



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

PETITION No. 6 OF 2015

COLLINS MAKOKHA.....1ST PETITIONER

FELIX MBUVI.....2ND PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE INSPECTOR-GENERAL OF POLICE.....2ND RESPONDENT

R U L I N G

1. The application before this court is the amended Notice of Motion dated 20th March 2015 and filed on the same day seeking several orders as outlined in the application:

a. An order of prohibition do issue and directed at the respondents and prohibiting the respondents from pressing for or prosecuting the petitioners with any imagined offences relating to the death of Stella Otieno;

b. An order of mandamus do issue and directed at the respondents and compelling them to reveal to the petitioners the details of the possible charges with all the facts and pieces of evidence that they intend to use in prosecuting them in compliance with the provisions of the constitution;

c. An order of mandamus compelling the respondent to bring to court the statements, inquiries and findings of the investigation reports to determine the basis of altering the finding that an inquest be opened to determine circumstances under which the said Stella Otieno died and circumstances that led to the change from inquest to manslaughter and later murder;

d. A declaration that the respondent is in breach of Articles 27, 35(2) 47,50,157 and 236 of the Constitution in the manner it has handled and treated the petitioners and that for such violations their actions are null and void to the extent of the violations;

e. A declaration that the respondents action lies against the constitutional mandate granted to the respondent and hence against the spirit and letter of the constitution and amount to abuse of the court process;

f. An order of certiorari quashing the recommendation to the 2nd respondent to charge the

peritoneums with the offences of murder or manslaughter;

g. Damages for violation and infringement of the petitioners rights under the constitution;

h. costs of the petition be borne by the respondents.

Applicants' Case

2. The application is supported by the affidavit of Felix Mbuvi, the 2nd petitioner herein, sworn on 20th March 2015. According to the applicants, their rights guaranteed under Articles 27,43,47 and 50 of the Constitution are likely to be breached if this Honourable Court does not intervene.

3. The background of this case, according to them is as follows: On 30th January 2013 at around 9:50pm, Linus Okwaro was driving motor vehicle registration No. KBR 280 Toyota Premio in the company of his friend Partick Wayiera. When they got to the home of Linus, he got out of the vehicle and went to unlock the gate. Mr. Mbuvi deponed that at that moment, armed thugs appeared and attacked Linus robbing him of his mobile phone, cash money and his wallet. On seeing what had transpired, Patrick drove off at high speed and went to the house of his girlfriend Stella Otieno(deceased). The thugs ran away and Linus went to Kondele Police Station to report the incidence thinking that his friend Patrick had been car jacked.

4. Mr. Mbuvi deposed further that on making the report, a signal and dispatch was sent to the applicants who were then policemen attached to the rapid response unit at Kondele Police Station. Their instructions were to immediately but cautiously proceed to the scene of crime as the robbers were armed and dangerous. That in the meantime, Patrick together with Stella decided to go back and check on Linus. The applicants spotted a vehicle approaching and it matched the description of the motor vehicle reported by Linus to have been stolen. According to the applicants, they approached the vehicle and on being ordered to stop, the driver sped off. The applicants followed the vehicle while shooting in the air and due to the high speed that the motor vehicle was being driven, it veered off the road and landed into a ditch. Patrick was injured in the accident whereas Stella lost her life.

5. That following the demise of Stella a file was opened at the Criminal Investigations Department to inquire and the same was sent to the 1st respondent in Nairobi for directions. Mr. Mbuvi deposed further that upon perusal of the file, the 1st respondent recommended that the applicants be charged with the offence of manslaughter contrary to the CID officers who had recommended that an inquest be opened. The file was again forwarded to the 1st respondent for further directions and via a letter dated 11th November 2014, the 1st respondent recommended that the applicants be charged with the offence of murder. It was the directive by the 1st respondent that the applicants be charged with the offence of the murder of Stella Otieno that provoked the institution of the petition herein.

6. It is the applicants' case that once they are charged with the offence of murder, they are likely to be held in remand cells together with other suspects whom they have previously assisted in locking up thus endangering their lives. That their rights to a fair administrative action and fair trial shall be in jeopardy as the charge is not meant to prove the charge of murder but to punish them. It is their view that the 1st respondent in exercise of its powers is bound by Article 10 and 157 of the Constitution. That according to Article 157(11) of the Constitution, the 1st Respondent in exercise of its powers, should have regard to public interest, interest of the administration of justice and the need to prevent and avoid abuse of the legal process. That in pushing them to court, the 1st respondent will be violating Article 157(11) which requires him to have regard to administration of justice. Further that their right to be informed of the charge and the evidence that the prosecution intends to rely on as guaranteed under Article 50(2)b and j of the Constitution have been violated. Further that unless the conservatory orders are granted, they will be charged in court and as such the substratum of the entire petition shall have been lost.

