



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**PETITION 46 OF 2011**

**IN THE MATTER OF: ARTICLES 19(1) (2) (3) (a) (b) (c), 20(1) (2) (3) & (4), 21(1),**

**22(1) (2) (3) (4), 23(1) (3), 24(1) (2) (3) OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 30(1), 47(2) AND 50(1)**

**IN THE MATTER OF: SECTION 14A AND 22 OF THE POLICE ACT CHAPTER 84 OF THE LAWS OF KENYA**

**HON. DANSON BUYA**

**MUNGATANA.....PETITIONER**

**V E R S U S**

**THE ATTORNEY**

**GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE INSPECTOR GENERAL.....2<sup>ND</sup> RESPONDENT**

**THE OFFICER COMMANDING CENTRAL POLICE STATION.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. On 1<sup>st</sup> August 2011 the Petitioner was served with Summons requiring him to attend the Resident Magistrates Court at Mombasa in Criminal Case No. 2338 of 2011 and to answer a charge of issuing bad cheques contrary to Section 346(A) (1) (a) of the Penal Code. The particulars of the charge being;

***“ISSUING BAD CHEQUES CONTRARY TO SECTION 316(A) (1) (a) OF THE PENAL CODE***

***HON. DANSON BUYA MUNGATANA: On the 20<sup>th</sup> day of June 2011, in Mombasa District within Coast Province, issued Co-operative cheques No.s 0005567 of Kshs. 700,000/-, 000557 of 700,000/- and 000558 of 700,000/- to CHWILE INVESTMENTS LTD which was to be drawn on account of***

**HON. DANSON BUYA MUNGATANA Account Number 2008467100 of Co-operative Bank Parliament Road Nairobi Branch, knowing that the said account had insufficient funds.”**

2. This vexed the Petitioner who thought that his Constitutional rights had been infringed and spurred him into filing this petition in which he seeks-

**“(a) This Honourable Court to declare that the Criminal Case No. 2338 of 2011 Republic –Vs- Hon. Danson Buya Mungatana is unconstitutional, wrong and or illegal.**

**(b) An order that the Petitioner pays the Complainant his debt of Kshs. 2,100,000/- by instalment as follows:-**

**(i) Kshs. 700,000/- immediately this Petition is granted or as is ordered by this Court.**

**(ii) Thereafter Kshs. 400,000/- monthly instalments until payment in full.**

**(iii) Any other orders that this Honourable Court may deem appropriate in the circumstances of this petition.”**

3. In the petition he alleges that the Respondents have violated his rights as guaranteed by Articles 30(1), 47(2) and 50(1) of The Constitution. These rights are in respect to a right not to be held in slavery or servitude, a right to fair administrative action and a right to fair hearing in that order.

4. The Petitioner gives the following as the manner in which those rights are said to be breached-

**“(i) By failing to investigate the Complainant’s claim by summoning the Petitioner to have his side of story as is expected under Section 14A of the Police Act Chapter 84 of the Laws of Kenya which requires the police to conduct themselves in an impartial and objective manner not to accord different treatment to different persons; and**

**(ii) By failing to exercise their power to summon the Petitioner to the Police Station as provided for under Section 22 of the Police Act for purposes of investigating the Complainants claim; and**

**(iii) By deliberately preferring a charge when the facts do not disclose a criminal offence as provided by the proviso to Section 316A(1) of the Penal Code, the Respondents have breached the law and are most likely to deny, violate and or infringe the Petitioner’s rights under the Constitution.”**

5. It is the contention of the Petitioner that he entered into a commercial deal with one Willy Dzombo who deposited Kshs. 1.4m into his account. Dzombo was to be refunded this money with an additional Kshs. 700,000/- in profit. The Petitioner gave him three postdated cheques of Kshs. 700,000/- each as security. The Petitioner says that in breach of their oral agreement the complainant banked the cheques before the Petitioner had confirmed that his account had sufficient funds to pay the cheque. That the complainant having disregarded this arrangement is maliciously using the penal process to resolve a purely commercial dispute.

6. Cpl Charles Lepuchirit a Police Officer attached to Criminal Investigations Office Urban Mombasa is the Investigation officer. The Complainant is CHWILE INVESTMENTS LTD in whose favour three postdated cheques were issued by the Petitioner. All the cheques were returned unpaid. The Investigation Officer preferred charges against the Petitioner after being satisfied that there was sufficient evidence that an offence contrary to Section 316A of the Penal Code had been committed.

