



IN THE HIGH COURT AT
NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 81 OF 2014

BETWEEN

**GEORGE TAITUMU
PETITIONER**

AND

THE CHIEF MAGISTRATES

COURT, KIBERA 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

THE DIRECTOR OF PUBLIC

PROSECUTIONS 3RD RESPONDENT

JUDGMENT

Introduction

1. By a petition filed on 24th February 2013, the petitioner seeks the following reliefs from the court;
 - a. *A declaration that any fresh, further or continued criminal proceedings against the petitioner in respect of the same facts as those relied on in Kibera Criminal Case No. 2880 of 2013 is a nullity, illegal and a gross violation of the petitioner's fundamental rights and freedoms and thus a violation of the constitution.*
 - b. *An order of prohibition permanently restraining the respondents jointly and severally from continuing and or proceeding with any criminal investigations, prosecution or trial against the petitioner in respect of the same offence(s) and matter as that concluded in Kibera Criminal Case No.2880 of 2013.*
 - c. *In the alternative to prayer (b) above, an order reviewing the orders of Honourable Ondieki in Kibera Chief Magistrate Court Criminal Case No. 2880 of 2013 of 20th January, 2014 and replacing the same with an order for acquittal.*
 - d. *General damages.*

- e. *Such other orders as this court may deem fit to grant.*
 - f. *Costs of this suit.*
2. As the prayers I have cited above illustrate the issue for consideration is whether the State should be restrained from preferring charges against the petitioner in respect of the offences he was charged with in ***Kibera Chief Magistrates Court Criminal Case No. 2880 of 2013*** after the charges against him were withdrawn under **section 87(a)** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** (“the ***CPC***”).

The Proceedings

3. On 22nd August 2013, the petitioner was charged with forgery contrary to **section 351** of the ***Penal Code (Chapter 63 of the Laws of Kenya)*** and uttering a false document contrary to **section 353** of the ***Penal Code***. The petitioner pleaded not guilty and was remanded in police custody until 26th August 2013. He pleaded not guilty and was thereafter released on bond.
4. The matter was scheduled for hearing on 17th October 2013. On that date the prosecutor indicated that he had bonded one witness and had difficulties in securing the other witnesses. The petitioner’s counsel opposed the adjournment as he had only been given two statements out of the five prospective witnesses. The matter was later fixed for hearing on 8th November 2013. The petitioner’s advocate protested that he still had not been supplied with all the statements. The matter was adjourned for hearing to 27th November 2013 as the prosecutor was away on training.
5. On 27th November 2013, the prosecutor applied for an adjournment as none of the witnesses had been bonded. After hearing the parties the court granted the last adjournment in the matter and scheduled the hearing for 20th January 2014.
6. On 20th January 2014, the prosecution called one witness, Daniel Yumbya. Prior to the commencing the hearing, the prosecutor indicated that he could not secure the attendance of four witnesses who had been bonded he was ready to proceed with one witness. The prosecutor also applied to amend the charges. The application was opposed and after hearing the parties the learned magistrate declined to permit the amendment. After Daniel Yumbya testified, the prosecution applied for an adjournment on the ground that the other four witnesses were not in court and that he required summons to procure their attendance. The petitioner counsel submitted that in view of the order made on 27th November 2013, the application ought to be rejected and the prosecution ordered to close its case. The court noted that the prosecution had only bonded one witness who had just testified and called upon the Investigating Officer to comment on the matter. The Investigating Officer indicated that he had difficulties in getting the other witnesses and was waiting for summons to be issued.
7. After the application was opposed by counsel for the petitioner but before the magistrate could rule on the adjournment, the prosecutor applied to withdraw the matter under **section 87(a)** of the ***CPC***. The application was opposed by the petitioner’s counsel who argued that in light of the conduct by the prosecution, the petitioner ought to be acquitted under **section 210** of the ***CPC***. The learned Magistrate after considering the matter rules as follows, “*After evaluating both grounds and the nature of the case and length of the case has taken, the court grants the application by the prosecution and orders that the accused person is discharged under section 87(a) of the Criminal Procedure Code.*”

Petitioner’s Case

8. The petition is supported by the petitioner’s own affidavit sworn on 24th February 2014. The petitioner also relies on the written submissions dated 20th March 2014.

