



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CONSTITUTIONAL PETITION NO. 18 OF 2018**

**AMINA SHIRAZ YAKUB.....PETITIONER**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS (DPP).....1<sup>ST</sup> RESPONDENT**

**THE CHIEF MAGISTRATE, MALINDI.....2<sup>ND</sup> RESPONDENT**

**AND**

**SGT. SHEIK ABDI.....1<sup>ST</sup> INTERESTED PARTY**

**JAGATRAM BABURAM.....2<sup>ND</sup> INTERESTED PARTY**

**JUDGEMENT**

1. The Petitioner, Amina Shiraz Yakub has brought this petition against the 1<sup>st</sup> Respondent, the Director of Public Prosecutions (DPP) and the 2<sup>nd</sup> Respondent, the Chief Magistrate, Malindi. When instituting the petition she named Sgt. Sheik Abdi as an interested party. Sgt. Sheik Abdi is now the 1<sup>st</sup> Interested Party after the 2<sup>nd</sup> Interested Party Jagatram Baburam sought and obtained leave to be enjoined as an interested party.
2. The background of the matter is that the Petitioner was jointly charged with another person not before court with the murder of Mr. Jimmy Paluram Baburam in Malindi High Court Criminal Case No. 15 of 2016 which was later transferred to Mombasa High Court and registered as Criminal Case No. 46 of 2017.
3. At the same time, the Petitioner and the 1<sup>st</sup> Interested Party face a charge of conspiracy to defeat justice contrary to Section 117(c) of the Penal Code in Malindi Chief Magistrate's Court Criminal Case No. 793 of 2016. According to the amended charge sheet supplied to the court by the Petitioner through her supplementary affidavit sworn on 17<sup>th</sup> May, 2018, the 1<sup>st</sup> Interested Party is also faced with two counts of abuse of office contrary to Section 101(1) of the Penal Code. The additional charges facing the 1<sup>st</sup> Interested Party are not the subject of this petition.
4. Through the Petition dated 21<sup>st</sup> March, 2018 the Petitioner seeks to quash or stay the trial before the Chief Magistrate's Court by praying for orders as follows:

**“1. A DECLARATION be and is hereby issued that the actions of the 1<sup>st</sup> Respondent and or their agents are unfair, unreasonable, irrational, illegal and the decision to charge or prosecute the Petitioner has been made in abuse of power and mala fides in contravention of Article 47 of the Constitution and Sections 4, 5 and 7 of the Fair Administrative Actions Act.**

**2. A DECLARATION be and is hereby issued that the continued prosecution of the Petitioner vide Criminal Case No. 793 of 2016; Republic Versus Amina Shiraz Yakub & Another during the pendency of the murder trial is unconstitutional and a breach of the Petitioner's rights under the Constitution more so the right to fair trial vis-à-vis the murder charge.**

**3. AN ORDER OF PROHIBITION, restraining the 1<sup>st</sup> Respondent from charging and/or continuing with the charges against the Petitioner vis-à-vis Criminal Case No. 793 of 2016; Republic Versus Amina Shiraz Yakub & Another;**

**4. An order of CERTIORARI to remove into this Honourable Court and quash the decision to charge and/or continue with the Prosecution of the Petitioner vis-à-vis Criminal Case No. 793 of 2016; Republic versus Amina Shiraz & Another;**

**5. IN THE ALTERNATIVE TO 3 & 4 ABOVE, A CONSERVATORY order do issue staying the prosecution of the petitioner vis-à-vis Criminal Case No. 793 of 2016; Republic Versus Amina Shiraz Yakub & Another, pending the hearing and determination of the Murder trial vis-à-vis Mombasa High Court Criminal Case No. 46 of 2017; (previously Malindi High Court criminal Case No. 15 of 2016); Republic versus Amina Shiraz Yakub & Others.**

**6. Costs of this Petition.**

**7. Any other relief as this Honourable Court deems fit to grant.”**

5. The Petitioner’s case as laid out in the petition and in her supporting affidavit is that she is the wife of Jimmy Paluram Baburam who passed away on 26<sup>th</sup> July, 2015 at Medina Palms Resort in Malindi. She is currently facing a murder charge in Mombasa High Court in respect of the death of her husband.

