for.**

APPLICANT'S CASE

0. The application was supported by a verifying affidavit sworn by Kenneth Charo on 11th June 2014. According to the applicant on 26th April 2009, while employed as a foreman in one of the farms in Msambweni, some uniformed police General Service Unit (GSU) Officers apprehended him and his co-workers without explaining the charges and took them to Magandia GSU camp. In his supporting affidavit, the applicant deponed that while in custody he was assaulted the GSU officers for three hours and coerced to call his employer before being released.
0. On 27th April 2009, he reported the matter to Msambweni Police Station, but no charges were taken against the officers. (He annexed a copy of the P3 form and treatment notes from the doctor.) The applicant through his lawyer on 18th June 2010 wrote, without success, to the 1st Respondent asking him to prefer charges against the officers. The applicant avers that failure or delay by the Respondents to prosecute the officers for inhumane treatment is unreasonable, and amounts to an abuse of officer and his powers.

No response

0. The matter came before Lady Justice Mary Kasango on 19th June 2014 where the application was certified urgent and fixed for hearing interpartes. Despite being served with the application, the respondent has not filed any appearance and neither did they file a response to this application. For this default by the Government departments of the Director of Public Prosecution and the Police, the Court has been deprived an opportunity to consider the respondent's case and argument as could have been made as to the propriety in the given case for an order for leave to file judicial review proceedings as prayed.
0. From the proceedings of the Court of 1/12.2014, it is clear that the court was misled into matter was coming up for hearing of the main Notice of Motion for the order of Mandamus, yet all that was coming up was the inter partes hearing of the Chamber Summons for leave to file judicial review proceedings as order by the Court (Kasango, J.) on 19th June 2014.
0. Counsel for the Applicant, Ms. Ngugi, made submissions as follows and Judgment was reserved:

“Ms. Ngugi:

Application dated 11/6/2014. Order of Mandamus to compel statutory obligation under Article 157. The applicant seeks criminal charges against the Police. I refer to the Affidavit of Kenneth CharoKarisa which sets out the facts. Affidavit contains P3, treatment notes and demand letter of 18/6/2010. Letter of compliant received but no action has been taken and the Police who tortured the applicant remain free. We pray that the order of Mandamus be granted.”

ISSUE FOR DETERMINATION

0. The single issue for determination in these proceedings is whether the judicial review Court may grant **leave to file for an order of Mandamus** to compel the Director of Public Prosecution to conduct investigations into a complaint and make a decision as to the prosecution of persons implicated then in accordance with Article 157 (6) of the Constitution.

PRINCIPLES OF LAW

0. The question that the Court must consider in an application for grant of leave to file judicial review proceedings is whether there is an arguable case that requires further investigation by the court by way of the judicial review proceedings and the such arguable case need not be a case that must succeed at the trial. The Court does not look for a prima facie case but rather an arguable

case. See *Meixner & Another v. AG* (2005) 2 KLR 189.

0. Needless to state, the action of the Police for which the applicant seeks a remedy, if true, infringed upon several of the applicant rights – protection from inhuman and degrading treatment, right to dignity and right to liberty under Articles of the Constitution which provide as follows:

- a. Article 28 on the right to dignity:

28. Every person has inherent dignity and the right to have that dignity respected and protected.

0. Article 29 on freedom and security of the person:

“29. Every person has the right to freedom and security of the person, which includes the right not to be—

(a) deprived of freedom arbitrarily or without just cause;

(b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;

(c) subjected to any form of violence from either public or private sources;

(d) subjected to torture in any manner, whether physical or psychological;

(e) subjected to corporal punishment; or

(f) treated or punished in a cruel, inhuman or degrading manner.”

Nature of remedy sought

0. The nature of judicial remedy of Mandamus was elaborated in *Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & Others* Civil Appeal No. 266 of 1996 [1997] eKLR where the Court of Appeal held:

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

0. The practical scope of the remedy of mandamus was admirably put in **KENYA NATIONAL EXAMINATION COUNCIL** case, supra, when the court discussed the role of the examinations council and the court, as follows:

“It is public knowledge that the council conducts academic examination known as Kenya Certificate of Primary Education, which is the subject of the dispute before us, and the Kenya Certificate of Secondary Education. It is also public knowledge that these examinations are conducted towards the end of each year. If the Council were to refuse to conduct any of these examinations and there were candidates ready and desiring to take the examinations, we have no

doubt the High Court would be perfectly entitled to compel it by mandamus to conduct the examinations as its failure to do so would constitute a failure to perform its statutory duty under section 10(a) of the Act. But the section does not specify when or how often the examinations are to be held in any one year and a candidate who is ready to take his examinations at a time when the Council is not conducting any would not be entitled to an order compelling the Council to conduct an examination for him alone. The times and frequency of the examinations are left to the discretion of the Council and it cannot be forced by mandamus to hold an examination at any particular time in the year.

