



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

PETITION NO. 8 OF 2017

IN THE MATTER OF ARTICLE 1, 22 (1), 86 (C), (D), 88 (B), 157 (11) AND 165 (6) OF THE CONSTITUTION OF KENYA 2010.

-AND-

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 50 (1)

-AND-

IN THE MATTER OF CHAPTER SEVEN OF THE CONSTITUTION

-AND-

IN THE MATTER OF REGULATION 85 OF ELECTION (GENERAL REGULATIONS). 2012

-AND-

IN THE MATTER OF SECTION 42 OF THE ELECTIONS ACT NO.24 OF 2011

BETWEEN

NICHOLAS MUGAMBI MUGWIRIA.....PETITIONER

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

1. Before me is a Petition dated 4th September 2017, in which the Petitioner Nicholas Mugambi Mugwiria seeks the following prayers:-

a) A declaration that the charge and proceedings in Meru Chief Magistrate Election Offence No. 4 of 2017 Republic V Nicholas Mugambi contravenes the Petitioner's right to a fair trial under Article 50 (1) of the Constitution.

b) A declaration that the dominant purpose for the institution and maintenance of Meru Chief Magistrate Election Offence No. 4 of 2017 Republic V Nicholas Mugambi is to achieve a purpose other than that which is intended that is to obstruct the Petitioner from lawful execution

of his duty.

c) An order of permanent stay of Meru Chief Magistrate Election Offence No. 4 of 2017.

d) An award for damages for wrongful arrest and charge by the Respondent.

e) Cost of the petition.

2. The Petitioner's case is that he was the Tally Agent for Mazingira Greens Party of Kenya which had nominated one Silas Muriuki Ruteere as its sole flag bearer in the elective position of the Member of Parliament for North Imenti Constituency, Meru County. The Petitioner was stationed at Kaaga Methodist School which was the Constituency tallying center for North Imenti Constituency. It was his case that he was collecting and collating data from I.E.B.C public portal while also liaising with party agents on the ground. That his immediate concern was that the public portal was not displaying data in some polling centers through information received from his polling agents on the ground. That since the results were not appearing on the IEBC portal as required, he decided to inform the Returning Officer who assured him that the issue would be rectified.

3. It was the Petitioner's contention that his persistent questions that sought clarification did not go down well with the Returning Officer and that on 10th August, 2017, at around 9:30-10:00PM, he noticed the OCPD and the DCIO Imenti North walk in the hall and that he got concerned when the OCPD started engaging the IEBC tallying clerks.

4. That, soon thereafter, the DCIO got hold of him, mishandled him, pushed him and arrested him whereupon he was whisked away and put into a police vehicle. He was latter charged with the offence of hindering an election officer in the execution of his lawful duty contrary to **Section 13 (i) of the Election Offences Act No. 37 of 2016.** The Petitioner has contended that the Respondent was using the criminal charges for a purpose other than that which was intended and that he had used his powers capriciously, arbitrary and unfairly.

5. The Respondent did not file any response to the factual allegations in the Petition and the supporting affidavit.

6. When the Petition came up for hearing on 8th November 2017, the court directed that the same be canvassed by way of written submissions. It was submitted for the Petitioner that he was a tally agent with Mazingira Greens Party of Kenya in the General Elections held on 8th August 2017. He set out what his duties were and submitted that on 10th August at around 9:30PM, he questioned the manner in which the tallying process was being conducted in the presence of security personnel. That this did not go down well with the security officers who arrested and charged him with the current offence.

7. It was further submitted for the Petitioner that **Article 88 of the Constitution of Kenya** establishes the IEBC and under sub article (h) thereof, the IEBC was mandated to facilitate the observation, monitoring and evaluation of elections; that the IEBC in compliance to the said Article admits political parties to tallying centres for that purpose; that further, under **Regulation 85 of the Election General Regulations 2012**, an authorized agent was one of the persons allowed at the tallying centers and that the function of a political party agent could not be overemphasized. The Petitioner thus contended that his arrest was not for a genuine reason and or in public interest but was meant to stop him from performing his duties and that the Respondent had acted in bad faith. He urged the Court to interfere with the DPP's exercise of discretion.

