



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL REVISION NO 112 OF 2015

UMMULKHAYR SADRI ABDULLA

KHADIJA ABUBAKAR

MARYAM SAID ABOUD

HALIMA ADAN.....APPLICANTS

VERSUS

OCS CENTRAL POLICE STATION

ANTI TERRORISM POLIE UNIT – MOMBASA

DIRECTOR OF PUBLIC PROSECUTIONREPONDENTS

RULING

1. The applicants, Ummulkhayr Sadri, Abdulla Khadija, Abubakar Maryam Said Aboud and Halima Adan have filed a Notice of Motion application under Articles 165 (3). (4) (6) and (7), 157 (11) 22, and 23 of the Constitution of Kenya, 2010, Rule 13 and 19 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and all enabling provisions of the law.

2. In this application, the applicants are seeking for orders that;

a. the matter be certified as raising a substantial point of law and issues of public interest and refer the same to the Honourable Chief Justice for the Constitution of a bench of uneven number of judges, being not less than three for hearing and determination of the petition filed herewith;

b. there be a stay of taking plea and any further proceedings and orders in Criminal case No 2428 of 2015, Republic vrs Ummalkhaayr Sadri Abdulla and 3 others in Mombasa pending the hearing and determination of the petition filed herewith;

3. The application is supported by the grounds on its face and supporting affidavit of the Applicants.

APPLICANTS CASE:

4. In support of the application, Mr Mwadzogo, counsel for the applicants submitted that with regard to the first issue on whether the matter should be referred to the honourable Chief Justice so he can constitute a bench of judges of uneven number, Article 165 (4) of the Constitution (2010) applies.

5. Article 165(4) of the Constitution (2010) clothes the High Court with the powers to certify a matter as raising a substantive question of law and refer the same to the Chief Justice so he can constitute a bench of uneven number of judges.

6. According to Mr. Mwandzogo, counsel for the applicants, they have raised substantive matters in their petition being;

a. whether the provisions of section 33 of the prevention of Terrorism Act No 30 of 2012 is constitutional and the right procedure for pre- charge detention;

b. whether the filing of new charges in the chief magistrate's criminal Case o 2428 of 2015, Republic vrs Ummulkhayr Sadri Abdulla and 3 others in another court during the subsistence of the Chief Magistrate's criminal case No. 799 of 2015, Ummulkhayr Sadri Abdulla and others;

c. the issue of the courts' jurisdiction since the offence the applicants are charged with is alleged to have been organized in Nairobi on 26.3.2015 and they were found preparing to commit a criminal offence at El Wak.

d. the correct procedure to be used in opposing bond in Kenya is it by filing an affidavit before plea is taken!

7. The applicant's counsel, Mr Mwandzogo acknowledged the court's ruling in which the 3rd respondent's independence in preferring criminal charges and appreciated the provisions of Article 157 of the Constitution, where the Director of Public Prosecution is granted unfettered discretion and independence in carrying out their said mandate.

8. He, however pointed out that Article 157 (11) of the Constitution raised the question of whether the Director of Public Prosecution in undertaking criminal case No 2428 of 2015 had an interest in the administration of justice and the need to prevent and avoid abuse of court process.

9. To demonstrate this, Mr Mwandzogo stated that in one count, the applicants are charged with being enroute to Somalia to join Al Shabaab while in another vide criminal case No 799 of 2015, the applicants are alleged to have engaged in criminal activities by being members of a terrorist group.

10. He submitted that the applicants believe that criminal case No 2428 of 2015 was only meant to defeat the bond which they had been granted.

11. Mr Mwandzogo submitted that since the charges in the two cases formed a series of the same transaction and founded on the same facts, the state ought to have invoked the provisions of section 135 of the Criminal Procedure Code and had the charges consolidated.

12. He singled out the further affidavit which had been filed to oppose bond in criminal case No. 2428 of 2015 by corporal Samuel Ouma as being similar in its entirety to the one filed in Miscellaneous Criminal Application No 104 of 2015. He submitted that this could lead to courts giving contradicting decisions in cases with similar issues.

13. The applicant's counsel submitted that the charges against the applicants in criminal case No 2428 of 2015 were vexatious and only meant to enhance extraneous issues, which is to block their release on bond. He cited Miscellaneous Criminal Application No 22 of 2014, Samuel Gicheru and another vrs The O.C.S Nanyuki police station where it was held that;

“a charge is said to be vexatious when it has not basis”.

