



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 23 OF 2018

IN THE MATTER OF: ARTICLES 22, 23, 27, 47, 48, 50(1), (2), 165 AND 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27(1), (2), 47, 48 AND 50(1), (2) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: SECTION 347 AND 348A OF THE CRIMINAL PROCEDURE CODE CAP 75 OF LAWS OF KENYA

BETWEEN

MAUR ABDALLA BWANAMAKA.....PETITIONER

AND

1. DIRECTOR OF PUBLIC PROSECUTIONS

2. HON. ATTORNEY GENERAL.....RESPONDENTS

JUDGMENT

The Petition

1. The petition before the court is dated 8th March, 2018 and filed herein on 8th March, 2018. The Petitioner states that he was charged together with 11 other accused persons on the 22nd day of August 2014 in **Criminal Case Number 1255 of 2014** before the Chief Magistrate's Court at Mombasa with the offence of Trafficking Narcotic Drugs contrary to Section 4 (a) of the Narcotic Drugs and Psychotropic Substances Control Act, 1994. The issue of jurisdiction was raised and the Trial Magistrate in delivering his ruling stated that many disputed facts relating to the matter of Kenya's territorial jurisdiction had been raised and he was of the view that it be considered at a later stage. The Learned Trial Magistrate thereafter assumed jurisdiction and ruled that the Prosecution had made out a *prima facie* case to require the Petitioner and 9 accused persons to be put on their defense and acquitted the other two on a no case to answer finding. The Petitioner referred the court to the Right of Appeal in criminal matters which is provided for under the Criminal Procedure Code Cap 75 Laws of Kenya and the Constitution of Kenya. Section 347 of the Criminal Procedure Code grants an accused person the right to appeal only on a conviction or a sentence, whereas Section 348A grants the appellate rights to the Director of Public Prosecutions if an accused person has been acquitted on a no case to answer Ruling. The Petitioner states that this is discriminatory. The Petitioner would like to appeal the aforementioned decision. However there is no provision in the law that grants an accused person the right to appeal on a Ruling made by a Subordinate Court. The Petitioner avers that this is contrary to the provisions of the Constitution and a threat to the rights and fundamental freedoms of an accused person's in the Bill of Rights. The Petitioner avers that in accordance with the current procedure, the Petitioner herein has to be subjected to the whole defense hearing, wait for the Judgment to be delivered to be able to appeal, whereas a Prosecutor has the right to appeal on a no case to answer ruling entered against an accused person. This is contrary to Article 27 of the Constitution which provides for equality before the law. Every person including an accused person has a right to equal protection and equal benefit of the law. The lack of the right to appeal on an interim ruling herein is therefore prejudicial and unfair to the Petitioner and a waste of the court's time which is contrary to Article 50 of the Constitution. The Petitioner avers that an accused person is entitled to fairness and the court is the custodian of the law. It ought to ensure that these constitutional safeguards are jealously protected and upheld at all times. The Petitioner states that his right to a fair trial is grossly violated as the Petitioner will be subjected to a long, un-procedural and unconstitutional trial that

undermines sound criminal justice system before the Trial Magistrate can rule on jurisdiction and deliver the Court's Judgment.

2. The Petitioner therefore prays for the following orders:

(a) An order of declaration that this Petition be certified as urgent.

(b) An order of declaration that this Honourable Court grants stay of the Ruling delivered on 23rd November 2017, proceedings in the **Criminal Case Number 1255 of 2014** before the Chief Magistrates Court at Mombasa pending the hearing and determination of this Petition and consequential orders given therein pending the hearing and determination of this Petition.

(c) an order of declaration that SECTIONS 347 AND 348A of the Criminal Procedure Code are unconstitutional and discriminatory, is inconsistent with Article 50 of the Constitution of Kenya to the extent that it does not provide for the right of appeal by an accused person on an interim ruling.

(d) An order of declaration that the continued enforcement of Sections 347 and 348A by the first Respondent against the Petitioner is unconstitutional.

(e) An order of declaration that each party to bear its own cost in this petition brought partly in the public interest and in view of the subject matter.

(f) Any further order or relief that this Honourable Court may deem fit to grant.

3. The petition is supported by affidavit sworn by the Petitioner on a date which is not stated but filed herein on 9th March, 2018.

