



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISC. APP NO. 674 OF 2017

In the matter of Judicial Review Proceedings for Orders of *Certiorari* and *Prohibition*

and

In the matter of breach of section 316A (2) of the Penal Code (Cap 63, Laws of Kenya)

and

In the matter of section 4 of the Office of Public Prosecutions Act, No. 2 of 2013

and

In the matter of alleged contravention of Fundamental Rights and Freedom under Articles 12,20,21,22,23,25,157 (6) & (11) and Article 159(2) (d) of the Constitution

and

In the matter of intended prosecution of the applicant in respect of issuing post-dated cheques to Tuffsteel Limited

and

In the matter of an application by Warsama Ismail for orders of *Prohibition* and *Certiorari*

Between

Republic.....Applicant

vs

Director of Public Prosecutions..1stRespondent

Inspector General of Police.....2ndRespondent

Mukesh Patel.....1stInterested Party

Desert Rock Limited.....2ndInterested Party

Ex parte Applicant.....Warsama Ismail

JUDGMENT

The Parties

1. Warsama Ismail (hereinafter referred to as the *ex parte* applicant) is a male adult and a director of Desert Rock Limited, a limited Liability company duly incorporated in Kenya under the companies act. The said company is the second Interested Party in these proceedings.

2. The first Respondent is the Director of Public Prosecutions established under Article 157 of the Constitution with constitutional mandate to *inter alia* institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.^[1]

3. The second Respondent is the Inspector General of Police appointed pursuant to Article 245 (2) of the Constitution. He exercises independent command over the National Police Service, and performs any other functions prescribed by national legislation.

4. Mukesh Patel, the first interested party is a male adult and a director of Tuffsteel Limited, a limited liability company duly incorporated in Kenya under the companies Act.

5. Desert Rock Limited, the second interested party is a limited liability company duly incorporated in Kenya under the companies Act. The *ex parte* applicant is one of its directors.

Factual matrix

6. The uncontested facts are that the first Interested Party supplied the second Interested Party with Bitumen in or about October 2016. It is also uncontested that the *ex parte* applicant paid for the said Bitumen by way of cheques, which were dishonoured by his bank upon presentation for payment.

7. The contested facts are that the *ex parte* applicant maintains that the said cheques were post-dated, and, that one week before the due dates for the said cheques, he notified the first interested party not to bank them. He also states that despite the said request, the first Interested Party proceeded to bank them. He maintains that the cheques were unpaid because he had stopped them.

8. The *ex parte* applicant states that he was arrested on 29th November 2017, taken to the Central Police Station, but, he was released on cash bail and asked to appear in court on 5th December 2017 to answer charges of issuing bad cheques.

Legal foundation of the application

9. The applicant states that issuing post-dated cheques is not an offence under section 316 A (2) of the Penal Code^[2] and that, the first Interested Party is using the criminal process to exert pressure on him to recover a civil debt. He also states that the dispute is purely a civil debt, which ought to be enforced through civil courts.

10. He also states that the DPP is obliged under Article 157 (11) to prevent abuse of legal process, and that; the first respondent abused its discretion by entertaining the complaint. In addition, he states that the decision is an abuse of process, an infringement of the his rights, and, that, it is illegal and an abuse of the criminal justice system.

The orders sought

11. The *ex parte* applicant prays for an order of *certiorari* to quash the proceedings before the District Criminal Investigations Officer, Central Police Station. He also prays for an order of *prohibition* to prohibit the Respondents from presenting or filing a criminal charge and or prosecuting him at Milimani Law Courts or any other court or bring charges against him in connection with bounced cheques. Lastly, the applicant prays for costs of this application.

Respondent's grounds of opposition

12. The Respondents filed grounds of opposition dated 3rd June 2019 stating *inter alia* that the application is misconceived, an abuse of court process, and is aimed at curtailing the Respondent's statutory mandate. The first Respondents cited its mandate under Article 157 (10) of the Constitution and stated that it is in public interest that perpetrators of crime be prosecuted. They also cited section 193A of the Criminal Procedure Code,^[3] which permits parallel criminal and civil proceedings.

