REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 225 OF 2011

REPUBLIC .....APPLICANT

VERSUS

CITY COUNCIL OF NAIROBI .....RESPONDENT

EX-PARTE JACKSON KITAVI MUINDI

JUDGEMENT

The ex-parte Applicant, Jackson Kitavi Muindi has through the Notice of Motion dated 17th November, 2011 prayed for orders to issue against the Respondent, the City Council of Nairobi as follows:-

> **"1. AN ORDER OF CERTIORARI to remove into this court for purposes of quashing the Charge Sheet and all proceedings relating to Criminal Case No. 2A/11 Republic vs. Jackson Kitavi Muindi in terms of the said Charge Sheet dated 10/1/2011 served upon the Applicant by the Respondent.**
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> **2. AN ORDER OF PROHIBITION to prohibit the Respondent or any of its employees and/or agents and/or servants from commencing any further or other proceedings and/or having the Applicant – Jackson Kitavi Muindi being charged and/or prosecuted in the intended criminal proceedings in term, with the Charge Sheet dated 10/1/2011 in reference with Criminal Case No. 2A/11 Republic vs. Jackson Kitavi Muindi.**
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> **3. That the costs of this application be borne by the Respondent."**

The application is supported by the grounds on its face, a verifying affidavit sworn by the Applicant on 6th September, 2011 and a statutory statement of the same date.

The genesis of this application, as narrated to the Court by the Applicant, is that on 7th January, 2011 three people who identified themselves as officers from the Respondent's Tobacco Control Department visited the premises of Seven Eight Six Wholesalers Limited at Embassy Cinema building along Latema Road in Nairobi where the Applicant is employed and informed him that they were on routine inspection.

The Applicant enquired from the visitors why they were conducting inspections on a Friday and yet the Respondent had advertised in the Star newspaper of 27th July, 2011 that inspection teams would only operate from Monday to Thursday. That is when the Respondent's employees informed the Applicant that everything was in order. They, however, did not leave empty handed as they went with 20 sachets of

a product called Kuber Scented Khaini.

On 10th January, 2011 two of the three people who had visited the premises on 7th January, 2011 together with another person arrived and arrested him. He was taken to the City Court where he was asked for a bribe of Kshs.50,000/= so that he could be released. He declined to offer money and he was charged with the offence of promoting a tobacco product by means of a misleading testimonial or an endorsement contrary to **Section 24 (1 & 2)** and punishable under **Section 24 (3) of the Tobacco Control Act, 2007.** The particulars of the charge stated that:

> **"Jackson Kitavi Muindi on the 10th of January, 2011 in your premises of SEVEN EIGHT WHOLESALERS situated on plot No. 209/52538 within NAIROBI Province did display/have in possession a tobacco product bearing misleading testimonial endorsement and or depiction of a person on the label (package)."**

It is the Applicant's case that his arrest and prosecution is malicious as no offence had been disclosed. He stated that the sachets of Kuber Scented Khaini had bold warnings both in English and Kiswahili about the harmful effects of tobacco. Further, the Applicant contends that packets of cigarettes with the trademark "Embassy Kings" have a picture of a lion and yet the owners or distributors of the product were not arrested.

The Applicant therefore prays for the orders aforesaid and according to the statutory statement, the grounds upon which he seeks relief are:

> **"i. That other than by way of this Application and the orders sought therein, the Applicant does not have any other means of quashing the charge sheet dated 20/1/2011 served upon the Applicant by the City Council and/or summons requiring court attendance in relation to Criminal Case No. 2A/11 Republic vs. Jackson Kitavi Muindi.**
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> **ii. That the Applicant will be adversely affected if the criminal matter proceeds for hearing and the Applicant is prosecuted in terms with the Charge Sheet served upon him in criminal case No. 2A/11 Republic vs. Jackson Kitavi Muindi as he is neither the owner of his place of work nor has he committed any offence as stated in the Charge Sheet."**

The application was opposed by the Respondent through the affidavit of its Chief Medical Officer of Health Dr. Robert Ayisi. It is the Respondent's case that the Applicant was arrested for selling tobacco products that did not meet the requirements of the **Tobacco Control Act, 2007.** The Respondent contends that the Applicant has indeed admitted in his verifying affidavit that due process was followed and that he was arrested and presented to Court within 24 hours as required by the law.

On the advertisement in the newspaper, the Respondent submits that the advert referred to inspection of licences and not products and that in any case the advertisement does not amount to legislation so as to dictate when inspection and arrest under the **Tobacco Control Act** should be carried out. Further, the Respondent argues that as the manager, criminal liability was imposed on the Applicant by **sections 56 and 57 of the Tobacco Control Act.**

Dr. Anyisi averred that he had been informed by the officers who had visited the Applicant's premises that none of them had demanded any bribe from the Applicant. Finally the Respondent contended that there is sufficient evidence to support the charge it has preferred against the Applicant and the duty of analyzing that evidence belongs to the trial court and not a judicial review court.

The issue for the determination of this Court boils down to whether the Applicant should be granted the orders sought. The entry point would then be to appreciate the scope and purpose of judicial review. In the **COMMISSIONER OF LANDS v KUNSTE LIMITED**, **Court of Appeal at Nakuru, Civil Appeal No. 234 of 1995,** the Court of Appeal defined the scope and purpose of judicial review as follows:

> **"But it must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority which he has been subjected."**

The Court went ahead and cited with approval the decision in the English case of **CHIEF CONSTABLE OF NORTH WALES POLICE v EVANS [1982] 1 WLR 1155** in which Lord Hailsham of St Marylebone at page 285 opined that:

> **"The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court."**

I have already reproduced the circumstances surrounding the Applicant's arrest. As correctly pointed out by the Respondent, due process was complied with in the arrest and presentation of the Applicant to the Court.

