



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION NO 339 OF 2013
CONSOLIDATED WITH PETITION NO. 340 OF 2013
ISAAC ALUOCH POLO ALUOCHIERPETITIONER
VERSUS
STEPHEN KALONZO MUSYOKA & 217 OTHERS.....RESPONDENTS
AND
DIRECTOR OF PUBLIC PROSECUTIONS.....INTERESTED PARTY

RULING

1. This petition and petition no. 340 of 2013, relate to two applications by the petitioner who wishes to carry out private prosecutions of all the 340 members of the current National Assembly and all the 218 members of the 10th Parliament. He lodged ACC1/2013 and ACC2/2013 before the Chief Magistrate's Court at Makadara seeking leave to institute private prosecutions under section 88 of the Criminal Procedure Code and Article 157 of the Constitution against the said past and present members of the National Assembly.
2. The Chief Magistrate's Court at Makadara took the view that the two matters raised constitutional issues on prosecution of a case by a private person. It therefore referred the matter to the High Court after framing issues for determination by the court as follows:
 - i. What is the extent and nature of cases that a private person could be permitted to institute against others?
 - ii. Whether the Director of Public Prosecutions could be excluded from prosecuting this matter as one member of the National Assembly is his relative.
- iii. Any other matter that the Court deemed appropriate to determine.
3. The petitioner, Mr. Aluochier, who seeks to carry out the private prosecutions, and Ms. Kahoro, from the office of the Director of Public Prosecutions, made submissions before me on the above issues on 31st July 2013.
4. According to Mr. Aluochier, the issue for determination is whether a private prosecution can proceed as of right. He argued that Article 157 provides that a prosecution can be conducted by the DPP or any other person; that this was recognised in Section 28 of the Office of the Director of Public Prosecutions (ODPP) Act, 2013; that the Act affirms what is in the Constitution and under section 57(4) of ODPP Act, the Act is given supremacy over all other laws; that section 28 and 57

of the ODPP Act would override section 88 of the Criminal Procedure Code which requires that permission be sought from the Magistrate before a prosecution can be undertaken. He concludes therefore that the law has changed and that he has a right to carry out the private prosecutions.

5. Ms. Kahoro opposed the application. In her view, the interpretation of the provisions of the law was misconceived; that Article 157(6)(b) refers to taking over of prosecutions by the DPP; that the issue of private prosecutions is an old concept and the new Constitution has not altered what is required when a person seeks to carry out a private prosecution. She relied on the case of **Floriculture International Limited and Others High Court Misc. Civil Application No 114 of 1997 (The Floriculture case)** in which the court set out the requirements for one to carry out a private prosecution.
6. Ms. Kahoro enumerated these requirements as being that one needed to show that he had made a report to investigate and prosecute to the state authorities charged with investigation and prosecution, namely the police; and that it is only if no action is taken after a report has been made to the ODPP, and the Magistrate sees that a report has been made no action taken, can a Magistrate allow a private prosecution.
7. According to Ms. Kahoro, there are six conditions to be fulfilled, which the petitioner had not even attempted to fulfil; that there is no evidence to show that there are serious offences committed; that the petitioner wishes to be the investigator, witness and prosecution, and relies on his own documents to institute the prosecution.
8. In Ms. Kahoro's view, the application to institute the prosecutions is frivolous and has no procedural or substantive basis; that the allegation by the petitioner in his application that the ODPP does not have qualified prosecutors is very far from the truth; that no report has been made to the Ethics and Ant-corruption Commission to enable them investigate, and the petitioner's that the matter needed to be prosecuted expeditiously had no basis.
9. In his rejoinder, Mr. Aluochier argued that Article 157(6) (b) allows the DPP to take over prosecutions, but only with the permission of the person prosecuting. He distinguished the decision in the Floriculture case by arguing that there has been a change in the law and that the principles in the case were therefore no longer applicable.
10. Ms. Kahoro applied and was granted leave to put in written submissions on the issues before the court, with leave to the petitioner to respond thereto. She duly filed written submissions dated 6th August 2013 which I shall refer to later in this ruling. It appears from the documents in the court file that the petitioner did not file submissions in reply.

Issues for Determination

11. In the written submissions, the respondent has made various submissions with regard to the matter before me, including the unsustainability of the charges sought to be brought against the members of the National Assembly, as well as their powers and privileges which, according to the respondent, insulate the members from civil or criminal proceedings with respect to any matter spoken before or contained in a report before the National Assembly.
12. The Court takes the view, however, that, as captured in the reference by the Chief Magistrate's Court in Makadara, the main issue for determination is the circumstances under which a private citizen can institute private prosecutions against another citizen. Whether or not the charges that the petitioner seeks to bring against the Members of Parliament are sustainable, and whether or not matters spoken or reported in Parliament are immune from civil or criminal process, do not fall for determination in this reference.