The First Interested Party's Replying Affidavit

13. Dev Mukund Patel, a director of the first Interested Party in his Replying Affidavit dated 26th February 2018 deposed that in October 2016, the *ex parte* applicant through the second Interested Party engaged the first Interested Party for the supply of bitumen worth Ksh. 4,776,300/=, and, that, it was agreed that at the time of the delivery, the *ex parte* applicant was to immediately give cheques for Ksh. 4,000,000/=. He deposed that the bitumen was delivered on 5th November 2016, and that, the *ex parte* applicant did not have sufficient funds, hence, he sought for extension until 4th December 2016 to enable him make the payments, and, on the said date, he issued cheques worth Ksh. 4,000,000/= in settlement of the supplied bitumen.

14. He averred that the cheques were dishonoured by his bank because of insufficient funds. He denied that the *ex parte* applicant notified him not to bank the cheques. He also stated that the *ex parte* applicant only paid Ksh. 501,000/= in April 2017 almost five months after the delivery of the consignment. He also deposed that he reported to the police after almost one year after the delivery. He denied that the cheques were post-dated as alleged by the *ex parte* applicant.

The Second Interested Party's Replying Affidavit.

15. Yunis Ismail, a director of the second Interested Party swore the affidavit dated 26th June 2018 in support of the *ex parte* applicant's

application. His affidavit is essentially similar to that sworn by his co-director, the *ex parte* applicant. In addition, he deposed that the post-dated cheques were not “dishonoured” but the drawer stopped them.

***Ex parte* applicant’s further affidavit**

16. The *ex parte* applicant swore the further affidavit dated 2nd March 2018. He reiterated that the first interested party received the post-dated cheques.

Submissions

17. The *ex parte* applicant’s advocate argued under section 336A (2) of the Penal Code, [4] it is not an offence if a post-dated cheque bounces. He relied on *Republic v DPP & 2 Others* [5] and argued that it is an abuse to charge a person with an offence that is excluded under the law.

18. The Respondent’s Advocate argued that the issues raised by the *ex parte* applicant are matters of his defence, which ought to be raised at the criminal trial. He cited the powers of the DPP under Article 157 of the Constitution and argued that the DPP independently analysed the evidence and arrived at the decision to prosecute. He further argued that judicial review is concerned with the decision making process and not the decision. He relied on *Penina Nadako Kiliswa v Independent Electoral & Boundaries Commission (IEBC) & 2 Others*. [6] Lastly, counsel submitted that the applicant has not demonstrated the illegality of the decision.

19. The first Interested Party’s Advocate argued that the charges are premised on section 316A (1) (a) of the Penal Code, [7] hence the impugned decision is legal. He argued that the charges do not amount to abuse of power or judicial process. He submitted that the decision whether the charges can be sustained or not should be left to the trial court.

20. The Second Interested Party’s Advocate submitted maintained that the *ex parte* applicant issued post-dated cheques, and argued that the decision to prefer the charges is illegal, since the alleged offence is not provided under the law.

Determination

21. A special feature in our Constitution is the establishment of an independent office of the DPP. His independence is provided under Article 157 (10) which declares that the DPP shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his powers or functions, shall not be under the direction or control of any person or authority.

22. The above position is replicated in Section 6 of the Office of the Director of Public Prosecutions Act. [8] The provision provides that pursuant to Article 157 (10) of the Constitution, the Director of Public Prosecutions shall:- (a) not require the consent of any person or authority for the commencement of criminal proceedings; (b) not be under the direction or control of any person or authority in the exercise of his powers or functions under constitution, this Act or any other written law; and (c) be subject only to the Constitution and the law.

23. It is also important to mention that under Article 245 (4) (a) of the Constitution, "no person may give direction to the Inspector General with respect to the investigation of any offence or offences." Just like the constitutionally guaranteed independence of the DPP, this provision is aimed at ensuring that investigations are undertaken independently.

24. The issues presented in this case are a direct invitation to this court to restate the circumstances, under which the High Court in exercise of its vast jurisdiction conferred upon it by the Constitution can halt, stop, prohibit or quash a police investigations or criminal prosecution. It is common ground that the Office of the Director of Public Prosecutions (DPP) is a constitutional office, which plays a vital role in the administration of justice in criminal matters. The Constitution vests the DPP with the sole Authority, power and responsibility to exercise control over the prosecution of all criminal matters except the institution of cases at the Court? Martial. [9]

25. Individuals involved in a crime – the victim, the accused, and the witnesses – as well as society as a whole have an interest in the decision whether to prosecute and for what offence, and in the outcome of the prosecution. In short, the proper and effective administration of the criminal justice system is a matter of great public interest.

