



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU CONSTITUTIONAL AND HUMAN RIGHT DIVISION**

**PETITION NO. 15 OF 2019**

**IN THE MATTER OF AN APPLICATION FOR ENFORCEMENT OF FUNDAMENTAL RIGHTS UNDER ARTICLE 19, 20, 22, 23, 31, 47, 48, 49, 50, 159 & 165 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS UNDER ARTICLE 27, 29, 31, 40, 47, 50, 73, & 75 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF AN APPLICATION BY JOHN MBACA AND**

**DANIEL ODINGI OCHWANGI FOR ORDERS OF STAY OF CRIMINAL PROSECUTION**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA UNDER**

**ARTICLES 19, 20, 22, 30, 47, 48, 49, 50, 159 & 165 AND UNDER SECTION 261, 123(1), (3) OF THE CRIMINAL PROCEDURE CODE CHAPTER 75 LAWS OF KENYA.**

**BETWEEN**

**DANIEL ODINGI OCHWANGI..... 1ST PETITIONER**

**JOHN MBACA NDUNGU..... 2ND PETITIONER**

**VERSUS**

**KENYA FOREST SERVICES..... 1ST RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTION.... 2ND RESPONDENT**

**JUDGMENT**

1. The Petitioners herein are Police Officers. They have each worked as such for more than sixteen years. Immediately prior to the incident giving rise to this Petition, they were both stationed at GSU Whiskey Company Olposumoru Operation Camp.

2. The Petitioners aver that on or about 03/06/2019, a signal was sent to from Stapol Nakuru to Polgen, Nairobi summoning the Petitioners to appear before the Chief Magistrate's Court in Nakuru to take plea for an offence of removing forest produce without authority contrary to section 64(1)(a) as read together with section 64(2) and section 68(1)(c) of the Forest Conservation and Management Act No. 34 of 2016.

3. The Petitioners aver that the signal stated that the Petitioners were intercepted on 29/05/2019 at 4:00am along Nakuru/Eldoret Highway at Njoro while ferrying forest produce, to wit, 119 bags of charcoal in a Motor Vehicle Registration No. GK B242R, Isuzu Lorry by Officers from the Kenya Forestry Services (KFS) attached to Mau Conservancy.

4. The Petitioners aver that upon interception by the KFS Officers, they tried to explain to them that they were on a routine patrol when they confiscated the charcoal and decided to transport it together with the two suspects who owned it to Nakuru Police Station. The Petitioners say that the owners of the charcoal were in the same vehicle. The two owners, the Petitioners say, are Evans Muchangi and his wife, Esther Waithera. The two have already been charged with an offence under the Forest Conservation and Management Act.

5. It is the Petitioners' position that they were on the line of duty when they were escorting the charcoal to Nakuru Police Station and that they had committed no offence at all. They say that on or about 29/05/2019, they were "arraigned" by KFS Officers at Nakuru Police Station and that when they were asked to record statements they explained their positions to the KFS Officers. However, the KFS Officers acted with malice and refused to accept their reasonable explanations.

6. The Petitioners insist that they were acting in good faith when they arrested the two suspects for the offence of removing forest produce without authority. They further insist that the owners of the charcoal have recorded statements in which they have clearly stated that they owned the charcoal. The Petitioners, therefore, find their intended prosecution to be in bad faith and to be in violation of their constitutional rights. They say that no investigations have been conducted against them to warrant any charges being brought against them. It is clear, they insist, that the Respondents are "abusing their power and authority by preferring charges against the Petitioners when there is no evidence that the forest produce belongs to the Petitioners."

7. The Petitioners aver that the action by the Respondents to charge them is "vindictive, discriminatory and unconstitutional." They seek three substantive prayers thus:

- a. A declaration that their rights to a fair hearing have been violated by the Respondents.
- b. An order prohibiting, stopping and restraining the Respondents from arresting, victimizing and prosecuting the Petitioners in connection with the facts and events leading to the institution of the Petition; and
- c. An order for costs of the Petition.

