REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 54 OF 2016

IN THE MATTER OF ARTICLES 19 (2), (3), 20, 21, 22 (1), 23(1), 40 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CRIMINAL PROCEDURE CODE CAP 75 LAWS OF KENYA

AND

IN THE MATTER OF RIGHT TO PROPERTY AND ACCESS TO JUSTICE

AND

IN THE MATTER OF MAVOKO CHIEF MAGISTRATES COURT CRIMINAL CASE NUMBER 44 OF 2016

BETWEEN

JESCA KIPLAGAT..…….....….….....PETITIONER

VERSUS

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....….….....2ND RESPONDENT

DORIS JEPKOECH.....3RD RESPONDENT

JUDGEMENT

The petitioner herein seeks reliefs expressed in the following words:-

a. compensation for Human Rights for Human Rights violations of the Right to property as enshrined in the constitution,

b. The Matrimonial property known as Mavoko Municipality Block 34/15 and preservation of the ownership to her name in trust for the minor- Duncan Kiptoo.

c. An order to quash the criminal case number 44 of 2016, Republic vs Jesca Kiplagat.

d. Costs of the petition.

The petitioner avers that on 23rd January 2016, the 3rd Respondent lodged a complaint with the police to

the effect that the petitioner had allegedly interfered with her privacy and disturbed the peace. Apparently the dispute arose over property known as Mavoko Municipality Block 34/15 which the petitioner claims was her matrimonial home together with her late husband in which she claims to have resided for over 6 years.

The petitioner accuses the third Respondent of furnishing the police with false information relating to a limited grant of letters of administration issued in succession cause number 2808 of 2015, Nairobi, and alleges that on 23rd January 2016 the third Respondent used her influence and caused her to be arrested and incarcerated at Embakasi Police Station and was charged in court. The petitioner also accuses the third Respondent for "interfering with her marriage" and her property and also avers, the third Respondent is facing a criminal trial at Makadara Law Courts for assault.

In her Replying affidavit filed on 23rd February 2016, the third Respondent averred that the petition is prompted by malice, falsehoods and concealment of material facts, that the property in question was lawfully transferred to her by the lawful proprietor and annexed documents in support thereof among them a letter of consent and transfer instrument and also annexed court papers relating to divorce proceedings between the petitioner and her late husband and confirmed that she was married to the deceased under customary law and annexed a hand written document and an affidavit sworn by the deceased.

On behalf of the first Respondent and second Respondent is the Replying affidavit filed on 18th March 2016 sworn by a police officer who averred that he received a complaint from the third Respondent, and investigations revealed that the petitioner accompanied by a group of ten youth stormed her house demanding that she vacates the premises alleging it belonged to her late husband, that the petitioner jumped over the perimeter fence and destroyed the third Respondents property, that the petitioner was arrested by the chief and administration police officers and brought to the police station, hence the petitioner is misleading the court. Upon reviewing the evidence the petitioner was charged with the offence in question, and that the DPP acted in accordance with the law while instituting the said proceedings.

I have considered the submissions filed by the parties and in my view, the issues for determination are whether or not the petitioner has established a case to demonstrate that her constitutional rights were violated and whether or not the DPP acted within the law in instituting the criminal proceedings in question.

Regarding the second issue, the basic principle is that it is for the prosecution, not the court, to decide whether a prosecution should be commenced and, if commenced, whether it should continue. In *Environment Agency v Stanford*,[1] Lord Bingham LCJ said:-

> *"The jurisdiction to stay, as has been repeatedly explained, is one to be exercised with the greatest caution ... ……."*

The DPP is required to act independently in the discharge of his duties. Article **157 (10)** of the Constitution of Kenya 2010 provides 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 powers or functions, shall not be under the direction or control of any person or authority. This position is also replicated under Section **6** of the Office of the Director of Public Prosecutions Act.[2]

The above provisions require the DPP to not only act independently in the exercise of his functions, but also ought not to be perceived to be acting under the direction or instructions or instigation of any other person. The decision to institute or not institute court proceedings is a high calling imposed upon the DPP by the law and must be exercised in a manner that leaves no doubt that the decision was made by the DPP independently. I find nothing in the petitioners case to suggest, even in the slightest manner that the DPP did not act independently in arriving at the decision to prosecute. The allegations that the prosecution was instigated by the third Respondent are in my view not convincing at all nor are they backed by any tangible evidence.

Section **24** of the *National Police Service Act**[3]*** sets out functions of the Kenya Police Service. In my view, the petitioner has not demonstrated that the investigations and prosecution in question constitute an abuse of process or police powers, nor has the petitioner proved malice or bad faith. The duty and mandate of the police was appreciated in ***Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another***[4] where it was held that **the police have a duty to investigate 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. 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.**

However, the courts can only stop a prosecution if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court or infringement of the petitioners fundamental rights.

