REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CONSTITUTIONAL PETITION NO. 206 OF 2018

IN THE MATTER OF ARTICLES 10, 21, 22, 23, 27, 28, 43, 47, 50, 157(11), 238 (1) and (3), 239 (3), 244 (c) and (d), 245 (4), 249 (1) (c), 258 (1) and 259 OF THE CONSTITUTION OF KENYA, 2010

AND

THE FAIR ADMINISTRATIVE ACTION ACT

AND

THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ACT

AND

MERU CHIEF MAGISTRATE'S COURT CRIMINAL CASE NO. 2272 OF 2018

BETWEEN

JAMES MUTHIORA ALIAS KARINTA.....PETITIONER

-VS-

DPP.....1ST RESPONDENT

IG OF POLICE.....2ND REPSONDENT

DCIO IMENTI NORTH.....3RD RESPONDENT

CHIEF MAGISTRATE, MERU.....4TH RESPONDENT

JUDGMENT

[1] This petition dated 10th December 2018 seeks the following orders:

a) A declaration that the investigations and intended prosecutions against the Petitioner by any and/or each and all the Respondents is unconstitutional, illegal, unreasonable, irrational and procedurally unfair

b) A declaration that the investigations and intended prosecution against the Petitioner has resulted in the violation and infringement and threatens to violate and infringe the Petitioner fundamental rights and freedoms under Articles 27(1) (2) and (3), 28, 43 (1) (f) and 47(1) of the Constitution

c) A declaration that the actions and conduct of each and all the Respondents, contravene Articles 2(1) and (2), 10(2), 157 (11), 238(1) and 2(b), 239 (3) (a) (b), 244 (c) and (d) and 245 (a) and (b) of the Constitution.

d) An order restraining and/or prohibiting each and all the Respondents whether by themselves, agents and servants and officers and whomsoever acting under their authority or instructions from charging prosecuting, arresting, harassing and/or intimidating the Petitioner vide summons issued by Chief Magistrates Court at Meru, in Criminal Case No 2272/18.

e) Any other or further order the Honorable deems fit and just to grant.

f) Costs be provided for.

[2] The Petitioner contends that the DCI officers raided his homestead on 1st November 2018 and arrested him with five others. On 8th November 2018 they were jointly charged vide Chief Magistrates Court at Meru Criminal Case No 2171/18 with the offence of trafficking in narcotic drugs contrary to **Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994**.

[3] On 22nd November 2018 the Petitioner was informed by his advocate on record that he had been served with fresh court summons in respect of Chief Magistrates Court at Meru, Criminal Case No. 2272/18 requiring his attendance on 4th December 2018 to take plea to a charge of trafficking in narcotic drugs contrary to **Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994**. He has not managed to take plea as he has been ill. However, the prosecution failed and or refused to avail a copy of the intended charge sheet and or any other documents relating to the fresh case. He urged that his fingerprints are yet to be taken before institution of the said suit. Thus, he argued that the actions of all the Respondents are in violation of **Article 47 of the Constitution.**

[4] More was stated by the petitioner; that the action by the 1st, 2nd and 3rd respondents is calculated with prejudice and ulterior motive or extraneous purpose. To him, their unexplained actions are intended to compel the Petitioner to plead to a charge based on incomplete and scanty investigation. He felt that he is being harassed, intimidated and persecuted. He says that his prosecution is an abuse of the legal process and administrative authority and discretion, and abuse of discretion and power; the action is disproportionate, oppressive, vexatious and illegal.

DPP: proceeding proper

[5] This petition was opposed vide the replying affidavit of No. 231862 James Githinji (ASP) sworn on 21st January 2019. He deposed that he is the investigating officer in all criminal matters involving the petitioner. It is not true that the security agent and /or other government bodies are being used to intimidate and or harass the petitioner. He averred that on 1st November 2018 they raided the Petitioner's homestead where they recovered narcotic drugs (cannabis/bhang) weighing about 103 Kilogrammes with an estimated street value of Kshs. 3,090,000/-. This led to Criminal Case No. 2171/18 against the petitioner and four other suspects who were arrested together with him during the raid.

[6] On further intelligence reports they commenced investigations on further criminal activities that directly connected to the Petitioner which led them to recover a total of 981 Kgs of cannabis valued at Kshs. 27 Million. They requested the petitioner to appear before their offices for further questioning but to no avail. They proceeded to his advocate's office and informed him to avail his client for further interrogation. Two weeks down the line they could not secure his attendance or information. The advocate undertook to avail his client before the DCIO for further interrogation and statement recording and fingerprint processing but again the advocate never presented his client.

[7] That one Jesse Koome was arrested and charged vide CR No. 2204/2018 and intelligence strongly indicates that Koome is an employee of the petitioner. After completion of further investigations and recommendation by the DPP to prefer further charges against the petitioner they prepared the necessary charge sheet and register in court on 29th November 2018 wherein the summons against the petitioner was extended, till then for purposes of plea taking on 4th December 2018. The petitioner has never appeared for plea taking. It is clear that the agencies were just executing their mandate under the law and no ill motive, harassment and/or intimidation of any kind was intended. The IO stated that it is the petitioner who is frustrating investigations by not co-operating using all manner of delaying tactics. They pray that the court disallows the petition for being mischievous, lacking in substance and a waste of the court's time.

[8] This matter was canvassed by way of written submissions. The Petitioner submitted that the Respondents have shown bad faith and exhibited bias by taking steps against him before undertaking full and comprehensive investigations. The Respondents have taken a multiplicity of actions and suits against him including CR. No. 2272/18 and subjected him to acts of harassment and intimidation before the investigations are completed. He averred that the 1st, 2nd and 3rd Respondents have contravened **Articles 2, 10, 27, 28, 43 and 47 of the Constitution** and was in breach of the provisions of the **Fair Administrative Action Act** to the detriment of the Petitioner.

