



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CRIMINAL PETITION NO. 9 OF 2017**

**ERICK ONCHOKE.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The petitioner herein has filed a petition dated 12<sup>th</sup> June, 2017 seeking for:-

*(a) A declaration that the charges of murder by the respondent against the petitioner of one P.C. (W) Ruth Nanjala made in the High Court in this matter, be found null and void as they are a breach, infringement, violation and denial of the petitioner's fundamental rights, to equality before the law, equal protection and equal benefit of the law as enshrined in Article 27 (1) of the Constitution.*

*(b) A declaration that the criminal proceedings initiated in this court and about to commence on 12<sup>th</sup> day of June, 2017, or any subsequent date, be stopped and dismissed forthwith as this will amount to an infringement, breach of otherwise contravention of the petitioner's rights, to a fair trial as enshrined in Article 50 of the Constitution of Kenya.*

*(c) A conservatory order to stay the prosecution of the criminal proceedings against the petitioner in this matter as relates to the death of one P.C. (W) Ruth as the same are an abuse of the process, illogical and impulsive by the respondent.*

*(d) An order directed to the respondent or any other officer acting with his authority to stay the proceedings and/or prosecution of the criminal charges against the petitioner until this petition is heard and determined.*

*(e) An order compelling the respondent or any other officer acting with his authority to commence effective fresh investigations on the alleged criminal offence levelled against the petitioner.*

*(f) Any further order or relief that the Honourable Court deems fit, just and expedient to uphold the rule of law and to protect the rights and freedoms of the petitioner, under the Constitution.*

*(g) The costs of the petition be awarded to the petitioner.*

2. The petition was supported by the affidavit of the petitioner and written submissions of his advocates, **Ondieki Orangi & Co. Advocates**.

3. The petition was opposed by the respondent, Director of Public Prosecutions vide the replying affidavit of one Shem Mokua Migiro and the oral submissions of the prosecution counsel **Mr. Juma**.

4. The petitioner is facing a charge of murder at Kakamega High Court where he is accused of the murder of PC Ruth Walumbe (herein referred to as the deceased). The brief facts of the case as deponed by the petitioner are that he, the petitioner is an administration police officer who at the material time was stationed at Khayega AP Camp. That on the 16<sup>th</sup> June, 2016 he, the deceased and APC Mutahi went to Khayega village to attend to a complaint of malicious damage to property. He was armed with a rifle. That they found one person demolishing some houses in the compound of his father. The person was armed with a panga. On seeing the police officers the suspect charged towards them with the panga. The petitioner cocked his gun in readiness to engage the person. On seeing that the suspect ran towards a crowd that had gathered there. The deceased who was in civilian clothes held the suspect from behind. A struggle ensued between the deceased and the suspect. The petitioner rushed forward to aid the deceased. He then heard a gun sound. He saw the deceased lying down screaming while bleeding. The crowd started to throw stones at him and his colleague. He and his other colleague ran away for their safety. The deceased died. Later he was summoned to the DCIO's office where he recorded a statement. Witness statements were

recorded. The investigating officer recommended an inquest. He was however charged before an inquest was conducted.

5. The petitioner contends that his being charged with the offence of murder before an inquest was conducted was in contravention of Article 47 and 50 of the Constitution on fair administrative action and free and fair hearing. That the respondents were in breach of his fundamental rights and freedoms as guaranteed by Articles 19, 20, 23, 27, 47, 50 (1) and 165 (2) of the Constitution.

6. Mr. Migiro who was reported to be the widower to the deceased deposed in his replying affidavit that investigations were thoroughly conducted in the matter that led to the arraignment of the petitioner. Further that there was an attempt by one of the prosecution counsels at the office of the DPP Kakamega to interfere with the investigations by unilaterally recommending for an inquest without the knowledge of his in-charge but that he was overruled by his senior.

#### **Submissions –**

7. The advocates for the petitioner argued that it was not clear from the facts of the case as narrated by the witnesses as who pulled the trigger from the petitioner's rifle thereby causing the death of the deceased. That none of the people who recorded statements with the police DW2, 3, 6, 9 and 13 cleared the air. That in such circumstances the DPP should have ordered for an inquest to be conducted as provided in Section 388 of the Criminal Procedure Code before preferring charges of murder. That the DPP was under pressure from various people to charge the petitioner. That the respondent abused its prosecutorial mandate which amounts to an abuse of the court's process and is an infringement of the petitioner's fundamental rights as envisaged in the Constitution. That where the respondent abuses his power and fails to independently discharge that mandate this court has duty to intervene. That the court should order for an inquest to be held to establish what transpired leading to the death of the deceased.

8. The prosecution counsel **Mr. Juma** submitted that the application is not based on good grounds. That it is the sole mandate of the respondent to prosecute criminal cases as provided under Article 157 of the Constitution. That it has not been shown that the officers of the respondent abused the powers bestowed on them by Article 157 of the Constitution or that the decision to charge the petitioner was improper and unfair. That the arguments being raised are on evidence which should await the trial. That during the trial the petitioner will be given an opportunity to cross-examine witnesses and to respond to the evidence. The advocates cited the cases of **Johnson Kamau Njuguna & Another – Vs- Director of Public Prosecutions (2018) eKLR** and **Republic –Vs- Richard Munyi Ndwiga & Another (2015) eKLR** that emphasized the powers of the DPP in prosecution of crimes. The state counsel urged the court to dismiss the petition.

9. The advocate for the petitioner cited several authorities in support of their case. In **Laban Kipsang Tendet & Another –Vs- Director of Public Prosecutions (2016) eKLR**, Ngaah J. held that in the circumstances of that case the prosecution of the petitioners with the offences of murder should have been preceded by an inquest. The advocates also referred to the case of **Republic –Vs- Director of Public Prosecutions & 2 Others Ex parte Mildred Mboya Muli & 3 Others (2015) Eklr** where grounds of issuing judicial review orders were discussed at length.

