



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.389'B' OF 2014

BETWEEN

STEPHEN MUREGI CHEGE.....PETITIONER

AND

THE INSPECTOR-GENERAL OF POLICE.....1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS DEPARTMENT.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

JOHN MTAY SAIKWA.....INTERESTED PARTY

JUDGMENT

Background

1. The Petitioner is an advocate of the High Court of Kenya. He was charged in the Nairobi Chief Magistrate's Court on 31st July, 2014 with the offence of Stealing by Agent contrary to **Section 283(c)** of the **Penal Code**. The particulars of the offence are:

“Stephen Muregi Chege, on diverse dates between the 11th day of February, 2014 and 14th day of May, 2014 at Upper Hill Apartments along Ragati Road in Nairobi within Nairobi County, jointly with others not before court, being agents of John Mtay Saikwa, stole Kshs.213,000,000.00, the property of the said John Mtay Saikwa which had been received by you for an account of the sale of a piece of land reference number 209/8558 Nairobi, I.R Number 28222 belonging to the said John Mtay Saikwa.”

2. The Interested Party is the previous owner of a parcel of land known as L.R No. 209/8558, (I.R No. 28222) located in Upper Hill, Nairobi. During the period preceding the sale of the land, he engaged the Petitioner as his advocate for the necessary sale transaction. According to the sale of land agreement, the Purchaser was to deposit the proceeds of sale into the Petitioner's account to hold it in trust for the Interested Party. The purchase price was Kshs.300,000,000.00 According to the facts on record, the Interested Party was to receive Kshs.7,000,000.00 in cash at the time of signing the sale agreement and the remainder, being Kshs. 293,000,000.00, was to be deposited in the Petitioner's account.

3. The Petitioner asserts that upon receiving the sale money, he disbursed it to various persons as

instructed by the Interested Party. The Interested Party on his part denies giving any such directions for payment of money to any third party. It is the alleged loss of money which occasioned the Interested Party to lodge a complaint with the Police and as a result, the Petitioner was charged with the criminal offence aforesaid and proceedings commenced at the **Chief Magistrate's Court** being **Criminal Case No.1098 of 2014**.

4. The Petitioner filed a Petition dated 5th August 2014, where he seeks to stop his prosecution aforesaid. The Petition specifically seeks to quash the entire proceedings commenced at the Chief Magistrate's Court as well as to declare that his prosecution is a violation of his rights under **Articles 28, 31, 47 and 50** of the **Constitution**. He further seeks damages for alleged breach of his constitutional rights.

5. Simultaneously with the filing of the Petition, the Petitioner also filed a Chamber Summons Application under a certificate of urgency dated 5th August, 2014, seeking to stay all proceedings commenced against him at the Chief Magistrate's Court by a consent order adopted in Court on 26th August, 2014, parties agreed to stay all further proceedings as against the Petitioner in **Chief Magistrate's Criminal Case No.1098 of 2014** pending the hearing and determination of the Petition.

The Petitioner's Case

6. The Petitioner's case is set out in the Petition dated 5th August, 2014; the Supporting Affidavit sworn on the same day; a Supplementary Affidavit sworn on 25th August, 2014; a further Affidavit sworn on 23rd October, 2014 and submissions dated 10th November, 2014.

7. The Petitioner contends that his constitutional rights have been violated by virtue of the criminal charge which has been preferred against him at the Chief Magistrate's Court. He explains that his relationship with the Interested Party commenced when the Interested Party, through a letter dated 28th November, 2013, retained him as his advocate in a sale of land transaction. Part of the Petitioner's mandate was to receive the sales proceeds on behalf of the Interested Party.

8. The Petitioner also contends that by another undated letter to him, the Interested Party appointed an agent giving him powers to issue directives to the Petitioner with regard to the disbursement of the funds held by him. He asserts that it is on the strength of that later letter that he (the Petitioner) acted on diverse instructions from the said agent thereby disbursing various instalments of payments to several persons.

9. The Petitioner further submits that, in addition to the instructions given by the agent specifying the modalities of payment, the Interested Party also continued to direct the Petitioner on whom and when to pay some of the money. He contends that the thumb prints of the Interested Party, through which he authenticated some of the instructions for payment have been verified by the National Registration Bureau. According to the Petitioner, the Interested Party does not dispute authorship of the said letters and that in addition, no expert document examiner has ascertained that the signatures and the handwriting belongs to someone else. The Petitioner therefore vehemently denies the allegations by the Interested Party that he disbursed money to 'unknown' persons contrary to the agreement. He therefore claims that the decision to charge and arraign him in Court was made without any lawful or valid basis.

