



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**REVISION NO.107 OF 2013**

**PETER MWANGI.....APPLICANT**

**Versus**

**REPUBLIC.....RESPONDENT**

*(From original conviction and sentence by Hon. A.W Mwangi, SPM, in CM CR. No.237 of 2013)*

**RULING**

The Applicant was arrested and charged in court on 25<sup>th</sup> April 2013 with assault causing actual bodily harm contrary to Section 251 of the Penal Code Cap 63 of the Laws of Kenya.

He filed a notice of motion application through his Advocate on 8<sup>th</sup> May 2013 seeking to defer the plea taking pending the hearing and determination of another application he intended to file challenging the propriety of the charges against him by the Prosecution. He contended that the charges against him were an afterthought made after the complainant had previously lodged a complaint for offensive conduct contrary to Section 94(1) of the Penal Code against the applicant's sister Grace Wanjiku Mwangi. He further aluded to malicious intent by the Prosecution as he was arrested close to 9 months after the said complaint had been lodged yet the police had numerous opportunities of arresting him as he regularly accompanied his accused sister to court and had all along been within sight of the Prosecution. They however feigned ignorance of this fact and alleged he was on the run and was being sought.

The ruling on the application was delivered on 20<sup>th</sup> June 2013 dismissing the applicant's application for lacking merit and the applicant ordered to take plea.

Dissatisfied with the above ruling the applicant moved this court by way of an application to set aside the said ruling. He is seeking to have it set aside and have the entire proceedings terminated. This application was canvassed by way of written submissions filed in court on 27<sup>th</sup> January 2014.

In his written submissions he urges the following:

- a. That he was first arraigned in court on 25<sup>th</sup> April 2013 over the alleged offence committed on 17<sup>th</sup> July 2012, slightly over 9 months after its commission. The same was reported to the police on 25<sup>th</sup> July 2012. Consequently the applicant's sister was charged in Criminal case number 556 of 2012 which case was currently being heard and which he had regularly been attending since commencement.
- b. On 5<sup>th</sup> April 2013 the Prosecutor of the said case number 556 of 2012 accosted and manhandled him while he attended court with his accused sister accusing him of being at large and evading arrest.

- c. His Advocate on inquiring from the OCS whether indeed they were looking for his client, he denied this and even sought clarity from his officers in vain.
- d. That the fact that the officer incharge as well as the Investigating Officer delayed in charging the accused for almost an year while the case number 556 of 2012 was in session without any intention to enjoin the applicant herein was clearly an afterthought by the complainant, the police and the prosecution smirking of malice. This according to him was evidence that that the criminal case was being instituted for reasons other than the honest enforcement of the law.
- e. That his right to freedom and security was being infringed by the Prosecutors' actions and motivated by ill motive and malice.
- f. That the charge sheet in criminal case number 556 of 2012 did not disclose an offence and should not have been accepted.
- g. For these reasons, the applicant urged the honorable court to set aside the ruling delivered by the trial court and terminate the entire proceedings in Criminal Case Number 237 of 2013.

Mr. Kadebe the learned counsel for the State submitted that he was relying on the ruling by the court and the earlier submissions. In the said submissions the state counsel urged that:-

- a. That the accused was charged with the offence of assault causing bodily harm based on the allegations by the complainant on 17<sup>th</sup> July 2012 which charge he had not pleaded to.
- b. In the complainants initial report made on 17<sup>th</sup> July 2012, she accused the applicant of assault and Grace Wanjiru Njoroge of offensive conduct.
- c. The said Grace Wanjiru Njoroge was subsequently arrested and charged in criminal case No. 556 of 2012.
- d. That the applicant then went at large and efforts to arrest him proved futile. However, he was spotted within the court precincts on 5<sup>th</sup> April 2013 by the complainant who alerted the prosecution, who in turn informed the applicant through his Advocate that he was required at Kikuyu police station. The complainant had recorded a statement which formed the basis of the charge against the applicant.
- e. The charge was founded on the evidence at hand and not malice as alleged by the applicant. His contention that he was manhandled was malicious and an exaggeration of the circumstances.
- f. For these reasons, the prosecution concluded that the application lacked merit and urged the court to dismiss it and order the accused to plead to the charges.

