Sonko v Ethics and Anti-Corruption Commission & 4 others; Kariuki & 36 others (Interested Parties) (Anti-Corruption and Economic Crime Petition 24 of 2020) [2023] KEHC 835 (KLR) (Anti-Corruption and Economic Crimes) (9 February 2023) (Ruling)

Neutral citation: [2023] KEHC 835 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

ANTI-CORRUPTION AND ECONOMIC CRIMES

ANTI-CORRUPTION AND ECONOMIC CRIME PETITION 24 OF 2020

EN MAINA, J

FEBRUARY 9, 2023

BETWEEN

MBUVI GIDION KIOKO MIKE SONKO ..... PETITIONER

AND

ETHICS AND ANTI-CORRUPTION COMMISSION ..... 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS ..... 2ND RESPONDENT

WITNESS PROTECTION AGENCY ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

CHIEF MAGISTRATE MILIMANI ANTI-CORRUPTION COURT .... 5TH RESPONDENT

AND

PETER MBUGUA KARIUKI & 36 OTHERS ..... INTERESTED PARTY

RULING

1. By the Petition dated 17th November 2020 which was initially filed in the High Court of Machakos but transferred to this court by order of that court, the Petitioner seeks the following orders:

> " a) A declaration that the fundamental rights and freedoms of the Petitioner under Article 25(c) and 50(2)(c), (d), (j), (k), (1), 50(4) of the *Constitution* have been violated, denied, infringed and or threatened to his prejudice.

b) A declaration do issue that section 3D, 4, 5, 6, 14, 15 and 16 of the *Witness Protection Act* and Rules 5, 9, and 14 of the *Witness Protection Rules* 2015 are inconsistent with the *Constitution*, in contravention of the *Constitution* and thereby void to the extent of that inconsistency.

c) An order for stay be issued by this Honourable Court in Anti-Corruption Case numbers 31 of 2019, 32 of 2019 and 1 of 2020 *Republic v Kioko Mike Sonko Mbuvi* staying further proceedings and or hearing any further hearing (sic) in the said matters until the Petition herein is heard and determined.

d) A declaration that once the rights to a fair trial under Article 25(c as read with Article 50(2) of the *Constitution* have been violated, there is no cure and the Petitioner is entitled to an acquittal notwithstanding the nature of the evidence against him/her.

e) An order prohibiting the 1st Respondent from hearing or presiding conduct and hearing of Anti-Corruption Case numbers 31 of 2019, 32 of 2019 and 1 of 2020 *Republic v Kioko Mike Sonko Mbuvi*.

f) This honorable court be pleased to issue a declaration that the 17th, 18th and 19th Interested Persons are not protected witnesses per se within the meaning, purport, object, letter, intention and spirit of the *Constitution* and are culpable are liable to be prosecuted in law.

g) In the alternative to f above, this Honourable Court be pleased to issue a declaration that the 17, 18 and 19 Interested parties cannot be witnesses in Anti-Corruption Case numbers 31 of 2019, 32 of 2019 and 1 of 2020 *Republic v Kioko Mike Sonko Mbuvi* as they are already accomplices and any evidence of their testimony be denied, negated and expunged and not to form any part of any official court record as it violates Article 50(4) of the *Constitution*.

h) Any agreement, memorandum, accommodation or deal entered between the 17th, 18th and 19th Interested parties and the Respondents either jointly or severally be declared null and void a initio and has no effect whatsoever to the Anti-Corruption Case numbers 31 of 2019, 32 of 2019 and 1 of 2020 *Republic v Kioko Mike Sonko Mbuvi* for having violated Article 2(4) of the *Constitution*.

i) This Honourable Court be pleased to issue an order calling into this court Anti-Corruption Case numbers 31 of 2019, 32 of 2019 and 1 of 2020 *Republic v Kioko Mike Sonko Mbuvi* and quash them for violating fair trial values and principles under Article 25 and 50 of the *Constitution*.

j) A declaration that the rights and freedoms of the Petitioner have been violated and infringed rendering further prosecution of Anti-Corruption Case numbers 31 of 2019, 32 of 2019 and 1 of 2020 *Republic v Kioko Mike Sonko Mbuvi* untenable.

k) Any other relief and or orders that the court may deem just and expedient in the circumstances of this case.

l) That the costs of this petition be borne by the Respondents.

2. The Petitioner alongside others has been charged with various offenses in Milimani Chief Magistrate Anti-Corruption Case Nos. 30 of 2019, 31 of 2019 and 1 of 2020. The charges include Conspiracy to commit an offence of corruption contrary to Section 471(3) as read with Section 48 of the *Anti-Corruption and Economic Crimes Act*, Abuse of office contrary to Section 46 as read with Section 48 of the *Anti-Corruption and Economic Crimes Act*, money laundering contrary to Section 3(b)(i) as read with Section 16 of the *Proceeds of Crime and Anti-Money Laundering Act* and Acquisition of proceeds of crime contrary to Section 4 of the *Proceeds of Crime and Anti-Money Laundering Act*.

