



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
IN THE CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 17 OF 2016

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 28,29,31,40,47(1),49,50,51& 157 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ANTI CORRUPTION CASE NO 1 OF 2016 AT NAIROBI

BETWEEN

GEORGE WAINAINA NJOGU..... PETITIONER

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE ETHICS AND ANTI CORRUPTION COMMISSION.....2ND RESPONDENT

SENATOR MIKE GIDEON MBUVI SONKO.....3RD RESPONDENT

JUDGMENT

Introduction

1. The Petitioner, an employee of the Nairobi County Government was on 9 January 2016 arraigned before the Chief magistrates Court alongside one Roselyne Oluoch and jointly charged with the offence of corruptly offering a benefit contrary to s.39(3) as read together with s.48(1) of the Anti Corruption and Economic Crimes Act, 2003. The charge constituted five counts and more particularly it was stated that the Petitioner and his co-accused had offered the benefit to the 3rd Respondent on 5 January 2016 and also on 6 January 2016, as an inducement for the 3rd Respondent to stop pursuing a story on how some senior officers employed by the Nairobi County Government were acquiring and developing property using public funds.

2. In his Petition, the Petitioner has sought a variety of reliefs though mainly declaratory in nature. The Petitioner challenges the investigatory process leading to his prosecution and seeks to have his prosecution declared unconstitutional. Additionally, the petitioner seeks to have the criminal proceedings initiated by the Respondents quashed and further that the Petitioner be paid damages for the violation of his rights and freedoms.

Background facts

3. The facts leading to the Petition are contained largely in the affidavit sworn in support of the Petition and also the Petitioner's Further Affidavits. Additional background facts may be retrieved from the affidavits sworn in opposition to the Petition. I may state the facts as follows.

4. The Petitioner, who at all material times to the Petition was the chief of staff of the Nairobi County Government, was arraigned in court on 9 January 2016 and charged with the offence of attempting to bribe or influence a person through corrupt means following a complaint by the 3rd Respondent. Apparently, the 3rd Respondent was scheduled to hold a press conference and reveal to the public how the County Government's officials had been misusing public funds. In the meantime, the Petitioner, had also been in contact with the 3rd Respondent and promised to let the 3rd Respondent access a Christmas gift.

5. The Petitioner gave his co-accused the sum of Kshs 1,000,000/= half of which was to be used in the Petitioner's business and the other half to be surrendered to the 3rd Respondent. The 3rd Respondent however reported the intended exchange of funds to the 2nd Respondent. He alleged that there was attempted bribery on the part of the Petitioner and following investigations the 2nd Respondent recommended the prosecution of the Petitioner. The recommendation was made to the 1st Respondent. A team of officers from the 2nd Respondent subsequently caused the arrest of the Petitioner and also armed with search warrants conducted a search on the the Petitioner's residence.

The Petitioner's case

6. According to the Petitioner, the offences were not well founded and had no foundational basis.

7. The Petitioner contends that the 3rd Respondent who was well known to him requested for a Christmas gift and the Petitioner felt obliged to give him. He decided to donate Kshs 500,000/= through his co-accused who was to deliver the money to the 3rd Respondent's agent one Mr. Makau. The 2nd Respondent's officers however pounced. The Petitioner denies having sought or attempted to bribe the 3rd Respondent and insists that the 3rd Respondent was simply out to extort money from the Petitioner hence the trumped up charges.

8. The Petitioner contends that he is not criminally culpable and that the only reason the 1st and 2nd Respondents are pursuing his prosecution is because the 3rd Respondent has completely manipulated and influenced the process. It is the Petitioner's contention that the 1st and 2nd Respondents had abused their investigatory and prosecutorial powers under Article 157 of the Constitution by allowing themselves to be directed and dictated to by the 3rd Respondent.

9. The Petitioner also raised issue with the 2nd respondent's composition in view of the common cause fact that at the time of the investigations and recommendation to prosecute there were no commissioners or chairperson in office.

10. The Petitioner also stated that the manner and speed of his arrest and arraignment in court showed that the there were no proper investigations undertaken under the relevant statutes. The Petitioner also laments that his arrest at a requiem mass by a contingent of police officers following press releases also interfered with his rights to fair trial.

1st Respondent's Case

11. The 1st Respondent opposed the Petition.

12. It was contended on behalf of the 1st Respondent that the Petition did not disclose any evidence of violation of constitutional rights.

