



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO. 408 OF 2015

**IN THE MATTER OF ARTICLES 10, 20, 21, 22, 23, 47, 48, 50, 156, 157, 165, 258, AND 259 OF
THE CONSTITUTION OF KENYA**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHT TO FAIR TRIAL UNDER
ARTICLE 50, 156, 157, 165, 258, AND 259 OF THE CONSTITUTION OF KENYA**

IN THE MATTER OF THE CRIMINAL PROCEDURE CODE SECTION 193A

IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT

BETWEEN

ERASTUS NGURA ODHIAMBO.....APPLICANT

AND

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

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

THE HONOURABLE THE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

Background.

This Petition dated 5th November 2015 was brought pursuant to **Articles 22, 23, 31 and 50** of the Constitution and **Rules 20 and 21** of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of an Individual) High Court Practice and Procedure Rules 2006.

The Petition was filed contemporaneously with Chamber Summons under a Certificate of Urgency dated and filed on 5th November 2015 seeking conservatory orders restraining the 1st and 2nd Respondents from carrying out any investigations or any intended prosecution in respect of the Petitioner in any matter or

issue related to High Court Criminal Case No. 115 of 2014 pending the hearing and determination of the application and until the final determination of the case in High Court Criminal Case No. 115 of 2014.

Petitioner's case.

The Petitioner is a male adult currently facing a murder charge in Nairobi High Court Criminal Case No. 115 of 2014. He is challenging the 1st and 2nd Respondents over investigations and intended prosecution of the Petitioner regarding offences which in his view are related to the ongoing murder trial at the High Court. While the said trial was proceeding, the Petitioner was charged with new offences on 6th November, 2015 in Milimani Chief Magistrate's Court Criminal Case No. 1810 of 2015. The Petitioner reads malice on the part of the 1st and 2nd Respondents aimed at violating his constitutional rights to a fair trial. He contends that investigations into the alleged new offences were closed when he was charged with murder in the High Court. Therefore, the intended prosecution is malicious, vexatious, in bad faith and intended to maliciously and adversely affect the hearing and determination of the murder trial.

The Petitioner prays for:

- a. An order of prohibition restraining the 1st and 2nd Respondents from carrying out investigations or any intended prosecution in respect of the Petitioner in respect of any matter or issue related to High Court Criminal Case No. 115 of 2014.
- b. An order of certiorari quashing the 1st and 2nd Respondents from carrying out investigations or any intended prosecution in respect of the Petitioner in respect of any matter or issue related to High Court Criminal Case No. 115 of 2014.
- c. A declaration that the continued investigations of the Petitioner by the 1st and 2nd Respondents or any intended prosecution in respect of the Petitioner in respect of any matter or issue related to High Court Criminal Case No. 115 of 2014 is a threat and a violation of the right to a fair trial.
- d. A declaration that the 1st and 2nd Respondents should as a condition precedent seek directions from the 3rd Respondent on issues touching on human rights.
- e. Exemplary damages and costs.

Respondents' case.

The 1st Respondent, the Inspector General of Police and the 3rd Respondent, the Attorney General, did not make any response to the Petition. The 2nd Respondent, the Director of Public Prosecutions opposed the petition and the accompanying application through the Replying Affidavit Ms. Catherine Mwaniki, an Assistant Director of Public Prosecutions and the prosecution counsel in Nairobi High Court Criminal Case No. 115 of 2014. In the Affidavit sworn on 10th November, 2014, the prosecution counsel deponed that the new charges were preferred following new evidence which revealed irregularities in the issuance of a firearm certificated number 8910 to the Petitioner. She added that both cases at the High Court and the Chief Magistrate's Court could lawfully run concurrently, and further that the Petitioner had failed to show that the 2nd Respondent had acted without or in excess of powers conferred by the law in reaching a decision to prefer more charges against the Petitioner. Ms Mwaniki stated that the decision to charge the Petitioner was informed by evidence and public interest. Furthermore, the Petitioner had not demonstrated how his rights have been infringed to justify award of damages suffered by the alleged infringement.

