REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO 137 OF 2015

JOHN NJENGA KAMAU ……..……..…PETITIONER

VERSUS

THE HON ATTORNEY GENERAL ……..……...1ST RESPONDENT

THE HON. E CHERONO SPM ……..2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS ……....3RD RESPONDENT

RULING

Introduction

1. The applicant/petitioner, John Njenga Kamau, has filed the present petition and an application dated 10th April 2015 in which he seeks the following substantive orders:

   (a)….

   (b) All proceedings respecting Nairobi Chief Magistrate Court Criminal Case No. 225 of 2010 be stayed pending the inter parte hearing of this application.

   (c) All proceedings relating to Nairobi Chief Magistrate Criminal Case No. 225 of 2010 be stayed pending the hearing and determination of the petition filed herein.

   (d) The cost of and incidental to this application be provided for.

Factual Background

2. Sometime in the year 2010, the applicant was charged with the offence of obtaining money by false pretences contrary to Section 313 of the Penal Code in Nairobi Chief Magistrate's Court Criminal Case No 225 of 2010. The criminal case is now pending judgment before the 2nd respondent. The petitioner is aggrieved by the manner in which the trial was conducted and seeks the above orders to restrain delivery of the judgment pending hearing of his petition.

The Applicant's Case

3. The applicant's case is contained in his application dated 10th April, 2015 supported by his affidavit sworn on the same day and his further affidavit sworn on 27th April, 2015.

4. In his affidavit in support of the application, the applicant deposes that the complainant in the criminal case he is facing is one Harun Arden Kipchumba Ago Kenei (a Kalenjin by tribe) who reported the case to Central Police Station, Nairobi and the case was assigned to one, P.C Joshua Chelimo (a Kalemjin by tribe), No. 67136 after which the same was prosecuted by one, Mr. Chemweno (a Kalenjin by tribe) before the Honourable E. Cherono and the custodian of the file at the criminal registry being one, Mr. Kipyegon. He therefore contends that there is a conspiracy to take him through a court process whose conclusion is predetermined and thereby deny him his rights and fundamental freedoms guaranteed by the Constitution.

5. He alleges, further, that the trial Court presided over by Hon. E. Cherono has demonstrated open bias against him as it declined to give him an opportunity to make submissions at the close of the prosecution's case and proceeded to call upon him to present his defence. It is also his averment that on 18th March 2015, the trial Magistrate accused him of having taken advantage of the confusion at the registry on the 13th March, 2015 after he returned home when it became obvious that his file was not called out.

6. He deposes further that on 7th April, 2015, the trial Magistrate refused to grant an adjournment to enable his advocate, Mr. Peter Kariuki, to attend court to help him adduce his defence and proceeded to close his case without affording him an opportunity to be heard. According to the applicant, the trial magistrate, while closing the defence case, remarked that he was going to make his judgment and the applicant could thereafter appeal. The applicant argues that this was an indication that the verdict in the case was already predetermined; and that the remarks were a manifestation that the trial process that he underwent was a mere farce and a violation of his right to a fair hearing.

7. In response to the respondents' affidavit in reply, the applicant filed an affidavit in which he denied that he deliberately delayed the hearing of the criminal matter. He averred that the delays were occasioned by both the court and the prosecution, that a perusal of the court record shows that the court on its own motion occasioned seven adjournments while the prosecution was responsible for nine adjournments. He states that he was responsible for six. He also alleged that following the transfer of the previous magistrate, he had not exercised his right to ask for the matter to proceed de novo as he wanted it to be concluded quickly.

8. In his submissions before the court, the applicant reiterated the contents of his affidavit. He submitted that he was placed on his defence in the criminal case on 30th of May 2014 but his right to a fair trial were violated as he was not given a right to submit after the prosecution closed its case, which he alleged he was entitled to in accordance with section 210 of the Criminal Procedure Code, but which right the trial court did not explain to him. He alleged that he appealed to the High Court on this point, but the High Court ruled that he could not appeal on this point unless there is a conviction or appeal. He did not avail a copy of this ruling to the Court.