13. According to the 1st Respondent, he was simply exercising his statutory and constitutional mandate after having reviewed the investigations files and documents availed by the 2nd Respondent. The 1st Respondent asserted that the evidence revealed that the Petitioner was criminally culpable.

2nd Respondent's Case

14. Through a Replying Affidavit by Patrick Mbijiwe, the 2nd Respondent also contended that the Petitioner had failed to prove that he had been discriminated against or treated in an undignified manner. It was the 2nd Respondent's contention that the determination as to the innocence or otherwise of the Petitioner was for the trial court and not this court.

15. The 2nd Respondent further asserted that the 2nd Respondent had correctly exercised his discretion to investigate and recommend the Petitioner's prosecution following a complaint by the 3rd Respondent that the Petitioner had attempted to bribe the 3rd Respondent.

16. The 2nd Respondent asserted that it had acted in accordance with the Constitution and all the relevant law, whilst explaining that the large number of officers dispatched to arrest the Petitioner was as a result of information obtained that there was going to be resistance.

17. The 2nd Respondent insisted that in the face of an admission to pay Kshs 500,000/= to the 3rd Respondent as a Christmas gift there was adequate evidence of the Petitioner's culpability

3rd Respondent's Case

18. The 3rd Respondent filed a Replying Affidavit in opposition to the Petition.

19. The Replying Affidavit detailed the chronology of events. According to the 3rd Respondent, the Petitioner had offered to pay to the 3rd Respondent the amount of Kshs 1,000,000/= so that the 3rd Respondent would tread slowly and not expose alleged corrupt and fraudulent activities within the County Government of Nairobi. The 3rd Respondent denied soliciting any monies from the Petitioner and contended that it was the Petitioner who sought the 3rd Respondent out.

Arguments in court

Petitioner's submissions

20. Ms. Noreen Kidunduhu urged the Petitioner's case.

21. Counsel submitted that the petitioner's right to a fair trial was being violated and that the process of fair trial which runs from the stage of investigations through the trial itself had been trampled. Counsel stated that the criminal charges could not be sustained given that the Constitution had been violated as there was no due process and unorthodox means had been used in the course of his arrest.

22. Counsel further submitted that the 1st and 2nd Respondents had abdicated their duties under Articles 249 and 157 of the Constitution and allowed themselves to be directed and controlled by the 3rd Respondent. It was also counsel's submission that the Petitioner's arrest and prosecution was predetermined as the Petitioner was arrested within days of a press release by the 3rd Respondent without any proper investigations being undertaken yet there was a great variance of facts. According to counsel there were no independent investigations and the Petitioner's prosecution was being directed and controlled by the 3rd Respondent.

23. Ms. Kidunduhu additionally submitted that the 2nd Respondent was not properly constituted and thus

the report to the 1st Respondent was incomplete and not binding at all. Finally, counsel submitted that the criminal charges against the Petitioner had no foundational basis.

24. It was the Petitioner's submission that public interest must always be considered alongside private interest.

25. Ms. Kidunduhu insisted that the Petitioner's rights under Articles 27 (equality and freedom from discrimination), 28(human dignity), 47(fair administrative action) and 50 (fair hearing) had been infringed.

26. In support of her submissions counsel relied on the cases of **Joram Mwenda Guantai v The Chief Magistrate Nairobi [2007]eKLR** as well as **Kuria & 3 Others v Attorney general [2002]2 KLR 69** both for the proposition that the court had jurisdiction to prohibit or stop any prosecution which was an abuse of the process. Counsel also relied on the cases of **George Joshua Okungu & Another v The Chief Magistrate's Court [2014]eKLR** and **R v Attorney General ex p Kipngeno Arap NgenyGithunguri v Republic HC Civil Appl No 406 of 2001** for the proposition that a criminal case commenced in the absence of a factual foundation or an improper motive was subject to being prohibited by the court.

Respondents' submissions

First Respondent

27. The 1st Respondent's counsel Mr. Ashimoshi submitted that the Petitioner had not shown that his rights under the Constitution had been violated. Counsel was of the considered view that the 1st Respondent had simply observed the law by reviewing and analyzing the evidence availed before concluding that it was proper to prosecute the Petitioner. According to Mr. Ashimoshi, it was "outrageous" for the Petitioner to complain that his prosecution was being expedited when the Constitution dictates that prosecution and trials be hastened. Mr Ashimoshi submitted further that there was no evidence laid before the court to show that the 3rd Respondent had conducted the investigations or directed and controlled the 1st and or the 2nd Respondent in the process.

