Mwangi v Director of Public Prosecutions & another; JNM (Interested Party) (Petition E118 of 2023) [2024] KEHC 7282 (KLR) (14 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7282 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

PETITION E118 OF 2023

EC MWITA, J

JUNE 14, 2024

BETWEEN

JOEL WAWERU MWANGI ..... PETITIONER

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 1ST RESPONDENT

KIBERA LAW COURTS ..... 2ND RESPONDENT

AND

JNM ..... INTERESTED PARTY

JUDGMENT

1. On 10th January 2022, the petitioner was arraigned at Kibera Chief Magistrate's court on two counts, of sexual harassment and indecent act contrary to sections 23(1) and 11A of the *Sexual Offences Act*, 2006 (SOA), respectively, in Criminal Case No. E008 of 2022 Republic v Joel Waweru Mwangi. The petitioner pleaded not guilty to both counts.

2. The petitioner has filed this petition against the Director of Publc Prosecution (the DPP) and the Chief Magistrae Kibera Law Courts, (the Chief Magistrate), seeking declarations that count 1 of the charge sheets as drawn violates article 50(2) (b) and (k) of *the Constitution*, thereby rendering his trial unfair; that his prosecution on count 2 of the charge sheet as drawn, is an abuse of the legal process in violation of article 157 (11) of *the Constitution*; an order prohibiting the 1st respondent from prosecuting him on the basis of the charge sheet dated 10th January 2022; an order prohibiting the 2nd respondent from presiding over the trial on both counts in the charge sheet filed by the 1st respondent; such other orders as the court shall deem just and costs to be paid by the 1st respondent, in any event. The petition is supported by an affidavit of the petitioner and written submissions.

3. JNM, (the complainant), has been joined in these proceedings as an interested party.

4. The petitioner's case is that he faces an omnibus count 1 that does not disclose the nature of harassment or particulars as to when and where harassment occurred; that the allegations span over a period of four years and as such, he is unable to prepare an appropriate defence and identify suitable witnesses to call in his defence.

5. The petitioner relies on relies on articles 25, 50 (2) (b) and (k) of *the Constitution*; section 134 of the Criminal Procedure Code (CPC) and the decisions in Benard Ombuna v Republic [2019] eKLR; KMK v Republic [2019] eKLR; Republic v George Peter Kaluma [2018] eKLR; US v Simmons 96 U.S. 360(1877) and R v Canadian General Electric Co 1974 CanLII 1540 (ON SC), to support this argument.

6. The petitioner argues that where it has been demonstrated that rights of an accused person are threatened with violation, or otherwise imperiled in criminal prosecution, the court is duty bound to halt such prosecution. He relies on the decisions in R *v Attorney General exparte Kipngeno Arap Ngeny (High Court Civil Application No. 406 of 2001*) [2021] eKLR and Republic v Judicial Commission of Inquiry into the Goldenberg Affair & 2 Others Ex Parte George Saitoti [2006] eKLR.

7. The petitioner takes the position, that the 1st respondent violated article 157(11) of *the Constitution* in making the decision to prosecute him. This is because the interested party never lodged any complaint with the authority about sexual harassment for four years; the reporting of the alleged sexual harassment was triggered by a letter dated 5th August 2021, sending the interested party on paid leave to facilitate investigation.

8. The petitioner asserts that the criminal justice system against him is being driven by a personal vendetta. He relies on the decisions in Kuria & 3 others v Attorney General [2002] 2 KLR 69 and R v Attorney General exparte Kipngeno Arap Ngeny (supra) to support his position that the court should halt the criminal proceedings.

9. The petitioner further asserts that an objective and impartial analysis of all statements recorded by potential prosecution witnesses and documentary evidence, lead to a conclusion that no reasonable prosecutor, acting completely independently and professionally, would have reached the decision to prosecute him. The decision to prosecute is, thus contrary to the Office of the Director of Public Prosecution National Prosecution Policy, 2015 and the Guidelines on the Decision to Charge, 2019.

10. The petitioner argues that the respondents have only filed grounds of opposition to the petition thus, his depositions in the supporting affidavit are uncontroverted. He urges that the petition be allowed with costs.

DPP's responses

11. The DPP has opposed the petition through grounds of opposition and written submissions. It is the DPP's position, that the petition lacks clarity; precision and does not also set out the alleged violations. The petitioner has also not met the prerequisite requirements for granting the orders sought.

12. The DPP contends that an order of stay of proceedings in criminal trials is made sparingly and in exceptional circumstances. The DPP argues that the charge sheet contains a statement of specific offences the petitioner is charged with, together with particulars necessary for giving reasonable information as to the nature of the offences.

13. The DPP also argues that under article 159(2) (d) of *the Constitution*, justice should be administered without undue regard to technicalities.

