



REPUBLIC OF KENYA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO 524 OF 2017

PETER GICHANGI MUNENE & GODFREY.....1ST PETITIONER

MUHURI MUCHIRI.....2ND PETITIONER

VERSUS

THE HON ATTORNEY GENERAL.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

JUDGMENT

1. The petitioners are members of Embakasi Ranching Company Limited. They have been arrested and charged before the Chief Magistrates' Court at Makadara with the offence of assault and causing actual bodily harm in criminal case Number 1559 of 2017, Republic v Peter Muhuri Muchiri and Muhuri Muchiri. They have brought this petition against the *Attorney General* and *Director of Public Prosecutions*, the 1st respondent and 2nd respondents respectively.

2. According to the petition, the petitioners accuse the Director of Public Prosecutions for instituting malicious and discriminatory prosecution thus excluding them from enjoying other rights and fundamental freedoms; that the 2nd respondent has failed to protect them and has applied the law selectively thereby discriminated against them.

3. The petitioners contend that the state has discriminated against them; that they have been subjected to indignity; that they have been arrested without just cause and that as a result, they have suffered physical and psychological torture. They state that due to these acts, respondents have denied them the freedom of conscience, belief and opinion.

4. The petitioners further state that they have been denied access to fair hearing in the Magistrates' court by being subjected to tramped up charged and that the respondents have acted at the behest of some people due to disputes in other courts and as such the court process is being abused.

5. They have filed this petition dated 18th October 2017 seeking the following reliefs:-

1. There be injunction or conservatory orders against proceedings Makadara criminal case number 1559 of 2017 between Republic versus Peter Gichangi Munene & Godfrey Muhuri Muchiri pending the hearing of inter partes of this petition;

2. There be injunction or conservatory order against proceedings Makadara criminal case number 1559 of 2017 between Republic versus Peter Gichangi Munene & Godfrey Muhuri Muchiri pending the hearing and determination of this petition.

3. There be a declaration that the fundamental freedoms of the petitioners in the Bill of rights, chapter 4 of the constitution of Kenya have been denied, violated, infringed and threatened;

4. That court does order that the petitioners' prosecution in Makadara criminal case number 1559 of 2017 between Republic versus Peter Gichangi Munene & Godfrey Muhuri Muchiri is contrary to the provisions of the Bill of rights, chapter 4 of the Constitution of Kenya and the same be struck out.

5. Such other orders that this Hon Court shall deem just.

Response

6. The respondents filed grounds of opposition dated 24th January 2018 and filed in court on 16th February 2018 contending that, the petition does not disclose any violation of fundamental rights and freedoms by the 2nd respondent; that the 2nd respondent is discharging his constitutional mandate in terms of Article 157(6) of the constitution; that the prayers sought if granted would fetter the 2nd respondent's discretion and that the 2nd respondent has constitutional mandate to determine whether or not to prosecute the petitioners,

7. The respondents deny that the petitioners' right to fair hearing and equal protection of the law has been violated. It is the respondents' contention that the petitioners have been subjected to proper forum where they will be given an opportunity to defend themselves and that the institution of the charges is not malicious.

8. In a replying affidavit sworn on 8th November 2017 by **SGT Dishon Obulu**, it is deposed that a complaint on assault was reported and the case assigned to him for investigation; that after investigating the case and recording of statements, he was satisfied on the genuineness of the complaint. He deposes that he arrested the petitioners and charged them with the offence once consent to prosecute was given by the 2nd respondent in exercise of his constitutional powers,

Petitioners' submissions

9. **Mr. Onyango**, learned counsel for the petitioners, submits highlighting their written submissions dated 21st February 2018 and filed on 22nd February 2018, that the prosecution against the petitioners was initiated with ulterior motive to settle vendetta between the petitioners and the complainant as directors and shareholders of the company. Counsel relied fully on their written submissions.

10. In the written submissions it is contended that the complainant is chairman while the petitioners are directors of Embakasi Ranching Company limited; that the complainant purported to suspend the petitioners from the directorship of the company leading to institution of **HCC No 33 of 2017** wherein restraining orders were issued against the complainant. It is stated that the complainant again trespassed on the 2nd petitioner's plots and again the 2nd petitioner moved to court in **ELC No 342 of 2017** and obtained restraining orders against the complainant.

11. It is submitted that it was after the two suits that assault charges were brought against the petitioners which they contend are malicious.

1st Respondent's submissions

12. **Mr. Marwa**, learned Counsel for the 1st respondent submits also highlighting their written submissions dated 18th May 2018 and filed on the same day, that the office of the Attorney General does not prosecute and that the petitioners have not demonstrated the role the attorney general has played in violation of constitutional rights of the petitioners. Counsel relies on the decision of **Simon Macharia Njenga v Anti Counterfeit Agency & 3 Others** [2018]eKLR to submit that the petitioners have not demonstrated that the prosecution is unfair, unfounded and promotes ulterior motives.

13. Counsel places reliance again on the case of **Thuita Mwangi & 2 Others v Ethics and anti-corruption commission & 3 others** [2013]eKLR to submit that the petitioners have not demonstrated that the prosecution was instituted for purposes other than enforcement of the law or is otherwise an abuse of the court process. It is further submitted that the petitioners have not demonstrated that their fundamental rights have been violated and reliance placed on the case of **Mumo Matemo v Trusted Society of Human Rights Alliance & 5 Others** [2013] eKLR.