10. The Petitioner also questions the manner in which the investigation into his alleged criminal conduct had been conducted and his position is that the Respondents solely relied on the information given by the Interested Party without gathering any independent evidence to confirm the accuracy of the allegations. According to the Petitioner, the Respondents did not even wait for the results of the verification report from the National Registration Bureau which report would have shed light on the precision of the complaint lodged. He therefore submits that the conduct of the Respondents contravened his rights to fair administrative action under **Article 47** of the **Constitution** as well as his rights to a fair hearing under **Article 50**. His case remains that the charge is a violation of his constitutional rights as he was purely acting in accordance with his client's instructions.

11. The Petitioner relies on the High Court case of *Musyoka Kimanathi v Inspector General of Police & 2*

Others Petition No.442 of 2013; [2014] eKLR where *Majanja J* held [paragraph 21]:

“The facts I have outlined are clear that the petitioner was at all material times the advocate of the Plaintiff in the ELC case, he acted in the best interest of the client in accordance with the dictates of the legal practice....in my view, the criminal proceedings are in the circumstances of this case oppressive to the petitioner and must be stopped.”

12. He makes further reference to the cases of **Mohamed Gulam Hussein Fazal & Anor v the Chief Magistrates Court Nairobi HC Misc.367 of 2005**, **Peter George Anthony D’costa v Attorney General & Another, Nairobi Petition No.83 of 2010**, **Investment & Mortgages Bank Ltd v Commissioner of Police & Director of Criminal Investigation Department Petition No.104 of 2012** and **Githunguri v Republic, [1986] eKLR**.

13. Lastly, he prays for the judicial review remedies of certiorari to quash the criminal charges in the Subordinate Court and compensation for the alleged violation of his rights.

The Interested Party’s Case

14. The Interested Party is the complainant in **Chief Magistrate’s Criminal Case No.1098 of 2014** where the Petitioner has been charged with the offence of Stealing by Agent contrary to **Section 283(c)** of the **Penal Code**. He was enjoined to these proceedings by an Order issued on 26th August 2014. In opposing the Petition, he relies on the Replying Affidavit sworn on 3rd October, 2014 as well as submissions dated 18th November, 2014.

15. He agrees that he retained the Petitioner as his advocate in a sale of land transaction where he was the Vendor. He submits that the Petitioner has failed to pay Kshs.213,000,000.00 which is the balance of the purchase price deposited in the Petitioner’s account and that the unlawful withholding of that money, necessitated the Interested Party to lodge a criminal complaint against the Petitioner which culminated in the institution of a criminal charge against him. The Interested Party disputes any ulterior motives or illegality committed by the Respondents in preferring the charges against the Petitioner.

16. The Interested Party further submits that the Petitioner has failed to postulate specific rights which have been breached. For example, that the Petitioner does not in any way indicate insufficiency on the information availed to him relating to the charges being levelled and does not claim that he was not given adequate opportunity to prepare his defence. In a nutshell, that the Petitioner does not present any evidence of breach of his rights but appears to be making a case worthy of consideration by the Magistrate’s Court in investigating the criminal charges against him.

17. The Interested Party further questions this Court’s authority to peruse the material placed before it in deciding whether any criminal charges can be levelled against the Petitioner. His argument in that regard is that the Court has no jurisdiction to delve into the merits of the case since it is not properly seized of the matter. He therefore implores the Court to dismiss the Petitioner’s case and allow the trial to proceed at the Chief Magistrate’s Court wherein the Petitioner will have the opportunity to tender evidence in a bid to exonerate himself.

The 3rd Respondent’s Case

18. The 3rd Respondent, the Director of Public Prosecutions (DPP) in response to the Petition filed a Replying Affidavit sworn by PC Moses Gituathi on 11th August, 2014 as well as written submissions dated 10th December, 2014.