14. To support their application, Mr Mwandzogo has adopted the following authorities;

a. Judicial Service Commission vrs Speaker of the National Assembly and another, High court of

Kenya at Nairobi, Petition No. 518 of 2013, where Article 165 (4) of the Constitution was given judicial interpretation by Justice Odunga on the constitution of a bench of more than one High court judge at page 29;

b. Hon (Lady) Justice Kalpana H. Rawal versus Judicial Service Commission and 4 others, High court of Kenya at Nairobi, Petition No 386 of 2015, where a substantive question of law is defined as one which is of general public importance or which directly and substantially affects the right of the parties and which has not been finally settled by the supreme court (page 5)

c. Peter Gichuki Mwangi versus the Copyright Board of Kenya and 3 others, High court of Kenya at Nairobi, Petition No 17 of 2013;

d. Stanley Munga Githunguri versus Republic, High court of Kenya No 271 of 1985; where it was held;

e. Samuel Rono Gicheru & another versus OCS Nanyuki police station and Director of Public Prosecuting, High court at Nyeri Miscellaneous criminal Applications No 22 of 2014; where it was held

“The moment a reasonable basis for misuse or abuse of court process or any other sufficient cause is established, the High court can stay quash, or protest such proceedings to safe guard and uphold the dignity of the judicial process”.

f. Rosemary Wanja Wangiru & 2 others versus Attorney General and 3 others, High court of Kenya at Nairobi, Constitutional Reference No. 165 of 2011, the court held that;

“ Should the court be satisfied that the criminal proceedings before it have been instituted for purposes other than the general enforcement of law and order, then the court ought to step in and stop such maneuvers in their tracks and prevent the process of the court being used to unfairly wield state powers over one party to a dispute”.

g. Peter Genge Antony D’ Costa versus The Attorney General and another , High court of Kenya at Nairobi Petition No 83 of 2010, the court said that;

“ The process of the court must be used properly, honestly and in good faith, and must not be abused. This means that the court will not allow its functions as a court of law to be misused and will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation”.

h. Mohamed Gulan Hussain Fezal Karmali versus the Chief Magistrate’s court, Nairobi and another , High court of Kenya at Nairobi, Miscellaneous application No 367 of 2005;

i. Investment and Mortgages Bank Limited versus the Commander of Police and 4 others, High Court of Kenya, Mombasa Petition No 19 of 2013.

j. Muslim for Human Right (MUHURI) and Another versus Inspector General of police and 5 others , High court of Kenya at Mombasa , Petition No19 of 2015

k. Kuria and others versus Attorney General, high court of Kenya t Nairobi, Miscellaneous civil application No 966 of 2000.

l. Meme Versus Republic and another, High court of Kenya at Nairobi Miscellaneous Criminal Application No. 495 of 2003.

15. Mr Chacha, counsel assisting Mr. Mwadzogo for the applicants reiterated the submissions and arguments by his learned colleague that the action by the 3rd respondent (DPP) of registering Mombasa

chief magistrate's criminal case No. 2428 of 2015 is an effort to defeat justice in the sense that they have applied all efforts to ensure that the applicants languish in custody in Mombasa chief magistrate's criminal case No 799 of 2015.

16. He also submitted that at Articles 157 (11) of the Constitution the Director of Public Prosecution is required to carry out their duties with regard to public interest and administration of justice so as to ensure that due process is observed and the legal process is not abused.

RESPONDENT'S CASE

17. In opposing the application, Mr. Wamotsa, counsel for the state submitted that they were relying on the replying affidavit of Corporal Samuel Ouma sworn on 15.12.2015 and filed on even date.

18. According to Mr Wamotsa, the application before court is incompetent as it is based on a petition that is not a petition in accordance to Article 22 and 23 of the Constitution.

19. Mr Wamotsa, submitted that in exercising Constitutional jurisdiction under Articles 22 and 23 of the Constitution, he court is exercising special jurisdiction and not criminal or civil jurisdiction. And in the miscellaneous application before court, counsel says that the provision is in mandatory terms.

20. He argued that there have been numerous court decisions which have held that the parties coming to court must use the right procedure for invoking the jurisdiction of the court, so that where this is challenged, courts should down their tools.

21. Mr Wamotsa submitted that since this court's jurisdiction was not invoked under Article 22 and 23 of the Constitution, and rule 10 of the Constitution, and rule 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) practice and procedure rules, 2013, there was no competence jurisdiction before court.