8. The Petition is opposed by the Director of Public Prosecutions (DPP). Paraphrased, the Petition is opposed on the following grounds:

- a. That under Article 157 of the Constitution and the ODPP Act of the Laws of Kenya, only the DPP is vested with State powers to prosecute offenders.
- b. That the Petitioners have not demonstrated that the DPP is executing its mandate without or in excess of powers conferred to him by the law.
- c. That the Petitioners have not demonstrated that the DPP has acted oppressively or has infringed, violated, or contravened the provisions of the Constitution or any law.
- d. That the decision to charge the Petitioners were premised on cogent evidence that the offences mentioned in the charge sheet were committed by the Petitioners.
- e. That none of the Petitioners' constitutional rights have been or are likely to be violated if further investigations are conducted and prosecution commenced.
- f. That the Petitions have failed to demonstrate what prejudice they would suffer if investigations are conducted and prosecution pursued.

9. The Petition was canvassed by way of Written Submissions. Both parties filed their submissions; neither party elected to highlight them orally.

10. The issues presented in this Petition can be framed in a singular question: can it be said that the decision to charge the

Petitioners with a criminal offence is, in a legal and constitutional sense, un-procedural, illegal and oppressive so as to attract an order for quashing by this Court?

11. The decisional law governing situations in which a Court would quash the decision by the DPP to bring criminal charges against an individual or prohibit his prosecution have now stabilized into a series of rules of the thumb aimed at balancing the constitutional authority to prosecute criminal offences vested singularly in the DPP and the need to protect individuals from whimsical or oppressive exercise of that authority while holding that authority of the DPP both untrammelled in the public interest and accountable in the interests of individual rights and liberties.

12. It is true that "*the Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation.*"

*(Kuria & 3 Others v Attorney General [2002] 2KLR 69.)* Indeed, our legal history now shows that this was the position in Kenya even before the promulgation of the Constitution of Kenya, 2010. Hence as early as 2001, the High Court stated:

*A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probably cause for mounting a*

*criminal prosecution otherwise the prosecution will be malicious and actionable.*

13. Odunga J. held similar views in ***R v Director of Public Prosecutions & 2 Others Ex Parte Praxidis Nomoni Saisi [2016] eKLR***, when he stated that “where it is clear that the [prosecutorial] discretion is being exercised with a view to achieving certain extraneous goals other than those recognised under the Constitution and the Office of the Director of Public Prosecutions Act, that would...constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion.” Another decision by Odunga J., ***Agnes Kinyua AKA Agnes Kinywa v DPP & Another [2019] eKLR***, cited at length by the Petitioners’ Counsel in his submissions, is in accord.

14. In ***Peter Ngungiri Maina v Director of Public Prosecutions & 2 others [2017] eKLR***, I made the following statement:

*The law and practice, then, are quite clear: while the discretion of the DPP is unfettered, it is not unaccountable. While the authority to prosecute is entirely in the hands of the DPP, it is not absolute. On the other hand, while the power of the Court to review the decisions of the DPP are untrammelled, they are not to be exercised whimsically. While the Court can review the DPP’s decisions for rationality and procedural infirmities, it cannot review them on merit.*

15. Is there evidence in the present case that the DPP is using his authority to prosecute the Petitioners unfairly or oppressively?

The Petitioners argue that there has been no proper investigations in the matter and allude to the fact that there may be improper motives in charging them alongside Evans Muchangi and Esther Waithera. The Petitioners insist that they simply arrested Evans Muchangi and Esther Waithera with the forest produce and then used the Police truck to ferry the charcoal to Nakuru Police Station. They claim that on their way from Olposumaru, they reported to Njoro Police Station where it was entered into the OB and then indicated in the Daily Work Ticket. The Petitioners say that the KFS Officers were, therefore, aware that they were escorting the charcoal and that it was therefore in bad faith for them to purport to lay an ambush and arrest them on the way.

16. The case is intensely factual: the question is whether, on the facts a Court can, without impermissibly doing a merit review of the DPP decision to charge, come to the conclusion that the facts disclose an improper motive on the part of the DPP; or oppressive conduct; tell-tale signs of mala fides; discrimination or irrational basis of the decision.