The Response

4. The petition is opposed by both Respondents. The 1st Respondent filed a Preliminary Objection on 16th March, 2018, stating that the petition is an abuse of process, calculated to delay the expeditious disposal of the criminal matter before the trial court, since the Petitioner's co-accused's have filed a Revision which is partly heard, raising the same issues of law that the Petitioner intends to canvass on Appeal; that the Petitioner is guilty of material non-disclosure of the fact that he has already filed an appeal, that is Criminal Appeal No. 210 of 2017, which is still live before the High Court thus this petition is meant to breathe life into a dead appeal; that the Petitioner is actively participating in the Revision matter mentioned above, that is Criminal Revision No. 5 of 2018 and therefore by filing this petition, he is mischievously bent on convoluting matters that are otherwise simple and direct; that the Petitioner has embarked on an academic misadventure to test the law since he continues enjoying his freedom yet his co-accuseds are in custody and any further delay in the conclusion of the criminal matter can only subject his co-accuseds to further agony which this court must prevent from happening by refusing to accede to any request for stay of proceedings and that this petition is a direct answer to the submissions filed by counsel for the Direction of Public Prosecutions in the Revision matter and is therefore brought in bad faith with the sole intention of scuttling the Revision.

5. The 2nd Respondent filed Grounds of Opposition to the petition on 3rd May, 2018, stating that the petition is misconceived, frivolous, vexatious and an abuse of the process of the court; that the effect of orders sought by the petitioner to quash the conviction and to set it aside would amount to upsetting the hierarchy of the courts as the petitioner was properly tried, convicted and sentenced; that his respective appeal to the highest court in the land was considered and dismissed; that the Petition does not entail Constitutional issues for consideration by this Court; that the Petitioner is trying to frustrate the ends of Justice by filing this Petition; that the Petitioner has circumnavigated, failed to appreciate and overlooks **Article 119(1)** of the Constitution of Kenya by filing this Petition; that the Petition is a waste of this Court's time; that if the orders sought in the Petition are not granted the Petitioner will not suffer any prejudice as he has other direct avenues to address his grievances; and that it is in the interest of Justice that this Petition be dismissed with costs to the respondents.

Submissions

6. With the leave of court parties filed submissions which I have considered

The Preliminary Objection

7. Since the 1st Respondent filed a Preliminary Objection to the petition it is prudent that the Preliminary Objection be considered first because if it succeeds then it will terminate these proceedings. The 1st Respondent states that the Petitioner is guilty of material non-disclosure of the fact that he has already filed an Appeal against the aforesaid criminal process being **Criminal Appeal No. 210 of 2017**, which is still active before the High Court thus this petition is meant to breathe life into the dead Appeal. The 1st Respondent also submitted that the Petitioner also filed a Revision in the High Court being **Criminal Revision No.5 of 2018** and therefore the filing of the petition is mischievous and bent on convoluting matters that are otherwise simple and direct.

8. The Petitioner has not refuted these allegations. As a matter of fact, the Petitioner in his submissions filed herein on 9th April, 2018 enclosed Petition of Appeal filed herein on 7th December, 2017 where it raises the same issues, and seeks to have the Trial Magistrate's Ruling dated 23rd November, 2017 set aside and Appellant be acquitted.

9. Further, the 1st Respondent enclosed an order in **Criminal Revision No. 5 of 2018** where the court ordered that the proceedings before the trial court be kept in abeyance pending the determination of the said Criminal Revision. Therefore, it is true to say that the Petitioner is actively seeking remedy in three different courts, and this could amount to an abuse of the process of the court.

10. The distinction, however, is that in the petition the Petitioner is also seeking constitutional interpretation of Sections 347 and 348A of Criminal Procedure Code, and a declaration that the said Sections be declared unconstitutional. On the basis of those prayers in the petition, it is the finding of this court that the Preliminary Objection lacks merit and is dismissed.

11. Now, back to the substantive petition, the issue for determination is whether or not the Sections 347 and 348A of the Criminal Procedure Code should be rendered unconstitutional.

12. I have carefully considered submissions of the parties and carefully noted the cited authorities. Mr. Oluga for the Petitioner submitted that **Article 23(3) of the Constitution** sets out the reliefs that may be granted by the court when exercising its jurisdiction in considering a petition where a person is claiming that a fundamental freedom in the Bill of Rights has been denied, violated or infringed or is being threatened. These reliefs include a declaration of invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the Bill of Rights. This Petition seeks Sections 347 and 348A of the Criminal Procedure Code be declared unconstitutional as they violate the Petitioner's right to a fair trial. The right of an accused person to appeal on an interim order is not provided for. The criminal justice administration system in Kenya places the right to a fair trial at a much higher pedestal. The Petitioner submitted that the Court is the custodian of the law and is expected to play a balanced role in the trial of an accused person. It ought to ensure that these constitutional safe guards are jealously protected and upheld at all times. The Petitioner and by extension any other accused person stands to unjustly suffer gross and immense prejudice in terms of time, unwarranted anxiety and extra legal costs in defending a matter which he ought not to. It was submitted for the Petitioner that a reading of the statutory provisions create the impression that any accused person in a similar situation is condemned to be subjected to the whole defense hearing, wait for the Judgment to be delivered to be able to appeal. It was submitted that this is profoundly prejudicial to any accused, is unwarranted, is a gross violation of an accused's right to fair trial and Article 159(2) (b) of the Constitution which provides that justice shall not be delayed. A criminal trial should be judicious, fair, transparent and expeditious but must ensure compliance with the basic rule of law. The Petitioner submitted that the Right to a Fair Trial is one of the cornerstones of a just society, citing **Joseph Ndungu Kagiri vs. Republic (supra)** where Mativo J adopted The Supreme Court of India three Judge Bench Ruling in **Rattiram vs. State of M.P** that:-

“Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracize injustice, prejudice, dishonesty and favoritism. ”And again:-“Decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused.....”

13. The Petitioner also relied on **Republic vs. Mark Lloyd Steveson [2016] eKLR** where Justice Joel Ngugi held that:

“It is important to state the trite position that the High Court will usually exercise its power to review or even exercise an appeal over an interlocutory matter before a magistrate's court only in exceptional circumstances. While difficult to determine with mathematical precision when the court will use this power, it is only be sparingly used where, in the words of South African authors, Gardiner and Lansdown (6th Ed. Vol. 1 p. 750), “grave injustice might otherwise result or where justice might not by other means be attained.” As the authors correctly write, the Court will generally “hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below.” (Walhaus & Others v Additional Magistrate, Johannesburg & Another, 1959 (3) SA 113(A) at 120D; S. v Western Areas Ltd & Others 2005 (5) SA 214 (SCA) at 224D.

14. The Petitioner's view then is that subjecting the Petitioner to the whole trial process then after conviction being allowed to appeal is the epitome of grave injustice. The remedy of Revision though provided for should not be the only remedy. The right to a fair trial as enshrined should not be interpreted to prejudice the Petitioner.

15. The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms. It is guaranteed under **Article 14 of the International Covenant on Civil and Political Rights (ICCPR)**. The fundamental importance of this right is illustrated not only by the extensive body of interpretation it has generated worldwide but, by the fact that under Article 25 (c) of our Constitution, it is among the fundamental rights and freedoms that may not be limited. Further, fairness should be accorded to both parties. Prosecutors have been granted the right to appeal on a No case to Answer Order under Section 348 A of the Criminal Procedure Code being an amended Section whereas the accused person has not been accorded the same right. The Petitioner suggests that this is discriminative. But is it really discriminative?

16. The Respondent says no, submitting that in every statute, there is the doctrine of presumption of constitutionality on interpretation of statutes, and that the Sections sought to be declared unconstitutional have withstood test of time. Mr. Jami counsel for the 1st Respondent submitted that this Court should, in addition to considering the said presumption of constitutionality, consider also a purposive interpretation of the constitution and the reasonableness of those statutes.

17. In my view the petition seeks to invalidate a statutory provision that basically limits interlocutory appeals. In the strict sense, the constitutional invalidity that the petitioner advances extends to that restriction on interlocutory appeal at the stage of a case to answer in criminal trials. It should be noted therefore, from the onset the petitioner seeks to strike down Sections 347 and 348A of the Criminal Procedure Code purely on that account while at the same time acknowledging that the same Section creates an avenue for appeals to higher Courts upon final determination of a criminal matter. The power of this Court that is being invoked is hinged on advancement on the right to fair trial envisaged in Article 50 of the Constitution. In statutory interpretation the general rule is that the statute in question is constitutional. The doctrine of presumption of constitutionality posits that the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. See **O'GORMAN & YOUNG V HARDTORD FIRE INSURANCE 282 U.S 251(1931)**. It is therefore, incumbent upon the petitioner to lay some solid factual foundation to justify the grant of the orders he seeks from this Court. For instance, he does not demonstrate the prejudice that he is likely to suffer in a criminal trial by denial of right to prefer an interlocutory appeal to the High Court upon being placed on his Defence. In **THOMAS PATRICK GILBERT CHOMOLMONDELY VS. REPUBLIC [2008] eKLR** the Court of Appeal dealt with the issues of interlocutory appeal and held, **“in ordinary criminal trials, there are generally no interlocutory appeal allowed, for Section 379(1) of the Criminal Procedure Code allows only appeals by**

persons who have been convicted of some offence. The appellant has not been convicted of any offence. As far as we understand the position the basis of an appeal cannot be that an order made in the course of trial is highly prejudicial to an accused person: Muya J ruled that the appellant had a case to answer and even if that order would be seen as being prejudicial that alone would not have entitled the appellant to appeal.” Secondly, the petitioner has not demonstrated how the right to fair trial would be compromised if an accused person is not allowed to challenge the decision to place him on his defence. The act of placing an accused person on his defence amounts to offering him an opportunity to present his case before a decision by the court is reached on whether or not he is guilty of the offence charged. Simply placing an accused person on his defence advances the right to a fair trial as opposed to limiting the same. It is indeed in tandem with the rules of natural justice and in particular of “*Audi alteram partem*.” Courts in our governance system act as a check against exercise of legislative arm of government and in doing so the doctrine of separation of powers requires that courts intervention should be in the clearest of cases to avoid unnecessary interference with the legislative function of parliament.