8. On the other hand, it was submitted for the Respondent that under **Article 157 (10) of the Constitution of Kenya** the Respondent requires no consent or is not under the direction or control of any person or authority for commencement of criminal proceedings in the exercise his duties. That in the instant case, a complaint was made and after investigations, the Respondent independently verified and made the decision to charge the Petitioner as per the law and that the criminal charges preferred against the

Petitioner were properly before the court.

9. Mr. Namiti further submitted that the complaint and statements disclosed an offence; that the Respondent had followed all laid down principles in law to have the Petitioner charged. The case of ***Helmuth Rame vs Republic and Manilal Jamnadas Ramji Gohil vs DPP [2014]eKLR*** were relied on for the proposition that a stay is to be sparingly granted in criminal proceedings. on the cases of ***Musyoki Kimathi vs Inspector General of Police & 2 Others [2014]eKLR***, ***Lucy Karauki Kirambis vs D.P.P Chuka H.C Pet. No. 1 of 2015 (VR) and Jadiel Karithi vs The OCS Meru Police Meru HC Pet. No 21 of 2015 (UR)*** for the proposition that where it is demonstrated that the dominant purpose of a prosecution is otherwise than justice, the D.P.P's discretion on prosecution is interferable.

10. I have carefully considered the petition; the rival submissions and the authorities relied on by the parties. In my view, the two main issues for determination are as follows:-

a) Whether the charge and proceedings in Meru Chief Magistrate Election Offence No. 4 of 2017 Republic V Nicholas Mugambi contravenes the Petitioner's right to a fair trial under Article 50 (1) of the Constitution;

b) Whether the proceedings in Meru Chief Magistrate's Election Offence No. 4 of 2017 Republic V Nicholas Mugambi, intend to achieve a purpose other than that which is intended, that is, to obstruct the Petitioner from lawful execution of his duty?

c) whether the Petitioner is entitled to prayers sought in the petition.

11. With regard to the first question, the Petitioner has contended that the criminal proceedings in Meru Chief Magistrate Election Offence No. 4 of 2017, contravenes his right to a fair trial contrary to ***Article 50 (1) of the Constitution. Article 50 (1) of the Constitution*** which deals with fair hearing provides as follows:-

"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

12. I have carefully considered the Petition and the affidavit in support thereof. Save for the Petitioner making general averments, the Petitioner has not demonstrated how his rights to fair trial pursuant to ***Article 50 (1) of the Constitution*** (supra) have been contravened.

13. In any event the proceedings in the lower court have not even commenced. Further the Petitioner has not demonstrated that he has not been accorded a fair and public hearing before court or any other independent and impartial tribunal/body. In light of the foregoing, it is this court's view that prayer 1 of the Petition is premature and is without merit and the if accordingly rejected.

14. With regard to the second issue the Respondent is a creature of the Constitution and specifically, ***Article 157 (1) of the Constitution. Sub Article 6*** thereof donates to the Respondent prosecutorial powers as follows:

"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 an[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).....

Sub Articles 10 and 11 thereof provides as follows:

" (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".

15. From the foregoing , it cannot be disputed that the Respondent is vested with wide and unfettered powers in the discharge of his prosecutorial duties. Those powers though like any other discretionary powers must be exercised judiciously and not capriciously. In **Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 3 others** [2013] Eklr the Court held;

"I find and hold that the DPP exercises discretionary power and what is required is a reasonable basis for the exercise of the discretion. I think it would be crossing the line of independence of the Office of the DPP to descend into the arena to finding whether or not there is a prima facie case against those other persons who are not even parties to the petition, quite apart from the fact that meandering along this path would usurp the jurisdiction of the trial court".

