Republic v Inspector General of Police & 4 others; Ombajo (Exparte) (Application E057 of 2023) [2024] KEHC 13708 (KLR) (Judicial Review) (1 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13708 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E057 OF 2023

J NGAAH, J

NOVEMBER 1, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

INSPECTOR GENERAL OF POLICE ..... 1ST RESPONDENT

OFFICER COMMANDING KAMUKUNJI POLICE STATION .... 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS ..... 3RD RESPONDENT

NATIONAL POLICE SERVICE ..... 4TH RESPONDENT

ATTORNEY GENERAL ..... 5TH RESPONDENT

AND

PHILIP ONYANGO OMBAJO ..... EXPARTE

JUDGMENT

1. The application before this Honourable Court is a motion dated 7 June 2023. It is expressed to be brought under Articles 22 (1), 23 (1)(3),47, 165(3) of the *Constitution*; Section 4 and 5 of the Fair Administrative Act, 2015; and, Order 51 rule 1 of the Civil Procedure Rules. The applicant prays for the following orders:

> " 1. That, this Honourable court be pleased to issue an order of Certiorari, and compel the Respondents to remove and bring into this court, for purposes of quashing, their decision to reinstitute criminal proceedings against the

Applicant on charges of attempted Rape contrary to sections 3&4 of the *Sexual Offences Act*.

2. That, this Honourable court be pleased to issue an order of Prohibition, prohibiting the Respondents, their servants, agents, junior officers and/ or anybody from continuation of the malicious investigations against the Applicant.

3. That, this Honorable court be pleased to issue an order of Prohibition, prohibiting the Respondents, their servants, agents, junior officers and/or anybody from the continuation of malicious investigations, summoning, arresting and harassment and intimidation against the Applicant.

4. That, this Honorable court be pleased to issue orders compelling the Respondents to uphold and respect the Applicant's Constitutional Rights and terminate any investigations arising from the attempted Rape allegations after the discharge of the case by the Director of criminal investigation on 28th October, 2021 for failing to give reasons for the reinstitution of the case.

5. That, this Honorable court be pleased to issue an order of Mandamus compelling the Respondents to uphold and respect the Applicant's Constitutional Rights and terminate further investigations arising from the attempted Rape allegations.

6. That, the respondents bear the costs of this suit."

2. The application is based on a statutory statement dated 29 May 2023 and an affidavit verifying the facts relied upon sworn on even date by Philip Onyango Ombajo, the applicant in this application.

3. According to these documents, the applicant was employed by Kenya Ports Authority as a basketball coach from 1 July 2016 to the 7 July 2021. His services were, however, terminated when he was accused of committing the offences of attempted rape and indecent assault. The applicant contends that these accusations were false and malicious. As a matter of fact, the applicant initiated a defamation suit against the Standard Media Group PLC in Mombasa Chief Magistrates Court Civil Case No. 101 of 2022 for publishing these accusations. At the time of swearing and filing of the affidavit in support of the application, the suit was set to be heard on 14 June 2023.

4. Besides the defamation suit, the applicant also sued his employers for unfair dismissal in the Employment and Labour Relations Court at Mombasa in suit No. E094 of 2021. The judgment in this case was set to be delivered on 5 October 2023.

5. A committee by the Kenya National Basketball Federation to which the applicant was subjected for disciplinary proceedings as a result of the accusations against him is said to have absolved the applicant in its report dated 4 October 2022. The applicant, thus, resumed his coaching activities.

6. Further, the applicant has contended that criminal investigations initiated by the police on the complaints against him and which were entered in the Occurrence Book at Kamukunji Police Station, as No. 65/09/07/2021 established that there was no proof of the allegations and, therefore, there was no basis to charge him. The police investigation report was given to the applicant, his employer, Kenya Ports Authority and the Kenya Basketball Federation. How such information as the outcome of police investigations could have reached the applicant and the two institutions is unclear from the applicant's affidavit.

7. Nonetheless, on 15 May 2023, the applicant was issued with summons by police officers seeking to charge him with the same offences that he had allegedly been absolved from. The applicant has faulted the summons on the ground that it is "ultra vires" for the reason that it does not state date or time when the applicant is to appear at the police station. He fears that the police are intent on arresting him in public or at his work place and the intended arrest and prosecution is merely orchestrated to derail his case at the Employment and Labour Relations Court.

