



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI**

**PETITION NO. 18 OF 2018**

**YWN.....PETITIONER**

**VERSUS**

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

**INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT**

**ETHICS & ANTI CORRUPTION COMMISSION.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. On the 29<sup>th</sup> May 2018, Y W N herein referred to as the petitioner, was together with several other persons arraigned before Nairobi Chief Magistrate's Court vide Anti-Corruption case No. 12/2018 facing various corruption related charges. In particular, the petitioner together with her husband J T N and their company to which they are joint directors [particulars withheld] Ltd, were charged with the offence of fraudulent acquisition of public property contrary to Section 45 (1) (A) as read with Section 48 of the Anti-Corruption and Economic Crimes Act 2003 (Count 18 of the Charge Sheet).

2. Particulars of the offence are that, on diverse dates between 9<sup>th</sup> December 2016 and 15<sup>th</sup> May 2017, within Nairobi County, in the Republic of Kenya, fraudulently acquired public property, to wit Kshs.115,534,000 purportedly as payment for the supply of goods by [particulars withheld] Ltd to National Youth Service, Mechanical and Transport Branch, Ministry of Public Service, Youth and Gender.

3. Aggrieved by the arrest and subsequent prosecution viewed as malicious and a violation of her rights, the petitioner moved to this court under certificate of urgency vide a Chamber Summons dated 7<sup>th</sup> August, 2018 and filed the same day seeking to have a notice of motion and a petition of even date heard during the August vacation.

4. The application was certified urgent and subsequently served upon the Director Public Prosecution (1<sup>st</sup> respondent) being the constitutional office charged with the mandate of recommending and conducting prosecution, the Inspector General of Police (2<sup>nd</sup> respondent) also a constitutional office responsible for investigation of crimes and, the Ethics and Anti-Corruption Commission (3<sup>rd</sup> respondent), a body charged with the power to investigate and enforce Anti-Corruption and Economic Crimes related offences.

5. Among the prayers sought in the said notice of motion was a conservatory order suspending the continuing prosecution of the petitioner pending the hearing and determination of the application and the petition herein. Basically, the petitioner averred that she was not an active director of [particulars withheld] Company which was alleged to have received monies from NYS through corruption.

6. In response, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a joint replying affidavit on 12<sup>th</sup> September, 2018 in which IP Paul Waweru averred that the petitioner was properly charged being an active director of [particulars withheld] Company which corruptly received over Kshs 115,000,000 from NYS through fraudulent and corrupt procurement activities. The 3<sup>rd</sup> respondent did not file any response claiming that, they were not involved in any investigation regarding the case. However, the court did not grant any temporary (conservatory) orders and instead directed for the application to be heard and determined on merit.

7. On 19<sup>th</sup> September 2018, parties agreed to compromise the hearing of the notice of motion in favour of the petition. They subsequently agreed to dispose of the same by way of written submissions and had the same scheduled for highlighting on 9<sup>th</sup> October 2018.

8. The petition herein sought for the following reliefs:

**(a) A declaration that the initiation and prosecution of the petitioner in Milimani Magistrate's court Cr. Case No. 12/18, R vs Lilian Omollo and others as co-director of [particulars withheld] Limited contravenes Article 157(11) of the Constitution and violates the petitioner's rights under Articles 27, 28, 29 and 50 of the Constitution.**

**(b) Judicial review order of prohibition, prohibiting the respondents from continuing with the prosecution of the petitioner via a Milimani Chief Magistrate's Court ACC No. 12/18.**

**(c) An order of compensation for violation of each of the above rights more so for subjecting the petitioner to an unfair trial and for an affront on her dignity and security of person by dint of their constitutional actions.**

**(d) That costs of this petition be borne by the respondents.**

**(e) Any other/further reliefs that this honourable court may deem fit.**

9. The petition is brought pursuant to the alleged violations to Articles 2, 10, 13, 20(1) and (2), 22 (1) & (2), 23 (1), 27, 28, 29, 50, 157 (1). It is predicated upon grounds and facts set out on the face of it and an affidavit in support deponed on 7<sup>th</sup> August, 2018 by Y W N (the petitioner).

