



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

PETITION NO. 52 OF 2018

BENSON GICHIE MWANGI.....1ST PETITIONER

JOSPHAT KABUTHA.....2ND PETITIONER

VERSUS

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

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....3RD RESPONDENT

MURANG'A CHIEF MAGISTRATES COURT.....4TH RESPONDENT

AND

MURANG'A COUNTY GOVERNMENT.....1ST INTERESTED PARTY

MURANG'A WATER & SANITATION COMPANY.....2ND INTERESTED PARTY

JUDGMENT

1. The petitioners are employed as *casual plumbers* by the County Government of Murang'a (the 1st interested party).
2. They were charged before Murang'a Chief Magistrate's Court (the 4th respondent) for *illegal connection of water* contrary to section 145 (f) as read with section 147 of the **Water Act 2016**.
3. The complainant in the criminal case is the 2nd interested party (hereafter *Muwasco*). The petitioners' argue that the *complaint* is brought by a stranger. The petitioners claim that they were arrested in the course of their duties of providing water and sanitation services as employees of the county.
4. Their gripe is that the prosecution contravenes **Article 50 (2) (n)** of the **Constitution**. They see themselves as pawns in a vicious fight for control of water resources in the county between *Muwasco* and the county government. They aver that their right to fair labour practices and reasonable working conditions is being violated in breach of **Article 41** of the **Constitution**. In a synopsis, the charges are against the public interest and geared towards a collateral purpose.
5. The petitioners thus crave three *declarations*: that the criminal charges are unconstitutional, null and void; that the charge is an abuse of legal process; and, that it is untenable because the county government is exercising its constitutional mandate to supply water and sanitation services.
6. The petitioners also seek orders of *certiorari* and *prohibition*: *Certiorari* to be directed to the 1st respondent (hereafter *the DPP*) to remove to this court for quashing the decision to charge the petitioners; secondly, to quash the charge sheet; and, thirdly, to quash any separate criminal proceedings against other employees in the discharge of their duties of providing water services in the county.
7. The writ of *prohibition* is sought against *all* the respondents to restrain them from proceeding with the prosecution; or, re-opening the

charge; or, from harassing, arresting, or instituting any charges against any of the employees of the county carrying out similar duties.

8. The petition is supported by an affidavit of the petitioners sworn on 1st October 2018. They have annexed their letters of appointment marked *B&J1*; and, the impugned charge sheet (annexture *B&J2*). The petitioners denied the charge in the lower court and were released on bail.

9. The petitioners have filed written submissions dated 24th April 2019. Learned counsel, *Mr. Kamau*, submitted that **Article 186** of the **Constitution**; and, section 11 (b) of Part II of the *Fourth Schedule* of the **Constitution** devolved *County Public Works and Services* including *water and sanitation* to the county government. Accordingly, Muwasco has no right to press the criminal charges.

10. Reliance was also placed on *Legal Notice Number 178 of 2013* in which the Transitional Authority approved transfer of water services or water companies to the county in particular “*urban water and sanitation services with formal service provision including water, sanitation and sewerage companies.*”

11. I was also referred to the decision of the High Court in ***Kahuti Water Sanitation Co. Ltd & Others v The Governor Murang’a & Others***, Murang’a, Jud. Rev. 5 of 2017 [2018] eKLR. *Waweru J* had ruled that water services were a devolved function; and, that the *ex parte* applicants could only “*continue to provide those services only until such time as the County Government was ready to take on that function.*”

12. Learned counsel cited at length the decision in ***George Okungu & another v Chief Magistrate’s Court Anti-Corruption Court & another***, Nairobi, High Court Pet. 227 & 230 of 2009 [2014] eKLR.

13. In a nutshell, the petitioners’ case is that the DPP is using his powers for oppressive purposes. The scheme is to pile up pressure on the county government to settle the ***Kahuti Water Case*** (supra) and another labour matter in *Nyeri ELRC petition 8 of 2018*. They argue that the criminal proceedings are ludicrous because the 2nd interested party “*does not have any separate existence or autonomy from the County Government.*”

14. The 1st interested party supported the petition. There are submissions filed on 26th April 2019. Learned counsel, *Mr. Ng’ang’a*, argued that only the county government has constitutional backing to provide water and sanitation services in Murang’a. Since the county government owns the infrastructure, it should be the only legitimate complainant.

15. Counsel also submitted that the *county legislation* contained in the **Murang’a County Water and sanitation Act 2018** supersedes the *national legislation* under the **Water Act** since the functions are fully devolved to the county government. Reliance was placed on the decision in ***Meru Bar, Wines & Spirits Owners Self Help Group v County Government of Meru***, High Court, Meru, Pet. 32 of 2014 [2014] eKLR.

16. The 1st and 3rd respondents opposed the petition. Learned State Counsel, *Mr. Mutinda*, relied on grounds of opposition filed on 14th December 2018. He submitted that the DPP has properly exercised his constitutional power to investigate the offence and to prosecute the petitioners. He denied that the DPP was influenced by Muwasco; or, is acting contrary to the public interest.

