REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CRIMINAL APPLICATION NO. 41 OF 2018

PROFESSOR WILLIAM KOSAR……...……APPLICANT

VERSUS

INSPECTOR GENERAL OF POLICE……..……..…1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS…...……..…2ND RESPONDENT

DR. EUGENE VALENTINE ERULU…….3RD RESPONDENT

JUDGEMENT

1. The Applicant, Prof. William Kosar, has filed a Notice of Motion dated 10th May, 2018 brought under Article 49(1)(h) of the Constitution and Section 123 of the Criminal Procedure Code seeking the following orders:

> **"1. THAT the Honourable Court be pleased to Certify this matter as urgent and service of this application upon the Respondents be dispensed with at the first instance.**
>
> **2. THAT the Honourable Court be pleased to admit the Applicant to Anticipatory Bail.**
>
> **3. THAT the Honourable Court be pleased to arrest and release the applicant on bond on his own recognisance.**
>
> **4. THAT the Honourable Court be pleased to direct the release of the Applicant on bail in the event of his arrest by the police.**
>
> **5. THAT the Honourable Court be pleased to make any other orders deemed expedient in the circumstances."**

2. The application is predicated upon his supporting affidavit and further affidavit and on the grounds that he is a lawyer domiciled in Kenya and consulting for various governments and the 3rd Respondent Dr. Eugene Valentine Erulu is their family doctor; that the Applicant having sought the medical intervention of the 3rd Respondent, the Applicant made a point to call a member of his family to intervene as the doctor had failed to execute his duty when he was called upon while the Applicant was out of the country on official duty; that the 3rd Respondent subsequently revealed their family issues to members of public in Watamu where the Applicant and his family have been residing for the past seven years.

3. It is further the Applicant's case that he is now a subject of a police report at Watamu Police Station filed by the 3rd Respondent who is intent in humiliating and/or harassing him, tarnishing his name and extorting money from him. In particular, the 3rd Respondent reported that the Applicant had allegedly published utterances calculated to injure his reputation as a professional doctor resulting in the Applicant being summoned to Watamu Police Station and at Malindi Police Station by the D.C.I.O. Further, that the 3rd Respondent's counsel wrote him a notice demanding redress for criminal defamation. The Applicant is therefore apprehensive that the 1st Respondent, the Inspector General of Police, through the O.C.S and the D.C.I.O. of Watamu Police Station would arrest, detain and confine him for reasons of false allegations of criminal defamation which criminal defamation was declared unconstitutional by this Court (Mativo, J) in **Jacqueline Okuta & another v Attorney General & 2 others [2017] eKLR**.

4. Consequently the looming threat of arrest, detention and confinement would be in violation of his right to liberty and a violation of the policy of law not to use the criminal justice system to enforce civil disputes. The Applicant asserts that the nature of his work is to travel

globally and he believes that the 3rd Respondent's goal is to immobilise him and exert duress to corner him into a forced settlement and that unless anticipatory bail is granted pending arrest he will suffer irreparable injury. The Applicant indicates his willingness to accept conditions imposed by the court or police in connection with the case. He also discloses that he has presented his statement to the police.

5. In response there is a replying affidavit dated 14th June, 2018 sworn by Police Constable Bernard Mutonga, a police officer familiar with the facts of the case. He deponed that the 3rd Respondent filed a report with the police at Watamu on 28th April, 2018; that the Applicant and the 3rd Respondent are yet to record statements with the police; that the investigation into the matter is pending and yet to be concluded hence they have not determined the culpability of the Applicant and cannot cause his arrest before this is established; and that consequently the application is premature and unwarranted.

6. The 3rd Respondent filed grounds of opposition dated 14th May, 2018 asserting that the Applicant has not established any violation, infringement or threatened violation or infringement of his rights or fundamental freedoms; that Section 132 of the Penal Code was declared invalid in **Robert Alai v The Hon Attorney General & another [2017] eKLR;** and Section 194 of the Penal Code to the extent that it covers offences other than those contemplated under Article 33 (2)(a)-(d) of the Constitution was declared invalid in **Jacqueline Okuta & another v Attorney General & 2 others [2017] eKLR;** that Section 29 of the Kenya Information and Communication Act was declared invalid in **Geoffrey Andre v Attorney General & 2 others [2016] eKLR**; that there is no declaration that Section 195 and 197 of the Penal Code is unconstitutional and/or invalid; that as per Article 157 of the Constitution the 2nd Respondent has a constitutional mandate to determine whether or not to proceed with the prosecution of the Applicant if an offence is disclosed from the facts levelled against him; and that the application is therefore misconceived, mischievous, in bad faith, frivolous and vexatious.