#### **Petitioner's Case**

10. According to the petitioner's petition and affidavit in support, she averred that she was/is a director holding only 10% shares in [particulars withheld] Company hence a minority share holder who was not active in the day to day operations of the company's business. She stated that, although married to one J T her co-director with whom she has since separated, she was not involved in any procurement transactions with NYS leading to the alleged payment to their company account No. [...] Standard Chartered Bank, to which her husband JT was the main signatory.

11. She further averred that, despite her husband confirming to the investigating officer the position that he was the only active director to the company, the investigating officer and the respondents did not bother to find out the truth. She attached an affidavit sworn by the said JTN confirming her averments that she was innocent. She further claimed that her arrest and prosecution on 29<sup>th</sup> May 2018 and subsequent freezing of her business and personal accounts by the Asset Recovery Agency was purely malicious and a violation to her constitutional rights to a fair trial as contemplated under Article 50 and 157 (11) of the Constitution which underpins fairness in any legal process including prosecution.

12. She therefore justified the grant of the orders sought claiming that; since the initiation of the said charges, she has continued to endure an affront to her rights which have been violated; that she has since been inconvenienced in attending court hearing and subsequent reporting to DCIO; that she has suffered unmitigated and cruel effects of unfair trial which is a mere academic exercise and; that the trial herein will amount to a waste of precious judicial time.

13. In his submissions, Mr. Okubasu counsel for the petitioner relied on his submissions filed on 3/10/2018 together with a list of authorities which he highlighted on 9<sup>th</sup> October 2018. Counsel reiterated the grounds set out on the face of the petition and averments contained in the affidavit of YW (petitioner) in support of the petition and that of JTN being an annexure to the petitioner's affidavit.

14. In a nut shell, Mr. Okubasu submitted that the 1<sup>st</sup> respondent recommended prosecution of the petitioner based on baseless and unfounded investigations conducted by the second respondent thus contravening Section 14(5) of the Office of the Director of public prosecutions Act and Article 157 (1) of the Constitution which provides –

**in exercising the powers conferred by this Article, the Director of Public prosecutions shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.**

15. Learned counsel opined that, the petitioner and her former husband JTN having confirmed on oath (affidavit) that the petitioner was not an active director to the affairs of the aforesaid company, she ought not to have been charged. He stated that, the prosecution herein was ill intended, unfair, unconstitutional and ultra vires. In support of his submissions, counsel referred to the case of **Samuel Roro Gicheru & another vs OCS Nanyuki Police Station & Another Misc. Cr. Appl. No. 22/14** Nyeri High Court in which the court held that, an unfair trial, for example would tend to bring the administration of justice into disrepute and undermine the integrity of the legal system because of some impropriety in the investigation or presentation of the case.

16. Mr. Okubasu further referred the court to the case of **George Joshua Okungu & Another vs Chief Magistrate's Court Anti-Corruption court at Nairobi & Another (2014) eKLR** where Justice Odunga held that:

**"[70]...where therefore the prosecution has been commenced or is being conducted in an arbitrary, discriminatory and selective manner which cannot be justified, that conduct would amount to an abuse of the legal process".**

To further solidify their case, counsel referred to the case of **Kuria and 3 others vs Attorney General (2002) 2KLR 69** where the court stated that:

**"...it would be a travesty to justice, and a sad day for justice should the procedures or the processes of the court be allowed**

**to be manipulated, abused or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made... ”.**

17. It is Mr. Okubasu's submission that the 1<sup>st</sup> respondent proceeded to charge the petitioner merely on the basis that she was a director to the company and that she withdrew monies from the company account notwithstanding the fact that she was not actively involved in the management of the company's affairs as enshrined under Section 23 of the penal code. He opined that, the 1<sup>st</sup> respondent failed to take into account relevant factors before mounting prosecution contrary to Section 14 (5) of the ODDP's Act. Counsel asserted that the petitioner was not involved in the preparation and submission of tender documents to facilitate the award of the contract between their company and NYS. He urged the court to quash the ongoing criminal proceedings before the magistrate's court.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondent's case**

18. In challenging the petitioner's case, the 1<sup>st</sup> and 2<sup>nd</sup> respondents relied on the averments contained in the affidavit of IP Paul Waweru the Investigating Officer. According to IP Waweru, the petitioner was one of the directors of [particulars withheld] Company Ltd. incorporated on 4<sup>th</sup> August 2006 which company was involved in corrupt and fraudulent procurement transactions with NYS wherein the public lost a lot of money. That the company held an account with Standard Chartered bank being account No. [...] with the petitioner and her husband (co-accused and co-director) as joint signatories. He attached bank opening documents marked annexure PW2 as proof of that fact.

