



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. 14 OF 2014**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 47(1) (2) & (3) OF THE CONSTITUTION OF KENYA**

**AND**

**ARTICLES 2, 19, 20, 21, 22, 23, 24, 25, 35, 47, 48, 50**

**AND**

**ARTICLES 159, 165 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA RULE 4(1) & 10 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013 AND ALL OTHER ENABLING POWERS AND PROVISIONS OF THE LAW**

**BETWEEN**

- 1. NYAMAWI RUMBA WEWA**
- 2. ANDREW MWINZAGU.....PETITIONERS**

**VERSUS**

- 1. DIRECTOR OF PUBLIC PROSECUTIONS**
- 2. INSPECTOR ELVIS CHARO**
- 3. CORPORAL JAMES KAUME.....RESPONDENTS**

**JUDGMENT**

**THE PETITION**

1. In their Petition dated 27<sup>th</sup> March, 2014 and filed on 28<sup>th</sup> March, 2014, the Petitioners sought the following orders:-

1. a declaration that the Petitioners rights to a fair trial and fair administrative action were violated;
2. an order of injunction against further prosecution of the Petitioners by the Respondents in Mombasa Criminal Case No. 2831 of 2013 (Republic vs. Andrew Mwinzagu and Rumba Nyamawi).
3. an order for compensation of the Petitioners by the Respondents for a gross violation of the Petitioners' rights to fair administrative action.
4. any other order that the Court may deem fit to grant;

5. an order that the costs of this Petition be paid by the Respondents.

2. Simultaneously with the Petition was filed a Notice of Motion of even date with the Petition in which the Petitioners sought a stay of their prosecution in Mombasa Chief Magistrate's Court Criminal Case No. 2831 of 2013. An order of stay was granted by this Court on 28<sup>th</sup> March, 2014 not 8<sup>th</sup> March, 2014 as per the extracted order issued on 19<sup>th</sup> May, 2014

### **THE PETITIONER'S CASE**

3. The Petition is based upon the averments on the face of the Petition, and the Further Affidavit of Stephen Andrew Mwinzagu, the Second Petitioner (referred to in the Petition as Andrew Mwinzagu). The Petitioners' main complaint appears to be that the investigations, the basis of which they are charged are shoddy and inadequate to sustain their prosecution. More importantly the Petitioners claim that they will not have a fair trial, and that their right to fair administrative action is being violated, and that for those reasons, the court should issue an injunction (they mean, I think, a prohibition) against their prosecution.

### **THE RESPONSE**

4. The Respondents have through the Replying Affidavit of No. 58752 IP Elvis Charo, a CID officer attached to the County Criminal Investigation Officer denied all the allegations by the Petitioners, and in particular allegations of denial of fair trial and fair administrative action, and conclude that the Petition is frivolous and abuse of the process of court, and is intended to obstruct, thwart and interfere with the administration of criminal justice.

### **DETERMINATION**

5. The issue to be determined in this Petition is whether or not the prosecution of the Petitioners should be prohibited on the ground that they will not receive a fair trial.

6. The criteria for determining what constitutes a fair trial are clearly set out in Article 50 (2) of the Constitution of Kenya 2010. Every accused person has the right to a fair trial, which includes the right -

1. to be presumed innocent until the contrary is proved;
2. to be informed of the charge, with sufficient detail to answer it;
3. to have adequate time and facilities to prepare a defence;
4. to a public trial before a court established under the Constitution;
5. to have the trial begin and conclude without unreasonable delay;
6. to be present when being tried unless excluded for unbecoming conduct during trial;
7. to remain silent, and not to testify during proceedings;
8. to have an advocate of one's choice, or assigned one by the state if substantial injustice would otherwise result; and to be so informed promptly of that right;
9. to adduce and challenge the evidence;
10. to refuse to give self incriminating evidence;
11. to be informed of the evidence to be adduced by the prosecution;
12. to have an interpreter at the expense of the prosecution (without payment);
13. to be charged with an offence known to the law.

7. The other rights under Article 50 (2) relate to conviction and sentence. The Petitioners have not shown which of these rights in relation to their prosecution has been violated. The Petitioners' counsel relied on the decision of the court, in the case of **MILLICENT WAMBUI MUGIH VS. DIRECTOR OF PUBLIC PROSECUTIONS & NAIROBI CITY COUNCIL [2014] KLR** in which the court held that powers conferred upon the Director of Public Prosecutions are not absolute, and are subject to the supervisory jurisdiction of this court; particularly if it is shown to the court that there has been serious abuse of power, and the court is entitled to express strong disapproval by stopping such prosecution. **[GITHUNGURI VS. REPUBLIC [1985] KLR3 3090]**. The court will also halt prosecution of an

accused where it is shown that such prosecution is oppressive and vexatious, and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable, or made in bad faith, or intended to achieve an ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigations or prosecution process – **NDARUA VS. REPUBLIC [2012] 1E.A. 205**, and **KURIA & 3 OTHERS VS. REPUBLIC [2002] 2 KLR 69**.

8. For the court to interfere with either the investigations by the Police, or prosecution by the Director of Public Prosecutions, the Petitioners must demonstrate how either the investigations are oppressive or vexatious or contrary to public policy, or are being conducted in bad faith or intended to achieve an ulterior motive, or used as a tool for personal score-settling or vilification.

9. In my view, the claim that the investigations are shoddy, or that the Petitioners have a plausible or good defence to the charges, and that prosecution is bound to fail, are not grounds for this court to interfere with the discretionary powers of the Respondent (DPP). Put in the words of the court in **REPUBLIC VS. ATTORNEY-GENERAL & 4 OTHERS ex parte KENNETH KARIUKI GITHII [2014] eKLR** paragraph 26 –

**“26. The court ought not to usurp the constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or on-going criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of a Judicial Review since Judicial Review proceedings are not concerned with the merits but with the decision making process.”**

10. This is a Petition, not a Judicial Review proceeding. But even in a Constitutional Petition, the constitutional court is not possessed of any conclusive information that the evidence is shoddy, or that the prosecution is necessarily oppressive, vexatious, or motivated by ulterior designs or personal score-settling.

## **CONCLUSION**

11. In the circumstances, I find no merit in this Petition, and the same is dismissed with a direction that each party bears its own costs.

12. It is so ordered.

**Dated, Signed and Delivered in Mombasa this 28<sup>th</sup> day of October, 2015**

**M. J. ANYARA EMUKULE**

## **JUDGE**

In the presence of:

Mr. Muchiri for Petitioner

Mr. Masila for DPP

Mr. Silas Kaunda Court Assistant