



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

PETITION NO. 27 OF 2017

IN THE MATTER OF:

ARTICLES 2, 3 (1), 10,19,20,21,22,23,25,29,39,48,50,157,159 & 165 OF THE CONSTITUTION OF KENYA

-AND-

**RULES 3, 4 & 23 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)
PRACTICE AND PROCEDURE RULES, 2013**

-AND-

TIGANIA PMCCRC NO. 906 OF 2015-R VS, STANLEY MWITI MUREA

-BETWEEN

STANLEY MWITI MUREA.....PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

IG OF POLICE (THR' OCPD, TIGANIA WEST.....2ND RESPONDENT

PRINCIPAL MAGISTRATE, TIGANIA COURTS.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

Alleged abuse of criminal process

[1] In the constitutional petition dated 20th December 2017, the Petitioner seeks the following orders:

- a) A declaration that the Petitioner's fundamental rights to a fair trial under Article 50 of the Constitution of Kenya, 2010 has been infringed upon by the 1st and 2nd Respondents.*
- b) A declaration that there is real danger that the Petitioner's fundamental rights under Articles 29 and 39 of the Constitution of Kenya, 2010 are likely to be violated in view of prayer 1 above.*
- c) An order of Certiorari do issue to bring to this court for purposes of quashing any decision (s) by the 1st and 2nd Respondents to charge the Petitioner in Tigania Principal Magistrate's criminal case No. 906 of 2015 Republic V Stanley Mwitii Murea and consequently all proceedings pursuant to the charge.*
- d) An order of prohibition prohibiting the 1st to 3rd Respondents from moving forward with, any, further proceedings relating to Tigania Principal Magistrate's Criminal Case No. 906 of 2015 Republic V Stanley Mwitii Murea in view of prayers 1 to 3 above.*
- e) In the alternative, an order that proceedings in the criminal charges against the Petitioner herein start afresh outside the*

jurisdiction of Mr. Onderi Senior Assistant Director of Public Prosecutions.

f) General damages.

g) Costs of the petition.

h) Any other order that the court deems fit for the interest of justice.

[2] The Petitioner's case is that he was related to the complainant in Tigania Principal Magistrate's Criminal Case No. 906 of 2015, Republic vs. Stanley Mwitii Murea. He explained the relationship; the complainant (the interested party) was married to the uncle of the Petitioner's wife and all along, they have had family issues ranging from suspicions of adultery to issues concerning payment of dowry. To the Petitioner, therefore, this was a family issue. But, the 1st and 2nd Respondents were being used to settle scores.

[3] The Petitioner contended further that on 9th December 2013, at around 2PM, the Petitioner lodged a complainant against the interested party's husband at Miathene Police post for threatening to kill him on baseless suspicion that the Petitioner was having an affair with the interested party. The complaint was ignored by the officer in charge. On the same day, at around 6PM, the interested party lodged a complaint against the Petitioner alleging that the Petitioner had attempted to rape her on 8th December 2013 at around 9:30AM in her house in Miathene. On 22nd December 2013, the Petitioner was arrested at his home on allegations of attempted rape on the interested party.

[4] More was averred. That, after further investigations, the investigations officer one Wanga Masake made the findings *inter alia* that two reports had been made, one by the Petitioner against the interested party's husband for threat to kill and the other by the Interested party against the Petitioner for attempted rape. The investigation officer recommended that; (1) the interested party be charged with giving false information to a person employed in the public service contrary to section 129 (a) of the Penal Code concerning alleged attempted rape; and (2) the interested party's husband be charged with threatening to kill contrary to section 223 (1) of the Penal Code. According to the Petitioner, the interested party and her husband were never charged as recommended; he found the behavior of the police suspect and shortly found out that the interested party and her husband had sought the help of a Mr. James Oludhe who was working with the DCIO Tigania West and who introduced them to a Mr. Onderi, a Senior Assistant Director of Public Prosecutions based at Meru. He alleges that, immediately thereafter, Mr. James Oludhe was arrested and charged by EACC officials for soliciting a bribe from the Petitioner which was to be shared between him and Mr. Onderi to ensure the Petitioner was not charged.

[5] The Petitioner thus sees the criminal proceedings not to be for purposes of upholding and safeguarding public interest and justice but a distortion of justice and an abuse of process by the 1st Respondent through its officer, Mr. Onderi and the 2nd Respondent through Mr. Oludhe. The criminal proceedings herein were also wrong, improper, capricious and unfair and a tool for settling scores.

