REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CONSTITUTIONAL/CRIMINAL PETITION NO 223 OF 2018

IN THE MATTER OF ARTICLES 159 AND 23 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF THE PETITIONER'S FUNDAMENTAL RIGHT TO A FAIR TRIAL UNDER ARTICLE 50 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010

DENNIS NJUGUNA GATHOGO.....PETITIONER.

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT.

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT.

JUDGMENT.

1. Dennis Njuguna Gathogo, hereafter the Petitioner, brought the present Petition seeking the following reliefs;

> **i. A declaration that the manner in which the trial in Makadara SPM Court Criminal Case No. 1810 of 2017 is being conducted by Honourable W. Oketch, SRM raises a reasonable apprehension of bias and infringement of the Petitioner's rights to a fair trial as envisaged by Article 50 of the Constitution of the Republic of Kenya.**
>
> **ii. A declaration that the said proceedings amount to a mistrial.**
>
> **iii. An order of prohibition directed to the Director of Public Prosecutions and or the said court to seize further proceedings in the case.**
>
> **iv. In the alternative, if the case was to proceed, that the trial be conducted by a different trial magistrate.**

2. The Petitioner sought the reliefs in question on the basis of the fact that his right to a fair trial as envisioned under Article 50 of the Constitution had been violated severally throughout the course of the proceedings in Makadara Chief Magistrate's Criminal Case No. 1810 of 2017. The first violation articulated was that the Petitioner was charged before the court on 28th August, 2017 after his police bond was cancelled the day before and he was confined in Embakasi Police Cells for an extra day. Secondly, that after he took plea on 28th August the matter was set for hearing on 11th September, 2017 at which hearing his advocates sought witness statements which were provided to his advocates in the afternoon before the matter being mentioned at 3:00pm. That during the mention in question his advocates sought for an adjournment as the Petitioner was not feeling well and they needed to study the documents in question but the trial magistrate was acrimonious in the application and accused them of dishonesty before granting an adjournment. The adjournment was marked as the last despite the fact that the Petitioner had never requested one before this date. It was further alluded that during the proceedings of 11th September, 2017 the trial magistrate further violated his right to a fair trial by allowing an advocate appearing for the complainant to participate and team up with the prosecution.

3. The Petitioner also pointed to the proceedings of the first date the matter came up for hearing. It was submitted that when the prosecution tried to rely on photographic evidence the Petitioner objected, an objection that was upheld by the trial court, before later in the proceedings, the court, *suo moto*, re-opened the issue and directed the Petitioner to file submissions on the production of the same.

4. According to the Petitioner, after the court reopened the issue, submissions and legal authorities were filed. That, unfortunately the court

entertained extraneous matters in arriving at a decision that the photographic evidence should be admitted in evidence.

5. Another source of dissatisfaction arises from the submission that after the court ruled that the photographic evidence be adduced, the Petitioner applied to the court to stay the proceedings pending the filing of the instant Petition. Again, the learned trial magistrate declined to grant the request, which according to the Petitioner amounted to a further violation of his right to a fair trial. In fact, the Petitioner submitted before the learned magistrate that he wanted to challenge that constitutionality of the order made therein.

6. Finally, the Petitioner argued that a look at the trial court proceedings attested to the fact that most arguments made by his advocate were not being recorded. An instance was cited when the Petitioner's counsel submitted that whilst he would abide by the court's order to proceed with the trial, the same did not waive the Petitioner's right to challenge the ruling in a constitutional court.

7. The Petition was supported by an affidavit sworn by the Petitioner in which he set out the background of the matter, namely; that the matter had its crux in Makadara Chief Magistrate's Criminal Case No. 1810 of 2017 whose genesis was an altercation that occurred at one Roxy Club, Utawala which led to the charge of grievous harm being filed against him. He then went ahead to reiterate the issues that were set out in the petition as analyzed above.

