



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
PETITION NO 69 OF 2014

JANE MUKHWANA MURUNGAPETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS ...1ST RESPONDENT

INSPECTOR GENERAL OF THE NATIONAL

POLICE SERVICE2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS ...3RD RESPONDENT

JUDGMENT

1. In her petition dated 11thFebruary 2014, the petitioner challenges her prosecution in **Nairobi City Court Criminal Case No. 2089 of 2013**. She alleges that the prosecution is brought in bad faith given the fact that she was arrested at her place of work instead of being summoned to the police station, and that the offence in question was committed by someone else.
2. By consent of the parties, proceedings in the criminal case were stayed on 18thFebruary 2014 pending the hearing and determination of the petition. The matter was heard before me on the 18th of June 2014.

The Petitioner's Case

3. The facts giving rise to this petition are set out in the petitioner's affidavit sworn in support of the petition on 11thFebruary 2014. The petitioner has also filed submissions dated 7th April 2014.
4. The petitioner is unhappy about the pendency at the Nairobi City Court of Criminal Case No. 2089 of 2013 in which she is charged with obtaining money by false pretences. She contends that the case is brought in bad faith as it is not grounded on law or fact; and that as a result, her fundamental rights were breached in the process of its institution, the intention being to have her removed from office as a Deputy Director in the Ministry of Education.
5. The petitioner alleges that she was arrested on a 'unilateral complaint' and was not summoned to give her account before her arrest, which she asserts through her Counsel, Mr. Oronga, is contrary to Article 24(1)(e) of the Constitution. According to the petitioner, since the investigating officer knew where she worked, she should have been summoned and not arrested at her place of work.

6. While conceding that Article 157(1) gives the respondent power to institute criminal proceedings, she asserts that these powers should not be exercised arbitrarily but in a manner that avoids abuse of the legal process.
7. The petitioner contends that the respondents have conceded that the offence of obtaining by false pretences was committed by a third party who is known to the investigating officer. She is aggrieved therefore that the respondents still went ahead and charged her with the said offence.
8. The petitioner contends further that the charge against her does not contain the ingredients of an offence known in law; and she prays that the Court protects her from going through a process that is in bad faith. She therefore seeks the following orders from the Court:
 - a. ***A declaration that the decision of the Respondents or any other person to charge the petitioner JANE MUKHWANA MURUNGA with an offence of obtaining money by false pretence without investigations, in NAIROBI CITY COURT CMCR NO 2089 of 2013 was malafides, irrational, unreasonable, illegal, an abuse of discretion by the 1st respondent under Article 157(6) of the Constitution, breached the Petitioner's Constitutional rights under the provisions of Article 27(1), 27(4), 27(5), 35(1), 50(2)(a) and 50(2)(j) of the Constitution of Kenya, and violated Article 157(11) of the Constitution, hence void for all intents and purposes.***
 - b. ***Judicial Review by way of an order of certiorari to remove into the Court and quash the division of the Respondents, jointly and severally, person to charge the petitioner, JANE MUKHWANA MURUNGA with an offence of obtaining money by false pretences and the charge sheet thereto in NAIROBI CITY COURT CMCR NO 2089 OF 2013.***
 - c. ***Judicial Review by way of an order of prohibition directed to the respondents, jointly and severally, and or directed to any other person, restraining the respondents, jointly and severally, or any other person, from prosecuting the petitioner, JANE MUKHWANA MURUNGA with an offence of obtaining money by false pretences in NAIROBI CITY COURT CMCR NO 2089 OF 2013 or otherwise.***
 - d. ***Costs of and incidental to this petition and***
 - e. ***Any other order that this honourable court deems fit and just to grant in the circumstances.***

The 1st Respondent's Case

9. The 1st respondent opposes the petition and prays that it be dismissed with costs. It has filed an affidavit in reply sworn by **P C Chirchir** on 10th March 2014 as well as submissions dated 7th April 2014.
10. According to the 1st respondent, the petitioner was summoned to the police station and was granted a chance to record a statement, a copy of which she has annexed to her affidavit in support of the petition. The respondent denies conceding that the offence in question was committed by a third party. Ms. Nyamweya for the respondent submitted that it was the petitioner who, in her statement, alleged that the offence had been committed by a third party.
11. Ms. Nyamweya submitted further that the petitioner is trying to tender her defence in the High Court rather than in the trial Court. She relied in this regard on the case of **Francis Mbugua –vs- Commissioner of Police High Court Petition No. 79 of 2012** for the proposition that the proper forum for the petitioner to tender her defence was before the trial Court.

