



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 73 OF 2018**

**DAVID KINUTHIA KARIUKI .....PETITIONER**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

**JUDGMENT**

1. Through his petition dated 25<sup>th</sup> February 2018, the petitioner herein, who describes himself as a male adult of sound mind sued the respondent herein seeking the following orders:-

- a. **A declaration that the respondent has contravened the petitioner's right under Articles 27(1), (2), (3), (4) & (5), 47(1) & (2) of the Constitution.**
- b. **A declaration that the respondent has acted in contravention of Articles 157(10) & (11) of the constitution.**
- c. **An order of Judicial Review by way of certiorari do issue to remove Makadara Criminal Case No. 3072 of 2016 Republic vs. David Kinuthia Kariuki and bring to this Honourable court for quashing the charges preferred against the petitioner.**
- d. **An order of Judicial Review by way of prohibition stopping the prosecution of Makadara Criminal Case No. 3072 of 2016 Republic vs David Kinuthia Kariuki.**
- e. **That the costs of this petition be provided for.**
- f. **Any other orders that this Honourable court may deem fit to grant.**

2. The petitioner's case is that he was on 15<sup>th</sup> May 2015 involved in an altercation with one Stella Kagwiria as a result of which he was injured and his cell phone damaged thereby prompting him to lodge a complaint with the police that led to the arrest of the said Stella who was then charged before the court in **Makadara Criminal Case No. 1782 of 2015 Republic vs Stella Kagwiria** with 2 counts of assault and malicious damage to property.

3. The petitioner's case is that in an unexpected turn of events and while acting under pressure and/or instructions from Federation of Women Lawyers Kenya (FIDA-KENYA), the respondent caused the charges against the said M/S Stella Kagwiria to be dropped and instead preferred charges against him before the said Makadara court being **Criminal Case No. 3072 of 2016 - Republic vs. David Kinuthia Kariuki**. He attached a copy of a letter from FIDA – Kenya to the respondent dated 15<sup>th</sup> June 2015 as annexure "DKK2" to the affidavit in support of the petition.

4. He states that the respondent acted unreasonably unfairly, contrary to advice of the police and without any justification in withdrawing the charges against the said Stella and preferring charges against him. He further states that the respondent's actions amounted to a violation of his constitutional rights under Article 27 and 47 of the Constitution.

5. At the hearing of the petition Mr. Kingati, learned counsel for the petitioner submitted that the decision by the Director of Public Prosecution to charge the petitioner with a criminal offence was erroneous and without any iota of evidence, and further that the Director of Public Prosecution contravened the provisions of Article 157 of the Constitution requiring him to act independently and without any control or direction by any person or authority. For this argument, counsel relied on the decision in the case of **Republic vs Director of Public Prosecution & 4 Others Exparte Charles Mwiti[2018] eKLR** wherein it was held:

**“ The DPP is not only required to act independently in the exercise of his functions, but also ought not to be perceived to be acting under the direction or instructions or instigation of any other person. The decision to institute or not to institute criminal proceedings is a high calling imposed upon the DPP by the law and must be exercised in a manner that leave no doubt that the decision was made by the DPP independently. The prosecutor is required to act with diligence and promptness to investigate, litigate, and dispose of criminal charges, consistent with the interests of justice and with due regard for fairness, accuracy, and rights of the accused, victims, and witnesses. Where the decision is surrounded by doubt or even mere reasonable suspicion that an interested party has a hand in the prosecution, such a decision cannot be allowed to stand.”**

6. On violation of the provisions of Article 27 of the Constitution, counsel submitted that even though there was an altercation between him and the said Stella, in which he was assaulted and his phone damaged, the respondent did not accord him equal treatment as the said Stella because his complaint was shelved and in its place, charges preferred against him. Counsel cited the decision in **Republic vs Director of Public Prosecution & 4 Others Exparte Charles Mwiti Mugambi** (supra) where the court held:

**“There are general principles which should underlie the approach to prosecution. The DPP must all the times uphold the rule of law, the integrity of the criminal justice system and the right to fair trial and respect the fundamental rights of all human beings to be held equal before the law, and abstain from any wrongful discrimination.”**

7. Counsel submitted that the petitioner’s right to fair administrative action under Article 47 of the Constitution was contravened in the entire process leading to the withdrawal of the charges against Stella in a decision made following the receipt of a letter of complaint from FIDA – Kenya yet the respondent’s letter to FIDA Kenya was not brought to his attention. It is the petitioner’s case that his side of the story was not considered during the investigations that led to his being charged in court. Counsel argued that the respondent abused his powers and acted in contravention of Articles 27, 47 and 157(10) and (11) of the Constitution.

#### **Respondent’s case.**

8. The respondent opposed the petition through the replying affidavit of the prosecution counsel, Mr. Jalson Makori, who states that the decision by the Director of Public Prosecution to charge the petitioner was made following the receipt of the investigation file from the police. He avers that a review of the investigation file revealed that there was sufficient evidence to sustain the charges against the petitioner and that the decision was made independently without any malice.

9. At the hearing of the petition, Mr. Makori, learned counsel for the state, submitted that the letter from FIDA- Kenya (annexure “DKK2”) was a letter of complaint that did not amount to direction or control to the Director of Public Prosecution on how to perform his functions.

10. Counsel submitted that the Director of Public Prosecution acted within his mandate under Article 157 of the Constitution in preferring charges against the petitioner upon considering the investigations file from the police.

