



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL REFERENCE NO. 388 OF 2011

ANN WANJIKU KURIA.....APPLICANT

VERSUS

HONOURABLE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Introduction

1. This reference arises out of the prosecution of the applicant, **Ann Wanjiku Kuria**, in Nairobi Chief Magistrate's Court Criminal Case No 2202 of 2009. The applicant alleges that her prosecution in the said case is a violation of her constitutional right to a fair trial, constitutes a breach of the criminal process of the court, and is a violation of her right to the presumption of innocence. She asks the court to permanently stay the proceedings against her and award her general damages for breach of her constitutional rights.

2. The facts giving rise to the petition as they appear from the pleadings are that on 18th February 2009, Maersk Kenya Limited made a request to Citibank through the Citidirect system to issue a banker's cheque of Kenya Shillings 68,384 to the applicant in the name of her business. Citibank erroneously issued a cheque in US dollars in the sum of **US\$68,384**, the equivalent then of about **Kshs 5, 378, 400** instead of Kshs 68,384. Upon realising the error, Citibank contacted the petitioner who acknowledged the payment in error and undertook to unequivocally repay the entire amount less **Kshs 68, 384** through a letter dated 23rd June 2009 addressed to the Operations Manager, Citibank Limited. The applicant later issued cheques Nos **500106** and **500103** each of **Kshs 1,300,000** on 14th August 2009 and 13th November 2009 respectively, but the cheques were not honoured since her account did not have sufficient funds.

3. As a result, criminal proceedings were commenced against the applicant in **Nairobi Chief Magistrate's Court Criminal Case No 2202 of 2009**. The applicant is charged with two counts of issuing a bad cheque in contravention of **Section 316 (A) (1) and (c)** of the **Penal Code** and stealing contrary to **Section 275** of the **Penal Code**.

4. In the course of the hearing of the matter on 17th May 2011, the applicant raised the question of the alleged violation of her rights under **articles 25 (c) and 50 (1) (o)** of the **Constitution**. In her ruling dated 17th June 2011 made after hearing the parties, the Magistrate, Hon. (Mrs.) Opondo referred the question of the contravention and/or threatened contravention of the said articles of the Constitution to the High Court for determination. The applicant then filed the present constitutional reference dated 14th July 2011.

5. The matter was initially filed before the Criminal Division of the High Court and on 7th November 2012, Ochieng J issued orders staying the prosecution of the petitioner, with the condition that if the

hearing and determination of the petition was not for any reason concluded within 60 days of the ruling, the stay order would stand vacated. The petition was not heard and determined as directed, however, though it appears that orders were made for maintenance of the status quo. It was eventually transferred to this Division on 29th May 2014.

The Applicant's Case

6. In her affidavit and submissions dated 20th June 2014, as well as in oral submissions made on her behalf by her Learned Counsel, Mr. Odera, the petitioner admits that sometime on or about the 18th February 2009, Citibank Limited erroneously credited her account with **USD 68,384.00 (Kshs 5,378,401.60)** instead of **Kshs 68,384.00**.

7. Mr. Odera conceded that the applicant used part of the amount credited erroneously to her account, but that on 22nd June 2009, she undertook to refund the amount by way of monthly instalments, and that she repaid Citibank Limited a sum of **Kshs 3,000,000.00** leaving a balance of **Kshs 2,078,401.60**. She states that in settlement of the outstanding balance she tendered to Citibank cheque Nos. **500103** and **500106** each for the sum of **Kshs 1,300,000.00** dated 13th November 2009 and 16th October 2009 respectively.

8. It is the case, however, that on 12th October 2009, on her instructions, her advocates wrote to Citibank stopping cheque No 500103; that in complete disregard of the said instructions, Citibank went ahead and banked the said cheques which were returned unpaid; that following the dishonour, Citibank lodged a criminal complaint with the result that she was charged with two counts of issuing a bad cheque in contravention of **Section 316 (A) (1) and (c)** of the **Penal Code** and stealing contrary to **Section 275** of the **Penal Code**.

9. The applicant alleges that having accepted part settlement of the monies erroneously credited into her account, Citibank by its conduct unequivocally represented to her that she would not be prosecuted. It is therefore her submission that Citibank is estopped by its conduct from lodging a complaint against her; that Citibank led her to believe that it had accepted the payment made by her in full settlement of its claim; and that consequently, the line of defence that she would have relied on stands compromised and the commencement of any subsequent proceedings over the same claim would be a violation of her constitutionally guaranteed right to fair trial under **article 50** of the **Constitution**.