3. The Application was opposed by the 1st to 4th Respondents. The 1st Respondent filed Grounds of Opposition and the 2nd, 3rd and 4th Respondents' replying affidavits. Thereafter Counsel for the parties canvassed the petition by way of written submissions.

4. I have considered the Petition, the factual and legal basis thereto, the responses by the Respondents, the rival submissions and the law.

5. It is trite that in performance of their functions the 1st and 2nd Respondents are required to act independently free from the direction or control from any person or authority. That is however not to say that their power is absolute as it can be reviewed by this court in appropriate cases – see the case of *Commissioner of Police & The Director of Criminal Investigation Department and Another v Kenya Commercial Bank Limited & 4 others* [2013] eKLR where the Court of Appeal stated: -

> "Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The courts must wait for the investigations to be complete and the suspect charged.
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> By the same token and in terms of Article 157 (11) of the *Constitution*, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain above of power that may lead to harassment or persecution. See *Githunguri v Republic* [1985] LLR 3090.
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> It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See *Ndarua v R.* [2002] 1EA 205. See also *Kuria & 3 Others v Attorney General* [2002] 2KLR 69." (Underlining mine)

6. The gravamen of this Petition is that the Petitioner's constitutional rights and more especially the right to fair trial were infringed or threatened to his detriment for reason that evidence was withheld from

him until only 36 hours to the trial; that certain Sections of the *Witness Protection Act* and Rules are inconsistent with the *Constitution* and therefore void to the extent of that inconsistency and hence the criminal cases against him, to wit, Milimani CMACC 31, 32 of 2019 and 1 of 2020 should be halted.

7. In the case of *Samuel Roro Gicheru & another v OCS Nanyuki Police Station & another* [2014] eKLR the court considering a similar issue held: -

> " Courts have an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power to stay an indictment or stop a prosecution in the magistrates' courts if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court."

8. Also in the case of *Director of Public Prosecutions v Martin Maina & 4 others* [2017] eKLR set out similar grounds namely:-

> " 44. In *Director of Public Prosecutions v Martin Maina & 4 Others* [2017] eKLR, this Court considered the grounds upon which criminal prosecution may be prohibited. The Court cited with approval the decision by the Supreme Court of India in State of *Maharastra & Others -v- Arun Gulab Gawali & Others*, Criminal Appeal No. 590 of 2007. The grounds are as follows:
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> i. Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice;
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> ii. Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction;
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> iii. Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; and
>
> iv. Where the allegations constitute an offence alleged but there is either no legal evidence adduced clearly or manifestly fails to prove the charge."

9. It is trite that a Petitioner must plead with specifity the rights infringed upon and also demonstrate the manner of infringement of those rights. See the cases of Anarita Karimi Njeru v Republic [1979] eKLR. I must admit that the Petitioner herein scores very well in respect to specifity and the only issue for determination therefore is whether he has demonstrated the manner of violation of those rights.

10. It is the Petitioner's case that the rights have been violated because most of the witness statements supplied to his Counsel were illegible, unpaginated and fundamentally, completely or totally redacted; that those documents therefore contravened the *Constitution* on fair trial, fair administrative action, logic and law, but also the rules of redaction since they left no substance for the defence to use to prepare for trial; that an order for witness protection issued by the trial courts on 14th January 2020 was issued unprocedurally as the same neither allowed the prosecution to redact any document nor obliterate the same save for witness statements; that the soft copies supplied to him though paginated also contained fully or partially redacted witness statements which offended the laid down principles and international best practices and standards of redaction for witness protection; that in bad faith

the Respondent withdrew charges against the 17th, 18th and 19th Interested Parties and turned them into witnesses and further that during the trial one of the witnesses identified himself by name hence defeating the purposes of placing him on witness protection. The Petitioner further avers that the case against the said witness on Danson Muchemi was dropped so as to exonerate him from glaring culpability; that the witness was in any event charged in another case with embezzlement of public funds and hence the arrangement between the witness and the Respondents was illegal and unconstitutional.

11. In regard to the *Witness Protection Act* the Petitioner avers that it is unconstitutional for reasons that:-

> " i) Article 10, 118 as read with Article 1 and 2 of the *Constitution* binds all in authority and all arms of government to allow the public to participate in legislative and official processes that determine the application of public authority and power whose resultant effect is governance, legislation and policy.
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> ii) The *Witness Protection Act* and the rules and regulations made thereunder were not subjected to public participation before the enactment, during the legislative process or commencement and operationalization contrary to Article 10, 118, 201 and Chapter 6 of the *Constitution* as read with Article 1 and 2 thereof and the provisions of the *Public Finance Management Act* and rules made thereunder.
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> iii) The Respondents failed to facilitate public participation and involvement of the public in the legislation process leading to the formulation of policy, enactment of the law, operationalization of the act and any of the plethora of amendments thereof.
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> iv) The *Witness Protection Act* and the rules and regulations made there under are illegal for want of actual, quantitative and qualitative public participation, as no fora or any enabling environment was availed to secure a public interest and safeguard against the resultant effect suffered by the Petitioner amounting to discriminatory application of law and unfair hearing, abuse of the process of court and impunity and a hearing which is a debacle.
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> The *Witness Protection Act* and the rules and regulations made thereunder has the resultant effect of invalidating, vitiating and vulgarizing the provisions of pre-trial directions envisaged, contained and published in Gazette Notice No. 1340 of 2016 on case management to criminal cases."

