



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

MISC CIVIL APPLICATION NO. E005 OF 2020

(28/2020)

IN THE MATTERS OF AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI BY SAMMY MWANGI GACHANJA

AND

IN THE MATTERS OF CHAPTER 4 SECTION 22(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF PROCEEDINGS OF THE CHIEF MAGISTRATE COURT AT KITALE IN KITALE CMC CRIMINAL CSE NO. 1952 (B) OF 2020 NOW PENDING BEFORE THE MAGISTRATE'S COURT SCHEDULED FOR HEARING ON 13/1/2020

BETWEEN

REPUBLIC..... APPLICANT

VERSUS

CHEF MAGISTRATE KITALE.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

THE OCPD KIMININI.....3RD RESPONDENT

THE DISTRICT CRIMINAL INVESTIGATION OFFICER.....4TH RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....5TH RESPONDENT

AND

SAMMY MWANGI GACHANJA.....EX-PARTE/APPLICANT

RULING

The Applicant, Sammy Mwangi Gachanja is facing a raft of charges before the Chief Magistrate's Court Kitale. They range from **Stealing Stock** contrary to **Section 278** of the **Penal code** to **Conveying suspected stolen property** contrary to **Section 322** of the **Penal Code**. In the alternative, he has been charged with **handling stolen property** contrary to **Section 322 (1) (2)** of the **Penal Code**. When he was arraigned before the trial Magistrate's court, the Applicant pleaded not guilty to the charges. He was released on bond pending the trial of the case. The hearing of the case is yet to commence.

The Applicant has moved this court by way of Judicial review seeking for orders of certiorari to remove to this court, for the purpose of quashing, the proceedings and orders emanating from Kitale CMC Criminal case No. 1952 (B) of 2020. The Applicant complained, *inter alia*, that the decision to charge him infringe his fundamental rights as protected by the **Constitution**. He was of the view that the charges

brought against him are meant to silence him after he had lodged a valid complaint with the police. He was particularly irked that his mobile phone, two Sim cards, 2 memory cards, KCB ATM National identity card, Equity ATM and Co-op ATM had been seized from him by the Police without any valid reason or legal justification. He complained that his right to privacy was infringed when the Police forced him to disclose the pass-words to his communication devices. The Applicant wondered why the Police were insisting on retaining his property yet the same had no bearing at all with charges that have been brought against him before the trial Magistrate's court. He was of the view that the retention of his said property was vengeful as was the bringing of the charges against him, which in his opinion was for the specific purpose of silencing him. The application is supported by the annexed affidavit of the Applicant.

The Application is opposed. IP Joseph Adongo swore a replying affidavit in opposition to the application. He stated that the Applicant was a suspect in a series of stock theft that was investigated by the police leading to the Applicant's arrest and subsequent arraignment before the court. He deponed that the communication gadgets seized from the Applicant will be produced into evidence as Prosecution's exhibits. This includes Motor Vehicle registration No. KCG 156Y which was being used to ferry the stolen stock. It is on that basis that the investigating officer swore that the Application had no merit and should be dismissed so as to allow the Applicant to defend the charges brought against him in the magistrate's court.

This court heard the rival oral submissions made by the parties to the application for judicial review. The jurisdiction of this court to consider an application such as the present one is circumscribed. In **Nairobi HC Judicial Review Application No. 78 of 2015, Republic –Vs- Director of Public Prosecution & Another Ex parte Chamantal Vrajlal Kamani & 2 Others**, Odunga J held thus:

“ The court in determining Judicial review proceedings ought not to usurp the Constitutional and Statutory mandate of the respondent and the interested party [Director of Public Prosecution and the Police] to investigate and undertake prosecution in the exercise of the discretion conferred upon them. It was in recognition of this fact that the House of Lords in Director of Public Prosecutions –V- Humphreys [1976] 2 All ER 497 at 511 cautioned that:

“ A Judge must keep out of the arena. He should not have or appear to have responsibility for institution of the Prosecution. The function of Prosecution and of Judges must not be blurred. If a Judge has power to decline to hear a case because he does not think it should be brought, then, it soon may be thought that the cases he allows to proceed are cases brought within his consent or approval. If there is power to stop a prosecution on indictment in limine, it is in my view a power that should be exercised in the most exceptional circumstances.”

In the present application, it is the Applicant's case that the charges brought against him before the trial Magistrate's court were not in good faith. He asserts that the charges were laid against him with the specific aim of silencing him from pursuing certain claims against the police. It is apparent that the Applicant is of the view that the charges laid against him are due to an ulterior motive. That is why the Applicant seeks to have the charges quashed. On the other hand, the Respondent is emphatic that the charges brought against the Applicant were justified after the conclusion of investigations. The charges should proceed to trial.

This court has carefully evaluated the rival arguments. It is clear to this court that the Applicant has not made a case for this court to grant him the orders of judicial review that he seeks. The investigating officer has given a legally tenable explanation why he has retained the Applicant's properties. The said properties will be produced as prosecution's exhibits in court during trial. This court discerned no malice or overreach on the part of the Police. The complaint made by the Applicant to the effect that the charges were brought with ulterior motives will be interrogated during cross-examination at the proper venue; the trial court. It has been held severally, and this court can pronounce that it is trite that **Article 50** of the **Constitution** grants an accused all the safeguards that he requires to secure a fair trial before the trial Magistrate's court. That includes the guarantee that he will not be intimidated or harassed when he will be defending the charges brought against him.

Enough said. The Application for Judicial review lacks merit. It is hereby dismissed. The trial shall proceed before the trial Magistrate's court to its conclusion. It is so ordered.

DATED AT KITALE THIS 7TH DAY OF OCTOBER 2021

L. KIMARU

JUDGE