REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 40 OF 2014

IN THE MATTER OF CHIEF MAGISTRATES COURT AT MAKADARA CRIMINAL CASE NO. 4896 OF 2014

AND

IN THE MATTER OF MISCARRIAGE OF JUSTICE, ABUSE OF DPP'S PROSECUTION POWER & POLICE

POWERS BY ARBITRARY CHARGING AND DETAINING THE FIRST ACCUSED PERSON (PETER NJUGUNA)

AND

IN THE MATTER OF BREACH OF FUNDAMENTAL RIGHTS AND FREEDOMS AS ENSHRINED UNDER ARTICLES

25 (C), 27 (1), 28, 29 (A), 39 (1), 50 (1) & 50 (2), (C), (E) OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

PETER NJUGUNA MBUTHIA.....PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

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

INSPECTOR GENERAL OF NATIONAL POLICE SERVICE....3RD RESPONDENT

S.N. KORIR.....4TH RESPONDENT

JUDGEMENT

Peter Njuguna Mbuthia (hereinafter referred to as the petitioner) seeks three substantive reliefs, namely, a declaration that his fundamental rights and freedoms guaranteed under Articles 25 (c), 27 (1), 28, 29 (a), 39 (1), 50 (1) & 50 (2) (c)-(e) of the constitution have been violated, that the court quashes the proceedings in criminal case number 4896 of 2014 and damages for alleged violation of fundamental rights.

The petitioner was charged jointly with another person with the offence of stealing contrary to section

268 as read with section 275 of the Penal Code[1] in criminal case number 4896 of 2014, Makadara. On 14th February 2016, the petitioner filed a further affidavit stating that the said criminal case was withdrawn on 12th February 2016 under section 87 (a) of the Criminal Procedure Code[2] and on 5th April 2016 the petitioner filed a further affidavit in which he swore that he be awarded damages to the tune of Ksh. 4,000,000/= for what he referred to as *"miscarriage of justice."*

On behalf of the second Respondent is a Replying affidavit filed on 28th July 2016 sworn by CPL Joel Korir who averred *inter alia* that a complaint was made at the Evergreen Police Post on 5th October 2014 by a one Eunice Kabura Njoki who claimed that she stored her goods at a store manned by the second accused in the above criminal trial, that her goods went missing and upon inquiring from the petitioner who was also an attendant at the store, the petitioner informed her that her goods had been moved to another store together with her wheelbarrow, but upon proceeding to the other store they found that the goods were also missing, that the petitioner informed her that his co-accused in the criminal trial had travelled but would show him his goods upon return, and subsequently upon inquiry the petitioner was found to be the owner of the store and responsible for the items in the store and investigations revealed that the petitioner and his co-accused were culpable, hence both were charged in court and that the alleged detention was lawful and that the adjournments complained of were within the discretion of the court and that the prosecution was lawful.

On record also is a reply to the replying affidavit filed by the petitioner in which he states that he was supplied with the witnesses statement, an admission that as the law demands he was supplied with the prosecution evidence in conformity with article 50 (2) (j) of the constitution. He alleges he was not supplied with what he refers to as the *"investigation diary."* Article 50 (2) (j) talks of evidence the prosecution intends to rely on. He was supplied with the witness statement. It has not been stated that the alleged *"investigation diary"* was part of the evidence which was to be relied upon or was relied upon by the prosecution. The evidence tendered in court did not mention the alleged *"investigation diary"* hence one wonders what prejudice if any the petitioner suffered.

The Hon. A.G. filed grounds of objection on 10th August 2016 in which it is stated that under Article 157 (10) of the constitution the DPP is required to act independently, that the police have a duty to investigate complaints and that the Inspector General of Police is required to act independently and that the alleged detention was lawful, that section 205 of the Criminal Procedure Code[3] permits adjournments and further that the petition is incompetent, misconceived and misplaced.

Regarding the prosecution complained of, 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.

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.[4]

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. There was a complaint made to the police and the police had a duty to investigate it.

Section **24** of the *National Police Service Act**[5]*** 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***[6] 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. I find absolutely nothing in this case to suggest the police acted unreasonably or maliciously.**

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.[7] 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.[8]

The inherent jurisdiction of the court to stop a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances.[9] 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 *Environment Agency v Stanford*,[10] Lord Bingham LCJ said:-

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

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.[11] These categories are not mutually exclusive and the facts of a particular case ought to determine whether to allow the orders sought or not.[12]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.[13] 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[14] cited above.

It is also important to note that the charges were withdrawn under section 87 (a) of the Criminal Procedure Code.[15] The said section is not a bar to subsequent proceedings. The petitioner does not seem to realize that the said charges are still hanging over his head. He was not cleared of the charges. Had the petitioner been tried and acquitted of the charges, then he could possibly have sustained a case for malicious prosecution, but such claim is not available under the present circumstances.

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. There is nothing to show that the trial in question was fundamentally flawed or was tried in a manner different from what the law prescribes.

The petitioner complains of unnecessary adjournments in the criminal trial. The record shows that the first application for adjournment was made on 30th January 2015 but the same was not opposed. The second application for adjournment was made on 8th May 2015. Clearly, the petitioner and his co-accused are recorded as saying they had no objection. The first objection for adjournment was made only by the petitioner on 13th October 2015 and the court granted a last adjournment to the prosecution. On the next hearing date on 12th February 2016, the case was withdrawn under section 87 (a) of the Criminal Procedure Code.[19] The adjournments granted are provided under the law and I find that it was within the magistrates discretion to grant or refuse the adjournments. Further, if the petitioner was dissatisfied with any orders of the magistrate, the remedy available in law is to appeal not to file a constitutional petition.

In all honesty, I find nothing in the material before me to show that the petitioners right to a fair trial was hampered or threatened in the criminal trial in question nor is there any 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 were infringed nor has it been shown that the said trial is an abuse of court process or it inherently violated his rights to a fair trial as enshrined in the constitution

The petitioner also pray for damages for alleged violation of fundamental. In all fairness, considering that no violation of constitutional rights has been proved, such a relief is totally misplaced and unavailable under the circumstances. I am afraid, the material before the court does not demonstrate any violation of his 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 damages sought. 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 my view the petitioner have failed to discharge the burden of prove to the required standard. All cases are decided on the legal burden of proof being discharged (or not). **Lord Brandon** in *Rhesa Shipping Co SA vs Edmunds*[20] 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*[21] **:-**

"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*,[22]**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.

Orders accordingly

Dated at Nairobi this ___**21st**__day of__**February**___2017

John M. Mativo

Judge

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[1] Cap 63, Laws of Kenya

[2] Cap 75, Laws of Kenya

[3] Ibid

[4] Act No. 2 of 2013

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

[6] **{2012} eKLR**

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

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

[9] 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.

[10] {1998} C.O.D. 373, DC

[11] *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.*

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

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

[14] Supra

[15] Supra

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

[18] L.R. 74 Ind App 65

[19] Supra

[20]{1955} 1 WLR 948 at 955

[21]{2007} 4 SLR (R} 855 at 59

[22] {1947} 2ALL ER 372