



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 400 OF 2016

IN THE MATTER OF ARTICLES 2, 20, 21, 22 (1), (3) (4), 23 (1), (3) (A), (B), (E) & (F), 25 (C), 28, 29, 47, 49 (1) (A), (I), (F), (I), 73, 165 (2), (B) & 244 (C), 258 (1), 259 (1) OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 28, 29, 47, 49 910 9A) 7 (F0 AND 244 (C) OF THE CONSTITUTION AND VIOLATION OF THE CONSTITUTIONAL DUTIES OF THE RESPONDENTS

IN THE MATTER OF ARREST AND CONTINUED DETENTION OF ABDIWAHAB IBRAHIM ALI AND HASSAN IBRAHIM ALI

BETWEEN

ABDIWAHAB IBRAHIM ALI.....1ST PETITIONER

HASSAN IBRAHIM ALI.....2ND PETITIONER

AND

THE INSPECTOR GENERAL OF THE NATIONAL

POLICE SERVICE.....1ST RESPONDENT

THE COMMISSIONER OF POLICE

MANDERA COUNTY.....2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

JUDGEMENT

The petitioners case

The petitioners case is that on 11th April 2016 they were charged in Mandera Criminal case number 89 of 2016 with the offence of stealing by servant among other offences, that the said charges were subsequently withdrawn under section 87 (a) of the Criminal Procedure Code[1] but the petitioners were re-arrested and booked at Mandera East Police station for more than 24 hours without being informed of the reasons for their arrest and in violation of their constitutional rights.

Fourth Respondents Grounds of opposition

In their grounds of opposition, the fourth Respondent states *inter alia* that the petitioners have not demonstrated how the Respondents violated their constitutional Right and that the matters raised are within the jurisdiction of the trial court.

Petitioners Advocates submissions

Counsel for the petitioner cited violation of article 49 (1) & (f) of the constitution,[2] and submitted that courts are under a duty to jealously protect the right to liberty and freedom and that such rights can only be curtailed in circumstances provided under the constitution.[3] Counsel recalled two court attendances and amendments of the charge sheet, the withdrawal and re-arrest and urged the court to prohibit the trial. Counsel submitted that the petitioners constitutional rights were violated and urged the court to award damages to the tune of Ksh. 3,000,000/=.

First, Second & Fourth Respondents Advocates submissions

Counsel for the first, second and fourth Respondents submitted that the Respondents conduct as set out in the petition does not constitute violation and or contravention of the petitioners fundamental rights and freedoms,[4] and that the first Respondent acted within its statutory powers.

Determination of the issues

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. This position is also replicated under Section 6 of the Office of the Director of Public Prosecutions Act.[6]

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. In my view, the petitioners have not demonstrated that the prosecution in question constitute an abuse of process or police powers, nor has the petitioners 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*[8] 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 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] 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. Also there is nothing to explain why the trial of the criminal case has not proceeded as ordered by the court.

The petitioners complains that the charge sheet was amended twice. To me, amendment of charges is provided for under the law. Once a amendment is effected, it is a requirement that charges be read to the accused persons and they be called upon to enter a plea. It has not been shown that this was not done. It is also a requirement that the accused be supplied with copies of the charge sheet. It has not been alleged that this was not done.

Further, withdrawal under section 87 (a) of the Criminal Procedure Code[22] is not a bar to subsequent proceedings. Also, no proceedings were annexed to show that the accused were held and charged in court after an unreasonable delay, hence the allegation of being held for more than the constitutionally provided period has not been proved to the required standard.

The petitioner also pray for damages for alleged violation of fundamental rights. 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 their fundamental rights to warrant the court to award compensation. 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 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 petitioners have not demonstrated even in the slightest manner that their rights to a fair trial have been or will be infringed if the prosecution in Criminal case number 89 of 2016 proceeds nor has it been shown that the said trial is an abuse of court process or it will inherently violate their 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 Mander Chief Magistrates Criminal case Number 89 of 2016 proceeds for hearing and determination.

Orders accordingly

Signed, Delivered, Dated at Nairobi this 12th day of May 2017

JOHN M. MATIVO

JUDGE

[1] Cap 75, Laws of Kenya

[2] Counsel cited *Martin Kemunto Ochangu vs Office of the DPP & 4 Others* {2017}eKLR & *Michael Rotich vs Republic* {2016}eKLR

[3] *Neeru Yadav vs State of U.P. & Another* , Criminal Appeal No. 2587 of 2014 cited and *R vs. Danson Mgunya & Another* {2010}eKLR

[4] *Anarita Karimi Njeru vs R* {1976}KLR 1272

[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 Methyrd 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] Supra