

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 24 A OF 2016

IN THE MATTER OF ARTICLES 2, 3 (1), 6 (2), 10, 19, 20, 21, 22, 23(1) & (3), 27 (4), 27 (5), 47 (1), 49(2), & 50(1), (2), (A), 50 (2) (J), 50 (4), 73 (1), (2), (B), 157 (4), (11), 159 (2) (C), 159 (2) (E) AND 258 (1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF RULES 10, 11, 22, 23, AND 24 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE PROCEDURE RULES, 2013

AND

IN THE MATTER OF SECTIONS 347 OF THE PENAL CODE, CP 63, LAWS OF KENYA

AND

IN THE MATTER OF SECTIONS 123 OF THE CRIMINAL PROCEDURE CODE, CAP 75, LAWS OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2, 3, 3 (1), 6 (2), 10, 19, 20, 21, 22, 23, (1) & (3), 27 (4), 27 (4), 27 (5), 47 (1), 49 (2), 50 (1), 50, (2) (A), 50 (2) (J), 50 (4), 73 (1), 73 (2) (B), 157 (4), 157 (11), 159 (2) (C), 159 (2) (E) AND 258 (1) OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

JEREMIAH MEEME KINYUA.....1ST PETITIONER

DAVID MUTHAMA MULULU.....2ND PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS & 3 OTHERS.....RESPONDENTS

CPL KAIMENYI.....INTERESTED PARTY

JUDGEMENT

By a petition dated 26th January 2016, the Petitioners herein sued the Respondents seeking a declaration that the Respondents decision to charge them with the offence of making a false document allegedly without investigations in CMCRC CASE No. 1008 of 2016-Milimani was *mala fides*, irrational, unreasonable, illegal, an abuse of discretion by the first Respondent under Article 157 (6) of the

constitution and a breach of the petitioners constitutional rights, hence null and void. The petitioners also seek an order seeking to quash the said decision and also an order of prohibition stopping the said prosecution.

The petitioners aver that their arrest was without investigation in total abuse of Article 157 (6) of the constitution and the prosecution for the offence of allegedly making false documents was malicious, hence a violation of their rights.

It is the petitioners case that they were summoned to the CID for interrogation, a problem that commenced after the first petitioner questioned the reason for his arrest and detention at the police station, that on 14th January 2016, the first petitioner was arraigned before a magistrates court and the interested party sought orders to detain the first petitioner for 4 days to facilitate investigations which order was granted and the petitioners were formally charged in court on 18.1.2016. The petitioners alleged that the interested party demanded Ksh. 160,000/= so as to be released on cash bail of Ksh. 100,000/= and the officer retain as his "fees" Ksh. 60,000/= and upon receipt of the said cash the interested party only issued a receipt of Ksh. 100,000/=, that the petitioners were listed as state witnesses in criminal case number 48 of 2016 where other persons were charged by the interested party herein.

It is also alleged that the interested party demanded Ksh. 1,000,000/= from the petitioners so that he could be exonerate them from the offence. It is also alleged that the interested party took from the first petitioner cash bail of Ksh. 100,000/= and claimed that out of the said sum of Ksh. 1,000,000/= their balance was Ksh. 900,000/= and gave them a deadline of 22.1.2016 to pay the said sum in default they would face the charges. It is also alleged that the interested party without involving the first petitioner demanded Ksh. 500,000/= from the second petitioner. That after failing to pay the said sum of Ksh. 900,000/=, the interested party preferred the charges in question and that the interested party's conduct was unprofessional and violated the petitioners rights.

In a further supporting affidavit filed on 27th January 2016, the first petitioner avers stated more details which in his view led to the prosecution in question and annexed documents in support of his averments and insisted that the prosecution was prompted by malice.

Conservatory orders were issued by this court on 27th January 2017 stopping the said prosecution pending the determination of this petition. An amended petition was filed on 15th February 2016 but the substance of the claim remained the same save for changing the criminal case number and some dates.

On behalf of the first Respondent is the Replying affidavit filed on 19th February 2016 in which it is averred *inter alia* that they received a complaint from a one Francis Mungai Muturi in which he alleged that he paid Ksh. 5.25 million to a one Zachariah N. Karembu through J. K. Meeme of Kago Muthama & Co advocates for the purchase of Donyo Sabuk/Komarock Block 1/52092, but upon going to transfer the land he discovered what he described as massive forgery which included forged title deed, land registrars signature, land registry stamp, and seal.

It is averred that investigations revealed that the "fictitious vendor" by the name of Antony Njuge Muiruri implicated the petitioners in his statement, that the sale agreement and the transfer documents were drawn by the above firm of advocates, and the first petitioner was an associate in the said firm, that Ksh. 1.25 million was paid by cash and later 4 million shillings paid through the said firm of advocates payment of which was acknowledged, that the deal was fraudulent in that fraudulent documents were used and that the first petitioner played a notable role in the transaction. It is also averred that there is nothing to show the first Respondents acted in excess of their powers.

The interested party also swore an affidavit in which he averred that the petitioners affidavit is full of falsehoods. The second petitioner filed a supporting affidavit on 8th March 2016 and sought to contradict issues raised in the first Respondents affidavit and also referred to a recorded conversation contained in a CD filed in court. There is no certificate to certify the authenticity of the recorded conversation and I find myself unable to attach any evidential weight to it.