8. The respondent opposed the motion. The 2nd, 4th and 5th respondents filed grounds of objection in which they contend that this Honourable court does not have the jurisdiction to grant anticipatory bail. According these respondents, Judicial Review proceedings are special in nature and, that the applicant ought to have filed a constitutional petition. They also plead that the application is only intended to curtail the statutory obligations and duties of the 1st, 2nd, 4th and 5th respondents. The respondents further plead that the application is an invitation to the court to venture into the arena specifically reserved for a trial court.

9. It is averred that the charges against the applicant are not informed by ulterior motives and, in any event, the applicant has not demonstrated how the acts complained of are tainted by illegality, irrationality and procedural impropriety. Finally, it is pleaded on behalf of the 2nd , 4th and 5th respondents that the law clothes them with discretion which this Honourable Court cannot direct them to exercise in any particular manner.

10. The 3rd respondent filed both grounds of objection and a replying affidavit. In the grounds, the 3rd respondent has pleaded that under Article 157(6) of the *Constitution*, the 3rd respondent has a constitutional mandate 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. He contends that the exercise of this mandate cannot be interfered with.

11. The 3rd respondent has also urged that under Article 157(10) of the *Constitution*, he does not require the consent of any person or authority to commence criminal proceedings and, that in the exercise of his powers or functions, he is not be under the direction or control of any person or authority. The exercise of the 3rd respondent's mandate, it is urged, cannot be interfered with unless in exceptional and the clearest of circumstances where there is infringement of fundamental freedoms, violation of the *Constitution* and the law or where there is abuse of the legal process.

12. Further, Section 24 of the *National Police Service Act* mandates the police to investigate any complaint brought to their attention in order to determine whether a criminal offence has been committed. After a case has been investigated by the 2nd respondent, the file is forwarded to the 3rd respondent's office for direction and advice on whether or not to charge. Accordingly, the 2nd respondent does not have the powers to make a decision to charge.

13. It has been urged that in making the decision to charge the applicant, the 3rd respondent has not abrogated, breached, infringed or violated any provision of the *Constitution* or any human and fundamental rights of the applicant or any other written law or the regulations that may be made thereunder.

14. Mr. Joseph Mburugu, a senior principal prosecution counsel at the Office of the 3rd respondent swore the 3rd respondent's replying affidavit. He has stated that, at the time material to this suit, he was in charge of office of the 3rd respondent at Makadara, in which jurisdiction the applicant's case fell. Mr. Mbuguru has sworn that the case was investigated by Kamukunji Police Station and the resultant file forwarded to the 3rd respondent's Office at Makadara for perusal and direction on the decision to charge. Upon review of the evidence in the police file, the investigating officer in conduct of the

matter was advised to cover the identified gaps and forward the file to the office for further advice and directions.

15. When the police file was resubmitted, the evidence gathered in the course of investigations was analysed, and in the 3rd respondent's opinion, there was sufficient evidence for the applicant to be arraigned for the offence of attempted rape contrary to section 4 of the Sexual Offence Act, cap. 63A or, in the alternative, the offence of indecent act with an adult contrary to section 11A of the Sexual Offence Act.

16. On 8 February, 2023, the decision to charge the applicant was communicated to the officer in-charge of the 3rd respondent's office at Makadara. The letter communicating this decision was copied to the officer commanding station at Kamukunji Police Station for action.

17. On the interested party's part, the replying affidavit opposing the application has been sworn by Ms. Ann Ireri who has introduced herself as the executive director of the interested party. According to Ms. Ireri, "the applicant faces serious charges some of which are being investigated by the serious crimes unit under the Directorate of Criminal Investigations and the instant application and stay orders granted have suffered the victims great injustice, by way of delays upon the wheels of justice and more injustice will be met against the ladies if their complaints against him are not investigated and before an independent Court of Justice."

18. Ms. Ireri has sworn that the genesis of the charges against the applicant is a complaint by a person she has described as a young talented female student, basket-ball player and who was induced by the applicant to travel to Nairobi on the pretext that the applicant was going to offer her an opportunity to play basketball. Instead, the applicant booked her in the same room where the applicant was himself booked and assaulted or attempted to sexually assault the complainant.