18. This position is espoused further by the Supreme Court of the United States in the case of **US VS. BUTLER, 297 US 1 (1936)** where the court held:

“The judicial branch of the government has only one duty: to lay the article of the constitution which is invoked beside the statute which is challenges and to decide whether the latter squares with the former .All the court does, or can do is to announce its considered Judgment upon the question. The only power it has, if such it may be called, is the power of Judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislative is in accordance with, or in contravention of, the provision of the constitution: and having done that, its duty ends.”

19. Apart from the presumption of constitutionality of statute, a constitutional court seized with a matter touching on validity of a statute or any of its sections should also address its mind to the question of the purpose for which the statute or impugned section was enacted. The section being challenged by the Petitioner was intended to set out instances when an appeal can be preferred by any party. Notably, the challenge here is that the right of appeal is not broad enough to allow persons who have been placed on their defence to challenge such decision by way of appeal. In essence, the legislature is being faulted, for narrowing the right of appeal. In determining the constitutionality of the provision, the court is to be guided by the holding of the constitutional court of Uganda in **OLUMUM & amp; ANOTHER VS. ATTORNEY GENERAL (2002)2 EA**. Where the court held:

“to determine the constitutionality of a section of a statute or Act of Parliament, the court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the constitution, the court has to go further and examine the effects of the implementation. If either its purpose or the effects of its implementation infringes a right guaranteed by the constitution, the impugned statute or section thereof shall be declared unconstitutional.”

20. In the view of this Court the Section does not violate the right to a fair trial since the aggrieved party is at liberty to appeal at the conclusion of the matter. The purpose and object of the statute should guide the court throughout since the impact and desired effect of a statutory provision go into the root of constitutionality, See **GEOFFREY ANDARE VS. ATTORNEY GENERAL & 2 OTHERS [2016] eKLR**. The Constitutional court in **KATIBA INSTITUTE & ANOTHER VS. ATTORNEY GENERAL & ANOTHER [2017]**. Citing with approval the case of **Hambardda Wakhana vs. Union of India Air [1960] AIR 554** held:

“since the issue before us is the constitutionality of legislation, it is importance to reiterate the applicable principles....In examining the constitutionality of a statute it must be assumed the legislature understands and appreciates the needs of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted.”

21. The other factor for the Court to consider is that of reasonableness of the provision challenged. In the view of this Court, discouraging interlocutory appeals in criminal matters is a positive step towards ensuring strict compliance with the provision of Article 50 of the constitution of Kenya, 2010 which requires that criminal trials open and conclude without unreasonable delay. The test of reasonableness was considered in the Tanzania Court of Appeal in **NDYANABO VS. ATTORNEY GENERAL [2002]AHRLR 243(TZCA 2002)**. The court in considering the matter found guidance in Supreme Court Of India in **State of Madras vs. VG Row [1952] SCR 597** where **Patanjali Sastri CJ, said at Page 607:**

“The test of reasonableness....should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion, of the prevailing conditions at the time, should all enter into the judicial verdict.”

The Court went further and stated:-

“[38]. We also find very useful the following passage from the judgment of Barnett J in Harvest Sheen Ltd case(supra) at 13:

[T]he court must be satisfied, firstly, that the limitation applied do not restrict or reduce the access (to the courts) left to the individual in such a way or to such an extent that the very essence of the right is impaired. Secondly, a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved....”

22. It is the view of this Court that the said Sections do not restrict or reduce access to the court to the point of rendering the right of appeal redundant. Allowing interlocutory Criminal Appeals would unnecessarily clog the system with the resultant effect of delays in conclusion of

criminal trials. The petitioner is not without recourse since upon conclusion of the criminal matter he will have an automatic right of appeal to the High Court on matters of both Law and fact.

23. It is the finding of this Court that the petition herein lacks merit. The same is herewith dismissed with costs to the Respondents.

Dated, Signed and Delivered in Mombasa this 1st day of April, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Isaboke for 1st Respondent

Ms. Kiti for 2nd Respondent

Ms. Mwenzi holding brief Olunya for Petitioner

Mr. Kaunda Court Assistant