9. The applicant submitted further that on 9th July 2014, his Counsel, Mr. Mbiyu Kamau, asked for an adjournment of the matter. The petitioner alleges that there was a letter on the record from the High Court requesting for the trial court's file. The petitioner alleges that the letter, which he did not place before this court, was ignored, and they were given a date for hearing on 26th September 2014. The file was not, however, available on 26th September 2014, and the matter was rescheduled to the 2nd of December 2014 for hearing.

10. The applicant submitted that on 2nd December 2012, because of what he alleges transpired on 26th September 2014, his Advocate, Mr. Mbiyu Kamau, decided not to act for him, and he was compelled to appoint another lawyer. The Court granted him an adjournment to the 12th of March 2015 but marked the said adjournment as the last adjournment. The applicant states that the defence hearing did not proceed on 12th March 2015 because of the failure of the Registry, but that the file resurfaced in the evening and was fixed for hearing on 18th March 2015 when the

hearing was set for 7th April 2015. Both the applicant and his Counsel, according to the applicant, were present when the matter was fixed for hearing on 7th April 2015.

11. With regard to the events of 7th April 2015, the applicant states that he was in court but his lawyer was before Odunga J in Judicial Review No. 105 of 2012. He claims that at 12.05 p.m, the Magistrate insisted that he should present his case without his lawyer, which the applicant alleges violated his rights under Article 50 of the Constitution as he was not given adequate time to prepare his defence. The trial court placed the file for judgment on 29th April 2015. He also reiterated his averments that the court was biased against him and that he would not get fairness, and he asked the court to grant the prayers that he was seeking.

The 1st and 2nd Respondents' Case

12. Ms. Wawira for the 1st and 2nd respondent submitted that the present petition and the application are an abuse of the Court process as the applicant has a remedy under the Criminal Procedure Code; and that he also has a right of appeal or revision. What he was seeking to do was to pre-empt the judgment of the trial court. or buy more time and in the process abuse the court process.

13. With respect to the applicant's contention that he had a right to submit after the close of the prosecution's case under section 210, Ms. Wawira submitted that the section is not relevant as it deals with acquittal. It was her submission, however, that the trial court's record does not show that the applicant requested to submit and was denied a chance to do so. It was her submission that the applicant was not telling the court the truth and this application is an afterthought.

14. Counsel also observed that the applicant had not produced the letter alleged to have been sent by the High Court requesting for the court file; that the petitioner had conceded that on 2nd December, 2014, he was granted a final adjournment and should have taken the sentiments of the court seriously and prepared for his defence; that the court record indicates that on 7th April 2015, the applicant did not indicate that his advocate was in the High Court or that he was held up in another matter; and she asked the Court to dismiss the application.

The 3rd Respondent's Case

15. The DPP's case is contained in his replying affidavit sworn by Mr. Gitonga Murang'a. It was presented by Ms. Spira.

16. In his affidavit, Mr. Murang'a avers that the Court record indicates that the plea in the applicant's case was taken on 3rd March, 2010 and the prosecution closed its case on 16th May, 2014. He states that the defence case was to proceed from 9th July, 2014 but did not as the defence kept giving excuses which can be best illustrated from the court record. Mr. Murang'a maintains that the applicant was given a fair hearing in terms of Article 50 of the Constitution and had been accorded sufficient time to prepare his defence.

17. Mr. Murang'a termed the allegations against the integrity of the trial process from the court to the prosecutors an attempt by the applicant to delay a finding of the court as to his culpability to the charge he is facing. It was his deposition that if the applicant is aggrieved by the judgment of the trial court, the appropriate remedy is to appeal or seek a revision of the decision from the trial court or High Court,

18. In her submissions, Ms. Spira, while associating herself with the submissions made on behalf of the 1st and 2nd respondents, observed that the applicant was alleging a conspiracy against him in the composition of the parties involved in the trial on the basis that they are members of one ethnic group. She submitted that the court record will show that there is nothing sinister as the matter was handled by different prosecutors from the time the plea was taken on 3rd March 2010 to the time

the prosecution closed its case on 16th May 2014. It was also her submission that the names of the parties did not necessarily indicate that they are from one ethnic group. Ms. Spira argued that the applicant was only trying to delay the case, and his allegations were baseless and an abuse of the Court process.

19. Ms. Spira submitted further that the defence case actually started from 9th July 2014 but did not proceed as the petitioner was unable to proceed on various dates having given several excuses which are illustrated by the trial court's record. She asked that the application be dismissed.

