REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 6 OF 2018

UCHENNA VALERIE BASSEY..PETITIONER

VERSUS

COMMISSIONER OF DOMESTIC TAXES................1ST RESPONDENT

CHIEF MAGISTRATES COURT AT NAIROBI........2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS..............3RD RESPONDENT

JUDGMENT

1. The Petitioner, Uchenna Valerie Bassey, is a Nigerian national who worked in Kenya as a Director of Kimberly Ryan Kenya Limited (hereinafter Kimberly Ryan). The 1st Respondent is the Commissioner of Domestic Taxes (the Commissioner). The 2nd Respondent is the Chief Magistrates Court at Nairobi whereas the 3rd Respondent is the Director of Public Prosecutions (DPP).

2. Through the petition dated 27th March, 2018, the Petitioner seeks the following reliefs:-

> **"1. An order of Certiorari to remove into this Court and quash the charge sheet, all proceedings and/or orders/judgment made or that may subsequently be made in Nairobi Chief Magistrates Criminal Case No. 1216 of 2016 – Republic v Uchenna Valerie Bassey and Another**.
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> **2. An order of prohibition be issued directed at the 2nd Respondent from proceeding further or entertaining any charge akin and/or arising from the facts similar [to] the facts in Nairobi Chief Magistrates Criminal Case No. 1216 of 2016 – Republic v Uchenna Valerie Bassey and Another or any and all proceedings based or related to this case.**
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> **3. An order of prohibition directed to the 3rd Respondent from exercising any investigation or prosecutorial powers with respect to Nairobi Chief Magistrates Criminal Case No. 1216 of 2016 – Republic v Uchenna Valerie Bassey and Another or preferring other further charges arising from the facts related to this case.**
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> **4. A declaration do issue that the failure of the 1st Respondent to notify the Petitioner within a reasonable time that a departure prohibition had been issued violated her rights under Article 47 of the Constitution.**
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> **5. A declaration do issue that the arrest and detention of the Petitioner violated her rights under Article 49 of the Constitution.**
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> **6. General damages for contravention of the Petitioner's fundamental rights.**
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> **7. Costs of this Petition.**
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> **8. Such other order(s) as this Honourable Court shall deem fit and just to grant."**

3. The facts as stated by the Petitioner, and which appear undisputed by the respondents, disclose that on 3rd February, 2018 the Commissioner issued Kimberly Ryan with a notice to audit its accounts for tax purposes. The audit was subsequently carried out and a preliminary report of the findings of the audit issued.

4. On 13th April, 2016, Kimberly Ryan disputed the audit report. Eventually the Commissioner issued tax demands for PAYE and VAT. Kimberly Ryan appealed the matter to the Tax Appeals Tribunal which dismissed the appeal on 15th November, 2017. There is a pending appeal in the High Court in respect of that decision.

5. It is the Petitioner's case that the Petitioner was arrested at Jomo Kenyatta International Airport on 3rd August, 2016 while on routine travel. On 5th August, 2016 the Petitioner was charged in **Nairobi Chief Magistrates Court Criminal Case No. 1216 of 2016 Republic v Uchenna Valerie Bassey & another.**

6. The Petitioner seeks to quash the criminal trial on two grounds. The first ground is that the prosecution violates Section 45(2) and (3) of the Tax Procedures Act (TPA) which provides for issuance of a departure prohibition on a person who is a controlling member of a company. The Petitioner's case is that the departure prohibition was issued notwithstanding the fact that the Petitioner was merely a director and not a controlling member of Kimberly Ryan.

7. It is the Petitioner's case that the Commissioner's action of issuing a departure prohibition on 27th July, 2016 a few days before the Petitioner's travel on 3rd August, 2018 denied the Petitioner the right to fair administrative action under Article 47 of the Constitution.

8. According to the Petitioner, the respondents' actions were unlawful and irregular for failing to comply with Section 45(2) and (3) of the TPA. That the prosecution of the Petitioner was unlawful and unreasonable as it is based on illegal and unlawful charges.

9. The second ground upon which the Petitioner seeks orders is that the prosecution is unconstitutional as she was held in custody for over twenty-four hours before being taken to court after her arrest hence violating Article 49(1)(f)(i) of the Constitution which requires that an arrested person be taken to court as soon as reasonably possible, but not later than twenty-four hours after being arrested.

10. The 1st Respondent opposed the petition through a replying affidavit sworn by one of its investigators, Inspector Richard Chemweno. Inspector Chemweno averred that he works with the Directorate of Criminal Investigations and is currently seconded to the Kenya Revenue Authority's Revenue Protection Services. He deposed that the Commissioner is an employee of the Kenya Revenue authority (KRA) appointed under Section 13 of the Kenya Revenue Authority Act.

11. According to Inspector Chemweno, he was instructed on 4th August, 2016 by his supervisor to go and collect a suspect who was under the custody of immigration officers. He went and collected the suspect who turned out to be the Petitioner.

