



**REPUBLIC OF KENYA**

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

**IN THE CONSTITUTIONAL AND HUMAN RIGHT DIVISION**

**PETITION NO. 247 OF 2016**

**JUSTUS MWENDWA KATHENGE.....PETITIONER**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTION .....1<sup>ST</sup> RESPONDENT**

**THE INSPECTOR GENERAL, NATIONAL POLICE SERVICE.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. **Justus Mwendwa Kanthenge**, the petitioner, filed this petition against the *Director of Public Prosecutions* and the *Inspector General the National Police Service* as the 1<sup>st</sup> and 2<sup>nd</sup> respectively, challenging their decision to arrest and prosecute him in *Criminal Case No 841 of 2016* which he contended was in violation of his rights and fundamental freedoms.

2. According to the petitioner, on 29<sup>th</sup> April 2016, a residential Building collapsed at Huruma Estate, Nairobi (Ngei 11) killing 52 persons, majority of them tenants. On 1<sup>st</sup> May 2016, he was summoned on phone by the County Criminal Investigating Officer for purposes of recording a statement as a witness on the collapse of the building and he obliged.

3. The petitioner avers that on arriving at the offices, he was surprised to be arrested and detained until 2<sup>nd</sup> May 2016 when he was arraigned before court in *Misc Criminal Application No 930 of 2016* through which the prosecution sought to hold him for more days but the court declined and released him on cash bail and directed to report at the Pangani Police Station once a week. All this time the petitioner had not been informed why he was being held. The petitioner avers that some of his colleagues were summoned by letters on 4<sup>th</sup> May 2016, recorded statements and released. He was however charged on 7<sup>th</sup> June 2016 with various offences in *Criminal Case No 841 of 2016*.

4. The petitioner further avers that prior to the collapse of the building, on 29<sup>th</sup> April 2016, the office of the President, through Chief of Staff and Head of Public Service, had given a Presidential directive that a committee be formed to carry out a comprehensive audit of all buildings in the country with a view to establishing buildings and structures that did not meet construction standards or were constructed without requisite approvals.

5. He stated that the Technical Audit Team was established headed by the building inspectorate from the Ministry of Lands Housing and Urban Development under the Principal Secretary and the County Government and the petitioner's employer was represented in that team by the petitioner's superior, **Tom Odongo**, the County Executive Committee Member in charge of urban renewal and Housing.

6. The petitioner went on to aver that by 19<sup>th</sup> February 2016, a preliminary audit of about 2000 buildings in Nairobi had been conducted, but due to lack of equipment, the team was unable to reach a conclusion on the safety of those structures hence a request was put through to the Ministry of Transport and Infrastructure to carry out non-destructive tests on the buildings that had been identified as requiring urgent attention before a final recommendation could be made for appropriate actions. He stated that the building that collapsed was one of those identified.

7. It is the petitioner's case that he did not have powers to intervene and or carry out demolitions of the illegal buildings; that the building had been constructed on a riparian land which was under the central government and NEMA; and that section 5 of the Nairobi City County Regularization Development Act, 2015 provided for regularization thus putting a 12 months moratorium on demolition of developments from the commencement of the Act.

8. The petitioner contends that despite the above facts it is only him who has been charged notwithstanding the fact that inspection of buildings and structures within the county had been delegated to sub county officers vide a memo dated 27<sup>th</sup> August 2014 and 4<sup>th</sup> November 2015 from the Chief County Officer, Urban Planning and Housing given that a single officer could not audit all the structures to establish

their integrity.

9. The petitioner contended that investigations carried out by the 2<sup>nd</sup> respondent exonerated him from blame but which was ignored by the 1<sup>st</sup> respondent thus violated his right to equal protection of the law granted under Article 27 of the Constitution. The petitioner therefore sought the following reliefs:-

**a. A declaration do and is hereby issued that the petitioner herein being a public officer is protected by Article 236 of the Constitution of Kenya and Section 6 of the Physical Planning Act (chapter 286, Laws of Kenya) against being victimized and held personally liable for any actions and/or omissions done in the performance of the functions of his office in good faith and without negligence.**

**b. A declaration do issue that the petitioner's fundamental right to fair administrative action and against discrimination was infringed and/or violated by the respondents in the institution of the criminal proceedings herein contrary to the provisions of Article 27 and 47 of the Constitution of Kenya.**

**c. A declaration do and hereby issue that the 1<sup>st</sup> respondent is Constitutionally obligated to act lawfully, fairly and reasonably in the exercise of his Constitutional mandate, which principles were violated in the institution of criminal proceedings against the petitioner in criminal case no 841 of 2016 at the Milimani Chief Magistrate's court.**