19. It was his contention that the funds obtained from NYS through fraudulent procurement dealings were paid into the said account. That on diverse dates as evidenced by the petitioner's annexed bank statements, she withdrew huge sums of money from the said account and transferred the same into her personal business account No. [...] held at Equity Bank which account has been frozen by the magistrate's court following the Agency for recovery of assets' application.

20. Basically, IP Waweru maintained that the petitioner was in active management of the company's affairs hence the reason for transacting business in withdrawing funds from their company and transferring the same into her private and personal business account. He termed the application as lacking in merit and merely intended to circumvent the DPP's constitutional mandate and a just trial process. Lastly, he asserted that the court should let the trial go through its due process and that the petitioner will not be prejudiced as she will have an opportunity to defend herself.

21. In submission, M/s Kimiri appearing for the respondents, vehemently opposed the application through her submissions and list of authorities filed on 9<sup>th</sup> October 2018. Learned counsel adopted the contents of the replying affidavit sworn by IP Waweru arguing that by recommending prosecution of the petitioner, the 1<sup>st</sup> respondent(DPP)acted procedurally, lawfully and within his constitutional and statutory mandate as provided under Article 157 (6) (a) of the Constitution and Section 14 of the Office of the Director public prosecution Act(ODPPA). M/s Kimiri contended that the petitioner's rights were not violated nor was the petitioner discriminated against as the decision to prosecute her was based on the evaluation of evidence and facts laid before him by the 2<sup>nd</sup> respondent.

22. She further submitted that the petitioner was an active director of the company and direct beneficiary of the monies received from NYS into their company's account. Counsel stated that, courts should act with extreme caution and restraint in discontinuing prosecution and interfering with the DPP's constitutional mandate. She submitted that, whether one is guilty or not, it is for the trial court to determine. To support that preposition, counsel relied on the decision of the court in **R vs Kenya Revenue Authority & 2 others (2013) e KLR**, **Meixner & Another vs Attorney General (2005) 2KLR 189** and **John Swaka vs Director of public prosecutions, Attorney General and 2 others (2013) eKLR**.

23. M/S Kimiri further submitted that it is not for the court to direct on who to charge but rather a function of the investigative agency and the DPP. To bolster this position, counsel referred the court to the case of **Cape Holding Ltd vs Attorney General and Another (2012) eKLR** in which the court held that:

**“.....in my view, it is up to the police to investigate the complaint and it is solely for the DPP and no one else after the investigations has been completed to decide whether the complaint discloses any criminal offence (s) requiring prosecution”.**

24. Regarding the judicial review orders sought, M/S Kimiri urged the court to look into the process leading into the prosecution of the petitioner and not the merits or demerits of the case (**See Njuguna S. Ndungu vs Ethics and Ant-CorruptionCC & 3 Others (2014) eKLR**). Counsel urged the court to find that the respondents did not act in any way capriciously, partially, in bad faith nor did they abuse the legal process leading to the petitioner's prosecution. She beseeched the court to dismiss the petition by finding that the 1<sup>st</sup> respondent did not exceed his mandate thus breaching the rules of natural justice.

### **Analysis and Determination**

25. I have carefully considered the petition herein, grounds in support together with the affidavit sworn by the petitioner and the annexures thereof. I have also considered the replying affidavit and all materials placed before court, submissions by both counsel and illuminating authorities thereto. Issues that render for determination are:

**(a) Whether the prosecution of the petitioner amount to a violation of her constitutional rights to a fair trial.**

**(b) Whether the recommendation to prosecute the petitioner was discriminatory.**

**(c) Whether this court can grant the judicial review orders of prohibition.**

**(d) Whether the petitioner is entitled to any order of compensation for**

**violation of her rights.**

26. In addressing the issues raised, I will deal with the first and second issues together as they are intertwined. Pursuant to Article 157 (6) of the Constitution, authority to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed is the sole responsibility of the director of public prosecution.

