**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CONSTITUTIONAL PETITION NO. 56 OF 2019**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: ARTICLES 10 (C), 20 (3) (b), 22 (1), 23 (1) (f), 28, 47 (1) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF: THE PROCEEDINGS IN MALINDI HCCR NO. 22 OF 2019 REPUBLIC VERSUS JULIUS MWENI ALIAS JULIO**

**AND**

**IN THE MATTER OF: A PETITION CHALLENGING THE DECISION TO PREFER MURDER CHARGES AS AGAINST THE PETITIONER HEREIN BY THE ODPP IN THE ABSENCE OF PROPER FACTUAL BASIS OR FOUNDATION AND WHEREAS THERE EXISTS NO REASONABLE & PROBABLE CAUSE FOR MOUNTING THE PROSECUTION OF MURDER CHARGES AGAINST THE PETITIONER HEREIN**

**BETWEEN**

**JULIUS MWENI ALIAS JULIO ..... PETITIONER**

**VERSUS**

**THE NATIONAL POLICE SERVICE .....1ST RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTION ..... 2ND RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 3RD RESPONDENT**

**RULING**

In the instant petition, through the firm of **Madzayo Mrima Jadi & Company Advocates** the petitioner moved this court in terms of a certificate of urgency and a notice of motion filed in court on 29.11.2019 seeking the following orders:

> ***1. That this Honourable court be pleased to issue a conservatory order to stay of proceedings and or deferment of plea with regards to Malindi High Court Criminal Case No. 22 of 2019 R vs Julius Mweni alias Julio in pending hearing of the petition herein.***
>
> ***2. That as a consequence of prayer 4 above the court be pleased to offer reasonable bail and/or surety bond terms to the petitioner herein pending determination of the petition.***
>
> ***3. That the costs of this application be provided for.***

The motion is supported by an affidavit deponed by the petitioner seeking out factual matrix why the intended indictment and prosecution ought to be stayed pending the hearing and determination of the petition.

The 1st and 3rd respondent filed grounds of opposition to fully challenge the line of arguments and affidavit evidence relied upon by the

petitioner. Likewise, the 2nd respondent also approached the rejoinder to the petition by way of grounds of opposition and a replying affidavit by **PC Abdalla Mawazo Abdarahmani**.

**Background to the petition**

The petitioner was arrested by Marereni Police Station pursuant to an investigation carried out by the 1st respondent and was to take plea for the offence of murder contrary to Section 203 of the Penal Code. The petitioners brought a petition in the form of a constitutional challenge expressed to be brought under Articles 10 (c), 20 (3) (b), 22 (1), 23 (1) (f), 28, 47 (1) of the Constitution.

The petitioners argued and submitted that the director of public prosecution has initiated a criminal charge of murder against the petitioner without justifiable cause or in the public interest as stipulated in Article 157 (1) 2 (11) of the constitution. The applicant contends that his arrest was arbitrary and in violating Article 27 on the right to freedom from discrimination and equal protection of the law.

Further the petitioner submits that on consideration of the matter the 2nd respondent ought to be motivated with prima facie evidence to justify that an offence has been committed.

The petitioner in his affidavit and oral submissions by counsel submitted that the case of murder against him is weak and its credibility seriously undermined by the already witness statements filed by the investigating officer. Learned counsel further argued and contended that the rights of an accused under Article 49 and 50 of the constitution stand to be violated and or infringed unless conservatory orders do issue as against the respondents.

**Analysis**

The central issue here is whether the decision by the DPP to charge and prosecute the petitioner before the High Court with the offence of murder is in contravention of **Articles 10 (C), 20 (3) (b), 22 (1), 23 (1) (f), 28, 47 (1) of the Constitution.**

As to the broader question of fairness, I consider matters complained of by the petitioner relate to a combination of factors as stated in the House of Lords case **Regina v Horseferry Road Magistrates Court, Ex parte Bennet [1994] 1 A. C. 42** where **Lord Lowry** observed as follows:

> ***"The question still remains what circumstances antecedent to the trial will produce a situation in which the process of the court of trial will have been abused if the trial proceeds. A court should have power to stay …. any criminal proceedings against the appellant, assuming the facts alleged to be proved, on the ground that to try those proceedings will amount to an abuse of its own process either because it will be impossible (usually by reason of delay) to give the accused a fair trial or because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case…. The jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons…."***

What is pertinent here, is the criminal matter involving the petitioner particularly challenged in light of the available material evidence obtained from the 1st respondent used as a basis by the 2nd respondent to initiate a prosecution for the offence of murder. The kernel of the petitioner's complaint revolves around the decision likely to occasion real prejudice and injustice at the end of it all.