DPP: Criminal proceedings proper

[6] The Petition was opposed via a Replying Affidavit sworn by Evans Onderi the Senior Assistant Director of Public Prosecutions in charge of Meru who deposed *inter alia*

a. That the 1st Respondent was an independent constitutional body created under Article 157 of the Constitution and according to Article 157 (10) of the Constitution, the 1st Respondent shall not require the consent or be under the direction or control of any person or authority in the commencement of criminal proceedings in the exercise of its duties;

b. That in making the decision to charge in this particular case, he carefully examined and re-evaluated the evidence on record and had regard to public interest, the interest of administration of justice and the need to prevent and avoid the abuse of the legal process. See Article 157 (11) of the Constitution;

c. That he had never seen or met the said Mr. Oludhe; came to learn of his existence through media reports after his arrest. Mr. Oludhe was arrested on 29th June 2015 after he had made the recommendations on the charges to be preferred via his letter dated 10th June 2015.

d. That he had carried out his mandate as provided for in Article 157 of the Constitution without any influence from anyone;

e. That it was evident from the foregoing that the Petitioner had not been able to demonstrate that the 1st Respondent was in any way compromised by the interested party and that it was interesting that the Petitioner had only found it fit to file this petition after having been placed on his defence in Tigania Criminal Case No. 906 of 2015.

Interested Party: No scores to settle

[7] The Interested Party also opposed the Petition. In her Replying Affidavit sworn on 17th January 2018, she deposed *inter alia*;

a. That there never existed any family disputes between her family and that of the Petitioner and as such there were no scores to settle;

b. That the Petitioner was never threatened as alleged but was merely informed of the consequences of raping or trying to rape someone.

c. She denied having ever been introduced to Mr. Onderi; and

e. Consequently contended that no Petitioner's rights had been curtailed in his prosecution and that he ought to defend himself at the trial by bringing all the evidence he desired to counter the prosecution's case.

ANALYSIS AND DETERMINATION

Threshold

[8] Upon careful consideration of this petition, the rival submissions and the authorities relied upon by the parties, I am of this persuasion. In Constitutional Petition, a party alleging violation of or threat to violate a right or fundamental freedom should state with some degree of precision, the right or fundamental freedom that is alleged to have been or threatened to be violated, the manner it has been violated and the relief they seek for that violation. See the case of Anarita Karimi Njeru v Republic (No. 1) [1979] 1 KLR 154 and as augmented by the Court of Appeal recently in the case of Mumo Matemu v Trusted Society of Human Rights Alliance Civil Appeal No. 290 of 2012 [2013]eKLR where the Court of Appeal rendered dismissed a petition for:

“...the petition provided little or no particulars as to the allegations and the manner of the alleged infringements.

Criminal case based on family issues

[9] The Petitioner has made an avalanche of very serious claims and allegations. Has he provided evidence in support of those allegations? If I understood the Petitioner well, one of his claims is that the issues forming the basis of the criminal proceedings was family issue. He seems to suggest that the complaint is incapable on founding a criminal prosecution. Without determining the merits or otherwise of the complaint before the trial court, it suffices to state that allegations of rape or attempted rape are investigated and where there is evidence, prosecuted as criminal offences; they should never be belittled as mere family issues or scores even if persons involved are related. Diminishing them in the manner proposed by the Petitioner does not add any grace or power to his claims. I find no merit in that argument. Having stated thus, is the criminal proceedings he is facing without reasonable basis or an abuse of process of court?

Basis of criminal prosecution

[10] I have stated that the allegations which the Petitioner calls family issues are of a criminal nature. Except I should say that a complaint lodged with the police or a body with the function of criminal investigation should be investigated; and if the investigator is satisfied that there exists reasonable suspicion that a crime may have been committed, charges will be preferred thereto. The investigation should however be done in adherence to due process. I am pleased that the Petitioner acknowledges that, after further investigations, the investigations officer one Wanga Masake made the findings *inter alia* that two reports had been made, one by the Petitioner against the interested party's husband for threat to kill and the other by the Interested party against the Petitioner for attempted rape. He also affirmed that the investigation officer recommended that; (1) the interested party be charged with giving false information to a person employed in the public service contrary to section 129 (a) of the Penal Code concerning alleged attempted rape; and (2) the interested party's husband be charged with threatening to kill contrary to section 223 (1) of the Penal Code. The only quarrel the Petitioner has is that the interested party and her husband were never charged as recommended. This brings me to this. The two cases were separate and should be dealt with as such. It would be most dangerous proposition that since his complaint against the husband of the interested party did not yield a prosecution he should not be prosecuted on the complaint lodged by the interested party and her husband. It is on this basis he found the behavior of the police suspect. Mr. Onderi stated that the investigations were subjected to quality check and DPP was satisfied that a crime may have been committed by the Petitioner and the current charges were commenced against him. At this juncture, it suffices to state that it appears that investigations were done and decision made to charge him. The Petitioner cannot be heard to say that the prosecution herein was baseless or aimed at settling scores. I reject that argument.

[11] It is worthy to note that the process of criminal trial stretches back from investigations and goes up to the formal court processes. The process is constitutionally sanctioned. That is why safeguards on procedural fairness, fair administrative action and fair trial are clearly stated in the Constitution. Therefore, being subjected to criminal justice process is not unconstitutional *per se* unless the proceeding is mounted for motives other than upholding the law or bringing the culprit to book. Nothing shows that due process was not followed; or that there was no fair administrative action in the process of investigations. Accordingly, I do not see how the petitioner's right to fair trial was violated. I do not make any finding of violation as alleged by the petitioner,

DPP is independent

[12] I am thrown to the next issue: DPP, in commencement of criminal proceedings, acts independent and is not under the control or direction of any person. See article 157(10) of the Constitution that:-

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.