7. The parties herein argued the petition by way of written submissions which they supplemented with oral highlights. In brief the arguments made in favour of the Petitioner are that-

(a) The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were not impartial and objective in conducting their investigations as they did not summon the Petitioner to give his side of the story. That Sections 14A (1) and Section 22(1)

of The Police Act (repealed) then in force were contravened.

(b) That the charge sheet fails to disclose a criminal offence against the Petitioner.

(c) That the prosecution lacks bona fides and is purely intended to embarrass the Petitioner.

(d) That the dispute between the Petitioner and the complainant is commercial in nature, there is nothing criminal about it.

8. For the Respondent it was argued that-

1) The events as accepted and narrated by the Petitioner disclose the commission of an offence under Section 316 A of the Penal Code.

2) The Police Act in Section 22 gives an investigating officer discretion as to who to call in for purposes of seeking information on an alleged offence and under Section 22(3), a Police Officer may record statements even after one has already been charged with an offence.

3) That the investigating officer formed an opinion that an offence had been committed and proceeded to charge the Petitioner. That the officer based his decision on the sufficiency of the evidence available.

4) The Respondent proposed that a court of law should not interfere with a decision to prosecute unless there are exceptional circumstances to warrant this. These exceptional circumstances include a decision tainted by dishonesty or is mala fides. It was argued by the Respondents that the Petitioner had failed to establish any dishonesty, mala fides or such like circumstances.

5) This Court was asked to in addition, to balance the rights of the Petitioner vis-à-vis the right of a legitimate complainant to have his complaint heard (Article 50)

9. As the Court embarks to determine this matter, it is imperative to remain focused on the specific rights that are the subject of the petition. These are the rights guaranteed under Articles 30(1), 47(2) and 50(1).

### **Article 30(1)**

10. This Article provides as-

***“A person shall not be held in slavery or servitude.”***

I must confess that the Court is unable to see how a Summons to answer charges to a criminal offence and to stand trial therefor can amount to exposing or subjecting the Petitioner to slavery or servitude. What is slavery or servitude? In ordinary parlance, slavery is-

***“The state of being a slave”***

While Servitude means ***“The state of being a slave or completely subject to someone more powerful.”***

While a slave is ***“a person who is the legal property of another and is forced to obey him or a person who is excessively dependent upon or controlled by something.”*** (Concise Oxford English Dictionary 11<sup>th</sup> Edition)

11. The Petitioner having been summoned to answer a charge is a suspect and becomes an accused person once he answers to the charge. The Petitioner was served summons on 29<sup>th</sup> July 2011 to attend Court 9 (nine) days later on 8<sup>th</sup> August 2011. The Respondents did not violate, threaten, take away or restrict his liberty and they certainly did not hold the Petitioner in bondage.

12. Should he have attended Court to answer plea, then as an accused person his right to a fair trial would be guaranteed by the raft of rights provided in Article 50(2). This includes the right to be presumed innocent until the contrary is proved. Even more importantly in respect to Petitioners concern is that Articles 49(1) (h) assures him of his right to be released on bond or bail.

### **Article 47(2)**

13. Article 47(2) of The Constitution reads-

***“If a right of fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”***

The right to be given written reasons arises only when a right or fundamental freedom of a person has been or is likely to be adversely affected. It is not in respect to all administrative action that written reasons must be furnished to the affected persons. The underlying question is whether a right or fundamental freedom of the Petitioner was or was likely to be adversely affected by the summons? None was pointed out by the Petitioner. The Court on its own could not find any.

14. As earlier noted the rights of an accused person are extensively Guaranteed by the Constitution. Not the least is the right to presumed innocent until the contrary is proved. An accused person may suffer the inconvenience of having to attend the trial and may feel that this is a restriction to his movement and time. But the restriction required by Court attendance is prescribed by law (the Criminal Procedure Code (Cap 75)) and is accepted and justifiable under Article 24 of The Constitution. The point is that by requiring the Petitioner to answer criminal charges none of his fundamental rights were adversely affected or threatened. It is therefore my respectful view that the Police had no Constitutional obligation to give the Petitioner written reasons for preferring charges against him.