The 2nd and 3rd Respondents' Case

12. Learned Counsel, Ms. Mwangi, relied on the grounds of Opposition filed on behalf of the 2nd and

- 3rd respondents and associated herself with the submissions made on behalf of the 1st respondent.
13. Ms. Mwangi submitted that there is no provision of law that requires that a person should not be arrested at his or her place of work, or that a person facing prosecution should be summoned instead of being arrested.
14. With regard to the powers of the 1st respondent to prosecute, Ms. Mwangi submitted that Article 157 allows the Director of Public Prosecution (DPP) to prosecute, and it is the duty of the trial court to acquit or convict the accused. Further, with regard to the petitioner's allegation that the charge sheet against her is defective, it was the respondents' case that this was also an issue for determination by the trial court. Indeed, according to the 2nd and 3rd respondents, all the issues being raised in this petition fell within the jurisdiction of the trial court, and the petition should be dismissed with costs to the respondents.

Determination

15. I have read the pleadings of the parties as well as their written submissions. I have also heard their respective counsel in their submissions before the Court.
16. In both her affidavit in support of the petition and in her oral and written submissions, it is evident that the gist of the petitioner's complaint is that she was arrested in her workplace instead of being summoned, and that she has been charged with an offence which she claims someone else committed.
17. The petitioner is a civil servant working as a Director in the Department of Basic Education, Ministry of Education. She states that she was taken from her place of work on 23rd December 2013 to Central Police Station to record a statement. Upon arrival at the police station, she was informed that she was under arrest with regard to a complaint made against her. She states that she answered questions which she was asked, but with she realised later were unconnected with the offence with which she was later charged.
18. The petitioner has made detailed averments with regard to her arrest, the charges against her, as well as allegations that she was not given witness statements until her lawyer asked for them.
19. As this is a constitutional petition alleging violation of constitutional rights, the petitioner has an obligation to show what provisions of the Constitution have been violated with regard to her, as well as the manner of such violation -see **Anarita Karimi Njeru -vs- Republic (1976-80) 1 KLR1272** and **Trusted Society of Human Rights Alliance -vs- Attorney General & Others High Court Petition No. 229 of 2012**.
20. Regrettably, I am unable to discern from the material before me any violation of the fundamental rights of the petitioner. She alleges that she was arrested at her place of work, instead of being summoned to the police station. However, neither in her oral or written submissions has she demonstrated what provision of law prohibits the arrest of an alleged offender from his or her place of work. Indeed, there is nothing in the law that makes any prescription with regard to the place at which an offender can be arrested.
21. The petitioner also alleges that the offence in question was committed by a third party, and that the respondents arrested her despite conceding that this was the case. I have read the affidavit in reply sworn by PC Chirchir on behalf of the 1st respondent in which the petitioner alleges that the respondents concede that the offence was committed by a third party. At paragraph 7 of the said affidavit, PC Chirchir states as follows:

“That from the petitioners statement it was clear that she was well informed of the issues that were complained about and was the contact person with one Joseph Owour

allegedly a personal assistant to honourable Dalmas Otieno who was meant to get the job as promised.”

22. It is clear from the averment above that there is no concession made by the respondents that the offence with which the petitioner is charged was committed by a third party.
23. I have also noted the various explanations given by the petitioner with regard to why she could not possibly have committed the offence she is now facing prosecution for; and her complaint about the defective charge sheet. I must agree with the respondents that the petitioner is attempting to place matters that fall within the jurisdiction of the trial court before this Court. Should the charge sheet be defective, that is a matter that falls to the trial court to deal with.
24. As for the evidence she tenders before this Court by way of affidavit, it is the duty of the trial court to weigh such evidence and determine whether it displaces such evidence as may have been adduced against her by the prosecution. This Court cannot arrogate to itself the role of the trial Court. I fully agree with the sentiments of the Court in **High Court Judicial Review Application No. 68 of 2011 - Michael Monari & Another -vs- The Commissioner of Police and 3 Others** where the Court (Warsame J (as he then was) expressed itself as follows:

“It is not the duty of the court to go into the merits and demerits of any intended charges to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and the merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment.”(Emphasis added)

25. In the circumstances, this petition must fail. It is hereby dismissed with no order as to costs.

Dated, Delivered and Signed at Nairobi this 31st day of July 2014

MUMBI NGUGI

JUDGE

Mr. Oronga instructed by the firm of Odhiambo Oronga & Company Advocates for the Petitioner

Ms. Nyamweya, Prosecution Counsel, instructed by the Director of Public Prosecutions

Ms. Mwangi, Litigation Counsel, instructed by the State Law Office, for the 2nd and 3rd Respondents.