2nd Respondent's Submissions

14. **Miss Cheruto**, learned counsel for the 2nd respondent, submits highlighting their written submissions dated 23rd February 2018 and filed in court on 26th February 2018, that the 2nd respondent exercised his constitutional mandate; that there is no discrimination in prosecuting the petitioners and this is not the trial court to ascertain the veracity of the charge the petitioners facing. According to learned counsel, it is the trial court that will have the ultimate power to decide on the substance of the evidence after hearing the parties.

Determination

15. I have considered this petition; the responses, submissions and the authorities relied on by both sides. The question before this court is whether the trial the petitioners face before the Chief Magistrate court at Makadara in Criminal Case No 1559 of 2017 amounts to violation of their constitutional rights and fundamental freedoms.

16. The petitioners have been charged before the magistrate's court with the offence of assault causing actual bodily harm. They contend that the charge has resulted into violation of their rights and fundamental freedoms; that they have been denied their dignity; that they have been subjected to physical and psychological torture; that the prosecution has been instituted to settle a vendetta and that the complainant and the petitioners are involved in a number of civil litigations hence this prosecution was not initiated in good faith but with malice.

17. The 2nd respondent exercises constitutional mandate under Article 157(6) of the constitution. Under Article 157(10), the 2nd respondent exercises mandate without consent or direction of any person or authority. The 2nd respondent must however exercise his mandate faithfully and in tandem with Article 157(11) so that in exercising the powers conferred by Article 157, the Director of Public Prosecutions should 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.

18. In that regard, therefore, this court may not interfere with the mandate of the 2nd respondent except where a petitioner demonstrates that the 2nd respondent is acting contrary to the constitution and the law and that he is violating rights and fundamental freedoms or is executing

his mandate other than as required by Article 157(11) of the constitution. The law on this subject is well settled and I can only mention a few authorities to help demonstrate this.

19. In the case of ***Republic v Director of Public Prosecution & 2 others Ex parte Francis Njakwe Maina & another*** [2015] eKLR the court stated;

“The Court ought not to usurp the Constitutional mandate of the Director of prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for halting those proceedings...However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim.”

20. In ***Kuria & 3 Others vs. Attorney General*** [2002] 2 KLR 6, the court held;

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society’s senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta

21. Flowing from the above decisions, it is clear that only where there is demonstration that the director of public prosecution is using his mandate in to achieve a purpose other than the course of justice or is using it to achieve ulterior motive or even to coerce the accused to settle some indebtedness as opposed to enforcing the law in pursuit of justice, this court will intervene to protect constitution and the law.

22. I have carefully read through the petition, affidavits and the annexures. The petitioners and complainant are shareholders of the same company and according to the pleadings the complainant is the chairman of the board of directors of that company. It is also true that according to the annexures, there are a numbers of civil suits pending in various courts over a number of issues between the petitioners and the complainant, I have also read the replying affidavit on behalf of the 2nd respondent and it is clear that the deponent who is the investigating officer carried out investigations and was satisfied that there was a reasonable ground to charge the petitioners. The 2nd respondent authorized prosecution leading to arrest and arraignment of the petitioners before court. He therefore states that there were reasonable grounds to prosecute the petitioners.

23. I have myself perused the petitioners’ grievance before this court and the contention that their fundamental rights and freedoms have been violated through this prosecution. I must however state that where a party pleads before that his rights and fundamental freedoms have been violated, or are being violated, he must demonstrate with certainty why and how that is so. It is not enough for a petitioner to come to court merely because he/she believes that his /her rights have been or are being violated. He/she has a duty to show that this is the case before the court can intervene.

24. Since the 2nd respondent exercises constitutional discretion, that exercise of discretion must as a matter of fact be brought into doubt to enable this court intervene. In the present case, the petitioners merely allege without evidential proof that their rights and fundamental freedoms are being violated. They do not show how that is the case. They also state that they have a number of civil cases pending in courts but do not show how the criminal case is related to those civil cases that are pending in the other courts. It must also be borne in mind that section 193A of the Criminal Procedure Code allows concurrent civil and criminal proceedings and therefore concurrent criminal and civil proceedings is not a bar

25. This court as the guardian of the constitution and fundamental rights in the Bill of rights will jealously guard the constitution and the Bill of rights where it is shown that they are under attack or threat or are being violated. However, it will not aid parties in avoiding what appears to be a lawful process in execution of lawful constitutional on legal mandate.

26. The petitioners are facing a criminal prosecution charged with assault causing actual bodily harm. If it is true that the petitioners are suspected to have committed that offence, whether or not they are involved in some civil litigation, is a different matter. The trial court in the criminal case will have to determine whether indeed there was assault or not. I also note that the petitioner have not challenged the constitutionality of the charge they face but merely aver that the motive of instituting it is malicious but do not show why and how this is so.

27. To my mind, the petitioners had a duty to show even as they contend that there was malice, that institution of the criminal charge was intended to achieve purposes other than the course of justice. They were to go further and show what this ulterior motive, other purposes and or course was so that this court could properly apply its mind to that fact and determine whether the charge and attendant prosecution are within the ambit of Article 157(11) of the constitution.

28. I have carefully considered this petition, the responses, submissions as well as the authorities. I have also applied my mind to the constitution and the law over this petition. The conclusion I come to is that the petitioners have failed to satisfy the court that the respondents have violated their rights and fundamental freedoms and that they deserve the reliefs they seek. Consequently, the petition dated 18th October 2017 is declined and dismissed. I make no order with regard to costs

Dated, Signed and Delivered at Nairobi this 5th day of October 2018

E C MWITA

JUDGE