



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

JUDICIAL REVIEW NO. 15 OF 2017

REPUBLIC.....APPLICANT

VERSUS

OFFICER COMMANDING STATION MALINDI.....RESPONDENT

AND

MERCY NDEMBO MWAPAGHA.....INTERESTED PARTY

CHRISPUS CHENGO MASHA.....EX-PARTE APPLICANT

JUDGEMENT

1. Upon obtaining the leave of this Court on 25th July, 2017 to commence these judicial review proceedings, the ex-parte applicant Chrispus Chengo Masha filed his notice of motion on 17th August, 2017 in which the main order he seeks is an order of mandamus to **“compel the Respondent herein to act upon the complaint by the Ex-parte Applicant vide OB No. 50/30/11/2015 and prefer charges if necessary.”** The respondent is the Officer Commanding Station, Malindi Police Station and Mercy Ndembo Mwapagha is an interested party.
2. Briefly, the ex-parte applicant’s case is that he had filed a complaint of abduction and abandonment at Malindi Police Station on 30th November, 2015 vide OB No. 50/30/11/2015 and had prior to that on 26th October, 2015 made a similar report to the Children Department.
3. The ex-parte applicant avers that the respondent only acted on the complaint of abduction but had refused, ignored or failed to act on the issue of abandonment despite the several visits he has made to the police station. It is the ex-parte applicant’s case that he has equal rights and is entitled to equal protection of the law like other Kenyans.
4. The Director of Public Prosecutions (DPP) filed a replying affidavit in opposition to the application. The affidavit is sworn by Charles Gatende an Inspector of Police based at Malindi Police Station.
5. Through the replying affidavit the respondent discloses that after the complaint was filed investigations were carried out, including the taking of statements of the ex-parte applicant and two police officers who visited the *locus in quo*. Subsequently the file was forwarded to the DPP who advised that the evidence was insufficient to sustain charges. It is the respondent’s case that the DPP acted objectively with utmost fairness and within the mandate donated by Article 157 of the Constitution. Further, that the DPP did not act capriciously or arbitrarily and that the DPP cannot be directed by anyone in the discharge of his constitutional mandate.
6. According to the respondent, the court lacks jurisdiction to determine the merits or the demerits of the decision of the DPP as to whether or not the evidence is sufficient to mount a prosecution. Further, that the issues raised could sufficiently be addressed through the civil process.
7. Inspector Gatende concluded by averring that the ex-parte applicant was accorded due process including a visit to the *locus in quo* and his constitutional rights were upheld. His view is that the application is without merit and is simply geared towards subverting justice.
8. The Interested Party swore an affidavit in opposition to the application.
9. The application was disposed of by way of written submissions.
10. The ex-parte applicant submitted that the police were under an obligation to investigate the complaint he had filed and take appropriate action by charging the suspect or advising the complainant that the evidence was insufficient to sustain the charges. In his view, their silence amounted to a violation of his rights.

11. In addition, it was submitted that the respondent being a civil servant is obliged to serve Kenyans equally without any discrimination and can be compelled to discharge this duty through judicial review proceedings. It is the ex-parte applicant's position that all that is required of the Respondent is to demonstrate the extent of their investigations, the number of people who recorded statements and if no action has been taken, the reasons why they should not be compelled to act on the complaint.
12. In his supplementary submissions, the ex-parte applicant stated that the replying affidavit was irrelevant as it refers to other entries in the occurrence book and which issues had been acted upon and he had been advised accordingly. He stressed that this matter was in regard to O.B. entry No. 50/30/11/2015 as the respondent had not acted on his complaint from the time it was lodged.
13. The respondent did not file any submissions with the respondent's counsel indicating to the court that they would rely on the replying affidavit.
14. On her part, the Interested Party submitted that when the ex-parte applicant made life unbearable and miserable for her, she sought help from her brothers who took her from her matrimonial home after filing a report with the police. She asserts that the ex-parte applicant was therefore aware of her movements and there was no abduction or kidnapping. She further submitted that the ex-parte applicant's proposed charges are impracticable as they refer to abduction as well as kidnapping and at the same time talk of abandonment. The Interested Party disclosed that the ex-parte applicant has filed a plethora of cases against her with a view of frustrating her.
15. The Interested Party closes her submission by stating that the respondent's replying affidavit is relevant and it is within the discretion of a police officer to act upon a complaint and take action.
16. It is important to state at the outset that the Respondent is a public officer and has a duty to discharge the functions of his office in accordance with the Constitution and the law of the land. If, in exercising his powers, he acts illegally, irrationally or in defiance of the principles of natural justice then this court has a duty to issue judicial review orders to correct such waywardness.
17. The question that needs to be answered is whether the ex-parte applicant has made out a case for the issuance of the order of mandamus as sought.
18. Among the duties bestowed upon the Inspector General of Police by Article 245 of the Constitution is the power to investigate offences and to enforce the law against any particular person or persons. That power is supposed to be exercised without interference from any quarters.
19. On the other hand, Article 157 of the Constitution empowers the DPP to prosecute criminal matters. In doing so, he does not need the consent of any person or authority and neither can he be under the direction of any person or authority.
20. In the case at hand, it has been averred on behalf of the respondent that after investigations the file was forwarded to the DPP who advised that the evidence was not sufficient to mount a prosecution. The respondent had therefore discharged his mandate and cannot be accused of acting illegally or irrationally.
21. The ex-parte applicant has not challenged the decision of the DPP not to prosecute. The ex-parte applicant has therefore directed his complaint at the wrong office.
22. I must add that the ex-parte applicant has not placed any iota of evidence before this court to demonstrate that the respondent acted outside his mandate or failed to execute his lawful duties.
23. Nevertheless, it would help if public officers learned the art of communicating with their customers. Nothing would have been easier than for the respondent to write to the ex-parte applicant informing him of the decision that had been taken by the DPP. I do not think this litigation would have been necessary had this been done.
24. Be that as it may, the ex-parte applicant is also to blame for this state of affairs. He has not exhibited any written communication showing that he asked the respondent for the progress or decision on the complaint he had made. Before an order of mandamus can issue, it must be clearly demonstrated that a public officer has refused to act and that the refusal is unlawful – see **Wamwere v Attorney General [2004] 1 K.L.R. 166** as cited in **Joseph Kakore Ole Mpoe & 5 others v Kenya Forest Service [2012] eKLR**.
25. I have said enough to show that this application is for dismissal.
26. In any event, there is no proper application before this court. When I granted leave to the ex-parte applicant on 25th July, 2017 to commence these proceedings, I directed him to file and serve the notice of motion within 21 days. The direction was not an idle one as it is in line with Order 53 Rule 3(1) of the Civil Procedure Rules, 2010 which requires that an application for judicial review orders be made by notice of motion within 21 days from the time of the grant of leave to apply for the orders. The application was filed on 17th August, 2018 which was outside the 21 days granted by this court and demanded by the rules. This means that all along there has been no application for hearing by this court since the leave to file the application had lapsed.
27. For all the stated reasons, the ex-parte applicant's case is dismissed. This being a matter touching on exercise of authority by a public officer, I will not award costs. Each party is therefore directed to meet own costs of the proceedings.

Dated, signed and delivered at Malindi this 18th day of October, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT