



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CONSTITUTIONAL, JUDICIAL REVIEW DIVISION
PETITION NO. 2 OF 2017

IN THE MATTER OF: ARTICLE 22 OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS AND OR
FUNDAMENTAL FREEDOMS UNDER ARTICLES 28, 29, 43, 49 AND 50 OF THE
CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: THE VIOLATION SECTION 24(C) AND 35(G) OF THE NATIONAL
POLICE SERVICE ACT**

BETWEEN

MOHAMED ALI SWALEH.....PETITIONER

VERSUS

1. THE DIRECTOR OF PUBLIC PROSECUTION

2. THE HON. ATTORNEY-GENERAL.....RESPONDENTS

EX PARTE APPLICANT: TITUS MUSAU NDOME

RULING

The Application

1. The Notice of Motion application before the court is dated 9th January, 2017 filed by the Petitioner herein under Articles 28, 29, 43, 49 and 50 of the Constitution. The motion prays for the following orders:

(1) That this honourable court do certify this application as urgent and service thereof be dispensed with in the first instance.

(2) That this honourable court do grant a conservatory order prohibiting, preventing and or stopping the 1st and or 2nd Respondents from proceeding to charge the petitioner with the intended charges of breaking and stealing and or any other related charges.

(3) In the alternative, if the intended charges or any other related charges are already preferred against the petitioner in court the same to be set aside and the petitioner be set at liberty.

(4) Costs of this application to be borne by the Respondents.

2. The motion is premised on the grounds that the Petitioner's right to human dignity and the right to have his dignity respected and protected as guaranteed by Article 28 of the Constitution, 2010 is likely to be contravened as the charges, if preferred against him, shall depict him as uncouth, dishonest and a criminal in the eyes of the public and shall cause prospective clients to shun him and make him unable to carry out any business profitably; that the aforesaid shall intern affect the Petitioner's right to social security and to be free from hunger and to have adequate food of acceptable quality as required by Article 43(i) (c) and (e) of the Constitution of Kenya, 2010; that the Petitioner is likely to lose his freedom and security as he may be remanded in custody if he is unable to meet the strict conditions of bail, and will be subjected to psychological torture and be treated in a cruel, inhuman or degrading manner contrary to the dictates of Article 29 of the Constitution of Kenya, 2010; and finally that it is just and fair in the circumstances to grant the prayers herein.

3. The motion is supported by affidavit of **Yusuf M. Aboubaker** sworn on 10th January, 2017. Mr. Aboubaker is the counsel to the Petitioner. The motion is also supported by the affidavit of the Petitioner in support of the Petition sworn on 10th January, 2017.

4. The Petitioner's case is that he had a business agreement with Gates and Barriers Security Services Limited to join the company as a chief Executive Officer upon terms which were not fulfilled, causing the Petitioner to leave that company and to join another security company called Alina Security Services Limited. Because of this the former company was not pleased and allegedly connived with some of its employers to stage a theft in the premises of one of the companies the Petitioner had as a client. The intention was allegedly to paint the Petitioner as a thief and to cause the Petitioner to be arrested and charged on trump up charges. This was allegedly fulfilled when the police started to investigate the Petitioner with a view to charging him for the alleged stealing. The Petitioner's case is that the scheme by the police is solely meant to deny the Petitioner his right to human dignity and the right to have his dignity respected and protected as guaranteed by Article 28 of the Constitution. The intention is to depict the Petitioner as uncouth, dishonest and a criminal in the eyes of the public and to cause prospective clients to shun him and to make him unable to carry out any business profitably. The Petitioner's case is that if the intended charges are effected his right to social security and freedom from hunger guaranteed under Article 43(i)(c) and (e) of the Constitution will be hindered. Further, the Petitioner's case is that he is likely to lose his freedom and security as he may be remanded in custody if he is unable to meet the strict conditions of bail. He shall also be subjected to psychological torture and be treated in a cruel, inhuman or degrading manner contrary to the dictates of Article 29 of the Constitution. It is the Applicant's case that unless the orders sought are granted he stands to suffer irreparable loss and damage, and that it is just and fair in the circumstances to grant the prayers sought in the motion.

The Response

5. The 1st Respondent has not filed any replying affidavit or grounds of opposition to the motion but has only opposed the same by way of submissions. The 2nd Respondent on their part filed grounds of opposition on 25th January, 2017, in which they state that:

(1) The application is incompetent, frivolous, vexatious and an abuse of the court process and ought to be struck out.

(2) The application is based on mere apprehension.

(3) The police summoned the Applicant to record a statement in ongoing investigations pursuant to powers vested in them under Section 52 of the National Police Service Act.