22. He cited the following decisions where courts have stated that parties must adhere to the procedures for moving with fidelity. They are not technicalities of procedure when one is told to comply with the procedure of invoking jurisdiction;

- a. Yusuf Gitau Abdalla vrs Building Centre (K) Ltd and 4 others (2014) e KLR;
- b. Bwana Mohamed Bwana versus Silvana Buko Bonye & others (2014) e KLR
- c. Anami Silvesi Lisamula vs the IEBC and others (2014) e KLR
- d. Ochaenga Emmanuel Dengana and 4 others versus Hon. Atai Aidoko Ali, Usma and 4 others consolidated judgment of the supreme court in Abuja, Nigeria.

23. Mr Wamotsa went on to submit that having argued that there is no petition filed before this court, it follows that there is nothing to be referred to the Honourable Chief Justice.

24. Further, Mr Wamotsa submitted that the substratum of the application, hence, petition, is to seek stay of proceedings in criminal case No2428 of 2015. Here he argues that this court already gave a ruling whereby it declined to interfere with the exercise of the decision by the director of Public Prosecution to charge and asked the parties to go before the trial court and take plea

25. There is therefore nothing to refer to the Chief Justice for the Constitution of an uneven number of judges since it would amount to the judges sitting on an appeal from a court exercising concurrent jurisdiction.

26. He also pointed out the applicants have not brought out the substantive point of law in the matter which would qualify it to be so referred. He cited the case of Hon. (Lady) Justice Kalpana H Rawal

versus Judicial Service Commission and others, High court of Kenya, Nairobi. Petition No 386 of 2015. Where the criterion of establishing what a substantive point of law is was set.

27. He further cited the authority of Meme versus Republic and another, High court of Kenya at Nairobi, Miscellaneous Criminal Application No 495 of 2003 where abuse of process and prosecutorial powers were addressed.

28. As for the issue of constitutionality of section 33 of the Prevention of Terrorism Act, Mr Wamotse submitted that the Applicants should not have raised it since it is not pleaded for in their petition/application.

29. Mr Wamotsa then distinguished the authorities which were cited by the applicants with the application before court; arguing that they dealt with different issues.

30. Mr Muteti, Senior state counsel, in furtherance to Mr Wamotsa's submission; stated that the application was incompetent and orders brought unavailable, to the applicants.

31. He submitted that the stay issued which is one of the orders the applicants are seeking has already been dealt with and is therefore Mute.

32. As for the prayer that the court orders the matter referred to the Chief Justice for constitution of an uneven number of judges, Mr Muteti submitted that the applicants have not been able to demonstrate to this court what the gravity or complexity of the issues to justify grant of the said order.

33. He states that Article 23 as read together with article 165, both of the constitution of Kenya donate powers to this court to have all constitutional matters that arise from proceedings before court.

34. To refer a matter to the Chief Justice and require that a bench of uneven number of judges be constituted, the court must justify that there is a weighty constitutional issue that raises substantial points of law to warrant the grant of such prayers. The burden of doing this solely lies upon the applicants and in this case, the applicants have failed to so demonstrate.

35. Mr Muteti submitted that by requiring that the matter be referred to the Chief Justice for the constitution of a bench of an uneven number of judges, this would impede expeditious trial in total breach of the constitutional right of the Applicant.

36. He submitted further that the matters raised can be sorted out administratively by the Director of Public Prosecution or judiciously by the trial court. And if not satisfied, the parties are at liberty to approach this court and inform it that they have exhausted all other avenues.

37. He also submitted that to entertain the argument that the matters are constitutional would be to invite parties who have absolutely no case to engage in wasteful use of resources that include time for the court.

38. In brief response, Mr Mwadzogo submitted that from all the authorities they submitted before court, it clearly comes out that this court has jurisdiction to intervene where there is abuse of court process.

39. He also replies that what is before court is an application and not a petition as it is not the subject of the application before court.

40. He further submitted that the issues raised by the applicants such as the applicants being charged after 6 months, the applicants being arrested for new charges in criminal case No 2428 of 2015 soon after their release on bond, the applicants being produced in court without production orders and issue of illegal detention are substantive issues of law and of public interest.

DETERMINATION

41. I have considered the application, the grounds upon which it is premised, and the supporting affidavit of the applicants, the replying affidavit of corporal Samuel Ouma together with submissions and all the cited authorities by counsel for both sides.

