REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 378 OF 2019

MADATALI CHATUR.....PETITIONER

-VERSUS-

THE CABINET SECRETARY IN-CHARGE OF MINISTRY OF INTERIOR

& COORDINATION OF NATIONAL GOVERNMENT...1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

INSPECTOR GENERAL OF POLICE.....4TH RESPONDENT

JUDGMENT

1. Madatali Chatur, the Petitioner, through the petition dated 23rd September, 2019 prays for orders as follows:-

> **"a) An order in terms [of] a permanent injunction restraining the Respondents by themselves, their agents, servants or howsoever from harassing the Petitioner and/or infringing on his right to pursuit of happiness until this matter is adjudicated.**
>
> **b). An order that the rights of the Petitioner have been violated, threatened, infringed and/or threatened by the conduct of the Respondents.**
>
> **c) An order ordering compensation of the Petitioner for violating his fundamental rights and freedoms protected by the Constitution.**
>
> **d) Any other order, declaration, writ or remedy or redress the Honourable Court may deem fit and convenient taking all the circumstances of his case into account.**
>
> **e) Costs of the suit be provided for."**

2. The 1st Respondent, the Cabinet Secretary in-charge of Ministry of Interior and Coordination of National Government, and the 3rd Respondent, the Attorney General opposed the petition through grounds of opposition dated 3rd October, 2019 as follows:-

> **"a.) THAT the Petitioner has not identified the specific rights that he alleges have been infringed as was decided in the case of Anarita Karimi Njeru vs. Republic (1976-1980) KLR 1272 that a petitioner ought to identify and specify how his rights have been infringed.**
>
> **b.) THAT the police have the mandate to investigate a complaint under the National Police Service Act and therefore the 4th Respondent has acted in accordance with the law.**

c.) THAT the Petitioner has only been summoned to give information to the 4th Respondent and if he has nothing to hide then he should not fear to appear before the 4th Respondent.

d.) That should the investigators find it is fit to prosecute the Petitioner, the Petitioner will be given a chance to defend himself and even thereafter the court may well proceed to acquit him.

e.) THAT judicial intervention should be limited to acts that are manifestly in breach of the law or where the court is satisfied that the decision maker reached a wrong decision influenced by other considerations other than the law, evidence and the duty to serve the interest of justice.

f.) THAT matters of disputed facts are purely within the jurisdiction and assessment of the investigating authority and any intervention by the High Court before a prosecution or judgment would be premature.

g.) THAT each case should be determined on its own merits and that the court should not judge the petitioner on the basis of a case whose facts are not before the court as was decided in the case of Michael Maina Kamami & Another vs. Attorney General (2016 eKLR.

h.) THAT the requirements for successful reliance on the doctrine of legitimate expectation are set out as follows:

i.) there must be an express, clear and unambiguous promise given by a public authority;

ii.) the expectation itself must be reasonable;

iii.) the representation must be one which was competent and lawful for the decision-maker to make; and

iv.) there cannot be a legitimate expectation against clear provisions of the law or the Constitution.

See Communications Commission of Kenya & 5 others –vs- Royal Media Services & 5 others, Petition No. 14 of 2014.

i.) THAT the Respondents have therefore acted in accordance with the power conferred upon them by the law.

j.) THAT there are no constitutional issues raised in this petition.

k.) THAT the petition is frivolous, vexatious, incompetent and improperly before court and an abuse of the court process."

3. The 2nd Respondent, the Director of Public Prosecutions (DPP) and the 4th Respondent, the Inspector General of Police opposed the petition through the replying affidavit sworn on 2nd October, 2019 by the investigating officer, Inspector of Police Evans Kituyi.

4. A perusal of the pleadings filed by the Petitioner shows that he is offended by a notice issued to him by Inspector Evans Kituyi on 4th September, 2019 under the National Police Service Act, 2011 asking him to attend before the said officer at the DCI Headquarters on 9th September, 2019 to answer an inquiry of the offence of human trafficking contrary to stated provisions of the Counter-Trafficking in Persons Act, 2010. The Petitioner did indeed attend before Inspector Kituyi on 16th September, 2019 as his counsel had requested that he appears on that date. After complying with the summons from the police, the Petitioner filed this petition a few days thereafter seeking the orders already stated.