Abuse of process has been defined as something so unfair and wrong with the prosecution that the court should not allow a prosecutor to proceed with what is, in all other respects, a perfectly supportable case. [5] Whether a prosecution is an abuse of court process, unfair, wrong or a breach of fundamental rights, it is for the court to determine on the individual facts of each case. I am afraid, from the material before this court, there is nothing to show that the prosecution is unfair, wrong, baseless or an abuse of police powers or judicial process. The concept of a fair trial involves fairness to the prosecution and to the public as well as to the accused.[6]

The inherent jurisdiction of the court to stop a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances.[7] The essential focus of the doctrine is on preventing unfairness at trial through which the accused is prejudiced in the presentation of his or her case or where there is clear breach of fundamental rights to a fair trial. Courts should first consider whether or not there is anything in the trial to prevent 'a fair trial' and if there is none, then the court ought to allow the prosecution to continue.

In my view, the high court should prohibit or quash prosecutions in cases where it would be **impossible to give the accused a fair trial;** or where it would amount to a **misuse/manipulation of process** because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.[8] These categories are not mutually exclusive and the facts of a particular case ought to determine whether to allow the orders sought or not.[9]The power to stay or stop a prosecution should only be exercised if exceptional circumstances exist which would result in prejudice to the accused which cannot be remedied in other ways.

A criminal prosecution can also be stopped if it was commenced in the absence of proper factual foundation. There is nothing to suggest that there was no proper factual foundation in undertaking the prosecution in question.[10] The decision whether or not to prosecute is very important. It can be very upsetting for a person to be prosecuted even if later found not guilty. However, a decision not to prosecute can cause great stress and upset to a victim of crime. I find nothing in the material before me (even mere reasonable suspicion) to suggest that the DPP acted in violation of article **157 (10)** of the Constitution and Section **6** of the Office of the Director of Public Prosecutions Act[11] cited above.

The Constitution contains, in material respects, a fundamental commitment to human rights. Interpreting similar provisions in the constitution of South Africa, the South African Constitutional court (Nicholas AJA), stated that:-***[12]***

> *"..... The enquiry is whether there has been an irregularity or an illegality, that is a departure from the formalities, rules and principles of procedure according to which our law required a criminal trial to be initiated or conducted...."****[13]***

The right to a fair trial is guaranteed by Article 50 of the Constitution. The prosecution of an accused person must be conducted with due regard to traditional considerations of candour, fairness, and justice.

In the Indian Case of *Pulukiri Kotayya vs Emperor*[14] the court held that where a trial is conducted in a manner different from what is prescribed under the law, the trial is bad.

Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracize injustice, prejudice, dishonesty and favouritism. And again decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused.[15]

The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person. It is guaranteed under Article **14** of the International Covenant on Civil and Political Rights (ICCPR).[16]The fundamental importance of this right is illustrated not only by the extensive body of interpretation it has generated worldwide but, by the fact that under article **25 (c)** of our constitution, it is among the fundamental rights and freedoms that may not be limited.

The cardinal principle in criminal justice is that an accused person is presumed innocent until proven guilty. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized.**[17]** There is no material before me to show that the criminal trial will be unfair or that the decision to charge was arrived at unfairly.

In all honesty, I find nothing in the material before me to show that the petitioners right to a fair trial has been hampered or threatened in the criminal trial in question nor is there is tangible evidence to demonstrate that the police acted maliciously or outside their powers or that the prosecution in question was commenced without proper or reasonable foundation. It is my view that the petitioner has not demonstrated even in the slightest manner that her rights to a fair trial have been or will be infringed if the prosecution in Criminal case number **44** of 2016 proceeds nor has it been shown that the said trial is an abuse of court process or it will inherently violate her rights to a fair trial as enshrined in the constitution

The petitioners also pray for restoration of her matrimonial property Mavoko Municipality Block 34/15. In all fairness such a relief is totally misplaced and unavailable in a case of this nature. It requires litigation in the proper forum for her to establish her right. In any event, the third Respondent has exhibited documents showing how she acquired it. The petitioner claim for the said property in these proceedings' is highly misguided.

The petitioner claims for compensation for Human Rights Violations. I am afraid, the material before the court does not demonstrate any violation of her fundamental rights to warrant the court to award compensation. In all honesty, I find no basis for awarding damages nor has evidence been adduced to demonstrate any basis for awarding the damages sought. In my view, the petitioner is obliged to place evidence of the alleged violation before the court can exercise its discretion to award damages in the nature of compensatory damages. It is only if infringement has been shown that the court can exercise its discretion whether or not to award compensatory damages. The practice developed in constitutional matters is to award damages for violation of constitutional rights, but it cannot be overemphasized that this is after there is evidence of the infringement.