6. It is the Petitioner’s case that upon taking plea in the murder case, the prosecution vehemently opposed her release on bail. On 26<sup>th</sup> October, 2016 as the ruling on her bail application was being delivered, she learned that the DPP had drafted another charge against her and presented it to the Chief Magistrate’s Court at Malindi. Concerned that the DPP was attempting to circumvent the orders releasing her on bail in the murder trial, she filed Petition No. 14 of 2016 against the DPP resulting in the issuance of conservatory orders on 28<sup>th</sup> October, 2016. Following assurances by counsel for the DPP that she would not be harassed or arrested on account of the intended new charges the said petition was marked as withdrawn.

7. The Petitioner’s averment is that upon withdrawal of Petition No. 14 of 2016 she was subsequently charged with the 1<sup>st</sup> Interested Party and one Jacob Schmalzle in Malindi CM Criminal Case No. 793 of 2016 with various counts related to conspiracy to defeat justice.

8. The Petitioner’s case is that when the statements to be used in her trial were availed to her advocates, she realized that the same were authored way after the decision to charge her had been made. The Petitioner wonders how the decision to charge her with the offence of conspiracy could be made prior to the recording of statements in support of such a charge.

9. The Petitioner also avers that the statements recorded by some of the witnesses in support of the conspiracy charge were contradictory to those made by the same witnesses in support of the murder charge.

10. According to the Petitioner, the contents of the statements recorded in respect of the conspiracy charge relate to the circumstances touching on the murder charge and if the trial before the Magistrate’s Court is allowed to proceed, a conflict may arise between the findings of the High Court and the Chief Magistrate’s Court.

11. The Petitioner contends that the situation created is potentially embarrassing to the court as it amounts to setting up one court against another. Further, that if the trial before the lower court is allowed to proceed, it would amount to subjecting her to parallel trials in different forums relating to the same series of events.

112. Another point raised by the Petitioner is that the conspiracy charge is presumptuous and pre-emptive of the issues pending trial in the High Court in relation to the murder charge. Her position is that the conspiracy charge presumes she is guilty of murder thus contravening her right to be presumed innocent until proven guilty.

13. The Petitioner asserts that the charge before the Magistrate’s Court is a clear attestation to the fact that the DPP is biased and is out to fix her at the behest of the father of the deceased who is the 2<sup>nd</sup> Interested Party herein.

14. The Petitioner asserts that the investigators acted under instructions and directions of the 2<sup>nd</sup> Interested Party. In support of this assertion she avers that during investigation the DCIO Mr. Jacob Ngao used taxis hired by the 2<sup>nd</sup> Interested Party. Her view is that the 2<sup>nd</sup> Interested Party is fighting her in relation to the control of the estate of her deceased husband. She avers that the 2<sup>nd</sup> Interested Party has indeed filed a succession cause in relation to the estate of the deceased.

15. The Petitioner concludes her case by citing various provisions of the Constitution breached by the DPP and urges this court to allow her petition.

16. The 1<sup>st</sup> Respondent and the interested parties all opposed the petition. The 2<sup>nd</sup> Respondent did not file any response to the petition.

17. The petition was dispensed with by way of written submissions. The submissions were highlighted on 23<sup>rd</sup> May, 2018.

18. Mr. Musyoki for the Petitioner correctly identified the two issues for determination in this petition as follows:

a. Whether the decision to charge the Petitioner in Malindi CM Criminal Case No. 793 of 2016 was warranted in the circumstances of this case; and

b. Whether the conspiracy case against the Petitioner in the lower court should proceed during the pendency of the murder trial in the High Court.

