



REPUBLIC OF KENYA



KENYA LAW
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Republic v Inspector of General of Police & 2 others; Osore (Exparte Applicant) (Judicial Review Application E008 of 2022) [2023] KEHC 21579 (KLR) (3 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21579 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
JUDICIAL REVIEW APPLICATION E008 OF 2022**

PM MULWA, J

AUGUST 3, 2023

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO
APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF ARTICLES 2, 3, 10, 22, 23, 25, 27, 28, 29, 47, 48,49,
50, 157, 159, 243, 244, 245, 259, OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF SECTIONS 8 &9 OF THE LAW REFORM ACT, CAP 26 LAWS
OF KENYA AND ORDER 53 RULE 1, 2, 3, AND 4 OF THE CIVIL PROCEDURE 2010.**

AND

IN THE MATTER OF THE CRIMINAL PROCEDURE CODE, CAP 75, LAWS OF KENYA

AND

IN THE MATTER OF THE PENAL CODE, CAP 63, LAWS OF KENYA

AND

**IN THE MATTER OF THE FAIR ADMINISTRATIVE
ACTIONS ACT NO. 4 OF 2015 LAWS OF KENYA**

AND

**IN THE MATTER OF SECTIONS 4, 5 AND 6 OF THE OFFICE OF THE
DIRECTOR OF PUBLIC PROSECUTIONS ACT NO.2 OF 2013 LAWS OF KENYA**

AND

**IN THE MATTER OF SECTION 35 OF THE NATIONAL
POLICE SERVICE ACT NO.11A OF 2011 LAWS OF KENYA**

AND

**IN THE MATTER OF THE CRIMINAL CASE NO E.495 OF 2021 IN
THE CHIEF MAGISTRATES COURT AT KIKUYU LAW COURTS**



BETWEEN

REPUBLIC APPLICANT

AND

INSPECTOR OF GENERAL OF POLICE 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

CHIEF MAGISTRATE'S COURT KIKUYU LAW COURTS ... 3RD RESPONDENT

AND

DAVID OSORE EXPARTE APPLICANT

JUDGMENT

1. Leave having been granted, the ex-parte applicant filed the Notice of Motion dated 25th October 2022 seeking the following orders:
 - i. An order of prohibition restraining the respondents from further proceedings in Kikuyu Chief Magistrate's Court Criminal Case No. E495 of 2021 and further prohibiting the 1st and 2nd Respondents from instituting any further charges based on the same subject.
 - ii. An order of certiorari to quash the decision of the 1st and 2nd Respondents to charge and prosecute the Applicant in Kikuyu Chief Magistrate's Court Criminal Case no. E495 of 2021.
 - iii. The order of prohibition above to act as a stay of the lower court proceedings.
 - iv. An order for costs to be paid to the Applicant.
 - v. Such other orders or directions that this court may deem fit.
2. The application is anchored on the grounds as set out in the statutory statement and the verifying Affidavit sworn by David Osore on 14th April 2022. The ex-parte applicant avers that he was unlawfully arrested on 24th May 2022 from his home and charged with the offence of bar breaking and stealing property valued at Kshs 200,000/=. He contends that the arrest was a travesty of justice, an abuse of power by the police officers and marred with procedural unfairness as the evidence was implanted in his home while he was being held in the police cells.
3. The ex-parte applicant disputes the annexed receipts terming them a forgery and avers that the arrest was aimed at punishing him for some ulterior motive. That his rights were infringed and the evidence of the complainant's witnesses is contradictory.
4. The Notice of Motion was heard by way of written submissions. Only the ex-parte applicant filed submissions on 17th March 2023.

Ex-parte Applicant's submissions

5. Counsel submitted that in the first search, only a speaker was recovered while the second search which was conducted a day after is suspicious as the items allegedly recovered were not found in the first



search. That the actions of the Respondent were arbitrary, unlawful, unfair and with ulterior motives as the ex-parte applicant was arrested and charged without being summoned to record a statement.