In the instant case there is no evidence of breach of constitutional rights for which the petitioner can be compensated. It has not been demonstrated the nature, extent or loss whether physical or psychological that the petitioner suffered as a result of the alleged infringement nor has the infringement been proved to the required standard. Close attention to the facts of each individual case is required in order to decide on what is required to meet the need for vindication of the constitutional right which is at stake. I find guidance in the following words expressed in *Romauld James v The Attorney General of Trinidad and*

*Tobago**[18]*** where citing previous decisions it was held:-

> *"When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation.……."*

The key words in the above passage is "*If the person wronged has suffered damage, the court may award him/her compensation." Thus, the person alleging breach of constitutional rights must prove both the infringement and the loss suffered.* The evidence tendered on behalf the petitioners in my view did not demonstrate the alleged infringement and consequential loss to the required standard. Courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of Rights they must not only state the provisions of the Constitution allegedly infringed in relation to them, but also the manner of infringement and the nature and extent of that infringement[19]and the nature and extent of the injury suffered (if any). Such any injury could be either physical, mental or psychological. None has been proved in the present case.

I am fully aware that it is self evident that proving an injury or loss, which is neither physical nor financial, presents special problems for the witnesses and the judicial process, which aims to produce results objectively justified by evidence, reason and precedent. Subjective feelings of upset, frustration worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of objective proof. But my fear is that there was no attempt at all to plead or prove any of the above.

I am also alive to the fact that although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, but I am constrained by lack sufficient evidence to enable me to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury.

In *Ministry of Defence v Cannock**[20]*** the court stated: -

> *"Compensation for injury to feelings is not automatic. Injury must be proved. It will often be easy to prove, in the sense that no tribunal will take much persuasion that the anger, distress and affront caused by the act of discrimination has injured the applicant's feelings. But it is not invariably so."*

In my view the petitioner have failed to discharge the burden of prove to the required standard. To my mind the burden of establishing all the allegations rests on the Petitioner who is under an obligation to discharge the burden of proof. All cases are decided on the legal burden of proof being discharged (or not). **Lord Brandon** in *Rhesa Shipping Co SA vs Edmunds*[21] remarked:-

> *"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."*

Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by **Rajah JA** in *Britestone Pte Ltd vs Smith & Associates Far East Ltd*[22] **:-**

> *"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"*

With the above observation in mind, the starting point is that *whoever desires* any court to give *judgement* as to any legal right or liability, dependant on the existence of fact which he asserts, *must*

prove that those facts exist. The *burden of proof* in a suit or proceeding *lies* on that person *who would fail if no evidence at all were given on either side.* The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In the case of *Miller vs Minister of Pensions*,[23]**Lord Denning** said the following about the standard of proof in civil cases:-

> *'The …{standard of proof}…is well settled. It must carry a reasonable degree of probability…..if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.'*

In my view the reason for this standard is that in some cases, the question of the probability or improbability of an action occurring is an important consideration to be taken into account in deciding whether that particular event had actually taken place or not. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist.

I have carefully considered the Petition before me and the response by the Respondents together with the submissions filed by both parties and I find that the Petitioner has failed to prove the alleged infringement/loss/damage (if any) to the required standard. In fact, other than the allegations in the petition, there is no supporting evidence or particulars at all to support the alleged infringement, loss or damage that may have been suffered by the petitioner, if any.

On the whole, I find that this petition has no merits. Consequently, I dismiss this petition with costs to the Respondents and direct that Criminal case Number **44** of **2016, Republic vs Jesca Kiplagat** proceeds for hearing and determination.

Orders accordingly

Dated at Nairobi this **15th** day of **February** 2017

John M. Mativo

Judge

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[1] {1998} C.O.D. 373, DC

[2] Act No. 2 of 2013

[3] **No 11 A of 2011**

[4] **{2012} eKLR**

[5] *Hui Chi-Ming v R [1992] 1 A.C. 34, PC*

[6]*DPP v Meakin [2006] EWHC 1067.*

[7] See Attorney General's Reference (No 1 of 1990) [1992] Q.B. 630, CA; Attorney General's Reference (No 2 of 2001) [2004] 2 A.C. 72, HL.

[8] *See Bennett v Horseferry Road Magistrates' Court and Another [1993] 3 All E.R. 138, 151, HL; see*

also R v Methyr Tydfil Magistrates' Court and Day ex parte DPP [1989] Crim. L. R. 148.

[9] *R v Birmingham and Others [1992] Crim. L.R. 117*

[10] Republic vs Attorney General ex-parte Arap Ngeny HCC APP NO. 406 of 2001

[11] Supra

[12] Shabalala & 5 others vs A.G of Transvaal & Another CCT/23/94

[14] L.R. 74 Ind App 65

[15]The Supreme Court of India in *Rattiram v. State of M.P.*[15], a three-Judge Bench

[16] International Covenant on Civil and Political Rights, UN General Assembly resolution 2200A (XXI), December 16, 1966, entered into force March 23, 1976 [hereinafter ICCPR].

[17] Natasha Singh v. CBI{2013} 5 SCC 741

[18] {2010} UKPC 23

[19] See John Kimanu vs Town Clerk, Kangema NBI Pet. No. 1030 OF 2007

[20] {1994|} ICR 918, 954

[21] {1955} 1 WLR 948 at 955

[22]{2007} 4 SLR (R} 855 at 59

[23] {1947} 2ALL ER 372