[13] Except, it be known that the exercise of power to prosecute by DPP is subject to the Constitution and the law. See article 157(11) of the Constitution that:-

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.

[14] See reasoning in the case of *Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 3 others* [2013] eKLR by the High Court when it stated as follows;

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.

In the case of Kuria & 3 others v Attorney General [2002] 2 KLR 69, cited with approval in the Thuita case (supra), it was observed as follows at pages 79, 80; “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 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.” In *REPUBLIC v COMMISSIONER OF POLICE & another EX-PARTE MICHAEL MONARI & another* [2012] eKLR, it was stated as follows; 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. Under article 157(10) the Director of Public Prosecution shall not require the consent of any person or authority for commencement of criminal proceedings and shall not be under the direction or control of any person. It is also clear in my mind that the police have a duty to investigate on any complaint once a complaint is made. In deed 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 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.

It is not the duty of the court to go into the merits and demerits of any intended charges to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and the merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment.

[15] In this case, DPP is the one who makes the decision to mount criminal prosecution. But as I have stated earlier, and I so believe, in mounting criminal prosecution, DPP acts on existence of reasonable or probable cause i.e. there are facts, which on reasonable grounds, justifies the prosecution of the suspect. He should not act maliciously or with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose. The Petitioner stated that he shortly found out that the interested party and her husband had sought the help of a Mr. James Oludhe who was working with the DCIO Tigania West and who introduced them to a Mr. Onderi, a Senior Assistant Director of Public Prosecutions based at Meru. He alleges that, immediately thereafter, Mr. James Oludhe was arrested and charged by EACC officials for soliciting a bribe from the Petitioner which was to be shared between him and Mr. Onderi to ensure the Petitioner was not charged. In spite of the fact that Oludhe was charged, there is absolutely nothing on record to support the alleged elaborate scheme amongst the officers named by him. Again, he has not demonstrated that the criminal proceedings were mounted or were influenced by the alleged bribe. He has not shown ulterior motive on the part of the DPP or his representative in the commencement of the criminal proceedings he is facing. I am not convinced that the criminal proceedings were instituted for purposes other than in pursuit of justice. The invitation by the Petitioner for this court to intervene is greeted by what Lord Viscount Dilhorne stated in *DPP vs. Humphrys* [1976] 2 All ELR 497 that:

“A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred.

And what Lord Salmon in the same case stated that:

“...a judge has not and should not appear to have any responsibility for the institution of prosecutions;...”

Stay of proceedings

[16] With regard to prayer 3 and 4 of the Petition, and in light of the conclusion I have reached above, this prayers must as well fall by the way side. In the case of *Goddy Mwakio & another v Republic* [2011] eKLR, the Court of Appeal stated as follows:

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.

[17] Of significance, a court of law will only prohibit criminal proceeding if the proceeding was instituted for purposes other than in pursuit of justice. For instance, a criminal proceeding will be stayed if it is being used to settle scores or to secure some collateral advantage. Where, in my view, the accused's complaint is that the trial court is treating the accused in a manner that is discriminatory or shabby or in complete violation of all known tenets and rectitude of fair trial and procedural fairness; care should be taken not to quickly prohibit prosecution or stay proceedings before the court is satisfied that transfer of the case to another court is not a feasible option. But, I have seen other grounds being cited in a petition such as this, such as; the charge does not disclose an offence or it is based on wrong law or non-existent law or is incurably defective or is not supported by the evidence. To me, such are defenses or matters which should be raised before the trial court as in law the trial court is duly authorized to deal with such issues and may reject the charge or order amendment or alteration of charge, to mention but a few. I am saying these things as trial process is constitutionally sanctioned and investigation and prosecution of offenders is equally eminent object of the constitution in order to have a safe and orderly nation. None of the foregoing potent grounds was proved on concrete evidence to warrant an order for stay of criminal proceedings.

In the final analysis

[18] The Petitioner ought to have provided concrete grounds and evidence that the criminal prosecution he is facing and its continuation is an abuse of the process of the court. See the case of *Kuria & 3 others v Attorney General [2002] 2 KLR 69*, 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”.

[19] Applying this standard, save for the Petitioner making general averments, the Petitioner has not demonstrated how his rights to a fair trial under Article 50 of the Constitution of Kenya have been infringed upon by the 1st and 2nd Respondents. Similarly, the Petitioner has not demonstrated how his rights pursuant to Articles 29 and 39 of the Constitution of Kenya have been violated or were likely to be violated. Taking into account the totality all the circumstances in this Petition, I am satisfied that the petition does not meet the threshold set out in law. He has not established any violation or threat to violate his right or fundamental freedom. As a consequence, the petition falls by the way side. The petition is dismissed with costs to the Respondents. It is so ordered.

Dated, signed and delivered in open court at Meru this 10th day of May, 2018

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F. GIKONYO

JUDGE

In the presence of:

Mr. Nareiti advocate for 1st respondent

Interested party – present

Petitioner – present

Namiti advocate for Mwingi advocate for interested party

Kiogora advocate for Denis Murithi advocate

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F. GIKONYO

JUDGE