



REPUBLIC OF KENYA



**Makokha v Netia & another (Miscellaneous Criminal Application
E037 of 2022) [2023] KEHC 22482 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22482 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CRIMINAL APPLICATION E037 OF 2022
JRA WANANDA, J
SEPTEMBER 22, 2023**

BETWEEN

WILFRIDA MOLA MAKOKHA APPLICANT

AND

MOSES NETIA 1ST RESPONDENT

REPUBLIC 2ND RESPONDENT

RULING

1. The Applicant has moved this Court to pronounce that being a complainant in a criminal prosecution case where the accused person was acquitted by the trial Court, she has a right to appeal against such acquittal.
2. From the records before me, I note that the Applicant was the complainant in Mumias Senior Principal Court Criminal Case No 153 of 2020 in which the 1st Respondent was charged with 4 counts of the following offences:
 - i. Arson contrary to Section 332(a) of the *Penal Code*. The particulars are that on the night of 3rd/4th April 2020 at Mirere “A” village, Mirere location, Matungu sub-County within Kakamega County jointly with others not before Court willfully and unlawfully set fire to a building namely a dwelling house and household goods valued at Kshs 4.2 Million belonging to the Applicant.
 - ii. Malicious injury contrary to Section 339(1) of the *Penal Code*. The particulars are that on the same night at the same place jointly with others not before Court willfully and unlawfully damaged the home gate valued at Kshs 48,000/- belonging to the Applicant.
 - iii. Forcible detainer contrary to Section 91 of the *Penal Code*. The particulars are that on diverse dates between February and April 2020 at the same place above being in possession of land



registered North/Wanga/Namamali 1662 of the Applicant without colour of right, held the possession of the said land in a manner likely to cause a breach of the peace, against the Applicant who was entitled by law to possession of the said land.

- iv. Cutting down trees contrary to Section 334(c) of the *Penal Code*. The particulars are that on diverse dates between 5th and 14th April 2020 at the same place above jointly with others not before Court willfully and unlawfully cut down (botanic names stated) all valued at Kshs 400,000/- the property of the Applicant.
3. The 1st Respondent pleaded not guilty and thereafter the case proceeded to trial. The prosecution called 5 witnesses (including the Applicant) and upon being found to have a case to answer, the 1st Respondent was put to his defence. The 1st Respondent then gave sworn evidence and did not call any other witness. After analyzing the evidence, the trial Court delivered its Judgment on 20/04/2022 whereof it found that the prosecution had not proved its case as required and accordingly acquitted the Applicant under Section 215 of the *Criminal Procedure Code* for lack of evidence.
4. In reaching the said verdict, the trial Magistrate held as follows:

“In this case, nobody among the witnesses pointed a finger to the accused as the person who torched the house of the complainant. Nobody saw the person who lit the match box. The accused was only suspected because of the land dispute with the complainant. It has been held severally that suspicion however strong it could be, cannot sustain a conviction. The evidence in this case is a mere suspicion and not supported by any evidence.”
5. Now, before the Court for determination is the Application dated 31/05/2022 filed by the Applicant through Messrs Luchivya & Co. Advocates. The Application is stated to brought under Articles 22(1), 50(1), 157(6)(b) and 159(2)(d) of the *Constitution*, Sections 88(3), 349 and 362 of the *Criminal Procedure Act* and all the enabling provisions of law. It seeks the following orders:
 - i. That the Applicant be granted leave to personally or through his Advocates privately prosecute the intended Appeal herein against the first Respondent.
 - ii. That the Applicant be granted leave to file Petition of Appeal out of time as per the draft Petition of Appeal.
 - iii. That costs of this Application be provided for.
6. The grounds of the Application are that the Applicant is aggrieved by the Judgment delivered by the trial Court, she was the complainant in the case thus has suffered injustice, the 2nd Respondent (office of the Director of Public Prosecutions) has refused to appeal against the Judgment, there was delay in obtaining the Judgment and proceedings of the lower Court, the same were certified as true copy on 24/05/2022, 14 days after delivery of Judgment hence need for leave to appeal out of time, the intended appeal has high chances of success and it shall be in the interest of justice for the orders to be granted.
7. The Application is then supported by the Applicant’s Affidavit in which she submitted that the Magistrate dismissed the case on the basis that no one saw the 1st Respondent burning the Applicant’s house the subject of the arson offence, from circumstantial evidence before the trial Court, prior to the burning of her said house the 1st Respondent had illegally stayed in the Applicant’s compound which information was within the knowledge of the provincial administration, the 1st Respondent was captured burning charcoal in the Applicant’s compound after illegally felling down the Applicant’s trees a few days to the arson, from the circumstances of the case the 1st Respondent had already showed his displeasure for the Applicant’s dwelling on the land where the house was which fact was known



to the local administration, the trial Magistrate erred in law and fact by acquitting the 1st Respondent when there was enough evidence of previous ill will/malice which the 1st Respondent displayed against the Applicant which was capable of leading him to commit the offence. The Applicant then deposed that he wished to appeal against the Judgment and she attached a draft Petition of Appeal.

