REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLENOUS CRIMINAL APPLICATION NO. 64 OF 2017

IN THE MATTER OF CRIMINAL CASE NO. 1019 OF 2014 SPM'S COURT MAVOKO (REPUBLIC V. THADDEUS GICHARU KARARI 1ST ACCUSED AND PAUL KIMANI NJIHIA 2ND ACCUSED

AND

IN THE MATTER OF ARTICLES 20 (4), 21 (1), 22 (1), 23, 25 (c), 27 (1) (2) (5), 29 (d), 40, 47 (1) (2), 48, 50 (1), 51 (1) OF THE CONSTITUTION OF KENYA 2010 AND SECTION 89 (1) (5), 362, 364 OF THE CRIMINAL PROCEDURE CAP 75 OF THE LAWS OF KENYA, SECTION 108, 112A OF THE PENAL CODE CAP 63 LAWS OF KENYA

BETWEEN

1. THADDEUS GICHARU KARARI

2. PAUL KIMANI NJIHIA Alias

CHARLES GACHERI WAIGURU…….....…APPLICANTS

VERSUS

1. EDWARD MUGAMBI MPUNGU

2. DIRECTOR OF PUBLIC PROSECUTION

3. INSPECTOR GENERAL OF POLICE…….....RESPONDENTS

CONSOLIDATED WITH

MISC. CRIMINAL APPLICATION NO. 91 OF 2017

BETWEEN

1. THADDEUS GICHARU KARARI

2. PAUL KIMANI NJIHIA……..…...APPLICANTS

VERSUS

REPUBLIC…….……...….RESPONDENT

RULING

1. The Applicants filed an application on 9th June, 2017 in Miscellaneous Criminal Application No. 64 of 2017 seeking orders that:

a) The ruling made by Hon. Kassan, trial magistrate in the application filed before the trial court on 24th May, 2017 be revised and the 1st respondent be ordered to refund all monies received by him from the applicant.

b) That this court order the 2nd and 3rd respondents to investigate and institute criminal proceedings against the 1st respondent for

perjury or subordination of perjury.

c) That this court does declare that the right of the applicant to property has been violated by the 1st respondent in conjunction with the 3rd respondent and declare that the applicant be compensated.

d) That the 1st respondent be declared unworthy witness and his affidavit made under oath are a violation of section 112 of the Penal Code Cap 63 Laws of Kenya and therefore he should be investigated.

2. The application was supported by the grounds on the application and the supporting affidavit of the 1st applicant. It is the applicants' case that their right to property has been greatly infringed by the 1st respondent; that the trial magistrate did not treat the parties with impartiality during the hearing of the application and the affidavit filed by the applicants' counsel was never considered against the rules of natural justice; that the issues contained in the affidavit in the lower court filed by the applicants' advocate were not determined or considered and therefore the applicants' right to fair trial under Article 50 (1), 159 (2) (a) of the Constitution were violated; that the 1st respondent had entered into negotiations with the applicants to settle the matter out of court and after receiving KShs. 80, 140/- decided to collapse the negotiations and thereafter resorted to using the 2nd and 3rd respondents to decline to refund the applicants the full amount advanced to him; that the 2nd respondent has sided with the 1st respondent in a total violation and disregard of the provisions of Article 157 (4) and (11) of the Constitution hence the applicants are apprehensive that the ruling without merits by the trial magistrate was as a result of false affidavit of the respondent and testimony of the 3rd respondent before the trial court; that the out of court settlement and negotiations which had been ongoing between the applicants and the 1st respondent form an integral part of the proceeding before the trial court in Criminal 1019 of 2014 and therefore the two issues cannot be de-alienated; that the 3rd respondent through the DCI Mlolongo has failed to conduct investigations regarding the monies received by the 1st respondent despite evidence of receipt of money and communication with the applicants' agent; that the money received by the 1st respondent emanated from the 1st applicant and therefore his brother was only acting as a link between them; that the 1st respondent has resorted to misusing the 3rd respondent to lodge complaints of threat and intimidation which are tailor made to deny the applicant his right to ask for a refund of KShs. 80,140/-; that the 1st respondent has failed to prove any refund of the amount received only insinuating that the money was usually demanded by unknown woman who remains anonymous as he has failed to disclose how and when the said money was received by the unknown women and that if the 1st respondent takes to the stand and testify the applicants will never recover their money.