26. There are general principles, which should underlie the approach to prosecution. The DPP must at all times uphold the rule of law, the integrity of the criminal justice system and the right to a fair trial and respect the fundamental rights of all human beings to be held equal before the law, and abstain from any wrongful discrimination.

27. The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to seek conviction. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion not to pursue criminal charges in appropriate circumstances. The DPP is required to protect the innocent and to seek conviction of the guilty, and to consider the interests of victims and witnesses. The DPP has an obligation to respect the constitutional and legal rights of all persons, including the accused persons and should avoid any appearance of impropriety in performing the prosecution function.

28. A key consideration to guide the DPP in instituting court proceedings is to advance or protect public interest as opposed to private interest. The decision to prosecute or not to prosecute is of great importance. It can have the most far-reaching consequences for an individual. Even where an accused person is acquitted, the consequences resulting from a prosecution can include loss of reputation, disruption of personal relations, loss of employment and financial expense, in addition to the anxiety and trauma caused by being charged with a criminal offence.

29. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system. For victims and their families, a decision not to prosecute can be distressing. The victim, having made what is often a very difficult and occasionally traumatic decision to report a crime, may feel rejected and disbelieved. It is therefore essential that the prosecution decision receive careful consideration.
30. It is beyond doubt that courts have an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power to 'stay' an indictment (or stop a prosecution) if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court or infringement of a citizens' fundamental rights. Abuse of process has been defined as something so unfair and wrong with the prosecution that the court should not allow a prosecutor to proceed with what is, in all other respects, a perfectly supportable case.^[10] Whether a prosecution is an abuse of court process, unfair, wrong or a breach of fundamental rights, it is for the court to determine on the individual facts of each case.
31. It is admitted by both parties that the *ex parte* applicant issued cheques to the first interested party. It is uncontested that the cheques were presented for payment but they were dishonoured by the *ex parte* applicants' bank. The point of departure is that the *ex parte* applicant states that he notified the first Interested Party not to present the cheques, and, that despite being told, he proceeded to present them for payment. The first Interested Party fiercely contests this assertion. The other point of departure is that the *ex parte* applicant states that the cheques were post-dated. The first Interested Party denies this assertion.
32. The *ex parte* applicant hinges his case on his assertion that post-dated cheques if unpaid do not constitute a criminal offence. He relies section 316A (2) of the Penal Code. The first Interested Party's Advocate argued that the charges are premised on section 316A (1) (a) of the Penal Code,^[11] hence the impugned decision is legal.
33. What is uncontested is that the prosecution is premised on a complaint filed by the first Interested Party arising from the said cheques. Upon investigations, the police preferred charging the *ex parte* applicant prompting him to file this case. The DPP's position is that he independently reviewed the evidence and was satisfied that an offence known to the law has been committed.
34. It is an established position of the law that it not for this court to determine the veracity or to weigh the strength of the evidence or accused persons' defence. That is a function for the trial court hearing the criminal trial. This court can only intervene if there are cogent allegations of violation of constitutional rights; or threat to violation of the Rights; or in clear circumstances where it is evident that the accused will not be afforded a fair trial; or the right to a Fair Trial has been infringed or threatened; or where the prosecution is commenced without a factual basis.
35. Whether a prosecution is an abuse of court process, unfair, wrong or a breach of fundamental rights, it is for the court to determine on the individual facts of each case. The concept of a fair trial involves fairness to the prosecution and to the public as well as to the accused.^[12]
36. The inherent jurisdiction of the court to stop a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances.^[13] The essential focus of the doctrine is on preventing unfairness at trial through which the accused is prejudiced in the presentation of his or her case or where there is clear breach of fundamental rights to a fair trial. Courts should first consider whether or not there is anything in the trial to prevent 'a fair trial' and if there is, then the court ought to stop the prosecution.
37. The high court will only prohibit or quash prosecutions in cases where it would be impossible to give the accused a fair trial ; **or where it would amount to a** misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.^[14]
38. A criminal prosecution can be stopped if it was commenced in the absence of proper factual foundation. The enquiry is whether there has been an irregularity or an illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right.
39. The provisions of the Constitution conferring powers upon the High Court to grant such remedies as *certiorari*, *prohibition* and *mandamus* are a device to advance justice and not to frustrate it. The saving High Court's inherent powers, both in civil and criminal matters is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution.
40. The High Court's inherent powers to quash, stay or prohibit criminal proceedings are wide as they imply the exoneration of the accused even before the proceedings have been culminated by way of trial. Noting the amplitude of these powers and the consequences, which they carry, the Supreme Court of India^[15] revisited the law on the issue and held that 'these powers should be exercised sparingly and should not carry an effect of frustrating the judicial process.'
41. The Supreme Court of India in the above case delineated the law in the following terms:-