12. It is Inspector Chemweno's testimony that the Petitioner had been made aware that travel restrictions would be placed against her in order to ensure that tax recovery was not frustrated by her departure from the Kenyan jurisdiction.

13. It is the Commissioner's evidence that all along the Petitioner had presented herself as the Chief Executive Officer and Director of Kimberly Ryan and signed all correspondences and contracts as such. Further, that the Petitioner had indeed committed fraud and it was only the trial court, which could determine whether or not a criminal offence was committed after hearing the evidence.

14. The 3rd Respondent opposed the petition through grounds of opposition dated 17th May, 2018. Through the said grounds, the 3rd Respondent asserts that the petition seeks to usurp his constitutional powers as no cause of action is disclosed. Further, that it is in the public interest and the interests of the administration of justice that perpetrators of crime are charged and prosecuted.

15. Finally, the 3rd Respondent contends that the prosecution of the Petitioner is pursuant to powers delegated to the Commissioner by the 3rd Respondent under Section 107 of the Tax Procedures Act. The advocates for the parties filed and exchanged submissions in support of their positions. I will take those submissions into consideration in reaching my decision.

16. The issue for the determination of this court in this petition is whether the Petitioner has made out a case for the grant of the orders sought. In essence, this petition is challenging the exercise of prosecutorial powers by the 3rd Respondent. Article 157(10) of the Constitution provides that the 3rd Respondent **"shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority."**

17. Those powers are, however, not absolute for Section 157(11) provides a caveat as follows:-

> **"In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process."**

18. Courts here and abroad have discussed in several decisions the conditions that have to be met by an applicant before a criminal trial can be prohibited. In the decision of the Supreme Court of Fiji in **Matalulu v DPP [2003] 4 LRC 712** (as cited by the Privy Council in **Mohit v the Director of Public Prosecutions of Mauritius (Mauritius) (2006) UKPC 20 (25 April 2006),** it was stated that:-

> **"It is not necessary for present purposes to explore exhaustively the circumstances in which the occasions for judicial review of a prosecutorial decision may arise. It is sufficient, in our opinion, in cases involving the exercise of prosecutorial discretion to apply established principles of judicial review. These would have proper regard to the great width of the DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits. This approach subsumes concerns about separation of powers.**

The decisions of the DPP challenged in this case were made under powers conferred by the 1990 Constitution. Springing directly from a written Constitution they are not to be treated as a modern formulation of ancient prerogative authority. They must be exercised within constitutional limits. It is not necessary for present purpose to explore those limits in full under either the 1990 or 1997 Constitutions. It may be accepted, however, that a purported exercise of power would be reviewable if it were made"

1. In excess of the DPP's constitutional or statutory grants of power-such as an attempt to institute proceedings in a court established by disciplinary law (see s 96 (4) (a)).

2. When, contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion–if the DPP were to act upon a political instruction the decision could be amenable to review.

3. In bad faith, for example, dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe.

4. In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved.

5. Where the DPP has fettered his or her discretion by a rigid policy – e.g. one that precludes prosecution of a specific class of offences.

There may be other considerations not precisely covered by the above in which judicial review of a prosecutorial discretion would be available. But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the consideration, to which the DPP may properly have regard in instituting or discontinuing proceedings. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice."

199. The same grounds were stated by the Supreme Court of India in **State of Maharasta & others v Arun Gulab Gavali & others Criminal Appeal No. 590 of 2007 (27 August, 2010)** where the Court held that:-

"95. In R.P. Kapur Vs. State of Punjab AIR 1960 SC 866, this Court laid down the following principles:-

(I) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice;

(II) where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction;

(III) where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; and

(IV) where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge."

There may be other instances in which a criminal prosecution can be quashed. Each case has to be assessed on its own before a decision is reached."

20. The Supreme Court of India went ahead to explain that the power to prohibit criminal prosecution is one to be wielded with restrain. The Court explained why this was so as follows:-

"12. The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice…

The power of judicial review is discretionary, however, it must be exercised to prevent the injustice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of power of the Court, but the more the power, the more due care and caution is to be exercised in invoking these powers."

21. The Petitioner's case is that her prosecution is unlawful and irregular because she was a mere director but a departure prohibition was issued against her contrary to Section 45 of the TPA which provides that a departure prohibition can only be issued to a controlling member of the company. This argument is without merit. Whether or not the Petitioner is a controlling member of Kimberly Ryan is a question that cannot be determined in these proceedings. Attempting to answer that question here will amount to usurping the role of the trial court. My statement finds support in the decision of the Court of Appeal in **Meixner & another v Attorney General [2005] 2 KLR 189** where it was

stated that:-

> **"As the learned judge correctly stated, judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through *certiorari* on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power.**
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> **Having regard to the law, we agree with the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision. The other grounds which the appellants claim were ignored ultimately raise the question whether the evidence gathered by the prosecution is sufficient to support the charge.**
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> **The criminal trial process is regulated by statutes, particularly, the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon an examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence. That is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court."**