28. The 1st Respondent also submitted that there were already adequate constitutional safeguards to protect the Petitioner before the trial court which would competently deal with the sufficiency or otherwise of the evidence. Counsel urged that the trial be allowed to proceed as there was no mala fides in commencing the prosecution and no law had been breached. Counsel stated that Article 157 of the Constitution was clear that the powers of the Director of Public Prosecutions to direct the investigations of crime and to prefer criminal charges against any suspects was not to be exercised under the control or direction of any person. According to counsel there was no evidence at all that the powers to prosecute had been abused.

Second Respondent

29. Ms. Grace Maina appeared for the 2nd Respondent. According to counsel, the 3rd Respondent prompted the 2nd Respondent through a formal complaint against the Petitioner and that under Article 252 of the Constitution, the 2nd Respondent was obliged to investigate the complaint and act as appropriate. Counsel submitted that there had been no procedural impropriety in the investigations or the gathering of evidence or in the framing of charges by the 2nd Respondent. Counsel added that the evidence was overwhelming and merited the Petitioner being prosecuted and the non availability of commissioners did not stop the 2nd Respondent from performing its duties including providing evidence to the 1st Respondent.

30. Ms. Maina was also categorical that the Petitioner had failed to prove that his rights under the Constitution had been violated.

31. According to Ms Maina, there was a sound foundational basis for the criminal case as the Petitioner had actually owned up to attempting to pay the 3rd Respondent monies and the petitioner's co-accused was actually arrested whilst in the process of giving the 3rd Respondent the monies.

32. Additionally, Ms. Maina submitted that the court should only interfere with the independent judgment of the Respondents if it is shown that the exercise of their powers was contrary to the Constitution, in bad faith or amounted to an abuse of process. Counsel relied on various cases amongst them **Paul Nganga Nyaga & 2 Others v Attorney General & 3 Others [2013]eKLR** and **Neptune Credit Management Limited & Another v Chief Magistrate's Court and 2 Others [2005]eKLR**.

Discussion and Determination

33. I have considered the Petition. I have also considered the evidence laid before me as well as the submissions made by the Parties and the case law referred to by the parties' counsel .

Issues

34. Four core issues, in my view, emerge for determination.

35. First, was there a violation of the Petitioner's constitutionally guaranteed rights and freedoms. Secondly, have the 1st and 2nd Respondents or either of them acted in a manner inconsistent with the Constitution and in abuse of their respective constitutional or statutory mandates. Thirdly, is whether the lack of commissioners of the 2nd Respondent, which the Petitioner's counsel referred to as "improper constitution or composition of the 2nd Respondent", affected the investigation and ultimate prosecution of the Petitioner. Finally, is whether there was a foundational basis for the prosecution of the Petitioner?

Discussion

36. I must state from the onset that a party alleging that his rights or fundamental freedoms as guaranteed by and under the Constitution is under a duty to, with reasonable precision, state the Articles of the Constitution which grant the rights allegedly violated. The party must also particularize the manner and extent of the violation. This has been and still is the position of the law and was clearly outlined in the case of **Anarita Karimi Njeru v Republic [1976-80] KLR 1272, [1979]KLR 154** and followed in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013]eKLR**, which cases were also cited by the Respondents.

37. Secondly, it must also be stated from the onset that it is up to the claimant to prove his case by discharging the evidential burden on a balance of probabilities: see **Matiba -V- Attorney General (1990) KLR 666**. See also **Catholic Commission for Justice & Peace in Zimbabwe -v- Attorney General [1993]2LRC (Const) 279 at 290** where Gubbay CJ stated as follows:

"I consider that the burden of proof that a fundamental right, of whatever nature has been breached is on he who asserts it...[it] is essentially a matter of fact and some evidence would have to be adduced to support the contention. The Respondent is not obliged to do anything until a case is made out which requires to be met"

The formality flop

38. In the instant case, the Petitioner indexed Articles 27, 28,29, 31,40,47,50 and 51 of the Constitution as the relevant constitutional provisions which had been violated. It was alleged that the rights under these Articles had been violated. Additionally, the petitioner also stated that the 1st Respondent had acted in a manner inconsistent with the provisions of Article 157 of the Constitution.

