



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CONSTITUTIONAL HUMAN RIGHTS DIVISION

PETITION NO. 25 OF 2014

IN THE MATTER OF ARTICLES 22, 23, 27, 28, 48, 53(D) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF VIOLATION AND FURTHER VIOLATION OF THE PETITIONER'S FUNDAMENTAL RIGHTS AND FREEDOM

BETWEEN

MN (suing as the mother

and the next friend of CW).....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

AND

GEOFFREY WERUMBE.....INTERESTED PARTY

RULING

1. This Ruling is in respect of the Preliminary Objection raised by the Respondent in this Petition K.F. Nyakira, Prosecutions Counsel dated 10th April, 2015. The Preliminary Objection is premised on the following grounds:-

i. The office of the Director of Public Prosecutions is an independent state organ which does not act under the direction or control of any person or authority.

ii. The investigative function lies with the National Police Service and office of the Inspector General and not the office of the Director of Public Prosecutions.

iii. There exists no status to warrant preservation by conservatory orders as sought in the application.

2. The Petition instituted by the Petitioner herein dated 3rd April, 2014, seeks the following orders:-

i. "An order do issue directing the Respondent to commence investigations into the claims by the Petitioner and the circumstances under which the shooting was done.

ii. A declaration that the Petitioner is entitled to compensation for all loss arising from the breach of her fundamental rights and for failing to give her protection.

iii. A declaration that the Petitioner is entitled to general damages.

iv. That the costs of this Petition be awarded to the Petitioner."

3. The Petitioner's claims are based on the following grounds:

i. That the Interested Party shot the Petitioner on 17th January, 2013 and has never been prosecuted.

ii. That the Petitioner filed a complaint with the police against the Interested Party and the same has not been acted upon by the police.

iii. That the Interested Party is a holder of a public office which may directly interfere with the interventions that the Respondent will take.

4. The Preliminary Objection (PO) was disposed of vide written submissions. The Petitioner's submissions are dated 23rd February, 2016 while the Respondent's submissions are dated 5th January, 2018.

5. The Petitioner submitted that on 17th February, 2013, she, her husband and 2 children took a trip to Kongasis centre within Gilgil, Sub-county of Nakuru County. They had gone to demand money from one Mr. Ole Kupele who owed them money. They were not able to find Mr. Kupele. The Petitioner submitted that she stopped the OCS Elementaita and reported the matter to him and that he, (OCS) asked them to report the matter at the police station. The Petitioner and her husband blocked the motor vehicle of the debtor and this led to a confrontation with the driver of the blocked motor vehicle. An Administration Police Officer took the driver's licenses of both the Petitioner's husband and the debtor's driver and directed them to the OSC who declined to intervene.

6. The Petitioner submitted that the OCS detained her husband under the claim that he had blocked him. She submitted that the OCS cocked his gun and fired at the motor vehicle whereupon their son minor CW was injured by the bullet. She averred that they reported the matter to Naivasha police station and that the OCPD visited the crime scene in person and promised to undertake investigations. She submitted that they rushed their son to St. Mary's hospital where he was hospitalised for 4 days.

7. The Petitioner further had written to the National Service Police Commission and the Inspector General of Police to intervene in the matter. She had filed a complaint with the Nakuru County Human Rights Network who on 29th May, 2013 wrote letters to the Director of Public Prosecutions, the Provincial Criminal Investigation Office, Rift Valley and the Kenya National Commission on Human Rights regarding the matter. That on 31st May, 2013, the Nakuru County Human Rights Network received a letter from the Provincial Criminal Investigation Headquarters, Nakuru indicating that the matter had been investigated and forwarded to the office of the Director of Public Prosecutions (ODPP) for further advice. On 9th January, 2014, the Head of Complaints and Compliments Unit wrote a letter to the person in charge in the ODPP Nakuru, Mr. J. G. Marete indicating they had not received any inquiry file on the said matter and instructed him to proceed with the matter to conclusion.

8. The Petitioner submitted that she realised that the recorded statements had been doctored and up to the time of filing this Petition no investigations had been conducted and the perpetrator had not been prosecuted. She averred that she had suffered loss and damages; and that her son has never enjoyed a normal life owing to the injuries he sustained. She submitted that her rights to fair administrative action and right to security and protection had been violated and has come to court by invoking Article 165 of the Constitution. She filed this Petition seeking an order of the court to compel the Director of Public Prosecutions to have the alleged incident investigated and consequently, the perpetrator prosecuted as this is his mandate under Article 157 (4) of the Constitution.

9. In urging the PO, the Respondent's counsel, Mr. Jackson Motende submitted that under Article 157 (10) of the Constitution, the office of the Respondent in exercise of its functions and powers shall not be under the direction or control of any person or authority. It was submitted that in allowing the Petition, the court would be acting in excess of its jurisdiction and powers. It was argued that the ODPP had not contravened nor curtailed the rights of the petitioner and that the petitioner had failed to demonstrate the same.

10. It was submitted that under Section 6 of the Independent Policing Oversight Authority Act, the IPOA had the mandate to investigate *inter alia* criminal offences committed by police officers and thereafter recommend prosecution where necessary. The Respondent argued that the petitioner had not utilised this avenue including seeking an order of judicial review against the National Police Service to investigate the alleged incident pursuant to its mandate under Article 245 of the Constitution. It was argued that the Petition was wrongly construed, premature and unnecessary delay to the judicial process.