19. He submits that it was only after investigations were concluded and upon being satisfied that a criminal offence had been committed that the Petitioner was charged in Court. That this Petition is therefore premature as only a trial Magistrate can investigate the veracity of all the allegations made. He states that the decision to charge the Petitioner was purely within the law and was not irrational or

actuated by malice as alleged by the Petitioner. He therefore reiterates the Interested Party's position that indeed a complaint was lodged and upon investigation, it was recommended that the Petitioner ought to be prosecuted for an alleged commission of an offence.

Determination

20. The underlying issue for determination in this matter is whether this Court should intervene to stop the Petitioner's prosecution on the basis that his constitutional rights have been violated. Connected to this, is the question whether the Director of Public Prosecutions was within the law in preferring criminal charges against the Petitioner and whether the 1st and 2nd Respondents properly executed their mandate.

21. In that regard, Pursuant to **Article 157(6)(a)** of the **Constitution**, the DPP has the constitutional mandate to commence criminal proceedings against persons suspected to have committed offences. On the other hand, the 1st Respondent, the Inspector General of Police, being in charge of the National Police Service has the mandate of *inter alia* maintenance of law and order, investigation of crimes, collection of criminal intelligence, prevention and detection of crimes and apprehension of offenders. [See **Section 24** of the **National Police Service Act, Cap 84, Laws of Kenya**]

22. Further, the Directorate of Criminal Investigations is established under **Section 28** of the **National Police Service Act** and its functions are within the Kenya Police Service, which is a component of the National Police Service, with regard to detection of crimes and apprehension of offenders. The directorate is also under the direction, control and command of the Inspector General of Police.

23. In essence, the 1st and 2nd Respondents are in charge of investigation and detection of crime as well as apprehending any offenders. On the other hand, the 3rd Respondent has the responsibility of instituting criminal proceedings against the alleged offenders.

24. In the present case, the Petitioner questions the propriety of the DPP in preferring the specific criminal charge against him as well as the effectiveness of the 1st and 2nd Respondents in conducting their investigations. In that context, I agree that the DPP's discretion in instituting criminal charges against an alleged offender is not absolute and the exercise of his powers may be questioned where the precepts of the **Constitution** are not met. His actions should therefore stand guided by the commands of **Article 157 (11)** 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 interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”

25. In the same breath, **Article 244 (c)** of the **Constitution** provides that in exercise of its mandate, the National Police Service shall comply with constitutional standards of human rights and fundamental freedoms and as already stated, the Inspector General is in charge of both the National Police Service and the Directorate of Criminal Investigations. Consequently, all the Respondents' actions are therefore strictly guarded by the constraints of the Constitution.

26. I also note that several decisions of this Court have consistently affirmed the guiding legal principles detailing circumstances under which a Court can interfere with an ongoing criminal prosecution in a Subordinate Court. That is why in the case of **Republic v Attorney General & 4 others Ex-Parte Kenneth Kariuki Githii Misc. Appl. No. 151 of 2013; [2014] eKLR, Odunga J** observed thus;

“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.”

Further, in the case of **Gulam & Anor v Chief Magistrate's Court & Anor [2006] eKLR** the Court 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”.

27. Additionally, the case of **Justus Mwenda Kathenge v Director of Public Prosecutions & 2 Others, Petition No.372 of 2013**, properly summed those key principles as follows;

“The reasoning...would lead to only one conclusion; whereas the DPP has the ultimate discretion in determining which complaint should lead to a criminal prosecution, where that power is seen to have been manifestly abused, the High Court can intervene by powers conferred by Articles 165(3)(d)(ii) of the Constitution and stop that abuse, including where the Court system is being used to settle scores and to put an accused person to great expense in a case which is clearly not otherwise prosecutable.”

28. With that background in mind, the Petitioner impugns the standard of investigation carried out by the Respondents collectively and independently. According to his submissions, there are diverse materials on record showing that he acted solely on the instruction of the Interested Party and should not therefore be victimized for acting in accordance with his client’s instructions. He also alleges that the Respondents were too ‘quick’ to arrest him without taking time to confirm the veracity of the allegations and avows that the decision to prefer criminal charges against him was arrived at arbitrarily.

29. In that context, the assertions by the Petitioner are heavily contested by the Interested Party as well as the Respondents. The unwavering position of the Interested Party is that he did not issue any instructions to the Petitioner directing him to disburse any money to any third party. The Respondents’ position on the other hand, as represented by the 3rd Respondent, aligns with the Interested Party’s case.

