



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CONSTITUTIONAL PETITION NO. 12 OF 2017

FRANCIS KABURU INGOSI.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS...1ST RESPONDENT

THE ATTORNEY-GENERAL OF THE

REPUBLIC OF KENYA.....2ND RESPONDENT

RAMADHAN MUNYASIA.....3RD RESPONDENT

ISAAC WABUKA NABUTO.....4TH RESPONDENT

JUDGMENT

1. The petition herein, dated 21st September 2017 was brought by Francis Kaburu Ingosi, to be known hereafter as the petitioner, alleging that his rights as an accused person, in Mumias SPMCCRC No. 949 of 2011, had been violated.
2. The petitioner is an accused person in Mumias SPMCCRC No. 949 of 2011, and he has brought the suit against the 1st respondent, who occupies an office established under the Constitution of Kenya responsible for public prosecutions. The 2nd respondent is also an occupant of a public office established under the Constitution of Kenya to provide legal advice to the Executive, while the 3rd and the 4th respondents are the complainants in Mumias SPMCCRC No. 949 of 2011. The interested party is Joseph Kabana Ngoche, who is the petitioner's co-accused in Mumias SPMCCRC No. 949 of 2011.
3. The legal and constitutional foundation of the petition are set out in the petition, to be Articles 27(1)(2), 28, 35(1)(a)(b), 36 and 50(1)(2) (a)(c)(e)(j)(q) of the Constitution of Kenya; relating to being informed of the criminal charge with sufficient detail to answer it, to have adequate time and facilities to prepare a defence, to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence, guarantees of right to access information and fair trial, guarantees to have a trial begin and conclude without unreasonable delay, among others.
4. The petitioner contends that he was subjected to taking a fresh plea on 15th May 2012, after the state had entered a *nolle prosequi*, on a charge that was not disclosed in the particulars detailed in the Police OB No. 69/26/2012, and that that amounted to a violation of Article 50(2) with regard to fair trial right of being informed in advance of the charges to enable him respond to them, being given adequate time and facilities to prepare a defence and being given the prosecution evidence in advance of the trial.
5. With respect to Article 35, the petitioner contends that the failure to disclose the identity of the complainant violated his right to information and fair trial since he could not possibly defend himself against unknown complainants who had not made any complaint against him. He avers that that violation was compounded by the refusal by the respondents to supply him with a copy of OB No. 48/21/2011, which had been indicated in the charge sheet and which would have established or revealed the true identities of the complainants in Police OB No. 69/26/2012. He contends that his arrest on the basis of complaints by undisclosed complainants violated his right to information and fair trial.
6. On Articles 27, 28 and 36, the petitioner avers that the making of criminal complaints, his arrest and arraignment in court simply founded on the fact that he worked for Messrs. Shikhule & Company Advocates where the impugned sale agreement was drawn, without taking into account that the said law firm was legally registered and the said sale agreement was prepared and duly signed by the advocate who was never arrested nor summoned to court as a witness, and who never denounced it, amounted to a violation of his fundamental rights and freedoms, and allowing the criminal matter to proceed to its completion would amount to criminalizing the right to work.

7. On Article 50(2) (e) (q), the petitioner contends that the failure to consider his unrivalled submissions on a no case to answer in what would have amounted to termination of the proceedings and the failure to inform him of his right of appeal against the ruling on a case to answer violated the right to have the trial begin and conclude within reasonable time.

8. On Article 50(1), it is contended that the respondents criminalized a pure civil dispute by failing to take notice of the fact that the dispute revolved around a contract which was regulated by civil law and the contract spelt out the available civil remedies in case of breach. The petitioner contends that the resort to criminal proceedings amounted a violation of his fair trial rights and undermined his dignity to work and promoted witch-hunt and vendetta.

9. The petitioner, therefore, seeks the following reliefs:

(1) a declaratory order that the criminal proceedings against him in Mumias SPMCCRC No. 949 of 2011 amounted to a mistrial and amounted to a violation of his fundamental rights and freedoms to a fair trial under Article 50 of the Constitution and should be withdrawn;

(2) a declaratory order that his arrest and arraignment in court merely because he was an employee in the law firm of Messrs. Shikhule & Company Advocates was a violation of fundamental freedom to association and right to work; and

(3) an order for general damages for compensation for malicious prosecution in Mumias SPMCCRC No. 949 of 2011.

