



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

**PETITION NO.135 OF 2011**

**THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION) AND PROTECTION OF  
FUNDAMENTAL RIGHTS IN THE BILL OF RIGHTS CHAPTER 3, ARTICLES 2, 3, 19, 20, 21,  
22, 23, 27, 28, 29, 31, 40, 43, 47 AND 259 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS  
UNDER ARTICLES 19, 20, 21, 22, 23, 27, 28, 29, 31, 40, 43, 47 AND 259 OF THE  
CONSTITUTION AND SECTIONS 79 AND 81 OF THE CRIMINAL PROCEDURE CODE**

**BETWEEN**

**FRANCIS BORURA ONCHAGWA ..... PETITIONER**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 1ST RESPONDENT**

**ABEL NYABUTO BISERA ..... 2ND RESPONDENT**

**JUDGMENT**

1. The petitioner herein Francis Borura Onchagwa filed a petition under the Bill of Rights dated 12<sup>th</sup> October 2011 seeking the following orders:-

- a. *That the fundamental freedom under the bill of rights Chapter 3 have been violated.*
- b. *That this court do make a declaration that the petitioner did not receive any money from Abel Nyabuto Bisera and therefore he cannot be a complainant.*
- c. *That the trial of the petitioner before Nyamira Court is unconstitutional.*
- d. *That the petitioner ought to be tried before Keroka Court if any*
- e. *That the costs of this application be provided for.*

2. The petition is supported by an affidavit sworn by the Petitioner on 12<sup>th</sup> October 2011. The Petitioner depones therein that his constitutional and fundamental rights under the **Bill of Rights – Chapter Four** – of the Constitution have been violated because:-

- i. *The alleged complainant in Nyamira SPMCr. Case No.309 of 2011 was not the one who entered into the purported agreement of sale with the petitioner.*
- ii. *The Criminal case has been filed in the wrong court.*
- iii. *The Petitioner has never been paid nor has he received any money in respect of the alleged land*

*sale transaction.*

iv. *The alleged complainant made false and malicious complaint, leading to petitioner's arrest without following due process of the law.*

3. The petitioner also blames the 1<sup>st</sup> respondent's agents of having failed to do proper investigation into the complaint thereby leading to a violation of his fundamental rights, a mockery of the due process of the law and an abuse of the court process. The Petitioner also contends that from the statements recorded by the 2<sup>nd</sup> Respondent herein, the said 2<sup>nd</sup> Respondent had no nexus with him over the alleged aborted sale of land agreement and that it is on the basis of these criminal omissions that he now wants this court to interpret his constitutional rights and make a proper finding that the 2<sup>nd</sup> respondent has no claim known in law against him and that the conduct of the 1<sup>st</sup> respondent to arraign him in court for the offence of receiving money by false pretences is unfounded and unconstitutional.

4. When the matter came before me on 7<sup>th</sup> November 2013 after it was confirmed that the applicant had filed his submissions, the 1<sup>st</sup> respondent was ordered to file and serve his written submissions on or before 27<sup>th</sup> January 2014.

5. The matter came up again for hearing on 3<sup>rd</sup> April 2014 when it was confirmed that the respondents had not filed their written submissions. Mr. Shabola for the 1<sup>st</sup> respondent chose to respond to points of law orally.

6. Mr. Nyambati for the applicant submitted that the 1<sup>st</sup> respondent did not carry out sufficient investigations before arraigning the petitioner before court and thereby violated the petitioner's constitutional rights. He submitted that the petitioner was wrongly framed by the two respondents in Nyamira SPMCr. Case No.309 of 2011.

7. He urged this court to make a declaration that petitioner's arrest and arraignment before Nyamira Court was unconstitutional and that his arrest and prosecution violated **Article 22** of the **Constitution** which deals with enforcement of the **Bill of Rights**. Counsel urged the court to exercise its judicial power and terminate proceedings against petitioner or make such other orders as the court thinks fit.

8. Mr. Shabola, learned counsel for the State conceded that the Keroka SPM's Court is the court with competent jurisdiction to hear and determine the case against the petitioner. Thus the 1<sup>st</sup> respondent had no objection to have the case transferred to Keroka Court for hearing and determination.

9. However, concerning the petitioner's prayer to have the proceedings terminated, Mr. Shabola submitted that petitioner was charged on the basis of investigations upon receiving complaints. That it is only after hearing witnesses that the trial court will determine whether the petitioner is guilty of the offence or not and that it is therefore not the duty of this court to summarily dismiss the case against the petitioner.

10. Furthermore, counsel submitted that the petitioner has the option of filing a suit for malicious prosecution should he not be found guilty; that it would not be in the interests of justice for this court to quash the charges facing the petitioner.

11. Counsel further submitted that the petitioner is seeking reprieve over a decision that has not been made since the criminal case has been stopped and the outcome is yet to be established. Further that since the petitioner is out on bond, there is no possibility that he will suffer prejudice should the case against him proceed to its logical conclusion. Mr. Shabola urged the court to order for this case to be transferred to Keroka SPM's court for hearing and final determination.

12. Mr. Nyambati in reply submitted that the provisions of **Article 23** of the **Constitution** were very clear and by the petitioner being arrested and taken to Nyamira court instead of Keroka court, there was a violation of his constitutional right. That it was not disputed that the 2<sup>nd</sup> respondent could not have been

a complainant by any stretch of imagination. He therefore asked the court to grant the orders since 1<sup>st</sup> respondent acted beyond his power.