8. Only the 1st Respondent entered appearance, and rightfully so, because the Hon. Attorney General is rarely a participant in criminal proceedings. The 2nd Respondent relied on Grounds of Opposition dated and filed on 16th October, 2018. They are;

a) That the application is based on the fallacy that the victim's role is passive.

b) That the Applicant has failed to recognize the fact that the court is not bound by the opinion of the State Counsel.

c) That the application is ill thought-out as there is no error in the proceedings.

d) The application is bad in law and the same should be dismissed for being a misuse of the court process as the applicant has not made the same application before the trial court.

Submissions.

9. The Petitioner relied on written submissions filed on 7th November, 2018. That application was canvassed on 5th March, 2019 with Ms. Munyingi holding brief for Mr. Mbigi while Ms. Atina acted for the State. Ms. Munyinyi relied on the written submissions. Ms. Atina in support of the Grounds of Opposition submitted that after the Petitioner took plea on 28th August, 2017 an was order made that a copy of the charge sheet and all the statements be provided to the Petitioner upon payment. The court also ordered for a mention on 11th September, 2017. She pointed out that on the mention date the Petitioner did not indicate that she had not received the documents and the hearing date was set for 2nd November, 2017. That on this hearing date the prosecution was ready to proceed but counsel holding brief for the Petitioner requested for the statement and that the file be placed aside. No adjournment was requested for then. That when the matter came up later the same day, at 3.00 pm, the Petitioner's advocate sought an adjournment on the grounds that he was yet to interrogate the documents in question and because the Petitioner had a running stomach. The application was opposed by the prosecution as the Petitioner had sufficient time to access the documents.

10. The court observed that the defence was not being honest as it had been given sufficient time to obtain the statements. Nevertheless, the court granted an adjournment. She submitted that from the analysis attested by the foregoing events the court was not biased and that the last adjournment granted to the Petitioner was based on the circumstances of the case.

11. With regards to the submission that the complainant's advocate was allowed to team up with the prosecutor she referred the court to Section 9(2)(3) of the Victims Protection Act which she submitted allowed the victim to participate in proceedings where his rights are affected. Further, that this right is non-derogable.

12. Pertaining to the production of photographic evidence, she submitted that the court was fair in asking the parties to make submissions on it, thereby upholding their right to be heard before making a finding on the issue.

13. With regards to the court's decision not to stay the proceedings, Miss Atina argued that the Petitioner's right to a fair trial was not violated because the Petitioner was granted the right to appeal. She argued that the trial magistrate rightly declined to stay his own proceedings unless with an order by the High Court. She submitted that the trial court could not stay its own proceedings and there was therefore no bias exhibited in refusing to do so.

14. With regards to the Petitioner's request that the trial be declared a mistrial, she submitted that this would only be occasioned by an error in the proceedings and none existed in the present case.

15. On the application for the recusal of the trial magistrate, she submitted that the Petitioner should first make the application before the trial court before approaching this court in case he is dissatisfied with that court's decision. She submitted that the application in question was an abuse of the process of the court and urged the court to protect itself from abuse.

16. On the prayer seeking the prohibition of further proceedings before the trial court she submitted that this could only be done in rare cases where the trial amounts to an abuse of the process of the court. That since no abuse of the process had been demonstrated she urged the court to not allow the prayer. She concluded by urging the court to dismiss this Petition as it lacked merit.

17. Ms. Minyingi, in reply, submitted that the Petitioner appointed counsel when the matter first came up for hearing. Further, that on the date that Petitioner sought an adjournment, the counsel holding brief for the Petitioner's counsel did not indicate that the latter advocate would proceed. She added that the statements were never availed to the Petitioner when he was charged and counsel could therefore not proceed on the same day that they were served with the documents.

18. With regards to production of photographic evidence, she submitted that Section 78 of the Evidence Act provides that only a police officer can produce photographs. That his certificate must demonstrate how and when he was appointed. She submitted that the Petitioner had also indicated that a lot of proceedings arising from his submissions had not been recorded as pointed to in the written submissions. She urged the court to allow the application.

Analysis and determination:

19. I have duly considering the respective rival submissions by the parties after which I have isolated the following issues for determination:

i. Whether the Petitioner's right to a fair trial was violated.

ii. Whether a recusal of the trial magistrate should be ordered.