5. It is the Petitioner's case that the police have formulated an evil scheme of lies, falsehoods and distortions with a view to fix him on trumped up charges that have no basis or foundation in law whatsoever. He states that he is a man who appreciates the law from a global perspective and has never engaged in any illegal activities. Further, that the respondents are acting on rumours, innuendos and bad mouthing by jealous business rivals to brand him as a person engaged in human trafficking.

6. According to the Petitioner, the respondents are planning to invade his privacy and search his homes and premises on trumped up charges and this has grossly violated his rights to fair trial and protection of the law under Articles 25, 27(1), 28 and 29 of the Constitution. Also that his right to private and family life protected under Articles 28 and 45 of the Constitution will be violated by the anticipated actions.

7. It is the Petitioner's case that the threatened search is not conducive to the public interest as he is a law-abiding individual with no criminal record. He states that he has no history of any serious offences as he has always strictly complied with the laws of the country. According to him the attempt to search his premises will violate his right to access justice under Article 48, the right to dignity under Article 28, and the right to protection of law and full benefit of the law under Article 27 of the Constitution.

8. It is the Petitioner's case that the threatened search of his offices and residences violates his freedoms and security and has subjected him to psychological, mental and physical torture that is tantamount to inhuman and degrading treatment. In his view, there is no justifiable cause for the summons by the Director of Criminal Investigations and the aim is simply to cause maximum fear and intimidation.

9. It is further the Petitioner's case that he was born and bred in Kenya. He deposes that he is also married to a Kenyan. He avers that he is therefore protected under Article 45(1) and (2) of the Constitution which protects the family as the natural and fundamental unit of society and the necessary basis of order. He states that he is entitled to recognition and protection by the State and does not understand why the State is attempting to deport him.

10. Additionally, the Petitioner asserts that taking into account the principle of proportionality, the decision to search his offices without due process is disproportionate, unjust and unreasonable in a democratic society. Also, that his right to legitimate expectation within the meaning of Article 10 of the Constitution has been violated.

11. It is the Petitioner's averment that although Section 33 of the Kenya Citizenship and Immigration Act provides that a person who engages in trafficking of narcotics and prohibited substances is a prohibited immigrant, Section 57(1) and (2) of the same Act provides for an appeal against the decision of a public officer.

12. Through his replying affidavit Inspector Kituyi avers that the Petitioner has not demonstrated any violation of the Constitution by the respondents and it is therefore in the public interest for the respondents to be left to exercise their constitutional powers and mandate without any interference. Inspector Kituyi avers that the 2nd Respondent is by dint of Article 157(6) of the Constitution mandated to institute and undertake criminal proceedings against any person before any court other than a court martial in respect of any offence alleged to have been committed. Further, that as per Article 157(10) of the Constitution the 2nd Respondent shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his powers or functions he shall not be under the direction or control of any person or authority. According to Inspector Kituyi, the exercise of constitutional powers by the 2nd Respondent does not abrogate, breach, infringe or violate any provision of the Constitution.

13. As regards the Inspector General of Police, Inspector Kituyi avers that Article 245(4) of the Constitution dictates that other than the Cabinet Secretary responsible for police services, no person may give any direction to the Inspector General in respect to the investigation of any particular offence or offences and the enforcement of the law against any particular person or persons. Inspector Kituyi deposes that Section 57(1) of the National Police Service Act, Cap. 84 empowers a police officer to enter and search premises if he has reasonable cause to believe that anything necessary for the investigation of an alleged offence can be found there. He states that search of premises is therefore a known legal procedure during investigations and does not amount to violation of any constitutional provisions. Any search of the Petitioner's premises, he asserts will be carried out in compliance with Articles 10, 27(1), 28, 45, 47 and 50(4) of the Constitution. Additionally Inspector Kituyi avers that Section 52 of the National Police Service Act gives the police power to compel attendance of any person before a police officer who has reason to believe that he has information which may assist in the investigation of an alleged offence.