Respondents' case

7. In response to the application, the respondents filed a replying affidavit sworn by **Douglas N. Ogoti**, an

Assistant Director of Public Prosecutions in charge of Kisumu County.

8. According to him, the 1st respondent is constitutionally empowered under Article 157(6) of the Constitution to institute and undertake criminal proceedings against any person before any court of any offence alleged to have been committed. That in exercise of this power, the 1st respondent is guided by the principles set out in section 4 of the Office of the Director of public Prosecutions Act and section 23 of the Act further empowers the 1st respondent to decide to prosecute or not to prosecute in relation to an offence.

9. Mr. Ogoti deponed that the 1st respondent received a letter from the Director of Criminal Investigations(DCI) for advice and directions in relation to the applicants herein. That after a perusal of the forwarded file, the 1st respondent realised that there was a requirement for clarity in certain aspects of the investigations. That he wrote to the DCI requiring such clarifications. After submission of the requested information and after review of the evidence adduced the 1st respondent recommended that the applicants be charged with the offence of manslaughter. Mr. Ogoti stated further that before charges could be preferred, the 1st respondent received another letter dated 16th July 2014 from the DCI re-submitting the file for re-evaluation and advice on the basis of new evidence that had been discovered.

10. Upon review of the evidence, the 1st respondent recommended vide his letter of 11th November 2014 that the applicants be charged with the offence of murder.

11. According to the deponent, 1st respondent issued the said directive based on the evidence placed before him, independently and devoid of any control or direction from any quarter. He further deponed that the applicants have not demonstrated that the respondents acted in excess of their jurisdiction or departed from the rules of natural justice. That the 1st respondent exercised his power under section 157(10) in adherence to Article 157(11). Mr. Ogoti further stated that the accuracy and correctness of the evidence or facts gathered in an investigations can only be assessed and tested by a trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered and properly adduced in support of the charges.

12. It was contended that Artcles 27 and 50 of the Constitution are inapplicable herein as the applicants have not demonstrated how they have been discriminated and the Article 50 applies in regard to an accused person at trial. To Mr. Ogoti, the applicants further affidavit in support of the application and petition is riddled with a lot of misinformation concerning the cause of death of the deceased and the real cause can only be ascertained during trial.

Counsel Submissions

13. Both parties filed written submissions. It was submitted for the applicants that the 1st respondent departed from the rules of natural justice by directing that the applicants be charged with the offence of murder without reviewing and analysing the evidence in the investigations file. Counsel was of the view that an inquest into the death of Stella ought to have been conducted to establish the circumstances leading to her death. It was submitted that just like other citizens, the applicants are entitled to protection by the law and they are entitled to rights enshrined under Article 27, 47, 35(2) and 50 of the Constitution. It was Counsel's main argument that the 1st respondent directive was mainly wrapped in malice and discrimination and its sole purpose was to punish the applicants for doing their job.

14. Counsel cited several authorities in support of his argument which I humbly take note of. One such is the case of **REPUBLIC VS. DIRECTOR OF PUBLIC PROSECUTIONS & 3 OTHERS EX-PARTE MILDRED MBUYA MULI [2015] eKLR** where **G.V ODUNGA J** made reference to the case of **REPUBLIC VS. CHIEF MAGISTRATE'S COURT AT MOMBASA EX-PARTE GANIJEE & ANOTHER [2002] 2KLR 703** where the court stated thus:

No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose....if a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and

or certiorari will issue and go forth...For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over awe the respondent by brandishing at him the sword of punishment there under, such an object is unworthy to say the least and cannot be countenanced by the court.

15. The respondents also filed written submissions. They reiterated the contents of their replying affidavit and further submitted that the applicants have failed to demonstrate how their rights under Articles 27, 47 and 50 as alleged have been infringed which is a requirement in a claim for an infringement of a fundamental right or freedom. They relied on the case of **ANNARITA KARIMI NJERU VS. REP [1979] KLR 154** wherein the court held that a person alleging a contravention of a constitutional right must set out the right infringed upon and the particulars of such infringement or threat.