The Applicant's assertion is that there is no sufficient evidence to charge him with the offence for which he is alleged to have committed. In fact he claims that he did not break any law. The answer to this contention is found in the words of the Court of Appeal in **MEIXNER & ANOTHER v ATTORNEY GENERAL [2005] 2KLR 189** where the Court stated:-

> **"As the learned judge correctly stated, judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through *certiorari* on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power.**
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> **Having regard to the law, we agree with the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision. The other grounds which the appellants claim were ignored ultimately raise the question whether the evidence gathered by the prosecution is sufficient to support the charge.**
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> **The criminal trial process is regulated by statutes, particularly, the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in Section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon an examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence. That is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court."**

It is not the purpose of this Court to analyse the evidence that is to be adduced before the magistrate and make a decision on its strengths or weaknesses. That is the duty of the trial court.

The Applicant raised a serious issue of alleged demand of a bribe by the Respondent's officer. One of the grounds for halting a criminal trial is where there is evidence that the trial has been commenced for corrupt purposes. In **MATALULU v DPP [2003] 4LRC 712** cited by this Court in **REPUBLIC v DIRECTOR OF PUBLIC PROSECUTIONS & ANOTHER EX-PARTE COMMUNICATIONS COMMISSION OF KENYA, Nairobi JR No. 221 of 2013** the Supreme Court of Fiji listed the grounds for intervening with the powers of the Director of Public Prosecutions as follows:

"It is not necessary for present purposes to explore exhaustively the circumstances in which the occasions for judicial review of a prosecutorial decision may arise. It is sufficient, in our opinion, in cases involving the exercise of prosecutorial discretion to apply established principles of judicial review. These would have proper regard to the great width of the DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits. This approach subsumes concerns about separation of powers.

The decisions of the DPP challenged in this case were made under powers conferred by the 1990 Constitution. Springing directly from a written Constitution they are not to be treated as a modern formulation of ancient prerogative authority. They must be exercised within constitutional limits. It is not necessary for present purpose to explore those limits in full under either the 1990 or 1997 Constitutions. It may be accepted, however, that a purported exercise of power would be reviewable if it were made:

1. **In excess of the DPP's constitutional or statutory grants of power-such as an attempt to institute proceedings in a court established by disciplinary law (see s 96 (4) (a)).**
2. **When, contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion–if the DPP were to act upon a political instruction the decision could be amenable to review.**
3. **In bad faith, for example, dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe.**
4. **In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved.**
5. **Where the DPP has fettered his or her discretion by a rigid policy – e.g. one that precludes prosecution of a specific class of offences.**

There may be other considerations not precisely covered by the above in which judicial review of a prosecutorial discretion would be available. But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the consideration, to which the DPP may properly have regard in instituting or discontinuing proceedings. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice." (Underlining is mine for emphasis).

In the Kenyan context, the DPP must exercise his powers with **"regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process"**-see **Article 157 (11) of the Constitution.** I therefore have no doubt in my mind that a prosecution can be quashed if an applicant can demonstrate that the institution of the criminal proceedings was motivated by failure to bribe the prosecuting authority.

The Applicant alleges that the officers who arrested him demanded a bribe of Kshs.50,000/= so as to release him. There is however no evidence adduced to back up this claim. One can say that the fact that the officers approached the Applicant on a Friday (7th January, 2011) a day that they were allegedly not supposed to conduct inspections shows that they were up to no good.

The Applicant exhibited an advertisement in the Star newspaper by the Respondent indicating that inspections were only to be conducted from Monday to Thursday. The Respondent's reply is that the said advertisement was in respect of inspection of licences and that the advertisement did not in any case change the **Tobacco Control Act** so as to limit detection of crimes to particular days of the week.

In my view, there was glaring misinformation by the Applicant. The Applicant was dishonest in exhibiting the advertisement in the Star newspaper and this even creates doubts as to whether he should be believed when he claims that the Respondent's officers attempted to extort money from him. The Applicant clearly indicated that he was arrested on 10th January, 2011. The advertisement in the newspaper was published on 27th July, 2011 over six months after the Applicant was arrested and charged. The Applicant has not demonstrated that he was privy to the information in the advertisement at the time of his arrest. The Applicant could not have therefore told the Respondent's officers that they were not entitled to carry out routine inspections on 7th January, 2011 which was allegedly a Friday. The Applicant therefore misled the court and portrayed the Respondent's officers in bad light using an advertisement that was published after his arrest. He has therefore not been candid with the Court and such behavior is normally punished by denial of the orders sought.

The Applicant also asserted that he was entitled to a hearing before he could be charged. The right to a hearing is a key component of the administrative process. It is a pivotal component of the principles of natural justice. In a criminal case, however, this requirement is fulfilled during the hearing of the case. It is then that Article 50 of the Constitution which provides for the right to a fair hearing kicks in. The Respondent's officers were not required to give a chance to the Applicant to testify and call witnesses. That would have meant that the Applicant would have undergone the trial process twice.

In essence, the Applicant has not established grounds for the grant of the orders sought. His application fails and the same is dismissed with no order as to costs.

Dated, signed and delivered at Nairobi this 24th day of July, 2014

W. KORIR,

JUDGE OF THE HIGH COURT