



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

PETITION NO. 18 OF 2020

IN THE MATTER OF

ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND

FREEDOMS UNDER ARTICLE 49 AND 50 OF THE CONSTITUTION

AND

IN THE MATTER OF

ARTICLES 22, 23 & 165 OF THE CONSTITUTION

AND

IN THE MATTER OF

ARTICLE 157(4) (6) & (9) OF THE CONSTITUTION

AND

IN THE MATTER OF

THE CONSTITUTION OF KENYA PROTECTION OF RIGHTS AND FUNDAMENTAL

FREEDOMS PRACTICE AND PROCEDURE RULES 2013

AND

IN THE MATTER OF

SECTION 4 OF THE OFFICE OF THE DIRECTOR OF

PUBLIC PROSECTUIONS ACT

JACOB MANTILI KINGA'NGA1ST PETITIONER

CHARLES BAARIU2ND PETITIONER

AND

DCIO-IMENTI NORTH1ST RESPONDENT

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

JUDGMENT

1. The petitioners approached this court through their amended Petition dated 2/10/2020 seeking:

- a) a permanent injunction be issued restraining the respondent whether by himself, agents and servants, and whomsoever acting under their authority or instruction from charging, prosecuting, arrest, continued harassment, questioning, intimidation, apprehension of the petitioners herein on any matter concerning the threat to kill one Silas Gitonga.
- b) A declaration that the petitioners' fundamental rights, guarantees and freedoms risk being greatly violated by the respondent.
- c) An order quashing the proceedings in Maua Criminal case No. 504 of 2020 and Meru CMC Criminal case No. 396/2020
- (c i) An order that the petitioners are entitled to a refund of police cash bail forfeited to the state
- d) Any further and/or better orders writs and direction as this honourable court may consider appropriate.
- e) Costs and interests of the petition.

Petitioners' case

2. The petitioners alleged that on 27/3/2019 while on their way home, they were confronted by one Silas Gitonga (**hereinafter referred to as the complainant**), who threatened to shoot the 1st petitioner with a pistol. The petitioner then visited to Imenti North Police station to report, and while there recording statements the complainant came in the company of Sergeant Kiswili, and started harassing them, arrested them with the resultant effect that they were unlawfully incarcerated before being subsequently released after being forced to forgive the complainant. On 27/12/2019, while the 2nd petitioner was in his car, the complainant allegedly cocked out his gun to shoot him. He again reported the matter to Mutuati CID vide OB 34/27/12/2019, where the officer in charge was reluctant to take any action. The reluctance prompted him to report the matter to the office of County Police Commander, who ordered the OCPD Igembe North to take action against the complainant but the 2nd petitioner was in a strange twist of events falsely charged in Maua Criminal case No. 504/2020, and later released on bail. The other petitioners were also arrested and charged with the offence of threatening/assault, and were released on a cash bail of Ksh.10,000 each. The petitioners feel that their inherent dignity and rights to have that dignity protected, were violated and will continue to be violated by the respondents. They alleged to be reasonably apprehensive that there is a malicious effort by officers from Imenti North Police station, who are acting at the instigation of the complainant, to arbitrarily threaten, harm and embarrass them.

Respondents' case

3. In opposing the petition, the respondents filed two replying affidavits sworn on 2/7/2020. In those affidavits, it is maintained that, the conclusion to charge the petitioners was competently arrived at, and was solely based on the investigations that had been conducted. According to them, the petition should be dismissed to pave way for hearing of the criminal cases in the trial courts. They contended that they acted on the report made by the complainant vide OB 33/27/03/2019, in order to charge the petitioners. Although they admitted the dispute between the 2nd petitioner and the complainant's father in ELC No.29/2018, they contended that, the charges were preferred against the petitioners based on the strength of the evidence. They even denied that the complainant possesses any fire arm, as alluded to by the petitioners.

4. The petitioners in their further affidavit sworn on 2/10/2020, reiterated their averments in the petition. They exhibited the ruling in ELC No.29/2018, court proceedings in Criminal case No. 396/2020 and cash bail receipts in support of their case and asserted that the prosecution at Maua was being propelled by bad faith as an extension of the ELC case.

Petitioners' submissions

5. Following the court's directions on 9/11/2020, the petitioners filed their written submissions on 11/12/2020 and contended that the criminal charges against them are fabrications instituted out of malice. They contend that the complainant is punishing them, particularly the 2nd petitioner for defeating the complainant's father, 1st plaintiff, in ELC No.29/2018. They concluded that their constitutional rights should be upheld charges quashed and the forfeited cash bail be refunded to them. They contend that to allow the prosecution to proceed would be in violation of order 50 and thus sanction are illegality and a nullity.