The issues that stand out are as follows:-

1. Whether the trial court was right in finding that the institution of the criminal proceedings against the applicant was not done in bad faith, malice or ulterior motive.
2. Whether the applicant should be compelled to take and enter plea.
3. Whether the proceedings at the trial court should be terminated and the ruling of Hon. Mwangi set aside.

On the first issue, the applicant in my view has not demonstrated bad faith on the Prosecution side. He has not shown how the proceedings were instituted for any other purpose other than enforcement of the law. From the evidence before this court, it is difficult to establish otherwise.

Whereas the applicant imputes malice on the prosecution, the prosecution alleges that the applicant had gone undercover making it difficult for them to find and arrest him. This makes it difficult to establish at this stage who is telling the truth and who is not, as it is the prosecution's word against the applicant.

This issue in my view would substantively be addressed at the trial court during trial as the burden to prove the existence of a prima facie case entirely rests on the prosecution. As rightly submitted by the applicant's counsel having relied on the case of **Kuria & 3 others v Attorney General [2002] 2 KLR 69**, I note that the following remarks were made by the Honorable Judge:-

***“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” Further, the Honorable Judge noted “I have not seen any evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even manipulation of court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial....there is need to show how the court process is used or misused.....”***

In the instant case, the applicant has not given persuasive reasons that would cause this court to derogate from the trial court’s finding. The trial magistrate did not find any clear evidence or violation of the applicant’s rights under the constitution as would interfere with the exercise by the Director of Public Prosecution of his mandate to prosecute. On the basis of these scanty facts I am unable to identify any abuse on the court process, malice or ulterior motive.

On the second issue, I have looked at the Prosecution’s submissions in reply filed on 24<sup>th</sup> May 2013 and the same lays out the fact that the charge against the applicant was based on a complaint made by the complainant on 17<sup>th</sup> July 2012 vide OB.4 of the same date. I also note from the said submissions that the complainant was issued with a P3 form in respect to the complaint in issue against the applicant on the same date which was later filled by one Doctor Dorcas of Wangige Health Centre after examining the complainant. It was then that the applicant went at large and efforts to arrest him bore no fruit until he was spotted in the court precincts on 5<sup>th</sup> April 2013.

They have also submitted that these allegations against the applicant were well documented in the complainant’s statement on 17<sup>th</sup> July 2012 at the Kikuyu Police Station which was supplied to the applicant’s counsel in the other case number 556 of 2012. There are also other three witnesses whose statements formed the basis of the charge. These in my view are issues that belong to the province of the trial and determination can only be done by the trial court.

On a different note, a clear examination of the supplementary affidavit by Peter Mwangi (the applicant herein) dated 5th June 2013 before the trial court at paragraph 6(a) annexes a copy of OB Entry No. 4/17/7/2012 for [Grace Wanjiku Mwangi] yet the annexed copy belongs to Milka Njoki Mimi, the complainant. The upshot of this is that there needs to be a thorough evidentiary proof of these issues at the trial court.

Under Article 157 of the Constitution of Kenya 2010, the Director of Public Prosecutions is mandated to order investigations on any information or allegation of criminal conduct and institute criminal proceedings against any person before any court. I would therefore not wish to interfere in the running of that office and the exercise of its powers as outlined above so long as it is within the Constitution and the law. I would only do so when the facts clearly disclose a flagrant violation of the rights and fundamental freedoms guaranteed under the Constitution. At this stage, nothing has been placed before the court to show that this power has been abused or exercised in a manner contrary to the Constitution and the law.

Finally, as to whether the proceedings at the trial court should be terminated and the Ruling of the trial magistrate set aside, I find no circumstance or set of facts that have been presented before this court to make such a far reaching order as would effectively terminate the proceedings in that case. Such an order would require very clear and cogent evidence that would lead to substantial justice. In the absence of such evidence, I would be hesitant to grant the orders sought.

This application is therefore dismissed and the applicant ordered to take plea before the trial court as required by law.

Orders accordingly.

**DATED, SIGNED and DELIVERED at NAIROBI this 19<sup>th</sup> day of March, 2014.**

**A.MBOGHOLI MSAGHA**

**JUDGE**