



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CONSTITUTION PETITION NO. 3 OF 2015

MATANO RIZIKI CHOGA PETITIONER

VERSUS

THE ETHICS AND ANTI-CORRUPTION COMMISSION...1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS..... 2ND RESPONDENT

COUNTY OF KILIFI 3RD RESPONDENT

RULING

The application dated 18th March, 2015 seeks the following orders: -

1. Spent
2. **THAT pending the hearing and determination of this motion or until further orders of the court, a conservatory order be and is hereby issued on a temporary basis for 14 days only to restrain the 1st and 2nd respondents from arraigning or presenting the petitioner in court to take a plea in respect of the charge of soliciting a bribe and/or in respect of any other charge relating to or arising from the matters which led to the petitioner's arrest on the 13.03.2015.**
3. **THAT pending the hearing and determination of the petition or until further orders of the court, a conservatory order be and is hereby issued to restrain the 1st and 2nd respondents from arraigning or presenting the petitioner in court to take a plea in respect of the charge of soliciting a bribe and/or in respect of any other charge relating to or arising from the matters which led to the petitioner's arrest on the 13.03.2015.**
4. **In the alternative, that if the petitioner has already been arraigned or presented in court to take the plea in respect of the offence of soliciting a bribe and/or any other charge arising from the matters which led to his arrest on 13.03.2015, a conservatory order be and is hereby issued on a temporary basis for 14 days only or until further orders of the court to restrain the 1st and 2nd respondents from proceeding with or continuing with the petitioner's prosecution on those charges pending the hearing and determination of this motion.**

The application is supported by the affidavit of the petitioner sworn on 17th March, 2015 and his further affidavit sworn on 24th April, 2015. The respondents filed two replying affidavits sworn by JAMES WACHIRA IKUA on 25th March, 2015 and TIMOTHY MUSYOKI on 25th March, 2015.

Counsel for the petitioner filed written submissions in support of the application. A summary of the

petitioner's submissions is that the investigations leading to the prosecution were poorly conducted; that the prosecution is malicious, and is driven by ulterior or improper motive, the prosecution is selective and an abuse of prosecutorial powers.

Mr. Mugambi, counsel for the applicant, submit that the prosecution is selective. The complainant attempted to influence the applicant by bribing him. The applicant declined and reported the matter to the police and recorded a statement. No action was taken to charge the complainant. However, when the complainant made trump up allegations, the applicant was arrested. This action amounts to selective prosecution. Counsel further contends that the prosecution is malicious. The investigations were conducted arbitrarily. The respondents are only listening to the complainant's story but ignoring the applicant's side of the story.

Counsel further submit that the intended prosecution is based on ulterior motive. It is fueled by bad blood between the complainant and the petitioner. This is attributed to the fact that the complainant failed to influence the petitioner to accept a bribe and give him tenders. Mr. Mugambi maintains that the applicant has established a prima facie case and there is real danger or prejudice if the prosecution was to proceed. The petitioner deals with procurement issues at the Kilifi County Government and his work is sensitive. His work requires utmost good faith. The prosecution of the petitioner will taint his image and the complainant is intentionally trying to achieve that goal. Once the prosecution starts, the petitioner's career will be over. He will suffer great prejudice. The prosecution is aimed at destroying the petitioner's career.

Mr. Mugambi reiterates that the Criminal Investigation department (CID) recommended that the applicant should not be prosecuted. On the other hand the Ethics and anti-Corruption Commission is pro-prosecution. The applicant was invited to a business meeting by the complainant and this has been turned to a meeting to solicit for bribes.

Miss Olivia Mureithi, counsel for the first respondent, opposed the application. Counsel submit that the case was initially reported at the Mombasa offices of the 1st respondent. The petitioner met the complainant on 12th March, 2015 and solicited for a bribe. Another meeting was to take place on 13th March, 2016. The petitioner did not go for the second meeting but instead sent a friend. According to Miss Mureithi, there was no report made by the complainant to the police. The alleged officer who booked the petitioner's complaint did not issue an Occurrence Book (OB) number and upon enquiry, she alleged that she had recorded the complaint on her personal diary. The investigations were conducted from August 2015 yet the petitioner alleges that he made a report on 13th March, 2015.

It is further submitted that the applicant has not established a prima facie case. A complaint was made. The petitioner met the complainant on 12th March, 2015 at Bofa in Kilifi and the respondents have tape recordings. The petitioner's fear of being prosecuted cannot stop the 1st respondent from executing its mandate. The petitioner is not the first public officer to be prosecuted.

Mr. Monda, prosecution counsel, also opposed the application. Counsel maintains that Article 157 of the Constitution gives the Director of Public Prosecution powers to prosecute anyone deemed to have committed an offence. There is no evidence that the Director of Public Prosecution has abused those powers. The prosecution of the petitioner is done in public interest which outweighs private interest. The Ethic and Anti-Corruption Commission carried out investigations and made recommendations to the Director of Public Prosecution. The petitioner was given an opportunity to give his story and recorded his statement which he has annexed. This was part of the investigation process. Subsequently, recommendation to prosecute the petitioner was made. There is no selective prosecution. The petitioner's co-accused has already been charged in court and the case cannot proceed due to this application. According to Mr. Monda, the issues being raised by the petitioner ought to be raised during the trial. This court cannot evaluate the sufficiency or otherwise of the evidence to be adduced at the trial.