19. The applicant immediately informed her parents and the interested party. She also lodged her complaint to the police. Upon investigations, the applicant was charged with the offence of sexual harassment and attempted rape before he moved to this Honourable Court for what the interested party regards as "refuge against prosecution".

20. It is the interested party's case that the applicant took advantage of his position as a re-known basketball coach and an official of the Kenya Basketball Federation to abuse the complainant who, by virtue of her disposition, she was a vulnerable victim, under the pretext of offering her a position to play basketball.

21. The rest of the depositions in Ms. Ireri's affidavit are consistent with the affidavits sworn by the respondents. In particular, Ms. Ireri has sworn that the accusation of attempted rape against the applicant was found to be sustainable after further investigations were carried out by Directorate of Criminal Investigations. It is on the basis of these investigations that the 3rd respondent came to the decision to charge the applicant under section 4 of the Sexual Offence Act, with the offence of attempted rape.

22. Contrary to the applicant's contentions, the initial investigations carried out by the officers at Makadara Police Station did not reach any conclusion that there was no evidence against the applicant. Rather, the advice by the 3rd respondent was that the evidence was insufficient to sustain the charges for attempted rape and that, further investigations were necessary. It is after these further investigations that the applicant was charged.

23. The parties' respective submissions replicate, to a greater degree, their pleadings and depositions in their affidavits. In a judicial review application such as the one before court, it is the grounds on which judicial review reliefs are sought that are of immediate interest to the court. The grounds constitute

the first hurdle which an applicant must surmount because without them, an application for judicial review would be baseless and fatally defective. Needless to say, the point of entry for a judicial review court to intervene and check the powers of subordinate courts or tribunals or such other bodies whose powers are subject to supervisory jurisdiction of this Honourable Court is the grounds upon which the application is made.

24. This is obvious from Order 53 Rule 1(2) which states in rather peremptory terms that the statement accompanying the application must contain, among other things, the grounds upon which the application is made. It reads as follows:

> (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. (Emphasis added).

And Order 53 Rule 4(1) states, also unambiguously, that no grounds should be relied upon except those specified in the statement accompanying the application for leave.

25. The grounds to which reference has been made in these provisions of the law have not been left to speculation or conjecture. They were enunciated in the English case of Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410. In that case, Lord Diplock set out the three heads which he described as "the grounds upon which administrative action is subject to control by judicial review". These grounds are illegality, irrationality and procedural impropriety. While discussing susceptibility of administrative actions to judicial review and, in the process defining these grounds, the learned judge stated as follows:

> " My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.
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> By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
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> By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's

> exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.
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> I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

26. These grounds of illegality, irrationality and procedural impropriety are ordinarily regarded as the traditional grounds for judicial review. The court will intervene and may grant the remedy for judicial review if any of them is proved to exist. But as Lord Diplock suggested, the list is by no means exhaustive. The learned judge hastened to say that further development of this area of law may yield further grounds on a case by case basis. It is in this spirit, the learned judge suggested, that the principle of proportionality as a further ground for judicial review has been developed.

27. Since they form the foundation upon which the application for judicial review is based, these grounds must be stated in precise, clear and unambiguous terms in the statement accompanying the application for leave.

28. While reiterating the importance of stating grounds for judicial review in concise and precise terms, Michael Fordham in his book, Judicial Review Handbook, at Paragraph 34.1 states as follows:

> " The need to identify and express accurately the possible grounds for judicial review is not simply a matter of analytical nicety. It is one of practical necessity. The provisions of the new order require the accurate identification of (a) potentially applicable grounds and (b) the time at which they arose. Given the frequent presence of multiple targets, the elusive nature of certain grounds, their disarming interrelationship, and the understandable fear of missed opportunity, it is easy to see why public lawyers may feel tempted to 'throw everything' including grounds which are dangerously close to the inconceivable. This approach is unlikely to endear them to the court."

29. The 'new order' referred to in this passage is Order 53 of the Rules of the Supreme Court of England whose provisions are more or less in pari materia with our own Order 53 of the Civil Procedure Rules, 2010. The point is, however, clear that courts will not entertain applications where grounds have not been identified and accurately stated. Stating the grounds in precise terms is not, as it were, a matter of analytical nicety but it is a practical necessity. It follows that where the grounds are not stated, the application is fatally defective as, strictly speaking, it has no foundation upon which it is built.

