



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

PETITION NO 22 OF 2016

IN THE MATTER OF:

ARTICLES, 2,3,, 5,10,19,20,21,22,23,25,31,40,47,73 157, 159 OF THE CONSTITUTION

AND:-

**SECTIONS 23,24,27,28, 29 OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT,
2012**

AND:

THE FAIR AND ADMINISTRATIVE ACTION ACT, 2015

AND:

ISIOLO ACC NO. 2 & 3 OF 2017

AND

CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

BETWEEN

IBRAHIM WAKO BORU..... PETITIONER

VERSUS

ETHICS & ANTI-CORRUPTION COMMISSION.....1STRESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2NDRESPONDENT

JUDGMENT

Harassment during investigations

[1] By a Petition filed on 29thSeptember 2017, the following reliefs were sought;

A. A DECLARATION that the acts of the Respondent of instituting criminal cases against the petitioner in view of the fact that the correct procedures were followed of the acts complained of, are in bad faith and not honest enforcement of the law and are unlawful and in violation of

articles 1,2,3,6,10,189,190 well as the Part 2 of the Schedule of the Constitution

B. A DECLARATION that the Respondent is bound by the national values and principles of Governance enumerated in Article 10 of the Constitution of Kenya to inter alia adhere to the rule of law, non discrimination and transparency in its operations.

C. That an ORDER OF CERTIORARI does issue to quash the charge sheets and proceedings in Isiolo ACC NO. 2/2017 and 3/2017 and to prohibit the Respondent from proceeding with prosecution in Isiolo ACC NO 2/2017 and 3/2017.

D. A DECLARATION that the fundamental rights and freedoms guaranteed to the petitioner, especially under Articles 2,3, 20 (1),20(2), 21 (1), 22 (1), 28,31,47,348 and 50 (1) of the Constitution have been contravened by the conduct of the Respondent.

E. Further to (b) above, an ORDER OF COMPENSATION in general damages to the Petitioner malicious prosecution and for violation of his rights and fundamental freedoms set out under articles 2k8,29,31,35,41,47,48 and 50 of the Constitution of Kenya.

F. Any other or such other relief that this court shall deem fit to grant.

G. Costs of this petition.

[2] The petition was canvassed through written submission of the parties. Of essence, the Petitioner complains that the 1st Respondent has subjected him to harassment through investigations and prosecution for alleged corruption crimes. He averred that the two cases, namely ISIOLO ACC NO2 & 3 OF 2017 as well as the investigations carried by EACC were actuated by bad faith at the instigation of a senior officer at EACC whose aim is to secure political advantage for himself and also settle scores with the petitioner and other former employees of the former governor of Isiolo County. To him, as long as these cases are not honest enforcement of the law, the actions by the Respondents are in violation of article 10 of the Constitution on National values. The petitioner claimed that constant intimidation by EACC has brought fear upon him and has had to work infear. In addition, he claimed that the charges in the two cases are fatally defective for they do not disclose any criminal or ethical culpability. He explained the circumstances in which the hiring were done and stated that they were perfectly in order and within the transitional statutory scheme under the Transitional Authority. According to him, he did not overstep his mandate in the hiring in question. See the supporting affidavit, further supporting affidavit as well as the submissions. He therefore sought declaration that the charges are in violation of his rights and the Constitution.

[4] In his submissions, the Petitioner termed the investigations herein as a witch-hunt by officers of EACC who were moved by malice. Specific scathing attack on the concerned officers of EACC is reproduced below:-

“The Respondent, through its agents has practiced and sharpened the art of illegal prosecution and interference of the Interested Party’s and its employees, the petitioner herein included in the discharge of their constitutional mandate through persistent, insistent unlawful and illegal prosecution”.

[5] The petitioner argued further that EACC conducted investigations on several individuals. But, deliberately refused to institute criminal proceedings against some of the person recommended for prosecution especially one HalakeHuka. Such, he said, is selective justice, discrimination against the Petitioner and an act of favouritism by the Respondents. He also complained that procedural fairness was not accorded as required under article 47 of the Constitution on administrative justice. The petitioner cited relevant authorities in support of the petition.

