



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.251 OF 2012

BEATRICE NGONYO KAMAU.....1ST PETITIONER

REHEMA WAIRIMU KAMAU.....2ND PETITIONER

ARTHUR KANAI KAMAU.....3RD PETITIONER

AND

COMMISSIONER OF POLICE AND THE DIRECTOR

OF CRIMINAL INVESTIGATIONS DEPARTMENT.....1ST RESPONDENTS

HON. ATTORNEY-GENERAL.....2ND RESPONDENT

STEPHEN KIMANI KAMAU.....INTERESTED PARTY

JUDGMENT

Factual Background

1. The Petitioners are relatives and the facts leading to the filing of the Petition dated 11/6/2012 are that sometime in October 2009, a building being constructed on L.R.No. Kiambu/Municipality Block II/149, collapsed, and a number of people were injured and others died as a result of injuries sustained at the time. The said land was registered in the name of Stephen Kimani Kamau, the Interested Party. Adjoining the said parcel of land was L.R. No.Kiambu/Municipality Block II/150 registered in the names of the 1st and 2nd Petitioners together with one Richard Silas Kamau, their deceased brother who died on 1/5/2012.

2.After the tragic incident described above, the Interested Party was arrested and together with four other persons was arraigned in the Kiambu Chief Magistrate's Court to face a number of charges including several counts of manslaughter. The Interested Party in the course of that trial filed H.C. Petition No.50 of 2010 seeking certain declarations including that since “*he was absolved from blame with regard to the collapse of the said building*”, any continued prosecution of the case against him would be a violation of **Articles 29(d), 48 and 50 of the Constitution.**

3. Ochieng J. in a judgment delivered on 20/12/2010 concluded as follows;

“...i reiterate that I found no basis in Law or in fact for directing the Respondents to terminate the proceedings against the Petitioner herein. The Petition is thus dismissed with costs to the Respondents.”

The matter as regards the prosecution of the Interested party ended there and his criminal charges are still pending before the Kiambu Chief Magistrate's Court.

4. All parties however agree that subsequently, the limelight shifted to the Petitioners because apparently by a Civil Suit filed on 5/8/2011 the Interested Party sought general damages against the 1st and 2nd Petitioners (*together with their deceased brother, Richard*). His claim, as was his case before Ochieng J., was that by a “*Report by Structural Department, Ministry of Public Works on Collapse of Building in Kiambu Town*”, he was absolved of any wrong-doing and instead blame was shifted to the Petitioners. The basis for that claim was that in the Report, it was found that the building collapsed because of excavation works being undertaken by the Petitioners on L.R. No. Kiambu Municipality Block II/150 which caused the Interested Party's building to tilt and thereafter collapse.

5. The 3rd Petitioner was thereafter arrested and arraigned in Kiambu Chief Magistrate's Court in Criminal Cases No.1421 and 1422 of 2010, Republic vs Arthur Kanai Kamau, where he was charged with various counts of the offence of manslaughter. Thereafter the 1st Petitioner was also summoned by the Police, on 20/2/2012, was bonded and her cash bail subsequently refunded but was later summoned back and informed that criminal charges would also be preferred against her. Apparently, the instructions to prosecute her came from the Director of Public Prosecutions and she was asked to attend Court on 12/6/2012 to take plea. On that day, charges against her were filed but she failed to turn up and a warrant of arrest against her was issued in Kiambu C.M.'s Criminal Case Nos.1770 and 1771 of 2012. Together with the other Petitioners, she thereafter filed the present Petition and on 15/6/2012, I issued conservatory orders staying the criminal prosecutions until the merits or otherwise of the Petition herein is determined.

Case for the Petitioner

6. I have read the Petition, the Affidavit in support and a Supplementary Affidavit sworn on 4/7/2012 by the 2nd Respondent. I have also read the Submissions filed by learned advocate for the Petitioners and in a nutshell their case is as follows;

i) That the prosecution against them is a camouflage to aid the Interested Party in the civil suit that he filed against the Petitioner i.e. HCCC No.314 of 2011, Stephen Kimani Kamau vs Arthur Kanai Kamau & 3 Others.

ii) That the investigations and subsequent prosecution of the Petitioners was vexatious and was intended to harass them and further, that the same was actuated by malice and amounts to abuse of Court process.

iii) That the actions of the Respondents amounted to violation of the constitutional right to equality and freedom from discrimination (**Article 27**); the right to human dignity (**Article 28**); the right to privacy (**Article 31**); the right to fair administrative action (**Article 47**); the rights afforded to an accused person (**Article 48**) and the right to a fair hearing (**Article 50**).