"The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and in the rarest of rare cases and the Court cannot be justified in embarking upon an inquiry as to the reliability or otherwise of allegations made in the complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at uncalled for stage nor can it 'soft-pedal the course of justice' at a crucial stage of proceedings...The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of

administration of justice remains clean and pure. However, there are no limits of the power of the court, but the more the power, the more due care and caution is to be exercised in invoking these powers.”^[16]

42. In *Bennet vs Horseferry Magistrates Court & another*,^[17] the court confirmed that an abuse of process justifying the stay of a prosecution could arise in the following circumstances:-

- i. Where it would be impossible to give the accused a fair trial; or;
- ii. Where it would amount to a misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.

43. Chris Corns^[18] argues that the grounds upon which a stay will be granted can be classified under three categories:-

- i. When the continuation of the proceedings would constitute an 'abuse of process,'
- ii. When any resultant trial would be 'unfair' to the accused, and
- iii. When the continuation of the proceedings would tend to undermine the integrity of the criminal justice system.

44. As stated above, the applicants' case essentially stands on two grounds. One, that he is charged with an offence that is excluded under the law. Two, that the dispute is civil in nature. First, the above argument is premised on what in all respects should be his defence in the lower court. He admits having been supplied with the goods. He also admits issuing cheques, but states that they were post-dated. As pointed out above, this argument is contested by the first Interested Party. The proper forum for the court to determine the veracity of either of the two versions is the lower court. The prosecution will have the burden of establishing their case. The *ex parte* applicant will have the opportunity of challenging the prosecution evidence. This court exercising judicial review jurisdiction cannot determine contested issues of fact.

45. The other ground upon which this case stands is that the dispute is civil in nature. This argument falls on the ground that section 193A of the Criminal Procedure Code^[19] permits parallel criminal and civil proceedings arising from the same set of facts and circumstances. This is because the law recognizes that a criminal offence can be committed in the course of a civil transaction.

46. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles. As stated earlier, the power to quash proceedings is immense since it amounts to exonerating a suspect before trial. Such power must be exercised with extreme care and caution. It is a power, which the court exercises only in exceptional cases where there is clear evidence of abuse of powers, abuse of discretion or absence of factual basis to mount the prosecution.

47. The applicant seeks an order of *Prohibition*. The writ of *Prohibition* arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation. However, as stated above, the illegality of the impugned decision has not been established.

48. The initial consideration in the exercise of the discretion to prosecute is whether the evidence is sufficient to justify the institution or continuation of a prosecution. This is a decision constitutionally vested on the DPP. Where discretion is conferred on the decision-maker the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.^[20] One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

49. The DPP is mandated to independently evaluate the evidence and make the decision to prosecute independently. When evaluating the evidence regard should be had to the following matters:- (a) Are there grounds for believing the evidence may be excluded bearing in mind the principles of admissibility at common law and under statute? (b) If the case depends in part on admissions by the accused, are there any grounds for believing that they are of doubtful reliability having regard to the age, intelligence and apparent understanding of the accused? (c) Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either hostile or friendly to the accused, or may be otherwise unreliable? (d) Does a witness have a motive for telling less than the whole truth? (e) Whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute. (f). whether the alleged offence is of considerable public concern and (g) the necessity to maintain public confidence. As a matter of practical reality the proper decision in most cases will be to proceed with a prosecution if there is sufficient evidence available to justify a prosecution. It has not been demonstrated that the decision to prosecute was influenced by irrelevant or extraneous considerations. Further, it has not been established that the DPP did not act independently in arriving at the decision to prosecute.

50. The *ex parte* applicant has not presented any material to demonstrate that there was no sufficient evidence or factual basis to justify a prosecution. As stated earlier, it is not the function of this court to weigh the veracity of the evidence. In my view, a prosecution should be instituted or continued if there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the accused. It has not been established that the facts presented in this case do not disclose an offence known to the law. The *ex parte* applicant's argument that the cheques were postdated can be useful as his defence in the lower court.