3. A supplementary affidavit was filed by the 1st applicant on 21st December, 2017. He stated that the annexed affidavit of Jim Muriithi Ndwiga ('TGK-5') is proof that the 1st respondent received money from the applicants in pretext that they were settling the matter out of court while indeed his aim was to take the applicants' hard earned money; that the 1st respondent misled and lied in his affidavit in the lower court as it was contrary to the oral evidence he had given before court pertaining to the money he had received from the applicants and their agent; that the allegations of threat and intimidation which were alluded to by the 1st respondent and the 2nd respondent were non-existent as the same were being raised for the first time after the applicants brought the issue of the money before the trial court; that by refusing to refund the applicants' money the 1st respondent has subjected the applicants to untold suffering and psychological torture which is against the Constitution; that it was against the principles of justice for the trial magistrate to dismiss the applicants' application for refund of money received by the complainant without looking at the evidence on record which the applicants' had filed; that it was manifestly wrong for the trial magistrate to fail to notice that the 1st respondent received money from the applicants eight times within a period of one year and four months and if there were issues of intimidation in the whole negotiation he could have raised it earlier; that as per 'TGK – 5' the 1st respondent received money on various dates and always confirmed receipt of the same; that the allegations of threat and intimidation have never been investigated to date and therefore it was erroneous for the trial magistrate to entertain the same; that this court has supervisory jurisdiction over the subordinate court and therefore the applicants are properly before this court; that it is in the interest of justice that the 1st respondent be called upon to refund all monies received by him prior to his testimony; that the 2nd respondent has a Constitutional mandate under Article 157 to ensure that the legal process is not abused which it failed to uphold by supporting the allegations of the 1st respondent without directing that proper investigations be done; that the report made to the police station by the 1st respondent vide OB No. 34/16/05/2017 did not disclose when the said threats were issued; that according to communication authority guidelines every sim card in Kenya is registered and therefore the 2nd and 3rd respondents ought to have obtained evidence on the registration status of cell phone numbers which the 1st respondent alleged were used to perpetrate the threats; that it is in the interest of justice for any allegation to be investigated and evidence put forward before the court believes the same; that the 1st respondent's affidavit 'TGK-4' is misleading at paragraph 3 as there would not have been any need of purchasing a car for the 1st respondent as the 1st respondent was not indebted to him at all and did not engage in such agreement; that at paragraph 4, the said annexure is misleading for the 1st respondent to depone that the money was sent to him without his knowledge when he received various amounts for a period of one year and four months; that paragraph 6 of the said affidavit is contradictory and discredited as there was no way the applicants could send money to the 1st respondent through M-Pesa each time and also send a lady to collect money in cash; that the 1st respondent did not disclose the names, cell phone number, or how they used to meet with the said lady who gave him money; that the 1st respondent did not give evidence that the applicant called his wife; that the affidavit of Jim Muriithi Ndwiga denies assertions of the 1st respondent that he used to send a lady to collect the money from him; that the 1st respondent did not disclose the contents of the alluded to text message and the date which it was sent, and from which cell phone number and that at no time ever has the 1st respondent ever reported the threats upon him to the police or court only when he was called upon to refund the money did he rush to the police station to make false claims.

4. The respondents filed grounds of opposition that; the request for order against the 1st respondent to refund money allegedly given to him is misconceived since if he obtained money by false pretense he should be charged under section 313 of the Penal Code, or the applicants should file a civil suit to recover their monies; 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 as provided for under Article 157 (10) of the Constitution of Kenya; that the Constitution of Kenya under Article 159 (2) support alternative forms of dispute resolution; however when invoking this mechanisms in criminal cases the same should be done in good faith and by the free will of the complainant as provided for under section 204 of the Criminal Procedure Code and that the

application is an abuse of the court process duly meant to delay the proceedings in Criminal No. 1019 of 2014.

5. In Miscellaneous Application No. 91 of 2017 the applicants filed a notice of motion dated 27th November, 2017 seeking orders that this court be pleased to order that criminal case No. 1019 of 2014 before SPM's Court at Mavoko be transferred to another jurisdiction. The application was based on grounds that; the applicants right to fair trial has been greatly infringed, violated and continues to be infringed, denied, violated and threatened as long as the criminal case no. 1019 of 2014 continues to be heard at Mavoko Law Courts; that the said case has been infiltrated by external forces present at Mavoko Law Courts and improper influence is being exerted and therefore a fair and impartial trial cannot be heard within the local jurisdiction; that there is a calculated move by judicial officers and the prosecution to subvert the rule of law and fair administration of justice pertaining to the criminal case, and events have taken place since the inception of the above mentioned criminal case which have raised reasonable apprehensiveness in the applicants' mind that they cannot achieve fair and impartial trial within Mavoko Law Courts; that having complained to relevant bodies about misconduct and improper interferences in cases by judicial officers it would be untenable and fallacious to think that they can achieve a fair and impartial trial before Mavoko Law Courts; that it is humanely impossible to assume that having reported the misconduct of judicial officers and the prosecution to the relevant bodies there is likelihood of interference by such officers in the criminal case; that due to the issues raised to the relevant bodies, the applicants fear that they may be victimized as a result of which justice shall be vitiated; that pursuant to the provisions of section 81 (1) 92) (3) and (4) of Cap 75 Laws of Kenya this court has powers to change venue for the hearing of the criminal case; that the applicants have a right to equal protection and benefit of the law pursuant to the provisions of Article 27 (1) (2) of the Constitution and that this court has powers under Article 165 (3) (a) and (b) to determine issues raised in this application.