7. In Submissions, learned Counsel for the Petitioners went into great lengths in justifying the position that the evidence against the Petitioners was solely based on the conclusions made in the Report by the Ministry of Public Works which evidence, in the Petitioners' view, was weak and contradicted by a subsequent report prepared by M/s. Leeds Engineering and Construction Management company. That the latter report was the only one that could be styled, “*an expert's report*”, within the meaning of **Section 48(2) of the Evidence Act**.

8. Further, that the Director of Public Prosecutions, by relying on the former report to harass and intimidate the Petitioners, was acting outside the powers conferred by **Article 157(11) of the Constitution** and the decision in Githunguri vs Republic [1985] KLR 91. The gist of the Githunguri Case, it was urged, is that where “*a person charged feels that he is a victim of oppression*”, then the Court has inherent power to intervene and grant relief.

9. Reliance was also placed on the decision of the Court of Appeal in Civil Appeal No.228 of 2003 where

it was held that where the Appellant was not a member of a Tender Board, he could not possibly be charged with an offence related to tender regulations. The point made in the context of the Petition before me was that what happened on title No.149, had nothing to do with title No.150, the latter being in the names of the Petitioners, save the 3rd.

That therefore, the Petitioners are entitled to the Prayers set out in the Petition.

Case for the Respondents

10. One, No.58101, Cpl. Peter Indeche, by his Replying Affidavit sworn on 29/6/2012 detailed out the facts of the case largely reproduced elsewhere above. However, he added that by letter dated 3/5/2012, the Director of Public Prosecutions instructed the 1st Respondents that having considered their request, he was of the view that all the Petitioners should be “*charged jointly with others already before the Court.*”

11. That thereafter, he contacted the 1st Petitioner who agreed to attend Court for plea on 13/6/2012 but failed to do so and yet she had sought time the week before to mourn the death of her brother, Richard. She was given time to do so and it was on her suggestion that the plea was fixed for that date, yet she never turned up.

12. That the Petitioners were all treated humanely and the Respondents knew nothing of a Civil Case filed by the Interested Party and that if the Petitioners have a credible defence to the charges, then they should face them and let the Court deal with that defence.

13. In submissions, learned Principal Prosecution Counsel urged the point that there is not an iota of evidence that any fundamental right with regard to the Petitioners has been violated and that their prosecution is neither an abuse of Court process, nor is it oppressive or vexatious and the Petitioner should be dismissed with costs.

Case for the Interested Party

14. The Interested Party in his Answer to Petition and in Submissions has expressed surprise that he has been enjoined in the present proceedings. While admitting all facts as relates to him save the one on alleged criminal liability, he argues that he has done nothing towards breach of any fundamental rights or freedoms enjoyed by the Petitioners. He also urges the point that he has nothing to do with the actions taken by the Respondents and he is not using them as his agents. To illustrate the point, he has directed the Court to the fact that he is facing multiple criminal charges relating to the collapsed building which charges were preferred by the Respondents. It cannot be true in the circumstances that he is acting in cahoots with his prosecutors to prosecute the Petitioners.

15. Both the Interested Party and his Counsel have trashed the report by Leeds Construction Management as being “*insubstantial, inaccurate and highly flawed.*”

The Interested Party like the Respondents also seeks that the Petition be dismissed with costs.

Determination

16. With the above narrative of the varying positions taken by the parties, I should at this stage reproduce the prayers that the Petitioners have made in the Petition. They are as follows;

“(a) A declaration that the Petitioners’ fundamental rights and freedoms to a fair hearing have been breached or are likely to be breached. (emphasis added)

(b) A declaration that the arrest and arraignment of the 3rd Petitioner is without legal basis and in toto breach of the Constitution. (Emphasis added)

(c) A declaration that the Respondents should desist from investigating and/or charging the 1st and

2nd Petitioners and/or their agents.

(d) A declaration that the Petitioners are entitled to compensation by way of aggravated and/or punitive damages. (Empasis added)

(e) Costs of this Petition.

(f) Interests on (d) and (e) above.

(g) Such other or further reliefs as this Court may deem fit to grant.”

