



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTION & HUMAN RIGHTS DIVISION
PETITION CASE NO. 151 OF 2015

GIDEON MWITI IREA.....PETITIONER

VERSUS

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

INSPECTOR GENERAL, KENYA POLICE SERVICE.....2ND RESPONDENT

CHIEF MAGISTRATE’S COURT, MILIMANI LAW COURTS.....3RD RESPONDENT

MUCIIMI MBAKA4TH RESPONDENT

HARUN NDUBI.....5TH RESPONDENT

ATTORNEY GENERAL6TH RESPONDENT

TERESA OMONDI7TH RESPONDENT

AND

VICTIMS PROTECTION BOARD.....INTERESTED PARTY

RULING

On 10th August, 2015 Mr Nderitu for Mr Muciimi Mbaka, Mr Harun Ndubi and Ms Teresa Omondi who are the 4th, 5th and 7th respondents in this Petition brought to the attention of this Court an article titled “*Lab test adds twist in MPs rape case*” which appeared in THE STANDARD newspaper on 3rd August, 2015. According to Mr Nderitu, the said article gave the impression that its author Mr Moses Njagih had accessed the medical records of the victim in **Nairobi (Milimani) Criminal Case No. 609 of 2015, Republic v Gideon MwitI Irea and another**. The constitutionality of that case is the subject of the instant Petition.

Mr Nderitu informed the Court that upon reading the said news item, he wrote to the author Mr Moses Njagih and the Managing Editor of THE STANDARD newspaper Mr Kipkoech Tanui asking them to explain the circumstances under which they had accessed the medical records in the criminal trial. He did not receive any response and that is why he has raised the matter.

Mr Nderitu asserts that the said news item raises two issues of concern. The first issue is the need to protect the dignity of the victim in the court proceedings. The second issue is that the article attempts to determine the criminal case and this Petition outside the four corners of the judicial proceedings.

Mr Nderitu's view is that the article is likely to have been written at the behest of a person interested in the outcome of these proceedings. He submits that this Court has a duty both under the Victim Protection Act, 2014 and in exercise of its inherent jurisdiction to ensure fairness to accused persons, victims of crime and the prosecution. He holds the view that the Court has a duty to ensure that neither the Petition nor the criminal case is determined in the press and at the expense of the victim.

In light of his submissions, Mr Nderitu prays that the author of the article and the Managing Editor of THE STANDARD newspaper be summoned to appear before this Court in order to preserve the integrity of this Court and the trial Court.

Ms Kithiki for the Director of Public Prosecutions supported the application whereas Ms Chimau for the Attorney General decided not to offer any opinion on this question.

Dr Khaminwa for the Petitioner Gideon Mwiti Irea opposes the application. Counsel for the Petitioner takes the position that the article in question is within the constitutional rights guaranteed by Articles 33, 34 and 35 of the Constitution of Kenya.

He asks the Court to note that even as the article is being discussed in Court, THE STANDARD is not represented. Further, that Mr Nderitu did not table in Court the letter he wrote to THE STANDARD and the article he complains of.

He also submits that there is no jury in this matter which will be influenced by whatever is discussed in the media. According to him, he only sees competent arbiters who are unlikely to be influenced by what is playing out in the media.

Dr Khaminwa finally asserts that pursuing the issue raised by Mr Nderitu amounts to engaging in an extraneous exercise.

I have gone through the article in question and I find that there is indeed reason for Mr Nderitu to be anxious about its contents. If the contents of the article are true, then it means that a prosecutor or a defence counsel or a potential witness or an advocate involved in the criminal case has released witness statements and documentary exhibits to the press. It is also possible that the institutions which handled the specimens have released the information.

I say so since I am aware that the criminal trial has not commenced before the Magistrate's Court and it cannot be said that Mr Njagih's statement that the medical reports are already before the trial Court is correct. His information cannot therefore be said to have been sourced from the testimony of witnesses in Court.

On the other hand, I agree with Dr Khaminwa that the space for free exchange of ideas and information has been greatly expanded by the 2010 Constitution.

In my view, the article in question is more about the ethical standards of the parties involved. What was the aim of the person or persons who gave the information to Mr Moses Njagih? Did Mr Moses Njagih consider it proper to submit the news item for publication in light of the fact that the trial had not commenced? Should a prudent editor have allowed such an article to go to print? Above all, could there be some truth in the story?

Those are questions that I do not find advisable to deal with in these proceedings as that would mean holding lengthy proceedings in an attempt to establish the source of Mr Njagih's information or the correctness of the same. In order not to prejudice the parties' right to take up this matter before the right forum, I will withhold my opinion on the said article. All I can say for now is that the said article is

unlikely to prejudice any party in this matter.

It is important to always remember that courts do not make decisions based on press reports. Any decision made is guided by the applicable law and the evidence that has been adduced in court. It would be tragic were a judicial officer to base his/her decision on reports appearing in the press. I will state, and I believe I am not wrong in saying so, that the courts and tribunals of this country are manned by men and women of great character. They are unlikely to be swayed by media reports on court proceedings. The parties in this matter should rest assured that this Court's decision will not be influenced by anything happening outside the litigation arena.

For now, it is important for this Court to focus its attention on the Petition before it. The answer the parties herein want to hear from this Court is whether the Petitioner's criminal trial is within the parameters of the Constitution of this country. I will focus my energies on that question with a view to giving an answer as soon as is practicable. I therefore decline to make any decision or give any directions in regard to the article appearing in THE STANDARD of 3rd August, 2015.

Dated, signed and delivered at Nairobi this 21st day of Sept. 2015

W. KORIR,

JUDGE OF THE HIGH COURT