Determination

20. The issue for determination in this matter is whether the Court should issue an order which, in effect, stays the delivery of the judgment by the trial court in Nairobi Chief Magistrate Criminal Case No 225 of 2010 pending the hearing and determination of the present petition. The applicant's reasons for seeking these orders are three-fold: that his right to a fair trial was violated as he was not given an opportunity to submit at the close of the prosecution case in May 2014; that the trial court did not afford him an adequate opportunity to prepare his defence and closed his case on 7th April, 2015; and that the trial court and the entire proceedings were biased against him as the trial magistrate, the prosecutor and the complainant are from one ethnic group. I will address these three issues with reference to the record of proceedings before the trial court.

21. I note from the record that on 17th January 2014, the criminal case against the applicant came up before Hon. Cherono, with a Mr. Kazungu as the prosecutor. The court observed that the matter was part heard and explained to the applicant his rights under section 200 of the Criminal Procedure Code. The applicant elected to proceed with the evidence that was on record. He also stated that he had a lawyer but was ready to proceed, the absence of his lawyer notwithstanding. The matter proceeded on that day and on the 27th of February and 16th of May 2014 when the prosecutor, Mr. Kazungu, closed the prosecution case. The record indicates that the trial magistrate then gave the 30th of March 2014 as the date of the ruling, but in view of the fact that the date the prosecution closed its case was 16th of May 2014, it can be assumed that this was a typographical error. On 30th May 2014, the trial court found that the accused had a case to answer and placed him on his defence, noting that section 211 of the Criminal Procedure Code had been complied with.

22. The applicant argues that he had a right to submit before the Magistrate rendered his decision on whether or not he had a case to answer. He cited section 210 of the Criminal Procedure Code in this regard. I have considered the provisions of section 210, as well as section 211 which the trial magistrate referred to in his ruling of 30th May 2014. They are in the following terms:

> ***210. If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.***
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> ***211. (1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).***

23. I note from the record that neither the applicant nor the prosecution made any submissions in respect of the prosecution case at that point. There is also no indication that the applicant requested to make any submissions and was denied a chance to do so. Indeed, at no time subsequent to that date, until he filed the present petition on April 10 2015, did the applicant raise the issue of submissions at the close of the prosecution case.

24. I am inclined to agree with the respondents that this argument is therefore an afterthought, and further, no prejudice was suffered as a result of the fact that he did not make any submissions at that stage. His rights with respect to his defence were explained to him on 30th May 2014, and he elected to give sworn testimony and to call no witnesses. I am not satisfied therefore that there was any denial of the right to a hearing in this respect.

25. The second limb of the applicant's case revolves around the alleged denial of the right to adequately prepare his evidence. As already noted, he elected on 30th May 2014 to give sworn testimony, and the hearing was scheduled for the 9th of July 2014. On this day, a Mr. Mbiyu came and asked to place himself on record for the applicant. He also sought, and was granted, an adjournment to familiarize himself with the case. The defence hearing was scheduled for 26th September 2014.

26. The court record indicates that the matter was next in court on 10th October 2014 when the trial court noted that the matter was scheduled for hearing on 26th September 2014 but did not proceed as it was said to have been recalled by the High Court. It was then rescheduled for hearing on 2nd December 2014.

27. On that day, the applicant indicated that his Counsel wished to have his matter placed aside for a few minutes, and the court acceded to the request. At 10.00 a.m., a Mr. Kariuki came and asked to be placed on record for the accused. The court again acceded and placed Mr. Kariuki on record. It also granted an adjournment, but indicated that that would be the last adjournment that the accused would be granted.

28. The matter was then fixed for hearing on 12th March 2015. It appears that on that date it was placed before another court, but was mentioned before the proper court the following day when the magistrate directed that it be mentioned on 18th March 2014. On that date, Mr. Kariuki appeared for the applicant and the trial court observed that there was confusion on 12th of March 2015, and set a hearing date for 7th April 2015 in the presence of both the applicant and his advocate.

29. When the matter came up for hearing on 7th April 2015, the applicant indicated that he was ready to proceed, but was waiting for his lawyer. The matter was then set for hearing at 11.00 a.m., when the applicant indicated that his lawyer had not yet arrived, and asked for more time, like 30 minutes. Again, the court acceded to the request and scheduled the matter for hearing at 12.00 p.m.