42. Although counsel in arguing their case raised a number of issues to be determined, what the applicants are seeking is for orders that;

a. the matter be certified as raising a substantial point of law and issues of public interest and be referred to the Honorable Chief Justice for the constitution of a bench of an even number of judges, being not less than three for the hearing and determination of the petition filed herewith;

b. there be a stay of taking plea and any other proceedings and orders in criminal case No. 2428 of 2015, Republic vrs Ummulkhayr Sadri Abdulla and 3 others in Mombasa, Chief Magistrate's court, pending the hearing and determination of the petition.

43. Article 165 (4) of the Constitution (2010) provides;

“ Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the chief Justice”.

44. Justice Lenaola in HON. (LADY) JUSTICE KALPANA H RAWAL VERS JUDICIAL SERVICE COMMISSION AND 4 OTHERS' High court of Kenya, Constitutional and Human Rights Petition No 386 of 2015, pointed out that:

“Nowhere in the constitution has the phrase “substantial question of law” been defined and it is therefore upon the High court to determine on a case to case basis, as to what amounts to substantial question of law”.

45. He went onto cite the case of CHUMILAL V MEHTA V CENTURY SPINNING AND MANUFACTURING CO; AIR 1962 SC 1314, where substantial question of law has been defined as follows;

“A substantial question of law is one which is of general public importance or which directly and substantially affects the rights of parties and which have not been finally settled by the supreme court, the privy council or the Federal court or which is not free from difficulty or which calls for discussion of alternative view. If the question is settled by the highest court on the general principles to be applied in determining the questions are well settled and there is a mere question of applying these principles or that the plea raised is palpably absurd, the question would not be substantial”.

46. He also cited the case of ROBERT N GAKURU and ANOTHER vs The county government of Kimadu and Another, Petition No 602 of 2014 , where the court states ;

“The test for construing a matter as raising a substantive issues of law is no easy a task and should be taken seriously by parties and the court as well. To my mind therefore a substantive question of law would depend on the facts and circumstances of each case. If any guidance is needed, I would say it is a matter that has not been previously settled by a court such that it does not have a binding or persuasive precedent. It also would be a matter that is intertwined in involving diverse areas of the law therefore making the matter relatively complex as compared to other matters normally canvassed before the same court, and calling for an alternative view. It is also a matter with difficulty and which would require extensive research to resolve.....”

47. These findings will guide my decision in this matter. In his submissions to court, Mr Mwadzogo highlighted the issues the applicant have raised in their supporting affidavits, which they feel warrant the matter being certified as having raised a substantive question of law and need to be referred to the Chief

Justice for the constitution of a bench of uneven number of judges to determine the same.

48. According to the Applicants, one of the questions relate to whether the provisions of section 33 of the Prevention of terrorism Act, No 30 of 2012 is Constitutional.

49. At paragraphs 3 to 5 of their supporting affidavits, the applicants have stated that they were arrested on 27.3.2015 and taken to court vide Mombasa Chief Magistrate Miscellaneous criminal Application No 98 of 2015, where the state applied and was granted 30days to conduct investigations. They were detained at Nyali police station by dint of section 33 of the Prevention of Terrorism Act. And on 20.4.2015, the 2nd Respondent vide an affidavit sworn on the same day sought an extension of the pre charge detention for a further 30 days.

50. According to the applicants, this was illegal as no formal application was made pursuant to section 33 (3) of the Prevention of Terrorism Act, which then poses a substantive point of law that needs to be determined by a bench of an uneven number of judges constituted by the Chief Justice.

51. They are seeking to know the right procedure to be adopted in pre-charge detention.

52. In addition, the applicants are seeking to know whether their current detention at Shimo La Tewa Women prison, before taking plea in Chief Magistrate's Criminal Case No 2428 of 2015 between the period of 9th December, 2015 to date, is legal.

53. The other question is whether the filing of new charges in Chief Magistrate's Criminal Case No 2428 of 2015. Republic vrs Ummulkhayr Sadri Abdulla and 3 others in one court during the subsistence of Chief Magistrate's Criminal Case No 799 of 2015 (same parties) amounts to an abuse of the court process.

54. The applicants, in their affidavits have stated that the issues raised in the charge sheets of either of the cases are connected. They have also stated that the charges in the Chief Magistrate's Criminal Case No. 2428 of 2015 were registered very late on 9.12.2015 and a court constituted at 4.00pm to facilitate the taking of plea so as defeat their release on bond as per the court order of 12th day of October, 2015.