Again as an incident of conducting the examinations, the Act imposes on the Council an obligation to mark the papers of the candidates. **If the Council refuses or neglects to mark the examinations within a reasonable time, or having marked them, to declare the results within a reasonable time, the High Court would be within its rights to compel the Council to mark the papers or to declare the results as the case may be.** The same goes for awarding diplomas or certificates to the successful candidates. That is a duty specifically imposed on it by section 10(b). **But the High Court would not be entitled to order the Council, when carrying out the process of marking the examination papers, to award any particular mark to any particular candidate. That duty or function lies wholly within the province of the Council and no court has any right to interfere. To conclude this aspect of the matter, an order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same. If the complaint is that the duty has been wrongly performed, i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done. Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the appeal before us, the respondents did not apply for an order of certiorari and that is all we want to say on that aspect of the matter.”**

Discretion of the Director of Public Prosecution

0. Under Article 157, the Director of Public Prosecution is granted authority to consider questions as to prosecution of offenders independent of any person as follows:

“157. (1) There is established the office of Director of Public Prosecutions.

(2) The Director of Public Prosecutions shall be nominated and, with the approval of the National Assembly, appointed by the President.

(3) The qualifications for appointment as Director of Public Prosecutions are the same as for the appointment as a judge of the High Court.

(4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

(5) The Director of Public Prosecutions shall hold office for a term of eight years and shall not be eligible for re-appointment.

(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the

permission of the person or authority; and

(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

(7) If the discontinuance of any proceedings under clause (6)

(c) takes place after the close of the prosecution's case, the defendant shall be acquitted.

(8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.

(9) The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

(11) 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.

(12) Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions."

0. However, the provision under Article 157 (10) that ***'in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority'*** does not mean, in my view, that the DPP may refuse or neglect to perform its duty under the constitution and rely on the protection from interference as a defence against a complaint on such inertia. The constitutional provision for independence in performance of prosecutorial decision to prosecute or not to prosecute does not afford protection where no decision is made one way or the next. Such is an abdication of duty rather than a wrongful exercise of duty or performance of an unlawful duty; it is nonfeasance rather than a misfeasance or malfeasance. If proved to the case, an order of Mandamus is available to compel performance of duty in such circumstances.

CONCLUSION

0. If upon the main Notice of Motion for an order of Mandamus, it is proved that the DPP has failed to perform his public duty under the Constitution, the DPP opens himself to judicial compulsion by a judicial review court, not to exercise his discretion in a certain way – to prosecute or not to prosecute - but to exercise the powers of the office under Article 157 (4) ***'to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct'*** and thereafter to make a determination under sub-Article (6) as to whether to prosecute or not. In making this decision, the DPP must comply with the principles of fair administrative action under Article 47 of the Constitution and to the Act of Parliament enacted to give effect to this constitutional right. Article 47 (1) of the Constitution is in the following terms:

"47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."

0. Accordingly, in making an compelling order of Mandamus in this suit, the court would not therefore offend the constitutional provision that ***'in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority'***. The compulsion by an order of Mandamus which issues under judicial review to compel performance

of a public duty, is consistent with Article 165 (6) of the Constitution would be justified and the judicial review court is entitled to make such an order by virtue of its supervisory jurisdiction of the High Court under Article 165 (6) and (7) of the Constitution which is in the following terms:

“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

0. Indeed, the remedy is also available in constitutional litigation under the scope of remedies in Article 23 of the Constitution, as follows:

“(3) In any proceedings brought under Article 22, a court may

grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.”

0. The Court considers that the applicant has an arguable case for the grant of the order of Mandamus and the applicant is, therefore, entitled to leave of the court to file judicial review proceedings for an order of Mandamus to compel the DPP to perform his lawful duty under Article 157 (4) and (6) of the Constitution, ultimately deciding whether there is disclosed by the investigations evidence of involvement in the matter complained of by the applicant to warrant a prosecution thereof.

ORDERS

0. Accordingly, for the reasons set out above, the court grants the Chamber Summons dated 11th June 2014. The costs of the application will abide the outcome of the main Notice of Motion.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 16TH DAY OF JUNE, 2016.

In the presence of: -

Mr. Wejenje holding brief for Munyuthyu for the Petitioners

Mr Ayodo for the 1st Respondent

Mr Ayodo for the 2nd Respondent

Mr Silas Kaunda - Court Assistant.