#### **Determination**

11. I have considered the petition filed herein, the respondent’s response, the parties’ submissions and the authorities cited. I discern the main issues for determination to be whether the respondent violated the petitioners rights under Articles 27 and 47 of the Constitution, whether the petitioner is entitled to the prayers sought and whether the respondent contravened the provisions of Articles 157(10) and (11) of the Constitution .

12. Article 157 of the constitution stipulates as follows;

**“There is established the office of Director of Public Prosecutions.  
(2) The Director of Public Prosecutions shall be nominated and, with the approval of the National Assembly, appointed by the President.**

**(3) The qualifications for appointment as Director of Public Prosecutions are the same as for the appointment as a judge of the High Court.**

**(4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.**

**(5) The Director of Public Prosecutions shall hold office for a term of eight years and shall not be eligible for re-appointment.**

**(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may--**

**(a) 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;**

**(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and**

(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

(7) If the discontinuance of any proceedings under clause (6) (c) takes place after the close of the prosecution's case, the defendant shall be acquitted.

(8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.

(9) The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

(10) The Director of Public Prosecutions 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.

(11) 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.

(12) Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecution.

13. The provisions of Article 157(10) of the Constitution are replicated in Section 6 of the Director of Public Prosecutions Act which stipulates that; *pursuant to Article 157(10) the Director of Public Prosecutions shall;-*

**The Director of Public Prosecutions shall exercise State powers of prosecution and may--**

(a) 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;

(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

**The Director of Public Prosecutions shall exercise State powers of prosecution and may--**

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(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

14. In the instant case it was not disputed that the petitioner and one Stella had an altercation and that at first, charges were preferred against the said Stella, which charges were, upon further investigations being conducted by the police following a complaint lodged by FIDA-Kenya on behalf of the said Stella, withdrawn and instead charges filed against the petitioner.

15. I have perused the impugned letter from FIDA- Kenya dated 15<sup>th</sup> June 2015 and I note that nowhere in the said letter does the author direct the respondent on what to do with the case. Infact at the last paragraph of the said letter, the Senior Legal Officer – FIDA(K) states:

*“Kindly assist the clients with representation and following up with the police to ensure justice is served. Attached hereto, please find supporting documents. Clients can also be reached on 0721[xxxx] or 0722[xxxx].”*

16. Having regard to the contents of the said letter, I am of the humble view that it was a mere request from FIDA(K), a women's rights protection body, to the respondent to intervene in the matter so as to ensure that justice is served based on the evidence that had been presented to the police.

17. It is also noteworthy that the respondent did not act solely on the complaint by FIDA (K) in preferring charges against the petitioner but instructed the Director of Criminal Investigations (DCI) through a letter dated 30th June 2015 (annexure “**DKK4**”) to investigate the complaint by FIDA (K) and to forward the police file for the respondent's further action. Indeed, through a letter dated 2<sup>nd</sup> October 2015, the Director of Criminal Investigations forwarded the investigation file to the respondent who, upon considering all the witness statements, decided to terminate the criminal case against the said Stella and institute charges against the petitioner.

18. The petitioner claimed that the decision by the respondent, to charge him in court and drop the charges against the said Stella amounted

to violation of his rights to equal treatment under Article 27 of the Constitution and right to fair administrative action under Article 47. Article 27 sets out the non-discrimination provisions and among other provisions, states that every person is equal before the law and has the right to equal protection and equal benefit of the law. Article 47 of the Constitution on the other hand codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and the right to be given reasons for the action taken, to any person who has been or is likely to be adversely affected by administrative action. The question that begs for answers is whether, by withdrawing the charges against the said Stella and instead filing charges against the petitioner, the Respondent acted in a manner that constituted a breach of Articles 27 and 47 of the Constitution.

19. My take is that the answer to the above question is to the negative as I note that before instituting charges against the petitioner, the respondent considered the weight of the evidence availed to him by the Director of Criminal Investigations and formed the opinion, as shown in annexure “**DKK5**”, that the petitioner was the aggressor in the altercation that he had with Stella as he was reported to have indecently touched the said Stella’s daughter thereby precipitating the physical confrontation. In the circumstances of this case and having found that there was a basis to institute charges against the petitioner, I am unable to find his rights under Article 27 were violated.

20. Similarly, on fair administrative action under Article 47 of the Constitution. I note that the petitioner’s statement was recorded, as shown in his annexure “**DKK6**” to the supporting affidavit, before the charges were filed against him. I therefore find that the claim that the petitioner was not accorded a hearing before the adverse action of being charged in court was taken against him is not true. I further note that the petitioner has not stated that the trial court will not be capable of granting him a right to be heard or will be biased so as to justify his claim that the charges/prosecution against him should be quashed. I also find that the right forum for the petitioner to present his case will be before the criminal court at Makadara where the sufficiency of the weight respondent’s evidence will be tested.

21. In conclusion, having found that the respondent acted within his mandate under Article 157 in instituting the charges against the petitioner and having found that there was no proof that the petitioner’s rights under Articles 27 and 47 of the Constitution were violated. I find that the instant petition is unmerited and the order that commends itself to me is the order to dismiss it with no orders as to costs.

**Dated, signed and delivered in open court at Nairobi this 9<sup>th</sup> day of January 2019**

**W. A. OKWANY**

**JUDGE**

**In the presence of**

Mr Ingati for the petitioner

No appearance for the respondent

Court Assistant – Kombo