



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 35 OF 2019

DIRECTOR OF PUBLIC PROSECUTIONS.....REPUBLIC

VERSUS

ASSA KIBAGENDI NYAKUNDI.....ACCUSED

RULING

The applicant herein **Assa Kibagendi Nyakundi** filed this application dated 25.6.2019 on the same date. The application, brought under the several provisions of the Constitution (Article 10, 22, 23, 25, 48, 50, 157 and 259), section 276 of the criminal Procedure Act and section 4 of the Fair Administration Action Act, on its face, seeks the following orders:-

- i) That the Honourable court be pleased to make a declaration that the Respondent's decision to prefer murder charges against the applicant in High Court Criminal Case Nos 32 and 35 of 2019 amounts to an abuse of legal process and is contrary to Article 157 (II) of the constitution.
- ii) That the Honourable court do make a declaration that the Respondent's decision to prefer murder charges against the applicant in High Court Criminal Case Nos 32 and 35 embarrasses and stands to prejudice the applicant's right to a fair trial under Article 25(1) of the constitution.
- iii) A declaration that the court lacks jurisdiction to admit the information before it, which seeks to charge the applicant herein with the offence of murder contrary to section 202 as read with section 204 of the Penal Code.
- iv) That the honourable court be pleased to quash the information in criminal case Nos 32 and 35 of 2019 preferred against the applicant for not being amenable to the amendments suggested under section 75 of the criminal Procedure, being gross abuse of power and inriolation to the constitution.
- v) Costs
- vi) Any other order that this court deems fit and just in the circumstances

The application is supported by the grounds encompassed on the same and an affidavit of the applicant of upto 40 paragraphs. The grounds and indeed the affidavit in support of the Application raise the issue that the filing of the 2 information's (Nos. 32 and 35 of 2019) is detrimental to the applicant since the applicant was already charged with the offence of manslaughter before the Kiambu Chief Magistrate's court in Criminal case number 704 of 2019.

As it turned out during the hearing of this application, the Respondent herein had filed for a nolle prosequi in the manslaughter case before the chief magistrate's court at Kiambu. That in a ruling of the court, the nolle prosequi of the respondent was rejected by the court which then ordered that the manslaughter case do proceed to hearing. Further, that the Respondent, being aggrieved of the said ruling, had filed for a revision of the same before the High Court, being High Court Criminal revision Application No. 424 of 2020. The same is pending determination.

It was maintained by the applicant, that this court has the power to stop this prosecution which does not accord with individual's freedoms and rights under the constitution and which runs contrary to public policy, interest and national values and principles.

The Respondent opposed this application and relied on a replying affidavit of the investigating officer, IP Maxwel Otieno. The affidavit basically stressed the prosecution's position that the preferred murder charge has been done in good faith and in strict adherence with the constitutional mandate of the director of public prosecutions.

APPLICANTS AUTHORITIES:

The parties agreed to canvass this application by way of written submissions. Both sides duly filed their set of submissions and lists of authorities. Of note from the submissions of the applicant were:-

(i) **Reuben Njuguna Gachukia and Another Versus IG of police and 4 others**, wherein the court held amongst other holdings that the power of quashing criminal proceedings has to be exercised sparingly with circumspection and that too in the rarest of rare cases. In the same decision, the Hon. W. A. Okwany J. quoted from Joram Mwenda Guantai Versus the Chief Magistrate (2001)2EA 17 that:

“the High court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious the judge has the power to intervene and the High Court has inherent power and duty to serve fair treatment for all persons who are brought before the court or to a subordinate court to present an abuse of the process of the court.”

(ii) **Douglas Maina Mwangi versus DPP and another (2013)eKLR**, wherein the Hon. Justice D. Majanja held that it is not an obligation of the court to supervise the minutiae of investigations and prosecution. The application challenging the decision of DPP following investigations was accordingly dismissed

(iii) **And in Satya Bhama Gandui Versus DPP and 3 others (2018)eKLR**, the Hon. Justice J. Mativo, held;

“It is clear that the issues raised in this application are substantially the same as those determined in the petition. It is beyond argument that the plea of res judicata succeeds. I am also persuaded that this application is a clear abuse of the process of court. This court has power and duty to protect its process from being abused. I strongly hold that the Applicant and his advocate should not go unpunished for abusing this court’s processes. Such flagrant abuse of court processes must be brought to a halt.”