9. The petitioner complains that as a result of the order of discharge, the police have started to investigate the matter and will charge him afresh and that no new evidence has arisen to warrant the petitioner being charged afresh when all the evidence and witnesses were available but the prosecution chose not to call them. He further complains that the intention of the police to prosecute him afresh is malicious, malafides, illegal and unconstitutional. He alleges that he risks suffering great prejudice, double jeopardy and inconvenience if he is taken through another prosecution on the same facts.
10. Mr Kirimi, the petitioner's counsel, submitted that the petitioner's rights under **Articles 50(2)(e), (j) and (4), 47 (1) and 157** of the Constitution were violated by the manner in which the proceedings were conducted.
11. The petitioner argues that **Article 50(2)(e)** of the Constitution which entitles an accused to have the trial begin and conclude without unreasonable delay was violated. Counsel submitted that the violation was as result of the prosecution seeking adjournments without good reason until the court had to grant the last adjournment.
12. The petitioner further complains that his right to be informed of evidence the prosecution intended to rely on in advance and to have reasonable access to it guaranteed under **Article 50(2)(j)** was violated when the prosecution kept manufacturing evidence three months into the trial.
13. As regards the application made under **section 87(a)** of the **CPC**, Mr Kirimi submitted that the application was unlawful since the Director of Public Prosecutions ("DPP") did not give instructions to the prosecutor to present the application and that no reasons for the discharge were proffered. Counsel argued that under **section 87** of the **CPC**, the DPP must grant the prosecutor specific authority to withdraw the case. He contended that the prosecutor had no power to withdraw the case as she did not have authority of the DPP as evidenced by the fact that the application came after the hearing of the first witness and that he expected her to take time to seek specific instructions.
14. The petitioner adds that the court's decision to consent to the withdrawal did not adhere to threshold provided under **Article 157(6)(c), (7), (8) and (11)** of the Constitution. Mr Kirimi submitted that the magistrate could not instigate such an application and he ought to have interrogated the reasons for the application. Counsel cited the case of **Republic v Fahmi Salim Said Msa Crim. Rev. No. 72 of 2013 [2013] eKLR** to support this argument.

The Respondents' Case

15. The 3rd respondent opposes the petition through written submissions dated 18th March 2014. Mr Ashimosi, counsel for the 3rd respondent, submits that **Article 260** of the Constitution does not define what acquittal means and that there is no bar to subsequent proceedings in instances where a discharge order under **section 87(a)** of the **CPC** is granted. Counsel also submits that according to the record of the subordinate court, the petitioner was discharged and there was no acquittal hence he cannot benefit from the provisions of **Article 50(2)(o)** of the Constitution.
16. The 3rd respondent argues that the prosecutor need not have specific instructions to withdraw the case. In any case the Director of Public Prosecutions, who is the prosecuting authority, has not disputed the instructions of the prosecutor.
17. Ms Mwangi, counsel for the 1st and 2nd respondents, supported the position taken by the 3rd respondent and urged the court to dismiss the petition.

Determination

18. The petitioner brings his petition under **Article 22** of the Constitution to enforce his rights and

fundamental freedoms which he claims were violated as a result of the order discharging him from the criminal proceedings.

19. The petitioner relies on **Article 47(1)** of the Constitution which protects every person's right to fair administrative action. **Article 47(1)** does not apply to criminal proceedings as the rights of the accused person are clearly protected in **Article 50** of the Constitution (See *Dry Associates Limited v Capital Markets Authority and Another Nairobi Petition 328 of 2011 [2012]eKLR* and *Diana Kethi Kilonzo and Another v Independent Electoral & Boundaries Commission (IEBC) and Others Nairobi Petition No. 359 of 2013 [2013]eKLR*).
20. The petitioner is apprehensive that having been discharged, he will be subjected to the same charges and may be tried upon the same facts in future proceedings. This argument implicates the provisions of **Article 50(2)(o)** which provides that a person shall, "*not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted.*" As the petitioner was neither acquitted nor convicted he cannot benefit from the benefit of this provision (See also *Stanley Maina Mutuota and Others v Labour Commission and Others Nairobi Petition No. 313 of 2012 [2012]eKLR*). It is therefore clear that the Constitution does not bar a subsequent trial on the same facts unless there is an acquittal or conviction.
21. The petitioner complains that his rights under **Article 50(2)(j)** were also violated as the prosecution did not provide him with statements. The answer to this complaint can be found in the case of *Dennis Edmond Aapa and Others v Ethics and Anti-Corruption Commission Nairobi Petition No. 317 of 2012 [2012]eKLR* which dealt with the issue of disclosure of documents by the prosecution as follows, "[26] [T]he words of Article 50(2)(j) that guarantee the right "to be informed in advance" cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with the other rights that constitute the right to a fair trial. Article 50(2)(c) guarantees the accused the right, "to have adequate facilities to prepare a defence. [27] This means the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence The obligation to disclose was a continuing one and was to be updated when additional information was received."
22. I would also add that DPP and the Police are not prevented from continuing investigations or even receiving new evidence once the accused has been charged and in the course of trial. The duty of the prosecutor is bring the new information and evidence to the attention of the accused and for the court to give the accused the opportunity to interrogate the new evidence and adequate time to prepare his defence. Likewise, after discharge of the accused under **section 87(a)** of the **CPC**, the court cannot prevent further the investigations into the subject of the trial.
23. I now turn to consideration as to whether the court may review the magistrates' decision to discharge the petitioner. Although the Director of Public prosecutions is entitled to institute and undertake criminal prosecutions and take and continue over criminal proceedings under **Article 157(6)** of the Constitution, his responsibility to withdraw any criminal case is subject to the consent of the court. **Article 157(8)** of the Constitution provides that, "*The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.*"
24. The Constitution does not set out the consequences of the discontinuance hence such reference must be made to the Criminal Procedure Code which at **section 87(a)** of the **CPC** which provides as follows;