(i)*Whether the Petitioner's right to a fair trial was violated:*

20. The Petitioner raised several issues touching on the infringement of his non-derogable right to a fair trial. In so determining, I will be guided by the wise words of Lord Steyn in **Regina *v.* A[2001] UKHL; [2001] 3 All ER 1**. He said as follows;

> ***"It is well established that the guarantee of a fair trial… is absolute: a conviction obtained in breach of it cannot stand… The only balancing permitted is in respect of what the concept of a fair trial entails: here account may be taken of the familiar triangulation of the interests of the accused, the victim and society."***

21. From the above decision, it is clear that while the right to a fair trial is absolute and non-derogable, see: Article 25 of the Constitution, a consideration of what it entails must of necessity involve a balancing act between the achievement of the right by the accused, the victim and society. In undertaking this balancing act, the court must seek guidance in Article 159(2) which sets out guiding principles of exercise of judicial authority. It provides as follows;

> (2) ***In exercising judicial authority, the courts and tribunals shall be guided by the following principles-***
>
> ***(a) Justice shall be done to all, irrespective of status:***
>
> ***(b) Justice shall not be delayed:***
>
> ***(c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause(3):***
>
> ***(d) Justice shall be administered without undue regard to procedural technicalities: and***
>
> ***(e) The purpose and principles of this Constitution shall be protected and promoted.***

22. The allegations of unfairness alluded to by the Petitioner can be divided into three distinct portions, namely; (a) issues relating to his arrest, (b) issues arising from the proceedings of 22nd November, 2017, and (c) issues arising from the hearing on 11th December, 2017. The court shall tackle them in that distinct order.

(a)Petitioner's Arrest:

23. The Petitioner alleges that he was charged on 28th August, 2017 after his police bond was cancelled the day before he was arraigned in court and was confined at Kayole Police cells for an extra day. This allegation was not clearly articulated but it appears that the Petitioner was alleging that his right under **Article 49(1)(f) of the Constitution**, to be brought to court as soon as reasonably possible, had been violated.

24. A perusal of the charge sheet indicates that the incident occurred on 19th August, 2017 whereas the Petitioner's arrest was executed on 27th August, 2017 pursuant to Occurrence Book entry 40/27/8/2017. It is therefore clear that the Petitioner was availed in court within the requisite 24 hours set out in Article 49(1)(f).

25. The court also understands him to be alleging that he had initially been arrested and placed in custody before being released on police bail before the subsequent arrest, thus, the submission that this constituted another day in the cells. This would imply that he had spent two days in custody between the incident and his arraignment. However, the days were spent in custody on two difference intervals as opposed to a continuous confinement. That is to say that he was not kept continuously in custody for a period longer than is provided in contravention of Article 49(1)(f) of the Constitution. As such, his right was not infringed. I dismiss this allegation as baseless.

(b)Proceedings of 22nd November, 2017:

26. When the Petitioner took plea on 28th August, 2017 a hearing date was set for 22nd November, 2017 with a mention on 11th September, 2017. When the matter came up for hearing on 22nd November, 2017 the prosecution indicated they were ready with two witnesses available. Mr. Mwaura holding brief for Mr. Mbigi requested for witness statements and also prayed for the file to be set aside as Mr. Mbigi was making his way to court. The matter proceeded later that day, at 3 o'clock when Mr. Mbigi was present. He made an application for adjournment which was opposed by the prosecution and the complainant's lawyer. The court made an observation, *inter alia,* that a mention date had been granted for the Petitioner to confirm his readiness to proceed. Further, that the court reserved the discretion to grant or decline an adjournment and that the grounds on which the application was based had historically been used to delay cases. That the advocate who addressed the court earlier that day should have informed the court of the accused person's predicament and avoided the detention of witnesses in court for such long hours. The learned magistrate concluded by stating that the application therefore appeared dishonest or a deliberate attempt to mislead the court. He however granted the adjournment with the added caveat that the same had been marked as the last. I shall revert to this issue later on in the judgment.

27. The Petitioner also contends that the trial magistrate violated his right to a fair trial by allowing the complainant's advocate to take part in the trial. The same was rebutted by Ms. Atina who pointed to the provisions of the Victims Protection Act.

