REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL REVISION CASE E074 OF 2021

REPUBLIC.....APPLICANT

VERSUS

PARESHKUMAR KESHANYI DODHIA.....RESPONDENT

HIRJI RAMJI PATEL.....1ST INTERESTED PARTY

ASHOK RUPSHI SHAH.....2ND INTERESTED PARTY

MEGHJI PATEL.....3RD INTERESTED PARTY

NILESH BHAVSAR.....4TH INTERESTED PARTY

MUKESH SULVA.....5TH INTERESTED PARTY

RULING

This matter come up before the court for the application of the republic dated 18.3.2021. The application is brought under Articles 165(6)(7) of the constitution and section 362, 364(1)(b) and 367 of the criminal Procedure Code. the application in its material context seeks the following orders:

> ***i) THAT this Honourable court be pleased to call for the record in Milimani Chief Magistrate's Case No. Criminal 2102/2020, Republic Versus Hirji Ramji Patel for purposes of reviewing the rulings of Hon. K. Cheruiyot, SPM, dated 18.2.2021 and 23.2.2021.***
>
> ***ii) THAT this Honourable court be pleased to review and set aside the said ruling of Hon. K. Cheruiyot dated 18.2.2021 and 23.2.2021.***
>
> ***iii) THAT this court be pleased to review the rulings of the Hon. K. Cheruiyot, SPM, dated 18.2.2021 and 23.2.2021 which sought to issue warrants of arrest and further direct the DCI, Gigiri to take over investigations and effect the warrants of arrest issued on the above dates.***

The application has been supported by an affidavit of Evelyne Onunga, Counsel for the state applicant. At the hearing of the same, Mr. Wanyanga appeared for the Respondent. Mr. Mwangi appeared for the 2nd to 5th interested parties, while Mr. Oyatta appeared for the 1st Interested party.

In her submissions, counsel for the applicant submitted that in the trial before the lower court, the respondent herein is the complainant, while the 1st interested party is the accused. The 2nd to 5th interested parties are witnesses. That the respondent reported a case of intimidation at Parklands Police station (OB/33/29/07/2020) and investigations commenced. That the Respondent moved to court vide Misc. Cr. 2102/2020 on allegations that Parklands police station had declined to act on the report, praying for warrants of arrest against the 2nd to 5th interested parties, then referred to as intended accused persons. That the court went on to issue the said warrants of arrest on 18.2.2021.

Counsel went on that the interested parties presented themselves to court and were directed to the DCI Gigiri, with the court, on 23.2.2021, issuing further orders that DCI, Gigiri should take over the case from parklands police station. It was submitted that the 2nd to 5th interested parties were never given any reason for their arrest, and that the court had made a conclusion that the application was similar to that of private prosecution. It was contended that the application did not conform with the rules of private prosecution since the DPP was never

given notice. No leave was also sought and obtained. Neither did the Respondent show any reluctance to act on the part of the investigating officer. Further that the said orders were issued in disregard to the constitutional mandate of the Inspector General to carry out independent investigations i.e by ordering transfer of the case from one police station to another.

Mr. Oyatta, for the 1st Interested party, supported this application. First, that in fact at page 2 of the ruling the court had noted that the application appeared to be the same as that of leave for private prosecution, in which case the court ought to have directed the respondent to approach court in the proper way. Counsel relied on the cases of ***Republic (through Devji Kanji and Another Civil Appeal No. 28/1978***, ***Bidco (a) Limited Versus DPP, Criminal Appeal, 73/2019***, and the ***Floriculture International Limited case***, on the steps leading to leave to institute private prosecution, being;

- that there was a report of the offence to the DPP or the police.

- That the public prosecutor has taken a decision on the report and decline to act.

- That the failure to prosecute is culpable and without any reasonable cause.

- that unless the suspect is prosecuted, there would be injustice.

- That it must be shown the special loss, injury or damage likely to be suffered.

Lastly, it was submitted that the court asked as the investigator, prosecutor and judge and thereby infridging on the independence of the independent bodies.

For the 2nd to 5th interested parties, Mr. Mwangi, submitted that his clients were never served. While supporting the submissions of both the applicant and the 1st interested party, counsel urged that this application be dismissed.

Mr. Wanyanga, for the Respondent, on the other hand, opposed this application. That the prosecution were present but had no objection to the application and that the court was right to decide in the manner in which it did. Further, that the order of 23.2.2021 was on application of the DPP. And that there is no evidence to show that the complainant was acted on and that even statements were only taken as a result of the vigilance of the Respondent.

Counsel submitted that this application was not akin to an application for private prosecution as the party had moved the court to inform the court of intimidation over a matter before the court and for protection of the court. Counsel urged that the application be dismissed so that the interested parties may be investigated.

