



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 12 OF 2016

IN THE MATTER OF: ARTICLES 22, 23 AND 165 (3) (B) OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS UNDER ARTICLES 27, 28, 29, 47, 48
AND 50 OF THE CONSTITUTION OF KENYA 2010**

BETWEEN

ASIF JETHAPETITIONER

AND

THE DIRECTOR OF CRIMINAL INVESTIGATIONS1ST RESPONDENT

THE PROVINCIAL CRIMINAL INVESTIGATION OFFICER.....2ND RESPONDENT

JUDGMENT

Introduction

1. The petitioner filed this petition against the Respondent on the **23rd March, 2016**. The Petitioner seeks the following orders:-

- a. An order permanently prohibiting the Respondents, their employees, agents and/or any other persons acting for, on behalf and/or under their command from arresting, charging, arraigning, incarcerating or in any other way detaining the Petitioner.
- b. An order permanently prohibiting the Respondents, their employees, agents and/or any other persons acting for, on behalf and/or under their command from harassing, intimidating or in any manner whatsoever threatening the Petitioner and his family.
- c. Such other and/or further relief as this Honourable Court may deem fit to grant.
- d. An order that the costs of and occasioned by this Petition be borne by the 1st and 2nd Respondents.

Background facts and the Petitioners' case

2. The Petitioner's case may be gathered from the Petition as well as the Affidavits sworn in support of the Petition on **24th March, 2016**.

3. The petitioner contends that he sought to dispose off his wife's motor vehicle registration number KBK 449 C Toyota Rav4 Model. He approached a close friend one **SHAMINDER CHADHA** who knew of a prospective purchaser who then introduced the Petitioner to him and thereafter agreed to purchase the motor vehicle at KSH. 950,000/

4. The interested purchaser then informed the Petitioner in the presence of their mutual friend that he only had Kshs. 800,000 at that time and that he would later pay the balance of Kshs. 150,000 within a maximum period of 30 days which balance was never cleared despite incessant demands and pleas.

5. The Petitioner alleges that prior to the completion and due to the complainant's negligence the subject vehicle was stolen from his home and that the matter was later reported to the relevant authorities.
6. The Petitioner alleges that purchaser had failed to insure the subject motor vehicle in any manner as a result of which the Petitioner's wife whose insurance was still valid had to cover the subject motor vehicle while the balance was still outstanding and consequently the Purchaser was compensated.
7. The petitioner further alleges that the complainant then reported the Petitioner to CID Offices and illegally and irregularly used to harass and intimidate the Petitioner to fully refund the entire deposit paid to Petitioner despite the theft and loss of the same being occasioned by the alleged Complainant and/or Purchaser.
8. The Petitioner states that having been summoned by the Provincial Criminal Investigations Office he proceeded to the relevant offices accompanied by one Mr. Chadha where they discovered that the alleged complainant had fabricated a story and reduced the same into writing vide a statement.
9. The Petitioner further alleges that there are active attempts by and or on behalf of the Respondents to unlawfully apprehend him in a bid to intimidate the Petitioner and his family into unlawfully, illegally, wrongfully, illegitimately and unfairly refunding the sum of Kshs. 800,000/-
10. The petitioner further contends that the Respondents have violated his constitutional rights as follows:-
 - a. Violation of his inalienable right and fundamental freedom from torture, inhuman or degrading treatment guaranteed by Article 25(a) of the constitution.
 - b. Violation of his right to equal protection and benefit of the law as guaranteed by Article 27(1) & (2) of the constitution.
 - c. Violation of his inherent right to have his dignity respected and protected as guaranteed under Article 28 of the constitution.
 - d. Violation of his right to freedom and security under Article 29 (a) (d) & (f) of the Constitution.
 - e. Violation of his fundamental right to administrative action contrary to Article 47 (2) of the constitution.
 - f. Violation of his non-derogable right to fair trial under the Article 50 (1) of the Constitution.

Respondent's case

11. The Respondents' case as stated in the Replying Affidavit of ELVIS OCHARO on behalf of the County Directorate of Criminal Investigations Mombasa sworn on 9th June, 2016 is that the complainant in this case known as DEEPAK MARU approached the Petitioner to lease him a car for hire for a period of one month at an agreed cost of Kshs. 90,000/= and that later the Complainant was desirous of purchasing the car at an agreed price of Kshs. 950,000/= and as a result of which he made a down payment of Kshs. 800,000/=
12. The Respondents aver that the motor vehicle was unfortunately stolen and on 27th September, 2013, the Complainant reported the theft vide OB No. 5/27/9/2013 and that when the Petitioner was informed of the loss he went to GA Insurance and was compensated for the loss of the car at Kshs. 720,000/=
13. The Respondents aver that it is at this point that the Petitioner demanded for Kshs. 150,000/= being the balance for the purchase value of the motor vehicle insisting that the motor vehicle was stolen while in the custody of the Complainant. As a result of this the Complainant reported the matter to the Police at County DCI Headquarters and investigations commenced.
14. The Respondents further aver that the Office of the Director of Public Prosecutions is mandated under Article 157 of the Constitution of Kenya to institute and undertake criminal proceedings against any person before any court in respect to any offence alleged to have been committed and that the filing of this Petition is a move calculated to use the court to block the constitutional mandate of both police and the office of the Director of Public Prosecution to defeat Justice.