17. I will begin by quickly and without much ado, dismissing prayer (d) above. I say so because nowhere in the Petition, in the Supporting and Supplementary Affidavits nor in the Submissions has any mention been made of this claim. I know that damages are payable for breach of fundamental rights and in the discretion of the court. But a party claiming damages must go beyond merely stating that it is entitled to “*compensation by way of aggravated and/or punitive damages*”. **What is that and in respect of what?** Enough said.

18. Turning to Prayer (a), although at paragraph 18 of the Petition, **Articles 10, 20, 23, 27 and 48** of the **Constitution** are mentioned, the only breach for which specific orders are sought is not in respect of those Articles and rights enshrined in them but only the breach of the right to a fair hearing is mentioned. A party must be held to its pleadings and in this case I can only but agree with Counsel for the Respondents that where no particulars of alleged breaches are given, the Court is put in a very difficult position. It cannot be left to speculation as to how an act or omission can amount to breach of a fundamental right. In saying this, Courts do not demand specificity to the level of scientific exactitude. Courts only demand that sufficient material be placed before them to enable a fair determination of the matters placed before them.

19. Turning back to Prayer (a) and the right to a fair hearing, **Article 50** of the **Constitution** provides as follows;

“1) Every person has the right to have any dispute that can be

resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right—

(a) to be presumed innocent until the contrary is proved;

(b) to be informed of the charge, with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence;

(d) to a public trial before a court established under this Constitution;

(e) to have the trial begin and conclude without unreasonable delay;

(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly; to remain silent, and not to testify during the proceedings;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(k) to adduce and challenge evidence;

(l) to refuse to give self-incriminating evidence;

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not—

(i) an offence in Kenya; or

(ii) a crime under international law;

(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

(3) If this Article requires information to be given to a person, the information shall be given in language that the person understands.

(4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

(5) An accused person—

(a) charged with an offence, other than an offence that the court may try by summary procedures, is entitled during the trial to a copy of the record of the proceedings of the trial on request; and

(b) has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a

reasonable fee as prescribed by law.

(6) A person who is convicted of a criminal offence may petition the High Court for a new trial if—

(a) the person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and

(b) new and compelling evidence has become available.

(7) In the interest of justice, a court may allow an intermediary

to assist a complainant or an accused person to communicate with the court.

(8) This Article does not prevent the exclusion of the press or

other members of the public from any proceedings if the exclusion

is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.

(9) Parliament shall enact legislation providing for the protection,

rights and welfare of victims of offences.”

20. The Article as can be seen, addresses many issues under the wide heading of fair hearing and I deliberately reproduced it for reasons to be seen shortly. Applying the facts of this case to those provisions, the question that I must answer is whether the prosecution of the Petitioners in any way violates that right and whether the Respondents have acted within their constitutional mandate. **Article 157** of the **Constitution** provides as follows;

“(1) There is established the office of Director of Public Prosecutions.

(2) ..

(3) ...

(4) The Director of Public Prosecutions shall have power to direct

the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

(5) ...

(6) The Director of Public Prosecutions shall exercise State powers

of prosecution and may—

(a) 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;

(b) 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; and

(c) subject to clause (7) and (8), discontinue at any stage before

judgment is delivered any criminal proceedings instituted

by the Director of Public Prosecutions or taken over by the

Director of Public Prosecutions under paragraph (b).

(7) If the discontinuance of any proceedings under clause (6)

(c) takes place after the close of the prosecution's case, the defendant shall be acquitted.

(8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.

(9) The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

(10) 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.

(11) In exercising the powers conferred by this Article, the

In exercising the powers conferred by this Article, the

Director of Public Prosecutions shall 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.

(12) Parliament may enact legislation conferring powers

of prosecution on authorities other than the Director of Public

Prosecutions. ” (Emphasis added)

21. I have specifically underlined **Sub-Article 6(a), 10 and 11** to make the point that Ochieng J. also made in Petition No.50 of 2010 filed by the Interested Party, that it behoves upon a Petitioner to show, by tangible evidence that the DPP in exercising his wide prosecutorial powers has acted;

- i) against the public interest
- ii) against the interests of the administration of justice and;
- iii) has abused the legal process.

