



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

JUDICIAL REVIEW APPLICATION NO. 2 OF 2017

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR

JUDICIAL REVIEW OF CERTIORARI,

PROHIBITION & MANDAMUS

AND

IN THE MATTER OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF THE POLICE SERVICE ACT SECTION 24

AND

IN THE MATTER OF KITUI CHIEF MAGISTRATE'S COURT CRIMINAL

CASE NO. 900 OF 2017 – REPUBLIC VS. MUTINDA NDEKE

AND

IN THE MATTER OF THE CRIMINAL PROCEDURE CODE,

CHAPTER 75 LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

CHIEF MAGISTRATE'S COURT AT KITUI.....3RD RESPONDENT

AND

NDUKU MWAMBU.....INTERESTED PARTY

MUTINDA NDEKE.....EXPARTE APPLICANT

J U D G M E N T

1. By way of Notice of Motion dated 2nd October, 2017, the Exparte Applicant seeks the following orders:

(i) An order of Mandamus directing the 1st Respondent together with his agents, delegates, and/or subordinates to conduct prompt, efficient, proper and professional investigations into the report made by him against the Interested Party and others vide **O.B. No. 12/16/08/2017** and **O.B. No. 12/18/8/2017** at **Katulani Sub-County A.P. Headquarters** and **Itoleka Police Station** respectively.

(ii) An order of Certiorari to remove into this Court and quash the charge sheet prepared by the 1st Respondent and approved by the 2nd Respondent charging him with the offence of assault causing actual bodily harm, presented to the 3rd Respondent's Court on **21st August, 2017** and allocated Court File **No. 900 of 2017**, together with the proceedings emanating therefrom, more particularly **Kitui Chief Magistrate's Court Criminal Case No. 900 of 2017 Republic vs. Mutinda Ndeke**.

(iii) An order of Prohibition directed to the 3rd Respondent, prohibiting it and any other Magistrate's Court of similar Jurisdiction from trying, hearing or further hearing and determination of **Kitui Chief Magistrate's Court Criminal Case No. 900 of 2017 Republic vs. Mutinda Ndeke**.

2. It is averred by the Exparte Applicant that he was herding livestock when he was confronted by the Interested Party and 5 other people who accused him of having slapped a boy and assaulted him. He reported the matter to **Katulani Sub-County Administrative Police Headquarters**, a report that was booked in **O.B. No. 12/16/08/2017** and he was advised to seek medical attention. On the **18th August, 2017**, he reported the matter to **Itoleka Police Station**, a report that was booked in **O.B. No. 12/18/8/2017** and he was issued with a P3 form which was filled. He returned it to the police station only to be arrested following allegations that he had assaulted one **Kimanzi Musembi**. His aunt intervened and he was released. On the **20th August, 2017** he was summoned to **Itoleka Police Station**, arrested and taken to Court on **21st August, 2017** where he was charged with the offence of assaulting **Kimanzi Musembi**.

3. That the police have neglected, omitted, refused and/or otherwise failed to conduct prompt, efficient, proper and professional investigations into the Complaint and as a result the Exparte Applicant has been denied justice. That the action of the 1st and 2nd Respondents to falsely prosecute the Exparte Applicant before the 3rd Respondent has been engineered by the Interested Party, one of the perpetrators of the assault upon him and a guardian of the minor **Kimanzi Musembi**. That the police at **Itoleka** have exhibited bias against the Exparte Applicant by instituting charges against him in bad faith, and it is in the interest of justice that the charge sheet and proceedings in **Kitui Chief Magistrate's Court Criminal Case No. 900 of 2017 Republic vs. Mutinda Ndeke** be quashed.

4. The Investigating Officer, **P. C. Lawrence Wanjala** deposed an affidavit in response of the Application where he deposed that **Kimanzi Musembi** lodged a Complaint of assault against the Exparte Applicant on the **16th day of August, 2017**. As a result of the act of assault he was issued with a P3 form that was filled. Subsequently, the arrest was effected and investigations concluded per the charge sheet. He was charged in **Criminal Case No. 900 of 2017**.