39. Article 27 deals with equality and freedom from discrimination while Article 28 is the human dignity Article. It provides that 'every person has inherent dignity and the right to have that dignity respected

and protected'. Article 29 deals with the freedom and security of person while Article 31 guarantees the right to privacy and Article 40 protects the right to property. Article 47 of the Constitution on the other hand guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, with both Articles 49 and 50 providing for the rights of arrested and accused persons.

40. From the onset, the petitioner's core complaint was how the investigations and prosecution was undertaken. The complaint largely centred on the exercise of the 1st and 2nd Respondents' constitutional mandate. Little focus was made on the Articles cited save for the violation of the Petitioner's right to privacy and dignity. I must also confess that I was unable to trace any particulars regarding the violation of Articles 27, 40, 47, 49 and 50 of the Constitution. The Petition itself was lacking on these particulars.

41. The affidavits sworn by the Petitioner, either in support of the Petition or in support of the intermediary applications, also did not contain any particulars on the manner and extent of the violation by the Respondents or any of them of the rights grounded under Articles 27, 40, 47, 49 and 50 of the Constitution. I also did not hear counsel make any specific submissions on the alleged violation of the rights and freedoms protected or guaranteed by Articles 27, 40, 47, 49 and 50 of the Constitution.

42. It was important that the Petition specifically detail the manner in which the rights and freedoms protected by these Articles of the Constitution had been violated.

43. I would agree with the Respondents consequently when they fault the Petition as not having met the competency test set out in *Anarita Karimi's* case but only to the extent of the alleged violation of Articles 27, 40, 47, 49 and 50 of the Constitution. With regard to these Articles the Petitioner failed to clear the formality hurdle and the Petition in these respects must summarily fail.

Privacy and dignity

44. The Petitioner has however argued that his right to privacy and thus his dignity was violated when the Respondents' officers stormed his house to conduct a search and also when he was arrested while attending a requiem service. The Petitioner also contended that his arrest and prosecution was unconstitutional as the same was orchestrated by the 3rd Respondent who took over the role of investigating and ensuring the Petitioner was arrested and prosecuted. Articles 28, 31 and 157 of the Constitution had thus been violated to the prejudice and detriment of the Petitioner.

45. The Petitioner faults his arrest while attending a church service but by the same vein admits that he gave himself up for arrest the moment he became aware that the 1st and 2nd Respondents' officers were around and ready to pounce. It is to be noted that the Petitioner was not arrested inside the house of God. He gave himself up voluntarily. I am not aware of any law which prohibits the arrest of a person within any place (save Parliament) let alone within the precincts of a worship house. The Petitioner could be arrested anywhere and all that was necessary was for the arresting officers to observe the rights protected under Article 49, which as I have already stated was not particularized.

46. I do not view it that the Petitioner's right to dignity and freedom of person were violated by the simple reason of his arrest within a church compound.

47. With regard to Article 31 rights as to privacy and protection thereof, the Petitioner lamented over the manner the 2nd Respondent's officers descended on his residence accompanied by police officers. Curiously, the Petitioner also admitted that the officers produced a court order issued by the Chief Magistrate at Makadara in Misc Case No 10 of 2016 as well as a search warrant which allowed the officers to carry out a search on the residence.

48. Article 31 rights are not absolute and home searches may be undertaken within the confines of the law and by law enforcement agents. In the instant case, the Petitioner admittedly sighted a court order as well as a search warrant. The Petitioner did not mount any challenge on either the court order or the search

warrants to place the Respondents on a rebuttal course. The only complaint seems to have been that the warrants were hastily obtained. I must thus make the inference that both the court order and the search warrants were regularly obtained pursuant to the appropriate legal provisions.

49. I do not consequently see how it may be stated that the Petitioner's privacy was violated or that his right to property was violated.

Article 157 of the Constitution

50. I will now consider the alleged violation of the 1st and 2nd Respondent's prosecutorial and constitutional powers.

51. The Respondents are enjoined under the Constitution to perform specific tasks.

52. The 1st Respondent has constitutional powers to investigate crime and institute the prosecution of possible suspects and offenders. Article 157 of the Constitution grants the 1st Respondent these powers. The 2nd Respondent on the other hand is also enjoined to undertake the investigation of economic crimes when prompted either by a member of the public or on its own initiative: see **Article 252(1) of the Constitution** and **Section 11 of the Ethics and Anti-Corruption Commission Act, 2011**. These are constitutional mandates and I would first agree with Ms. Maina, counsel for the 2nd Respondent, that the court ought to exercise caution before intervening where the exercise of such responsibilities has been questioned.