**d. An order of prohibition do issue restraining the respondents by themselves, their agents and/or assigns from prosecuting Milimani Criminal Case No 841 of 2016 so far as the same touches on the petitioner and/or instating any other proceedings based on the same grounds.**

**e. An order of certiorari do issue removing into this Honourable court for purposes of quashing the decision of the 1<sup>st</sup> respondent to institute criminal proceedings against the petitioner herein in criminal case No 841 of 2016.**

**f. A declaration do hereby issue that all criminal proceedings before Chief magistrates court at Milimani specifically criminal case No 841 of 2016 as against the petitioner in relation to the facts herein are unconstitutional thus null and void.**

**g. That the costs of this application be borne by the respondents.**

**h. Any such further orders this Honourable Court shall deem just and fit to grant.**

#### **Respondents' response**

10. The respondents filed a replying affidavit by **Chief Inspector Samuel Ogutu**, an investigations officer, deposing that investigations into the case began after the collapse of the building which caused 52 deaths.

11. **C. I Ogutu** deposed that preliminary investigation on the cause of the collapse of the building showed that the building was constructed near a river bank and on a riparian land without approvals from the County Government's planning department; that there were no records at the relevant county government department for any approvals for the constructions and that there were officers from the county government department on compliance and enforcement assigned to the area where construction took place.

12. Further deposed was to the effect that investigations revealed that constructions materials used were substandard and that officers of the county government, namely; **Pancras Namwando Mwakazi** and **Antony Njuguna Ngugi** were assigned the responsibility of enforcing building regulations and inspection and who had also been charged in the **Criminal Case No 841 of 2016**.

13. **C I Ogutu** contended that they recorded statements from over 133 witnesses including the petitioner who was the Director of Planning, Compliance and Enforcement and who was been employed on 30<sup>th</sup> May 2014. **C I Ogutu** stated that the construction of the building took place between 2011 and 2013. He contended that the investigation file was forwarded to the 1<sup>st</sup> respondent who satisfied himself on the sufficiency of the evidence gathered and made a decision in exercise of his mandate under Article 157 of the Constitution to prosecute the petitioner and others. He denied that there was malice in deciding to prosecute the petitioner.

#### **Petitioner's submissions**

14. **Mr Omogeni**, learned Senior Counsel for the petitioner submitted, highlighting their written submissions dated 28<sup>th</sup> September 2016 and filed in court on 29<sup>th</sup> September 2016, that the 1<sup>st</sup> respondent is abusing his powers in prosecuting the petitioner in violation of Article 157(11) of the Constitution. Making reference to the charge sheet, he contended that the petitioner was charged with an offence that occurred before he took office. According to learned Senior Counsel, the petitioner was appointed on 30<sup>th</sup> May 2014 yet he is charged with officers who were in office when he was not the Director of Planning.

15. With regard to other charges, learned Senior Counsel submitted that there is no nexus between the offence of manslaughter and the petitioner's duties as can be seen from the petitioner's letter of appointment. Learned Senior Counsel contended that according to the investigating officer's affidavit, they were investigating those who were involved in the approvals of the collapsed building which was illegally constructed. Learned Senior Counsel submitted that when the building was constructed, the petitioner was not an official of the City County Government hence there is no reason for charging him with manslaughter hence the DPP made an erroneous decision to prosecute him.

16. **Mr Omogeni** further contended that the building was constructed in a riparian area which is under NEMA, a national government agency hence it is the national government that is responsible for such demolitions. He also referred to a letter from the Chief of Staff from the President's Office indicating that tests conducted were not conclusive, hence DPP was wrong in charging the petitioner and was thus abusing his powers and office.

17. Senior counsel relied on several authorities and urged the court to allow the petition. The respondents did not attend court although the date had been taken by consent hence offered no submissions.

### **Determination**

18. I have considered this petition, the response; submissions and the authorities relied on. The issue that arises for determination is whether the 1<sup>st</sup> respondent, the DPP, has property exercised his discretion in deciding to prefer charges against the petitioner over the collapsed building at Huruma, Nairobi that occurred on 29<sup>th</sup> April 2016.

19. The petitioner was arrested and charged after a building collapsed in Huruma (Ngei II) estate Nairobi killing about 52 people most of them tenants. The prosecution's case is that the petitioner was the Director of Planning within the City County of Nairobi, the department responsible to approving and supervising construction of buildings in the City County. They state that the building was put up without approved plans; that there were no records of approvals and therefore, that there was negligence on the part of the County Government hence the petitioner as the head of the department was to be held liable.

