



**REPUBLIC OF KENYA**

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

**Petition No.148 Of 2012**

**IN THE MATTER OF ARTICLE 22, 23 AND 165 OF THE CONSTITUTION AND IN THE MATTER OF AN ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS ARTICLE 27 OF THE CONSTITUTION**

**BETWEEN**

**Nemwel Momanyi ..... PETITIONER**

**VERSUS**

**Joseph Satia ..... 1<sup>ST</sup> RESPONDENT**

**Republic ..... 2<sup>ND</sup> RESPONDENT**

**The Chief Magistrate’s Court Kisii ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The petitioner herein Nemwel Momanyi filed an Application on 20<sup>th</sup> May 2013 seeking the following reliefs:-
  - a. *A declaration that the respondents have to infringe upon the petitioner’s constitutional rights which violates the Article 50 of the Constitution under fair hearing (sic);*
  - b. *That there be a stay of proceedings in Kisii CMC Cr. Case No.921 of 2012 pending the hearing and determination of the petition 148/2012.*
  - c. *That this court do cause proceedings in Kisii CMCRC No.92/012 be placed before this court and same be quashed.*
  
2. The application is not supported by an affidavit, though it appears to the court that the grounds on which the application is premised appear to be part of the application as per paragraphs 1-10 thereof. The petitioner avers that he is the accused in Kisii CMC Cr. Case Number 921 of 2012. From the application, the prosecution closed its case but when the same was meant to proceed to defence hearing, the petitioner sought to have the case stayed. This was on 16<sup>th</sup> May 2012 and accordingly, the defence case was fixed for 28<sup>th</sup> May 2013. In the meantime, the petitioner filed his petition alleging that his constitutional rights may not be threatened, infringed and denied. The petitioner contended that he continued to suffer in the hands of the respondents hence the filing of both the petition and the application for stay.
  
3. In the petition dated 19<sup>th</sup> December 2012, the petitioner contends that upon his arrest, he was locked up in cells at the Kisii Police station instead of being taken to Gesonso place station; that he was falsely accused of causing incitement when all he was doing was pursuing the rights of

IDP's for compensation of some Kshs.55 million which was launched on 30<sup>th</sup> April 2012. The petitioner also contends that there was no evidence to support the charge of incitement against him; that all the evidence adduced against him was a frame-up; that he was treated in a discriminatory manner; that one witness who was meant to testify was not called to testify; that the rest of the prosecution evidence was contradictory. The petitioner also alleges conspiracy/corruption and a sinister motive on the part of the trial magistrate and says that the prosecution evidence was not supported by any exhibits; that in any event, the investigations in this case were carried out by an officer from a different area of jurisdiction. The petitioner therefore avers that his rights to a fair hearing are threatened for being charged with this incitement offence.

4. There have been no responses to the petitioner's application but at the hearing hereof, the petitioner submitted that after going through the evidence adduced before the lower court, he felt that he should not have been put on his defence. He argued that the evidence against him was pre-planned and doctored. He also said that the people allegedly incited were never arrested and that in the circumstances, this court should quash the ruling requiring him to be put on his defence.
5. In response to the submissions, counsel for the state, Mr. Shabola submitted that both the petition and the application by the petitioner have no basis. Counsel submitted that the trial court had the sole discretion, after hearing evidence by the prosecution to put the petitioner on his defence. Counsel also submitted that the provisions of **Article 50** of the **Constitution** are wrongly invoked and that if he (petitioner) felt aggrieved by the ruling of the trial court, he should either have applied for review the same or filed an appeal against the said ruling. It was counsel's view that this whole petition is premature since the criminal case against the petitioner is yet to be concluded.
6. **Article 50** of the **Constitution** provides under sub article (1) thereof that **"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."** The right to a fair hearing is defined under sub article (2) thereof and among those rights is the right to adduce and challenge evidence. Under **Article 50 (2) (f)** an accused person, if convicted has the right to appeal to, or apply for review by, a higher court as prescribed by law.
7. The procedure for the conduct of Criminal Cases, is provided under the

**Criminal Procedure Code Cap 75 of the Laws of Kenya. Section 150** thereof gives the trial court power to summon or call any person as a witness, whether previously summoned as a witness or not, to recall and re-examine any witness if the evidence of such a person appears to the court to be essential for the just determination of the case.

8. PART VI – Procedure in Trials before Subordinate Courts – of the CPC also provides a detailed procedure through which a trial before a subordinate court is taken upon taking of plea. Where an accused does not plead guilty, the court shall proceed to hear the complainant and his witnesses as provided under **section 208** of the **Criminal Procedure Code**. Under **section 210**, an accused person may be acquitted if the trial court is satisfied that the prosecution has not established a prima facie case requiring him to be put on his defence. On the other hand, where the Court, upon hearing evidence in support of the charge and such other arguments or submissions, it appears to the court that a case is made out against the accused person, sufficiently to require him to be put on his defence, the court shall proceed to put the accused to his defence upon compliance with **section 211 (1)** of the **Criminal Procedure Code**.
9. In the instant case, the petitioner wants this court to make a declaration that the trial court's decision to put him on his defence was illegal. The question that this court must ask itself is whether the petitioner has put sufficient reasons before it to support such a prayer, in light of the provisions under **Part VI** of the **Criminal Procedure Code**.
10. In my considered view, the petitioner has not put any sufficient

reasons before this court to support the prayers sought in both the petition and the application. The trial court has followed the law as provided under **Part VI** of the **Criminal Procedure Code** in the conduct of the case against the petitioner. It is the said court which heard the evidence and whether some witnesses whom the petitioner thought should be called were not called by the

prosecution is not a matter for this court. The trial court had the full mandate to decide whether or not the evidence supports a prima facie case after hearing the evidence from the prosecution. In this case, the petitioner has made allegations of corruption and conspiracy without laying any evidence before this court to support such allegations.

11. It is to be noted that putting an accused person on his defence is not the same as saying that the prosecution has proved its case beyond any reasonable doubt. The bar for the evidence to convict is much higher than the one for finding that a prima facie case has been established. And in any event, the petitioner will have choices to make as to how he conducts his defence, one of those choices being to remain silent even after being put on his defence. The petitioner has not demonstrated in what manner his trial was not fair. Accordingly, I find no merit in the petitioner's complaint and dismiss it in its entirety.
12. The petitioner also wants the criminal case against him stayed on grounds that some witnesses were not called and that the evidence adduced by the prosecution was doctored. As regards the issue of calling witnesses, it is the State (prosecution) which decides on the number of witnesses to be called and in what order such witnesses are to be called, save that where a court is of the view that the evidence of a particular witness, whether such witness is summoned by the prosecution or not, is necessary for the just determination of the case, then the court has the power to summon such a witness.
13. In my view, the issues raised by the petitioner in seeking a stay of the criminal case facing him before the trial court are pertinent issues either on an application for review or appeal. The petition herein is neither an application for review nor an appeal. I therefore entirely agree with prosecuting counsel that both this petition and application are premature and have no merit.
14. Accordingly, both the petition dated 19<sup>th</sup> December 2012 and the application dated 20<sup>th</sup> May 2013 be and are hereby dismissed.
15. Orders accordingly.

**Dated and delivered at Kisii this 30<sup>th</sup> day of September, 2013**

**RUTH NEKOYE SITATI**

**JUDGE**

In the presence of:

Present in person for Petitioner/Applicant

Mr. Shabola (present) for State

Mr. Bibu - Court Clerk