16. It was submitted further that though the DCI recommended that an inquest file be opened the 1st respondent was not bound by such a recommendation. Counsel argued that the 1st respondent is mandated under **Article 157(10)** of the **Constitution** and **Section 23** of the **Office of the Director of Public Prosecution** to make independent decisions whether to prosecute or not after evaluation of the evidence and that is exactly what the 1st respondent did.

17. Counsel finalised by submitting that Judicial review orders as sought by the applicants only concern the decision making process and not the merits of the decision made by the body or person in question. It was the duty of the applicants to demonstrate that the decision was tainted with illegality, irrationality and procedural impropriety. Counsel was of the view that the applicants had failed to so demonstrate. She relied on the case of **PASTOLI VS. KABALE DISTRICT LOCAL GOVERNMENT COUNCIL & OTHERS [2008] 2EA 300** And urged this court to dismiss the application and the entire petition forthwith.

Court's Rendition

18. I have considered the parties' respective cases, as contained in their affidavits as well as submissions on record.

19. It must be noted at the onset that the intention of this court must not be to test the legality or otherwise of the charge or determine the guilt or innocence of the applicants. Although the parties have raised several issues for consideration, the single most important issue raised based on the material before court is the question as to whether the 1st respondent's decision directing the 2nd respondent to prefer charges against the applicants for the offence of murder is within the law and whether such decision is infringing on the constitutional rights of the applicants envisaged under Articles 27,47 and 50 of the Constitution or an abuse of due process. It is this issue that the court must limit itself to.

20. The office of the Director of Public Prosecutions established under Article 157 is an independent office which is empowered to conduct its duties free from any influence or control by any authority. Article 157(10) empowers the Director of the Office of Public Prosecutions to commence criminal proceedings without consent of any person or authority and in exercise of such powers, he shall not be under the direction or control of any person or authority. However, the Constitution does not grant the DPP a carte blanche to run amok in exercise of its powers. He is required to exercise his powers with regard to the provisions of Article 157(11) of the Constitution. The Article provides as follows:

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

21. Therefore, though the 1st respondent has the power to independently charge and prosecute, the court will not hesitate in putting a halt to such a decision and proceedings if the criminal proceedings intended constitute an abuse of process and interests of justice. The court in **REPUBLIC VS DIRECTOR OF PUBLIC PROSECUTIONS & 2 OTHERS EX-PARTE MILDRED MBUYA MULI & 3 OTHERS [2015] eKLR** has stated thus:

“ Where it is alleged that the standards set out in the Constitution and in the aforesaid Act have not been adhered to, this Court cannot shirk its Constitutional mandate to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, the Constitution itself.”

22. It is, however upon the applicants to satisfy the court that the discretion given to the 1st respondent to investigate and prosecute is being abused and ought to be interfered with.

23. In **KURIA & 3 OTHERS VS. ATTORNEY GENERAL [2002] 2KLR 69** the court stated that:

“A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution.”

24. In this case, the applicants contend that the charges intended to be preferred against them are not in good faith and they are discriminatory and intended to punish them. That the 1st respondent's decision is based on ulterior motive as he did not take into consideration the recommendation of the DCI who recommended that the matter be disposed of by way of inquest. As was correctly stated by Counsel for the respondents, the recommendation by the DCI is not binding on the 1st respondent. The 1st respondent is at liberty to make his own decision based on the facts. The court cannot therefore halt criminal proceedings merely because the 1st respondent did not take heed of the DCI'S recommendation if the 1st respondent exercised his power in accordance with the constitution. see **MEIXNER & ANOTHER VS.- ATTORNEY GENERAL [2005] 2KLR 189**. The applicants must meet the muster and demonstrate that the 1st respondent did not act in line with Article 157(11) of the Constitution. They have failed so to do.

25. On the issue of the alleged contravention of the applicants rights under Articles 27, 47 and 53, the court was very clear in the case of **ANNARITA (SUPRA)**. The person alleging an abuse or infringement of a right must set out the acts or omissions constituting violations. A mere statement that a right has been infringed cannot suffice. Again the orders being sought are judicial review orders. As the judicial review is concerned with the process rather than the merits of the challenged decision or proceedings the court is not entitled to make definitive findings on matters which go to the merit of the impugned proceedings. In the premises I find that this is not a proper case in which the court ought to bring the criminal proceeding to a halt. The applicants will be afforded a chance to defend themselves in the criminal case, adduce evidence and even cross examine witnesses. It is only through a trial that the court will be able to determine the veracity of the applicants case

26. The amended notice of motion is hereby dismissed with no orders as to costs.

Dated, signed and delivered this 21st September, 2015

H. K. CHEMITEI

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