14. The DPP takes the position, that the criminal case against the petitioner is in line with his mandate. Having reviewed the evidence gathered by the Directorate of Criminal Investigations, (DCI), the sufficiency of evidence together with public interest met the threshold for making the decision to charge the petitioner.

15. Citing article 157 (6), (10), & (11) of *the Constitution*, section 4 of the *Office of the Director of Public Prosecutions Act* and the decisions in Yunus Abdul Rubi & 2 others v Director of Public Prosecution & 2 others [2016] eKLR and Justus Mwenda Kathenge v Director of Public Prosecution and 2 others (Petition No 372 of 2013) [2014] eKLR, the DPP argues he exercises mandate to independently institute criminal proceedings. The court will only intervene where there is manifest violation of *the Constitution*, abuse of process and where prosecution is instituted for improper purposes.

16. According to the DPP, the petitioner is inviting the Court to delve into the merits of the criminal case and sufficiency of evidence to be adduced which is the mandate of the trial court. This court, it is urged, should not usurp the mandate of the trial court. Reliance is placed on Justus Mwenda Kathenge v Director of Public prosecutions & 2 others (supra) and Ronald Leposo case.

17. The DPP posits that the facts the petitioner has sought to present in this petition, are matters he should present in his defence before the trial court. The DPP further posits that the petitioner's arrest and prosecution is not in itself an unlawful process and cannot be said to be prejudicial to him. The petitioner is presumed innocent until proven guilty, and there are constitutional safeguards underpinned by various statutes to ensure that he is accorded a fair trial.

18. The DPP relies on the decisions in Elory Kraneveld v the Attorney General & 2 others (Nairobi Petition No. 153 of 2012) and Michael Monari & another v Commissioner of Police & 3 others (Miscellaneous Application No. 68 of 2011), for the argument that the petitioner should presented his defence of innocence before the trial court and not in this court.

19. The DPP again relies on Andrew Okoth Onanda v Inspector General Police & 2 others [2018] eKLR, for the argument that the petitioner has not demonstrated how his constitutional rights have been violated.

20. The DPP again relies on Joshua Kulei and 5 others v Attorney General and 4 others (Petition No. 66 of 2012) for the proposition that he has discretion to prefer charges against any person in respect of whom there is sufficient evidence. Omissions to charge co-accused persons is neither fatal to the criminal proceedings against the petition, nor is it discriminatory.

21. Regarding separation of powers, the DPP argues that has discretion to decide whether or not, on the evidence gathered, to charge a person with a criminal offence. The court can only interfere where the discretion has been exercised unreasonably. Reliance is placed on Dr. Alfred N. Mutua v The Ethics and Anti-Corruption Commission & 2 others (Misc. Application No. 31 of 2016); Director of Public Prosecutions v Humphrey [1976]2ALL ER 497 (at 511); and Njuguna S. Ndung'u v Ethics & Anti-Corruption Commission (EACC) & 3 others [2018] eKLR.

22. The DPP urges the court to dismiss the petition.

AG' response

23. The AG has opposed the petition through grounds of opposition and written submissions. It is the AG's case that the petition lacks clarity; discloses no cause of action against, and the orders sought by the petitioner are untenable.

24. The AG relies on the decisions in Anarita Karimi Njeru v Attorney General (1979) KLR 154; Meme v Republic [2004] eKLR; and Trusted Society of Human Rights Alliance v AG. & 2 others [2012] eKLR, on whether the petitioner has met the threshold for granting the constitutional remedies and reliefs sought.

25. Regarding whether the DCI and the DPP followed due process in initiating the charges against the petitioner, the AG submits that the DPP took the decision to prosecute after independently reviewing investigations conducted by the DCI.The AG relies on the case of William S.K. Ruto & another v Attorney General, [2010] eKLR for the argument that it is not for this court to determine the sufficiency or otherwise of evidence to be adduced at the trial. There is also no allegation that the trial court will not accord the petitioner a fair hearing.

26. On whether a prima facie case has been established, the AG relies on the decisions in M Narayan Rao v G Venkata Reddy & another, 1977 (AIR) (SC) 208; Mrao Ltd v First American Bank Ltd & 2 others [2003] KLR 125; Mirugi Kariuki v Attorney General (Civil Appeal No. 70 of 1991 (1990-1994) EA 156, (1992) KLR 8); Re Bivac International SA (Bureau Veritas) (2005) 2EA 43 and Naftali Ruthi Kinyua v Patrick Thuita Gachure & another [2015] eKLR.

27. On whether the petitioner is entitled to the reliefs sought, the AG relies on the case of Leonard Otieno v Airtel Kenya Limited [2018] eKLR for the argument that the petitioner has the onus of proving the alleged violation of constitutional rights. The petitioner was charged in accordance with the law and the petition has been filed in bad faith. It should, therefore, be dismissed.

