



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NYERI

CRIMINAL CASE NO. 14 OF 2015

CHIBUNGU SANGA.....APPLICANT

REPUBLIC RESPONDENT

RULING

1. The Applicant filed a Notice of Motion dated the 15th February, 2016; the application was brought under the provisions of Article 49(1) (h) of the Constitution of Kenya and all other Relevant Provisions of the Law.

2. The Applicant prayed for Court Directions and the following Order;

(i) That the Honorable Court rule on which witness statements will be used in determining this case; between those recorded by the Criminal Investigation Department (CID) and those recorded by the Independent Police Oversight Authority (IPOA).

3. At the hearing hereof the applicant was represented by learned Counsel Mr.Mwagambo, the Office of the DPP by Mr. Njue, IPOA by Ms Maina and the victims by Mr. Mbanya; all the parties filed written submissions and highlighted their respective submissions; hereunder is a summary of the rival parties submission highlights;

APPLICANT'S CASE

4. The Applicant relied on the grounds on the face of the application and on his Supporting Affidavit dated the 15th February, 2016; that he was a police officer and has been charged with the offence of having murdered one **Geoffrey Kingori Kanyi on the 8th March, 2015;**

5. The Kenya Police Service (KPS) investigated the matter and recorded statements three (3) days after the incident; that the role of the police is as set out under the provisions of Section 24 of the National Police Act; one of the functions being the investigation of crimes; that the exclusive mandate of the role of the police to investigate alleged crimes was set out in the case of **Republic vs Minister for Agriculture & 6 Others & Anor Misc. Appl. No. 78 of 2012;** the role of the police is further highlighted in the case of **Republic vs Commissioner of Police and Anor ex parte Michael Monari & Anor [2012]** *“that the police have a duty to investigate on any complaint made”* and that failure to investigate any complaint made and prepare appropriate report would be unconstitutional.

6. There was no complaint made by anyone that these investigations were flawed or shoddy; but after one (1) month IPOA investigated the matter and generated other statements and the charges preferred against the applicant were based on this report and the statements recorded by IPOA; that the prosecution also seeks to rely on these statements recorded by IPOA to prosecute its case against the applicant; it is

submitted that the reliance by the prosecution on such report is inappropriate and amounts to usurping of the powers of the police;

7. The mandate of IPOA as provided under Section 7 of the IPOA Act is as follows;

Section 7(1)(a)(ix)- “recommending to the DPP the prosecution of any person for any offence”

Section 7(1)(c)- “where appropriate, to provide relevant information to enable a victim of unlawful police conduct, to institute and conduct civil proceedings for compensation in respect of injuries, damages and loss of income.”

8. Counsel made reference to the case of **IPOA & Anor vs Attorney General & 660 Others Petition No.390 of 2014** which outlines the limited functions of IPOA; therefore any reports or witness statements obtained from investigations carried out by IPOA can only be used by the DPP in making a determination as to whether to order the initiation of a murder trial or not;

9. The statements are glaringly contradictory, inconsistent and convoluted and look like the witnesses were coached; particularly the statement made by Patrick Wanjau Kanyi; that there was also a hidden

hand that influenced the investigations; the hand being that of the area Member of Parliament; the investigations were commenced under political pressure as opposed to a factual basis; refer to the cases of **R vs Attorney General Ex Parte Kipneno Arap Ngeny High Court Misc. Civil Application No. 406 of 2001** and **Republic vs Chief Magistrates’ Court at Mombasa Ex parte Ganijee & Anor [2002] 2KLR 703** where it was held that;

“No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose.”

10. Article 50 calls for a fair trial but the statements prepared by IPOA are conclusive in nature and prejudicial to the applicant and amount to an infringement of his constitutional right to a fair trial and his presumption of innocence;

11. Counsel urged the court to disregard the report prepared by IPOA and not to admit the witness statements as evidence and to instead prefer the police report prepared as per their mandate and recorded a month earlier than the IPOA report; that the use of the IPOA report instead of the Police Report is an abuse of court process.

RESPONDENT’S (DPP) SUBMISSION

12. In responding and opposing the application relied on the Replying Affidavit dated the 5/4/2016 and the authorities annexed; that it is not in dispute that two sets of investigations carried out; the first one was by the CID in exercise of their powers under Section 24 of the National Police Service Act; but the point of departure is that the Act does not indicate that investigative role in criminal cases is exclusively for the Police; that there is no law barring others;

13. The IPOA Act established IPOA and under the provisions of Section 6 (a) as read with Section 7(i) powers are donated to it to carry out investigations under their own motion or upon a complaint being lodged by any party or body or an individual;

14. The first investigation was carried out by the CID and sent to the ODPP and was placed before an Officer known as Tumaini who duly considered the report and recommended that an impartial investigations be carried out as the applicant was a police officer; the CID is also a body of police officers and arising from previous experiences there was a history of partiality when police officers carry out investigations on their colleagues; that this fear was expressed by the Court of Appeal in the case of **AG & 2 Others vs IPOA & Anor (2015) eKLR**.