8. The 2nd Respondent, Director of Prosecutions (DPP) opposed the Application vide the Grounds of Opposition filed on 6/09/2022 through Principal Prosecution Counsel, Loice Nyaboke Osoro and also the Notice of Preliminary Objection filed subsequently on 15/09/2022 by Prosecution Counsel, N.K. Chala.
9. I have not come across any Response filed by the 1st Respondent.

2nd Respondent's Preliminary Objection

10. The 2nd Respondent states that the Application offends the provisions of Section 348A of the Criminal Procedure Code which confers powers upon the DPP to appeal against acquittals and not on any person, the Application also offends the provision of Section 88 of the Criminal Procedure Code because it is only the trial Magistrate who has the power to grant orders of private prosecution as by law and that further, the Application also offends Article 157 of the Constitution.

2nd Respondent's Grounds of Opposition

11. In addition to the Preliminary Objection, the 2nd Respondent states that the entire case was based on suspicion as opposed to circumstantial evidence, the 2nd Respondent cannot be directed by any person or authority in making a decision to commence criminal proceedings, litigation must come to an end, the Applicant is merely disgruntled with the outcome of the criminal case as opposed to having a real and tangible grounds of Appeal with a likelihood of success, the intended Appeal has no chance of succeeding, the 2nd Respondent in exercising the powers conferred by Article 157 of the Constitution shall have regard to the interest of administration of justice and the need to prevent and avoid abuse of the legal process, the rights of the Applicant have not been violated or infringed for the reason that the Applicant's case was heard to its logical conclusion where the Applicant fully participated, she therefore cannot invoke the relief sought under Article 22(1) of the Constitution, on the contrary, to allow the Applicant prayer to institute an Appeal that has little or no likelihood of success will gravely infringe on the rights of the 1st Respondent who was charged with a case based on suspicion as opposed to evidence. Finally, it was stated that the Application is otherwise incompetent, misconceived, misplaced and an abuse of the process of the Court.

Hearing of the Application

12. Pursuant to directions given, the parties filed written Submissions. The Applicant filed her Submissions on 22/11/2022 through her said Advocates while the 2nd Respondent filed earlier on 15/09/2022.

Applicant's Submissions

13. The Applicant's Counsel submitted that according to Article 22(1) as read with Article 50(1) of the Constitution "every person has the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed", Article 50(1) provides that "every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court ...".



14. According to Counsel, a verbal Petition to the 2nd Respondent to appeal against the decision of the trial Court has been an exercise in futility thus occasioning this Application, Article 157(6)(b) gives the 2nd Respondent all the prosecution powers, however under Section 88(1) of the [Criminal Procedure Act](#), the Court can grant leave for a person to privately prosecute a criminal case, according to the [Judicature Act](#), Cap. 8, the subsidiary Rules of the [High Court \(Practice and Procedure\) Rules](#), part III, the interpretation part defines a “Judge” as including “Magistrates or other person acting in a judicial capacity”, this Court has unlimited jurisdiction under Section 4 and 69 of the [Criminal Procedure Code](#) as read with Article 165(3)(a) of the [Constitution](#) to grant orders for the Applicant to prosecute the intended Appeal.
15. He cited the case of *Albert Gacheru Kiarie t/a Wamaitu Productions v James Maina Munene & 6 Others*, Petition No. 42 of 2009 eKLR in which the earlier case of *Floriculture International Limited & Others*, High Court Misc. Application No. 114 of 1997 was quoted and submitted that the cases provide parameters to guide Courts in issuing orders for private prosecution. According to Counsel, the principles are that the private prosecutor must show that he has locus standi such as that he has suffered special and exceptional and substantial loss or damage peculiarly personal to him and that he is not motivated by malice, politics or some ulterior consideration devoid of good faith.
16. Counsel added that in applying the said principles to the facts herein, the Applicant lodged a complaint against the 1st Respondent, the latter was charged at the trial Magistrate’s Court with the offence of arson of the Applicant’s house, the fact of ownership of the house was not disputed, it was further not disputed that the Applicant’s house was torched meaning the Applicant personally suffered substantial damage or loss, the present Application has been brought in good faith devoid of any politics or ulterior motive as the Applicant is simply seeking for justice, the evidence to be used in the Appeal has already been gathered by the agents of the 2nd Respondent which was placed before the trial Magistrate and it is the same evidence which the Applicant wants this Court to have a second look at hence the private prosecution will not be biased, the 2nd Respondent was approached by the Applicant after the Judgment of the trial Magistrate and verbally instructed to commence an Appeal but the 2nd Respondent has so far not made any effort which demonstrates that the 2nd Respondent has no intention of pursuing the Appeal, the intended Appeal has high chances of success, prior to the torching of the Applicant’s residence the 1st Respondent had illegally resided on the said torched house and was captured in the exhibits before Court burning charcoal in the Applicant’s homestead, the Application has met the parameters for grant of the order sought.
17. On the prayer for leave to appeal out of time, Counsel submitted that Judgment was delivered on 20/04/2022, the proceedings do not indicate whether the parties were present when the Judgment was delivered, the proceedings were certified as true copy on 24/05/2022, about one month after delivery of the Judgment, the present Application was filed on 31/05/2021, the Applicant’s Advocate had to first study the proceedings and Judgment before making the Application, the delay in filing the Application was caused by the delay in obtaining the typed proceedings of the trial Court, which was beyond the control of the Applicant.