13. I have carefully considered the petitioner's application, his written and oral submissions and also the 1<sup>st</sup> respondent's oral submissions. The petitioner contends that his arrest, arraignment and prosecution before Nyamira SPM's court was a violation of his fundamental rights. **Article 23 (1)** confers authority on the High Court to uphold and enforce the Bill of Rights. It stipulates:-

**“The High Court has jurisdiction in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights.”**

14. On the other hand, **Article 24** of the **Constitution** provides for limitations of rights and fundamental freedoms in certain circumstances. I have looked at the entire petition by the petitioner and apart from the petitioner merely listing the various articles under the Bill of Rights he has not mentioned which particular right was violated nor even demonstrated how his fundamental and constitutional rights have been violated and what loss or damage he has suffered.

15. Secondly, I must observe that the decision to prosecute a person for commission of a crime lies solely with the Director of Public Prosecutions, as **Article 157 (6) (a) and (b)** of the **Constitution** donates power to the DPP to :-

**“Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.” and “to take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority.”**

16. Further, the independence of the DPP is in this respect protected under **Article 157 (10)** which provides that:-

**“The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions shall not be under the direction or control of any person or authority.”**

17. In **Republic -vs- Michael Thuo Gikaru [2014] e KLR** Korir J stated:-

**“In discharging its prosecution mandate however the DPP is required under Article 157 (11) to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. This requirement is echoed by Section 4 of the Office of the Director of Public Prosecution Act. The court has the duty to ensure that those principles are adhered to in order to preserve the integrity of proceedings before it.”**

I entirely agree.”

18. Further, the instances where a court may declare a prosecution improper were laid down in **Macharia & another -vs- A.G. & another [2001] KLR 448** in which it was held that the court can declare a prosecution to be improper if:-

- a. *It is for a purpose other than upholding the criminal law.*
- b. *It is meant to bring pressure to bear upon the applicant/accused to settle a civil dispute*
- c. *It is an abuse of the criminal process of the Court.*
- d. *It amounts to harassment and is contrary to public policy.*
- e. *It is in contravention of the applicant's Constitutional rights to*

freedom.

1. In the case of **Kuria and others -vs- A.G.[2002] 2 KLR 69** it was held as follows:-
  - i. *For an application of such a nature to succeed, there is need to show how the court process is being abused or misused, there is need to indicate or show the basis upon which the rights of the appellant are under serious threat of being undermined by the criminal prosecution.*
  - ii. *There is public interest underlying every criminal prosecution which must be jealously guarded. At the same time there are private interests of the applicant to be protected and it is therefore imperative for the court to balance considerations.*
2. In **Joshua Chelelgo Kulei -vs- Republic & others [2014] e KLR** Lenaola J observed:-

**“This court has on very rare occasions stopped an ongoing prosecution where malice and ulterior motive has been proved and also where the court process was being abused – see for example Kathenge -vs- DPP – Petition No.372 of 2013.”**

3. The legal positions stated in the above cited authorities are correct and it is quite clear that this court will only interfere with a criminal trial in circumstances as listed in the **Macharia case** (supra). The petitioner in this case has not shown or demonstrated in what way his constitutional rights have been generally violated or are threatened to be violated. Nor has he shown that the functions of the DPP as set out under **Article 157 of the Constitution** are not being properly carried out or have been curtailed either generally or in respect of the criminal case against the petitioner. The petitioner has denied first that he entered into a land sale agreement and two that he received any money from the alleged complainant. The complaint that led to the petitioner's arrest, and his denial of those allegations are matters that only the trial court can interrogate on hearing of evidence. And if the trial ends in the petitioner's favour, he can exercise his right to sue for damages for malicious prosecution. This is as far as this court can go in this case.
4. The only valid issue which the petitioner has and the State has conceded to is the fact that his trial should take place in a place that is easily accessible to himself and probably his witnesses as it has been established that the cause of action arose in Keroka and not Nyamira. **Section 81 (1) and (2) of the Criminal Procedure Code** clearly stipulates:-

*“(1) Whenever it is made to appear to the High Court -*

- a. *that a fair and impartial trial cannot be had in any criminal court subordinate thereto;*
  - b. *that some question of law of unusual difficulty is likely to arise; or*
  - c. *that a view of the place in or near which any offence has been committed may be required for the satisfactory trial of the offence; or*
  - d. *that an order under this section will tend to the general convenience of the parties or witnesses;*  
*or*
  - e. *that such an order is expedient for the ends of justice or is required by any provision of this Code, it may order -*
- i. -----
  - ii. *that a particular criminal case or class of cases be transferred from a criminal court subordinate to its authority to any other criminal court of equal or superior jurisdiction.*

*(2) The High Court may act on the report of the lower court, or on the application of a party interested, or on its own initiative.”*

5. Pursuant to the above stated provisions of the **Criminal Procedure Code**, I hereby withdraw Nyamira Principal Magistrate's Court Criminal Case No.309 of 2011 from the said court and transfer it to Keroka SPM's court for hearing and determination. The petitioner shall appear for mention before Keroka SPM's Court on 23/09/2014 for directions in his case.

**Ruling dated and delivered at Kisii this 16<sup>th</sup> day of September, 2014**

**R.N. SITATI**

**JUDGE.**

In the presence of:

Mr. Sonye Ondari for Nyambati for the Applicant

Mr. Ochieng for the Respondent

Mr. Bibu - Court Assistant