28. It is trite that a victim's participation in the trial process is allowed pursuant to the provisions of Article 50(9) which were crystallized under the Victims Protection Act, 2014 particularly Sections 9 and 13. They set out a victim's rights and scope of participation at the trial. The record of proceedings clearly attests to the fact that the complainant basically participated in the proceedings within the confine of the law. The objection therefore by counsel for the Petitioner that he ought not to have participated or worked in cohort with the prosecution to defeat justice is unmerited and unwarranted. No prejudice was occasioned to the Petitioner by the participation of the complainant's advocate. This ground of the Petition hence fails.

29. Reverting to the court's order of last adjournmen, it is clear that when the Petitioner took plea on 28th August, 2017 an order was made for the supply of the witness statements and all other documents incidental to his defence. This was to be at his cost. It appears that he did not procure the documents. When the matter came up for mention 11th September, 2017 he did not indicate that he was unable to obtain the statements and the hearing date of 22nd November was affirmed.

30. It is clear that the Petitioner had severally been availed opportunities to obtain the documents. The failure to do so was clear indolence on his part which applied to his detriment.

31. However, the matter took a new twist as his advocate who appeared on 22nd November submitted that he was not adequately prepared. The right to legal representation is a key component of the right to a fair trial. Given the late application for statements, the Petitioner made out a case that his advocate was not adequately prepared to mount a defence for him.

32. However, if that were the case it would have behooved the Petitioner's advocate, through counsel holding brief, to inform the court of the inability to set out a defence. Instead, counsel holding brief for Mr. Mbigi requested the court to set the file aside as the matter would proceed later. This created an inherent implication that the matter would proceed to hearing later that day contrary to Ms. Munyingi's submission that there was no indication that the matter would proceed.

33. Viewed in this light, the trial magistrate's observation that the application appeared to be dishonest and a deliberate misleading of the court is clearly tenable. This is more so, when particularly one observes that in reaching this conclusion the trial court indicated that historically, applications of this nature had been used to delay cases. There is no doubt therefore, that the court's observations were reasonable in the circumstances and that there was no bias exhibited by the learned trial magistrate in issuing an order of last adjournment. It was intended in good faith so as to ensure that there would be no further delay in the trial. It is my view that, moving forward, both the court and the parties in the case will create a platform for understanding each other with a view to easing the delivery of justice in the case.

(c) Proceedings of 11th December, 2017:

34. When the matter finally came up for hearing on 11th December, 2017 the prosecution indicated that there were three witnesses present and the evidence of PW1 and PW2 was recorded. The Petitioner points to the reliance of photographic evidence at the trial by PW1, the complainant, as being prejudicial to his right to a fair trial as the same were not produced in accordance with the rules of evidence as stipulated in Section 78 of the Evidence Act.

35. During the taking of PW1's evidence, the prosecution tried to adduce photographs that were taken during the complainant's admission to hospital but the Petitioner's counsel objected. The court directed that the photographs were not a necessary piece of evidence as proof of treatment of PW1 and may be disregarded in the end. The hearing proceeded to cross examination and then re-examination after which the prosecution applied to have the witness stood down so that he could produce a shirt he was wearing on the date of the incident. This application was opposed by the Petitioner's advocate citing that they were not informed of this during discovery and that the proposed exhibits lacked probative value.

36. The court directed that the defence should file written submissions on the issues of production of the photographs on the one hand and standing down of PW1 for purposes of production of the clothing items on the other. A ruling was delivered on 7th March, 2018 in which it directed that; (i**) the objection in the marking of the documents was premature since the production stage was yet to be reached, and (ii) the said photographs be marked for identification as prosecution will have the burden to avail the accompanying certificate.**

37. The Petitioner questioned the trial magistrate's reopening of the issue of submission of the photographs of its own motion. He also questioned the correctness of its finding that the photographs could be produced by a person other than an authorized officer, namely; scenes of crime officer as provided by Section 78 of the Evidence Act. It was further alluded that the trial magistrate violated the Petitioner's right to a fair trial by refusing the stay the proceedings following his application upon delivery of the ruling. It was his view that the trial had already

been determined.