(4) Charges are only brought against persons after investigations conducted reveal material evidence on which the prosecution can say with certainty that they have a probable case.

(5) Director of Public Prosecutions is conferred with state powers of prosecution under Article 157 of the Constitution and to issue the orders sought would amount to ordering the Director of Public Prosecution not to discharge his constitutional mandate.

(6) The application seeks final orders at an interlocutory stage.

6. When the petition and the application first came to court ex parte on 10th January, 2017 the court granted temporary conservatory orders prohibiting, stopping and preventing the 1st and 2nd Defendants acting jointly or severally from preferring any charges as intended or at all against the Petitioner pending the inter-parte hearing of the Notice of Motion on 25th January, 2017. Those orders have been extended pending this Ruling.

Submissions

7. Parties filed submissions which were highlighted in court. **Mr. Aboubakar** counsel for the Petitioner/Applicant submitted that the Petitioner seeks a declaration that the intended charges of breaking and stealing are based on malice, vendetta and fabricated allegations and therefore a contravention of the Petitioner's fundamental rights and freedoms under Article 28, 29, 43, 49 and 50 of the Constitution of Kenya, 2010. Counsel submitted that once such a declaration is made by this Court then consequently an order of prohibition, prohibiting the Respondents from charging him with the said charges ought to be granted. Counsel submitted that the facts of this Petition are not challenged as no Response to Petition or Affidavit in Reply was filed by the Respondents to challenge the facts. Mr. Aboubakar submitted that the Respondents only filed Grounds of Opposition which were deemed to be a response to the Petition but the same only raised points of law and did not in any way challenge the facts of the Petition as supported by the affidavit of the Petitioner. In essence, counsel submitted, the facts are that due to a dispute between the Petitioner and one Famau A. Famau arising out of a business relationship and based on unreasonable complaint by the said Famau, the police intend to charge the Petitioner with house breaking and stealing in order to tarnish the Petitioner's name and paint him as dishonest and a criminal to prospective clients. With the aforesaid uncontroverted facts the Petitioner believes that the said charges, if preferred against him, shall amount to a violation of his rights and an abuse of the court process and this court has the jurisdiction and power to prevent the said abuse. Counsel cited Petition Number 230 of 2015 **Engineer Michael Sistu Mwaura Kamau & 12 others vs. EACC & 4 others** where the High Court, while quoting from **Kuria & 3 others vs. Attorney-General** held that –

“It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and or misused, all in the name that the court simply has no say in the matter... The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law... In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that that pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court.”

8. **M/S Mwaura** counsel for the 1st Respondent submitted that the application lacks merit and should be dismissed. Counsel submitted that the Director of Public Prosecution is conferred with state powers of prosecution under Article 157 of the Constitution, and issuing any orders which limits the exercise of such powers would be tantamount to taking away the constitutional mandate of the Director of Public

Prosecutions contrary to provisions of Article 157(10) of the Constitution which states that the Director of Public Prosecutions shall not require the consent of any person or authority for commencement of any criminal proceedings.

9. Counsel further submitted that the police are vested with powers under Section 52 of the National Police Service Act to summon the Applicant to record statements. The orders sought herein if granted are likely to interfere with the legal mandate of the police under Section 52 of the said Act. These orders if granted would also impinge Article 157(4) of the Constitution which gives the Director of Public Prosecutions the power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct. Ms. Mwaura further submitted that the application is based on mere apprehension, and that if indeed the Petitioner is innocent then he ought to face the charges, table his defence and clear his name in court, should he be charged.

10. **Mr. Makuto** counsel for the 2nd Respondent on his part submitted that this application is premature, as the Petitioner has not been charged in court since the investigations are still ongoing. It is only after the same are concluded that a decision will be taken whether or not to charge the Petitioner. Counsel referred the court to **Section 52(1) of the National Police Service Act** which empowers the police to summon any person to assist in investigations. Mr. Makuto submitted that the Director Public Prosecution is an independent institution and cannot be subject to any other authority in exercising its mandate. Counsel submitted that the Petition herein is premature and is founded on misunderstanding of law and facts, and should be dismissed to enable the police conclude their investigations.

The Determination

11. I have carefully considered the application, the opposition to it and the submissions. In my view, the issues for determination by this court are as follows -

- (i) Whether this court can stop the Director Public Prosecutions from carrying out investigations.
- (ii) Whether the motion or Petition is premature.
- (iii) Whether the Petitioner has been charged in court.

I will address all the above issues together.