Petitioner's submissions.

The Petitioner's submissions were drawn and filed by Rachuonyo & Rachuonyo Advocates. It was submitted that the new charges were fabricated against the Petitioner as manifested by the false entries in

the date of the Petitioner's arrest and production in the Magistrates' court over the new charges, when in fact the Petitioner appeared before the High Court where the murder trial had been proceeding. It was submitted further, that in the new charge sheet, one of the witnesses is the same witness on the basis of which the 2nd Respondent opposed the release of the Petitioner on bail at the murder trial. The Petitioner viewed the new proceedings as intended to frustrate his further request to be released on bond and delay the hearing of murder trial. It is further submitted that the new proceedings are directly related to the ongoing murder trial and are therefore intended to prejudice and violate the Petitioner's right to a fair trial. In the Petitioner's view, investigations over the alleged new offences committed were closed when the Petitioner was presented for plea taking in the murder trial. In addition, the continued investigation and prosecution of the Petitioner in the middle of an ongoing trial creates duplicity and is therefore a violation of the Petitioner's constitutional rights. The Petitioner relied on the decision of the court in **Nairobi High Court Petition No. 104 of 2012 Investments and Mortgages Bank Limited v The Commissioner of Police & Others**.

2nd Respondents' submissions.

In her written submissions, Ms. Mwaniki for the 2nd Respondent denied the allegations of malice on the part of the 2nd Respondent. She submitted that the Petitioner had failed to prove the acts of malice and ulterior motive by the Respondent. She submitted further that both the 1st and 2nd Respondents acted within their statutory duty. Further, the new charges are distinct and unrelated to the ongoing proceedings at the High Court and are not founded on the same cause of transaction. Ms. Mwaniki further submitted that the charges were preferred following new evidence in the process of investigation. Thus, the Magistrate's court is not precluded from hearing the case before it. Again, both courts can concurrently try the cases before them independently. The 2nd Respondent relied on the cases of **Hamisi Mungale Burehe v Republic Mombasa Criminal Appeal No. 37 of 2013** and **Hussein Khaled & 16 Others v The Attorney General & 2 Others Petition No. 324 of 2013**. The 2nd Respondent submitted that the possibility of duplicity of charges and merits of the case before the trial court are matters concerning the competency of the charge that should be left to the trial court which is best placed to determine the veracity and sufficiency of the evidence presented before it. In response to the 4th prayer in the Petition, the 2nd Respondent submitted that the 3rd Respondent is an independent constitutional office empowered to act free from control and direction of any person and authority in commencing and conducting criminal proceedings. Thus, the declaration sought by the Petitioner is unconstitutional. Further, the Petitioner had not demonstrated the prerequisites of illegality, irrationality or procedural impropriety by the Respondents in order to justify the orders sought. The Petitioner had also not demonstrated with precision the rights alleged to have been breached. Citing the case of **Douglas Maina Mwangi v Kenya Revenue Authority & Another Petition No. 528 of 2013**, the 2nd Respondent submitted that Petitioner had not demonstrated grounds to justify the court's intervention in his prosecution.

Analysis and determination.

Having considered the respective parties' cases, I narrow down the main issue for determination to be whether the 1st and 2nd Respondents' actions of respectively investigating and commencing criminal charges against the Petitioner were malicious, an abuse of the court process and an infringement of the fundamental rights and freedoms of the Petitioner. However, I must point out that the Petitioner in addition to the constitutional provisions cited, has relied on provisions of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of an Individual) High Court Practice and Procedure Rules 2006 which were repealed by the Constitution of Kenya (Protection and Fundamental Freedoms) Practice and Procedure Rules 2013.