51. In any event, a copy of the charge sheet was not annexed to show the nature of the charges contemplated by the DPP. In absence of a charge sheet, it is not clear why and how the *ex parte* applicant concluded the offence, he is likely to face. As the law stands, the facts

properly construed can sustain criminal charges known to the law including obtaining goods by false pretenses or issuing bad cheques. While it is not the duty of this court to prescribe the nature of the offence disclosed by the facts, it was pre-mature for the *ex parte* applicant to rush to this court citing a section in the Penal Code^[21] that he believes he is likely to be charged with. He conveniently forgot the possibility of other charges might be mounted against him based on the same set of facts.

52. The Constitutional provision in Article 157 (10) of the Constitution ensures that the DPP has complete independence in his decision-making processes, which is vital to protect the integrity of the criminal justice system because it guarantees that any decision to prosecute a person is made free of any external influences. This court respects this Constitutional imperative and will hesitate to interfere with the functions of the DPP unless there is clear evidence of breach of the Constitution or abuse of discretion to prosecute.

53. Applying the legal tests discussed above to the facts and circumstances of this case, I find that there is nothing to show that the prosecution is unfair or an abuse of court process or abuse of police powers or judicial process. There is no material before me to demonstrate that the prosecution has no proper factual foundation.^[22] It has not been demonstrated that the prosecution will be conducted or is being undertaken without due regard to traditional considerations of candour, fairness, and justice, nor has it been shown that the trial is being conducted or will be conducted in a manner different from what is prescribed under the law, or that the trial is bad in law.^[23]

54. In view of my analysis and findings herein above, the conclusion becomes irresistible that the *ex parte* applicant's Notice of Motion dated 11th December 2017 must fail. Accordingly, I hereby dismiss the said application with no orders as to costs.

Orders accordingly

Signed, Delivered and Dated at Nairobi this 17th day of July, 2019.

John M. Mativo

Judge

[1] Article 157 (6) of the Constitution.

[2] Cap 63, Laws of Kenya.

[3] Cap 75, Laws of Kenya.

[4] Cap 63, Laws of Kenya.

[5] {2015}e KLR

[6] {2015} eKLR Counsel also cited Lameck Okeyo & Another v Inspector General of Police & 2 Others {2016} e KLR & Thuits Mwangi & Anti-C & 2 Others v The Ethics and Anti-Corruption Commission & 3 Others

[7] Cap 63, Laws of Kenya.

[8] Act No. 2 of 2013.

[9] Article 157 of the constitution.

[10] *Hui Chi-Ming vs R* {1992} 1 A.C. 34, PC.

[11] Cap 63, Laws of Kenya.

[12] *DPP vs Meakin* {2006} EWHC 1067.

[13] See Attorney General's Reference (No 1 of 1990) [1992] Q.B. 630, CA; Attorney General's Reference (No 2 of 2001) [2004] 2 A.C. 72, HL.

[14] See *Bennett v Horseferry Road Magistrates' Court and Another* [1993] 3 All E.R. 138, 151, HL; see also *R v Methyr Tydfil Magistrates' Court and Day ex parte DPP* [1989] Crim. L. R. 148.

[15] See *Maharashtra vs Arun Gulab Gawali*.

[16] See *State of West Bengal & Others vs Swapan Kumar Guha & Others*, AIR, 1982, SC 949, *Pepsi Foods Ltd & Another vs Special Judicial Magistrate & Others* AIR 1998, SC 128 & *G. Ugar Suri & Ano vs State of U.P & Others*, AIR 2000 Sc 754.

[17] {1993}All E.R 138, 151, House of Lords.

[18]Chris Corns, *Judicial Termination of Defective Criminal Prosecutions: Stay Applications*, 76 *University of Tasmania Law Review*, Vol 16 No. 1, 1977.

[19] Cap 75, Laws of Kenya.

[20] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, *Statute Law in New Zealand*, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

[21] Cap 63, Laws of Kenya.

[22] Republic vs Attorney General ex-parte Arap Ngeny HCC APP NO. 406 of 2001.

[23] Indian Case of *Pulukiri Kotayya vs Emperor* L.R. 74 Ind App 65.