6. The 1st applicant filed a supplementary affidavit dated 21st December, 2017 that the annexed affidavit of Lucy Mumbi Muriithi is proof that the trial magistrate met the prosecutor and the complainant in his chamber in the applicants' absence on 17th July, 2017; that the applicants are apprehensive that the meeting of 17th July, 2017 between the trial magistrate and the complainant revolved around issues pertaining to the trial they are facing at Mavoko Law Courts and it is against the tenets of justice for the magistrate to meet one party in the absence of the other; that the allegations of threat and intimidations propagated by the prosecution and ostensibly believed by the trial magistrate were baseless and unfounded as no investigations were carried out to authenticate the same; that the trial magistrate L. P. Kassan being the overall magistrate at Mavoko Law Courts may interfere with the trial going by the language used by him on the 10th November, 2017 when he ruled on the application the applicants had filed for his recusal and transfer of the criminal case from Mavoko Law Courts; that 'TGK- 4' prove that indeed the issues the applicants are raising were raised in the lower court and therefore they are not an afterthought; that having complained to the relevant authorities, they are apprehensive that they might be victimized by the judicial officers at Mavoko Law Courts as a result of the same; that the affidavit of Lucy Mumbi Muriithi is proof that the trial magistrate used vile and threatening language in his ruling of 10th November, 2017 in open court which raises fear that he could set a revenge mission; that it is common knowledge that informers do not testify in court and therefore this court should take such judicia notice; that the assertions by the applicants in criminal case no. 414 of 2007 is not an isolated case but there has been an outcry in several matters; that despite having indicated that the issue of contact person was removed as a requirement to date the applicants' bond terms have not been reviewed. It was contended in the further affidavit that the respondents' affidavit filed on 18th January, 2018 has no legal basis and is of no evidential value as it goes against Article 22 (3) (b) (d) of the Constitution as it would be unfair to delve into the issues raised in this application.

7. The respondents opposed the application through the prosecution counsel in the office of the 2nd respondent filed on 18th January, 2018. It was contended that the criminal process is guided by the Criminal Procedure Code, the Evidence Act and the Constitution of Kenya in which all this statutes must be read as an integrated whole for mutual sustenance of their provisions such that the applicants' fundamental rights are not violated; that most of the allegations raised by the applicants in their application are devoid of any merit, and further they have in all manner and intent violated the principles enshrined in the Evidence Act and the Oath and Statutory Declaration Act; that the lateral concession by the applicant in paragraph 39 and 40 of his undated supporting affidavit, that the trial magistrate recused himself automatically renders this application nugatory since all the issues raised have been overtaken by events; that the application lacks merit, is grossly misleading, a concoction of fabricated falsehoods and an abuse of the criminal process calculated to hoodwink this court into a ploy by the applicants to defeat justice and be dismissed summarily.

8. The applicants invoked this court's revisionary powers under Sections 362 and 364 of the Criminal Procedure Code. Section 362 of the Criminal Procedure Code provided:

> "***The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality, or propriety of any finding sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court."***

The applicants approached this court on account of alleged; impartiality by the trial court and failure by the 2nd and 3rd respondent to investigate the 1st respondent's allegation of threat. The applicants particularly alleged that the trial magistrate met the complainant in his chambers in the absence of the applicants and that the 1st respondent received money within a period of 1 year and 4 months which money the applicants claim was payment due to ongoing negotiations. The said allegations have not been rebutted or so satisfactorily rebutted by the respondents in my considered view. It is in fact clear from the record that it is after the applicants demanded for the refund that the 1st respondent claimed that he was being threatened by the applicants. Secondly, the Constitutional provision under Article 157 (10) enunciates thus:

Article **157 (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."***

Such powers must however be exercised within the confines of Article 157 (11) thus:

> ***"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."***

9. It follows therefore that although the 2nd respondent's discretion to prosecute criminal offences ought not be interfered with, the same must be properly exercised and the court can stop proceedings where it is established that the discretion is abused. See: **R v. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** where it was held that:

> ***"A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable".***

And **Republic v. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR**:

> ***"The police have a duty to investigate on any complaint once a complaint is made. Indeed 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 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".***

10. In the case at hand, the 2nd respondent has other than emphasizing its discretion under Article 157 (10) not explained the investigations that were done instigating the action against the appellants. It is therefore unclear whether they interrogated the 1st respondent and gathered evidence before taking action against the 1st respondent. The need for the court to safeguard against such proceedings are illustrated in **Stanley Muga Githunguri v. Republic [1985] eKLR** where Madan JA discussed the inherent power of the High Court to stop a prosecution that amounts to an abuse of the court process as it is oppressive and vexatious.

And in **Kuria & 3 Others v. Attorney General [2018] eKLR** where the High 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 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. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the court's) independence and impartiality…The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped…It would be a travesty to justice, a sad day for justice should the procedures or the process of the court be allowed to be manipulated, abused and or misused, all in the name that the court simply has no say in the matter because the decision to so utilize the procedure has been made. It has never been argued that because a decision has already been made to charge the accused person, the court should simply as it were fold its arms and stare at the squabbling litigants/disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of one of them because there is nothing, in terms of decisions to prohibit …The intrusion of judicial review proceedings in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law…In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and or prohibiting prosecutions brought to not only for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its process and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilized. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus, where the court cannot order that the prosecution be not commenced, because already it has, it can order that the continued implementation of that decision be stayed…There is nothing which can stop the Court from prohibiting further hearings and or prosecution of a criminal case, where the decision to charge and or admit the charges as they were have already been made…"***

11. I have carefully analyzed the facts of this case, authorities cited in both parties' submissions and I find that the criminal proceedings were instituted with the motive of frustrating the applicants and the application filed on 9th June, 2017 has merit.

12. On the second application dated 27th November, 2017, I reiterate the finding of Judge Ouko (as he then was) in George Lemison Sayaya & 2 Others v. Republic [2016] e KLR where it was held:

> ***"Section 77 of the constitution guarantees a person charged with a criminal offence a fair trial within a reasonable time by an independent and impartial court.***

As I have started the application, although not reflected on it, is brought under Section 81 of the Criminal Procedure Code which stipulates that;

"81. (1) whenever it is made to appear to the

High Court –

(a) that a fair and impartial trial cannot be had in any criminal court subordinate thereto; or (b)……

(c)……..

(d)…….

(e) ……

it may order

(ii) that a particular criminal case or class of cases be transferred from a criminal court subordinate to its authority to any other criminal court of equal or superior jurisdiction"

The central consideration in an application for transfer is that a fair and impartial hearing cannot be had in the court seized of the case…In order to uphold the provisions of Section 77 of the Constitution adjournments ought to be granted sparingly and only on sufficient grounds. They must not be granted as a matter of course.

Can there be a fair and impartial trial by the trial court"

Transfer of a suit from a Magistrate with Jurisdiction to another also with jurisdiction must be done only if real bias in the former has been shown.

In Shilenje V R (1980) KLR 132, Trevelyan, J. cited with approval Sir H.T. Prinsep and Sir John Woodroffe in their commentaries – Commentary and Notes (14th Edn) 1906 and Criminal Procedure in British India (1926) as follows:

"The High Court will always require some very strong grounds for transferring a case from one judicial officer to another if it is stated that a fair and impartial inquiry or trial cannot be held by him, especially when the statement implies a personal censure on such officer"

13. In the case at hand, as was found earlier, the allegation of impartiality by the court was found to be true for the reason that no explanation was offered by the respondents why the trial court had a meeting with the 1st respondent in the absence of the applicants neither was the allegation rebutted. In the circumstances I find that bias was established. On whether or not the applicants will find justice, I am inclined to hold that interference by the trial magistrate with the other judicial officers in Mavoko Law Courts has not been established. Further other judicial officers cannot be condemned on account of bias by one court. In the end, I find no merit in the application dated 27th November, 2017 and I make orders that:

a) The application filed on 9th June, 2017 is allowed in terms of prayers (a) and (b) only.

b) The case be heard by a magistrate other than Hon. L. Kassan but with equal jurisdiction.

Orders accordingly.

Dated and delivered at Machakos this 17th day of October, 2018.

D. K. KEMEI

JUDGE