12. I have carefully perused the petition and submissions and in my view nothing therein has demonstrated the violation of the Petitioner's right to fair trial. The issues he has raised in regard to witness statements being unpaginated, redacted, illegible and so on are issues that should have been dealt with by the trial court during the pretrial. They are not issues which would warrant this court to halt the trial. The general conduct of proceedings before a trial court are matters for that court and can only be visited by this court if an injustice to the accused person is demonstrated. In this case the deficiency pointed out by the Petitioner could very well have been corrected by the trial court without the necessity for bringing this petition. It appears to me that this petition is but an appeal against the exercise of discretion by

the trial magistrate. That ought not to be entertained by this court. In the case of *Njuguna Mwangi & Another v Republic* [2019] eKLR the court observed:-

> " Exercise of a discretion based on the understanding of analysis of the law by the trial court does not automatically amount to an illegality nor impropriety. Perceived misinterpretation of the law cannot automatically in all situations be held to be an error calling for revision but a ground for appeal. Courts are bound to make determinations based on varied interpretation of the law. Where the court applies wrong principles of the law and an injustice is bound to arise with no remedy available other than a revision, a superior court should intervene at the earliest opportunity possible."

13. The Petitioner has not demonstrated that any injustice has arisen due to the deficiencies complained of. His right to fair trial is still intact hence the reason the trial court made an order for him to be supplied with the evidence of the prosecution before the trial. He is represented by Counsel at the trial who ought to raise the issues of pagination and illegibility, if at all, with the trial magistrate so that remedial action can be taken. I reiterate that those are not grounds to halt the prosecution.

14. In regard to redaction of the witness statements and the constitutionality of the *Witness Protection Act*, the 3rd Respondent, through the affidavits of Nelson M. Njiri, a Deputy Director Operations at the Witness Protection Agency, sworn on 8th December, 2020 and 15th July, 2022, has ably demonstrated that there was sufficient public participation before the enactment of the *Witness Protection Act*. The Supreme Court had occasion to set down the guiding principles for public participation in the case of *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)* [2019] eKLR as follows:-

> "(96) From the foregoing analysis, we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments. Consequently, while Courts have pronounced themselves on this issue, in line with this Court's mandate under Section 3 of the *Supreme Court Act*, we would like to delimit the following framework for public participation:
>
> Guiding Principles for public participation
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> (i) As a constitutional principle under Article 10(2) of the *Constitution*, public participation applies to all aspects of governance.
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> (ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
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> (iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.

(iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There is need for both quantitative and qualitative components in public participation.

(v) Public participation is not an abstract notion; it must be purposive and meaningful.

(vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.

(vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.

(viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.

(ix) Components of meaningful public participation include the following:

a. clarity of the subject matter for the public to understand;

b. structures and processes (medium of engagement) of participation that are clear and simple;

c. opportunity for balanced influence from the public in general;

d. commitment to the process;

e. inclusive and effective representation;

f. integrity and transparency of the process;

g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter."

15. It is my finding on the evidence before this court that public participation in regard to the *Witness Protection Act* and *Rules* made thereunder meets the threshold laid by the Supreme Court. The fact that its provisions did not favour the Petitioner is not a ground for this court to declare it unconstitutional. Courts are bound to observe the provisions of the Act for the sake of witnesses who appear before it

who may require protection for various reasons otherwise people would be reluctant to give evidence in court to the detriment of the administration of justice.

16. Having come to the conclusion that the Petitioner herein has not met the threshold required for this court to interfere with the 2nd Respondents decision to charge, I now wish to conclude by repeating the observation of the Court of Appeal in the case of *Omtatah Okoiti & 2 others v Attorney General & 4 others* [2018] eKLR that:-

> "Any...inclination to demand an inquiry every time there is a bare allegation of a constitutional violation would clog the Court with unmeritorious constitutional references which would in turn trivialise the constitutional jurisdiction and further erode the proper administration of justice by allowing what is plainly an abuse of the court process. where the facts do not plainly disclose any breach of fundamental rights or the *Constitution* there cannot be any basis for an inquiry...It is the view of this court that the matter was rendered academic and speculative by the dissolution and the court has no business giving declarations and orders in a vacuum. A constitutional court has no business giving orders or declarations in academic or in speculative matters... The notion that whenever there is failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by the chapters of the *Constitution* is fallacious...the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom."

17. The Petition is clearly not merited and in any event it seems to have been overtaken by events following the acquittal of the Petitioner by the trial court. The petition is accordingly dismissed with costs to the 1st and 2nd Respondent.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 9TH DAY OF FEBRUARY 2023

E N MAINA

JUDGE