15. The second investigation was carried out by IPOA and when forwarded to ODPP the Director was satisfied that the report contained enough evidence to have the applicant charged and he directed that charges be preferred; that IPOA acts only as an Ombudsman in matters related to Police Officers and does not prefer charges; this the work of the ODPP;

16. That IPOA had a duty to forward the report to the office of the DPP and that there was nothing irregular in IPOA sending the file to the Office of the DPP; that there is no provision in law that prevents the ODPP from getting evidence from any other body;

17. IPOA also informed the area Member of Parliament of the progress of the case but it did not inform him that the applicant would be charged and convicted;

18. All the witnesses in the first report also gave statements in the second report; the only discomfort to the applicant is the statement of Patrick Wanjau Kanyi; in the first report he had recorded that the deceased came out with a “**panga**”; whereas in the second statement he indicated that the deceased did not have a “**panga**”; both sets of statements have been availed to the applicants advocates; ODPP undertakes to utilize only the statements prepared by IPOA to lead the witnesses; the trial is not a private prosecution by ODPP and the applicant will be accorded a fair trial; the applicant is adequately represented by Counsel and the credibility of the evidence of the witnesses in particular that of Patrick Kanyi will be tested in cross-examination;

19. In summation Counsel submitted that IPOA did not act ‘**ultra vires**’ and nor did the ODPP; that calling on the court to rule on the statements that the ODPP should use would be directly interfering with the independence of the ODPP; and prayed that the application be disallowed;

IPOA’S SUBMISSIONS

20. Counsel opposed the application and relied on the Grounds of Opposition dated the 16/03/2016; that Section 3 of the IPOA Act established the Authority and Section 6 sets down its mandate; which is to investigate complaint on its own motion or upon receipt of a complaint; it can conduct investigations and make recommendations to the ODPP;

21. In this instance IPOA learnt of the shooting from a local daily; and commenced investigations on its own motion; IPOA is required to publish findings of its investigations as it deems fit; and the information is available to all including the area Member of Parliament for Mukuruweini;

22. There are two investigation reports one prepared by IPOA and another by the CID; Section 26 excludes the authority from investigating certain matters before any court of law or tribunal; but in this instance the investigations by the CID had not been brought to court; therefore nothing barred the authority from conducting the investigations herein;

23. Section 24 (6) of the Act is clear that in the event that investigations run parallel then IPOA may “**at its sole discretion**” abide or adopt the investigations conducted by the police; Counsel reiterated that Section 6 was very clear on the mandate of IPOA that it can conduct investigations and make recommendations to ODPP; and that IPOA does not conduct prosecution;

24. The application lacks merit and ought to be dismissed.

VICTIM’S SUBMISSIONS

25. Counsel relied on the submissions dated the 8/03/2016; and submitted that the application was an attempt to lock out vital evidence; and the court was being invited to direct how ODPP should conduct its case;

26. Section 7(1) (A) of IPOA Act allows IPOA conducts investigations and record statements under oath or affirmation; the instant application focuses on Patrick Wanjau the brother of the deceased; that this

witness will testify and be subjected to cross-examination and the issues will come into focus;

27. That the applicant in requesting the court to rule in its favour is asking the court to overstep its boundaries; a ruling in favour of the applicant will lock out vital evidence and prejudicial to the prosecution and the victims' family; the ruling will affect the status of the court which should be impartial;

28. Both sets of the statements had been availed to the applicant; and his rights had not been infringed; Counsel appealed to the court to allow the ODPP to conduct the trial based on all the evidence; to listen to all the evidence and to make a decision on all the evidence;

REJOINDER

29. In his rejoinder Counsel for the applicant submitted that the applicant took his plea on the 9/09/2015 and that the letter with recommendations is dated 28/10/2015 and is marked as annexure "FNN3"; he reiterated that it was not factual that the applicant was prosecuted on the recommendation; that Section 7(1)(c) expressly gives IPOA the mandate to recommend in civil proceedings; and that was the mandate envisaged by the drafters of the law;

30. Impartiality has not been exhibited from IPOA to the ODPP and it is very clear that a position has already been taken; and any evidence brought by such a party means that there is a position; and the applicant stands to be prejudiced; that the statements used in these proceedings should be the initial ones prepared by Kenya Police Service;

ISSUES FOR DETERMINATION

31. After hearing the rival submissions and perusing the respective written submissions there is only one issue framed by this court for determination which is;

- i) Whether this court has the mandate to determine which set of witness statements to be used in the prosecution of the instant case; being the ones prepared by the Criminal Investigation Department (CID) or the ones recorded by Independent Police Oversight Authority.