10. The factual background to the petition is set out in the body of the petition itself, as well as in a supporting affidavit sworn by the petitioner on 21st September 2017. The affidavit merely reproduces the facts set out in the body of the petition. He avers that while working for Messrs. Shikhule & Company Advocates, the 4th respondent and another came to the office and he attended to them. They wanted to enter into a land sale transaction. He referred them to the advocate, who met them, a sale agreement was drawn and they signed it and left. He subsequently left the law firm to engage in politics. After the elections he was arrested and charged with malicious damage to property, forcible retainer, intimidation and molestation. When he was presented in court he was surprised to find his co-accused was one of the men who were party to the land sale agreement, and who he had attended to in Messrs. Shikhule & Company Advocates.

11. The initial malicious damage charge was terminated through *nolle prosequi*, and fresh charges were brought relating to the land sale transaction. He complains that he was not informed about the reasons for the termination of the initial charges, and he was subjected to an unexplained fresh plea. He avers that he sought to be provided with particulars but to no avail. He protests that the prosecution had even sought to have him produce the original land sale agreement when he had in fact left the law firm. He further complains that he was embarrassed when the prosecution introduced a new complainant, the 4th respondent, with respect to a separate land sale transaction. He asserts that he had not met the 4th respondent before the new charges were introduced, and he was not witness to any land sale transaction involving him. He complains that the case proceeded in 2017 despite his pleas to be supplied with copies of a police occurrence book to help him cross-examine the witnesses. At the close of the prosecution's case, he filed detailed written submissions, but the court placed him on his defence without giving him reasons and advising him that he had a right of appeal against the said order to place him on his defence. He further complains that when he once failed to attend court on account of an ailment the trial court had declined to adjourn the matter to allow him present his defence and cancelled his bond, placed him in custody and fixed the matter for judgment.

12. Although the supporting affidavit does refer to annexures, no documents have been annexed to that affidavit.

13. I have scrupulously ploughed through the file of papers before me but I have not come across any response by any of the respondents. I do note, though, that the petitioner swore a supplementary affidavit on 30th May 2018, ostensibly to respond to an affidavit in reply sworn by the 3rd respondent on 1st March 2018. Unfortunately, that affidavit is not on record. I note too that although the court allowed joinder of the interested party on 4th June 2018, the interested party has not filed any documents either in support or opposition to the petition. The interested party has, therefore, not sought any orders in his favour.

14. Directions were taken on 20th March 2018, that the petition be disposed of by way of written submissions. Written submissions were filed by the petitioner, the 3rd and 4th respondents and the interested party. I have read through the submissions and noted the arguments made therein.

15. It is common ground that the matter in Mumias SPMCCRC No. 949 of 2011 has been heard fully and is only pending judgement, which has been held off because there is a stay order from this court. It is also common ground that the proceedings herein were only initiated in 2017, after the trial court in Mumias SPMCCRC No. 949 of 2011 cancelled the petitioner's bond after he failed to attend court when the criminal case was scheduled to come up. The instant proceedings were no doubt initiated to obtain orders that would have resulted in the petitioner being released from custody upon stay of proceedings in Mumias SPMCCRC No. 949 of 2011. The issues raised are, therefore, an afterthought, and were brought too late in the day.

16. I have carefully gone through the annexed record of the trial court, and juxtaposed it against the petition and the averments made in the supporting affidavit. It is clear that the issues that the petitioner raises date back to 2012. He acquiesced to the trial by participating in it. The issues he raises now, in the petition, are issues that he could and ought to have raised at the trial. If he was aggrieved by some of the orders or actions or decisions taken by the trial court in the course of the trial, it was open to him to seek revision under the provisions of the Criminal Procedure Code or appeal against them at the High Court. Ideally, intervention through constitutional petitions is undesirable where the law has made provision for alternative interventions through processes provided for in ordinary legislation.

17. I am persuaded that these proceedings were initiated with the sole intention of derailing the criminal proceedings. Justice would demand that the criminal proceedings be concluded, and, should the petitioner be convicted, the arguments being raised in this cause can then be legitimately raised in an appeal. Otherwise, it would be imprudent to prevent a trial court, seized of a matter that has been handled to

conclusion, from concluding the same by delivering the judgment that is pending.

18. I believe it would be academic to consider the petition on its merits for the reasons that I have given above. Let the criminal matter before the trial court be concluded. The petition is, in my view, not merited and I hereby dismiss it. The orders made herein on 11th October 2017, staying the proceedings in Mumias SPMCCRC No. 949 of 2011, are hereby vacated. Any party aggrieved hereby has a right to challenge these orders at the Court of Appeal within twenty-eight (28) days. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 17th DAY OF January, 2020

W MUSYOKA

JUDGE