REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL REVISION NO. 186 OF 2019

JOHANNES PETRUS VILIOEN.....PETITIONER/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. Through a notice of motion dated 3/12/2019 the applicant sought this court to find that the charges levelled against him in **Criminal Case No, 1154 of 2019 and Criminal Case No. 68 of 2019** constituted a violation of his rights under **Article 20 (1) ,20(2), 50 (1) and 157 of the Constitution of Kenya.** The applicant therefore prays that those charges be reviewed and/or quashed.

2. It was his averment that he was not informed of the charges against him at the time of his arrest. In addition, he argued that no meaningful investigations were carried out on the matter. According to him, the charges against him are of a civil nature since he is a half owner and co-director of the complainants Company.

3. He narrated the events that unfolded from 1st July 2019. He stated that, on the material date he was with his family at Westgate Mall when he was arrested by police officers from Timau Police station and taken to Parklands Police Station. He was not informed of the charges levelled against him. On 3/7/2019 he was taken to Timau mobile court. No charge sheet was presented and was therefore remanded for a further seven (7) days.

4. He stated further that, on 10/7/2019 he was presented before Meru Chief Magistrate's court to answer to the charges in question and he was released on a cash bail of Kshs. 80,000/= in Cr Case No. 1154 o 2009 & Kshs 30,000/= in Cr Case No. 68 of 2019. Until that time no statement had been recorded from him. On 8/08/2019 his advocates informed the court that they were ready to mediate and had called upon the elders of Njuri Ncheke to intervene on the matter. The elders deliberated on the matter and exonerated him of any criminal or civil liability. The elders also found that the complainants ought to revert back his share in Sunland Roses Company Limited.

5. The applicant averred that, previously the complainant had filed a suit against him in **Elrc No. 312 of 2019 Major Silas Mirit Rtd & Sunland Roses Limited versus Peter ciljoen** which they withdrew on 6/11/2019.

6. It was his further averment that it is evident from the copy of records of motor vehicle registration no. KBL 922D that the complainant wishes to take away the assets of Sunland Roses Ltd hence the criminal charges are meant to harass, frustrate and embarrass him in order to keep away from Sunland Roses Ltd.

7. **I.P. Edward K. Kiplgat** attached to DCI Buuri Sub County opposed the application vide Replying affidavit dated 20/12/2019. He averred that on 22/5/2019 the complainant made a report to their offices concerning the petitioner that ranged from misappropriation of funds and mismanagement of Company affairs. That they commenced investigations and gathered enough evidence that linked the petitioner with the offence of **stealing by Director contrary to Section 282 of the Penal Code**. They forwarded the file to the Director of Public Prosecution who upon perusal directed that there was enough evidence to support the charges.

8. That their efforts to summon the petitioner bore no fruits until 1/7/2019 when he was arrested at Westgate mall and presented to Timau mobile court on 3/7/2019 and subsequently charged in cr. 68/2019 & 1154/2019.

9. That from their investigations they found competent legal issues that ought to be canvassed before a court of competent jurisdiction as opposed to the Njuri Ncheke. That their investigations revealed that the petitioner was in communication with one Rinnus Bowman with the intent to defraud the Company. That the audit Report from Shah and Associates of Financial year 2017 for Sunland Roses Ltd indicated huge financial theft/misappropriation by the petitioner that led to Company to incur a loss of Kshs. 13,165,434/=.

10. The Respondent argued that whereas the facts constituting the basis of the Criminal proceedings may be a basis of a civil suit, that is no reason to stay the criminal process if it can similarly be a basis for a criminal offence.

11. On 10/2/2020 this court directed the parties to canvass the application through written submissions. The applicant restated the facts and relied on the following cited authorities in support of his averments i.e. **Director of Public Prosecution vrs Tom Ojienda t/a Prof Tom Ojienda & Associates [2016} EKLR & {2019} EKLR, Agnes Ngenesi Kinya alias Agnes Kinyua vrs DPP & Rhamel Mukhisa Wasilwa (2019) eklr.** The respondent filed a list of authorities citing the following cases; **Helmeth Rame v Republic [2015] eklr, Manilal Jamnadas Ramji Gohil vrs Direcotr of Public Prosecution {2014] eklr.**

Analysis and Determination

12. Notably, the applicant initially sought to bring these proceedings as a Constitutional Petition but later limited it to a revision cause. That notwithstanding, as was stated in the case of Kelly **Kases Bunjika v Director of Public Prosecutions (DPP) & another [2018] eKLR** the court has jurisdiction over such matter either in the exercise of its supervisory jurisdiction, or unlimited original criminal jurisdiction. I am also content to cite Waweru J. in the case of **Republic v. Samuel Gathuo Kamau [2016] eKLR,** that:

> **"Needless to say, that supervisory jurisdiction is exercised as may be provided by law – by way of appeal, revision, etc. it does not include on any perceived power to make a decision on behalf of a subordinate court which that court ought to make. In the case of appeals the supervisory power is exercised in respect to conviction, sentence, acquittal (section 347, 348 and 348A of the Criminal Procedure Code). As for revision, the supervisory jurisdiction is exercised in respect to findings, sentences, orders and regularity of any proceedings. See Article 165(7) of the Constitution and Section 362 and 364 of the Criminal Procedure Code."**

13. It has been stated that courts should be slow to interfere with a criminal trial, except where justifiable reasons exist. See for instance **Agnes Ngenesi Kinyua aka Agnes Kinywa v Director of Public Prosecution & another [2019] eKLR** the Court held as follows;

> **"It must be emphasised that a constitutional petition challenging prosecution does not deal with the merits of the case but only with the process. The Court in such proceedings is mainly concerned with the question of fairness to the petitioner in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are bona fides and that the same are being conducted in a fair manner, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution's evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution."**

14. What does the applicant say? The applicant has relied on the Bill of Rights enshrined in **Article 20 of the Constitution of Kenya. Article 20 (1) and (2)** provides as follows;

> **20. (1) The Bill of Rights applies to all law and binds all State organs and all persons.**
>
> **(2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom**

15. He also relied on Article 49 which guarantees the right of arrested persons. Article 49(1) provides as follows;

> **49. (1) An arrested person has the right—**
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> **(a) to be informed promptly, in language that the person understands, of—**
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> **(i) the reason for the arrest;**
>
> **(ii) the right to remain silent; and**
>
> **(iii) the consequences of not remaining silent;**

16. **Article 50** also guarantees the right to fair hearing sub articles (1) and (2) provide as follows;

> **50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.**
>
> **(2) Every accused person has the right to a fair trial, which includes the right—**
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> **(a) to be presumed innocent until the contrary is proved;**
>
> **(b) to be informed of the charge, with sufficient detail to answer it;**

17. The major thrust of this application is stay of criminal proceedings. Therefore, it is necessary to speak about exercise of power to prosecute offenders. Article 157 establishes the office of the Director of Public Prosecution with state power to prosecute offenders. The power to prosecute is however exercised in accordance with the Constitution. Article 157(11) specifically circumscribes the exercise of state power to prosecute as follows: -

"11 In exercising the powers conferred by this article, the Director of Public Prosecutions 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."

18. Needless to state that power to prosecute as well as the entire criminal justice system which include the courts is constitutionally-mandated. Anyone seeking to stop the process particularly the trial must be armed with cogent reasons say, that the criminal process has been initiated for purposes other than bringing the person to justice, or for other collateral advantages such as to force settlement of a civil claim, or its founded on facts which do not disclose any offence known to law, or it is malicious or its merely an abuse of court. Majanja J in the case of **Musyoki Kimanthi –Vs- Inspector General Of Police & 2 Others [2014]** stated: -

"In light of the mandate conferred upon the DPP in Article 157 of the constitution, the High Court therefore ought not to interfere with the above mandate unless cogent reasons are given thus, that the DPP has acted without due regard to public interest, against the interest of the administration of justice and has not taken account of the need to prevent and avoid abuse of the court process. Although the DPP has the discretion to determine which complaint should lead to criminal prosecution, the High Court may intervene where that discretion has been abused or where the effect of the proceedings results in the abuse of the court process."

19. The petitioner's case is premised on the fact that he was never informed of the reasons of his arrest at the time of his arrest, no investigations were done and the facts herein constitute civil claim. In particular, he stated that no statement was taken from him prior, during and after his arrest.

20. On this subject see the case of **Republic –vs- Commissioner of police and another ex parte Michael Monari and Another (2012) eKLR** where it was stated that;

"……the police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need establish reasonable suspicion before preferring charges. The rest is left to the trial court as long as the prosecution and those charged with the responsibility of making the decision to charge act in a reasonable manner, the High Court would be reluctant to intervene."