53. The core of the Petitioner's complaint was the 1st and 2nd Respondents had abrogated their duties to the 3rd Respondent who controlled the investigatory stage and was now controlling the process of the Petitioner's prosecution. Reliance was placed by the Petitioner on press conferences held by the 3rd Respondent as well as the allegedly speedy manner in which the Petitioner's arrest and prosecution was executed.

54. It is true, everything from the complaint by the 3rd Respondent to the investigations and to the arraignment of the Petitioner in court happened so fast by local standards. However, should adverse inferences be made in such a case? Expediency of process alone should not invite adverse inferences. There is evidence before the court to suggest that the 3rd Respondent was always in the thick of things. He was either issuing pre-emptory press statements or choreographing the arrests. There is however no direct evidence to suggest that the prosecution of the Petitioner may have been directed or controlled by the 3rd Respondent. This is the role of the 1st Respondent and so far there is nothing to suggest that the 1st Respondent is not up to the task or has abdicated his duties.

55. The 3rd Respondent may have played more than just a complainant or whistle blower but I am not convinced that the 3rd Respondent influenced the decision by the 1st Respondent to approve the charges against the Petitioner. He prompted the complaint. He then was deeply involved in the investigations, claiming though that he was assisting with the investigations. He acted in a pre-emptory manner. While I am satisfied that the investigations were prompted by the 3rd Respondent who like any other citizen could lodge and did indeed lodge a complaint regarding criminal culpability with the 2nd Respondent, I am not entirely satisfied that the role of the 3rd Respondent as far as the 2nd Respondent was concerned was that of a bystander.

56. It was the duty of the 1st and 2nd Respondents to investigate the complaint. The two Respondents would have failed in their duty if they failed to investigate and prosecute any allegations of criminal offences: see **R v Commissioner of Police & Another ex p Michael Monari & Another [2012]eKLR**. However, it is inexplicable how the 2nd Respondent allowed the 3rd Respondent to condescendingly gloat about the process of investigation and ultimate prosecution of the Petitioner. The 3rd Respondent, even though a complainant, appeared to be overbearing but I do not think that the 2nd Respondent was helpless

in these respects. Sanity in the process and in the public eye could have been met to avoid a ridicule of the process. The press releases by the 3rd Respondent were most certainly unnecessary.

57. Article 157 of the Constitution donates powers to the 1st Respondent not only to direct the investigations of any particular offence but also prosecute any person. The powers are to be exercised without the direction or control of any person while at the same time adhering to, observing and upholding various constitutional provisions.

58. It is clear that the court ought to not interfere with the 1st Respondent's powers to prosecute and likewise the court also ought not meddle with any agency mandated by statute or the Constitution to undertake any investigatory and supportive role on behalf of or at the instance of the 1st Respondent. Where however the 1st Respondent does not meet the constitutional muster in performing its role then the court will invoke its superintending powers to ensure that the process of the court is not abused.

59. In ***Kuria and Others v AG (2002) 2 KLR 69*** the court held that for an application to prohibit or stay criminal proceedings to succeed:

“(i), there is need to show how the Court process is being abused or misused, there is need to indicate or show the basis upon which the rights of the Applicants are under serious threat of being undermined by the criminal prosecution”.

60. In the Indian case of ***State of Maharashtra & others v Arun Gulab Gawali & others Criminal Appeal No. 590 of 2007 (27 August, 2010)***, the Supreme Court of India stated as follows:

“In R.P. Kapur Vs. State of Punjab AIR 1960 SC 866, this Court laid down the following principles:-

(I) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice;

(II) where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction;

(III) where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; and

(IV) where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.”

61. The circumstances appear infinite and an attempt at indexation was also made in the case of ***Macharia & Another vs Attorney General & Another [2001] KLR 448***. The court stated as follows

“A prosecution is improper if:

(a) it is for a purpose other than upholding the criminal law;

(b) it is meant to bring pressure to bear upon the Applicant/Accused to settle a civil dispute;

(c) it is an abuse of the criminal process of the Court;

(d) it amounts to harassment and is contrary to public policy;

(e) it is in contravention of the Applicant's constitutional right to freedom”.