30. The parties have also clearly presented before me a controversial versions of facts. On one hand, the Petitioner has placed weighty material before me in justification as to why his prosecution is unwarranted. He has presented various instructions’ notes alleged to be emanating from the Interested Party and has also provided documents which he says, verifies the Interested Party’s thumb print, signifying his approval of various transactions. On the other hand, the Interested Party strongly dissociates himself from the assertions made by the Petitioner.

31. It seems to me therefore that, I am being asked to evaluate the evidence on record to determine whether the 3rd Respondent was justified in instituting any criminal charge against the Petitioner. This would necessarily necessitate my probing into the veracity of the allegations made by all the parties. Unfortunately my powers in that regard are very limited because I cannot make a determination as to the justiciability of criminal proceedings which have already commenced without delving into the merit of the case.

32. I say so because in the case of **Michael Monari & Anor v Commissioner of Police & 3 Others Misc. Appl. No.68 of 2011**, Warsame J (as he then was) stated thus;

“It is not the duty of the Court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it.”

33. I agree with the learned Judge and flowing from the facts above, I hold that, where there are contested issues of fact, which facts are paramount in making a determination as to the propriety of the charges facing an accused, this Court would be constrained in arriving at a proper determination thereon since it has no power to evaluate the evidence presented to it without the benefit of cross-examination.

34. It is only the trial Magistrate in the Court where the Petitioner is facing a criminal charge, who is properly seized of the matter, who has the power to assess and determine the probity of the evidence presented. No matter how aggrieved the Petitioner is, therefore this is not the appropriate time or indeed the forum to prove his innocence. It is in fact in his best interest that the wheels of justice are quickly set rolling so that he can have his day in the Chief Magistrate's Court.

35. In no specific details, the Petitioner also claims that his right to fair hearing, fair administrative action, dignity and privacy have been infringed. With regard to the right of fair hearing, **Article 50(1)** provides;

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body.”

36. In that context, the Petitioner is facing a criminal charge at the Chief Magistrate's Court. That Court is properly clothed with the jurisdiction to undertake the criminal proceedings and the Petitioner does not question the competence or otherwise of the said Court. I therefore do not find any basis upon which the Petitioner can properly say that his right to fair hearing has been infringed.

37. With regard to the alleged infringement of the Petitioner's right to human dignity and privacy, the Petitioner has not specified how those rights have been violated. The pleadings and the submissions on record only tangentially mention the possibility of such an infringement without sufficiently detailing how the alleged infringement has occurred. That notwithstanding, those rights are not absolute and may be limited in certain circumstances. Unfortunately, I cannot say more since doing so would tantamount to crafting an imaginary case on behalf of the Petitioner.

38. Finally, the Petitioner alleges violation of his right to fair administrative action under **Article 47** of the **Constitution**. The basis of his allegations is the alleged insufficient investigations carried out by the Respondents. Unfortunately as I have already stated, I cannot scrutinize the actions of the Respondents without digging deeper into the merits of the case. Such a task can only be undertaken by the trial Court which will have the opportunity to examine all the evidence on record. I am therefore unable to inquire into the alleged violation of the Constitution without encroaching into an unknown realm – See **Petition No.310 of 2014 Dr. Alfred N. Mutua v The Ethics & Anti-Corruption Commission (EACC) and 4 Others** and also **Petition No.66 of 2012, Joshua Chelelgo Kulei v Republic and 9 Others**.

Conclusion

39. I know that as an advocate the Petitioner's livelihood is at risk so is his professional reputation. In clear circumstances, this Court would not have hesitated to protect him from criminal charges that may run afoul of the expectations of **Article 157(11)** of the **Constitution**. However for reasons explained above, the conflicting positions taken by the Petitioner and his erstwhile client and the role of the alleged agent for the Interested Party in the sale transaction are matters to be resolved through cross-examination in a trial and not the submission now before me. Only then can an innocent person be fully and properly vindicated.

Disposition

40. For the above reasons, the Petition herein is dismissed and the stay orders with regard to **Nairobi Chief Magistrate's Criminal Court No.1098 of 2014** are vacated. Let each party bear its own costs.

41. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF JANUARY, 2017

ISAAC LENAOLA

JUDGE

DELIVERED AND SIGNED AT NAIROBI THIS 25TH DAY OF JANUARY, 2017

E. CHACHA MWITA

JUDGE