



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MIGORI**  
**PETITION NO. 1 OF 2015**  
**(FORMERLY KISII CR. PETITION NO. 123 OF 2012)**

**BETWEEN**

**JARED OMWOYO OSORO ..... PETITIONER**

**AND**

**DISTRICT CRIMINAL INVESTIGATION**

**OFFICER MIGORI ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 2<sup>ND</sup> RESPONDENT**

**COMMISSIONER OF POLICE ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner is an administration police officer. He seeks the following reliefs in the petition dated 4<sup>th</sup> June 2012;

(a) A declaration that the petitioner's constitutional rights to equal protection of the law, fair hearing and not be subjected to torture (mental or otherwise) and to protection against inhuman and degrading treatment have been grossly violated by the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent.

(b) A declaration that the petitioner is entitled to protection against malicious arrest and prosecution by the 1<sup>st</sup> and 2<sup>nd</sup> respondents using agents of the 3<sup>rd</sup> respondent in pursuit of the 2<sup>nd</sup> respondent's letter dated 17<sup>th</sup> January 2012 for want of proper investigation, bona fide and because of bias.

(c) An order do issue to remove into this honourable court and quash the decision and direction of the 2<sup>nd</sup> respondent to the 1<sup>st</sup> respondent and a declaration that the decision and direction is null and void for want of independence and proper investigations.

(d) Any further orders, writs, directions as this Honourable Court may consider appropriate.

(e) The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents be ordered to bear the costs of this petition.

2. The facts leading up to this petition are set out in the petitioner's deposition filed in support of the petition. He states that on the night of 20<sup>th</sup> and 21<sup>st</sup> August 2011, he was on duty at New Nyanza Provincial Commissioner's officer at Kisumu. Thereafter on 24<sup>th</sup> August 2011, he was on duty at the Family Bank in Kisumu when he was summoned to the 1<sup>st</sup> respondent in Kisumu and told to surrender his Nokia phone which he was alleged to be using. The petitioner contends that he has been using an Ideos phone since July 2011. He was informed that he had been using the Nokia phone which was said to be the property of JA who had been shot three times at his residence in Migori. His sim card was taken and he was ordered to record a statement. The petitioner avers that after a lapse of 2 months, he was given back his sim card without being charged or arrested. The petitioner avers that since then he has been subjected to threats and harassment which have fuelled a sense of insecurity not only by him but also by his family forcing him to apply for leave.

3. In the meantime, the Office of the Director of Public Prosecution ("DPP") by a letter dated 17<sup>th</sup> January 2012, wrote to the 1<sup>st</sup> respondent to proceed and arrest, amongst others, the petitioner and prefer charges of capital robbery against him under **section 296(2) of the Penal Code (Chapter 63 of the Laws of Kenya)** and consolidate it with an ongoing robbery case.

4. It is worth noting that the said letter was the second letter written to 1<sup>st</sup> respondent on the subject as a previous letter did not recommend the petitioner's prosecution. In the letter dated 17<sup>th</sup> January 2012, the 2<sup>nd</sup> respondent stated that, "*I personally perused the witness statements and am satisfied there is overwhelming evidence against the accused person herein and other suspects yet to be arrested.*" The petitioner was one of the suspects identified in the letter.

5. The petitioner complains that he was not arrested and charged but instead the 1<sup>st</sup> respondent's agents have been using the letter of 17<sup>th</sup> January 2012 to threaten and harass him. He avers that the threats to arrest and prosecute him are malicious and that they violate his constitutional rights. The petitioner contends that there is lack of sufficient evidence to prosecute him and that he cannot be fairly prosecuted in the circumstances.

6. Mr Sagwe, counsel for the petitioner, supplemented his oral arguments with written submissions. He submitted that the petitioner has been subjected to harassment and that the misuse of state apparatus, if not checked, will lead to malicious prosecution of the petitioner. He maintained that the High Court has power to stop a prosecution that amounts to an abuse of the power to prosecute granted to the Director of Public Prosecution under **Article 157** of the Constitution. He cited several authorities among them *Karua v Radio Africa Limited t/a Kiss FM Station and Others* [2006] 2 EA, *Joseph Mwenda Mbuko v Provincial Police Officer & Others* EMBU Pet. No. 5 of 2011 (UR) and *Jacinta Wanjiru Kamau v DCIO, Kisii County and Another* KSI Pet. No. 42 of 2012 (UR).

7. Although the respondents did not file replying affidavits, I permitted Ms Owenga, counsel for the 2<sup>nd</sup> respondent, to make submissions limited to issues of law. She submitted that the issue whether or not there is sufficient evidence to prosecute the petitioner was a decision vested in the DPP. She added that should the DPP decide to launch the prosecution then it is for the court to decide the case on its own merits. She submitted that no letter of comfort had been written to the petitioner to assure him that he would not be prosecuted. She urged the court to dismiss the petition.

8. The main issue for determination in this matter is whether I should quash the decision of the 2<sup>nd</sup> respondent directing the 1<sup>st</sup> respondent to arrest and charge the petitioner as directed in the letter dated 17<sup>th</sup> January 2012.

9. I understood the petitioner to argue that there was insufficient evidence to prosecute him and that the learned prosecuting counsel could not reverse his decision and issue the directive contained in the letter dated 17<sup>th</sup> January 2012. Unfortunately the earlier letter which seems to have advised against prosecuting the petitioner was not produced in court. In the circumstances I cannot

suppose or speculate what was stated therein. The letter dated 17<sup>th</sup> January 2012, whose contents I have set out, was advice and direction given to the 1<sup>st</sup> respondent based on studying the witness statements which are were not provided to the court.