The holding of the Judge was basically that the High Court would not hesitate to struck out or dismiss any action if the same turns out to be an abuse of the process of the court.

iv) The Hon. Justice Mativo, reached the same holding in Republic Versus DPP and 3 others (2018)eKLR, a case in which the parties had filed multiplicity of suits regarding the same subject matter.

RESPONDENT’S AUTHORITIES:

On the side of the prosecution, many decisions were relied on. I find the following more relevant to our instant case:

(i) **CCK Versus ODPP and Another (2018)eKLR**, in which the Court of Appeal held that the decision whether or not to institute criminal proceedings is purely discretionary, but the same must be exercised within the constitutional limits i.e with regard to public interest, the interests of administration of justice and the need to prevent and avoid abuse of the process of the court.

(ii) **Otieno Clifford Richard Versus Republic (2006)eKLR**, in which, in a similar case regarding the challenge of a nolle prosequi, the 3 Judge Bench held that the entry of the nolle prosequi was not a usurpation of the court’s powers and neither did it’s entry interfere or prevent the administration of justice.

(iii) **Republic Versus Leonard date Sekento (2019)eKLR**, wherein, the court held that the DPP acts improperly, not in the interest of justice or acts beyond the powers vested by the constitution or carrying out some arbitrary objection under the guise of discharging the functions of the office of prosecution, then the court would be justified to move in to regulate the DPP’s jurisdiction.

(iv) **Alfred N. Mutua Versus EACC and 4 others (2016)eKLR**, in which, the Court of Appeal, while stressing on the independence and powers of the DPP, observed that threat to arrest or arrest with reasons given is not a violation or threatened violation of the fundamental rights and freedoms and that what the law seeks to prevent is arbitrary arrest without probable cause. I am guided by these authorities relied on by the parties.

I have considered the 2 rival submissions of the parties. The sequence of the events leading to this application are agreed on by the 2 antagonists, the applicant, Assa Kibagendi Nyakundi, and the respondent, the Director of public prosecution. That on 17.3.2019, one Joseph Bogonko Nyakundi (deceased) passed on. He was son to the applicant. That based on the evidence at the time, the respondent made a decision to charge the applicant with the offence of manslaughter over the death of the deceased. The applicant was accordingly arraigned before the Kiambu chief magistrate’s court in criminal case number 704 of 2019 with the said offence of manslaughter. That on 10.5.2019, the Respondent entered a nolle prosequi in court intending to have the said case of manslaughter terminated, a move that the applicant opposed. That as the ruling on the objection was still under consideration by the trial magistrate, the respondent on 20.6.2019 filed an information of murder against the applicant in High Court Criminal case number 35 of 2019. A holding charge (No. 32 of 2019) had initially been presented to court. It is this charge and information No. 35 of 2019 (and also the holding charge no. 35 of 2019) that the applicant seeks to have struck out and or dismissed.

Meanwhile, during the pendency of this application, the ruling pending before the trial magistrate in Kiambu, was delivered by the learned Senior Principal Magistrate dismissing the nolle prosequi and ordering that the manslaughter case do proceed for hearing. Aggrieved by the said ruling the Respondent has already filed for revision of the said orders, vide revision case number 424/2020. The same is still pending determination.

From the submissions of both parties, at least 5 cases have been filed and are pending both at the lower court at Kiambu and the various divisions of the High Court. These include:-

1. *Kiambu, Chief Magistrate's court, Criminal Case No. 704/2019.*
2. *Nairobi HCCR case No. 35 of 2019 (This case)*
3. *Nairobi High Court, Petition No. 166/2019, Lydia Kanga Nyakundi Versus Republic, filed by mother of the deceased.*
4. *Nairobi High Court, Misc. Criminal 309/2019, Assa Kibagendi Nyakundi Versus DPP and 3 others, on constitutionality of the murder charges.*
5. *Nairobi High Court, Criminal Revision No. 424/2020, seeking revision of the orders refusing the nolle prosequi by the Senior Principal Magistrate, Kiambu.*

The present application seeks that information and charge of murder be struck out and or dismissed on the basis that it is an abuse of the process of the court. That because there is existing a manslaughter case involving the same party and from the same incident, the charge of murder filed before this court is evidence of abuse of the powers of the DPP and ought to be dismissed. The respondent, on the other hand has maintained that this application lacks merit and ought to be dismissed as there has not been shown any evidence of abuse on the part of the prosecution.