7. The application was ventilated through written submissions. The Applicant submits that the report to the police, the subsequent summoning to the police station over the complaint and the communication by the 3rd Respondent's advocate is a clear indicator of their pursuit of criminal justice based on criminal libel. The Applicant relies on the High Court case of **Angelina Mumbua Mutuku & another v Inspector General of Police & another [2017] eKLR** to buttress his point. It is the Applicant's case that criminal libel is unconstitutional as decided in **Jacqueline Okuta** (supra). Furthermore, that the 3rd Respondent being their family doctor knows him well and the nature of his work which requires plenty of globetrotting making him reasonably apprehensive that he will be arrested, detained and confined in a bid to elicit a forced settlement. It is also submitted that the Applicant did file his statutory declaration whose receipt was acknowledged by the police at Watamu Police Station on 10th May, 2018.

8. In addition, the Applicant submits that the claim that only Section 194 was declared unconstitutional and not sections 196 and 197 of the Penal Code is an absurd interpretation of the law as sections 196 and 197 do not create an offence and are merely descriptive. The Applicant relies on the High Court finding of **Simon Materu Munialu v Republic [2007] eKLR** approved by the Court of Appeal in **Joseph Njuguna Mwaura & 2 others v Republic [2013] eKLR** to posit that a person can only be charged with a criminal offence under the section that establishes the offence providing for its ingredients or under that which provides for its punishment. The Applicant asserts that neither Section 196 nor Section 197 of the Penal Code establishes an offence or provide for punishment and a charge brought under those provisions would be in contravention of Article 49(1) of the Constitution.

9. It is further submitted that in interpreting a provision of a statute to determine its constitutionality the purpose and its effect ought to be considered as was held in the High Court decision of **Association of Retirement Benefits Schemes v Attorney General & 3 others [2017] eKLR**. The Applicant contends that sections 196 and 197 of the Penal Code address the same mischief as Section 195 of the Penal Code and the finding in **Jacqueline Okuta** (supra) ought to be applied based on the principle of the *ejusdem generis* rule.

10. The Applicant urges that Section 29 of the Kenya Information and Communication Act does not create a criminal offence and prosecuting under the same would contravene the right to fair trial as per Article 50 (2)(n) of the Constitution. Further, that in any case the alleged defamation has a civil recourse and even so the defence of qualified privilege applies to the case. It is also urged that the Robert Alai case (supra) refers to the unconstitutionality of Section 132 of the Penal Code that refers to public authorities and neither is the Applicant nor the 3rd Respondent a public officer.

11. The 1st and 2nd respondents filed joint submissions stating that the 1st Respondent has a constitutional mandate to investigate complaints made to the National Police Service and is properly seized of the matter. However, the statements have yet to be recorded hence the investigation is incomplete and the Applicant is therefore not in danger of arrest as it is yet to be established that he is culpable making the application premature. In addition, it was stated that the policy of the 2nd Respondent, the Office of the Director of Public Prosecutions, is against sanction of prosecution in matters relating to criminal libel. They conclude that the Applicant ought to submit himself to relevant authorities so that his complaint is fully investigated.

12. The 3rd Respondent relied on the pleadings.

13. This court in accordance with Article 23(1) of the Constitution is mandated to protect against threats of and or actual infringements of rights and fundamental freedoms safeguarded under the Constitution. The right to liberty under Article 29(a) is one of them. Every person within the Republic has an equal protection of the law and equal benefit of the law - see Article 27(1) of the Constitution. Further to this, the Court must jealously guard against abuse of the court process, in this case the criminal justice process.

14. The germane question is whether or not there is a threat to or a breach of the rights and fundamental freedoms of the Applicant in the act of summoning him to record a statement that would assist in investigations of a matter reported to the police.

15. The Constitution is clear on the protection of arrested persons and in particular that they must be presented to court within a set period of time. Article 49(1)(f) of the Constitution provides that:

"49. (1) An arrested person has the right—

(f) to be brought before a court as soon as reasonably possible, but not later than—

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day."