17. Counsel relied on **Article 157 (10) & (11)** of the **Constitution** and sections 6 of the **Office of the Director of Public Prosecutions Act 2013**. He also referred to ***Francis Mwithukia v DPP & another***, Court of Appeal, Nyeri, Civil Appeal 77 of 2017 [2017] eKLR.

18. Learned counsel submitted that the petitioners have not proved that any of their rights have been violated. Furthermore, the mere existence of civil proceedings is not a bar to criminal proceedings. He relied on section 193A of the **Criminal Procedure Code**.

19. The 2nd and 4th respondents also opposed the petition. There are grounds of opposition filed on 28th November 2018; and, written submissions filed on 26th March 2019 plus a list of authorities. Learned Litigation Counsel, *Ms. Mutindi*, submitted that the petitioners have not challenged the right of the police to investigate the offence; or, the constitutional mandate of the DPP; or, the jurisdiction of the criminal court.

20. Learned counsel challenged the link between the criminal charge and the two civil matters pitting the county against Muwasco. She opined that only the criminal court can properly determine the innocence or guilt of the petitioners.

21. The 2nd interested party relied on submissions filed on 30th April 2019. The main point taken is that the county does not have the exclusive mandate to supply water; and, that Muwasco is still exercising the function. The change over to the county was meant to be gradual and incremental. Accordingly, it will be a question of evidence whether Muwasco had such mandate at the time of the alleged offence. That would be the true province of the criminal court.

22. Learned counsel, *Mr. Otieno*, submitted that the facts in this case are distinguishable from those in ***George Okungu & another v Chief Magistrate’s Court Anti-Corruption Court & another***, Nairobi, High Court Pet. 227 & 230 of 2009 [2014] eKLR. He stated that the facts here are straightforward: the two petitioners were apprehended vandalizing water installations and connecting water contrary to the **Water Act**.

23. On 30th April 2019, I heard further arguments from all the learned counsel for the disputants.

24. I will commence with **Article 165 (3)** of the **Constitution**. It clothes this court with jurisdiction to determine whether a right or fundamental freedom in the **Bill of Rights** has been denied, violated, infringed or threatened. Various remedies are provided in

Article 23 including a *declaration* or an order for *judicial review*.

25. Sections 5 and 116 of the **County Governments Act** requires county governments to deliver on their devolved functions.

26. **Article 187 (1)** of the **Constitution** provides the framework for transfer of functions between the two levels of government-

“A function or power of government at one level may be transferred to a government at the other level by agreement between the governments if—

(a) the function or power would be more effectively performed or exercised by the receiving government; and

(b) the transfer of the function or power is not prohibited by the legislation under which it is to be performed or exercised.”

27. **Article 187 (2)** then states-

“If a function or power is transferred from a government at one level to a government at the other level

(a) arrangements shall be put in place to ensure that the resources necessary for the performance of the function or exercise of the power are transferred; and

(b) constitutional responsibility for the performance of the function or exercise of the power shall remain with the government to which it is assigned by the Fourth Schedule.”[Emphasis added]

28. The *Fourth Schedule* deals with *distribution* of functions *between* the national and county governments. Part 2 of the schedule at section 11 grants county governments the following functions-

“County public works and services, including—

(a) storm water management systems in built-up areas; and

(b) water and sanitation services.”[Emphasis added]

29. It is common ground that in *Legal Notice Number 178 of 2013*, the Transitional Authority approved transfer of water services or water companies to the county in particular “*urban water and sanitation services with formal service provision including water, sanitation and sewerage companies*.”

30. There are a several *pending* constitutional petitions on whom between the county government and Muwasco has the power to provide water and sanitation services in Murang’a. The High Court has not finally pronounced itself on the rights of the parties. What has happened is that the court has determined some *interlocutory* motions.

31. In one of those matters, ***Kahuti Water Sanitation Co. Ltd & Others v The Governor Murang’a & Others***, High Court, Murang’a, Jud. Rev. 2 & 5 of 2017 [2018] eKLR, *Waweru J* ruled that water services were a devolved function; and, that the *ex parte* applicants could only “*continue to provide those services only until such time as the County Government was ready to take on that function*.”

32. In yet another *interlocutory motion* revolving around the subject, ***Mercy Wanjiku Kimwe & another v County Government of Murang’a***, High Court Petition 55 of 2018 [2018] eKLR, I observed as follows

“[43] But that is not to say that the governor or county government of Murang’a can wake up one morning and violently take over the management of the water service providers. The **Constitution** in the Fourth Schedule envisioned a negotiated and orderly transition. For example, some assets of Muwasco may belong to the national government. Accrued loans and other debts will need to be re-assigned or transferred. That position must be respected and remains a live issue in the main petition.”