These considerations were also taken into account in the Githunguri Case (supra) where the Court stated as follows;

“If we thought, which we do not, that the Applicant by being prosecuted is not being deprived of the protection of any of the fundamental rights given by Section 77(1) of the Constitution, we are firmly of the opinion that in that event we ought to invoke our inherent powers to prevent this prosecution in the public interest because otherwise it would similarly be an abuse of the process of the Court, oppressive and vexatious. It follows that we are of the opinion that the Application must succeed in either event.”

22. The point being made above is that the DPP though not subject to control in exercise of his powers to prosecute criminal offences, must exercise that power on reasonable grounds. Reasonable grounds, it must be noted, cannot amount to the DPP being asked to prove the charge against an accused persons at the commencement of the trial but merely show a prima facie case before mounting a prosecution. The proof of the charge is made at trial.

23. In the instant case, and I am not going to delve into the merits of the case, the evidence tendered before me is sufficient at a prima facie level to show that the DPP had reasonable grounds to suspect that

the Petitioners and the Interested Party may have, by negligent criminal actions caused the collapse of the building on L.R. No.149. The converse would have been true if the DPP acted capriciously, with malice directed at the Petitioners and unfairly invoked his prosecutorial powers – see Jared Benson Kangwana vs The Attorney- General, H.C Misc. Appl. No.446 of 1995.

24. It has been alleged that the Interested Party and the Respondents are acting jointly to aid his civil suit against the Petitioners. To my mind, that is an incredible proposition; how can an accused person with the prosecutor's noose around his neck, act in concert with the prosecutor to hang his neighbour? I see no evidence of such a scheme nor do I see any link between the Interested Party's actions to extricate himself from prosecution and the prosecution initiated against the Petitioners.

25. At this point, I should say this about the two reports as to the cause of the collapse of the Interested party's building. Both are pieces of evidence to be relied on at the trial and this Court cannot purport to turn itself into a trial Court and determine their value.

26. I should advert back to prayer (a) with the above background in mind and state that **Article 50(1)** provides for a fair and public hearing before a Court to resolve the contested issues of fact. The Petitioners have failed to show what the Kiambu Chief Magistrate's Court has done to deny them a fair hearing. It is not the Respondents but that Court that is expected to give them a hearing. Instead of presenting themselves to its jurisdiction, the 1st and 2nd Petitioners ran to this Court and as of today, a warrant of arrest from that Court is still outstanding as regards the 1st Petitioner. As an advocate of this Court, I expected better of her; she ought to have submitted herself to that Court and then seek this Court's intervention. To abscond goes against all the training that lawyers receive and this Court cannot countenance such conduct.

27. In any event, I also note that the 1st Petitioner knew the charges she was to face, argument that she was exonerated cannot be true and I believe the statements by Cpl. Indechi that she was initially released to await the instructions of the DPP and once the same were received, the 1st Petitioner was duly informed. She sought time to mourn her brother and by an SMS which is before this Court, she requested to appear in Court on 12/6/2013 but she instead absconded.

The decision of Council of Civil Service vs Minister for the Civil Service [1985] AC No.374 at 408 that there was a breach of public duty on the part of a decision maker, in this case, the DPP, cannot apply to the situation that the Petitioners find themselves in.

28. Lastly, on this issue, Article 50 of the Constitution was wrongly invoked and the Petitioners, like the Interested Party was told by Ochieng J., must face their accusers in the Magistrate's Court and tender the report by Leeds aforesaid as their defence. They are safe in that Court and they are innocent until proof of guilty is properly shown.

29. Having held as I have done above, Prayers (b) and (c) of the Petition are clearly spent and there is nothing more to say.

Conclusion

30. When this matter was first placed before me, at the ex-parte stage, I saw *prima facie* evidence that injustice may have been caused to the Petitioners. On hearing all sides, it is obvious to me, that the Petition before me has no merit, was filed as an escape route to criminal prosecution and is an abuse of Court process.

31. Regarding the Interested Party, his protestations that he was improperly joined to the Petition cannot be sustained. The issues raised, although unmerited, would have affected his interests had I found in favour of the Petitioners. That he participated in arguments made assisted the Court in reaching a fair determination of the matter.

32. Lastly, since the Petition is without merit, it is hereby dismissed with costs to the Respondents and

Interested Party.

33. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 6TH DAY OF JUNE, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Florence – court clerk

Miss Wambugu for Petitioner

Mr. Kago for Interested Parte

Miss Spira holding brief for Mr. Okello for Respondents

Order

Judgment dully read.

ISAAC LENAOLA

JUDGE