



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**Petition 67 of 2006**

**IN THE MATTER OF SECTION 84 (1) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALL ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTION 70, 72, 74 & 77 OF THE CONSTITUTION OF KENYA**

**TOM CHEPTOT ..... 1<sup>ST</sup> PETITIONER**

**ELIJAH NDIEMA WATAKU ..... 2<sup>ND</sup> PETITIONER**

**AND**

**ATTORNEY GENERAL ..... RESPONDENT**

**RULING**

Tom Cheptot and Elijah Ndiema Wataka ordinarily reside in Kitalale Phase 3 in the Mount Elgon Area of the Trans Nzoia District of the Rift Valley Province.

As Cheptot entertained guests in his house on Christmas night last year, they were attacked by armed persons, which attack led to the death of his wife, his brother in law Francis Kura, his nephew and three other guests. He was not able to recognize any of the assailants because it was dark and he only survived the attack because he hid under the bed. According to him, nothing was stolen during the attack.

He recorded a statement with the police soon thereafter. He was arrested on 3/1/2006 and arraigned before the Chief Magistrate Eldoret in C.M. Criminal Case No. 376 of 2006 where he was charged with that offence of robbery with violence contrary to section 296 (2) of the Penal Code, the particulars of which are that together with Benard Marui Kipsoi, Elijah Ndiema Wataku, Daniel Chemorei Ndiema and Judith Chesoi Chemorei, on the night of 25/12/2005 at Kitalale Phase 3 in Trans Nzoia District of the Rift Valley Province, jointly with others not before the Court, while armed with dangerous/offensive weapons namely AK 47 Rifles robbed Francis Masai Kura of one wallet containing cash K. Shs. 8,000/- and at or immediately before or immediately after the time of such robbery killed the said Francis Masai Kura.

Tom Cheptot and Elijah Ndiema Wataka, who however feel that the charge against them is malicious and predicated on ill will, and whose contention it is that their prosecution amounts to an abuse of the process of the court, have now moved this court in an application in which they seek the following orders inter alia:

“1. That this Court do find that their prosecution in the aforementioned case amounts to a contravention of their fundamental and freedoms.

2. That this Court do issue orders terminating their prosecution and to bar the state from initiating any other criminal case against them arising from the same set of facts.”

What would be the consequence of granting the orders which the two seek? In my view it would mean that the termination of criminal proceedings even before the prosecution is given a chance to prove itself.

It cannot be gainsaid, that the Attorney General is empowered to initiate criminal proceedings against anyone who is suspected to have committed a crime. Indeed such powers are well stipulated in section 26 (1) (2) & 3 (a) of the Constitution where it is provided that:

“(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 adviser 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;”

As I discern it, the issues that therefore arise in this application, , and which this court is urged by both the counsel to determine, are whether the charge as framed can be sustained, whether given the statements which were recorded by the various witnesses, who as expected will be the prosecution witnesses there is to be a likelihood of the prosecution ever proving its case beyond reasonable doubt, whether their constitutional rights have been infringed or whether the whole action against them is malicious, predicated on ill will, and an abuse of the process of the court.

Mrs. Odede, learned counsel for the applicants relied on the case of Kuria & 3 others v. Attorney General [2002] 2 KLR 69 1, in which the applicants who had sought prerogative orders to bar a criminal case against them, based their application on the grounds that the matters in the criminal prosecution were purely civil in nature and were precisely the same issues, which were before court in another matter. The learned Hon. Justice Kasanga Mulwa held inter alia that “*the machinery of criminal justice is not to be allowed to become a pawn in personal feuds and individual vendetta .....*”. Mrs. Odede also relied on a passage from that judgment in which the learned Judge reiterated that “*it is a duty of the Court to ensure that the utilization and/or invocation of its processes and the law is not actuated by other consideration so divorced from the goals of justice as to make the Court virtually a scapegoat in personal score settling vendetta*”. I concur with my learned brother entirely and would have nothing to add on that particular issue, save that the decision should be distinguished from the matter at hand in that my brother was dealing with a matter in which by the time when the criminal proceedings were commenced, there was already a civil matter pending in court, and he therefore dealt with an application for prohibition against the criminal proceedings, as the civil matter proceeded to hearing and final determination. The situation is not similar to that prevailing in this application where the charges are purely criminal in nature, and where the applicants who have yet to prove ill will on the part of the prosecution seek orders of stay of further proceedings in the criminal matter.

