



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA KIAMBU

PETITION NO. 3 OF 2018

IN THE MATTER OF THE INTENDED PROSECUTION OF THE APPLICANT

AND

**IN THE MATTER OF A THREAT TO VIOLATION OF THE PROVISIONS
OF ARTICLE 157 ON THE PROSECUTORIAL POWERS CONFERRED**

UPON THE DIRECTOR OF PUBLIC PROSECUTIONS

AND

IN THE MATTER OF ARTICLE 157 OF THE CONSTITUTION AS READ

**WITH SECTIONS 4, 5 AND 23 OF THE OFFICE OF THE DIRECTOR OF
PUBLIC PROSECUTIONS ACT NO. 20 OF 2013**

AND

IN THE MATTER OF ARTICLES 10, 21, 22, 23, 47, 50 AND 51 OF THE CONSTITUTION

BETWEEN

ELIZABETH WANJIKU MUNGAI.....PETITIONER/APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

KYANJAU HOUSING CO-OPERATIVE SOCIETY LTD.....2ND RESPONDENT

MICHAEL NJUGUNA NJONGE.....3RD RESPONDENT

JUDGMENT

1. This Petition was brought by **Elizabeth Wanjiku Mungai** (the Petitioner) against the Director of Public Prosecutions (DPP), Kyanjau Housing Co-operative Society Limited and Michael Njuguna Njonge, the 1st to 3rd Respondents respectively.

2. The Petitioner seeks against the Respondents jointly and severally the following orders:-

a. A declaration that the 1st Respondent's decision and or recommendation made arising from a complaint lodged by the 2nd and 3rd Respondents at Thika Police Station relating to loss of funds belonging to the 2nd Respondent was arrived at capriciously, maliciously, was lacking in logic, reasonableness and rationality and therefore violating Articles 47, 50 and 157 of the Constitution as read together with Section 4 of the Office of the DPP Act.

b. An order of certiorari to bring into this court for quashing, the decision made by the 1st Respondent recommending that the Petitioner be charged with the offence of Stealing by servant together with the preceding investigations carried out thereunto emanating from a complaint made by the 2nd and 3rd Respondents at Thika Police Station.

c. An order of prohibition directed at the 1st Respondent staying any further investigations by its officers, subjects or persons acting under its direction, control, supervision, recommendation and or advice for the arrest of the petitioner or her arraignment for prosecution in any criminal courts with regard to matters arising from the allegation /report on theft of any funds belonging to the 2nd Respondent.

3. The Petitioner contends that in the material period, she was employed as the office manager by the 2nd Respondent and that in July 2017, the employer sent her on compulsory leave; that she learned subsequently that her employer had lodged a complaint against her regarding loss of some monies in excess of Sh. 2000,000/- ; that she had co-operated with the police during investigations ; and that the 1st Respondent had made a decision to charge her with the offence of stealing by servant. She contended that the decision was in bad faith, unreasonable and irrational. She asserted that sums of money allegedly stolen were received by the 3rd Respondent.

4. The Petitioner expressed fear that her fundamental rights and freedom are under threat as a consequence of the failure by the 1st Respondent to properly exercise his constitutional mandate under Article 157. The Petitioner contended that the 3rd Respondent instigated the complaint against her in order to cover up for his own involvement in the misappropriation of funds belonging to the 3rd Respondent and that following the Petitioner's disclosures implicating the 2nd Respondent, the said Respondent commenced a campaign of intimidation against her and vowing to have the Petitioner charged. She avers that the Respondents jointly violated the principles of fair administrative action. In the circumstances she singled out the 1st Respondent for blame for the decision to lay charges against her. The foregoing is in a nutshell the substance of the Petition and supporting affidavit.

5. The DPP filed an affidavit in opposition to the Petition through **Cpl. Eusebius Kizito** the investigating officer in Thika CM's Criminal Case No. 30 of 2017. He deposed that following a complaint lodged by the 3rd Respondent, he commenced investigations; that investigations revealed that the Petitioner was responsible for receiving, receipting and banking payments from members of the 3rd Respondent and that the Petitioner had been sent on compulsory leave for misdeeds including the failure to account for Ksh. 2,106,200/= and issuance of fake receipts among other irregularities. That the 1st Respondent in preferring charges against the accused/Petitioner had carefully considered the evidence gathered during investigations and did not act out of malice. He asserted that the Petitioner has not demonstrated that the mounting of criminal proceedings amount to abuse of process by the DPP and that the Petitioner is without justification inviting the court to interfere with and usurp the constitutional independent exercise of the DPP's mandate pursuant to Article 157 of the Constitution.

6. The chairman of the 2nd Respondent **Michael Njuguna Njonge** sued as the 3rd Respondent opposed the Petition through his replying affidavit. He deposed that the Petitioner was an employee of the 2nd Respondent in the material period when the Society lost monies in excess of Ksh. 2,000,000/-; that in 2017 he had realised that some funds received by the Petitioner on the 2nd Respondent's account had not been accounted for and a decision was made to send the Petitioner on compulsory leave and to appoint auditors to carry out a forensic audit ; and that the forensic audit revealed that the Petitioner had misappropriated funds amounting to Ksh. 2,106,200/=. The 3rd Respondent subsequently reported to police who carried out investigations at the end of which it was decided that criminal charges be brought against the Petitioner. He denied the Petitioner's claims that the charges against her are actuated by vendetta and malice. He denied receiving any cash as alleged by the Petitioner stating that the Petitioner will have an opportunity to fight the charges facing her during the trial.

7. The Petition was canvassed by way of written submissions. However, the Petitioner failed to file her written submissions. The 1st Respondent's submissions were filed on 21st September 2018. It was submitted that the DPP's decision to prefer charges against the Petitioner was based on the outcome of investigations carried out and that it will be the duty of the trial court to consider the said evidence during trial. Reliance was placed on the case of **Uwe Meixner & another vs Attorney General (2005) eKLR**. It was contended that the Petitioner's fundamental rights and freedoms have not been contravened by the laying of charges against her and in any event, the Petitioner has not demonstrated the manner in which the intended criminal proceedings breached or represent a threat of breach of the rules of natural justice or her fundamental rights and freedoms.

8. The 2nd & 3rd Respondents submitted that the police acted within their mandate in commencing investigations against the Petitioner upon receipt of a complaint. That it is the duty of the police to investigate complaints received as stated in the case of **Chaitanya Amrital Sevek & another v Republic (2016) eKLR**. It was submitted that the DPP owes a duty to the public to protect their rights and interests and that the orders sought by the Petitioner should not be granted without adequate demonstration that the decision to prosecute is based on ulterior motives and or that the DPP had not properly exercised his mandate under the Constitution. The case of **Republic v Director of Public Prosecutions & another Ex parte Geoffrey Mayaka Bogonko & another (2017) eKLR** was cited in this regard. That the trial court is the proper forum before which the Petitioner ought to canvass the defence proffered through her affidavit. The court was urged to dismiss the Petition as it is no more than an attempt by the Petitioner to evade her trial.

9. The court has considered the averments in the Petition and the supporting affidavit of the Petitioner as well as the material contained in the Respondents' affidavits and submissions. As pointed out earlier, the Petitioner did not file her submissions in respect of the Petition despite directions made by the court on 8th February 2019. There is no dispute, that the Petitioner had been in the employment of Kyanjau Housing Co-operative Society Ltd (the 2nd Respondent) for over 20 years at the time she was sent on compulsory leave on 1st July 2017. Initially employed as a clerk, the Petitioner had risen to the position of an office manager responsible for receiving payments from society members, banking and issuance of receipts.

10. Although the letter sending the Petitioner on compulsory leave did not raise any issue of embezzlement of funds as one of the reasons for the action, it appears that around that time, monies belonging to the 2nd Respondent were suspected to have been misappropriated and the society management ordered a forensic audit that revealed that some KShs.2 Million odd could not be accounted for and subsequently a

report was made to the Directorate of Criminal Investigations (DCI) Thika. Cpl. Eusebius Kizito was mandated to conduct investigations and eventually, a decision was made to charge the Petitioner, who had been severally interviewed in the course of the said investigations.

11. It is the Petitioner's contention that the decision to charge her is in violation of her rights under Articles 10 and 47 of the Constitution and constitute a violation of Article 157 of the Constitution by the DPP. The principle enunciated in **Anarita Karimi Njeru v The Republic 1976 – 1980) KLR** bears repeating in this case :

“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 provision said to be infringed and the manner in which they are alleged to be infringed.”

12. It is therefore not enough for a Petitioner to cite omnibus provisions of the Constitution without providing the particulars of alleged violation and the manner in which the provisions cited have been violated with regard to such Petitioner.

13. The key thrust of the Petitioner's complaint is captured at paragraphs 12 to 25 of the Petition. The gist thereof being that the DPP in arriving at the decision to charge the Petitioner violated the principles of fair administrative action in Article 47 of the Constitution and acted in a manner inconsistent with the proper exercise of the DPP's mandate under Article 157 of the Constitution. Because, the evidence collected was questionable or insufficient and that the complaint and charges against the Petitioner were maliciously instigated against the Petitioner by the 2nd and 3rd Respondents, not only to cover up for fraudulent acts by the 3rd Respondent and other board members of the society, but also for the ulterior purpose of silencing or punishing the Petitioner.