30. Turning back to the applicant's application, I must confess that I have struggled to find the grounds upon which the applicant seeks the judicial review reliefs. What has been presented as grounds are the depositions in the affidavit verifying the facts relied upon. The closest the applicant has come to

singling out the grounds upon which he relies is in paragraphs *23*,*25* and *27* under the head 'grounds upon which the reliefs are sought' in the statutory statement; it is pleaded in this statement as follows:

> " 23. That the said summons are ultra vires because it didn't list the date and/or time that the Applicant was to present himself to the Police Station thus the applicant is apprehensive that the police intend to arrest him in public at his place of work when he list expect with the sole purpose to embarrass him and derail the Judgment at the ELRC court and defamation suit at the Chief Magistrates Court at Mombasa.
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> 25. That, it is clear that the Police are not only abusing their authority, but are on a mission to violate the Applicant's Constitutional Right to access Justice and obtain a fair hearing.
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> 27. That, the Applicant is apprehensive that his right to freedom and liberty is under threat and he believes that the "new" investigations are malicious."

There is a hint of the grounds of illegality and procedural impropriety in these averments but, for reasons I have given, it is not for the court to speculate the grounds upon which the applicant seeks the judicial review reliefs.

31. But even if I was to give the applicant the benefit of the doubt and proceed on the assumption that that is application is based on all or any of the grounds of judicial review, I would still be hesitant to find that any of these grounds has been proved to exist. I say so because the applicant's application is rooted on the wrong premise that upon investigations of the criminal complainant against him, the respondents absolved him from any wrong doing and, therefore, it would be wrong to arraign him on the same complaint that he has been adjudged to be innocent. Looking at the applicant's own evidence, his position is not factually correct and neither is it supported by law.

32. It is not in dispute that a complaint of attempted rape was lodged against the applicant and registered at Kamukunji police station as No. 65/09/07/21. It is also apparent that the police carried out some investigations into the complaint after which, somehow, they led the applicant to believe that there was no substance in the complaint. This is apparent in paragraph 13 of the applicant's own affidavit where he swore as follows:

> " 13. That, the investigations were done by Makadara Police Station officers, PPC Mburu and PCW Emily, who later on presented their findings stating that there was no evidence to charge me of any wrong doing. (Annexed and marked herein "POO-4" is a copy of the report dated 28th October 2022)
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> 14. That the authors of the investigation being PPC Mburu and PCW Emily, later on presented their findings to the Director of public prosecutions who returned a verdict dated 28th October,2021 stating that there was no evidence to charge me with any wrong doing.
>
> 15. That the report of the two officers was supported by the lack of medical evidence upon examination of the alleged victim and any other corroborating evidence which included a cctv evidence or record from the hotel confirming that the Applicant herein was at the locus in quo."

33. There are indeed hand-written notes exhibited to the applicant's affidavit showing that the complaint against the applicant was lacking in some material respect. They are not on any official document

and it is not quite apparent who their authors were. As I have also noted earlier in this judgment, it is not clear how the applicant accessed this information that by and large would constitute internal communication between or amongst the respondents. Be that as it may, irrespective of the source of these notes, the 3rd respondent has, in answer to the applicant's depositions, sworn as follows:

> " 4. That upon review of the evidence in the police file, the investigating officer in conduct of the matter was avised to cover the identified gaps and forward the file to the office for further advice and directions.
>
> 5. That the police file was resubmitted, the evidence analysed, and the DPP established that the file met the threshold for prosecution consequently a decision was made to charge the applicant herein with offence of attempted rape contrary to section 4 of the *Sexual Offences Act*, in the alternative indecent act with an adult contrary to section 11A of the *Sexual Offences Act*."