62. Article 157(11) of the Constitution seems to give the clearest indication yet of when the court will intervene when it states that in the exercise of his powers, the Director of Public Prosecutions must have regard to

“...the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process”

63. A party who shows that the Director of Public Prosecution has not so acted will likely succeed in convincing the court that the prosecution ought to be stopped: see **Joram Mwenda Guantai v The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170**, where the Court of Appeal held:

“..., the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”

64. In **Kuria & 3 Others v Attorney General [2002] 2 KLR 69**, the High Court held:

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society’s senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court’s) independence.....There is a The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial....”

65. Then more recently in **R v Commissioner of Police and Another ex p Michael Monari & Another [2012]eKLR** the court stated as follows:

“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”.

66. The decisions point to the fact that the 1st Respondent cannot exercise its prosecutorial discretion or powers arbitrarily. He must act within the confines of the Constitution. He must not allow his office to be used for any other purpose other than for attaining the objectives of the criminal justice system. The standards are clearly provided under the Constitution and the Office of the Director of Public

Prosecutions Act.

67. Where it is alleged as in this case that the Director of Public Prosecutions office has been influenced directed and or controlled by a third party, then the person making the allegation has to establish a case for the court to intervene: see **Koinange v Attorney General and Others [2007] 2 EA 256**. Mere allegations will not suffice. Manifested abuse of the process however will. That is why in the case of **Manilal Jamnadas Ramji Gohil v Director of Public Prosecutions NBI Criminal Appeal No 57 of 2013** the Court of Appeal was clear that criminal proceedings before a trial court should only be stayed (or prohibited) by the High Court in the most exceptional circumstances.

68. I return the verdict that the Petitioner has not shown that the 1st Respondent acted under the control of any person in this case.

69. The Petitioner however laments that the process was tainted by the 3rd Respondent's influence over the 2nd Respondent.

70. The Petitioner has alleged that his prosecution was prompted by other ulterior motives, that of settling scores instigated by the 3rd Respondent who was allegedly not given his Christmas gift by the Petitioner and who had allegedly also tried to extort money from the Petitioner and other employees of the county government. The Petitioner urged the court to make inferences from the way the investigation were handled and also from the press conferences called and addressed by the 3rd Respondent.

71. I have reviewed the evidence placed before me. I have already previously in this judgment pointed out that the staggering nature of the 3rd Respondent's conduct. The 3rd Respondent's role may not be simply gainsaid. Besides being the complainant, the 3rd Respondent struck me as having been overbearing in the circumstances. He overarched. He lodged the complaint but then opted not to go mute and wait the result of the investigations. He appeared on top of what was happening. He knew who was going to be arrested and who would be arraigned in court and when. The press conference held by the 3rd Respondent, in my view, may not be simply dismissed as having been of little consequence as far as the investigations and ultimate prosecution of the Petitioner was concerned.

72. I am convinced that the expedited investigations had something to do with the 3rd Respondent even though as it was indeed the duty of the 1st and 2nd Respondents undertake the investigations and arraign the Petitioner in court without any delay. The 3rd Respondent was involved. The depth of the 3rd Respondents involvement is what is unclear.

73. It brings me to the question as to whether the lack of commissioners of the 2nd Respondent could have affected the investigation and ultimate prosecution of the Petitioner.

74. According to counsel for the Petitioner, Ms Kidunduhu, the mere fact that the 2nd Respondent was not properly constituted at the time it undertook the investigations and recommended the prosecution of the Petitioner meant that the process was fatally defective and the prosecution had to be stalled. More specifically, it was contended that in the absence of the Commissioners and a substantive chairperson, the 2nd Respondent could not forward any investigative report or recommendations to the 1st Respondent. The Respondents held the contrary view with the basic contention that the 1st Respondent always has the final say and is never bound by any recommendations.

75. I must first point out that the 1st Respondent's mandate is executed pursuant to the provisions of Article 157 of the Constitution and not otherwise. He satisfies himself that there is a adequate evidence to prosecute and no more. He is not obliged to receive any recommendations and where he does, he is not bound by any recommendations. It may not be appropriate for the 2nd Respondent to act in the absence of a fully constituted commission but such action has no binding effect upon the 1st Respondent. He and he alone decides when and whether to prosecute. This should never be doubted.