Petition was opposed

[6] The Respondents opposed the petition and filed replying affidavits sworn by Leonard NjengaMungai and David NaibeSangula. They also filed joint submissions. They raised two objections. One, that the petition was defective for lack of particulars of the manner the petitioner's rights have been violated. Two; that this court is not the proper forum to determine issues raised; the criminal trial court is. They made further submissions that the report to the DPP recommended the prosecution of the petitioner and DPP concurred with the recommendation. They also stated that the petitioner was interviewed before the decision to charge him was made and he gave his own account of the matters in issue. And that there is no evidence that EACC or DPP was not independent in making the decisions herein. They accused the petitioner of concealing material information from this court particularly that he is the one who signed the appointment letters in question. Yet, under section 63(3) of the County Governments Act, only Public Service Board has power to make appointments in controversy unless it has properly delegated authority under section 86 thereof. He did not produce evidence of delegated authority by the board.

[7] With regard to the defective charges; they argued this is a matter for the trial court to determine, and cannot be a basis for stay of proceedings. They cited relevant cases to support their position. In any event, they argued that the acts by the petitioner of conferring a benefit to himself or another or other persons constituted a criminal offence under section 46 as read with section 48(1) of ACECA. In sum, they submitted that the Respondents were entitled in law to take the decisions they did. And, the law provides sufficient safeguards within the trial of the accused. Therefore, he should not complain of harassment simply because he has been charged. They urged the court to dismiss the petition. They also cited relevant decisions in support of their arguments.

DETERMINATION

[8] If I understood the petition well, I should determine:-

- 1. Whether the criminal cases No 2 & 3 of 2017 instituted against the petitioner were a violation of the Constitution and the law**
- 2. Whether the conduct of officers of EACC in conducting investigations as well as recommending the prosecution of the petitioner violated the Constitution and petitioner's constitutional rights; and**
- 3. Whether the charges in the two criminal cases are defective for they do not disclose an offence or are not supported by evidence.**

[9] I will invert these issues and begin with the last one for obvious reason; it is straight-forward issue and simple to tackle.

Claim of defective charge

[10] The arguments by the parties on the subject of defective charge, are a twinning of two strands;

- (1) That the charge does not disclose an offence; and
- (2) That the charge is not supported by evidence.

Immediately I heard the claim that the charge discloses an offence, section 89 of the Criminal Procedure Code came to mind. The section provides as follows:-

- 89 (1) Proceedings may be instituted either by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without warrant.**
- (2) A person who believes from a reasonable and probable cause that an offence has been committed by another person may make a complaint thereof to a magistrate having jurisdiction.**

(3) A complaint may be made orally or in writing, but, if made orally, shall be reduced to writing by the magistrate, and, in either case, shall be signed by the complainant and the magistrate.

(4) The magistrate, upon receiving a complaint, or where an accused person who has been arrested without a warrant is brought before him, shall, subject to the provisions of subsection (5), draw up or cause to be drawn up and shall sign a formal charge containing a statement of the offence with which the accused is charged, unless the charge is signed and presented by a police officer.

(5) Where the magistrate is of the opinion that a complaint or formal charge made or presented under this section does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for the order.

Of specific relevance here is section 89(5) that:-

Where the magistrate is of the opinion that a complaint or formal charge made or presented under this section does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for the order.

[11] In my view, therefore, a claim that a charge does not disclose an offence falls squarely within the jurisdiction of the trial court to determine. And such objection could be raised at any time in the trial by the accused or by court the court on its own initiative. Accordingly, the petitioner should so move the trial court for appropriate remedy. I think this court should never appear to usurp the powers of the trial court or try to regulate the way the trial court should conduct trial or deal with such matters, in the guise of constitutional declarations. The procedure for summary rejection of charge sheets has been provided in law as a safeguard mechanism against sustenance of charges which are hollow or unsustainable in law. And are bestowed upon the trial court in the first instance. The ground fails.

[12] On the second strand that the charge is not supported by evidence, I am content to cite the decision in **MEIXNER & ANOTHER vs. AG** that:-

“...it is the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered to support the charge. It would be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of the trial court”.

I should state that, the offence of abuse of office, attempt to commit an offence involving corruption and uttering false document are known to law; have been established under the law and penalty thereof provided as required by the principle of legality. More specifically see sections 46, 48(1) and 47A of ACECA, and section 353 of the Penal Code. Therefore, for the reason I have stated, I find the invitation to evaluate the adequacy or otherwise of the evidence herein to be wrong. I find no merit in the argument in so far as it has been packaged as a constitutional query, yet it will require me to usurp the power of the trial court. These issues form part of his defence before the trial court. Thus, let the issue be raised and determined by the trial court at earliest possible opportunity.