This court is therefore faced with two scenarios:

First, the petitioner is already an arrested suspect ready to take plea for the offence of murder in terms of Section 203 of the Penal Code. Secondly, the charge legally drafted may have been as a consequence of a victim who recorded a statement with the 1st respondent alleging an unlawful act of omission against the victim of the offence.

In my Judgment, under Article 157 (11) of the constitution, the Director of Public Prosecution in initiating the criminal proceedings shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.

The test whether the 2nd respondent was inspired by a collateral objective or an abuse of the process, Lord Steyn in the case **Latif [1996] 1 WLR 104** said that:

> ***"General guidance as to how the discretion to decide whether there has been an abuse of process should be exercised in particular circumstances will not be useful. But it is possible to say that … a judge must weigh in the balance the public interest in ensuring that those who are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies the means."***

The facts of this case, though largely premised under Article 22 & 23 of the constitution challenging the jurisdiction of the Director of Public Prosecution brings the circumstances within the supervisory jurisdiction of this court under Article 165 (6) of the constitution.

In each of the cases, the conduct of both respondents in causing the petitioner to be charged with a criminal offence is a matter under question whether it is an affront to the constitution.

The predominant question in consideration for grant of conservatory orders to ensure that the litigation in the criminal court is stayed remains purely a matter of this court to tamper with judicial discretion. The court's discretion in any event is to be balanced with the principles in the Jamaican case of **Bank of Jamaica v Dextra Bank and Trust Co. Ltd [1994] 31 JLR 361:**

> ***"The court in the exercise of its inherent jurisdiction to control its own proceedings is required to balance justice between the parties, taking account of all relevant factors. What must not be lost sight of is, that it is the justice between the parties in the civil action which is being balanced and the onus is on the defendant (who seeks the stay) to show that the plaintiff's right to have its claim decided should be interfered with."***

The important point that emerges from this case, is whether the 1st and 2nd respondent in exercise of the executive powers, the petitioner has shown that it was in contravention of the constitution for the court to grant interim conservatory orders. Amidst accusation by the petitioner that the charge of murder is not well founded.

I take this opportunity to ask whether the approved action by the second respondent is of a nature that temporary measure of conservatory orders ought to be granted. The following dicta in the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR** it was held that:

> ***"Conservatory orders" bears a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes."(***See also the case of **Kevin K. Mwiti & Others –vs- Kenya School of Law & Others [2015] Eklr and Centre for Rights Education and Awareness (CREAW) & 7 Others***)*

Applying the yardstick in the above principles the petitioner has failed to discharge both the legal and evidential burden that the power applied to proceed with the criminal process is alien to the object and purposes under Article 50 of the constitution on the right to a fair hearing and due process by the petitioner.

An inclusive conceptual approach unless the charge against the petitioner was brought with malice, it would not be appropriate to stay or dismiss the criminal proceedings at the interlocutory stage unless there can be no longer be a fair hearing under Article 50 of the Constitution.

I am not convinced as submitted by counsels for the petitioner, that the provisions of Article 22,23 of the Constitution for the protection of a fundamental right or freedom overrides the specific provisions on right to a fair hearing in Article 50 and that the Director of Public Prosecution under Article 157 (11) has a right initiate, to continue, or terminate any criminal charge without any direction or authority from other persons.

From a wider perspective crime is about the community and victims disturbed due to the alleged criminal acts. The imperative character of Law is that the public, the victims and the defendant are all entitled to see that justice is not only done but be seen to work fairly, and efficiently in accordance with the Law.

The doctrine of separation of power and abuse of power was revisited in the case of **Regina v Humphreys {1977} A. C. 1** where **Lord Salmon** observed as follows:

> ***"I respectfully agree with my noble and learned friend, Viscount Dilhorne, that a Judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as matter of policy, it ought not have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene. Fortunately, such prosecutions are hardly ever brought but the power of the court to prevent them is, in my view, of great constitutional importance and should jealously preserved. …… I express no concluded view as to whether courts of inferior jurisdiction possess similar powers. But if they do and exercise them mistakenly, their error can be corrected by mandamus: See Mills v Cooper {1967} 2 Q. B. 459."***

It is the view of this court that the state has an imperative duty to observe minimum guarantees for a fair trial set out in Article 50 of the constitution. The relief the petitioner seeks to bar the prosecution albeit temporarily has the effect of requiring even the 1st respondent not to investigate any alleged transgressions which may have been committed by the petitioner or any other person in respect to intended prosecution under Section 203 of the Penal Code. In the event, prejudice is established as against the respondents there are various constitutional remedies available to the petitioner.

The notice of motion dated 29th November 2019 lacks merit and is hereby dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF DECEMBER, 2019**

**.....**

**R. NYAKUNDI**

**JUDGE**

**<u>In the presence of:</u>**

1. Mr. Mwangunya for the 1st and 3rd respondent

2. Mr. Kinyanjui for the petitioner

3. Ms. Sombo for the 2nd respondent