20. The petitioner has on his part argued that he was not an employee of the County Government at the time the building was put up having been employed much later; that the building was constructed on a riparian which is under the national government and its agency namely (NEMA); that the national government's Task Force was undecided on the soundness of the buildings earmarked for demolition and that no decision had been made whether or not to demolish them including the collapsed building. The petitioner contended, therefore, that the 1<sup>st</sup> respondent acted improperly by deciding to charge and prosecute him and subjected him to discrimination given that officers from the national government who were in charge of the team that was evaluating soundness of buildings were not charged.

21. The DPP exercises Constitutional mandate in deciding whether or not to prosecute. This mandate is conferred on him by Article 157 of the Constitution. In that regard, when making a decision whether or not to prosecute, the DPP does not require consent from any person or authority. He has, however, to satisfy himself that the action he is about to take is in furtherance of the cause of justice in line with Article 157(11) of the Constitution.

22. That notwithstanding, this court has jurisdiction to determine whether the DPP's action is being under taken in accordance with his mandate in terms of Article 157(11) of the Constitution. This is also the case under Article 165(3)(d)(ii) which gives this court jurisdiction to determine the question of whether anything said to be done under the authority of the Constitution or any law, is in consistent with or in contravention of the Constitution. That being the case, this court has mandate to check the powers of the DPP or any other state officer and ensure that they are exercised in line with the spirit of the Constitution.

23. On the other hand, the police have a right to investigate any person for suspicion of committing any offence section 49 of the Police Service Act contains general powers of police officers. However, police powers are subject to Article 244 of the Constitution and the Bill of Rights. Article 244 provides, where necessary, that the National Police Service shall ***(b) "prevent corruption and promote and practice transparency and accountability; (c) comply with constitutional standards of human rights and fundamental freedoms"***; In this regard, transparency and accountability is a constitutional requirement and one of the hallmarks in the performance of police duties. But again the court will intervene where there is evidence of violation of the constitution and the Bill of Rights.

24. The fact that the court can intervene if the DPP's powers are being exercised in violation of rights and fundamental freedoms was stated in ***Meixner & Another vs. Attorney General*** [2005] 2 KLR 189, where, although dealing with the prosecutorial powers of the Attorney under the old constitution, the court of Appeal held that;

**"The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion is acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution."**(emphasis)

25. The court will also intervene where the prosecution is intended to achieve collateral purpose rather than the course of justice. In the case of ***Republic v Director of Public Prosecution & 2 others Ex parte Francis Njakwe Maina & another*** [2015] eKLR the court observed that;

**"The Court ought not to usurp the Constitutional mandate of the Director of prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for halting 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 proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a 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."**

26. The Court expressed a similar view in Republic v Attorney General Ex parte Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001 stating;

**“Although the state’s interest and indeed the constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court ...It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case....In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual’s liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds.”**

27. And in the case of Kuria & 3 Others vs. Attorney General [2002] 2 KLR, it was held 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. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society’s senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta.”**

28. I have perused the charge sheet annexed to the petition as **“JMK 6”** which shows that the petitioner was named as the 6<sup>th</sup> accused. In count 1 to 52, the petitioner is jointly charged with the offence of unlawfully causing the death of the people who died as a result of the collapse of the building. In count 55, the petitioner is also jointly charged with the offence of neglect of duty. The particulars of the charge state that between 1<sup>st</sup> January 2011 and 31<sup>st</sup> December 2013, being servants of the Nairobi City County Government as Development control officers in charge of Ngei 11 Area, neglected to stop the construction of the collapsed building, a duty they were bound to perform under the Physical Planning Act.

29. I have also carefully perused the response to this petition and in particular the replying affidavit by **Chief Inspector Samuel Ogutu**, one of the investigating officers in the impugned criminal case. Paragraph 6 of the said affidavit narrates the failures that were identified following the investigations that he and his colleagues carried out regarding the collapsed building. The investigations showed that the building was constructed on a riparian; without approvals from the City County Planning department; that there were no records of any approvals at the County Governments relevant department and most importantly, that the construction took place between 2011 and 2013.

30. That evidence, if anything, means that the building was constructed without supervision from the City County Government’s department responsible. The deponent further makes observation that the materials used for construction were substandard. He however makes a vital revelation at paragraph 8 of the affidavit that the petitioner was employed on 30<sup>th</sup> May 2014 which is consistent with the petitioner’s contention that he was not an employee of the City County Government when the building was constructed.