She also relied on the case Tirop v. Attorney General [2002] 2 KR 165 where the applicant who was charged with abuse of office, unprocedural purchase and other criminal charges, seven years after the event, filed an application by way of Judicial Review for prohibition directed at the Attorney General on the grounds inter alia that the charges against him were brought too late, that the alleged criminal actions were without criminal intent and were therefore an abuse of the process of the Court. The Court held inter alia that “*the situations under which a trial can be said to be unfair and oppressive are severally:*

(a) where there is absolutely no iota of evidence

(b) *where it is selectively mounted as to amount to a persecution for ulterior motives*".

The learned Justice Mbitio allowed the application, and he also pointed out that "*each case must therefore be considered on its own facts.*" but in my humble opinion, I am unable to apply his findings to the case before me as, these applicants claim there is no iota of evidence against them yet as well put by Miss Oundo, the defence cannot pre-empt the evidence which the prosecution intends to call by looking at the statements.

Mrs. Odede finally relied on the case of Dr. Christopher N. Murungaru v. Kenya Anti-Corruption & another CA (Nai) 43/2006 (24/2006), where the main issue for consideration by the Court of Appeal was whether the intended appeal would be rendered nugatory if that Court did not grant an order for the stay enforcement of a notice issued by KACA, which case would not readily apply here.

I have looked at the charge as framed. It is Mrs. Odede's view that the charge is defective as the person who was allegedly violently robbed is dead. Indeed there have been many circumstances in which convictions have been upheld in cases of robbery with violence, where the victims of the robbery succumbed to injuries which they sustained during the particular attack, and I am therefore unable to understand that line of submission, as a person can not get away with it just because the person whom he allegedly robbed died during the attack. Based on this fact I would find that the charge as framed is not defective and that it can withstand all the relevant tests. In my view, what would be required of the prosecution would be to adduce sufficient evidence, with a view to proving its case to the only standard, that being beyond any reasonable doubt. I see that that mandatory requirement would be the most important test for the prosecution.

It is not for this Court at this stage to evaluate the evidence which emanates from the statements of several persons which the applicants have annexed in support of their application, for to do so would be tantamount to usurping the role of the trial Magistrate.

I am well minded of the fact that the State may amend or substitute the charge and it would also have a right to call for additional evidence. I know of no law which would bar the prosecution from calling additional evidence before it closes its case, with leave of the Court, at which point it would then be incumbent upon the trial Magistrate to consider that particular application at the opportune moment.

In the meantime and bearing in mind that the alleged robbery took place over 4½ months ago, it can be very safely assumed that the State will be well content to rely on the evidence which will be adduced by the six witnesses whose statements have been annexed by the applicants, to the supporting affidavit.

It is clear that the applicants have been charged with the offence of Robbery with violence contrary to section 296 (2) of the Penal Code. Though section 123 (3) of the Criminal Procedure Code on which the applicants rely on, stipulates that "*the High Court may in any case direct that an accused (underlining mine) person be admitted to bail or that bail required by a subordinate court or police officer be reduced,*" it is important that I point out that the said provision of the law can not be read in isolation as

one would be required to look at the whole section as a whole, which would show very clearly that this court has no powers to grant anticipatory bail.

However, the fact that bail can only be granted to a person who is already accused in cases other than those which are specifically excluded, such as robbery with violence, is in my mind a clear indication also that this court would lack the jurisdiction to grant the said order, unless of course an applicant, who moves the court by way of a constitutional reference is able to convince the court his constitutional rights have been infringed unfortunately these applicants have not been able to provide evidence to show that their rights have been infringed, or that the whole process is motivated by ill will or malice, or that it is otherwise an abuse of the process.

I am of the view that given the circumstances of this matter, it would be wrong to grant the orders which the applicants seek for it would lead to interfering with the due process of the law.

The application is thus dismissed, with costs.

Dated and delivered at Eldoret this 16<sup>th</sup> day of May 2006.

**JEANNE GACHECHE**

**Judge**

Delivered in the presence of:

Mrs. Fundii for the applicants

Miss Oundo for the respondents