27. However, in discharging such noble powers, the DPP under Article 157 (11) is subject to certain limitations inter alia; regard to public interest, interests of the administration of justice and the need to prevent and avoid abuse of the legal process. The office of the DPP being a public office is bound by Article 2 of the Constitution. Whatever decision he makes, he should not derogate from the letter and spirit of the constitution which is supreme and of course without subjecting himself to any direction, person or authority (Article 157 (10)).

28. Under Article 73 of the Constitution, the DPP is clothed with public trust which he must exercise in a manner that is; consistent with the purposes and objects of the Constitution; demonstrates respect for the people; brings honour to the nation and dignity to the office and provides public confidence in the integrity of the office.

29. It therefore follows that, before recommending or commencement of prosecution, the DPP must critically evaluate the evidence and materials placed before his office to make an independent and informed opinion which can stand the test of a prima facie case. His decision must be free from any influence or external direction, political machinations, public euphoria, public relations exercise, media publicity, personal feelings, malice, bias or other extraneous considerations thus offending the cherished principles and rules of natural justice.

30. In the case of **R vs Attorney General Exparte Kipngeno Arap Ngeny H.C. application 406/2001** the court correctly held;

**“criminal prosecution which is commenced in the absence of proper functional foundation or basis is always suspect for ulterior motive or improper purpose”.**

Similar position was held in the case of **Bitange Ndemo vs DPP and 4 others (2016) eKLR** where the court stated that:

**“criminal proceedings are to be informed by the fact that criminal proceedings are to be impartially conducted in the interest of general public and when prosecution is being used as a machinery to cause an injustice, or shield the real perpetrators of crime the court will not hesitate to find that that is an abuse of the court process, oppressive and vexatious”.**

31. In the course of executing his mandate, the DPP must not of necessity and strictly recommend prosecution only on the strength of proof of a case beyond reasonable doubt. If there is sufficient proof of a prima facie case, the DPP can proceed with prosecution and it will be the duty of the trial court to determine whether the evidence is sufficient enough to prove a case beyond reasonable doubt or not.

32. In the instant case, the petitioner is alleging that the second respondent maliciously recommended the charges of fraudulent acquisition of the public property against her. She claimed that although she and her husband also a co-accused were co-directors of [particulars withheld] Ltd, she was not actively engaged in its operations as envisaged under Section 23 of the Penal Code.

33. For avoidance of doubt, Section 23 of the Penal Code provides that-

**where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such a person that, through no act or omission on his part, he was not aware that the offence being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.**

34. Under the above provision, the investigating agency is only bound to prove that an offence was committed by a company or anybody or persons charged with the affairs of the company and it is incumbent upon the person being charged to prove that he or she was not involved or took reasonable steps to prevent the commission of the offence.

35. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have recommended prosecution of the petitioner, her husband and their company known as [particulars withheld] for engaging in corrupt procurement dealings with NYS which is a public entity thereby fraudulently receiving over Kshs 115,000,000 millions. There is no dispute that the company in question did engage into procurement transactions with NYS. The petitioner does not deny being a director in the said company which received money from NYS. She only claimed that she was a minority shareholder who had no say in the day to day operations of the company. On the other hand, the respondent asserted that the petitioner was an active player in the running of the company as evidenced from the company's financial transactions between the year 2016 and 2018 wherein huge sums of monies were transferred from the company account to her personal business account in Equity bank which has been frozen.

36. The DPP in his replying affidavit at Paragraph 10 referred to pages 132, 134, 136, 138, 139, 142, 155, 159, 168 and 195 of the bank statement attached to the petition by the petitioner showing several withdrawals of cash in terms of hundreds of thousands and millions of shillings by the petitioner being one of the signatories of the said company's account through which the funds were paid.

37. The petitioner does not deny withdrawing and transferring some monies from the company's account into her account. She is only shifting the responsibility of the company affairs to the husband who confirmed in the affirmative in his affidavit annexed to the petition.

38. As stated above, all that the 1<sup>st</sup> respondent was required to do is to evaluate the evidence before him to determine whether there is a prima facie case to recommend prosecution before a court of law.