10. The applicant further contends that by virtue of the part payment in settlement of Citibank's claim, the complaint is now spent and the institution, prosecution and pendency and/or continuation of the **Nairobi Chief Magistrate's Criminal Case No 2202 of 2009** constitutes a breach and continuing breach of her right to fair hearing under **article 25 (c)** and **50 (1), (2) (a) (i)** of the **Constitution**. It is also her contention that in light of the circumstances, any independent and impartial tribunal will view her actions as an admission of liability and as a result she shall be indubitably be found guilty; that the institution, prosecution and maintenance of the case against her upon the complaint by Citibank has and shall further undermine her constitutional right of presumption of innocence as the fact that she acceded to repay the amount credited into her account effectively presupposes guilt, and that she therefore stands no chance to raise a reasonable doubt.

11. It is the applicant's case that in placing reliance upon Citibank's deception that the entire matter had been settled, she disposed of any material evidence that she would have otherwise used in her defence; that the underhand tactics orchestrated by Citibank to undermine the preparation of her defence are contrary to judicial precedents guarding against the violation and/or infringement of the fundamental right to a fair trial and that the trial in the circumstances amounts to luring her to incriminate herself in violation of her constitutional rights. The applicant has relied on the decision in **Peter M Kariuki –vs- Attorney General, Civil Appeal No 79 of 2012** and **Republic –vs- Subordinate Court of the 1st Class Magistrate at City Hall, Nairobi and Another Ex-parte Yougindar Pall Sennik and Another Misc App. 652 of 2005** in support of her argument on the importance of a fair trial.

12. It is also submitted on her behalf that the institution of the criminal proceedings against her is inconsistent with the principle established in the case of **Githunguri –vs- Republic (1986) KLR 91**; that

there exists no valid reason for Citibank's change of mind against instituting criminal proceedings against her, and that there has been no discovery of new evidence to warrant the prosecution.

13. The applicant relies on the decisions in **Mohammed Koriow Nur –vs- Attorney General Petition No 181 of 2010** to advance her argument against self incrimination. It is her submission that as it is the bank *“that originated the criminal design by implanting in an innocent person’s mind the disposition to commit a criminal act,”* she *“should not be seen to be without a remedy when her constitutional rights are violated by the same complainant who entrapped her into self incrimination”*.

14. She prays that the court finds in her favour and grants her the following orders:

a) A Declaration that the institution, prosecution and maintenance of the Chief Magistrates Criminal Case No. 2202 of 2009 upon the complaint of Citibank Limited is a contravention of the Applicant’s constitutional and fundamental rights and freedoms to a fair trial as guaranteed under Articles 25 (c) and 50 (1) (2) (a) (i) of the constitution of Kenya.

b) A Declaration that in accepting part payment as settlement of the debt, no criminal liability attaches and that the institution, prosecution and the maintenance of Chief Magistrates Criminal Case No. 2202 of 2009 upon the complaint of Citibank Limited is an abuse of criminal process in court.

c) A declaration that the respondent’s duty to respect, promote and fulfil the right to a fair trial under Articles 25 (c) and 50 of the Constitution is perpetual and cannot be abrogated.

d) A declaration that the institution, prosecution and maintenance of Chief Magistrate’s Nairobi Criminal Case No. 2202 of 2009 is a flagrant affront to the universally acknowledged presumption of innocence contained in articles 50 (2) (a) of the Constitution of Kenya and Article 11(1) of the Universal Declaration of Human Rights (1948) to which Kenya is a signatory.

e) An order that the proceedings in Chief Magistrates Nairobi Criminal Case No. 2202 of 2009 be stayed permanently.

f) General damages for breach of the Applicant’s constitutional rights.

g) The cost

h) Such other or further or incidental orders, reliefs and or remedies as this Honourable Court deems just and expedient.

The Case for the Respondent

15. In presenting the case for the respondent, Learned State Counsel, Ms. Kithikii relied on the Replying Affidavit sworn on 11th June 2012 by **Corporal Jama Feisal** and submissions dated 14th July 2014.

16. The respondent’s case is that the applicant dishonestly withdrew all the money totaling **Kshs 5,446,785.60** yet she was only entitled to **Kshs 68,384**. It is its case further that she issued cheques to the complainant which were dishonoured on presentation, then she disappeared and so her case was reported by Citibank on 23rd November 2009. She was arrested on 7th December 2009.