2nd Respondent’s Submissions

18. In opposing the Application, Prosecution Counsel, N.K Chala submitted that the intended Appeal lacks merit and it would be a waste of judicial time and abuse of the criminal justice system to entertain the same. She cited the Court of Appeal case of *Jopley Constantine Oyieng v Republic* [1988] eKLR and submitted that as stated in that case, the right of Appeal can only be given by statute. She also cited the case of *Chege Njoroge v Henry Karanja & another* [1982] eKLR and submitted that the case



is authority that a complainant or a private prosecutor in a criminal case has no right to appeal against an acquittal and that it is only the DPP who has the permission of the law to do so.

19. Prosecution Counsel further submitted that under Section 88(1) of the *Criminal Procedure Code*, it is clear that powers to grant leave for private prosecution are conferred upon a Magistrate only and as such an Application has to be made during trial of the matter before the Magistrate, the prosecutorial powers of the DPP are provided under Article 157 of the *Constitution*, in carrying out its mandate the office of the DPP is also mandated to ensure that there would be no abuse of the Court process, the evidence on record clearly shows that the accusations that were levied against the 1st Respondent were based on suspicion, there was no eye-witness to the crimes alleged, instituting an Appeal in such a case would amount to a total abuse of the Court process, the Courts have always stated that private prosecution when legally sought, is only to be used as a safeguard against extraordinary impropriety, capricious, corrupt or biased failure or refusal to prosecute by the public prosecuting agencies. She then cited the case of *Frandik Nyamwaro Ogora v Elkana Obwaya Nyandika & 2 Others* [2018] eKLR.

Analysis and determination

20. I have considered the Application, responses thereto, submissions and authorities filed. I find that the issues that arise for determination to be the following:
- i. Whether the High Court has the jurisdiction to grant leave for private prosecution or leave to a complainant to appeal against an acquittal of an accused person by the Magistrates Court.
 - ii. Whether therefore this High Court should grant leave to the Applicant to appeal against the acquittal of the 1st Respondent by the Magistrates Court.
 - iii. Whether therefore this High Court should grant leave to the Applicant to appeal out of time against the acquittal of the 1st Respondent by the Magistrates Court.
21. I now proceed to analyse and answer the said issues.

i. Whether the High Court has the jurisdiction to grant leave for private prosecution or leave to a complainant to appeal against an acquittal of an accused person by the Magistrates Court

22. In Kenya, the office of the DPP is established under Section 157 of the *Constitution*. As correctly pointed out by both parties, prosecutorial power in criminal matters is provided for in Article 157(6) (a), (b) and (c) of the *Constitution* in the following terms:

“The Director of Public Prosecutions shall exercise State powers of prosecution and may —

- a. 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;
- b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority.
- c. subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).”



