



**REPUBLIC OF KENYA**

**High Court at Nyeri**

**Constitutional Reference 2 of 2012**

**MWANGI NJURURI .....APPLICANT**

**Versus**

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

**THUO MATHENGE .....2ND RESPONDENT**

**RULING**

1. The application before the court is a constitutional reference under Articles 50, 157(6) and 165(6) of the Constitution of Kenya and rules 2 and 25 supervisory jurisdiction and protection of fundamental rights and freedom of individual in which the applicant seeks the following orders :

a. A declaration that the proceedings of Chief Magistrate's court at Nyeri criminal case No. 834/2002 R. v DR. MWANGI NJURURI MUTAHI contravenes the applicant's right to fair trial under article 50 of the constitution.

b. A declaration that the dominant propose for the institution and maintenance of the Chief Magistrate court at Nyeri Criminal Case No. 834/2012 is to obtain a purpose other than what it is intended namely affect pressure frustrate dislodge or weaken the applicant candidacy for Governor Nyeri County in the year 2013

c. A declaration that the institution and maintenance of the Chief Magistrate's court at Nyeri Criminal Case No. 834/2012 is an abuse of criminal court process.

d. an order of permanent stay of chief magistrate's court at Nyeri Criminal case No. 834/2012.

e. An order for cost.

2. It is supported by the affidavit of the petitioner Dr. Mwangi Njururi Mutahi in which the same deponed that he has declared his interest to be the first Governor of Nyeri County and that on 20th July 2012 made a formal complaint at the Nyeri Police station over threats made to his life by the 2nd Respondent and that the police did not take any action.

3. That it came to his notice that the 2nd respondent Thuo Mathenge made a complaint that on 4th July 2012 the applicant published defamatory matter against the same contrary to section 194 of the Penal Code and that it has downed on him that the charge was part of scheme in respect of the forth coming elections and that the DCIO Othaya and the investigating officer have a keen personal interest in the matter.

4. The applicant finds fault with the way he was arrested by the said officers on Saturday 8th September 2012 and paraded him in the streets and that all the intended prosecution witnesses have a common purpose.
5. The application is opposed by the 1st Respondent through an affidavit of Cpl Patrick Oyalo in which he deponed that that fact surrounding the case are that on 25th July 2012 the second Respondent made a complaint to Nyeri police station that the applicant herein published a defamatory allegation against him through email and print that he had infected his wife with syphilis and raped his own daughter.
6. That upon conclusion of investigation he informed an opinion that a cognizable offence had been committed and recommended that charges be preferred against the applicant and that in respect of the complaint by the applicant the PCIO had instructed that the matter by investigation by the DCIO Othaya to avoid any conflict in the two matters and that it is the applicant which is abusing the court process as he is trying to ventilate his defence before this court which is not the trial court.
7. The 2nd respondent also filed a replying affidavit in opposing the application on the ground that the applicant has committed an offence for misusing communication gadget to malign him and ruin his family and business and that the applicant is in breach of law by violating section 29 Kenya Communication Acts and that under section 193 of criminal procedure code the civil nature of the applicant's activities is not a bar to criminal proceedings.
8. It must be pointed out for record purpose that when the matter came up for hearing before me I granted stay of proceeding of the criminal case pending the ruling herein.
9. I must also point out that at the time of writing the ruling herein there was no evidence placed before me by either the applicant or the respondent to show that the 2nd Respondent was or is running for any elective post save for what has been deponed by the applicant.
10. At the hearing herein Mr. Ombogi appeared for the applicant and submitted that the same feared that he might not be able to get fair hearing before the lower court and that the net effect of his trial thereat is that he was not going to be granted a certificate of good conduct.
11. that the original complaint is malicious since he is not the author of the alleged material contained in the charge sheet and that he has had a bad relationship with the 2nd respondent since he is his strong opponent and would not want him to stand.
12. that the police is applying justice in partial manner to his detrimental since there is no evidence that the matter has been investigated and that there is nothing to show that the said emails were authored by the applicant.
13. Miss Maundu for the 1st Respondent submitted that the matter was properly investigated and the DPP formed the opinion that a recognised offence had been committed and that having had been committed and that having a political ambition is not a bar to criminal proceedings and that the matters of evidence should be raised before the trial court.
14. Mr. Wahome for the 2nd respondent submitted that the application should have been brought under Article 22 of the Constitution enforcement of bills of right and not under Article 50. It was submitted that under the Gicheru rules the application should have been raised before the subordinate court and since the Chief Justice has not made any rules for enforcement of rights under the new constitution the Gicheru rules are applicable.
15. It was submitted that the applicant has not demonstrated that any of the provisions under Article 50 right to fair hearing have been violated and the issues raised are issues of defence.
16. That both election Act and integrity act contains provisions that until someone has exhausted

the avenues of appeal he cannot be barred from contesting.

17. It was submitted that under section 193A of the Criminal Procedure Code notwithstanding the provisions of any written law the fact that any matter is pending in civil matter would not be a bar to making a complaint and that it is upon the respondent to elect whether he would like to enforce the civil rights.