2nd Respondent's submissions

6. The position taken by the 2nd respondent was that it was the organ constitutionally mandated to initiate criminal charges against anybody. It faulted the petitioners for their failure to furnish evidence of either ulterior motives in the charges preferred against them or violation of their rights. The cases of **R v Director of Public Prosecution & Ex parte Geoffrey Mayaka Bogonko & anor (2017) eKLR** and **R v Attorney General & 4 others Ex-parte Kenneth Kariuki Githii (2014) eKLR** were cited in support of the position. That task of testing the truthfulness of witnesses and correctness of evidence is that of the trial court. It reiterated that investigations were conducted independently and in a fair manner in the criminal cases the petitioners were facing and that having perused both files, it was established that there was indeed enough evidence to charge the petitioners. The court is cautioned against interfering with the constitutional powers of the office of the Director of Public Prosecution and not to be seen to direct it against the dictates of the constitution.

Analysis and determination

7. I have perused and given due regard and consideration to the pleadings filed herein, the rival submissions together with the authorities cited. I note that the pertinent issue for determination is whether the petitioners have made out a case to warrant the issuance of the orders sought. The gist of the petitioners' case is that, the actions of the respondents, in instituting the criminal proceedings were actuated by malice and show of might. To my mind, the mere fact that a person has been charged in court or that the said charges are unlikely to

culminate in a conviction, does not in itself amount to a violation of a constitutional right. My take is that the legality of the said charges or their success thereof is a matter that can only be determined by the trial court. However where it is demonstrated that the director of public prosecution is accentuated by ulterior and persons other than genuine objects of punishing criminal conduct, the court must answer to its duty to stop such as part of its duty to ensure public accountability by public agencies.

8. In this case, apart from the petitioners' allegations that the charges preferred against them are meant to harm and embarrass them, no material was placed before the court to show that, the 2nd respondent acted contrary to the provisions of Article 157 of the Constitution. In my considered view, stopping the pending criminal proceedings against the petitioners, would be tantamount to usurping the mandate of the office of Director of Public Prosecution who is, by dint of the provisions of Article 157 of the Constitution, under a duty to perform the functions of his office with due regard to public interest, administration of justice and the need to prevent abuse of the legal process.

9. Needless to say, the trial courts in both criminal matters admitted the petitioners to reasonable bail/bond terms. On 14/5/2020 when the petitioners had failed to appear in court, the trial court gladly lifted the warrants of arrest issued against them. I therefore believe the petitioners' constitutional right to fair hearing will be adhered to by the trial courts. In coming to this conclusion I am not in any doubt that even the trial court is under the obligation to respect, uphold and defend the constitution.

10. In the case of R v Attorney General & 4 others Ex-Parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR it was held that:

“Our criminal process entails safeguards which are meant to ensure that an accused person is afforded a fair trial and the trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words unless the applicants demonstrate that the circumstances of the impugned process render it impossible for the applicant to have a fair trial, the High Court ought not to interfere with the trial simply on the basis that the applicant's chances of being acquitted are high. In other words a judicial review court ought not to transform itself into a trial court and examine minutely whether or not the prosecution is merited.”

11. I have read the case of Republic vs Director of Public Prosecution & Another Ex-parte Geoffrey Mayaka Bogonko & Another cited by the 2nd respondent, where Odunga J. observed as follows:-

“The circumstances under which the court will grant stay of a criminal process in these kinds of proceedings are now well settled. The court ought not to usurp the constitutional mandate of the Director of the Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legality recognized aim.”

12. That there is a pending suit at the Environment and Land Court between the complainant's father and the 2nd petitioner, is not proof of malice, unfairness or injustice against the petitioners. If the same is indeed accentuated by malice, proof of malice is by evidence to be led by the party making the allegation and before the trial court, not here. It is squarely within the mandate and jurisdiction of the trial court as the trier of fact. It ought not to be forgotten that, in initiating the criminal proceedings against the petitioners, the 2nd respondent was performing its constitutional functions, and it cannot therefore be faulted for doing so.

13. In Jago v District Court (NSW) 106 the court observed that:

“.. it cannot be said that a trial is not capable of serving its true purpose when some unfairness has been occasioned by circumstances outside the court's control, unless it be said that an accused person's liability to conviction is discharged by such unfairness. This is a lofty aspiration but it is not the law.”

14. Having carefully read the ruling in ELC No.29 of 2018 delivered on 23/5/2019, I note that the matter was not determined in favour of either party. Although the learned judge observed that there was animosity between the 1st plaintiff (complainant's father) and the 1st defendant (2nd petitioner), she declined to issue any orders in favour of either party, until the committee united and agreed to work in harmony. As it stands, the 1st plaintiff (the current chairman) is still in office, pursuant to the interim orders of that court on 1/8/2018.

15. In conclusion, I find that the petitioners have not made a case for the grant of the orders sought. In my very humble opinion, the petitioners deserve the opportunity to meet their tormentor (complainant) in the trial courts, and thoroughly cross examine him, to expose their ulterior motive and convince the trial court that its process is being abused or used unfairly by the prosecution.

16. I find that the petition is unmeritorious and is dismissed. I make no orders as to costs.

DATED, SIGNED AND DELIVERED AT MERU THIS 15TH DAY OF JULY, 2021

Patrick J.O Otieno

Judge

In presence of

Miss Kirimi for petitioner

Mr. Maina for the respondent

Patrick J.O Otieno

Judge