39. According to the petitioner, there was no proof of participation in the procurement process that led to the alleged loss of public funds. I find that to be a matter of finer details and evidence which will be presented before the trial Court wherein the accused will have an opportunity to cross examine witnesses and the court will make a determination of guilty or not guilty.

40. From the materials more particularly the bank statements presented before court and the company's bank opening documents, the petitioner was and still is a director of [particulars withheld] Company which is accused of corrupt dealings with NYS through shoddy procurement transactions and that the petitioner was during the material time engaged in financial transactions relating to the operations of the company.

41. One cannot claim to be a passive company director only to be active in financial transactions of that company. It is the duty of the petitioner to show that the DPP exceeded his jurisdiction, breached rules of natural justice or considered extraneous matters (**See R vs Commissioner of Police and Another Ex parte Michael Monari and another (2012)Eklr.**)

42. The allegation that the petitioner is being discriminated against contrary to Article 27 of the Constitution by being charged of an offence she did not commit in a company she is not actively engaged in its affairs is counterproductive. In fact, it will amount to discrimination on grounds of marital status if her husband J T N a co-director were to be charged alone.

43. I do not find any breach or contravention of the petitioner's rights nor breach of constitution or statutory mandate by the respondents in recommending the prosecution herein.

#### **Whether the order of prohibition shall issue**

44. The petitioner did not specifically pray for orders of certiorari which is essentially designed to prevent abuse of office by calling up a decision of an inferior court, tribunal or authority to quash the same. In this case, the decision to prosecute has already been made. The petitioner is seeking prohibition of continuing prosecution and a declaration that the decision for prosecution was unconstitutional which the court has already observed that there was no proof of unconstitutionality in the decision made.

45. The prayer to prohibit the pending proceedings before the magistrate's court is based on the ground of innocence or inculpability on account of alleged passive participation in the affairs of the company which is linked to the corrupt dealings with NYS. It is my finding that, the second respondent has a mandate under the powers conferred to the inspector general of police vide Article 245 of the Constitution, to investigate and prefer charges against the petitioner which the 1<sup>st</sup> respondent approved and recommended the impugned prosecution under the powers donated by Article 157 of the Constitution.

46. The petitioner has not proved any commission of illegality, irrationality, impropriety or unreasonable acts against the respondents in recommending the prosecution. Prosecution of any person is a constitutional and statutory mandate bestowed upon the DPP exercisable within the parameters of established legal framework and not a mechanical and ritualistic undertaking. Prosecution must be based on logical and proper legal foundation. None of those breaches have been proved to call upon this court's intervention to stop the criminal proceedings for the integrity of the court to be upheld. The petitioner has a chance before the trial court to state her case and due process shall apply.

47. It is not the duty of this court to interrogate the general and finer details of the intended evidence yet to be tabled before the trial court. It is the trial court's mandate to examine and evaluate such evidence and make a determination (**See R vs Kenya Revenue Authority & 2 others (supra)**). It would be unreasonable and premature for courts to curtail the respondent's powers based on perception that one is not guilty of the charges preferred or is likely to be acquitted upon trial. For prohibition to apply, the applicant should satisfy the court that proper legal process was not followed in arriving at the decision in question and not the merits or demerits of the case. For those reasons, the prayer for prohibition fails as the reasons cited do not meet the threshold for grant of such orders.

#### **Order for Compensation**

48. Having dismissed the prayers for declaring the prosecution herein unconstitutional and that the orders for prohibition are not available, there is no basis upon which I can make orders for compensation at this stage. That prayer is therefore not applicable.

49. Having held that the petitioner has not proved that her constitutional rights were violated and that the respondents did not act within their legal mandate in recommending the prosecution, this petition cannot stand. In the circumstances, the petition dated 7<sup>th</sup> August 2018 be and is hereby dismissed.

#### **Order for Costs**

50. Ordinarily, an order for costs follows the event. However, on matters bordering on public interest such as this one, courts have been reluctant to award costs. Accordingly, each party shall bear its own costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7<sup>TH</sup> DECEMBER, 2018.**

**J.N. ONYIEGO**

**JUDGE**