JNM's response

28. JNM has opposed the petition through a replying affidavit and written submissions. She has deposed that each of the charges has particulars regarding the offence the petitioner committed. According to JNM, while the petitioner complains that he is not able to answer the charges he is facing in the criminal trial, he has been supplied with all witness statements which give details of the offences committed.

29. The issues raised by the petitioner were raised with the DPP on 16th January 2023 and were responded to by her advocates. This petition is therefore an abuse of the court process and geared towards subverting the due process of the law.

30. According to JNM, from the statements recorded, the offences were committed over a period of time and eventually due to the persistent nature, she had to complain. The four years are a period of continuous offence and did not in any way inhibit her from making the complaint at the time she did.

31. JNM asserts that the charges as presented before the court disclose adequate particulars and the petitioner can adequately answer to those charges. The petitioner pleaded not guilty to the charges which meant he understood the nature of the charges he faced. Furthermore, witness statements are detailed and leave nothing to doubt on how the petitioner committed the offences.

32. JNM posits that details of an offence cannot be included in a charge sheet. The issue of the charge sheet being deficient in particulars was raised before the trial court but it was not persuaded and left it to parties to agree and provide further and better particulars if that was necessary. Particulars were provided through statements and documents as necessary.

33. JNM reiterates the fact that the petitioner raised a complaint through letter dated 16th January 2023 to the prosecutor which was n sufficiently responded to vide letter of 21st February 2023. JNM contends that the statements detail the particulars of the harassment. She argues that if there are any flaws in the criminal case, the proper forum to ventilate that fact is the trial court and not through this petition.She

relies on the decisions in Bernard Ombuna v Republic (supra) and KMK v Republic (supra), and prays that the petition be dismissed.

Determination

34. I have considered the pleadings, arguments by parties and the decisions relied on. The issue that arises for determination is whether this court should halt criminal proceedings the petitioner is facing before the trial court.

35. The facts of this petition are not in dispute. The petitioner and JNM were working for the same organisation. JNM laid a complaint with the police and after investigations, the petitioner was arrested and arraigned on two counts of sexual harassment and indecent act with an adult contrary to sections 23(1) and 11A of the SOA respectively. The petitioner pleaded not guilty to both counts. He then filed this challenging his prosecution on grounds that the prosecution violates his fundament rights and freedoms. The petitioner takes the position contending that the DPP has acted inappropriately.

36. The DPP, AG and JNM all argue, that there is no violation of the petitioner's fundamental rights and freedoms as alleged. They maintain that the prosecution is well founded and the DPP has properly exercised his discretion under *the Constitution* and the law.

37. The DPP has constitutional mandate and discretion to initiate, continue and, or terminate criminal prosecutions. (Article 157). In doing so, the DPP does not require consent or permission from any person or authority. The DPP must, however, exercise his powers in a manner that has regard to public interest, interests of administration of justice and the need to prevent and avoid abuse of the legal process.

38. That the DPP exercises constitutional discretion and courts should rarely interfere with this discretion, has been affirmed by courts on many occasions. Courts should only interfere with this discretion where there are justifiable grounds.

39. In Republic v Director of Public Prosecution & 2 others Exparte Francis Njakwe Maina & another [2015] eKLR, it was observed that the Court ought not to usurp the constitutional mandate of the Director of prosecutions to undertake prosecution in exercise of the discretion conferred upon that office. The court made the point that if an applicant demonstrates that the criminal proceedings constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.

40. In Paul Ng'ang'a Nyaga v Attorney General & 3 others (2013) eKLR, it was held that the court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they acted in contravention of *the Constitution*

41. Similarly, in Francis Anyango Juma v The Director of Public Prosecutions and another [2012] eKLR, the Court stated:

> [T]he intention under *the Constitution*, was to enable the Director of Public Prosecutions to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the DPP of his power under *the Constitution* or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a party's rights under *the Constitution*, or violation of *the Constitution* itself.

42. And in Williams v Spautz [1992] HCA 34; 174 CLR 509; 66 ALJR 585 it was stated that:

> If a stay is sought to stop a prosecution which has been instituted and maintained for an improper purpose, it by no means follows that it is necessary, before granting a stay, for the court to satisfy itself in such a case, that an unfair trial will ensue unless the prosecution is stopped.

The Court emphasized that unless the interests of justice demand it, courts should refrain from exercising the jurisdiction, and persons charged with criminal offences should not obtain an immunity from prosecution.

43. In this country, courts have maintained that the DPP's discretion to charge will only be interfered with where there is evidence of abuse, malice and all the negative instances that blur exercise of that discretion.

44. In Kuria & 3 others v Attorney General [2002] 2 KLR 69, for instance, it was held that the Court has the power and duty to prohibit continuation of criminal prosecution if extraneous matters divorced from the goals of justice, guide their instigation and that a stay by an order of prohibition should be granted where compelling an accused to stand trial would violate the fundamental principles of justice.