16. Article 49(1)(h) of the Constitution provides that an arrested person has the right to be released on bond or bail pending a charge or trial unless there are compelling reasons not to be released. The terms of bond or bail ought to be reasonable and this right can only be denied if there are compelling reasons not to be released. Section 123 of the Criminal Procedure Code also provides for the processing of bail for arrested persons.

17. The investigations are still at a young stage and the alleged 'threats' of the 3rd Respondent through his advocates are but still a paper tiger. However, if the arrest of the Applicant were to occur, his rights and fundamental freedoms would be safeguarded and in the event that a breach of the same occurs a civil suit can be instituted for damages for malicious prosecution or arbitrary arrest or a petition can be filed to halt prosecution on grounds that its continuation is coloured with ulterior motives. Hence it would be jumping the gun on the part of the court to presume that the 1st and 2nd respondents are aiming at arresting and prosecuting the Applicant with ulterior motive as the same has not been demonstrated sufficiently to warrant an intervention.

18. The Court of Appeal in the case of **The Commissioner of Police & The Director of Criminal Investigations Department & another v Kenya Commercial Bank Limited & 4 others [2013] eKLR** considered the cases of **Ndarua v R. [2002] 1 EA 205** and **Kuria & 3 others v Attorney General [2002] 2 KLR 69** and held that:

> **"It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. "**

19. The Court of Appeal also held that :

> **"It is not in the public interest or in the interest of the administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court."**

20. In **Stanley Munga Githunguri v Republic [1985] eKLR**, the High Court followed the English Case of ***DPP v Humphreys*** **[1976] 2 All ER 497** where Lord Salmon rendered himself thus:

> **"I respectfully agree with my noble and learned friend, Viscount Dilhorne, that a judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene. Fortunately, such prosecutions are hardly ever brought but the power of the court to prevent them is in my view, of great Constitutional importance and should be jealously preserved."**

21. In the case of **Gladys Boss Shollei v attorney General & 3 others [2015] eKLR; Nairobi High Court Misc. Criminal Application No. 128 of 2015**, G.W. Ngenye–Macharia, J after analyzing various authorities touching on the question of anticipatory bail opined that:

> **"It is then salient that anticipatory bail is aimed at giving remedy for breach of….fundamental constitutional rights in conformity with what the Constitution envisages constitutes protection of fundamental rights and freedom of a citizen. It cannot issue where an applicant labours under apprehension founded on rumours or unsubstantiated claims."**

22. That statement captures the need for an applicant for anticipatory bail to demonstrate that his fundamental rights and freedoms are under imminent threat before the court can seriously consider issuing the order. Where there is no such threat, the court will not come to the aid of the applicant.

23. What we have at this point in time is a report made to the 1st Respondent by the 3rd Respondent. There is a rebuttable presumption that every police officer knows the law. Police officers are not expected to arrest a person who has not breached the law. The 1st and 2nd respondents have clearly indicated that they are yet to make up their minds as to whether any offence has been committed by the Applicant.

24. The application fails to meet the threshold for granting of anticipatory bail. The investigations on the matter may reveal more than criminal libel justifying an arrest, detention and confinement. However, I wish to add that if the investigations only reveal criminal libel, the investigations ought to be halted immediately.

25. As already indicated, Article 49(1)(h) of the Constitution has provision for granting bond to an arrested person and the 1st Respondent

under Section 53 of the National Police Service Act has powers to give bond to a person awaiting arraignment in court making the 4th prayer in the application superfluous and premature as he is yet to be arrested and the bond unreasonably denied.

26. A perusal of the application in its entirety discloses that the same is without merit. An inane disagreement between a patient and his doctor is being elevated to the level of a matter of great public importance. This should not be so and I presume the 1st and 2nd respondents have more important matters touching on public security to attend to. They need to avoid being dragged into matters that can be amicably settled between the parties or through civil litigation.

27. The end result is that this application is dismissed. Considering that the same touched on protection of fundamental rights and freedoms, I direct each party to meet own costs of the application.

Dated, signed and delivered at Malindi this 14th day of February, 2019.

W. KORIR,

JUDGE OF THE HIGH COURT