17. The Petitioners have attached a patchwork of documents to try and establish their case. In my view, the most critical document would have been clear, official communication on their part showing that they had, in fact, arrested Evans Muchangi and Esther Waithera in Olposumaru; and that they were escorting them to a Police Station or a KFS Office. This would only have been shown with *prima facie* evidence of:

- a. A first report by the Petitioners showing that they had, in fact, made the arrest upon probable cause;
- b. Communication with their superior about their actions;
- c. Clear communication to the official destination showing that the charcoal was being taken there. For example, if the charcoal was being taken to Nakuru Central Police Station as the Petitioners claim, communication with the OCS demonstrating that the charcoal was being taken there would have been helpful.

18. The only document that the Petitioners have attached in an attempt to demonstrate that they were on official duty is a photocopy of an OB purportedly from Njoro Police Station. That OB photocopy – which is incomplete – is singularly unhelpful to the Petitioners’ cause. It reads as follows:

*Daniel Ochwangi both of GSU W Company. The vehicle was carrying 119 bags of charcoal from Olposumaru forest to Nakuru. It is alleged that the lorry was hired by two civilians namely Evans Muchangi Muriithi and Esther Waithera both residents of Nakuru. Now report booked waiting further Police action. The Motor Vehicle and the exhibits are being detained at KFS Regional Office, Nakuru.*

19. This exhibit is offered to demonstrate that the Petitioners had reported to Njoro Police Station that they were escorting two suspects with 119 bags of charcoal to Nakuru Police Station! As is, this extract does not come anywhere near the evidential threshold which would be required to make a *prima facie* determination that the DPP is acting maliciously, irrationally, or oppressively in pursuing criminal charges against the Petitioners.

Instead, the OB extract tends to support the DPP narrative that, in fact, the two Petitioners were acting in cahoots with the two suspects.

20. Suffice it to say that, after considering all the material presented by the Petitioners in this case in a mode most reasonably favourable to

them, I am unable to draw the inescapable conclusion that the decision to charge Petitioner was made un-procedurally, whimsically, irrationally, or for motives other than the enforcement of criminal law. In coming to this conclusion, it is important to remember that the High Court does not, in an application of this nature, sit on appeal on merit of the decisions made by the DPP. The correct position is that stated by the Court in **Republic Vs Attorney General & Four Others Ex-parte Kenneth Kariuki Githii (2014) eKLR**:

*The mere fact that the intended or on-going criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is not a ground that ought not to be relied upon by a court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceedings may similarly be a basis for civil suit, is no ground for staying the criminal process if the same can similarly be a basis for criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. In the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good administration.*

21. Or, as the Court said in **Diamond Hasham Lalji & Another vs Attorney General and 4 others [2018] eKLR**:

*In considering the evidential test, the Court should only be satisfied that the evidence collected by the investigative agency upon which the DPP's decision is made establishes a prima facie case necessitating prosecution. At this stage the courts should not hold a fully-fledged inquiry to find if evidence would end in a conviction or acquittal.*

22. It may be true that the Petitioners may have plausible or even concrete defences to the charges raised but these are appropriately raised in the criminal trial. It may be that, in context, the Petitioners can persuade a Trial Court that, indeed, they were escorting suspects and contrabands goods rather than being part of the criminal enterprise. However, on the facts and material placed before the Court at this time, it is not possible to say that the DPP has acted improperly or irrationally in making a charging decision. It is proper to say that in the present case there has been no showing of improper exercise of prosecutorial authority by the DPP.

**23. The upshot is that the Petition is without merit. It is hereby dismissed in its entirety. The Petitioners shall also pay the costs of the Petition.**

24. Orders accordingly.

**Dated and delivered at Nairobi this 2<sup>nd</sup> day of July, 2020.**

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**JOEL NGUGI**

**JUDGE**

**NOTE:** This ruling was delivered by both Zoom video-conference facility and email pursuant to the various Directives by the Honourable Chief Justice urging Courts to consider use of technology to deliver judgments and rulings where expedient due to the COVID-19 Pandemic. This resulted in Administrative Directives dated 01/04/2020 by the Presiding Judge, Nakuru Law Courts authorizing the delivery of judgment by email in appropriate cases and especially where all the parties have consented to dispense with the requirements of Order 21 Rule 1 of the Civil Procedure Rules. In this case, both the Counsel for the Petitioners, Mong'eri & Co. Advocates and Mr. Alex Chigit, from the ODPP, consented to the delivery of the ruling by both email and video-conference facility.