Constitutional Powers to Prosecute

13. The office of the Director of Public Prosecutions is established under Article 157 of the Constitution. The provisions of this Article relevant to the matter now before me are as follows:

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

(2)....

(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 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.*

14. The petitioner argues that the Constitution gives him or any other person the right to institute criminal prosecutions against any person; and that the principles set out in the **Floriculture** case

relied on by the respondent predated the Constitution and do not therefore apply.

15. In determining the issues raised in this reference, I believe I should consider first the position obtaining prior to the promulgation of the Constitution in 2010 with regard to private prosecutions.

16. The power to carry out prosecutions was vested in the Attorney General (AG) under the former Constitution. Section 26 thereof provided as follows:

26. (1) There shall be an Attorney General whose office shall be an office in the public service.

(2) The Attorney General shall be the principal legal advisor to the Government of Kenya.

(3) The Attorney General shall have power in any case in which he considers it desirable so to do;

(a) 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 by that person;

(b) to take over and continue any such criminal proceedings that have been instituted or undertaken by another person or authority; and

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority.

(4) The Attorney-General may require the Commissioner of Police to investigate any matter which, in the Attorney-General's opinion, relates to any offence or alleged offence or suspected offence, and the Commissioner shall comply with that requirement and shall report to the Attorney-General upon the investigation.

(5) The powers of the Attorney-General under subsections (3) and (4) may be exercised by him in person or by officers subordinate to him acting in accordance with his general or special instructions.

(6) The powers conferred on the Attorney-General by paragraphs (b) and (c) of subsection (3) shall be vested in him to the exclusion of any other person or authority: Provided that where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the court.

17. As can be observed from the provisions of the former and the current Constitution set out above, the powers granted to the offices of the AG and the ODPP under the old and the new constitution respectively are essentially the same. While the AG combined, under the former constitution, the function of chief legal advisor of the government and the powers of prosecution, the Constitution of Kenya 2010 has now separated these functions.

18. However, what may be observed is that the functions and powers of prosecution given to the AG, including powers related to taking over and terminating private prosecutions, are virtually identical to those given to the Director of Public Prosecutions, with two important differences.

19. These differences relate to the power of the AG, and now the DPP, to take over and terminate private prosecutions. Under the former constitution, the AG could take over and terminate private prosecutions at will. However, under the new Constitution, the DPP can only take over a private prosecution, as provided under Article 157(6)(b), with the permission or authority of the person undertaking such prosecution. With regard to discontinuation or termination of prosecution, the DPP cannot, under Article 157(8), terminate or discontinue any prosecution without the permission of the Court.
20. Other than these two changes with regard to the taking over and discontinuation of private prosecutions, I believe that the law and judicial precedent with regard to the extent and circumstances under which a private person may institute criminal prosecutions against another as was in force under the former Constitution is still applicable today. I do not believe that a private citizen can wake up one morning and decide that a fellow citizen has committed an offence, and that he is entitled as of right to bring a private prosecution against the said citizen without reference to the police or the office of the DPP.
21. The law required, and I believe still requires, that a party should approach the Magistrate's Court under the provisions of section 88 of the Criminal Procedure Code to permit him or her to carry out the prosecution. The Court has in various decisions in the past set out what is required for a party to be permitted to carry out a prosecution, which is now the constitutional responsibility of the ODPP and formerly, the AG.
22. In the case of **Otieno Clifford Richard vs Republic High Court at Nairobi (Nairobi Law Courts) Misc Civil Suit No. 720 of 2005**, the High Court (Nyamu, Emukule and Wendoh, JJ), observed as follows with regard to the circumstances under which a party could be permitted to carry out a private prosecution:

*“Section 85 to Section 88 of the Criminal Procedure Code deal with “Appointment of Public Prosecutors and conduct of prosecutions”. On the other hand Section 89 to Section 90 of Criminal Procedure Code deal with the “Institution of proceedings and making of complaint”. We think that in the case of a private prosecution an application must first be made under Section 88(1) of the Criminal Procedure Code for the Magistrate trying the case to grant or refuse to grant permission to the Plaintiff to conduct a private prosecution. It is after permission has been granted for the private prosecution to be conducted that Section 89 and Section 90 of the Criminal Procedure Code can be brought into effect and the criminal proceedings instituted. We believe that the principles set out in the **KAHARA CASE** at page 89 are good law and provide guidance to a subordinate court when determining the question whether to allow a private prosecution since it spells out certain issues which must be addressed by the court when considering the application for permission to private prosecute before granting it.”*