Of violation of the Constitution, rights and freedoms

[13] The petitioner has argued that there are powerful people within EACC structure who are illegally using their influence and power to harass and intimidate him in order to gain political mileage. See affidavit and petition. This is a very serious allegation because if proved, hinges on abuse of public power and office to hurt the very citizens the institution should be protecting. At this juncture, I feel obliged to state that independence of EACC and DPP is at the core of justice itself, for when it is compromised, the criminal justice system fails and people will be hurt by injustice. Therefore, any person who alleges that these institutions acted contrary to the Constitution in the exercise of their powers, should appreciate the enormity of the subject and provide proof thereof. Accordingly, details of the specific acts of harassment and intimidation alleged should be stated clearly. In addition, the particular individuals who perpetuated

the alleged acts of harassment and intimidation must be named. The law is also interested in knowing the persons accused of abusing the Constitution and the law for the sake of administration of justice and punishment of such individuals through criminal process or disciplinary process. Nevertheless, neither the specific details of the alleged acts of harassment and intimidation nor the persons involved was provided. Of significance is that two EACC investigators, namely, David Naibei Sangula and Leonard Njenga Mungai swore affidavits stating the manner in which they conducted investigations which gave rise to the impugned criminal proceedings. I note that the petitioner did not accuse any particular investigator or any or both of these two investigators of harassment or intimidation during investigations. The ground therefore fails for lack of merit.

Alleged selective, discriminatory prosecution

[14] I note two allegations of serious nature, to wit:-

1. That the Respondents did not give the petitioner an opportunity during investigations, thus, contravened the requirements of administrative justice as well as the national values under article 10 of the Constitution; and
2. That the Respondents have perfected the art of sharp practice; have administered selective and discriminatory justice against the petitioner. The reason given is that, some persons who were recommended for prosecution were not prosecuted except the petitioner.

Procedural fairness

[15] On the breach of rules of natural justice, I say this: article 47 of the Constitution embodies the right to fair administrative action as follows:-

47(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.

Parliament also enacted legislation to give effect to this right. Therefore, it is no longer a matter of importing common law principle on procedural fairness. It is now a matter of the Constitution. I agree with the petitioner that EACC and DPP are public bodies which exercise public authority. As such, they should adhere to the national values in making their decisions, and imbue their processes with procedural fairness. However, there is no exact or definite measure of what amounts to procedural fairness, as in every administrative action taken by a particular body, the circumstances of the case, the nature of the action or process and so forth will determine the type of procedural fairness attendant thereto. The petitioner cited many relevant cases on the subject. I will not multiply them, except I cite the case of **SIMON GAKUO vs. KENYATTA UNIVERSITY & 2 OTHERS MISC CIVIL APP NO 34 OF 2009** where it was held that:-

“...Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection in law. There are no rigid or universal rules as to what is needed in order to be procedurally fair. What is needed is what the court considers sufficient in the context of each situation with its own unique facts with the needs of good

administration in view. I urge practitioners of law not to rigidly import the hearing requirement in court room situation etc...

[16] Applying this test, I have perused the record and I find that the petitioner was interviewed by the investigators of EACC and he recorded two statements one dated 27th April 2015 at 3.00 pm and another dated 9th November 2016 at 8.30 pm. The statements are annexed to the affidavit of David Naibe Sangula as DN-3. The statements are fairly comprehensive and addressed the very issues under investigation. In fact, the petitioner has given comprehensive account of his understanding of the letters he wrote on the subject of investigations. In the circumstances, it cannot be said that he was denied an opportunity to be heard or to respond to matters under investigation. The ground fails.