22. Indeed the sufficiency or otherwise of the evidence in a criminal trial belongs to the trial arena. That is where the parties will test the evidence and the court will gauge the credibility of the witnesses and the evidence adduced. I therefore reiterate my statement in **Midlands Limited & 2 others v Director of Public Prosecutions & 7 others [2015] eKLR** that:-

> **"112. The applicants pinpointed paragraphs in the witness statements and referred to documents to show that they are innocent of the charges facing them in the Anti-Corruption Court. In essence, the applicants are asking this Court to look at the evidence to be presented during the trial by the DPP and arrive at a conclusion that the same is not sufficient. They are asking for an acquittal without a trial and this is short-circuiting the clearly established constitutional and statutory mechanism for dealing with criminal cases. In the trial Court they will have the opportunity, by way of cross-examination, to test the evidence gathered by the EACC. As was pointed out by the Court of Appeal in Meixner (supra), the applicants will have the constitutional and statutory protection of their rights during the trial."**

In view of the stated law, I find no merit in the Petitioner's claim that her prosecution contravenes Section 45 of the TPA.

23. The other complaint by the Petitioner is that she was brought to court outside the twenty-four hours required by Article 49(1)(f)(i) of the Constitution. It is not disputed that the Petitioner was arrested on Wednesday and was taken to court on Friday. The Constitution requires that the Petitioner ought to have been taken to court within twenty-four hours of her arrest. That means that she should have been presented in court on Thursday.

24. The question is whether the failure to comply with the constitutional requirement vitiates the trial. The answer is in the negative. I find support for my view in the case of **Julius Kamau Mbugua v Republic [2010] eKLR** where the Court of Appeal stated that:-

> **"As already indicated, it was held in <u>Albanus Mutua's</u> case that unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature of, and, the strength of evidence which may be adduced in support of the charge. That decision was taken further in <u>Ann Njogu's</u> case where the High Court held, in essence that, a prosecution after the constitutional and fundamental rights have been violated is *illegal and null and void*. The decision was taken even further in <u>Republic vs. George Muchuki Kangu</u> where the High Court, Nyeri, held, among other things, that upon discovery of constitutional violation the court had no *jurisdiction* to continue hearing an *illegality* or a *nullity*.**
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> **With respect that jurisprudence is peculiar to this jurisdiction and has no parallel in international jurisprudence. The contrary decision of Emukule, J. and his reasons for the judgment has already been cited.**
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> **In our view, the right of a suspect to personal liberty before he is taken to court under Section 72 (3) (b) are clearly distinct from the rights of an accused person awaiting trial under Section 77 (1)."**

25. In **Godfrey Oluoch Ochuodha v Republic [2015] eKLR**, Majanja, J also stated that:-

> **"The appellant complained that he was arrested on 15th June 2014 and taken to court on 17th June 2014 and therefore his constitutional rights were violated. Mr Nyagesoa cited several cases with upheld the position in the case of *Albanus Mwasia Mutua v Republic* Criminal Appeal No. 102 of 2004 [2006]eKLR where the it had been held that the violation of the accused's rights would lead to an acquittal. The cases cited by learned counsel are no longer good law in light of the Court of Appeal decision in *Julius Kamau Mbugua v Republic* Criminal Appeal No. 50 of 2008 [2010]*e*KLR where the Court held that such violations do not have any bearing on the innocence or guilt of the accused and may be vindicated by filing a separate petition under Article 22 of the Constitution."**

The delay in taking the Petitioner to court is therefore not a ground for quashing the criminal trial. In short, the Petitioner has totally failed to establish grounds for the halting of her prosecution.

26. On the prayer for declaration that her right to be taken to court within twenty-four hours has been violated, I find that the Petitioner's evidence of delay in taking her to court was not rebutted. No explanation was offered for the delay in taking her to court. Her constitutional right to be presented in court without delay, and in any case within twenty-four hours of arrest was thus violated.

27. The Petitioner was held in custody beyond the time provided by the Constitution. Instead of being taken to court on Thursday, she was taken to court on Friday. I, however, find that the period of delay in taking her to court, though unconstitutional, was not inordinate. She nevertheless should be compensated for the violation of her right so that a clear message is passed that violation of rights cannot be tolerated. I find an award of Kshs.50,000 reasonable in the circumstances and that is what I award the Petitioner as general damages.

28. In summary, the Petitioner's case partially succeeds in the following terms:-

a. A declaration is hereby issued that the arrest and detention of the Petitioner violated her right under Article 49(1)(f)(i) of the Constitution.

b. The Petitioner is awarded Kshs.50,000 as general damages for the said violation.

c. The respondents shall meet the Petitioner's costs for this proceedings.

29. For avoidance of doubt, all the other prayers in the petition fail and the Petitioner shall continue with her criminal trial to conclusion, that is if the trial has not been finalized.

Dated, signed and delivered at Nairobi this 5th day of March, 2020.

W. Korir,

Judge of the High Court