

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 468 OF 2015

**IN THE MATTER OF ARTICLES 19, 20, 21, 23, 25, 27, 28, 29, 47, 49 & 50 OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 19, 25, 27, 28, 29 & 47 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF CRIMINAL PROSECUTION OF PHILIP ULUMA

PHILIP ULUMA.....PETITIONER

Versus

THE HONOURBLE ATTORNEY GENERAL & 3 OTHERS.....1ST RESPONDENT

JUDGEMENT

By a petition dated 28th October 2015, the Petitioner herein seeks an order quashing charges preferred against him in criminal case number 159 of 2015 and an order restraining the Director of Criminal Investigation Department from raiding, intimidating, harassing and or threatening his personal liberty and or prosecuting the petitioner on allegedly unfounded charges relating to the liquidation process of Ngundu Farmers Sacco Society.

The petitioner states that in 2008, he was appointed as the liquidator of Ng'undu Farmers Sacco and that it was his duty working with other persons appointed by the Ministry of Co-operatives to identify the Sacco's members for purposes of processing their titles in respect of the Sacco's land, and that in furtherance of the aforesaid duties he made an advertisement notifying members to report to his offices armed with supporting documents to facilitate processing of their titles, a process that was undertaken after verifying each members details.

The petitioner further avers that in the year 2012, the CID summoned him to respond to allegations raised by a one Francis W. Theuri who claimed that the petitioner had irregularly allocated his plot to another person. The investigations revealed that the plot in question belonged to a one John Ngenga Kibe and not the complainant, a position that was supported by the register. Further, the alleged complainant did not responded to the notice made by the liquidator. The police file was closed after they were informed that the allegations were baseless, but on 3rd September 2015 the petitioner was once again summoned b the CID and was told that he would be charged on the same allegations made by the same complainant.

It is the petitioners case that the police did not conduct any fresh investigations, that his arrest, arraignment and prosecution in court on the alleged charges is inhuman and degrading and contravenes Article 28 of the constitution and that unless the reliefs sought are granted his rights shall be infringed.

On record is a replying affidavit filed on 3rd December 2015 sworn by the investigating officer in the criminal case in question relating to a complaint relating to illegal transfer of a property, and upon investigations, he formed the opinion that the petitioner herein may be culpable. He annexed documents pertaining to the transaction in question and questioned the involvement of the petitioners counsel in these proceedings yet, he prepared some documents relating to the transaction in question and that the court ought to exercise extreme caution to avoid interfering with the legal mandate of the Police. He also averred that there is no evidence that the police acted outside their powers.

In their grounds of opposition, the 2nd, 3rd & 4th Respondents argued that the petition is misconceived, an abuse of the court process and incompetent, that it seeks to curtail statutory mandate of the 2nd, 3rd & 4th Respondents contrary to the law, that no evidence of double jeopardy has been provided, and that it is in public interest that perpetrators of crime be prosecuted.

On his part, the 1st Respondent's grounds of opposition are that the petitioner has not demonstrated how his rights were violated, that criminal case number 1519 be allowed to proceed and if aggrieved by the outcome, the petitioner can exercise his rights of appeal, and that no constitutional issues have been raised in this case for the court to determine.

In his submissions, counsel for the petitioner argued that the liquidator acted within the law and cited several decisions in support of his position. He further submitted that the criminal proceedings are oppressive and relied on several decisions among them *Stanley Githunguri vs R*,^[1] *Metropolitan Bank Limited v Pooley*,^[2] and *Mills vs Cooper*.^[3]

The first Respondent submitted that constitutional rights must be pleaded with reasonable degree of precision,^[4] and that the power to prosecute is vested on the DPP^[5] and cited the case of *Peter Njage vs O.C.S Kasarani & Others*,^[6] *Francis Anyango Juma vs The DPP & Another*,^[7] and *Florence Dorothy Seyanoi & Another vs DPP & 3 Others*.^[8]

In their submission, counsel for the 2nd, 3rd & 4th Respondents' cited the powers of the DPP under Article 157 of the constitution and reiterated that granting the reliefs sought herein would amount to ordering the DPP not to discharge his functions and cited several decisions on the issue.^[9]

The key issue for determination is whether or not the petitioner has 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*,^[10] 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. Most of the points relied on in support of an argument of abuse are more profitably relied on as mitigation."

Counsel for the Respondents correctly submitted that 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^[11] 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*[\[12\]](#) 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*[\[13\]](#) 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 unsupportable case.[14] 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.[15]

The inherent jurisdiction of the court to stop a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances.[16] 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.[17] These categories are not mutually exclusive and the facts of a particular case ought to determine whether to allow the orders sought or not.[18] 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.[19] 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[20] cited above.

The Constitution contains, in material respects, a and fundamental commitment to human rights. Interpreting similar provisions in the constitution of South Africa, the South African Constitutional court (Nicholas AJA), stated that:-[21]

"..... 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..."[22]

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*[23] 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 decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused.[24]

The cardinal principle in criminal justice is that an accused person is presumed innocent until proven guilty. In this regard, it is apt to reproduce a passage from a decision by the Supreme Court of India in the case of *Natasha Singh v. CBI*[25] where it was held as follows:-

"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." (Emphasis added)

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 case in question. 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 1519 of 2015 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 Criminal Trial Number **1519** of **2015** proceeds for hearing and determination if it is still pending before the trial court.

Orders accordingly.

Dated at Nairobi this 8th day of February 2017

John M. Mativo

Judge

[1] Cr App No 271 of 1985

[2] {1885} 10 App Cases, 210 at 220, 221

[3] {1967} 2All ER 100 at P 104

[4] {1976-1980} KLR 1272, Meme vs Republic {2004} eKLR, & R. vs Truth Justice & Reconciliation Commission & Ano. {2011} eKLR

[5] Article 157 of the Constitution

[6] Cr Pet No 169 of 2012

[7] Pet No 1160 of 2012

[8] Pet No. 341 of 2012

[9] These are vs KHRC, Misc 86 of 2009., R vs JSC {2004} 1KLR, Yabesh Amoro vs DPP & 2 Others, JR No. 250 f 20-11 and Paul Nganga vs DPP, Con. Ref No 483 of 2012

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

[11] Act No. 2 of 2013

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

[13] **{2012} eKLR**

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

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

[16] 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.

[17] 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.

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

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

[20] Supra

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

[23] L.R. 74 Ind App 65

[24] The Supreme Court of India in *Rattiram v. State of M.P.*[24], a three-Judge Bench

[25]{2013} 5 SCC 741