14. Inspector Kituyi concludes by averring that the petition is an abuse of the court process as the Petitioner has not demonstrated a *prima facie* case on violation or intended breach of any constitutional rights.

15. Through submissions dated 2nd December, 2019 counsel for the Petitioner reiterates the pleadings. On the alleged violation of the Petitioner's right to privacy, counsel submits that the intended search of the Petitioner's homes and offices will violate the right to privacy as protected by Article 31 of the Constitution. On the allegation that the Petitioner's right to freedom from discrimination under Article 27(1) and (4) of the Constitution is threatened, counsel submits that the Petitioner should be given equal protection and benefit of the law. Further, that under Article 2(1) of the Constitution the respondents are obligated to observe, respect, protect, promote and fulfil the rights in the Bill of Rights.

16. It is the submission of counsel for the Petitioner that Article 25(a) as read with Article 29(a), (c), (d) and (f) of the Constitution protects every individual from inhuman and degrading treatment. Counsel contend that the respondents' threatened actions constitute psychological torture and degrading treatment. It is counsel's submission that such actions can potentially ruin the Petitioner's family relations as they are too intrusive and disruptive of family life. He therefore asserts that the threatened action will violate the Petitioner's rights as enshrined under Article 45(1) and (2) of the Constitution. Counsel for the Petitioner submits that the respondents' actions could further irreparably damage the Petitioner's business relations as he is a revered business person with huge investments in Kenya and overseas.

17. On the alleged violation of the right to human dignity under Article 28 of the Constitution, counsel submits that the respondents' actions will violate this right. Counsel stresses that rights are not granted by the State as they belong to each individual as contemplated by Article 19(3)(a) and (b) of the Constitution.

18. As for the claim that the respondents have violated Article 47(1) and (2) of the Constitution, counsel submits that the respondents summoned the Petitioner twice to the DCI Headquarters without giving any reasons.

19. On the prejudice to be suffered by the Petitioner, counsel submits that tenants and potential clients would move out of the Petitioner's premises on account of suspicion that the Petitioner was being investigated. Further, that the Petitioner has indeed incurred massive financial losses because most rooms were vacant. Further, that the clients, partners and other visitors who frequented Diamond Plaza no longer went there.

20. It is counsel's submission that a search under Section 118 of the Criminal Procedure Code, Cap. 75 can only be conducted on the strength of a search warrant issued by a magistrate. It is counsel's contention that the rights in the Bill of Rights are also recognized by international instruments like the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.

21. In support of the submissions, counsel cites the decisions in **Samura Engineering Limited & 10 others v Kenya Revenue Authority, Petition No. 54 of 2011; Hassan Ali Joho v The Inspector General of Police & 3 others, Petition No. 15 of 2017;** and **Muhindo Herbert and others v The Attorney General HCT-05-CVMA-0042-2012.** The Court is consequently urged to allow the petition.

22. Through the submissions dated 2nd February, 2020, counsel for the 1st and 3rd respondents started by stating that the Petitioner has failed to demonstrate the rights violated and the manner of their violation hence failing to meet the test of a proper constitutional petition as established in **Anarita Karimi Njeru v Republic [1976-1980] KLR 1272,** and **Mumo Matemo v Trusted Society of Human Rights Alliance and 5 others [2013] eKLR.**

23. Turning to the substance of the petition, counsel submits that the respondents acted within their powers under sections 24 and 35 of the National Police Service Act. Section 24 is identified as providing the functions of the National Police Service and Section 35 is said to highlight the functions of the Directorate of Criminal Investigations. According to counsel, there has been no violation of the Petitioner's rights and if he has nothing to hide then he should not fear anything.

24. As for the orders sought in the petition, counsel urges that the Office of the Director of Public Prosecutions is an independent office and the Court can only intervene where there is clear breach of the law. Reliance is placed on the decision in **Erick Kibiwott Tarus & 2 others v Director of Public Prosecutions & 7 others (2014) eKLR** in support of the argument. Further, that the doctrine of legitimate expectation as set out by the Supreme Court in the case of **Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others, Petition No. 14 of 2014,** cannot come to the aid of the Petitioner in the circumstances of this case.