55. In analyzing the issues raised by the applicants the questions in my mind become:

a. Are these issues so grave or complex to justify their referral to the Chief Justice for the constitution of an uneven bench of judges?

b. What is the constitutionality of what the applicants seek interpreted?

56. Clearly, these are issues which can, and have, on numerous occasions been dealt with by courts before a single judge so that they do not require the constitution of a bench of an uneven number of judges by the Chief Justice to deliberate over such issues.

57. Article 23 (1) of the constitution (2010) provides that:

“The High court has jurisdiction in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or fundamental freedom in the bill of Rights”.

58. Article 165 (3) of the Constitution states that:

“Subject to clause (5) of the High court shall have –

b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of rights has been denied violated, infringed or threatened”.

59. There is even a constitution and Human Rights Division within the High court, which deals with a lot of such matters.

60. Therefore, from the facts that have been brought out by the applicants, I find that the issues raised by them are not strange to courts and neither are they so grave or complex to warrant the constitution of a bench of uneven number of judges by the Chief Justice.

61. As for the issues of the Applicants being charged with charges that are similar or arising from a series of events in the same transaction and the same being registered late in the day vide Mombasa chief magistrate's criminal case Nos 799 and 2428 of 2015, the question is;

“Even if the applicants found this an abuse of court process, is it a matter that qualifies to be certified as raising a substantial point of law and public interest to warrant it being referred to the Chief Justice for the constitution of an uneven bench for hearing and determination?”

62. Even from the authorities that have been cited by counsel in this case, this issue of abuse of court process by the Director of Public prosecution (and many others) has been deliberated over by single judge benches all over the country by virtue of the provisions of Article 157 (1) of the Constitution.

63. While article 157 of the constitution, 2010 vests state powers of prosecution in the Director of Public Prosecution (DPP) to institute and undertake criminal proceedings against a person before any court (other than a court martial) which decision is discretionary and without direction of anyone, the exercise must be within the law and in accordance with the dictates of Article 157 (11) of the Constitution which states;

“In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interest of administration of justice and the need to prevent and avoid abuse of the legal process”.

See a. Peter Gichui Mwangi versus the Copy Right Board of Kenya & 3 others, High court of Kenya at Nairobi, Petition No 176 of 2013;

b. Samuel Rono Gicheru & another versus OCS Nanyuki police Station & Director of Public Prosecution, High court in Nyeri, Miscellaneous Criminal Application No 22 of 2014.

c. Rosemary Wanja Wangiru & 2 others versus Attorney General and 3 others, High court of Kenya of at Nairobi, Constitutional reference no 165 of 2011;

d. Peter Genga Antony D Costa versus the Attorney General and Another, High court of Kenya at Nairobi, Petition No.83 f 2010;

63. The above-mentioned cases, and many others are a demonstration of how courts in this country have completely dealt with the matter of abuse of court process by the Director of Public Prosecution and other bodies and or Tribunals.

64. In fact, I agree with Mr Chacha, counsel for the Applicants, who in his submissions to court indicated that where charges are founded on the same facts or a part of a series, reference should have been made to the provisions of section 134 and 135 of the criminal procedure code with regard to joining of the charges or information in the two cases and Section 214 of the same code with regard to amendment or substitution or additional of a new charge. He submitted that the 3rd respondent ought to have considered consolidating the charges in the two cases, being Mombasa Chief Magistrate Criminal Case No 799 and 2428, both of 2015.

65. In supporting this line thinking Mr Muteti for Respondent submitted that consolidation of charges is a matter that can be considered by the trial court or their office but not a constitutional court. He went on to submit that this can be done by inviting the Director of Public Prosecution to a discussion on the same or

moving the trial court to consider consolidation.

66. In conclusion, having considered the issues that have been raised by the applicants and their counsels, I find that none of them raise a substantial question of law or public interest under Article 165 (4) of the constitution to justify reference of this matter to the Chief Justice for the constitution of a bench of uneven number of judges.

67. Accordingly, I dismiss the application by the applicant as prayed. I believe the part of prayer No 4, which is in regard to plea taking in Mombasa chief magistrate criminal case No. 2428 of 2015 has been overtaken by the ruling in High court miscellaneous No of 2015.

68. I however, direct that the said case proceeds and issues of concern to the parties if any, be addressed before the trial court. And where a party is aggrieved, the appellate process remains open to them.

Ruling signed and delivered this 30th day of September 2016,

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr Ayodo for the state

Mr Mwadzog of or the Applicants

Applicants

C/clerk- Kiarie