16. In the case of **Kuria & 3 others v Attorney General** [2002] 2 KLR 69, it was observed as follows that

"There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution. In the instant case, the applicants have stated that there is an abuse of the process of the court by the AG. Several allegations have been levelled against the state that there is selective prosecution, that there is harassment of the applicants and pressure from the state to settle the civil dispute... I have not seen any evidence of these allegations made against the state. There is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority no evidence of harassment or intimidation or even manipulation of court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial as provided under section 77 of the Constitution.....There is need to show how the process of the court is being is being used or misused. There is a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means... Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence...However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is manipulation, abuse or misuse of the court process or that there is a danger to the right of the accused person to have a fair trial."

17. In Republic V Commissioner of Police & Another Ex-Parte Michael Monari & another [2012] eKLR, the Court stated:-

"under Article 157(4) of the Constitution, the Director shall have power to direct police to investigate any information or allegation of a criminal conduct and it is mandatory for the police to comply with any directions or instructions given by the Director of Public Prosecution. 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 not 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”

18. The Petitioner has contended that the dominant purpose for the institution and maintenance of charges against him. was to achieve a purpose other than that which is intended namely; to obstruct the Petitioner from lawful execution of duty. I have carefully looked at the witness statements that the Petitioner annexed to his affidavit in support. The Court notes that the petitioner was an agent for Mazingira Greens Party in the last general elections and his role in the said elections has since ceased to exist. However he was arrested and arraigned in Court while, as he states in the course of his duty as a tallying agent.

19. He swore on oath that he questioned the Returning Officer severally about the manner in which the tallying data was being collated and the failure by IEBC to explain why there was delay in relaying results to the Public Portal. He swore that this was one of his duties. That it is his persistence to have information from the Returning Officer that annoyed the latter and a decision made to have him arrested and charged with the offence he is facing before the trial Court. That the arrest and prosecution was meant to hinder him from monitoring the election (tallying of votes) on behalf of his party.

20. It should be recalled that despite these bold and damning allegations, the DPP did not cause any Replying Affidavit in response to be filed. Those allegations remained uncontroverted. The Court has to treat them as being true. If they be true, will the charges and prosecution be in the public interest? I have looked at the statement of the Returning Officer who is the complainant. He states:-

“....a tallying centre agent whom I know physically has persistently interfered with my tallying duties causing several interruptions, in the midst of strict timeline cum deadline. When the security team at the tallying centre came to my resque the said agent became arrogant and assaulted the Senior most security officer”.

21. There are no particulars of the alleged hindering of the Returning Officer from execution of his duties. If being questioned on how the Constitutional process of tallying votes is hindering, then the principles of how to carryout a credible election under Article 81 of the Constitution would be but a mirage. The Petitioner has sworn that he was carrying out his duties as a tallying agent and the arrest and prosecution was meant to facilitate the interference of the free will of the voters at the tallying centre. Indeed there was an affidavit in support of the petition on record by the candidate for whom the Petitioner was agent and he has indicated that he had lodged an election petition in Court challenging the results returned and that the petitioner’s predicament is an issue in that petition. All these matters were not denied or challenged.

22. In the absence of any denial that the arrest and prosecution was then meant to remove the petitioner from the tallying centre and hinder him from the execution of his lawful duties, I find that the prosecution is meant for an ulterior notice other than criminal justice.

23. I am alive to the decision of the Court of Appeal in ***Goddy Mwakio & another v Republic [2011] eKLR***, where it was held that:-

An order for stay of proceedings, particularly stay of criminal proceedings is made sparingly and only in exceptional circumstances (see Halsbury’s Laws of England, 4th Edition Re-issue page 290 paragraph 926). The order is not given as a matter of course.

25. However, for reasons advanced, I am satisfied that a case has been made to stay the proceedings. I find that the petition is meritorious and the same is hereby allowed in terms of prayer Nos. (b)(c) and (e). Since the petitioner did not demonstrate the loss and damage he had suffered as a result of the arrest and prosecution. I decline to make any award of damages under prayer (d) of the petition.

It is so ordered.

DATED and DELIVERED at Meru this 5th day of April, 2018.

A.

MABEYA

JUDGE