The Petitioner faces a murder charge in Nairobi High Court Criminal Case No. 115 of 2014. He was arraigned in court to answer to the charges on 19th December 2014. The trial is ongoing and the Petitioner has been in custody, following denial of bail by the trial court until certain crucial witnesses had testified. He renewed his application for release on bail when the witnesses had given their testimony. At this point, the 2nd Respondent opposed his release based on new evidence that had emerged in the process of

investigations. That is what gave rise to the charges before the Magistrate's court.

According to the 2nd Respondent, the police investigations revealed anomalies in the licensing of a firearm to the Petitioner. In the Replying Affidavit sworn on behalf of the 2nd Respondent, investigations revealed that the firearm certificate no. 8910 purportedly issued to the Petitioner could not be traced in the Central Firearms Bureau's data systems documentation, and that it belonged to a different licensee, not the Petitioner. This resulted in new charges being preferred against the Petitioner in Milimani Chief Magistrate's Court Criminal Case No. 1810 of 2015. The Petitioner has since been arraigned in court to answer to the five counts of offences including being in possession of a firearm without a valid firearms certificate contrary to Section 4A (a) (i) of the Firearms Act.

The Petitioner's view is that the institution of the latter criminal charges is vitiated by malice and is intended to infringe on his constitutional rights to a fair trial. All the charges relate to the possession of the firearm in question alleged to have been issued to him.

It is within this court's power to examine the actions of the 1st and 2nd Respondent's actions to determine whether, as alleged, their actions were in violation of the constitutional rights of the Petitioner. The Respondents draw their authority from the Constitution and in exercise of their respective powers; they are enjoined to abide by the constitutional dictates. The National Police Service, as with all security organs are enjoined to abide by the principles of national security set out under **Article 238(2)** of the Constitution which include, *inter alia*, **'national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms.'** **Article 244** further requires the National Police Service to among others, **'comply with constitutional standards of human rights and fundamental freedoms.'** The 2nd Respondent is an independent constitutional officer with power, pursuant to **Article 157(6)** of the Constitution, over the commencement and conduct of criminal proceedings. In exercising its mandate, the Office of the Director of Public Prosecutions is required under **Article 157(11)** to **'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.'** No case has been alleged against the 3rd Respondent. This Court is empowered by the Constitution to intervene where a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

In alleging malice against the 1st and 2nd Respondents, the Petitioner states that no further charges related to the pending murder trial ought to be initiated against him, on the basis that investigations over the alleged new offences committed were closed when the Petitioner was presented for plea taking in the murder trial. In his view, the new charges are related to the ongoing murder trial, and therefore, raise the possibility of duplicated charges. He also questioned the delay in instituting the charges, dismissing the proceedings against him as malicious, vexatious and a violation of his rights.

This court has inherent powers to protect the integrity of its proceedings where proceedings before it amount to an abuse of its process. In determining the question as to whether to intervene in proceedings of the lower court, the court must be careful not to enter into the realm of the trial court that involves the consideration of the merits or demerits of the evidence, for that remains the duty of the trial court. That is to say that this court, despite the wide powers vested in it to intervene with the matters pending before the trial courts, must be extremely careful not to micro manage the way those courts should work. See ***Meixner & Another v. Attorney General* [2005] 2 KLR 189, in which the Court of Appeal stated;**

"The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion of the Attorney General, in exercising his discretion if acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution... It is the trial court, which is best equipped to deal with the quality and sufficiency of the evidence

gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence and that is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.”

The Petitioner is also under a duty to prove the allegations of abuse and infringement of his rights. It is not enough to simply allege violations of his rights without specifying how the conduct of the Respondents has resulted in the alleged violation. As was reasoned in the case of *Kuria & 3 Others vs. Attorney General* [2002] 2 KLR 69:

“There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an “abuse of process”, is a “manipulation”, “amounts to selective prosecution” or such other processes, or even supposing that the applicants might not get a fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. 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... In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names.”