15. The Petitioner repeatedly argued that the 3<sup>rd</sup> Respondent did not carry out impartial and objective investigations and further that he was never summoned for purposes of telling his side of the story. For this reason, it was submitted, the Respondents had not complied with Sections 14A and 22 of The Police Act (Repealed). For some unknown reason the Petitioner never cited the violation of Article 47(1) of The Constitution. That Article requires that the administrative action is expeditious, efficient, lawful, reasonable and procedurally fair. The arguments on Sections 14A and 22 of The Police Act do not fall for the Courts consideration in so far as the Petitioner does not state in his petition that his Article 47(1) rights are abridged.

### **Article 50(1)**

16. This is what the Article provides:

***“Every person has the right to have any dispute that can be resolved by application of law decided in a fair and public hearing before a Court or if appropriate another independence and impartial tribunal or body.”***

Although it was not clear how the conduct of the Respondents infringed on this right, the Petitioners right to a fair trial as an accused person is constitutionally protected. Secondly, if as the Petitioner says, the dispute has a commercial complexion then the criminal proceedings do not bar the Petitioner from seeking a resolution from a Civil Court. The Petitioners apprehension is addressed by the contemplation of Section 193A of The Criminal Procedure Code which provides-

***“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is and directly or substantially an issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay in the criminal proceedings.”***

This is a Statutory recognition that Courts can exercise concurrent jurisdiction in criminal and civil proceedings in respect to the same subject matter.

17. I would agree with the State Counsel that, save in exceptional circumstances, challenges to a decision to prosecute or to ongoing prosecution should not be upheld by Court. I have not seen any evidence that persuades me that the Respondents action was oblique, ill motivated or manifestly unreasonable. The fact that the dispute could also be civil in nature does not bar the State from invoking the Penal Code as long as it is satisfied that the commission of a crime has been disclosed. Section 193A of The Criminal Procedure Code which I have discussed above supports this position.

### **Other Issues**

18. The State Counsel painstakingly cited Statute and case law to demonstrate that the Respondents decision to prosecute was well founded. On my part, I will be more restrained. The duty of the Court in a Constitutional Petition is not about analyzing the sufficiency of evidence. That must be left to the trial Court. It will suffice for the Respondents “to demonstrate that they have a reasonable or probable case that an offence may have been committed and therefore the accused person(s) should stand trial”. (**The Court in Nrb Application No. 1192 of 2005 William S. G. Ruto & Ano. –Vs- The Attorney General** (following) **Nrb HCC 1384/01 Immanuel Kuria Wagathoni –Vs- A.G.**)

19. The Petitioner admits drawing three postdated cheques. Copies are annexed to the affidavit of Cpl Charles Lepuchirit showing their dates as 20<sup>th</sup> June 2011. The bank stamps on the cheques show that they were presented for payment by the complainant after 20<sup>th</sup> June 2011 as they bear receipts stamps of 28<sup>th</sup> June 2011. Shown to this Court also is a copy of a statement to the Petitioners account as evidence that the account lacked sufficient funds on the date the cheques were presented. The Petitioner does not discount this but says that the complainant banked the cheques contrary to an oral agreement reached between them.

20. The Petitioner is charged with an offence under Section 316A (1) (a) of The Penal Code which provides-

***“Any person who draws or issues a cheque on an account is guilty of a misdemeanour if the person knows that the account has insufficient funds.”***

A Drawer of a postdated cheque is protected by Subsection (2) where, for whatever reason, a Drawee presents the cheque for payment before the date on the face of the cheque. This is what Subsection (2) provides-

***“Subsection (1) (a) does not apply with respect to a postdated cheque.”***

21. In the matter before me the cheques appear to have been presented after 20<sup>th</sup> June 2011, which is the date on the face of the cheques. Does Subsection (2) really afford a defence to the Petitioner? That will be decided by the Criminal Court. The Petitioner will no doubt have his day in Court to rebut any prosecution evidence and if need be to present his own. As for this Court it cannot fault the decision of the Respondent in bringing the charges against the Petitioner.

22. The upshot is that the Petition is hereby dismissed. The Court seized of the Criminal matter is at liberty to require the Petitioner to answer the charge as it shall deem fit.

23. The Petitioner shall bear the costs of this Petition.

***Dated and delivered at Mombasa this 19<sup>th</sup> day of July, 2012.***

**F. TUIYOTT**  
**JUDGE**

**Dated and delivered in open court in the presence of:-**

**Mutua for Mlandi for the Petitioner**

**Jamii for the Respondents**

**Court clerk - Moriasi**

**F. TUIYOTT**

**JUDGE**