## **ISSUES**

18. From the above affidavit evidence and submission I am of the considered opinion that the following issues arises for determination:

a. whether the institution of the suit before the trial court infringes on the applicant's rights to free and fair trial.

b. whether the application herein is brought under the right article of the constitution and what is the effect thereof.

c. whether the said criminal trial is an abuse of the court process.

19. It must be pointed out at the start that the issue before the court is not on the validity of the charges but on whether by the said charges the applicant's constitutional rights to fair trial or under bills of rights have been violated.

20. I will deal with the rights to free and fair trial as provided for under constitution of Kenya 2010 since article 165(3)(b) of the said constitution vests this court the jurisdiction to determined the question whether rights on fundamental freedom in the Bill of right has been denied, violated infringed or threatened.

21. Article 50(1) protects the rights of every person to have any dispute that can be resolved by the application of law decided in fair and public hearing before a court or if appropriate another independent and impartial tribunal or body whereas article 22 and 23 deals with the rights to move to court and reliefs provided therein.

22. That whereas the applicant has right under article 22(1) to institute proceedings in claiming that a right fundamental freedom in the bill of right has been denied violated or infringed or is threatened a look at the proceedings before the chief magistrate's court does not show any of the applicants rights to fair trial and hearing have been violated.

23. He has been taken to court within reasonable time taken plea and supplied with witness statement and granted bail as the law requires

24. I am guided by the holding in Juma and others vs AG and another (2003) 2 EA 461 wherein Mboghli and Kulloba JJ have this to say:

***“It is an elementary principle in our system of the administration of justice that fair hearing within reasonable time is ordinarily investigation and listening to evidence and arguments conducted impartially in accordance with the principles of justice and due process of law and of which as to the time place and issues or charges for which a party has had a reasonable notice as to the time place and issues or charge for which he has had reasonable opportunity to prepare at which he is permitted to have assistance of a lawyer of his choice as he may afford and during which he has a right to present his witnesses and evidence in his favour a right to cross examine his adversary witness a right to be appraised of the evidence against him in the matter so that he would be fully aware of the basis of the adverse view of him.*”**

***The adjective 'fair' describing the requisite hearing requires the court to ensure that every hearing or***

***trial is reasonable, free from suspicion of bias, free from clouds of prejudice, every step is not obscured and in whatever is done it is imperative to weigh the interest of both parties alike for both and make an estimate of what right is reciprocally just. A fair trial having the above maximum qualities must be undertaken prosecuted and concluded within reasonable time before and by an independent and impartial court established by law.”***

25. From the material placed before me and the above test am unable to find any violation of the applicant's rights to fair trial as alleged and whereas the constitution requires that it be interpreted purposefully and robustly and broadly in order to realize the spirit and values thereon to interparte all the criminal trials before courts as a violation of right to my mind is not what the spirit of the constitution requires.

26. To my mind the application before the court is premature since the applicant has already taken plea and the trial has not commenced to enable the same allege violation of right to fair trial. It is therefore only right that the said trial proceed noting that the 2nd respondent also has an equal right and entitlement to free and fair trial and to lock the same out before evidence is presented would be a miscarriage of justice on the part of this court acting as a constitutional court and taking into account Article 159(2)(a) justice to all.

27. The other issue is whether the application is brought under the right article of the constitution. In this I agree with submission by Mr. Wahome that the same should have been brought under articles 22, 23 and 27 of the constitution but this to my mind is not fatal to the application before me in view of the provisions of article 22(2)(b) and (c) which states as follows for record purposes:

***b) Formalities relating to the proceedings including commencement of proceedings are kept to the minimum and in particular the court should if necessary entertain proceedings on the basis of informal documentation.***

***d) The court while observing the rules of nature justice shall not be unreasonably restricted by procedural technicalities.***

28. Further on the issue raised by the 2nd respondent on the issue of procedure I am guided by Article 159(2)(d) justice shall be administered without undue regard to procedural technicalities and therefore find no merit on that line of submission.

29. Having said that the only right which the applicant is able to demonstrate has been violated is the right of equal protection of the law as guaranteed in article 27 of the constitution and the right to fair administrative action under Article 47(1) in that the complaint against the 2nd respondent has not been investigated and action taken thereon but this has been explained by the 1st respondent that his complaint was to be investigated by the DCIO Othaya to avoid any conflict in the 2nd matter.

30. The above matters to my mind answers the third issue as to whether the proceedings herein is an abuse of the court process. Without going into the merits of the trial before the chief magistrate's court I am unable to find any evidence that this matter has been instituted for political reason as stated above since no evidence was tendered to support the same but should the same arise at the trial the applicant is at liberty to file a further reference to this court.

31. I am therefore unable to find merit on the applicant's application as this court hold the view that political battles if any are best fought in political battle field and not within the courts.

32. I therefore dismiss the application herein with no orders as to cost and order that the trial before the chief magistrate to proceed to conclusion.

Dated and delivered at Nyeri this 24th day of January 2013.

**J. WAKIAGA**

**JUDGE**

Mr. Ombongi for the applicant

Mr. Wahome for the 2nd Respondent

Miss Maundu for the 1st Respondent

Ruling read in open court in the presence of the above named.

**J. WAKIAGA**

**JUDGE**