11. I have considered the preliminary objection and the respective submissions of the parties. I find that the only issue before court is whether the court can direct the office of the Director of Public Prosecutions to investigate and prosecute the alleged shooting of the Petitioner's minor son.

12. The principles for preliminary objection were laid down by Sir Charles Newbold in the case of **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 696** where he held as follows:-

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

13. In the present case, the preliminary objection being raised is in respect of Article 157 of the Constitution of Kenya. It is therefore an objection that raises a pure point of law.

14. The office of the Director of Public Prosecutions is established under Article 157 of the Constitution and it confers the following powers:

“(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.

(6) The Director of Public Prosecutions shall exercise State powers of Prosecutions 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;

(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.”

15. Section 6 of the Office of the Director of Public Prosecutions Act, 2013, establishes the independence of the Director:

Pursuant to Article 157(10) of the Constitution, the Director shall—

(a) not require the consent of any person or authority for the commencement of criminal proceedings;

(b) not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law; and

(c) be subject only to the Constitution and the law.

16. In the case of **Republic v Chief Magistrate, Milimani Criminal Division & 4 others Ex-Parte John Wachira Wambugu & another [2018] eKLR**, Mativo J., commented with respect to Article 259 of the Constitution:-

“... Therefore, in construing Articles 47 and 157 of the Constitution, we are obliged not only to avoid an interpretation that clashes with the Constitutional values, purposes and principles but also to seek a meaning of the provisions that promotes constitutional purposes, values, principles, and which advances rule of law, human rights and fundamental freedoms in the Bill of Rights and also an interpretation that permits development of the law and contributes to good governance. We are also obliged to be guided by the provisions of Article 159 (e) which requires us to promote and protect the purposes and principles of the Constitution. It is an elementary rule of constitutional construction that no one provision of the constitution is to be segregated from the others and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument ...”

17. As highlighted above, the office of the Director of Public Prosecutions as an independent constitutional office is not under the direction, influence nor interference by any person or authority in the exercise of its powers and functions. However, the constitutional independence of the DPP must be seen against the provisions of the Constitution that provide for the enforcement of the Bill of Rights and where there is violation of the Constitution itself, then the court must intervene.

18. In **Douglas Maina Mwangi vs Kenya Revenue Authority and Another High Court Constitutional Petition No. 528 of 2013** Majanja J., held that;

“When dealing with the decision as to whether or not to prosecute, the office of the DPP exercises independent judgment and the court cannot interfere unless it is shown that the exercise is contrary to the Constitution, in bad faith or amounts to an abuse of the court process...I do not find any reason or ground to intervene in that decision nor is it the obligation of the court to supervise the minutiae of investigation and Prosecutions”

19. In **Francis Anyango Juma v Director of Public Prosecutions & another [2012] eKLR**, Mumbi J., held that:-

“Clearly, the intention under the Constitution was to enable the Director of Public Prosecutions to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the DPP of his power under the Constitution or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a party’s rights under the Constitution, or violation of the Constitution itself”. (Emphasis mine)

20. In the present Petition, the Petitioner’s grievance is that the office of the DPP has failed to investigate and prosecute the alleged shooting of her minor son. There is however correspondence between the Head of Complaints and Compliments Unit and the office of the Director of Public Prosecutions, Nakuru with instructions to the latter to proceed with the matter until conclusion. The court does not have any contrary information that the office of the Director of Public Prosecutions, Nakuru had failed to perform its functions. It appears from the Petitioner’s own documents that her complaint was being looked into though perhaps not as expeditiously as it should.

21. I find that the court cannot compel the office of the Director of Public Prosecutions to carry out its functions which have been conferred upon it by the Constitution unless it is shown that the office violated the Constitution. However, the Director of Public Prosecutions has powers to direct the Inspector-General of Police to investigate any information or allegation of criminal conduct and the Inspector-General of Police shall comply with any such direction under Section 5 (1) (a) of the Office of the Director of Public Prosecutions Act. In the circumstances of this case, I find that the DPP has not utilised the provision to cause the expeditious investigation by the Inspector-General of Police whose mandate is provided for under Articles 238, 239, 243 and 244 of the Constitution and Section 24 of the National Police Service Act No. 11A of 2011.

22. The Petitioner has also complained that the alleged perpetrator who is a police officer has not been investigated or apprehended despite her report. That being the case, the Petitioner can pursue the complaint by seeking assistance from the Independent Policing Oversight Authority (IPOA) established under Section 3 of the Independent Policing Oversight Authority Act with the mandate provided under Section 6 to:-

“(a) investigate any complaints related to disciplinary or criminal offences committed by any member of the Service, whether on its own motion or on receipt of a complaint, and make recommendations to the relevant authorities, including recommendations for Prosecutions, compensation, internal disciplinary action or any other appropriate relief, and shall make public the response received to these recommendations.”

23. Having carefully considered the petition, I find that the court lacks the basis for interfering with the independence and mandate of the office of the Director of Public Prosecutions as it has not been shown that the said office has contravened the Constitution with regards to the Petitioner’s rights. The Petition is premature and the Preliminary Objection dated 10th April, 2015 is upheld.

24. The Petition dated 3rd April, 2014 is thus struck out with no orders as to costs.

Orders accordingly.

Judgement signed

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R.LAGAT KORIR

JUDGE

Judgment delivered, dated and signed at Nakuru This 12th day of February, 2019

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JANET MULWA

JUDGE

In the presence of:

.....Court Assistant

.....For the Petitioner

.....For the Respondent

.....For the Interested Party