38. It is clear that the learned trial magistrate initially directed that the photographs would not be admitted. This related to partial proceedings when the issue of adducing evidence related to the treatment of the complainant was ongoing. The court ruled that;

> ***"Direction: Photographs disregarded for treatment."***

39. A look at the above direction leads me to conclude that it would be incredulous to conclude that the court had made a finding that photographs were inadmissible pursuant to the Petitioner's submissions. All the same, even if this were to be assumed was the implication of the direction of the court, the same cannot be subjected to a revision pursuant to Section 362 of the Criminal Procedure Code. I say so because it could only arise out of a mistake by the court in making a finding as opposed to the court being biased or deliberately violating the Petitioner's right to a fair trial.

40. I also find nothing wrong with subjecting the arguments on the objection to the production of the photographic evidence to submissions. This is a normal procedure adopted by courts throughout; and again, if the Petitioner felt that it was an incorrect procedure, he was at liberty to file a revision application. My view though is that there was nothing incorrect or irregular in the direction adopted. I do accordingly find and hold that this direction did not in any way violate the Petitioner's right to a fair trial.

41. With regards to the content of the ruling, I once again hold that it cannot be determined within this Petition. A wrong decision should be challenged through other avenues. I agree the objection was made based on the relevant law but as to whether the ruling was right or wrong is not a matter for determination in a Petition of this nature. All that I can state that there is nothing on record to demonstrate that the learned trial magistrate arrived at the finding with a view to violating the Petitioner's right to a fair trial. The ruling itself did not also violate the Petitioner's right to a fair trial.

42. Further, and without prejudice to the foregoing, I note that Section 78 of the Evidence Act has been amended to provide for this new technological dispensation with the addition of Section 78A which relates to admissibility of electronic and digital evidence which may include photographs taken in this manner. It is also trite that photographs are documents for purposes of the Evidence Act and the processes that relate to the production of primary and secondary documents, as set out in Part III, are therefore applicable as read with the provisions of Section 106B where they are electronic in nature. That being the case, I find that the conclusions of the trial magistrate were correct in so far as they were instructed by the provisions of Article 159 of the Constitution.

43. In light of the foregoing I find that the Petitioner's right to a fair trial was not violated.

(ii) <u>Whether a recusal of the trial magistrate should be ordered</u>:

44. The Petitioner urged the court that in case it did not grant the other reliefs sought, to order that the matter be tried by a different trial magistrate. I underscore the observation made in **Locabail(UK) Ltd. *v.* Bayfield Properties Ltd. & Anor [1999] EWCA Civ 3004; [2000] 1 All ER 64,** that:

> ***"The mere fact that a judge, earlier in the same or a previous case, had commented adversely on a party or a witness, or found the evidence of a part to be unreliable, would not without more found a suitable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every case must be decided on the facts and circumstances of the individual case."***

45. In the present case, the only statement made in the proceedings that may be viewed as adverse against the Petitioner was when he was applying for an adjournment. I already highlighted earlier on in this judgment the background to this issue. I have already ruled that the trial magistrate's sentiments were reasonable based on the circumstances of the case prevailing at the time. The sentiments were not biased against the Petitioner and would therefore not warrant a recusal of the magistrate from the trial. The Petitioner is nevertheless at liberty to make such an application before the trial court.

46. In the foregoing, it is the view of this court that the Petition herein is unmeritorious. I decline to grant the reliefs sought. The Petition is accordingly dismissed with each party to bear its own costs. I order that the trial file in **Makadara Chief Magistrate's Criminal Case 1810 of 2017** be returned to the trial court for directions on the hearing. Mention for this purpose on 11th April, 21019. It is so ordered.

DATED and DELIVERED this 2nd day of April, 2019

G.W. NGENYE-MACHARIA

<u>JUDGE</u>

<u>In the presence of;</u>

1. Kimani h/b Mbigi Njuguna for the Petitioner.

2. Mr. Momanyi . For the 1st Respondent.