12. The basis for the misapprehension on the part of the Petitioner is the summons to appear before the investigating officer, issued to the Petitioner by the police, under Section 53(1) of the National Police Service Act. Section 52(1) of the National Police Service Act grants a police officer power to summon any person believed to have information which may assist in investigation to appear before the police in a police station. The said Section provides that –

“(1) A police officer may, in writing, require any person whom the police officer has reason to believe has information which may assist in the investigation or an alleged offence to attend before him at a police station or police office in the county in which that person resides or for the time being is.”

13. The summons issued under Section 52 of the National Police Service Act are among the tools used by the police in conducting investigations. They do not indicate intention to charge and/or prosecute the person summoned. The summons indicate that the Petitioner was to report to the police station on 11th January, 2017. However, before the said date the Petitioner moved this court to block his “prosecution”. Clearly as at 10th January, 2017, when the Petition herein was filed, investigations were still on going and no decision had been made to charge the Petitioner.

14. It is the opinion of this court that the decision whether or not to institute criminal proceedings is made based on the evidence collected. Once the investigations establish reasonable suspicion that a person committed a crime he ought to be charged in a court of law. The rest is left to the courts of law.

This position was set out in the case of **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** where it was held that:-

“...the police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court...”

The court went on to state that:-

“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.”

15. Further, the National Prosecution Policy ensures that right considerations are taken into account before reaching the decision to prosecute. The policy gives guidelines that ensure that before the decision to prosecute is made the totality of evidence both for and against the suspect has been scrutinized to establish if there is a realistic chance of conviction. Paragraph 3 at page 6 of the National Prosecution Policy states as follows:-

“In exercising the prosecution mandate the DPP is constitutionally bound to have due regard to public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. This provision applies equally to the DPP and officers acting on his or her behalf. This requirement is generally accepted as an international best practice whose origins are in common law.”

In the current case the decision whether or not to charge the Petitioner has not been reached as investigations are still on going. It is the finding of this court that the Petitioner has not demonstrated that the 1st and 2nd Respondents lacked jurisdiction, acted in excess of jurisdiction or departed from the rules of natural justice in conducting investigations. The Director of Public Prosecutions who exercises power donated by Article 157 of the Constitution has the constitutional mandate to:-

(a) Institute and undertake criminal proceedings against any person before any court (other than a Court Martial) in respect of any offences alleged to have been committed;

(b) Take over and continue any criminal proceedings against any person before any court that have been instituted or undertaken by another person or authority, with the permission of the person or authority;

(c) With permission of the court, discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecution under paragraph b of Article 157(6) of the Constitution.

16. In the case of **Bitange Ndemo vs. Director of Public Prosecutions & 4 others [2016] eKLR** the court stated that:

“It is now established law that a court ought not to usurp the constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecutions in the exercise of the discretion conferred upon that office.”

This position has foundation in Article 157(10) of the Constitution which provides that:-

“(10) The Director of Public Prosecutions is also empowered to work without being under the direction of or control of any person or authority and to apply all principles and values of the Constitution and to be subject only to the Constitution.”

17. However, the Constitution is keen to provide guidelines in Article 157(11) which provides that:-

“(11) And in the exercise of the powers conferred by the Constitution, the Director of Public

Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”

18. I have carefully considered the authorities which were cited by Mr. Aboubakar. They are excellent authorities. However, all those authorities were concerned with circumstances where there were already preferred charges, and which address situations where already there is an ongoing prosecution which is alleged to be an abuse of the process of court, or which is based on faulty legal foundation. To the contrary, in this matter the Petitioner has come to court to stop investigations and possible charges being preferred against him. This scenario has not been adequately addressed by the said authorities.

19. Having knowledge that this Petition was filed before investigations were concluded and so far the conduct of the investigation has not been faulted, the Office of the Director of Public Prosecution cannot be said to have intentions to prosecute and/or charge the Petitioner as the decision whether or not to charge has not been made. Similarly, a declaration cannot be made to the effect that the intended charges and/or charges against the Petitioner are based on malice, vendetta and fabricated evidence as there are no intended charges and or charges. Further, whether an intension to charge will ever materialize is dependent on the outcome of investigations that are yet to be concluded.

20. From the foregoing it is the finding of this court that the motion herein must fail. However, the court has noted that the basis of the allegations against the Petitioner herein appear to originate from a business disagreement between the Petitioner and his former business associates. The police must therefore ensure that any investigations must be carried out without any bias or intimidation, and above all without the influence of any of the protagonists, and is seen to be free or fair to ensure the attainment of the rights and fundamental freedoms under Article 28 guaranteed in the Constitution.

21. The application is dismissed with costs to the Respondents.

Dated, Signed and Delivered in Mombasa this 9th day of March,

2017.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Mogaka holding brief Mr. Aboubakar for Petitioner

M/S Mwaura for DPP

Mr. Makuto for Hon. AG

Mr. Kaunda Court Assistant