In their submissions, the petitioners urged the court to grant the prayers sought citing inherent powers of the court to stop a prosecution that amounts to abuse of court processes while the first Respondents counsel submitted that the petitioners did not prove that their rights were violated and cited the decision in *Anarita Karimi Njeru vs R*[1] and that the orders of certiorari and prohibition could not issue in the present case and cited the case of *Kenya National Examinations Council vs R*[2] and further submitted that the police have a duty to investigate crime[3] and further added that there was nothing to show that the prosecution was prompted by malice.[4] Counsel for the 4th and 5th Respondents adopted the submissions by counsel for the 1st, 2nd & 3rd Respondents.

The key issue for determination is whether or not the petitioners demonstrated a case to warrant this court to grant the reliefs sought in the petition. 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*,[5] Lord Bingham LCJ said:-

"The jurisdiction to stay, as has been repeatedly explained, is one to be exercised with the greatest caution ... The question of whether or not to prosecute is for the prosecutor....."

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.

The above position is also replicated under Section 6 of the Office of the Director of Public Prosecutions Act[6] in the following terms:-

6. Pursuant to Article 157 (10) of the Constitution, the Director of Public Prosecutions shall-

(a) not require the consent of any person or authority for the commencement of criminal proceedings;

(b) not be under the direction or control of any person or authority in the exercise of his powers or functions under constitution, this Act or any other written law; and

(c) be subject only to the Constitution and the law.

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.

Section 24 of the *National Police Service Act*[7] sets out functions of the Kenya Police Service as being the—

(a) Provision of assistance to the public when in need;

(b) Maintenance of law and order;

(c) Preservation of peace;

(d) Protection of life and property;

(e) Investigation of crimes;

(f) Collection of criminal intelligence;

(g) *Prevention and detection of crime;*

(h) *Apprehension of offenders;*

(i) *Enforcement of all laws and regulations with which it is charged; and*

(j) *Performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.*

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 alleged 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*^[8] where it was held:-

“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”.

However, the courts have an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power to 'stay' an indictment (or stop a prosecution in the magistrates' courts) 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.^[9] 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.^[10]

The inherent jurisdiction of the court to stop a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances.^[11] 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.^[12] These categories are not mutually exclusive and the facts of a particular case ought to determine whether to allow the orders sought or not.^[13] 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.^[14] In fact, from the petitioners affidavit, it is clear it is more of a defence that ought to be offered in the trial court and the same is thin on breach of fundamental rights which ordinarily would warrant this court to intervene. The allegations of misconduct by the investigator are not in my view grounds to warrant the court to stop the proceedings. Serious as they are, there is nothing to show

they were reported to any relevant authorities. No explanation was offered why no formal complaint was made to the relevant authorities.

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^[15] 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:-^[16]

"..... 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...."^[17]

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*^[18] 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.^[19]

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).^[20] 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.^[21] 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.

The petitioners seek judicial review orders of certiorari and prohibition in this petition. Judicial review is about the decision making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach' Judicial review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

Judicial review is a means to hold those who exercise public power accountable for the manner of its exercise, especially when decisions lie outside the effective control of the political process. The primary role of the Courts is to uphold the fundamental and enduring values that constitute the rule of law. As

with any other form of governmental authority, discretionary exercise of public power is subject to the Courts supervision in order to ensure the paramountcy of the law. Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere.[\[22\]](#)

In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted ...illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires* or contrary to the provisions of a law or its principles are instances of illegality. **Irrationality** is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such decision is usually a defiance of logic and acceptable moral standards. **Procedural impropriety** is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of natural justice. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument.[\[23\]](#)

Judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in **illegality, irrationality, impropriety** of procedure and become the most powerful enforcement of constitutionalism, one of the greatest promoters of rule of law and perhaps one of the greatest and most powerful tools against abuse of power and arbitrariness. [\[24\]](#)

Certiorari is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

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 his rights to a fair trial have been or will be infringed if the prosecution in Criminal case number 108 of 2016 proceeds nor has it been shown that the said trial is an abuse of court process or it will inherently violate his rights to a fair trial as enshrined in the constitution.

I find that this petition has no merits. Consequently, I dismiss this petition with costs to the Respondents and direct that Chief Magistrates Criminal case Number **108** of **2016** proceeds for hearing and determination.

Orders accordingly

Dated at Nairobi this 8th day of February 2017

John M. Mativo

Judge

[\[1\]](#){1976-1980} KLR1272

[\[2\]](#) CA No 266 of 1996

[\[3\]](#) Citing decision {2014}eKLR

[\[4\]](#) Cited R vs A.G. & 4 Others {2014}eKLR

[5] {1998} C.O.D. 373, DC

[6] Act No. 2 of 2013

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

[8] **{2012} eKLR**

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

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

[11] 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.

[12] 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.

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

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

[15] Supra

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

[18] L.R. 74 Ind App 65

[19] The Supreme Court of India in *Rattiram v. State of M.P.* [19], a three-Judge Bench

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

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

[22] Republic v Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji

[23] *Pastoli vs Kabale District Local Government Council and Others* {2008} 2EA 300

[24] See *Ondunga J* in J R 112 of 2011 cited above in note 3