See Also; Mary Lairumbi & another v Inspector General of Police & 4 others [2018] eKLR

21. I also find the case of **Republic v Attorney General & 4 others Ex-Parte Kenneth Kariuki Githii [2014] eKLR (Odunga J.)** to be to the point that;

" it is upon the ex parte applicant to satisfy the Court that the discretion given to the DPP to investigate and prosecute ought to be interfered with. Such a power ought not to be lightly invoked and it is not enough to simply inform the Court that the intended trial is bound to fail or that the complaints constitute both criminal offence as well civil liability. Nor is it enough to display to the Court the nature of the defence the applicant intends to bring forward in the criminal proceedings. The High Court ought not to interfere with the investigative or prosecutorial powers conferred upon the police or the Director of Public Prosecution unless cogent reasons are given for doing so.

……. the mere fact that the facts disclose both criminal offence as well as civil liability does not entitle the Court in judicial review proceedings to bring to a halt the criminal proceedings.

It was further contended that the actions of the Respondents are malicious and are motivated by extraneous matters. The applicant was however unable to pinpoint the basis for the alleged malice save for the fact that the warrants for arrest were applied for before he was made aware of the existence of the complaints or the proceedings. Malice here must however go the root of the proceedings complained of and not just the procedure adopted. Mere carelessness or recklessness would not ipso facto amount to malice which would justify the halting of criminal proceedings. In my view even in cases where it is shown that the prosecution is partly motivated by malice or other extraneous considerations unless it is shown that the predominant motive for preferring charges is informed by such malicious or extraneous matters, the Court ought not to interfere if apart from such motives the facts of the case justified the course taken. In other words malice ought to be the driving force behind the institution of the criminal process and not just one of the factors."

22. **In Agnes Ngenesi Kinyua aka Agnes Kinywa v Director of Public Prosecution & another [2019] eKLR Odunga J.** also held as follows;

"The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. I say ordinarily because the mere fact that the version of one of the parties is not considered is not necessarily fatal to the prosecution. However, adopting an equivocal approach to investigations by deliberately denying a suspect an opportunity to put forward his version before a person is arraigned in court surely amounts to maladministration of justice. Similarly, where exculpatory evidence is presented to the police in the course of investigation and for some reasons known to them they deliberately decide to ignore the same one may be justified in concluding that the police are driven by collateral considerations other than genuine vindication of the criminal judicial process. Neglect to make a reasonable use of the sources of information available before instituting proceedings may therefore be evidence of malice and hence abuse of discretion and power."

23. In investigations, the account of the suspect is necessary and the police should afford an opportunity for this. However, in light of the right to remain silence, merely because the version of the suspect is missing is not ipso facto fatal to a criminal process. It is possible the

applicant's statement was not taken during the course of the investigation. But it bears repeating that the mere fact that the version of one of the parties is not considered is not invariably or necessarily fatal to the prosecution of the applicant. I note also that the respondent averred that they had severally summoned the applicant to give his version to the allegations made by the complainant but he did not avail himself. This averment was not controverted.

24. The applicant has also alleged a co-relation between this case and the case lodged by the complainant in **Elrc No. 312 of 2019 Major Silas Mirit Rtd & Sunland Roses Limited versus Peter ciljoen.** The applicant has not produced the particulars of the case so as to illuminate this allegation. It is therefore difficult for this court to discern whether the charges in the criminal case have a direct correlation with the case in **Elrc No. 312 of 2019 Major Silas Mirit Rtd & Sunland Roses Limited versus Peter ciljoen.** Even if that was the case **Section 193 A of the Criminal Procedure Code (Chapter 75, Laws of Kenya)** permits concurrent prosecution of facts which constitute civil claim as well as criminal culpability. The said Section provides-

> **"193. Notwithstanding the provisions of any other within law the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.**

25. Admittedly all the shortcomings pointed out by the applicant are defences which should be raised in the trial. The concerns herein are capable of being addressed in the trial which already has sufficient staple criminal protection in law. See the case of **Manilal Jamnandas Ramji Gohil v Director of Public Prosecution [2014] eKLR** where the Court of Appeal was of the considered view that issues of malice and harassment can be raised during the trial in the subordinate court as defences.

26. In light of the foregoing, there is no cogent evidence that the charges are an abuse of the process of court or a product of malice or are for reason other than to bring the applicant to justice. It was not shown the trial is for purposes of obtaining collateral advantage. The applicant merely stated that his co-director is using criminal process to harass and embarrass him so that he gives up his shares in the company in question. Accordingly, I do not find any violation of the Constitution or rights or anything worth of interrupting or quashing the criminal charges. This court therefore find that the application dated 3rd December 2019 lacks merit and is hereby dismissed.

Dated signed and delivered in open court this 17th day of February, 2020

F. GIKONYO

JUDGE

IN PRESENCE OF

Manari for applicant

M/s Nandwa for respondent

F. GIKONYO

JUDGE