25. In conclusion, counsel for the 1st and 3rd respondents urges the Court to dismiss the petition stating that courts within this jurisdiction normally give the independent offices and institutions unfettered liberty to exercise their mandate as required by the Constitution rather than substitute the courts' decision for those of the independent offices and institutions.

26. Counsel for the 2nd and 4th respondents filed submissions on 4th February, 2020. Like counsel for the 1st and 3rd respondents, counsel for the 2nd and 4th respondents is also of the view that the Petitioner has not pleaded in a precise manner the constitutional provisions said to have been violated or infringed, the manner of infringement and the jurisdictional basis for it. Counsel submits that investigation and subsequent prosecution of any person is a constitutional and statutory mandate bestowed upon the 4th and 2nd respondents respectively and exercisable within the parameters of established legal framework. According to counsel, the Petitioner has not proved any of the alleged breaches to warrant the court's intervention of ongoing investigations.

27. Counsel for the 2nd and 4th respondents reiterates the averments of Inspector Kituyi as regards the constitutional and statutory powers of the 2nd and 4th respondents. Further, that search of premises is a known legal procedure used during investigations.

28. According to counsel for the 2nd and 4th respondents, courts have held the view that they ought not to usurp the constitutional mandate of the DPP and the police to initiate criminal proceedings and investigate crime. It is further contended that courts have also taken the position that the mere fact that the intended or ongoing criminal proceedings are in all likelihood deemed to fail or that the Petitioner has a good defence in the said criminal case cannot be a ground for stopping the criminal process if the same is undertaken *bona fides.* The decision in **Michael Monari & another v Commissioner of Police and 3 others, Misc. Application No. 68 of 2011** is cited in support of this assertion. The Court is therefore asked to find that the petition is an abuse of the court process meant to interfere with the respondents' constitutional mandate and dismiss the petition.

29. The only question is whether the Petitioner has established violation of the Constitution by any or all of the respondents. Although the Petitioner's case is not very clear, there is a hint that he challenges the investigative powers of police and the prosecutorial powers of the Director of Public Prosecutions (DPP).

30. The power of this Court to interfere with the investigative authority of the police and the prosecutorial powers of the DPP's not open-ended. Warsame, J (as he then was) spoke to those powers in **Republic v Commissioner of Police & another Ex-parte Michael Monari & another [2012] eKLR** when he held that:-

> **"….It is also clear in my mind 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 to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said not to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.**
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> **It is not the duty of the court to go into the merits and demerits of any intended charges to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and the merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving of punishment."**

31. It is apparent from the cited decision that the court can only intervene in the activities of the police and the DPP if it is shown that they are acting in excess of jurisdiction, breach of the rules of natural justice, malice or that they have taken into account extraneous factors. Even then, the power should be exercised sparingly as was stated in **Stanley Munga Githunguri v Republic [1985] eKLR** that:-

> **"Mr. Chunga conceded that the High Court has inherent jurisdiction and that a person charged before a subordinate court and considering himself to be the victim of oppression may seek a remedy in the High Court by way of an application for a prerogative order. We have no doubt that he is correct and that Judges of the High Court have a similar discretion in respect of offences triable before them. (Connelly v DPP [1964] 2 All ER 401 cited by both counsel). It is a power to be exercised very sparingly however."**

32. The Court went ahead and quoted Lord Salmon's statement in **DPP v Hurmphreys [1976] 2 All ER 497** at page 527 that:-

> **"I respectively agree with my noble and learned friend, Viscount Dilhorne, that a judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene. Fortunately, such prosecutions are hardly ever brought but the power of the court to prevent them is in my view, of great constitutional importance and should be jealously preserved."**

33. It is important to appreciate that a constitutional petition is just like any other case in that he who alleges has a duty to prove the allegations. It is not enough to just throw constitutional provisions at the Court and pray that some of them will bear fruits. Each claim must be matched to a particular provision and the claim must be backed up by evidence. This position was stated years back in **Anarita Karimi Njeru v Republic [1976-1980] KLR 1272** thus:-

> **"We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."**

That position was approved post-2010 by the Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013) eKLR.**

34. The Petitioner apart from citing several constitutional provisions has not connected those provisions to any violation of constitutional rights. It is not sufficient for a petitioner to just quote constitutional provisions and allege violation of the same without stating in what manner the provisions have been violated.

