



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

MISC. CRIMINAL APPLICATION NO.39 OF 2014

JOASH AREBA NYOKWOYO

RHODA KWAMBOKA NYOKWOYO.....APPLICANTS

LINET KEMUNTO AREGA

VERSUS

HON. ATTORNEY GENERAL

CABINET SECRETARY,

MINISTRY OF INTERNAL SECURITY & ADMINISTRATION

INSPECTOR GENERAL OF POLICE.....RESPONDENTS

OCPD NYAMIRA DISTRICT

MARGARET SAGINI (ASS. CHIEF)

RULING

By a Notice of Motion under **Section 66, 69, 88(1)** of the **Criminal Procedure Code** as read with **Section 169** of the **Penal Code**, the Applicants herein moved the court for orders that:-

- 1. The Honourable Court be pleased to issue an order directing the Respondents to arrest the said Assistant Chief one Margaret Sagini and charge her before the court of competent jurisdiction for an offence of Assault and or grievous harm as provided in the **Penal Code Cap 63 Laws of Kenya**.*
- 2. The Honourable Court be pleased to issue any other directions to effectuate justice to the Applicants.*

The Application was supported by the annexed affidavit of Rhoda Kwamboka Nyokwoyo in which she deponed on her own behalf and on behalf of the other applicants that on 8<sup>th</sup> day of January 2014 at about 3 O'clock in the morning she heard screams from her son's house and when she went outside she saw the Assistant Chief the 4<sup>th</sup> respondent with other people assaulting her son and his wife and when she moved closer she was dragged into the scene and beaten using whip as a result of which they sustained injuries and left dying.

The applicants later on proceeded for treatment and were issued with P3 forms upon reporting to the police station but to date the said Assistant Chief has not been arrested and or charged in court. The applicants therefore seeks court order of arrest of the respondent and charge her in a court of law since she has been denied justice by the OCS by refusing to issue an order to arrest the 5<sup>th</sup> respondent.

The respondents did not file any reply to the application herein but at the hearing Mr. Majale submitted that **Article 157** gives the DPP Powers to prosecute and that the evidence availed does not warrant prosecution. In reply thereto Mr. Sagwe submitted that the DPP had violated **Article 47** right to fair Administration Act and that there is an abuse of power.

The office of DPP is established under **Article 157** of the **Constitution** and the powers thereof are set out as follows:-

**“157(4) The Director of Public Prosecution shall have powers to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector General shall comply with any such direction.**

**(6) The Director of Public Prosecution 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;**

**(10) The Director of Public Prosecution shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his powers or functions shall not be under the director or control of any person or authority (Emphasis added)**

**(11) In exercising the powers conferred by this Article the Director of Public Prosecution shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the Legal process.”**

**Section 6** of the **Office of Director of Public Prosecutions Act No.2 of 2012** states as follows:-

**a. Pursuant to Article 157(10) of the Constitution the Director shall not require the consent of any person or authority for the commencement of a criminal proceedings;**

**b. Not be under direction or control of any person or authority in the exercise of his/her powers or function under the Constitution or any other written Law; and**

**c. be subject only to the constitution and the Law.**

From the reading of the constitution and the statute establishing the office of DPP, it is clear that this court cannot direct or interfere with the exercise of the mandate of the respondents herein unless it is established that he has:-

*i. acted without due regard to public interest;*

*ii. he has acted against the interest of Administration of Justice.*

and as was stated in the case of **R -vs- A.G exparte Ngeny Misc. CA No.448 of 2013** courts should exercise extreme care not to interfere with the constitutional powers of DPP to institute and undertake criminal proceedings.

The petitioners have not shown this court what will happen once the orders sought are granted and since

courts do not act in vain I find no merit in the application herein as to allow the same would amount to the court giving direction to the DPP which is contrary to the constitution.

However this does not affect the rights of the application under **Section 88** and **89** of the **CPC** should they decide to make an appropriate application before the magistrate's court.

In the final analysis the application dated 25<sup>th</sup> March 2014 is hereby dismissed.

**Delivered, signed and dated on this 28<sup>th</sup> day of May 2015.**

**J. WAKIAGA**

**JUDGE.**

In the presence of:

Mr. Sagwe for the Applicants

Miss. Boyon for Respondents