



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CRIMINAL APPL. 30 OF 2011

JAMES BANGA YANGAN.....1ST APPLICANT

EUSTACE WAMURIA MAHINDA.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The petitioners, **JAMES BANGA YANGAN** and **EUSTACE WAMURIA MAHINDA**, have moved the court by a Petition premised on **Articles 25, 27, 28, 29, 32, 33, 35, 36, 47, 48 and 50** of the Constitution of the Republic of Kenya. They assert that their constitutional rights had been violated, denied, infringed or threatened.

Therefore, they ask this court to put a stop to their trial in Murang'a Criminal Case No. 788 of 2010.

When canvassing the petition, Mr. Onyango advocate submitted that his clients' rights had been seriously infringed by the prosecution. He also asserted that if the trial against the applicants continued, their rights would be further infringed.

It was pointed out by the applicants that the prosecution was being conducted by the same police officers to whom the applicants had earlier reported that the complainant herein had committed a criminal offence.

The complainant herein is **SAMUEL MWANGI THUITA**. And the applicants say that they had reported to the police that the complainant had falsely accused the applicants of having killed someone.

The complainant is said to have issued the said statement at a funeral in Murang'a.

Although the applicants herein were not at the said funeral, they reported the issue to the police, as soon as they became aware of the utterances allegedly made by the complainant.

Thereafter, the police officers to whom the applicants had lodged the complaint, were listed as witnesses in the criminal case against the said applicants. That prompted the applicants to conclude that the police had carried out no independent investigations into their complaints.

The court was informed that although the complainant herein as only listed as a witness for the prosecution, the trial court had allowed him to have an advocate who was holding brief for him, in the criminal case.

That prompted the applicants to ask the trial court to disqualify itself. But the learned trial magistrate had declined to disqualify himself.

The applicants believe that the trial court was being used by Samuel Mwangi Thuita, to ensure that they are imprisoned, so that they can be unable to offer themselves as candidates in the elections of EMBAKASI RANCHING COMPANY LIMITED. It is for that reason that they ask this court to stop the said criminal case.

In answer to the Petition, Mr. Tanui, learned state counsel, submitted that the same was defective, malicious and mischievous.

As far as the respondent was concerned, the applicants did give false information to public officers, and that that was the reason why they had been charged with that offence.

The respondent says that when the applicants told the police that Samuel Mwangi Thuita had accused them of murder, the police carried out their own investigations, which revealed that the complaint lodged by the applicants was false.

I was told by the respondent that the investigations by the police indicated that Samuel Mwangi Thuita did nothing more than to suggest that the applicants could be responsible for the death of the deceased, and that the said Thuita would co-operate with the police and relatives of the deceased, to find out who caused the death.

It is the respondent's submission that the trial court will determine whether or not the applicants gave false information to the police. It was expected that the criminal court would soon make that determination because the trial had already reached the stage of submissions, after the prosecution closed its case.

As to why the police officers to whom the applicants had lodged their complaint were listed as prosecution witnesses, the respondent explained that the said officers had to testify because it is they that were given the complaint that is now the subject matter of the criminal charges facing the applicants.

The respondent also finds nothing wrong in the trial court permitting one prosecution witness to have an advocate holding a brief for him.

It was pointed out that that witness was the subject of the complaint earlier lodged by the applicants herein.

Meanwhile, the respondent believes that it was not proper for the applicants to complain about the learned trial magistrate, whilst the complaints were in relation to things which happened before the trial begun. In any event, if the applicants were dissatisfied with the rejection of their application for the disqualification of the learned trial magistrate, the respondent believes that the applicants should have appealed.

The respondent feels that the charge sheet was signed in a regular manner, by the OCS Muranga; and that the proceedings before the trial court were regular in all respects, so far. They find no reason to warrant the applicants' request for the trial to be halted by this court.

It is noteworthy that although the respondent asserted that the charge sheet was signed in the regular manner, by the OCS Murang'a Police Station, the signature appears to be similar in all material particulars to that of SGT. ALPHONCE MBULU, as appearing on his written witness statement dated 31st January 2010.

The said SGT Mbulu described himself as being with the Divisional CID, Muranga. He laid no claim to being the OCS Murang'a Police Station.

I will refrain from stating whether or not that fact renders the criminal proceedings void or voidable. My decision to refrain from passing judgment in that respect is that the issue was not canvassed substantively before me. The parties simply used it as a set of "facts" upon which to found their respective submissions.

Meanwhile, if the complaints lodged by the applicants, were made to SGT Alphone Mbulu, the said officer would be an essential prosecution witness at the trial, because it is he who would be best suited to tell the trial court about what he was or was not told by the applicants.

The fact that he was a witness for the prosecution could not imply that there were no independent investigations by the police.

As far as the witness, Samuel Mwangi Thuita, is concerned, it is noteworthy that the original complaint by the applicants was against him. They told the police that he had accused them of being responsible for the death of PATRICK KARIUKI MWANGANU, a former director of Embakasi Ranching Company Limited.

It therefore follows that the said Samuel Mwangi Thuita was not simply an ordinary witness. He may have had sufficient lawful reasons for wanting to have his own advocate keeping an eye on the criminal case.

But then again, if his said advocate was present in court all through the proceedings, even before Samuel Mwangi Thuita testified, some legal issues may well arise.

At present, the applicants have not provided me with information that would enable me establish the stage at which Thuita's advocate started holding a watching brief at the trial. I have also not been informed whether or not the applicants raised any concerns about that fact, with the trial court.

On the issue of the refusal by the learned trial magistrate to disqualify himself, the respondent was right to have submitted that the applicants could have appealed, if they were dissatisfied. It cannot form the basis for halting the criminal case altogether.

If the applicants have any tangible evidence that the trial court is being used by Samuel Mwangi Thuita or by any other person, the applicants should take appropriate action, to have the learned magistrate and other persons concerned with efforts to subvert the course of justice, dealt with firmly. It is not enough nor appropriate to simply cast aspersions.

Although the respondent is convinced that Samuel Mwangi Thuita did not tell mourners that the applicants were responsible for the death of Patrick Kariuki Mwanganu, this court cannot make any comments in that regard at this stage. I so find because that is the very issue that the trial court has been called upon to determine. It is that court which has received evidence from the witnesses, and therefore it is the said court that should make a determination on the issue.

The prosecution has already called all its witnesses. The next step in the criminal case, as at the date when this Petition was being canvassed before me, was for parties to make submissions on whether or not the applicants have a case to answer. In other words, the trial had reached an advanced stage. I find no reason, in law, to halt the said proceedings.

The interests of justice dictate that I allow the trial court to undertake its task without any hindrance. That task includes the making of determinations on the basis of the evidence made available, together with the applicable law.

I have no doubt that if the trial court falls short of its legal mandate, to discharge its duty without fear or favour, the party who feels prejudiced will have appropriate recourse within the law.

I therefore reject the Petition. It is dismissed.

Dated, Signed and Delivered at Nairobi, this 10th day of May, 2011.

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FRED A. OCHIENG

JUDGE