Article 157(6) of the constitution gives the general powers of the director of public prosecution. More important is Article 157(10), that

“That the Director of Public Prosecution shall not require the consent of any person or authority for the commencement of Criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

At sub-Article 11,

“In exercising the powers conferred by this article, the DPP shall have regard to the public interest, the interests of administration of Justice and the need to prevent and avoid abuse of the legal process.”

There is no doubt that a life was lost in this unfortunate incident of 13.3.2019. This necessitated investigations to be carried out into the circumstances leading to the death of the deceased. The DPP (Respondent) has submitted and stated on oath that the filing of the nolle prosequi before the chief Magistrate court in Kiambu, and indeed the filing of the information and charge of murder before this court was a result of further investigations which brought to light evidence that convinced the public prosecutor that the applicant would properly be charged with the offence of murder and not manslaughter.

The threshold and the conman string that runs across the various authorities cited by the 2 sides and which I fully associate with is that in exercising its constitutional mandate, the Director of Public Prosecutions must have regard to public interest, interest of administration of justice and the need to prevent abuse of the legal process. Therefore, it is only failure to observe these 3 constitutional guidelines that the courts, would interfere with the independent prosecutorial powers of the Director of Public Prosecution.

It is incumbent upon the applicant to prove that in exercising its power under Article 157 of the constitution, by instituting the manslaughter case, filing nolle prosequi in the same and filing an information and charge of murder before the High Court, the Respondent has acted in abuse of the process of the court, or subverted the legal process.

The applicant has only submitted that the Respondent has acted in abuse of the legal process by instituting these charges of murder while the nolle prosequi filed before the trial court had been opposed and eventually dismissed. Whereas the finding of the Senior Principal Magistrate on the question of the nolle prosequi is subject of a revision application pending before this court, and on which I can't comment at this time, I am not convinced that the filling of the murder charge herein in the circumstances under which the same was done amounts to an abuse of the legal process on the part of the Respondent.

As already stated above, a life was lost in this incident. The Respondent would naturally be expected to act in public interest in ensuring that investigations are done over the incident and if possible, that prosecution is done to ensure the ends of justice. I have not been shown how or in which way the respondent has acted against these constitutional tenets under Article 157(II). On my part I see none.

I have also noted that there are pending cases that have a direct bearing with this present application.

First, there is Nairobi, High Court, Criminal (Miscellaneous) 309/2019, in which the applicants challenged the constitutionality of the murder charge. By this application, the applicant in effect is seeking the same orders probably sought for in that case. I have however, not been furnished with the pleadings filed therein.

Second is the pending manslaughter case before the Senior Principal Magistrate, Kiambu i.e Criminal Case Number 704/2019, and the revision application filed at the High Court challenging the order of the Honourable Senior Principal Magistrate, i.e Criminal Revision No. 424/2020. These 2 cases, in my view, automatically makes the orders of dismissal sought herein untenable. Let's for a moment assume that this application is allowed and the information and charge of murder is struck out or dismissed, only for the High Court, sitting on the revision application allows that application, what would the scenario look like? The applicant would in effect be discharged following the

success of the nolle prosequi while at the same time there would be no pending case before the High Court. In my view this resultant would not be in public interest. Neither would it be in the interests of administration of justice. These whole proceedings would very well be an abuse of the legal process. The court must frown against this and act to prevent any such eventually.

It is for these reasons that I am not convinced that prayers 1, 2, 3 and 4(I, ii, iii, iv) have any merit or that any of the 4 orders can issue. I accordingly dismiss the 4 prayers 1, 2, 3 and 4.

It is my view that in the interest of justice, it would be fair and just that an order staying this case do issue pending the determination of either HCCR. MISC. 309/2019 or HCCR. Rev. No. 424/2020, whichever decision comes out first and ahead of the other. I so order.

D. O. OGEMBO

JUDGE

5.2.2021.

Court:

Ruling read in court (online) in the presence of Mr. Ndubi (also holding brief for Dr. Khaminwa, Senior counsel), for the applicant and Ms. Mwaniki for the state.

D. O. OGEMBO

JUDGE

5.2.2021.

Mr. Ndubi:

I ask for leave to file appeal.

Ms. Mwaniki:

We do not object.

Court:

Leave granted as prayed.

D. O. OGEMBO

JUDGE

5.2.2021.