10. For the reasons I have stated above I am unable to draw the conclusions which the petitioner does to support his case. The contentious letter was written to the 1<sup>st</sup> respondent as a directive. It was not written to the petitioner and neither was the earlier letter. It cannot be said that the petitioner was given any comfort that he would not be prosecuted. As the first letter was not produced in court, I am unable to conclusively determine the reasons for the first decision not to prosecute the petitioner. I reject the suggestion by Mr Sagwe that the Office of the DPP cannot change its decision not to prosecute the petitioner after reviewing the evidence or receiving fresh evidence to support the decision.

11. This brings me to the nature and extent of the prosecutorial powers vested in the DPP. The State's prosecutorial powers are vested in the DPP under **Article 157** of the Constitution, the pertinent part which provides as follows;

*(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.*

14. The decision to institute criminal proceedings by the DPP is discretionary. Such exercise of power is not subject to the direction or control by any authority as **Article 157(10)** stipulates that;

*(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.*

15. These provisions are also replicated under **section 6** of the **Office of the Director of Public Prosecutions Act, No. 2 of 2013** in the following terms;

*6. Pursuant to Article 157(10) of the Constitution, the Director shall—*

*(a) not require the consent of any person or authority for the commencement of criminal proceedings;*

*(b) not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law; and*

*(c) be subject only to the Constitution and the law.*

16. In the case of **Githunguri v Republic [1986] KLR 1,100**, the Court observed as follows, regarding the Attorney General's powers to institute proceedings under the former Constitution;

*The Attorney-General in Kenya by section 26 of the Constitution is given unfettered discretion to institute and undertake criminal proceedings against any person "in any case in which he considers it desirable so to do."...this discretion should be exercised in a quasi-judicial way. That is, it should not be exercised arbitrarily, oppressively or contrary to public policy.... [Emphasis added].*

17. The discretionary power vested in the DPP is not an open cheque and such discretion must be

exercised within the four corners of the Constitution. It must be exercised reasonably, within the law and in accordance to the rules of justice. Such discretion must also be exercised to promote the policies and objects of the enabling law. The office of the DPP must also be guided by the fundamental guiding principles as set forth under **section 4** of the **Office of the Director of Public Prosecutions Act**, which are, the diversity of the people of Kenya, impartiality and gender equity, the rules of natural justice, promotion of public confidence in the integrity of the Office, the need to discharge the functions of the Office on behalf of the people of Kenya, the need to serve the cause of justice, prevent abuse of the legal process and public interest, protection of the sovereignty of the people, secure the observance of democratic values and principles and promotion of constitutionalism.

18. Typical instances where the court may intervene is where it is shown that the impugned criminal proceedings are instituted for other means other than the honest enforcement of criminal law, or are otherwise an abuse of the court process. As the Kuloba J., observed in **Vincent Kibiego Saina v Attorney General, High Court Misc Civil Appl. No. 839 of 1999 (UR)** that,

*If a criminal prosecution is seen as amounting to an abuse of the process of the court the court will interfere and stop it. This power to prevent such prosecutions is of great constitutional importance. It has never been doubted. It is jealously preserved. It is readily used, and if there are circumstances of abuse of the process of court the court will unhesitatingly step in to stop it.*

19. In this instance, I cannot say that the petitioner has proved that the 2<sup>nd</sup> respondent has acted contrary to the principles I have laid out. Furthermore, the petitioner has not been subjected to ‘cruel, inhuman or degrading treatment’. In the case of **Hon. James Ondicho Gesami v The Hon. Attorney General & 2 Others NBI Petition No. 376 of 2011 [2012]eKLR** the Court stated,

*[72] The terms ‘cruel, inhuman and degrading treatment’ have acquired a specific meaning in law. They have also been judicially considered in our courts-see for instance the decision of the court in **Republic v Minister for Home Affairs and Others ex parte Sitamze Nairobi HCCC NO. 1652 OF 2004 [2008] 2 EA 323 and Dennis Mogamb iMong’are v The Attorney General & Others Petition No. 146 of 2011.** They do not refer to general discomfort or inconvenience arising out of the application of the ordinary legal process. In the case of **Republic v Minister for Home Affairs and Others ex parte Sitamze Nairobi (supra)** Justice Nyamu noted that “Inhuman treatment” is physical or mental cruelty so severe that it endangers life or health. It is an intentional act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.’*

20. I accept that the respondent did not file a replying affidavit to controvert the petitioner’s case but that alone is not the end of the case. It only means that the facts as pleaded by the petitioner are accepted as true but it does not automatically mean that the petitioner is entitled to relief. The court must test the allegations to see whether they meet the legal threshold for the grant of relief. In this case, I have come to the conclusion that the petitioner has not established that he is entitled to relief.

21. Although I have dismissed the petition, I understand the petitioner’s anxiety in relation to the decision to charge and prosecute him. I hope the Office of the DPP moves with speed to review the matter and make the decision whether or not to charge the petitioner.

22. The petition is dismissed but with no order as to costs.

**DATED and DELIVERED at MIGORI this 23<sup>rd</sup> day March 2015.**

**D.S. MAJANJA**

**JUDGE**

Mr Sagwe, instructed by S. M. Sagwe and Company Advocates for the petitioner.

Ms Owenga, Principal Prosecution Counsel, instructed by the Director of Public Prosecutions for respondents.