31. In the case of Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR the Court of Appeal stated the applicable law and the circumstances under which the court can interfere with the exercise of the DPP’s prosecutorial discretion. The court went on to observe the evidential test to be applied in determining the suitability of the prosecution thus;

**“[45] 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 court should not hold a fully-fledged inquiry to find if evidence would end in a conviction or acquittal. That is the function of the trial court. However, a proper scrutiny of facts of the circumstances of the case are absolutely imperative.”** {Emphasis}

32. The circumstances of the charges the petitioner is facing and the evidence gathered by the investigative agency which was relied on by the DPP to prosecute him, reveal that the petitioner was not an employee of the County Government at the time the building was put up. It is, therefore, not clear whether the DPP took this fact into account in authorizing the prosecution against the petitioner over the offences he is charged with.

33. The construction took place between 2011 and 2013, while the petitioner was employed in May 2014 and had also nothing to do with supervision of the construction, a fact acknowledged by the investigating officers themselves. In that regard, count 55 on neglect and failure to supervise construction of the building that eventually collapsed refers to a period the petitioner could not have supervised the construction. This raises the bonafides in the decision by the DPP decide to prosecute the petitioner with this offence.

34. Article 157(11) requires the DPP to exercise his powers with regard to public interest, interests of the administration of justice and the need to prevent and avoid abuse of the legal process. From the facts of this case, it is clear to me that the petitioner could not in any way be connected with the construction of the building and its eventual collapse. The petitioner could not be blamed for failing to supervise the construction and, or any act of negligence because he was not yet an employee of the County Government. In that regard, he could not be said to have acted negligently and as a result, caused the deaths of those unfortunate deaths.

35. It is not clear why the DPP did not direct the investigating officers to zero in on the person who was in office at the time the building was constructed and pursue him/her to answer to these misdeeds instead of going for the petitioner. It is also not clear to the court what purpose

the DPP's action was intended to achieve by deciding to prosecute the petitioner with these offences. The respondents submitted that in making his decision, the DPP acted on the sufficiency of the evidence and that he properly exercised his Constitutional mandate in the matter.

36. However, it is not lost on any keen observer that the DPP was probably acting out of emotions to have someone prosecuted irrespective of the purpose that prosecution would serve. The Court of Appeal in a majority decision in the case of **Prof. Njuguna Ndungu v The Ethics and Anti-Corruption Commission (EACC) & others** [2018] eKLR stated that the court has to scrutinize the charges, the relevant documents including and reach a conclusive and objective decision on whether or not the charges have any legal or factual foundation and realistic prospect of conviction.

37. On that note, I am not satisfied with the evidential threshold and it is not proper that a person be prosecuted for the sake of it. Any prosecution must serve a legitimate interest of justice and nothing else. The petitioner's intended prosecution violated his right to fair hearing and equal treatment before the law. In the circumstances and for the above reason, I am satisfied that the petition is merited and is allowed as follows;

38. Consequently, I am satisfied that this petition has merit and must succeed. The petition is hereby allowed and I make the following orders.

**i. A declaration is hereby issued that the 1<sup>st</sup> respondent is constitutionally obligated to act lawfully, fairly and reasonably in the exercise of his Constitutional mandate, which principles were violated in the institution of criminal proceedings against the petitioner in criminal case No 841 of 2016 at the Milimani Chief Magistrate's court Nairobi.**

**ii. A declaration is hereby issued that the petitioner's fundamental right to fair administrative action and against discrimination was infringed and violated by the respondents contrary to Articles 27 and 47 of the constitution in instituting criminal proceedings in criminal case No. 841 of 2016.**

**iii. A declaration is hereby issued that criminal proceedings before Chief magistrates court at Milimani, namely; criminal case No 841 of 2016 against the petitioner in relation to the facts herein are unconstitutional null and void.**

**iv. An order of certiorari is hereby issued removing into this court for purposes of quashing the decision of the 1<sup>st</sup> respondent to institute criminal proceedings against the petitioner in criminal case No 841 of 2016.**

**v. An order of prohibition is hereby issued prohibiting the respondents by themselves, their agents and/or assigns from prosecuting Milimani Criminal Case No 841 of 2016 so far as the same touches on the petitioner and/or instituting any other proceedings based on the same grounds.**

**vi. Each party do bear their own costs**

**Dated, Signed and Delivered at Nairobi this 18<sup>th</sup> Day of January 2019**

**E C MWITA**

**JUDGE**