19. I have read the submissions made by the parties in this case and I will incorporate them in my decision.
20. In order to understand this matter I find it necessary to restate the charges and their particulars in the two criminal cases facing the Petitioner.
21. In the High Court case, the Petitioner is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence being that on the night of 26<sup>th</sup> July, 2015 at Amani Villas, Watamu Township within Kilifi County, the Petitioner jointly with another not before court murdered Jimmy Paluram Jagatram.
22. Through the charge sheet amended in the Chief Magistrate's Court on 19<sup>th</sup> April, 2018, the Petitioner is in the 1<sup>st</sup> count jointly charged with the 1<sup>st</sup> Interested Party with conspiracy to defeat justice contrary to Section 117(c) of the Penal Code. The particulars of the offence state that on diverse dates between 26<sup>th</sup> July, 2015 and 5<sup>th</sup> November, 2015 in Nairobi within Nairobi County and Watamu Police Station within Kilifi County they jointly with another not before court, knowingly obstructed and interfered with the due execution of the criminal legal process regarding the circumstances of the death of Jimmy Jagatram Baburam.
23. In short the Petitioner is accused of killing the deceased and conspiring with the 1<sup>st</sup> Interested Party to obstruct investigation into the death of the deceased.
24. Submitting in support of the petition, counsel for the Petitioner asserted that the statements in the murder trial and in the conspiracy case are by the same witnesses and raise issues which are substantially the same. According to counsel, the decision to commence the conspiracy case while the murder trial is pending was not done in good faith and is only meant to serve as a collateral attack to the murder trial.
25. It is counsel's submission that allowing the trial before the lower court to proceed amounts to subjecting the Petitioner to trials over the same issues before different courts hence compromising her rights.
26. Counsel for the Petitioner cited the decision in **Nicholas Kipsigei Ngetich & 6 others v Republic [2016] eKLR** and asserted that the "same evidence" and the "same transaction" tests referred to in that case bars the prosecution from proceeding with the conspiracy case during the pendency of the murder trial.
27. It is the Petitioner's position that nothing stops the prosecution from consolidating the conspiracy case with the murder case. The decision of the Court of Appeal in **Hamisi Mungale Burehe v Republic [2015] eKLR** is cited in support of this proposition.
28. Relying on the decision in **Graham Rioba Sagwe & 2 others v Fina Bank Limited & 5 others [2017] eKLR** counsel for the Petitioner asserted that a multiplicity of suits between the same parties amounts to abuse of the court process. The decision in **Guantai v The Chief Magistrate [2007] 2 EA 170** is cited to show what amounts to abuse of power. Also cited on the same issue is the decision in the case of **Republic v Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR**.
29. The Petitioner's counsel reminded this court of its authority to quash persecutions commenced by the DPP in abuse of his powers by citing **Kuria & 3 others v Attorney General [2002] 2 KLR 69**.
30. In response, the 1<sup>st</sup> Respondent's counsel dwelt at length on the history of the matter and concluded that there is no evidence tabled before this court in support of the allegation of abuse of power by the 1<sup>st</sup> Respondent.
31. On his part, counsel for the 2<sup>nd</sup> Interested Party relied on the already cited **Nicholas Kipsigei Ngetich** case in support of his submission that the murder charge and the conspiracy charge can be tried separately. Reliance was also placed on the decision of the House of Lords in **Connelly v DPP [1964] 2 All ER 401**.
32. I think the case of Connelly speaks better to the circumstances of the case before me. In that case, the appellant had been charged for the offences of murder and robbery following the killing of a man by one of the robbers during an armed robbery. The Judge put the charge of robbery in abeyance and proceeded with that of murder ending up in convicting the appellant. On appeal to the Court of Criminal Appeal, the Court concluded that there was misdirection in the summing up, allowed the appeal and set aside the conviction for murder.
33. Subsequently, the DPP reactivated the robbery charge and obtained a conviction. The appellant's appeal to the Court of Criminal Appeal was dismissed. He then moved to the House of Lords on the ground that the plea of autrefois acquit was applicable to his case. Dismissing the appeal, Lord Morris of Borth-Y-Gest held:

**"It is, however, clear that in framing two indictments against the appellant in the present case the prosecution were not at fault and were only doing what they were obliged to do. While, as I will endeavor to show, there has never been a rule that the same facts may not form the basis of successive charges, there is inherent in our criminal administration a policy and a tradition that even in the case of wrong doers there must be an avoidance of anything that savours of oppression. That fine tradition is not tarnished if, where rules (which have themselves been evolved in the interests of fairness) make it inevitable, and where the interests of justice so direct, a second trial takes place in which facts are for a second time investigated."**

34. He went ahead and stated that:

**"The power which is inherent in a court's jurisdiction to prevent abuses of its process and to control its own procedure must in a criminal court include a power to safeguard an accused person from oppression or prejudice. That power as is**

**demonstrated by a stream of authority to which I will refer, has, however, never been regarded as endowing a court with a power to say that evidence given in reference to one charge may not be repeated in reference to another and different charge. Nor does it enable a court to order that a prosecution be dropped merely because of some rather imprecise regret that an accused should have to face another charge.”**

35. In view of the cited authority, the Petitioner’s plea to have his trial before the Magistrate’s Court quashed is therefore without merit. However, I note that in the cited case the trials were held one after another unlike in the present situation where two trials are taking place at the same time. Can one therefore say that the trials are oppressive to the Petitioner?

36. In **Nicholas Kipsigei Ngetich** (supra), M. Odero, J identified two tests that must be met by an accused person in order to benefit from the protection of Article 50(2)(a) of the Constitution which bars the prosecution of an accused person in respect of an act or omission for which the accused person has previously been either acquitted or convicted. She states that:

**“(i) The “same evidence Test” bars the mounting of a second prosecution requiring the very same evidence which would have been required to convict at the first prosecution. In any situation where the same evidence would be required to sustain a conviction in any subsequent litigation, then that subsequent litigation is prohibited by the double jeopardy rule....**

**(ii) The same Transaction Test classifies as the same offence all acts which occur out of the same criminal episode. The ‘same transaction’ test limits piecemeal prosecution by compelling the state to prosecute at one trial all offences which have been committed with a common motivating intent and which has a single ultimate goal.”**

37. The learned Judge then went ahead to further explain the same transaction test by quoting from the United States case of **S. Block Burger v United States 284 U.S. 200 (1932)** where it was stated that:

**“Where the same act or transaction constitutes a violation of two distinct statutory provisions, the tests to be applied to determine whether they are two offences is whether each provision requires a proof of a fact which the other does not....”**

38. In the case before me, the Petitioner’s arguments fails the two tests of “same evidence” and “same transaction”. In the trial before the High Court the prosecution is seeking to demonstrate that the Petitioner unlawfully killed Jimmy Jagatram Baburam without justification and being with malice aforethought. In the trial before the Chief Magistrate, the prosecution will be required to establish that the Petitioner with two others conspired to obstruct and interfere with the execution of the criminal legal process regarding the circumstances of the death of Jimmy Jagatram Baburam.

39. The circumstances of the two offences are distinct and separate. Conviction in the High Court will not necessarily lead to a conviction in the Magistrate’s Court and vice versa. The fact that the Petitioner may be found guilty of conspiring to defeat justice does not mean that she killed the deceased. Likewise, she may be found guilty of murder but that in itself, without further evidence, is not sufficient to lead to her conviction by the lower court for conspiring with others to defeat justice. The prosecution must establish what the petitioner did to obstruct justice and that there was a conspiracy between her and her co-accused.

40. The two offences are distinct and separate from each other and I do not see how it can be said that the trial before the Chief Magistrate amounts to abuse of process and unfairness by the DPP. There is no material placed before me to make me conclude that the 1<sup>st</sup> Respondent has breached the Constitution. The result is that the petition is without merit and the same is dismissed.

41. This being a matter concerning alleged breach of constitutional rights, I will not penalize the Petitioner with costs. Each party will therefore meet own costs of the proceedings.

**Dated, signed and delivered at Malindi this 19<sup>th</sup> day of July, 2018.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**