



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

CRIMINAL DIVISION

CRIMINAL REVISION NO.172 OF 2019

MARY MUTHONI NDEGE.....APPLICANT

VERSES

REPUBLIC.....RESPONDENT

RULING

The Applicant, Mary Muthoni Ndege is facing a theft charge under **Section 268(1)** as read with **Section 275** of the **Penal Code** before the Chief Magistrate's Court Nairobi. The charge states that on diverse dates between 6th May 2017 and 16th November 2017 at Imara Daima Estate in Nairobi County, the Applicant stole the sum of Kshs.1,542,250/-, the property of Daniel Ng'ang'a Thuo (the complainant). When the Applicant was arraigned before the trial magistrate's court, she pleaded not guilty to the charge. The case is yet to be tried.

The Applicant filed an application before this court pursuant to the provisions of **Articles 49(1)(c), 50(1), 51(1), 159(2)(e), 165(3)(a), 165(3)(b)** and **165(6)** of the **Constitution** and **Section 362** of the **Criminal Procedure Code** seeking orders to have the charge brought against her quashed. The Applicant contends that the proceedings were instituted by the complainant to settle personal differences between them and thereby enable him assume an upper hand in relation to a parental responsibility case that the Applicant seeks to bring to court. According to the Applicant (and this fact has not been denied by the prosecution) between the years 2016 and 2018, the Applicant and the Respondents had a romantic relationship which culminated in the birth of a child.

It is apparent that after the birth of a child, the relationship soured leading to a break-up. Whereas the Applicant contends that she cohabited with the complainant during the material period, the complainant on his part denies it. He however states that during this period, he had rented an apartment for the Applicant where he used to occasionally visit. The Applicant states that after the end of the relationship, she did on 30th May 2019 write a demand letter, through his counsel seeking to compel the complainant to undertake his parental responsibilities by paying child maintenance to the sum of Kshs.100,000/- per month. Upon receipt of this letter, the complainant on 12th June 2019 lodged a complaint with the police alleging that the Applicant had stolen money from him. The complaint culminated in the Applicant's arrest and subsequent charge before the trial court. The Applicant contends that:

“...the proceedings were instituted with a collateral motive. It is apparent that the complainant and the Applicant were cohabiting in the year 2018 separating in October of that year. It is clear that the complainant had sufficient opportunity to lodge the complaint with the police during the pendency of their relationship and after dissolution of the same but failed to do so until 12th June 2019 with the ulterior motive of settling a collateral personal issue.”

It is the Applicant's case that the charge brought against her was an abuse of the court process. The court should therefore invoke its inherent jurisdiction and purge the proceedings.

The application is opposed. Cpl. India Abdullahi, the investigating officer in the case swore a replying affidavit in opposition to the application. She deponed that investigations had indeed established that the Applicant secretly and without the complainant's knowledge transferred the sum of Kshs.1,542, 250/- from the complainant's account in Equity Bank by using the mobile transfer platform via her mobile phone. She annexed copies of bank statements in support of her contention that the said sums were indeed transferred from the complainant's account. She denied the assertion by the Applicant that the charge laid against her was motivated by anything other than for the complainant to get justice in the case. She contended that the bringing of charges against accused person is not limited in terms of time. The charge brought against the Applicant was not therefore time barred. She denied the assertion by the Applicant that the charge against her was brought in abuse of the due process of the court.

Prior to the hearing of the application, counsel for the parties to the application filed written submission in support of their respective opposing cases. This court further heard oral submission made by Mr. Michuki for the Applicant and Ms. Kimaru for the State. This court has carefully considered the rival submission made. The issue for determination by this court is whether the Applicant made a case for this

court to quash the charges brought against her on the ground that the same was lodged in abuse of the due process of the court. That this court has inherent power to terminate proceedings when it forms the opinion that the same has been brought in abuse of the due process of the court is not in doubt.