Selective justice

[17] I turn to the other argument on selective justice. I reiterate that EACC and DPP are public bodies which exercise public authority. As such, they should adhere to the national values in making their decisions, and imbue their processes with procedural fairness. Therefore, whereas they are independent institutions, they are not divorced from the Constitution; they must adhere to the Constitution in the exercise of their mandates. The Constitution itself proclaims that that National values and Principles of Governance binds all state organs, state officers, public officers and persons whenever any of them—

- (a) applies or interprets this Constitution;**
- (b) enacts, applies or interprets any law; or**
- (c) makes or implements public policy decisions.**

On this, see article 10 of the Constitution below:

10. National values and principles of governance

(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

- (a) applies or interprets this Constitution;**
- (b) enacts, applies or interprets any law; or**
- (c) makes or implements public policy decisions.**

(2) The national values and principles of governance include—

- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;**
- (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;**
- (c) good governance, integrity, transparency and accountability; and**
- (d) sustainable development.**

Couple article 10 with the principle of justice that; justice shall be done to all regardless of status; and article 27 of the Constitution which prohibits any form of discrimination on the grounds stated in sub article (4) thereof. Here, I should state that investigation is part of the process of administration of justice and so tenets of impartiality, fair administrative action and non-discrimination apply to it. I therefore take the allegation of selective and discriminatory prosecution to be a serious constitutional issue. But what

evidence is before me?

[18] The petitioner argued that one of the persons recommended for prosecution, namely Hussein Huka was not charged. I have perused the report made to the DPP under section 35 of the ACECA. Huka was recommended for prosecution. EACC and DPP did not tell the court whether Hukahas been or will be charged or reasons for not charging him. These two state organs should always be accountable for their decisions which they exercise on behalf of the public under the principle of delegated authority. Such accountability is placed by the Constitution; not by this court or the petitioner. However, failure to charge all suspects or those the petitioner thinks ought to have been charged, does not alone translate into selective or discriminative prosecution. Violation of right that arise out such failure has to be established and proved. I should also state that it will be dangerous to set as law, that, merely because one or more suspects are not charged in a proceeding, an automatic quashing of a criminal proceeding against one or some of the suspects invariably ensue. I could be wrong on this proposition. But, in the circumstances of this case, I do not think there is any prejudice or discrimination which the petitioner has suffered. There is also no evidence that there is selective prosecution of the petitioner. Except, and I have stated this earlier, EACC and DPP should always account to the public and the law on all their actions. I am aware that even where EACC has terminated an investigation, they must notify the complainant in writing and give reasons for the termination. Therefore, where a person has not been charged after due recommendation for his prosecution, EACC and DPP must give a satisfactory account thereof as a matter of accountability. That notwithstanding, I do not find any evidence that the two institutions did not act independently or in accordance with their mandates in matters giving rise to these proceedings. And the petitioner's indictment will not be defeated for simple reason that some suspects have not been charged unless the nature of the charge requires both or all the suspects should be charged. And such question should be raised in the trial. Needless to state that, in ordinary circumstances, it is legally permissible for a person to be charged with others not before court. I am aware that prosecution may source witnesses who may be blameworthy but such evidence will still have to pass the test of accomplice evidence; therein lies the protection of the accused. In sum, the ground fails to elicit sufficient weight and I find that there was no selective and discriminative prosecution of the petitioner. The ground is rejected.

Conclusions and orders

[19] I hope by now to have established that the attempt by the petitioner to show that; (1) there was harassment and intimidation during investigations; (2) he was not provided with opportunity to be heard or to interrogate the complaints he was facing; (3) there was selective prosecution and discrimination in his prosecution; (4) that the charges are defective and thus, in violation of the Constitution and his rights; and (5) that EACC and DPP have abuse their powers; has failed on the numerous reasons I have given. But, before I close, it is profitable to re-state that, being subjected to the criminal process is not *per se* a violation of right or freedom of the person concerned. When I say criminal process, I mean investigations and the trial proper in court, the way we know it. The said process is anchored in the Constitution and the law; and it has been clothed with sufficient safeguards which guarantee enjoyment of rights and freedoms under the Bill of Rights even as the process is undertaken. Here, fathom rights of arrested person, right to bail, right to be presumed innocent until proven guilty, right to remain silent, right of disclosure of evidence, right against self-incriminating evidence, right to fair administrative action, and so on and so forth; all are available in the criminal process and serve to ensure fair trial. Having said that, upon applying the only yardstick: the Constitution; I find this petition to lack merit and is dismissed. I will not however condemn the petitioner to costs as I believe he was moved by legitimate desire for justice. I order each party to bear own costs of the petition. It is so ordered.

Dated, signed and delivered in open court at Meru this 8th day of February 2018

F. GIKONYO

JUDGE

In the presence of :

Mrs. Mwathi for DPP

Mrs. Mwathi for EACC

Non appearance for Petitioner

F. GIKONYO

JUDGE