76. In the case of **Eng. Michael Sistu Kamau & 12 Others v The EACC & 4 others [2016]eKLR** the court was faced with a similar question as to the constitutional composition of the 2nd Respondent and its relationship with the 1st Respondent when not properly constituted. The court found and held that the resignation or dismissal of commissioners did not render the 2nd Respondent non-existent but only disabled it from performing some of its core functions. The court further found and held that in the absence of the commissioners, the 2nd Respondent could not perform one of its core functions of recommending to the 1st Respondent the prosecution of any acts of corruption or economic crimes or violation of Codes of Ethics or any other matter prescribed under the Ethics and Anti Corruption Commission Act, the Anti-Corruption & Economic Crimes Act or any other law. The court however was categorical that in the circumstances of the case and as the 1st Respondent was never bound to follow any recommendations of the 2nd Respondent, the prosecution in that case was not fatally flawed. The decision to prosecute was allowed to continue.

77. This court also had occasion to consider the question of the 2nd Respondent's composition again in the case of **Busia County Government v Ethics and Anti-Corruption Commission [2016]eKLR**.

78. Like in the instant case, in **Busia County Government v Ethics and Anti-Corruption Commission(supra)** there was no dispute that at the time the 2nd Respondent undertook investigations on alleged improprieties and criminal culpabilities on the part of the petitioner and its officers, the three commissioners had long resigned from office. The petitioner consequently argued that 2nd Respondent could not thus execute the constitutional mandate which was bestowed not upon the secretariat but the commission.

79. This court in the **Busia County Government** case (supra) while citing the case of **Eng. Michael Sistu Mwaura Kamau & 12 Others v The EACC & 4 others [2016]eKLR** with approval went on to hold as follows:

“[31]I have no quarrel and entirely agree with the decision of the court in Michael Sistu Mwaura Kamau’s case. In the absence of the commissioners, the secretariat on its own motion could not and cannot purport to execute and perform the core functions of the EACC. It would be contrary to law. Such core functions include investigating and recommending the prosecution of offenders.”

...

[35] I come to the conclusion that while the absence of the commissioners did not render the EACC extinct by virtue of its juristic corporate features, in so far as its core functions of investigating economic crimes and recommending the prosecution of offenders was concerned, it had to be dormant until properly reconstituted or assisted through the Director of Public Prosecutions. The EACC in the circumstances of this case had no powers in the absence of the commissioners to initiate investigations of its own motion or any other person’s motion, save any directions by the Director of Public Prosecutions.” [emphasis added]

80. Slightly earlier in the case of **Koech Kemboi v Halakhe Waqo & 2 others [2015] eKLR** this court was faced with the same question as to the exercise of the constitutional and statutory mandate of the 2nd Respondent in the absence of commissioners. In answer to the question as to whether the 2nd Respondent Commission could recruit its staff when there were no commissioners in office, this court held that:

“[48]... even though the Commission continues to exist pursuant to Article 253 of the Constitution, both the Constitution as read together with the Ethics and Anti-Corruption Act, Cap 65A Laws of Kenya seem to outline what the secretariat can do as well as what the Commissioners, and then indeed, the Commission can do. Some functions and duties are the recluses of the Secretariat, others are reserved for the Commissioners and then finally the Commission. The line appears thin but it does appear discernible and not merely out of

perception.

[49] It cannot be said in my view that the Secretariat as headed by the 1st and 2nd Respondents can do anything that the Commission is mandated to do. The almost dichotomic provision of functions and roles under the statute would make little sense. I would take the preliminary view that even the setting and establishment of a corporate entity does not allow its officers and employees to do everything in the absence of shareholders or directors.”

81. The result, in two cases of **Koech Kemboi v Halakhe Waqo & 2 others [2015]eKLR** and **Busia County Government v Ethics and Anti-Corruption Commission [2016] eKLR**, were injunctive orders issued as against 2nd Respondent restraining it from performing tasks and functions reserved under statute for the Commission and not the secretariat. The court in both instances pointed out that there would exist no lacuna as even in the absence of the 2nd Respondent’s Commissioners, the 1st Respondent could still detail investigators. Likewise, with regard to recruitment of staff the court was clear that the Public Service Commission could always second staff to the 2nd Respondent Commission until such time as the Commission would be properly constituted to undertake its statutory mandate.

82. In all instances the essence is to ensure and ascertain that the independence of the 2nd Respondent Commission survive the absence of the commissioners. The 2nd Respondent commission as a juristic organ must not only be independent in its actions and performance of its functions but must also be so seen. This includes where the functions performed or executed are the sole recluse of the 2nd Respondent’s secretariat and not the commission.

83. I have alluded to the role played by the 3rd Respondent in the investigation and ultimate arrest and prosecution of the Petitioner. There was overarching. The 3rd Respondent was not only a complainant. He over-asserted himself in a manner as to leave any reasonable bystander to conclude that he dictated the process. The fact that the commissioners were absent could only help acerbate the situation and make one believe that the 2nd Respondent was under the 3rd Respondent’s directions.