I have considered the submissions of the 4 learned counsel of the parties herein. I have also considered the affidavit filed herein by the parties, both in favour of the application and in opposing the same. I have also further considered the 2 ruling of the trial court dated 18.2.2021 and 23.2.2021.

It is clear that it is the 1st Respondent who moved the trial court by way of the application dated 12.2.2021, seeking that warrants of arrest do issue against the 2nd to 5th interested parties herein. This despite the fact that the case had been instituted by the state. This, in my view, is what formed the mind of the Honourable Senior Principal Magistrate in observing at paragraph 3 of the ruling of 18.2.2021, that;

"The application appears to be in the nature of one for leave to prosecute privately."

I say so, because in ordinary circumstances, applications for warrants of arrest against persons alleged to be interfering with a criminal trial would be made by the prosecution side, in this case, it was the vice versa, with the learned prosecutor only indicating no objection to the application.

In the ruling of the court, the court gave reasons as to why it granted the orders as sought. That there were serious threats to the rule of law and abuse of the criminal process. That there were also claims of protection from senior government officials. And also the need to protect witnesses. I agree with the Honourable Senior Principal Magistrate that these allegations were grave enough as to be capable of breaching the course of Justice.

But having observed that the application before it appeared to be in the nature of one for leave to prosecute privately, was it proper for the court to allow the application and issue the orders prayed for in the application in the form in which it was presented? I think not. The rules that guide the issuance of leave to institute private prosecution are well settled in the case of Floriculture International limited and others, HCC Misc. Civil Application No. 114/97, (Kuloba J.) cited by counsel for the 1st interested party as follows:-

i) That the complainant has exhausted public machinery of prosecution before embarking on it himself.

ii) THAT the Attorney General or other public prosecutor seized of the complainant has declined to institute criminal proceedings.

iii) THAT the refusal by the state agencies to prosecute is without reasonable cause and there is no good reason that a prosecution should not be undertaken.

iv) THAT id the suspect is not prosecuted at that point in time there is likely to be a failure in public and private justice,

v) There is no basis for the Locus Standi, such as, that he has suffered special, exceptional and substantial injury peculiarly personal to him and that he is not motivated by malice, politics or interior considerations;

vi) There exists demonstrable grounds for believing that a grave social evil is being allowed to flourish unchecked.

Had the applicant desired to privately pursue the said intended accused persons, as found by the court, he ought to have come to court in the proper manner as above. On the part of the court, the orders ought not to have issued on an application that was patently flawed. And in my view, it mattered not that the learned counsel for the state present did not object to the said application. This is as for the orders of 18.2.2021.

Regarding the orders of 23.2.2021, I have perused the proceedings before the trial court, it is clear that the application to have the investigations be conducted by Gigiri police station away from Parklands police station was made by the learned counsel for the state. The court accordingly therefore made the ordered as prayed. And I do not find any fault in this. It is therefore improper for the applicant and the interested parties to make submissions to the effect that in issuing the said orders, the court usurped the constitutional mandate of the Inspector general of Police or that of the Director of criminal investigations, which are independent offices. The assertion that the court acted as the investigator, prosecutor and Judge, all at the same time, therefore fails and is dismissed.

This application is brought under section 362 of the Criminal Procedure Code i.e the revisionary powers of the court. The section provides;

"The High court may call for and examine the record of any criminal proceedings of a subordinate court for the purposes of subordinate court for the purposes of satisfying itself as to the correctness, legality or propriety of any finding sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court"

Under section 364(1)(b) of the Criminal Procedure Code, the powers of this court on revision, extends to:

"in the case of any other order other than an order of acquittal, alter or reverse the order.'

As observed above the orders of the trial court of 18.2.2021 were improper and ought not to have issue. The orders of 23.2.2021, being hinged on the orders of 18.2.2021 in so far as they relate to the execution of the orders of 18.2.2021 must also fail. I so find.

I accordingly allow the applicant's application dated 18.3.2021 and set aside the rulings and orders of the Hon. K. Cheruiyot, SPM, dated 18.2.2021 and 23.2.2021 as prayed in paragraph 3 of the application.

D. O. OGEMBO

JUDGE

1.9.2021.

Court:

Ruling read out in presence of Mr. Oyatta for 2nd Respondent, Wanyanga for 1st respondent, Ms. Onunga for the state, and Ms. Nzuki for Mwangi for 2nd to 5th Respondents.

D. O. OGEMBO

JUDGE

1.9.2021.

Ms. Nzuki:

We pray for certified copy of the ruling.

Wanyanga:

Me too.

Court:

Certified copies of the ruling to be prepared and supplied to be parties upon payment of requisite fees.

D. O. OGEMBO

JUDGE

1.9.2021.

Court:

The lower court file to be returned to the trial court. To be mentioned before the court on 7.9.2021.

D. O. OGEMBO

JUDGE

1.9.2021.