17. The respondent submits that a complaint was lodged by Citibank Limited to the Police which complaint was investigated in accordance with **Article 245(4)** of the **Constitution** and **Section 24(e)** of the **National Police Service Act, Cap 84**; that the investigations conducted revealed that the conduct of the applicant in respect of the said complaint amounted to criminal offences provided within the Penal Code, and as a result the applicant was charged in **Criminal Case No. 2202 of 2009**.

18. The respondent argues that the Kenya police is empowered under **Section 24** of the **National Police Service Act, 2011** to inter alia maintain law and order and prevent and detect crime, and it acted properly in arresting and preferring charges against the petitioner.

19. The respondent denies that there has been any violation or threat of violation of the right to fair trial enshrined under **Articles 25(c)** and **50** of the **Constitution**. It is its case that the right has been observed and shall continue to be upheld by all courts including the Chief Magistrate's Court. The respondent submitted further that the petitioner had failed to demonstrate with particularity how her rights shall or have been infringed.

20. With regard to the right under **Article 50(2)(l)** of the **Constitution**, the respondent concedes that every accused person has the right to refuse to give self-incriminating evidence. It was Ms. Kithikii's submission, however, that the applicant is free to invoke this right during her trial, and that it is in the interest of justice that the criminal case proceeds. It is its case, further, that the presumption of innocence protected under **Article 50 (2) (a)** of the **Constitution** has and shall continue to be observed throughout the trial process; and that in any event the applicant has not demonstrated how the said right has been infringed. It is also the respondent's submission that the applicant seeks to put across her defence at the wrong forum as matters of fact are to be determined at the trial court.

21. The respondent further argues that the decision to charge the applicant was informed by the sufficiency of the evidence on record and the public interest and not any other consideration; that the independence of the prosecutorial office under **Article 157(10)** provides that the office is free from control or direction of any person or authority in the commencement of criminal proceedings and as stated in *Republic –vs- Attorney General ex-parte Ngeny, Misc. CA No.448 of 2003* and *Stanley Munga Githunguri (Supra)*, the Court should exercise extreme care not to interfere with the constitutional power of the Director of Public Prosecution to institute and undertake criminal proceedings and should only interfere with the independent judgment of the Director of Public Prosecution if it is shown that the exercise of such powers is contrary to the Constitution, is in bad faith or amounts to an abuse of process.

Determination

22. In determining the matter before me, I do so bearing in mind certain undisputed facts. The applicant was supposed to receive into her account with Eco Bank, Westminster Branch Kshs 68,384 from Citibank. The bank erroneously credited her account with the sum of **US\$68,384**, the equivalent of about **Kshs 5, 378, 400**. She withdrew the entire amount knowing she was entitled to Kshs 68,384 only. Subsequently, she repaid **Kshs 3, 000,000.00**, leaving a balance of **Kshs 2,078,401.60**. She then issued cheques for this amount, which cheques were dishonoured. It has been alleged by the respondent, and this has not been disputed by the petitioner, that after the cheques were dishonoured, the applicant disappeared, and was arrested on 6th December 2009 and charged in court. The applicant has not to-date made any effort to repay the amount to the bank.

23. The applicant has now approached the court alleging violation of her constitutional rights guaranteed under **article 25(c)** and **50(2)(l)** of the Constitution in her being prosecuted in **Nairobi Chief Magistrate's Criminal Case No 2202 of 2009**, and she asks the court to permanently stay the proceedings. The applicant has alleged that her rights under **Articles 25 (c)** and **50 (1), (2) (a) (i)** of the Constitution have been violated or are threatened with violation. Article **Article 25 (c)** provides that the right to fair trial is one of those right to which Article 24, which allows limitation of rights in certain circumstances, shall not apply. **At article 50**, the Constitution provides that:

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right –

(a) To be presumed innocent until the contrary is proved;

...

(i) To refuse to give self-incriminating evidence.

24. In a matter such as this, the court must ask itself the purpose for and the objects sought to be achieved by the criminal justice system. In the case of **Paul Ng'ang'a Nyaga and 2 Others –vs- Attorney General and 3 Others, Petition No. 518 of 2012**, the court stated as follows:

“[38] There is a clear public interest in ensuring that crime is prosecuted and that a wrongdoer is convicted and punished.”