The essence of the application is that the applicant would like to stop the respondents from prosecuting him. The respondents have exhibited the charge sheet which has four counts against the applicant. The

charges are related to corruption issues. According to the respondents, a complaint was made that the petitioner was soliciting a bribe from the complainant, Stephen Sanga. On the other hand, the petitioner maintains that it was the same complainant, Stephen Sanga, who wanted to bribe him and he went to report the matter at the Mtwapa CID office on 13th March, 2015 at 10.00 am. On the same day the petitioner was arrested. It is the petitioner's position that the prosecution is Malicious, based on ulterior motive, selective and intended to achieve some results other than the enhancement of justice.

Counsels for all the parties cited several authorities. I do not wish to evaluate the authorities. Some are in favour of such applications while others are against. The parameters upon which a court can determine whether a prosecution is improper were stated in the case of **MACHARIA & ANOTHER V REPUBLIC; [2001] KLR 448** where the court stated as follows: -

“A prosecution is improper if:

- a. It is for a purpose other than upholding the criminal law;**
- b. It is meant to bring pressure to bear upon the applicant/accused to settle a civil dispute;**
- c. It is an abuse of the criminal process of the court;**
- d. It amounts to harassment and is contrary to public policy;**
- e. It is in contravention of the applicant's constitutional right to freedom;**
- f. It is in contempt of court;**
- g. It is oppressive, illegitimate, vexatious harassment of applicants and contrary to public policy.**

My understanding of the applicant's contention herein is that the prosecution of the petitioner is improper. Parties proceeded with the application and at this state I need not go into the details of the petition. The charges as framed in the charge sheet involve corruption allegations. The record show that two co-accused took plea. The state dropped the charges against one of those two already charged in court. Whereas the petitioner claims that he reported the matter at the Mtwapa CID office and the matter was treated as an incident report, there is no evidence to that effect. It is not clear why the petitioner opted to report to the CID office instead of at the normal police station or at the 1st respondent's offices at Kilifi. The statement is self-recorded and the officer who assisted in taking the statement is not given. The O.B. number is also not stated.

The petitioner's statement was made on 13th Mach, 2015. According to the respondents, the petitioner met the complainant on 12th March, 2016 at Bofa. The respondents were monitoring the petitioner's movements and contend that they have tape recordings of the meeting. All these issues need to be ventilated during the criminal trial. It is the duty of the trial court to evaluate all those allegations and counter-allegations and make up its mind. This court cannot at this state simply conclude that the prosecution does not have sufficient evidence against the petitioner. I have read the affidavits filed on behalf of the respondents as well as the petitioner's affidavits. All the issues being raised therein need to be raised before the trial court. There are allegations of phone calls and the complaint will have to testify to the effect that he was in contact with the petitioner and his alledged accomplice.

The Director of Public Prosecution is empowered under Article 157 of the Constitution to prosecute those alledged to have infringed the law. That power is to be exercised independently for the interest of the public. The applicant has to establish that the Director of Public prosecution is abusing those powers and the prosecution is not intended to fulfil public interest.

As established in the Macharia Case (supra), it has to be established to this court that the prosecution is for a purpose other than upholding the criminal law. The offences being preferred against the petitioner involve economic crimes. The first respondent is authorized under Article 252 of the Constitution to carry out investigations relating to economic crimes. The matter does not fall within the purview of the CID. The 1st respondent investigated the matter and made recommendation to the 2nd respondent for the petitioner to be prosecuted.

There is no civil suit or dispute between the petitioner and the complainant. The prosecution is therefore not intended to put pressure on the applicant to settle a civil dispute. Any form of prosecution is always taken to be unfair by an accused person. It is unheard of to hear someone commending the prosecution for having taken him to court. Whether the prosecution amounts to harassment depends on the circumstances of each case. To any accused person, his/her prosecution amounts to harassment and violation of his constitutional rights. If that were to be the case then no one will be prosecuted. The courts have to weigh the allegation of the one alleging harassment or persecution against the prosecution process undertaken by the state. If the court is of the view that the prosecution is meant to harass the accused or is an abuse of the criminal process, then the court would proceed and terminate the prosecution.

An accused person will always contend that his constitutional rights are being violated. Such allegations have to be weighed against the public interest which calls for prosecution of offenders. It is true that the prosecutorial powers can be abused. However, where the court is satisfied that no constitutional rights have been violated, the prosecution ought to be sanctioned to proceed.

Given the circumstances of this matter, I do find that the respondents are within their constitutional and statutory mandate to prosecute the applicant. The prosecution is not selective. The respondents accorded the applicant the opportunity to record his statement. There is no malice being exhibited in the prosecution process. I do hold that the application dated 18th March, 2015 lacks merit and the same is hereby dismissed. Parties shall bear their own costs.

Dated and delivered in Malindi this 14th day of June, 2016.

S.J. CHITEMBWE

JUDGE