Submission

The Petitioner's Submissions

15. With the leave of court parties filed submissions which were highlighted orally in open court on 17th July 2018. **The Petitioner** was represented by **Mr. Ngaine** while **The Respondents** were represented by **Mr. Isaboke**.
16. **Mr. Ngaine** Counsel for the Petitioner Submitted that the Petitioner is falsely alleged to have obtained money under False Pretense on the basis that he would supply a motor vehicle, yet it is not disclosed the motor vehicle that was to be given and that the Respondent did not give the Petitioner a chance to give his side of the story.
17. **Mr. Isaboke** Counsel for the Respondent opposed the Petition. He submitted that the Prosecution had gathered evidence and that they would be ready to charge the Petitioner but the Petitioner rushed to court to stop the charges. He further prayed that the Petition be dismissed.

Analysis and Determination

18. I have considered this petition, supplementary affidavit, the response thereto, submissions by counsel for the parties and authorities relied on. The issues the court is called upon to decide are:-

- a. Whether this petition has met the threshold of constitutional petitions as provided in the case of **Anarita Karimi njeru vs. Republic (1976-1980)1 KLR 1972**.
- b. Whether the Petition offends the principle of Constitutional Avoidance.

Whether this petition has met the threshold of constitutional petitions:

19. The **Supreme Court** in the case of **Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others** [2014] eKLR stated that:-

“[349] Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Annarita Karimi Njeru v. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”

20. A Careful reading of the Petition shows it is premised under the provisions of Articles **25(a), 27, 28, 29, 47(1) and (2) and 50** of the Constitution. As much as the Petitioner has alleged a violation of those rights it should be borne in mind that the crux of the Petitioner’s case is based on an alleged contract for sale of motor vehicle. The overflow from that sale, if it amounts to criminal violations, cannot be couched as constitutional issues. They must remain either within the domain of contract law, and if there is suspicion of criminal culpability, the same must be determined in a Criminal Court. In **Republic versus Chief Magistrate Milimani & Another Ex-parte Tusker Mattresses Ltd & 3 others [2013]** the court held that:

“The court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the court which may eventually be called upon to determine the issues hence the court ought not to make determinations which may affect the investigations or the yet to be conducted trial. That this court has power to quash impugned warrants cannot be doubted. However, it is upon the ex parte applicant to satisfy the court that the discretion given to the police to investigate allegations of the commission of a criminal offence ought not be interfered with... The High Court ought not to interfere with the investigative powers conferred upon the police or the Director of Public Prosecutions unless cogent reasons are given for doing so.”

21. The DPP in the commencement of criminal proceedings shall not seek the consent of any person or authority. However, the DPP is mandated to 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. Did the DPP do these in this Petition?

22. In **Kuria & 3 others versus Attorney General [2002] 2 KLR 69** it was held:

“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-setting or vilification on issues not pertaining to that which the system was formed to perform...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives...”

23. It is the opinion of this court that the decision whether or not to institute criminal proceedings is made based on the evidence collected. Once the investigations establish reasonable suspicion that a person committed a crime, he ought to be charged in a court of law.

24. From the foregoing the Petitioner in my view has failed to demonstrate the basis of his grievance and the link between him and the Articles of the Constitution alleged to have been contravened and as a result his petition failed to meet the irreducible minimum expected for a Constitutional Petition.

25. The petitioner has failed to demonstrate how his alleged mistreatment amounted to violation of his inalienable right and freedom from torture, cruel, inhuman or degrading treatment guaranteed under Article Articles **25(a), 27, 28, 29, 47(1) and (2) and 50** of the Constitution.

26. In **Benard Murage v Fine Serve Africa Limited & 3 others** [2015] eKLR the Court stated that **“Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first;”**

27. The Court of Appeal in **Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 others [2017] eKLR...**

“The Appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High

Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High court by way of constitutional petitions. See **International Centre for Policy and Conflict & 4 others vs The Hon. Uhuru Kenyatta and others, Petition No. 552 of 2012**, and **Speaker of National Assembly vs Njenga Karume [2008] 1KLR 425.**”

28. The High Court in **International Centre for Policy and Conflict and 5 others –vs- The Hon. Attorney-General & 4 others [2013] eKLR** observed as follows:

“[109] An important tenet of the concept of the rule of law is that this Court before exercising its jurisdiction under Article 165 of the Constitution in general, must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or State organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act.”

29. In the circumstances, this court finds that it ought not to entertain the current action brought by way of a petition. The Criminal Process must run its full course and this court will interfere only when the process is abused by the DPP.

30. This petition is dismissed with costs.

Dated, Signed and Delivered in Mombasa this 2nd day of April, 2019.

E. OGOLA

JUDGE

In the presence of:

Mr. Isaboke for DPP

Mr. Ngaine for Petitioner

Mr. Kaunda Court Assistant