87. In a trial before a subordinate court a public prosecutor may with the consent of the court or on the instruction or the Attorney General at any time before the judgment is

pronounced withdrawn from the prosecution of any person and upon withdrawal:-

(a) if it is made before the accused person is called upon to make his defence, he shall be discharged but the discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts,

(b) if it is made after the accused person is called upon to make his defence he shall be acquitted.

25. The petitioner's argues that the prosecutor did not have instructions to withdraw the case against him as provided in the chapeau to **section 87** of the **CPC**. Under **Article 157(9)** of the Constitution, the powers of the DPP may be exercised in person or by subordinate officers acting in accordance with general or special instructions. In the matter at hand there is no dispute the prosecutor had authority to exercise the power of the DPP and no objection had been raised by the DPP in that regard. In accordance with the long standing maxim *omnia praesumuntur rite et solemniter esse acta*: all acts are presumed to be done rightly and regularly and in this case there is no basis to doubt that the prosecutor had authority to withdraw the case. This argument, in my view, lacks merit.
26. The petitioner argues that the learned magistrate did not exercise his discretion in accordance with the Constitution and the law. This court is entitled to review the decision by the learned magistrate to determine whether it complies with legal standards (see **Republic v Enoch Wekesa and Another Kitale HC Revision No. 267 of 2010 [2010]eKLR**). In **Republic v Fahmi Salim Said (Supra)**, Muya J., asked the question, "*Was the magistrate's court supposed to be a rubber stamp? Ought not the magistrate interrogate the reasons given by the DPP as to satisfy himself as to whether they answer to the threshold set by the Constitution and in particular Article 157(11)?*"
27. **Section 87(a)** of the **CPC** gives the learned magistrate broad discretion to accept or reject an application for withdrawal of charges presented by the prosecutor. In light of **Article 157(11)** of the Constitution such discretion has to be exercised judiciously taking into account the facts of each case and in particular whether the application is brought in the public interest, the interests of administration of justice and the need to prevent and avoid an abuse of the legal process.
28. According to the proceedings of 20th January 2014, it is clear that the prosecutor pre-empted the learned magistrate's decision on the adjournment by applying to withdraw the case against the accused. No reasons were furnished for withdrawing the case under **section 87(a)** of the **CPC**. However, the learned magistrate in the short ruling I have set out above at paragraph 7 above granted the application.
29. In prayer (c) of his petition, the petitioner seeks that the order of discharge be replaced with an acquittal. Unfortunately and in light of **section 87(a)** of the **CPC**, this is not possible as the accused had not been called upon to make his defence. The prosecution had only called one witness out of a possible five other witnesses. The petitioner was charged in August 2013, the hearing commenced in January 2014 and the petitioner discharged thereafter. I do not consider the period taken unreasonable delay in light of **Article 50(2)(e)** of the Constitution. I also take into account that the petitioner was free on bail terms. The duty of the court is look at all the circumstances of the case. The petitioner's rights and fundamental freedoms on the one hand and the public interest in ensuring that where offences are alleged they are prosecuted to the full extent of the law.
30. In the circumstances, I am not inclined to interfere with the direction of the learned magistrate in discharging the petitioner. There is indeed a risk that the applicant may be charged again on the same facts but such an eventuality is contemplated by the law and does not, of itself, constitute a violation of the petitioner's fundamental rights and freedoms in light of the circumstances of this case.

Disposition

31.I therefore dismiss the petition with no order as to costs.

DATED and **DELIVERED** at **NAIROBI** this 31st day of March 2014

D.S. MAJANJA

JUDGE

Mr Kirimi instructed by Kinyanjui, Kirimi and Company Advocates for the petitioner.

Ms Mwangi, Litigation Counsel, instructed by the State Law Office for the 1st and 2nd respondents.

Mr Ashimosi, Prosecution Counsel, instructed by Office of the Director of Public Prosecutions.