23. The Court then set out the principles to be applied in determining whether an applicant should be allowed to institute private prosecution. The court took the view that upon such an application being made, the Magistrate before whom the application is made should *question the applicant to “ascertain whether a report has been made to the Attorney General or to the Police and with what result. If no such report has been made the magistrate may either adjourn the matter to enable a report to be made and to await a decision thereon or in a simple case of trespass or assault proceed to grant permission and notify the Police of that fact.”*
24. The Court placed reliance on the principles enunciated by Kuloba J (as he then was) in the **Floriculture** case (supra). In that case, the Court set out six principles that the Magistrate's Court should consider before granting a party leave to carry out a private prosecution. The Court stated as follows:

“For all these reasons criminal proceedings at the instance of a private person shall be

allowed to start or to be maintained to the end only where it is shown by the private prosecutor;

1. *that a report of the alleged offence was made to the Attorney General or the Police or other appropriate public prosecutor, to accord either of them a reasonable opportunity to commence or take over the criminal process, or to raise objection (if any) against prosecuting; that is to say, the complainant must firstly exhaust the public machinery of prosecution before embarking on it himself; and*
2. *that the Attorney General or other public prosecutor seized of the complaint has taken a decision on the report and declined to institute or conduct the criminal proceedings; or that he has maintained a more than usual and reasonable reticence; and either the decision or reticence must be clearly demonstrated; and*
3. *that the failure or refusal by the State agencies to prosecute is culpable and, in the circumstances, without reasonable cause, and that there is no good reason why a prosecution should not be undertaken or pursued; and*
4. *that unless the suspect is prosecuted and prosecuted at the given point of time, there is a clear likelihood of a failure of public and private justice; and*
5. *the basis for the locus standi, such as, that he has suffered special and exceptional and substantial injury or damage, peculiarly personal to him, and that he is not motivated by, malice, politics, or some ulterior considerations devoid of good faith, and*
6. *that demonstrable grounds exist for believing that a grave social evil is being allowed to flourish unchecked because of the inaction of a pusillanimous Attorney General or police force guilty of a capricious, corrupt or biased failure to prosecute, and that the private prosecution is an initiative to counter act the culpable refusal or failure to prosecute or to neutralize the attempts of crooked people to stifle criminal justice”.*

25. I take the view that even under the new Constitution, with perhaps the exception of principle No 5, with regard to locus standi, these are reasonable requirements to demand that a citizen who takes the view that a private prosecution is called for must fulfil. They accord, to some extent, with the principles enunciated by the court in the case of **Rufus Riddlebarger vs. Brian John Robbison [1959] EA 841** also relied on by the respondent in this case. The court observed at page 845 thereof as follows:

“This being so, a private prosecution can only be given legitimacy and allowed by the court to be instituted or maintained if it serves as a remedy against a culpable inertia or partiality on the part of the public prosecuting authority. It must be shown to be taken only as a safeguard against extraordinary impropriety, capricious, corrupt or biased failure or refusal to prosecute by the public prosecuting agencies. The court will therefore, require to be satisfied by the private prosecutor, that the private proceedings are necessary because the Attorney General and his officers or the Police, do not wish to act on the complaint, and that they have declined to act or refused to take action, for culpable reasons.”

26. The Makadara Chief Magistrate’s Court, which is seized of this matter, should be guided by the above principles in determining whether it should allow the petitioner, who is the applicant before it, carry out the intended private prosecution of the Members of Parliament. Even though there is now a new Constitution, it does not give free reign to citizens to attempt to take over the functions of the state entity charged with prosecution of offences on a whim. An applicant must satisfy the Magistrate’s Court, which is still seized of powers under section 88(1) of the Criminal Procedure Code to grant leave for a party to institute private prosecution of any party, that there has been a failure by the state authorities to act in accordance with their constitutional and statutory mandate.

27. The Court's response to the issues raised by the Chief Magistrate, therefore, is as follows:

- i. A private citizen can only institute private prosecutions in those cases where he or she satisfies the Magistrate's Court before whom he or she wishes to carry out the prosecution that there has been a failure by the bodies charged with prosecution to carry out their mandate. To do so, the private citizen must meet the requirements enunciated in the Floriculture case which are set out above.

28. In order not to pre-empt the decision of the Chief Magistrate in Makadara when he considers the application by the petitioner, I will say no more on this matter save to observe that in making his decision, in addition to considering the Floriculture principles, he must be guided by the constitutional injunction that requires that there should be fast and expeditious disposal of cases, and that there should not be an abuse of the court process by any party.

Dated, Signed and Delivered at Nairobi this 17th day of October 2013

MUMBI NGUGI

JUDGE

Isaac Polo Aluochier, Petitioner, in Person

Ms. Terry Kahoro, Litigation Counsel, instructed by the Office of the DPP.