35. The Petitioner annexed to his submissions the judgement in the case of **Edgar Kagoni Matsigulu & 4 others v Director of Public Prosecutions & another; Law Society of Kenya & another (interested parties) [2019] eKLR** without saying anything about the decision. It is indeed true that the prosecution of the one of the petitioners in that case was halted by the High Court. The reason for that decision is found at paragraph 107 where the court held that:-

> **"The light shone by the above decisions illuminates a path where the prosecutorial authority attributed to the Office of the 1st Respondent is circumspect to** *intervention to prevent any prosecution which is vexatious, oppressive, mala fides, frivolous or taken up other improper purpose such as undue harassment of a party or abuse of the process of the Court***. In my considered view, the institution of criminal proceedings against judicial officers for engaging in their judicial functions would definitely fall in the realm of absurdity worthy of being termed as an abuse of the process and militating against the interests of the public and administration of justice. Such a scenario demands that the scales tilt in favour of safeguarding the independence of the judiciary as against the mandate of the 1st Respondent to undertake their prosecutorial mandate undisturbed. Consequently, the conclusion to be drawn is that if I am to find that the Petitioners' actions that were the precursor to their arrests and pre-arraignment constituted judicial acts done in exercise of judicial function, the inevitable corollary finding would be that the 1st Respondent is precluded from instituting criminal proceedings against the Petitioners and I shall thus stop their prosecution forthwith. However, if my finding is that the Petitioners actions were beyond the purview of judicial function, the 1st Respondent shall be at liberty to flex the powers contemplated under Article 157, hence the Petitions would ultimately fail."**

The facts in the cited case cannot be said to be similar to the facts in the case before this Court. In the cited case the Court frowned upon an attempt by the DPP to prosecute a judicial officer in respect of events that occurred in the course of his judicial duties.

36. The Petitioner also cited the decision of **Hassan Ali Joho v Inspector General of Police & 3 others [2017] eKLR.** The facts in said case are again not similar to the facts in the case before this Court. In the cited case the Court found that the respondents were not acting independently but were executing threats issued by the President of the Republic of Kenya that he would straighten the petitioner therein.

37. In the case before this Court, the Petitioner has not pointed out how the police and the DPP have exceeded their constitutional and statutory mandates. In fact the DPP is even not yet in the picture. The Petitioner simply alleges violation of various rights without producing any evidence to support the allegations. For instance, he claims that the threat by the police to search his premises and homes is likely to threaten his marriage since such an action is so intrusive. He does not explain how this is so unless he wants to say that his marriage is hanging on a thin thread. If that be so, he should not blame the police when the thread snaps.

38. The petition before this Court is based on speculations. It is based on fears, which from a reading of the pleadings before this Court are unfounded. For instance, the Petitioner does not say how the exercise of the power of search which is legally given to the police has been abused or will be abused if the police decide to exercise that power. The Court does indeed have power to prevent and avoid abuse of the legal process, however, the Court can only engage that power once there is prove of abuse of process. There is no evidence placed before this Court to show abuse or misuse of power by any of the respondents. The impression I get is that the Petitioner wants this Court to protect his purported *"clean record"*. The Court has no such powers. So long as the respondents are acting within the confines of the law, they should be allowed to proceed. The Petitioner has not established that any of the rights allegedly breached or threatened with violation has been breached or is likely to be breached. In short, I find this petition to be without merit. The same is therefore dismissed with no order as to costs.

Dated, signed and delivered through video conferencing/email at Nairobi this 4th day of June, 2020.

W. KORIR,

JUDGE OF THE HIGH COURT