33. I went further to say-

“[44] The existing water service providers on the other hand should let go at some point. See ***Kahuti Water Sanitation Co. Ltd & Others v The Governor Murang’a & Others***, High Court, Murang’a, Jud. Rev. 2 & 5 of 2017 [2018] eKLR. The less I say about it the better.”

34. I have studied the particulars of the charge sheet. It states that on 20th September 2018 at *Ka Mbwe* area, the petitioners jointly vandalized water pipes and connected water without the permission of Muwasco.

35. Clearly, only evidence to the required *standard* in criminal proceedings can establish whether on the *material date*, Muwasco had control of the water and sanitation service; or, whether the county government had assumed complete or exclusive mandate.

36. Concomitant with that will be the question whether the two petitioners required the permission of Muwasco to interfere with the supply

or water connections. I am afraid that at *this stage* the true province for that inquiry is the criminal court.

37. The office of the DPP is an independent constitutional office. **Article 157** of the **Constitution** grants the office the mandate to investigate and prosecute criminal conduct. However, **Article 157 (11)** of the **Constitution** requires the DPP-

“To have regard to the public interest, interests of the administration of justice and the need to prevent and avoid abuse of the legal process”.

38. The petitioners have *not* laid cogent evidence to show that the DPP is at the beck and call of Muwasco or being *directed* by external forces. But the charges are proceeding against the backdrop of the civil cases; and, the DPP should *not* ignore *perceptions* of bias. I remain alive that under section 193A of the **Criminal Procedure Code**, the mere existence of such proceedings is *not* a bar to criminal proceedings.

39. The petitioners have raised powerful arguments against the framing of the charge under section 145 (f) of the **Water Act 2016**; or, whether Muwasco is a proper complainant. The underlying argument seems to be that Muwasco does *not* hold a permit under the Act; that the county government or its employees do not need such a permit; and, that in any case the water infrastructure does not belong to Muwasco but the county government. In a word, the charge does not lie.

40. The two petitioners are deemed *innocent* until proved otherwise. They are entitled to equal protection of the law. They have been released on bail. I agree that criminal proceedings can be unpleasant and burdensome. In the present petition there is no complaint that the presiding magistrate has breached rules of natural justice.

41. The writ of prohibition restrains abuse or excess power. See **Meixner & another v Attorney General** [2005] 2 KLR 189, **Joram Mwenda Guantai v The Chief Magistrate** [2007] 2 EA 170. To succeed in the prayer for prohibition, the petitioners required to demonstrate that there is some impropriety or that the trial magistrate is acting contrary to the law or in excess of her jurisdiction. See **John Wambua v The Principal Magistrates Court Kibera** Nairobi, High Court Miscellaneous Application 328 of 2000 [2000] eKLR.

42. Furthermore, the **Criminal Procedure Code** has sufficient safeguards ring-fencing the accused. In **William Ruto & another v Attorney General** Nairobi, High Court Civil Suit 1192 of 2005 [2010] eKLR, the court had this to say-

“The petitioners have questioned the competence of the charges that they face. In our view, it is not for this court to determine whether or not the charges as framed disclose an offence. There are adequate provisions in the Criminal Procedure Code (CPC) for instance Section 89 (5) CPC which can be used to address the issue. That section states as follows -

“89(5) where the magistrate is of the opinion that a complaint or formal charge made or presented under this section does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for the order.”

43. From the submissions in this court, the petitioners seem to have a robust defence to the criminal action. Whether or not it is sound; or whether or not the charge will hold is the true province of the criminal court upon tested evidence.

44. I am unable to hold on the materials before me that the respondents were acting outside the law or exceeded their jurisdiction to warrant the court to remove their decision to this court for quashing. The prayer for certiorari is thus equally on a quicksand.

45. I am also persuaded by the reasoning in **James Gesami v Attorney General & 2 others** Nairobi, High Court Petition 376 of 2011 [2012] eKLR-

“With respect, I do not find anything discriminatory in the preferment of criminal charges against the petitioner. The DPP is at liberty to prefer charges against any party in respect of whom he finds sufficient evidence to prefer charges. I do not know of anything in the law that would require that all members of the CDF Committee for West Mugirango constituency be prosecuted for alleged misappropriation of funds unless there was evidence against them.”

46. The upshot is that no sufficient grounds have been laid to warrant the declarations or writs of prohibition and certiorari. The entire petition dated 1st October 2018 is *dismissed*.

47. In the interests of justice; and, considering that the criminal case is still pending; and, to avoid further prejudice to the petitioners, I order that each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 21st day of May 2019.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Mr. Mutinda holding brief for Mr. Kamau for the petitioners instructed by P. W. Kamau Advocates.

Mr. Mutinda for the 1st and 3rd respondents instructed by the Office of the Director of Public Prosecutions.

Mr. Mutinda holding brief for Ms. Mutindi for the 2nd and 4th respondents instructed by the Office of the Attorney General.

Mr. Mutinda holding brief for Mr. Ng'ang'a for the 1st interested party instructed by Mbugua Ng'ang'a & Company Advocates.

No appearance for the 2nd interested party.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.