ANALYSIS

32. The Applicant has been charged with the offence of murder contrary to Section 204 of the Penal Code; there were two sets of investigations carried out; the first was done by the CID and the second conducted by IPOA; the prosecution in this instance seeks to rely on the investigation carried out by IPOA to which the applicant is opposed to;

33. It was submitted that there was no complaint by anyone that the first set of the investigations were flawed or shoddy; but after one (1) month IPOA investigated the matter and generated other statements and then preferred charges against the applicant which were based on the report and sets of statements recorded by IPOA; that the prosecution also seeks to rely on these statements recorded by IPOA to prosecute its case against the applicant; that the reliance by the prosecution on such report is inappropriate and amounts to usurping of the powers of the police.

34. The applicants contention is that IPOAs mandate is limited to carrying out investigations and to making recommendations to be used in civil claims against errant police officers; and that in recording the witness statements it acted ultra vires to its mandate; that these statements are also prejudicial to him as the making of the statements had been influenced by the area Member of Parliament; and that the applicant will not be accorded a fair trial if these statement are used;

35. It is this courts considered view that this application is not a constitutional petition for it to determine whether the applicants rights and fundamental freedoms may be violated; in any event the applicant is ably represented by learned Counsel; both sets of statements and all committal documents have been

availed to the applicant in advance; and he will be given an opportunity at trial to cross-examine all the prosecution witnesses and to defend himself; it is therefore too early in the day to say that he will not be accorded a fair trial;

36. It is not in dispute that both parallel statements were in the possession of the ODPP and that the applicant was charged subsequent thereto; therefore in essence the applicant seeks a determination by this court of the merits and demerits of the two sets of investigation reports; in the case of **Eng. Michael Kamau and 12 Others vs EACC and 4 Others [2016] eKLR** it was held as follows;

“It follows that where a Petitioner brings such proceedings with a view to determining contested matters of facts and in fact urges the court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction to determine such a matter and will leave the parties to resort to the usual forums where such matters ought to be resolved.”

37. The court went further to state;

“...the High Court ought not to usurp the jurisdiction of the trial court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the Petitioner.”

38. IPOA has powers to investigate a case and make recommendations to the ODPP; its investigative role is recognized by the ODPP and its findings and recommendations can be relied upon by the ODPP in discharging its constitutional mandate under Article 157 of the Constitution.

39. The ODPP once it receives the recommendations from any investigating body and after examining the evidence is at liberty and has the discretion to choose the best evidence that can lead to a conviction provided that this discretion is exercised legally and is not motivated by ill will or ill motive; and this was the observation of the court in the case of **Eng. Michael Kamau and 12 Others vs EACC and 4 Others supra**;

“.....the DPP is entitled to rely on any lawful sources to determine whether or not to commence criminal proceedings, the mere fact that the information emanating from a particular body was released without the authority of the body does not bar the DPP from making use of that information so long as the information is admissible in evidence. Whether or not to admit the said information in evidence, however, is the role of the trial court. We therefore cannot at this stage bar the DPP from relying on the information furnished to it by the Commission merely because the same was not procedurally submitted.”

40. The court went on to make the following declaration;

“We declare that the Director of Public Prosecution is at liberty to rely on any source of information in order to institute criminal proceedings whether the information emanates from the Ethics and Anti-Corruption Commission or not as long as the source is not declared to be unlawful.”

41. This court is persuaded by the above findings and reiterates that the application is not a constitutional petition for it to determine whether the applicants' rights and fundamental freedoms will be violated; further the applicant has placed no material before this court to demonstrate that the ODPP's discretion may have acted capriciously or may have been motivated by ill will or motive.

FINDINGS AND DETERMINATION

42. For the forgoing reasons the court makes the following findings;

(i) It is not the duty of this court to determine the merits or demerits of an investigation report and

or which set of witness statements ought to be used by the ODPP in prosecuting its case; the ODPP is at liberty and has the sole discretion to decide on which set of investigation reports and witness statements it shall use to prosecute its case;

(ii) The application is found to be premature as the allegations made by the applicant and the veracity of the evidence can only be tested within the full trial;

(iii) The directions that this court will make is that the prosecution shall not be limited to using any set of witness statements; as for IPOA once it handed in its report and its recommendations were effected it then ceased to have any mandate or any further business in the matter and it does not have any oversight or supervisory powers over the prosecution.

(iv) The application is otherwise found lacking in merit and is hereby dismissed;

Orders Accordingly.

Dated, Signed and Delivered at Nyeri this 20th day of Feb, 2017.

HON. A. MSHILA

JUDGE