Before delving on the issue raised, it is important for this court to state that as a matter of policy, this court in exercise of its supervisory jurisdiction of subordinate courts as donated by **Article 165(6) & (7)** of the **Constitution** and **Section 362** of the **Criminal Procedure Code** is required to exercise the power with restraint so as not to unnecessarily disrupt and interfere with pending trials upon application being made to it challenging certain aspects of the proceedings. This court agrees with the holding by the court in **Ebrahim, R (On the application of) v. Feltham Magistrates' Court & anor [2001] EWHC Admin 130.**:

“We think it helpful to restate the principles underlying the jurisdiction. The Crown is usually responsible for bringing prosecutions and, prima facie, it is the duty of a court to try persons who are charged before it with offences which it has power to try. Nonetheless the courts retain an inherent jurisdiction to restrain what they perceive to be an abuse of the process. This power is “of great constitutional importance and should be...preserved”: per Lord Salmon in DPP v Humphrys [1977] AC 1 at p 46C-F. It is the policy of the courts, however, to ensure that criminal proceedings are not subject to unnecessary delays through collateral challenges, and in most cases any alleged unfairness can be cured in the trial process itself. We must therefore stress from the outset that this residual (and discretionary) power of any court to stay proceedings as an abuse of its process is one which ought to be employed in exceptional circumstances, whatever the reasons submitted for invoking it. See Attorney-General Reference (No.1 of 1990 [1992] QB 630, 634G.”

It should also be noted that to ensure that the criminal trial process is fair to an accused, the **Constitution**, the **Criminal Procedure Code** and other **Statutes** and decided cases have put in place legal safeguards in the trial process itself that protects the rights of an accused person during the entire proceedings. A court having supervisory powers, when a challenge on such proceedings before a trial court is brought before it, should not therefore proceed on the assumption that the criminal trial process itself was on the face of it or was inherently unjust. In other words, the High Court exercising its supervisory powers of magistrate's court, should exercise with circumspection its powers unless it is established that the trial process that is being challenged is so antithetical to the right to fair trial of the Applicant as guaranteed by the **Constitution** and **Statute** that the court should have no option but to appropriately intervene.

In the present application, certain facts are not in dispute. It is not disputed that the Applicant and the complainant were in a romantic relationship for approximately two years before the relationship soured leading to their separation. Whereas the Applicant contends that she was cohabiting with the complainant during the material time, it was the complainant's argument that no such cohabitation occurred. What is not in dispute is that as a result of the relationship, a child was born. It appeared that after the relationship went south, the complainant declined to financially support the child. This led to the Applicant approaching an advocate in pursuit of an appropriate remedy. A demand letter was written to the complainant. Instead of responding to the demand, the complainant lodged a complaint with the police. This led to the Applicant's arrest and subsequent charge before court.

The Applicant contends that the criminal charge brought against her was motivated by the complainant's determination to avoid parental responsibility by shielding himself from the responsibility of financially supporting the child. On the other hand, it was the prosecution's contention that its investigations had established that indeed certain sums as contained in the charge sheet were transferred from the complainant's account using the mobile bank platform via the Applicant's mobile phone without the complainant's consent. It was clear that whereas the Applicant is contending that such transactions would be “normal” with people in such a relationship, it was the prosecution's case that the complainant did not give permission for the said sum to be withdrawn from his account.

Without making a finding as to the credibility or otherwise of the facts of the case (that is a duty that is reserved for the trial court), *do these facts constitute an abuse of the due process of the court?* This court contends that it does not. The relationship between the Applicant and the complainant was not that of a husband and a wife where the law would have been on the Applicant's side if she were to argue that the said sums of money were transferred to her in the normal course of a family transaction. In this case, it will be for the trial court to determine whether indeed the said transfer of funds from the complainant to the Applicant was done consensually or without the knowledge of the complainant. This is a legitimate issue to be determined by the trial court.

As regard whether the existence of a child maintenance dispute bars the trial court from proceeding with the case, this court holds that nothing in law stops or prevents the Applicant from pursuing the claim for child support before the Children's Court. The two proceedings can run parallel because the remedies available in either case are mutually exclusive. In the premises therefore, this court holds that the charge brought against the Applicant by the prosecution is not in abuse of the due process of the court and cannot therefore be terminated by this court. The Applicant shall be at liberty to raise her concerns as to the motive of the complainant in lodging the complaint with the police during trial.

It is clear from the foregoing that the application lacks merit and is hereby dismissed. The trial court's file shall be returned to the Chief Magistrate's Court for trial and determination. It is so ordered.

DATED AT NAIROBI THIS 6TH DAY OF NOVEMBER 2019.

L. KIMARU

JUDGE