25. The Court went on to observe that it is generally in the public interest to prosecute a crime where there is sufficient evidence to justify the prosecution unless there is some countervailing reason not to prosecute.

26. In the present case, it is difficult not to marvel at the effrontery of the applicant. She readily admits that she took and used over Kshs 5,000,000 that she knew full well she was not entitled to. She then cinged the fact that she was not entitled to the money, and repaid some of it. She then issued cheques which were dishonoured. Yet she now blames the complainant for **“implanting in an innocent person’s mind the disposition to commit a criminal act,”** and seeks damages for violation of her rights.

27. The applicant’s complaints are basically against the complainant, Citibank, which she makes various allegations against. It is her contention that by accepting part payment of the amount due to it, it was estopped from making a complaint to the police. I have considered the authorities that the applicant relies on to support her case that the prosecution against her should not proceed, among them the celebrated case of **Githunguri -vs- Republic** [supra]. As this court observed in **Petition No 260 of 2013 Dr Andrew Kibet Cheruiyot & Another –vs-The Medical Practitioners & Dentists Board** in finding that the Githunguri case did not assist the petitioners:

[80.]“The decision in Githunguri related to a situation where the offences alleged against the applicant had occurred some nine years before; had been investigated six years before, and a decision communicated to him by the Attorney General that he would not be prosecuted. Four years later, the same office of the Attorney General, who had communicated the decision that no charges would be laid, sought to re-open the matter and prosecute the applicant.”

28. The circumstances of this case are entirely different from the facts in **Githunguri**. The respondent has deponed that a complaint was made to it, and investigations revealed that there was sufficient evidence to prefer criminal charges against the applicant. The applicant complains against Citibank that by representing to her that it had accepted part payment in full and final settlement and that it would not prosecute her, Citibank was estopped from prosecuting her.

29. This submission is based on a misunderstanding or misrepresentation of the law, in my view. The applicant and her Counsel are fully aware of the constitutional provisions with regard to prosecutions. It is the mandate of the Director of Public Prosecutions, if satisfied that there is sufficient evidence, to institute prosecutions. It is not the complainant who decides whether a criminal prosecution should proceed or not.

30. The applicant alleges violation of her rights to fair hearing, including the right to be presumed innocent and against self-incrimination. However, as Majanja J observed in the case of **Total Kenya Limited and 9 Others -vs- Director of Criminal Investigations Department and 3 Others Petition No 478 of 2012** which the applicant sought to distinguish:

[23.]“The petitioners have raised an important question that they aided the investigations that culminated in the on-going criminal matter and that some are in fact potential witnesses in the said matter. In my view, this fact alone does not entitle the petitioners to immunity from

prosecution. The duty of the CID and the DPP is to determine the facts and see whether there is evidence of criminal culpability as a basis for the decision to prosecute. The right against self-incrimination is one of the fundamental rights ingrained especially in our criminal justice system. Indeed, one of the elements of the right to fair trial under Article 50(2)(l) is the right 'to refuse to give self-incriminating evidence.' In this case though, the remedy to such a violation is not to stop the intended prosecution but rather to exclude evidence that is obtained in violation of the prohibition. I think the issue is one to be taken at the trial where the petitioners are entitled to object to specific evidence obtained in contravention of the Constitution." (Emphasis added)

31. I fully agree with the views of Majanja J set out above. It is not for this court to determine whether any evidence sought to be tendered before the trial court is self-incriminatory or not. The applicant has the right to refuse to give any self-incriminatory evidence, or to call for the exclusion of such evidence. It is my view that it would be greatly to undermine the criminal justice system if this court were to arrogate to itself the duty of inquiring into facts and determining whether or not they are sufficient to support a criminal prosecution. In this, I fully agree with and are guided by the words of Warsame J (as he then was) in **Miscellaneous Application No. 68 of 2011 Michael Monari & Anor vs. The Commissioner of Police & 3 Others** where he held that;

"It is not the duty of the court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the Respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment."

32. For the above reasons, I find no merit in the present petition. It is dismissed with costs to the respondent.

33. A copy of this ruling shall be furnished to the court seized of **Nairobi Chief Magistrate's Court Criminal Case No 2202 of 2009** with a view to proceeding with the matter.

Dated Delivered and Signed at Nairobi this 16th day of January 2015

MUMBI NGUGI

JUDGE

Mr. Odera instructed by the firm of Odera Obar & Company Advocates for the Applicant

Ms. Kithikii instructed by the Director of Public Prosecutions for the Respondent