#### **Analysis and Determination –**

10. The questions for determination are –

- (1) Whether the respondent acted within its mandate.
- (2) Whether the respondent infringed on the petitioner's rights.

11. It is the constitutional mandate of the Director of Public Prosecutions to prosecute criminal cases as provided by Article 157 (6) of the Constitution that states that:-

***“The Director of Public Prosecutions shall exercise state powers of prosecution and may –***

***(a) 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;***

***(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and***

***(c) subject to clauses (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).***

12. Articles 157 (10) and (11) further provides that:-

***“(10) 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.***

***(11) 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.”***

13. Though the office of the Director of Public Prosecution enjoys immense powers in institution and termination of criminal cases it is settled law that those powers are not unbridled where it is established in a case that the exercise of the powers amounted to an abuse of the process of the court, are oppressive and vexatious – See **DPP –Vs- Humphreys (1976) 2AII ER 497 as cited in Stanley Munga Githunguri –Vs- Republic (1985) eKLR**. It is the duty of this court to intervene where it is shown that the DPP acted ultravires and without any reasonable and probable cause.

14. The situations in which the court can intervene in reviewing the exercise of discretion by the DPP were summarized by Prof. Ngugi J. in **Peter Ngunjiri Maina –Vs- DPP & 2 Others (2017) eKLR** where he stated that:-

***“It is now clear that even in the exercise of what may appear to be prima facie absolute discretion conferred on the executive, the court may interfere. The court can only intervene in the following situation:***

- 1. Where there is an abuse of discretion;***
- 2. Where the decision-maker exercises discretion for an improper purpose;***
- 3. Whether decision-maker is in breach of the duty to act fairly;***
- 4. Whether decision-maker has failed to exercise statutory discretion reasonably;***
- 5. Where the decision-maker fetters the discretion given;***
- 6. Where the decision-maker fails to exercise discretion;***
- 7. Where the decision-maker is irrational and unreasonable.”***

15. The petitioner submits that the circumstances of the case required for an inquest to be conducted. That investigations did not disclose as to who fired the fatal shot. He faulted the DPP for not conducting an inquest before making a decision of whether to charge him or not. He further alleges that there was interference in the investigations by a relative of the deceased who is a senior police officer.

16. Under the provisions of Section 386 and 387 of the CPC inquests are required to be conducted where a person –

- (a) has committed suicide; or***
- (b) has been killed by another or by an accident; or***
- (c) has died under circumstances raising a reasonable suspicion that some other person has committed an offence; or***
- (d) is missing and believed to have died.***
- (e) under Section 387 – dies while in the custody of the police or of a prison officer.***

17. Section 387 requires inquests to be conducted either instead of or in addition to the investigation held by the police or prison officer. There is nothing in Sections 386 and 387 of the Criminal Procedure Code to suggest that it is mandatory to hold an inquest before a person is charged with the offence of murder. Inquests are only required to be conducted where the evidence gathered by investigators has come to a dead end.

18. The petitioner argues that none of the prospective prosecution witnesses mentioned him to be the person who fired the fatal shot. He referred to the statements of the prosecution witnesses DW2, 3, 6, 9, 13 and the statement of the investigating officer to show that none of them mentioned him.

19. It is trite law that judicial review proceedings are limited to the process rather than the merits of the decision being challenged. The court is not required to make definite findings on such matters which go to the merit of the case as these are reserved for the trial court. It is clear from the summary of evidence stated by the petitioner that there were eye witnesses to the shooting. If there were discrepancies in the evidence of the prosecution witnesses, that is an issue to be resolved by the trial court. If the evidence gathered by the respondent was not sufficient to sustain a charge that is for the trial court to determine and not the duty of this court. There is nothing to show that the respondent acted outside its mandate or that it acted out of pressure from other quarters. It is my view that the respondent was not bound by the recommendation of the investigating officer to conduct an inquest in the matter if the respondent was of the view that the evidence gathered was sufficient to sustain a charge.

20. It is the duty of the police to investigate crime. Once it is shown that the police have reasonable evidence on which to charge a person with an offence the court should not intervene. In **Republic –Vs- Commissioner of Police & Another Ex parte 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.”*

21. The duty of this court in an application for Judicial Review is as was stated in **Peter Ngunjiri Case** (supra) where the court stated that:-

*“The task of this court is only to determine, based on the facts and the evidence before it whether there is any sense in which one could say, in context, the decision by the DPP to charge the applicant in this case is irrational, an abuse of discretion, a failure to act fairly in the exercise of discretion, (was) actuated by malice or other relevant considerations, against public interests, does not cohere with the interests of the due administration of justice, is oppressive, or is an abuse of the legal process.”*

22. In this petition there was no evidence that the officers of the respondent were actuated by malice when they charged the petitioner or that their action was irrational, or that they acted in abuse of their mandate. I find that the respondent acted within its mandate as bestowed by Article 157 of the Constitution. It was not established that the respondent breached the fundamental rights of the petitioner in charging him with the offence. To charge a person with a crime as by law provided is not a breach of one’s fundamental rights.

23. The upshot is that there is no merit in the petition and the same is accordingly dismissed.

Delivered, dated and signed in open court at Kakamega this 3<sup>rd</sup> day of October, 2019.

**J. NJAGI**

**JUDGE**

In the presence of:

Miss Mukwana holding brief for petitioner

Miss Kibet for respondent/State

Petitioner - present

Court Assistant - George

14 days right of appeal.