5. But, he is also a Complainant in **Criminal Case No. 913 of 2017** where the persons accused are **Samuel Kyalo Mutava** and **Patrick Mutinda Mbithi** who are relatives of **Kimanzi Musembi**.

6. The Attorney General filed Grounds of Opposition in respect of the 3rd Respondent. It was stated that Judicial Review cannot be used to curtail or step statutory bodies of Public Officers from the lawful exercise of power within their statutory mandate; the Application is based on contradictory allegations which border on mere belief, suspicion and speculation therefore incapable of any Judicial Review determination and an abuse of Court process which lacks merit.

7. In a Supplementary Affidavit the Exparte Applicant urged that the police chose to speedily prosecute the complaint made against him and to act with less enthusiasm in investigating his complaint. That he learnt of action having been taken in his matter after he filed the instant Application. That when he went to Court, he found only two (2) people had been charged and the Interested Party who procured the two (2) people to commit the offence was left out.

8. The Application was canvassed by way of written submissions that I have duly considered.

9. In his submissions the Exparte Applicant relied on the case of **Kuria and 3 Others vs. Attorney General (2002) 2 KLR 69** where it was held *inter alia* that:

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform ...”

10. In as much as the Court is seized of jurisdiction to formally forbid the continuation of criminal prosecution once it is established that extraneous matters have been considered instead of the intention of ends of justice being met, the ODP and the police have their mandate of dealing with complaints raised.

11. With regard to the 1st Respondent, a report was made to **Itoleka Police Station** as appreciated by both the Exparte Applicant and the Investigation Officer in the matter and investigations commenced. In **Republic vs. Commissioner of Police and Another, Exparte Michael Monari & Another (2012) eKLR** it was held that:

“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.”

12. It is the argument of the Exparte Applicant that investigations carried out favoured the complaint pursued by the Interested Party as opposed to the complaint he made. However, what has been demonstrated is the fact that as per the charge sheets drawn the arrest of the Exparte Applicant was on **20th August, 2017** while his alleged assailants were arrested on the **23rd August, 2017**. Subsequently, they were arraigned in Court. The Director of Public Prosecutions is seized of the power to institute criminal proceedings against any individual and in respect of any offence alleged to have been committed and in doing so he does not require the consent or authority of any person (**see Article 157(6) and (10) of the Constitution**).

13. In the case of **William vs. Spautz 66 NSW LR 585** it was stated that:

“The purpose of criminal proceedings generally speaking is to hear and determine finally whether the accused engaged in conduct that amounts to an offence and, on the account, is deserving sentence.”

14. With this in mind the question to be posed is whether prerogative orders sought should issue? In the case of **Republic vs. Attorney General & 4 Others Exparte Diamond Hashim Lalji and Another (2014) eKLR** it was stated that:

“Judicial Review Applications do not deal with the merits of the case but only with the process. In other words, Judicial Review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matter ... therefore Judicial Review proceedings are not the proper forum in which the innocence or otherwise of the Applicant is to be determined and a party ought not to institute Judicial Review proceedings with a view to having the Court determine his innocence or otherwise ... the Court in Judicial Review proceedings is mainly concerned with the question of fairness to the Applicant ...”

15. I have considered affidavit evidence and annexures thereto. It is disclosed that carrying out the investigations, statements were recorded and the 1st Respondent caused charges to be framed. The 2nd Respondent on perusal of the information availed approved the charges as framed and ensured the Exparte Applicant was arraigned in Court. The 3rd Respondent a Court of competent jurisdiction on its part acted procedurally by causing the Court file to be opened. Subsequently, the trial commenced. It is not stated that the process was flawed. There was no abuse of the criminal process. Therefore, this Court cannot interrogate the merit of the charges that were preferred against the Exparte Applicant because he will be given the opportunity of cross examining the accuser and witnesses that will be availed to testify and he will also be accorded an equal opportunity of tendering evidence in his defence. The Court will ensure the trial is fair as enshrined in the Constitution of Kenya.

16. In the result, the orders sought are not available to the Exparte Applicant. Accordingly, the Application fails and is dismissed with costs to the Respondents.

17. It is so ordered.

Dated, Signed and Delivered at Kitui this 11th day of July, 2019.

L. N. MUTENDE

JUDGE