23. It is clear from the above that although under Article 157(6)(a) of the *Constitution* vests prosecutorial powers upon the DPP, Article 157(6)(b) however recognizes the existence of prosecution undertaken by other entities other than the DPP. Prosecution by these other entities is then provided for under Section 88 of the *Criminal Procedure Code*, Cap 75 which stipulates as follows:
- “(1) A Magistrate trying a case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorized by the Director of Public Prosecutions in this behalf shall be entitled to do so without permission.
 - (2) Any such person or officer shall have the same power of withdrawing from the prosecution as is provided by section 87, and the provisions of that section shall apply to withdrawal by that person or officer.
 - (3) Any person conducting the prosecution may do so personally or by an advocate.”
24. The State’s power over criminal prosecutions is not therefore exclusive, a private individual may institute criminal proceedings in person in accordance with Articles 157(6)(b) of the *Constitution* and Section 88 of the *Criminal Procedure Code* (see *Richard Kimani & M. Maina v Nathan Kahara*, High Court Revision No. 11 of 1983).
25. In the case of *Otieno Clifford Richard vs Republic*, High Court at Nairobi (Nairobi Law Courts) Misc Civil Suit No. 720 of 2005, a 3-bench of the High Court (Nyamu, Emukule and Wendoh, JJ), observed as follows:
- “Section 85 to Section 88 of the *Criminal Procedure Code* deal with “Appointment of Public Prosecutors and conduct of prosecutions”. On the other hand, Section 89 to Section 90 of *Criminal Procedure Code* deal with the “Institution of proceedings and making of complaint”. We think that in the case of a private prosecution an application must first be made under Section 88(1) of the *Criminal Procedure Code* for the Magistrate trying the case to grant or refuse to grant permission to the Plaintiff to conduct a private prosecution. It is after permission has been granted for the private prosecution to be conducted that Section 89 and Section 90 of the *Criminal Procedure Code* can be brought into effect and the criminal proceedings instituted” (emphasis mine).
26. It is therefore clear from the foregoing that the right to privately prosecute is a right provided for under Section 88 of the *Criminal Procedure Code* but according to which one must approach the Magistrates’ Court, not the High Court, for obtain permission to exercise.
27. It is true that in the present matter, the issue is not exactly about grant of leave to commence private prosecution before the Magistrate’s Court but grant of leave to a complainant in a criminal case to file an Appeal at the High Court to challenge the acquittal of an accused person by the trial Court. Although the two issues may sound different, they are not. The two are closely intertwined since both deal with the issue of a private person prosecuting a criminal matter. I have no reason to believe that the term “private prosecution” does not logically include determination of questions on whether a private person possesses the right to privately prosecute an appeal arising out of an acquittal in a criminal case.
28. Further, in this case, the complainant did not privately prosecute the case before the trial Court. The prosecution was conducted by the DPP and the Applicant was only a complainant and a witness. No leave to privately prosecute having been given to the Applicant in the first place and no private



prosecution having taken place before the trial Court, he cannot argue that a right to Appeal to the High Court ensues as a continuation of leave already given. The present Application for leave to appeal is therefore not a continuation of leave already given, but a fresh prayer for leave.

29. I note that Counsel for the Applicant has submitted that under part III of the *High Court (Practice and Procedure) Rules*, enacted under the *Judicature Act*, Cap. 8, the interpretation part defines a “Judge” as including “Magistrates or other person acting in a judicial capacity”. However, what Counsel has cleverly omitted to state is that these provisions that he has cited deals exclusively, specifically and only in regard to the issue of “Reference to High Court Archives”. Clearly therefore, the provisions cannot apply to the totally different issue of private prosecution which is what is before this Court.
30. In view of the foregoing, I find that this Court lacks the jurisdiction to entertain or determine the present Application.
31. It is trite law that where a Court determines that it is bereft of jurisdiction, it should forthwith down its tools the moment it reaches such finding (see The *Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR). I so do.
32. Granted, the issue of extension of time to file an Appeal out of time may properly be before this Court but canvassing such issue before the Magistrate’s Court has determined whether, in the first place, it has powers to grant the Applicant leave to privately file an appeal will, in my opinion, be premature. My view is that on that issue of whether the Magistrate’s Court has powers to grant the Applicant leave to privately file an appeal, the High Court can only be approached as an appellate Court, not as a Court of first instance.
33. In view of the above, to avoid pre-empting or pre-judging the decision of the Magistrate Court when it considers the Application for leave to prosecute the intended Appeal, should it be brought before him/her, I will say no more on this matter and will not therefore analyze or determine the two remaining issues.

Final Orders

34. In the end, the Application dated 31/05/2022 is hereby struck out for want of jurisdiction.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 22ND DAY OF SEPTEMBER 2023

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WANANDA J. R. ANURO

JUDGE