34. In the wake of these depositions by the 3rd respondent, there is no basis for claiming that the applicant was absolved of the complaint against him. If, based on the evidence gathered by the 3rd respondent, the latter is of the opinion that a charge of rape or indecent assault with an adult is sustainable, then it will be left for the trial court to determine whether indeed any of those charges have been proved at the closure of the trial. At the stage at which the investigations are, it is sufficient that the applicant is reasonably suspected to have committed a crime defined in law. It is trite that reasonable suspicion is not synonymous with a prima facie case and neither does it mean that the 3rd respondent has to prove the complaint against the suspect at the investigation stage. The Privy Council in Inspector Shaaban bin Hussien and others versus Chong Fook Kam and another (1969 3 ALL ER 1626, defined suspicion in this context as follows:

> " Suspicion in its ordinary meaning is state of conjunctive or surmise where proof is lacking. 'I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end. When such proof has been obtained, the police case is complete, it is ready for trial and passes on to its next stage. It is indeed desirable as a general rule that an arrest should not be made until the case is complete. But if arrest before that were forbidden, it could seriously hamper the police. To give power to arrest on reasonable suspicion does not mean that it is always or even ordinarily to be exercised. It means that there is an executive discretion... There is no serious danger in a large measure of executive discretion in the first instance because in countries where common law principles prevail the discretion is subject indirectly to judicial control."

35. If, in the opinion of the 3rd respondent, he has sufficient evidence upon which he can mount a criminal case against the applicant, a judicial review court cannot, and should not stand in his way to do so.

36. It is also important to be mindful of the discretion with which the 3rd respondent has been clothed in taking the decision to prosecute or not to prosecute. This concept was also explained in the above decision as a common law principle but, in Kenya, it also has a constitutional underpinning in Article 157(6)(a) of the *Constitution*; this Article reads as follows:

> 157. (6)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; (Emphasis added).

37. The discretion to charge or not to charge is, of course not to be exercised at the whim of the Director of Public Prosecutions but it is subject to the supervisory jurisdiction of this Honourable Court. Again, this point was taken in Inspector Shaaban bin Hussien and others versus Chong Fook Kam and another (supra)where the Privy Council noted: "There is no serious danger in a large measure of executive discretion in the first instance because in countries where common law principles prevail the discretion is subject indirectly to judicial control."

38. It has been noted that in Kenya, over and above the common law principles, the *Constitution* is the benchmark upon which the exercise of the discretion by the Director of Public Prosecutions is weighted. This why it is expressly stated in Article 157(11) of the *Constitution* that in exercising the powers conferred by Article 157, the Director of Public Prosecutions is enjoined to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

39. Taking all these factors into consideration, if a judicial review court has to disturb the exercise of discretion by the Director of Public Prosecutions, or any other public authority for that matter, it must bear in mind that:

> " The very concept of administrative discretion involves a right to choose between more than one possible course of action on which there is room for reasonable people to hold differing opinions as to which is to be preferred."

These are the words of Lord Diplock in Secretary of State for Education and Science v Tameside Metropolitan BC [1976] 3 All ER 665 at 695, [1977] AC 1014 at 1064.

40. Against this background, I do not see anything, in the material presented before court, to suggest that, in reaching the decision to charge the applicant, the 3rd respondent did not exercise his discretion properly. No doubt, the 3rd will have opportunity to present his case before the trial court based on the evidence he has gathered. There is also no doubt, that the prosecution evidence will be tested when the applicant is given the opportunity to cross-examine the prosecution witnesses and if, in the process, he succeeds in raising a reasonable doubt on the cogency or the weight of that evidence, he will be acquitted.

41. As I have noted in my previous decisions in cases similar to the one before court, a judicial review court cannot assume the Director of Public Prosecution's duty and direct the Director of Public Prosecution to exercise his discretion in any particular way; neither can it purport to substitute its own decision for that of the Director of Public Prosecutions. Similarly, it cannot assume the jurisdiction of the trial court and decide whether offences alleged to have been committed were indeed committed. All the court would be concerned about is the process by which the decision to prosecute the applicant was reached.

42. As far as I can see, there is no basis upon which the process employed by the 3rd respondent to reach his decision can be faulted. He has been presented with evidence which, upon consideration, he suspects the applicant to have committed a crime. Like the rest of the respondents upon whom the *Constitution* has placed a duty and the mandate to undertake their constitutional and statutory duties, the 3rd respondent ought to be allowed to proceed and exercise his powers to prosecute.

For these reasons, I do not find any merit in the applicant's application. It is hereby dismissed with costs. Orders accordingly.

SIGNED, DATED AND UPLOADED ON THE CTS ON 1 NOVEMBER 2024.

NGAAH JAIRUS

JUDGE