14. The Petition does not cite the specific principle or right in Article 10 of the Constitution that was thereby threatened or violated by the Respondents. Nor was there an averment to demonstrate the manner in which the Petitioner's right under Article 47 of the Constitution has been violated. On the contrary, the Petitioner's averments and depositions in her supporting affidavit tend to indicate that the investigators did give her an opportunity to tell her side of the story in the course of the investigations. With regard to the exercise of the DPP's mandate under Article 157 of the Constitution, what I hear the Petitioner assert is that the charges against her were based on insufficient or questionable evidence and came as the result of malicious instigation by the 2nd and 3rd Respondents.

15. As has been stated time without number, it is the duty and obligation of the police to investigate any criminal complaints filed by members of the public. It is also axiomatic that in a democratic country, persons suspected to have committed criminal offences must be made to account for their actions through due process of the law; it is a matter of public interest that this be so.. The decision to lay or not lay charges lies within the independent discretion of the DPP. The provisions of Article 157 of the Constitution make clear that the DPP exercises his mandate without direction or interference by any party. The prescription in Article 157 (11) is designed to protect citizens from the arbitrary, whimsical or capricious exercise of this independent mandate of the DPP. The requirement is Sub article 11 of Article 157 is that:

“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.” See also Section 4 and 6 of the Office of the DPP Act.

16. A person who challenges the exercise of the DPP's mandate in any criminal prosecution is therefore under a duty to bring clear evidence of violation of his rights under the Constitution or the violation of the Constitution in order to justify the court's intervention. See **Francis Anyango Juma v DPP & Another [2012] e KLR**. The court may intervene where it is demonstrated that the impugned criminal proceedings are instituted for motives other than the honest enforcement of the criminal law or are an abuse of the legal process.

17. In my estimation, the Petition before me is primarily taken up with matters of evidence, in an obvious attempt by the Petitioner to exonerate herself by repeatedly stating that the case against her is not supported by any or credible evidence ,while pointing fingers at the 2nd Respondent as the real culprit. The mere fact that the intended charges are likely to fail, or that the Applicant has a good defence, without more, cannot be the basis of the court interfering with the DPP's exercise of his prosecutorial mandate. There is no demonstration that the charges to be brought against the Petitioner represent an abuse of the criminal process by the Respondents, and the DPP in particular. This Petition is not the proper process in which to vet the weight of the prosecution case.

18. I would adopt the words of the Court of Appeal in **Uwe Meixner & Another v Attorney General [2005] e KLR** to the effect that:

“It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. It would be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.”

19. In the case of **Beatrice Ngonyo Kamau & 2 others v Commissioner of Police and 2 Others [2013] e KLR Lenaola J** as he then was stated that:

“The point being made above is that the DPP though not subject to control in exercise of his powers to prosecute criminal offences, must exercise that power on reasonable grounds. Reasonable grounds, it must be noted, cannot amount to the DPP being asked to prove the charge against an accused at the commencement of the trial but merely to show a prima facie case before mounting a prosecution. The proof of the charge is made at trial.”

20. The Respondents have on their part demonstrated that the complaint against the Petitioner was based on a report made to the DCI pursuant to a forensic audit conducted by the 2nd Respondent's auditors, a portion of which is annexed to the Replying affidavit of the 2nd

Respondent as annexure "A". The conclusion of the report reads in part that:

"It is clear from the investigations carried out by Gichohi Irungu and Company, Certified Public Accountants (K) that shareholder funds and resources have been misappropriated by the suspended officer (Petitioner)."

21. A summary of the flagged transactions through which the alleged misappropriation occurred is included in the conclusion. This annexure taken together with the contents of the Replying affidavits by the 2nd Respondent and Cpl. Eusebius Kizito tend to suggest that there were reasonable grounds for the decision to lay criminal charges against the Petitioner. The Petitioner has implied by her depositions that the DPP was somehow blindsided by the influence of the 2nd Respondent, acting out of ulterior motives, to lay the charges against her. Not only was this assertion not demonstrated, but it also seemed to be rebutted by the Respondent's affidavits.

22. I think I have said enough to demonstrate that the Petition before the court lacks merit and is for dismissal. It is so ordered.

SIGNED AND DELIVERED ELECTRONICALLY ON THIS 2ND DAY OF JULY 2020

C. MEOLI

JUDGE