84. My view is that, unlike in the case of **Eng. Michael Sistu Mwaura Kamau & 12 Others v The EACC & 4 others [2016]eKLR**, the circumstances of this case would point to a situation where in the absence of the commissioners, it may not be safely stated that the 2nd Respondent commission independently executed its mandate in investigating and recommending the prosecution of the Petitioner.

85. I will now address the question as to whether there was a foundational basis to prosecute the Petitioner.

86. It was the Petitioner’s argument that there is no foundational basis for his prosecution. It was contended that the Petitioner never attempted or sought to corruptly offer a benefit to the 3rd Respondent to forestall attempts by the 3rd Respondent to expose corrupt activities in the county government. According to the Petitioner, the 3rd Respondent asked for and the Petitioner was willing to present to the 3rd Respondent a Christmas gift in the form of cash. According to the Petitioner he committed no crime in agreeing to give the 3rd Respondent a gift.

87. A decision to prosecute any person ought to be pegged on sound evidence: see **The National Prosecution Policy**, pp 5-6, 2015 ed. In **R v Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** the court stated that :

.. “A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable”.

88. I must hasten however to add the paradoxical principle that the sufficiency and veracity of evidence is a matter of the trial court to decide in determining whether the accused person is innocent or guilty: see **Meixner & Another v Attorney General [2005]2 KLR 189** and **R v Attorney General & 4 Others ex p Diamond Hashim Lalji & Another [2014]eKLR**.

89. I have looked at the documentation availed. There is also admission by the Petitioner that he was on the verge of presenting a Christmas gift in the form of cash to the 3rd Respondent. The Respondents say this amount was an intended bribe and not a gift. I have also considered the offences with which the Petitioner is charged. It is not for this court to make any conclusions as to whether the evidence is adequate or not.

90. I am conscious of the principle that I must refrain from acting as an appellate forum over a decision by the 1st Respondent. I am also conscious of the principle that I need to keep away from the arena of trials. Trial is the reclusé of the trial court which vets evaluates and assesses evidence before returning a verdict.

91. Oxymoronically, it is however demanded of me to decide whether there is a foundational basis for the prosecution. I return the verdict that there appears to have existed a basis to lay the charges against the Petitioner but as to whether or not the Petitioner is guilty, it is a matter which must be left to the sound judgment of a trial court.

Conclusion

92. The Petitioner has failed to show how his constitutional rights have been violated. The Petitioner has also failed to show that the 1st Respondent acted in abuse of his offices when he approved the prosecution of the Petitioner. The Petitioner has however shown that the role of the 3rd Respondent was more than that of a complainant. The Petitioner has also done enough to show that in the absence of the commissioners of the 2nd Respondent Commission, the 2nd Respondent in the circumstances of this case was not objective enough and could not recommend to the 1st Respondent the prosecution of the Petitioner as the veil of independence appeared to have been pierced.

93. I come to the inescapable conclusion that *“it is not right to prosecute the Petitioner as proposed”*: see **Githunguri vs. R [1986]KLR 1**.

94. The Petition succeeds.

Disposal

95. The Petitioner sought damages but has not proven any violation of his constitutional rights or freedoms. Neither has the Petitioner shown any specific loss.

96. Before making my final orders in disposal, let me unreservedly tender my apology to the parties as well as counsel for the delay in rendering this decision. The circumstances which led to the delay were simply beyond my control.

97. In the premises, the orders which commend themselves to me and which I grant are as follows:

a. A declaration that the initiation, maintenance and prosecution of Chief Magistrate’s Court Criminal Case No. 1 of 2016 against the Petitioner herein, in the manner intended, is an abuse of the Criminal Justice process and an abuse of the court process.

b. An order of prohibition, prohibiting the continuance of Criminal Case No. 1 of 2016 at Chief Magistrates Court against the Petitioner herein, in the manner intended.

c. An order of certiorari shall also issue to remove into this court for purposes of being

quashed the entire proceedings and criminal charges against the petitioner in Chief Magistrates Court Criminal Case No 1 of 2016 and the same are hereby quashed.

d. Each party will bear its own costs of the Petition.

98. It is so decreed.

Dated signed and delivered at Nairobi this 18th day of July, 2017

J. L. ONGUTO

JUDGE