45. In Director of Public Prosecutions v Martin Mina & 4others [2017] eKLR, the Court of Appeal observed that under Article 157(10) of *the Constitution*, the DPP, does not require the consent of any person or authority to commence of criminal proceedings, and is not under the direction or control of any person or authority in the exercise of his constitutional powers or functions. The DPP is only subject to *the Constitution* and the law.

46. As pointed out in the decisions above, the law is settled, that courts should be slow in interfering with the DPP's constitutional discretion to prosecute. Article 157(10) shields that discretion so that the DPP "shall not require the consent of any person or authority for the commencement of criminal proceedings exercise of his or her powers or functions, shall not be under the direction or control and in the of any person or authority." The only caveat is in article 157(11), that in exercising the powers, the DPP shall have regard to "public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process."

47. For the petitioner to succeed, he has to show that the DPP, in deciding to mount the prosecution against him, the decision was not made in public interest and interest of administration of justice, but that the decision is an abuse of the legal process.

48. The petitioner's case, as I understand it, and as is clear from the depositions in his affidavit and submissions, is that he faces an omnibus count 1 which does not disclose the nature of harassment, or particulars as to when and where the harassment occurred; that the allegations span over a period of four years and as such, he is unable to prepare an appropriate defence and identify suitable witnesses to call in his defence.

49. The petitioner further argues that an impartial analysis of the potential prosecution witnesses' statements as recorded, as well as the documentary evidence, would lead to a conclusion that no reasonable prosecutor, acting completely independently and professionally, would have reached the decision to charge and prosecute him.

50. I do not see the petitioner arguing that the decision to prosecute him is against public interest; is not in furtherance of interest of administration of justice, or that the decision is an abuse of the legal process. What I see the argument to be, is that there is a personal vendetta; that the allegations span four years

which make it hard to identify and call appropriate witnesses, and that the evidence recorded could not support a professional and independent decision to prosecute him.

51. The concerns raised, in my respectful view, do not fall within the caveat in article 157(11). That is, the petitioner has not demonstrated that the decision to prosecute him is against public interest; does not further interest of the administration of justice, or that it is an abuse of the legal process. The argument that the alleged harassment spans a period of 4 years may not, on its own, be a basis for halting the prosecution as this will depend on the evidence to be adduced during the trial.

52. Similarly, the argument that the witnesses' statements and documentary evidence gathered, if professionally; competently and independently reviewed, could not lead to his prosecution, can only be answered by stating that sufficiency of evidence or otherwise to be lead during a trial, is a matter for the trial court and not this court.

53. In this regard, the decision of the Court of Appeal in Director of Public Prosecutions v Martin Mina & 4 others (supra), comes to mind. The Court of Appeal stated that it is not "the duty of the High Court ... to evaluate the sufficiency of the evidence in the envisaged criminal proceedings, that is the function of the trial Court, or the High Court in a criminal appeal. A Judicial Review Court should not usurp the functions of a trial court, except in the clearest of the cases." Whether or not the evidence would be sufficient for making the decision to prosecute the petitioner will be answered by the trial court and not this court.

54. The DPP and AG argue that evidence was reviewed and a conclusion made that there was reason for the prosecution of the petitioner. In my respectful view, it is the DPP's mandate, if he is satisfied that there is sufficient evidence to sustain criminal prosecution, to initiate and continue such prosecution. The court would only to interfere if the petitioner demonstrated to the satisfaction of the court, that the DPP was exercising his discretion contrary to article 157(11) of *the Constitution*.

55. In the present petition, the petitioner has not pointed out how the DPP has abused his discretion in making the decision to prosecute him, in violation of article 157(11) to call on this court's review jurisdiction to halt the prosecution.

56. It was in that respect that the Court of Appeal held in Meixner & another v Attorney General [2005] 2 KLR 189, that judicial review is concerned with the decision making process and not with the merits of the decision itself.

57. The 2010 Constitution dispersed power and identified organs to exercise which power and the limit of exercise of that power. In that regard, organs of state and institutions must be allowed to exercise power assigned to them by *the Constitution* and the law. This Court will interfere only where there is clear evidence that the power is not being exercised as contemplated by *the Constitution* and the law. In other words, this court would only interfere if it was shown that the criminal prosecution was being used for ulterior or improper purpose.

58. From the material placed before the court, the petitioner has not satisfied the threshold that would persuade this court exercise its judicial review jurisdiction and halt the criminal proceedings in the magistrate's court.

59. Having considered the petition, responses, submissions and *the Constitution*, and noting the fact that the petitioner will have an opportunity to respond to the charges and cross-examine the witnesses, I do not find sufficient reasons for this court's intervention. Consequently, the petition is declined and dismissed with no order as to costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JUNE 2024

E C MWITA

JUDGE