[9] The Respondent's submitted that the Petitioner has failed to demonstrate that he has met all the ingredients required for the orders being sought. They affirmed that all the legal requirements were adhered to but the Petitioner who is represented by counsel was notified of every step but were both uncooperative. Furthermore, the Petitioner has not answered to the charges to be able to raise any ground. He must show that if the orders sought are not granted he may suffer loss incapable of being compensated by damages. That the discretion given to the 1st Respondent to prosecute criminal offences is not to be lightly interfered with but that when the court finds that their discretion is being abused it should not hesitate to bring such proceedings to a halt.

ANALYSIS AND DETERMINATION

[10] The issue for determination by this court is whether institution of criminal proceedings in the Chief Magistrates Court at Meru in Criminal Case No. 2272/18 against the petitioner contravenes the Constitution and other provisions of the law.

[11] Each institution created by or under the Constitution has individual mandate spelt out by the Constitution. And a court of law will not interfere easily with the exercise of the power and discretion inextricable to the role of such government agencies unless the agency is acting beyond its mandate or its actions violate the law or the Constitution or rights or freedoms of persons guaranteed under the Constitution. In this case, the DPP and the IG of police are on a spot. One of the primary mandates of the police and the DPP is to investigate and institute criminal prosecution, respectively. The court cannot take over any of these mandates.

DPP independent

[12] I am thrown to the independence of DPP, in commencement of criminal proceedings; he acts independently and is not under the control

or direction of any person. See article 157(10) of the Constitution that:-

> **The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.**

[13] Except, in the exercise of power to prosecute, DPP is subject to the Constitution and the law. See article 157(11) of the Constitution that:-

> **In exercising the powers conferred by this Article, the Director of Public Prosecutions shall 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.**

[14] Therefore, a court of law will only intervene where the investigations and or the proceedings are an abuse of the court process, violate the Constitution or are oppressive or are aimed at gaining collateral advantage rather than bringing the petitioner to justice. See a persuasive but superb rendition by Odunga J in the case of **Republic v Attorney General & 4 others Ex-Parte Kenneth Kariuki Githii [2014] eKLR** that:

> **"The Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. In the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good administration**.

[15] See also the Court of Appeal in the case of **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170** that:-

> **"It is trite that an Order of Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court."**

[16] It is expected that a criminal case should be instituted against a person where investigations reveal evidence that would support a charge in a court of law. The IO stated that CR. Case No. 2171/18 was instituted against the petitioner after the security officers' recovered narcotic drugs (cannabis/bhang) weighing about 103 Kgs in the petitioner's homestead. Thereafter, CR. Case No. 2272/18 was instituted against the petitioner. **The Respondent through the replying affidavit of James Githinji (ASP), the investigating officer, explained that upon conducting further investigations on** intelligence reports received and established further criminal activities that directly connected the Petitioner to and which led them to recover a total of 981 Kgs of cannabis valued at Kshs. 27 Million. They requested the petitioner to appear before their offices for further questioning but to no avail. They made all efforts to secure his attendance in court in vain.

[17] I will weigh these averments against the arguments by the petitioner. According to the petitioner, Criminal Case No. 2272/18 exhibits incomplete investigations and utter abuse of the respondent's discretion and power which has been compounded with oppression, vexation and illegality. To him, the respondents' desire is to mount a prosecution against him not for the vindication of the law or the objectives of the law but for ulterior motives and abuse of court process.

[18] He who alleges abuse of the court process must prove. Contrary to the assertion by the petitioner, the second case derives from a totally different transaction and discovery of another haul of narcotics. Therefore, institution of a criminal case on that transaction is not a multiplicity of suit. The mounting of the second case is not therefore an abuse of court process or power of the police or DPP. In addition, the IO has clearly explained the evidence available and which forms the basis of the second case and I find that there was probable reason and material to mount a charge against the petitioner. As for the case having been instituted before fingerprints are taken. I believe the IO that the petitioner is the one who has circumvent his processing. He cannot therefore derive any advantage on his own misdeeds or default.

[19] Secondly, the allegation that a copy of the intended charge sheet and other documents have not been presented to him is a matter that ought to be canvassed in the trial court. Other matters such, Jesse Koome is the Petitioner's employee are matters to for the trial which will evaluate it as a defence. The court exercising jurisdiction in a constitutional petition may not be legally endowed to usurp the role of a trial court. I should state here that taking of plea in or being charged in a criminal case per se is not a violation of right or the Constitution as the

trial court and the entire criminal process is established under the Constitution and is clothed with all staple protections for fair trial. An applicant must show that the institution of criminal proceedings is for reasons other than vindication of the law, say, an abuse of process, or power, or discretion, or a violation of law and Constitution, for collateral advantage and so forth and so forth.

[20] **It bears repeating that from the material before me, the charges in question were not preferred against the petitioner before establishing reasonable suspicion. See Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR**:

> **"the police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene**".[Emphasis added]

[21] From the foregoing, I am not convinced that the criminal proceedings were instituted for purposes other than in pursuit of justice. The invitation by the Petitioner for this court to intervene should be greeted by negative response. The petition lacks merit and is dismissed. The petitioner to take plea accordingly. No order as to costs.

Dated and delivered in open court at Meru this 21st day of May 2019

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F. GIKONYO

JUDGE

In presence of

Abubakar for Kiogora Mugambi for petitioner

DPP – Absent

F. GIKONYO

JUDGE