6. It was further submitted that the DPP failed to consider the public interest as opposed to the private interest. That a criminal prosecution which is commenced in the absence of a proper factual foundation or basis is always suspect for ulterior motives or improper purposes. The case cited was Republic vs Attorney General ex-parte Arap Ngeny HCC App No. 406 of 2001 where the court stated: - "Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable."
7. It was submitted for the ex-parte applicant that the police violated their mandate by failing to conduct investigations before preferring charges against him and therefore high court has the power to prohibit or quash prosecutions in cases where it would be impossible to give the accused a fair trial; or where it would amount to a misuse or manipulation of the process because it offends the court's sense of justice and propriety.
8. According to the applicant, the bar alleged to have been broken and stolen from was none existent in structure and license.
9. Counsel pleaded with the court to allow the Notice of Motion with costs as the Respondents had failed to controvert the facts therein.

Analysis and determination

10. Having taken into consideration the motion and the submissions by the applicant, the issue for determination is whether this court should issue an order of prohibition restraining further proceedings in Kikuyu Criminal Case No. E495 of 2021 as well as an order of certiorari to quash the decision of the 1st and 2nd Respondents to charge and prosecute the applicant.
11. The applicant contends that the police acted arbitrarily in the excess of their mandate in arresting him and preferring charges before conducting proper investigations. That at the time of arrest only the alleged woofer worth Kshs. 7,000/= was recovered in his house. The police locked the house and the next day he was taken out of the police cells for a further search of his house where more stolen goods were recovered.
12. The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function as envisaged under Article 165 (6) of *the Constitution*. That said, I am alive to the fact that the High Court in the exercise of its supervisory jurisdiction, must always be cautious in its findings so as not to prejudice the intended or pending criminal proceedings in the trial court and not to transform itself into a trial court. The court is not concerned with the merit of the criminal proceedings in Kikuyu Criminal Case No. E495 of 2022 but the alleged abuse of power by the Respondents.
13. Additionally, this court will exercise caution and will not interfere with the constitutional mandate of the Respondents to conduct investigations and prosecution.
14. The ex-parte applicant is challenging the 1st and 2nd Respondent exercise of their powers as bestowed by on them under Section 24 of the National Police Service and Section 4 of the *Office of the Director of Public Prosecutions Act* respectively. He challenges the arbitrary nature of his arrest and charges preferred against him and the failure by the 2nd Respondent to analyze the evidence tendered before preferring the charges.



15. In *Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another* [2012] eKLR the court held that: “The police have to investigate any complaint once a complaint is made...otherwise they would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court...As long as the prosecution and those charged with the responsibility of making the decisions to charge or act in a reasonable manner, the High Court would be reluctant to intervene.”
16. I have considered the averments of the ex-parte applicant, he contends at the time of arrest, the alleged stolen woofer was recovered in his house, thereafter other alleged stolen goods were also recovered in his house.
17. I find that the trial court, once a suspect is arraigned, is vested with the criminal jurisdiction to hear and determine the issue in question. This court should therefore be slow in interfering with the jurisdiction of the trial court. The 1st and 2nd Respondents acted within their constitutional mandate. They acted in good faith. And the trial court should be left to exercise its jurisdiction and determine the case on merit. The ex-parte applicant has the opportunity to demonstrate to the trial court that the Respondents acted in bad faith.
18. The ex-parte applicant has failed to prove his contentions in the motion. This court is therefore not persuaded that the respondents mandate should be curtailed. The ex-parte applicant will still be able to address his grievances as a claim for malicious prosecution at the end of the trial in the lower court.
19. In the upshot, this court finds that the judicial review application herein as lacking in merit. The same is dismissed. Each party is to bear their costs.

Orders accordingly.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 3RD DAY OF AUGUST 2023.

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P.M. MULWA

JUDGE

In the presence of:

Duale – court assistant

Mr. Obwanda - for Ex-parte applicant

Mr. Muriuki - for respondents