30. The lawyer had still not turned up by 12.05 p.m., and the applicant asked for another date. This was opposed by the prosecution, and the applicant demanded that he should be given time, or the court should recuse itself. Upon the court rejecting the applications for an adjournment or its recusal, the applicant stated that he had no defence to offer, and the court then indicated that the defence case was closed.

31. It is against this background that the applicant alleges that his right to adequately prepare his defence has been violated.

32. I must observe that justice cuts both ways, and the rights of one person must be balanced against those of others. In this case, as the summary from the court record set out above indicates, the

applicant was given more than adequate time to prepare and present his defence. From the 30th of May 2014 when he was put on his defence, to the 7th of April 2015 when he once again sought to postpone presenting his defence, a period of close to a year had elapsed. On at least two occasions, on 9th July 2014 and again on 2nd December 2014, he was granted adjournments to enable two different advocates come on record.

33. The explanation that he sought to give at the hearing of this matter before me, that his Counsel was engaged in a matter before the High Court, is not borne out by the record. In fact, at no point did he even mention to the trial court that his lawyer was engaged in a matter before the High Court.

34. In my view, the trial court accommodated the applicant in every respect. I note in particular the proceedings of the 7th of April 2015 when the trial court acceded twice, when the matter was first called out, and again at 11.00 a.m., to wait for the applicant's advocate. In my view, the allegation that he was denied an opportunity to prepare and present his defence was without merit. I can therefore find no violation or threat of violation of the petitioner's right to a hearing with respect to the time to prepare and present his defence.

35. The third and last argument raised by the applicant is that the entire trial process was biased against him as the prosecutor, the magistrate and the complainant are of the same ethnic group. My perusal of the record does not bear this out. I note that the prosecution case was presented and closed by a prosecutor known as I.C Kazungu. If we are to go by the ethnic profiling on the basis of one's name that the applicant uses, then he was prosecuted by a person who probably hails from the Coast province.

36. The court notes further that there was also a Mr. Mwita for the prosecution, as well as Mr. Chemweno who was dealing with the matter from the 2nd of December 2014. At the start of the case, there was a prosecutor called Ouma, as well as a Wanjohi; a magistrate called Ngenye-Macharia, who heard the matter substantively between 2010 and 2012 when the applicant elected to have the matter start de novo on 30th October 2012 when it came up before Hon. E. Nduva.

37. In my view, the allegation that a court is biased against a party on the basis of ethnicity is quite unfortunate. It would render any work in our courts impossible, for there will always be instances where a party, Counsel for the defence or prosecution, and the court may be of different, or the same, ethnic origins given the diversity of the people of Kenya. I note from the record that there were times when the court, accused and prosecutor were also from the same ethnic group, if the names could be taken as the indicator of ethnicity. The petitioner's argument is one that this court will not lend credence to. No basis for the alleged bias has been shown, and the court record does not bear it out. It is, in my view, an unfortunate and baseless allegation.

38. Finally, the applicant's contention that his rights will be violated if the judgment scheduled for 29th April 2015 is read is misconceived, for two reasons. First, he has a clear remedy by way of appeal or revision under the Criminal Procedure Code. This court would be setting a very dangerous precedent were it to find that it can stop a court of competent jurisdiction from delivering its judgments on the accusation by a party that it has breached his or her constitutional rights. As the court observed in the case of **Maharaj -v- Attorney General of Trinidad and Tobago** (**No. 2) [1978] ALL ER 670 at 679, [1979] AC 385 at 399:**

> **'…..no human right or fundamental freedom…… is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say that there was error.'**

39. The applicant has a right of appeal against the decision of the trial court should it find him guilty

of the offences charged. I can find no basis for interfering with the process before the trial court at this stage. The application dated 10th April 2015 is therefore dismissed. The costs thereof shall await the outcome of the petition should the applicant still wish to proceed with it.

Dated, Delivered and Signed at Nairobi this 28th day of April 2015

MUMBI NGUGI

JUDGE

Mr. John Njenga Kamau, petitioner in person

Ms. Wawira instructed by the State Law Office for the 1st and 2nd respondent

Ms. Spira for the Director of Public Prosecutions