While the Petitioner may have legitimate concerns regarding the veracity of the charges, the proper avenue lies in the trial court where evidence on the charges will be ventilated. This court, cannot usurp the function of the trial court. The criminal trial process provides for fair trial safeguards to the Petitioner which he can be invoked at any stage of the trial process. The powers of this court are limited to scrutinizing the exercise of the powers of the 1st and 2nd Respondents and not the merits of the case. May I emphasize as was submitted by the learned counsel for the 2nd Respondent that the fresh charges were informed based on fresh evidence related to the firearm found in the possession of the Petitioner. That evidence, in my view, is distinct from the evidence in the murder trial. It relates to a separate offence altogether, and it then behooves the prosecution to adduce it sufficiently in prove their case. In turn, the Petitioner will be afforded the opportunity to prove his innocence. The determination of the case will be based on the strength of the evidence before the trial court. I find no reason, in the circumstances, why the trial should not proceed or to what extent it is instituted in contravention of the Petitioner’s right to a fair trial.

The Petitioner pointed some observations regarding the charges being instituted; notably, the details of his arrest and arraignment in the lower court and further the basis of the institution of the investigations by the police, being the same entry that preceded the institution of murder charges. That observation may be construed in view of the fact that no new complaint had been made with the police. It is apparent that the subsequent investigations and proceedings in the Magistrate’s court arose out of the issuance of the firearm that was connected to the offence that is the subject of the murder trial in the High Court. That said, it is evident that the charges in the lower court are not related to the charges of murder in the High Court. The latter charges arose from the facts of possession and the process of acquisition of the subject firearm. This came about as a result of the police’ own inquiry into the firearm, leading to the proceedings now being challenged. Nothing precludes the police from filing charges against a person on account that a complaint was not filed by a third party. In any criminal trial, the complainant is the state, thus the use of

the word '**Republic**'. Therefore, the police themselves who hold the key evidence will stand in the gap of a complainant as the charges are informed on evidence that came to their knowledge in the course of investigating another case. If this court were to order that the trial before the Magistrate's court comes to a halt, it would amount to curtailing the police from lawfully exercising their mandate in respect of investigations. That would be against the tenets of good administration of justice. And more specifically amount to interfering with the work of the police. I do accordingly concur with the words in *Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another* [2012] eKLR:

“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”

The Petitioner further raised the possibility of duplicity of charges if the trial in the lower court is allowed to proceed. While the investigations and prosecution emanate from the initial complaint into the murder that is the subject of trial at the High Court, the offences are distinct from the murder charge, and unrelated in terms of evidence needed to prove the charges. In fact, the only common factor is the Petitioner herein, the facts leading to prove of the offences in both trials being distinct and unrelated. The principle against duplicity of charges arises from **Section 134** of the Criminal Procedure Code which requires that every charge should contain a clear statement of the offence(s) which the accused is facing together with the particulars. The rationale is to ensure that the accused is aware of the charges he is facing to enable him advance his defence. This is in line with **Article 50** of the Constitution which guarantees a fair hearing, entitling the accused to be informed of the charge with sufficient detail to answer it. That said though, the fact of duplicity of charges does not arise in the context merely because of the existence of two concurrent criminal trials against the accused.

The Petitioner seems to further allege that the proceedings at the lower court should not proceed as they are directly related to the ongoing murder trial. I need not say more than I have observed above. But let me point out that this concern can only be legitimate where the proceedings would violate the principle against double jeopardy. However, as I have already observed, the charges in the lower court are distinct from the murder charges facing the Petitioner. As such, I find no violation of **Article 50 (2)(o)** which prohibits the subsequent trial of an accused for an offence in respect of an act or omission for which he has previously been either acquitted or convicted. Nothing therefore, precludes the institution of criminal proceedings concurrently where there is reasonable basis for their commencement.

For this court to issue the orders of certiorari and prohibition as sought by the Petitioner, it must be shown that 1st and 2nd Respondents acted without or in excess of jurisdiction, or in contravention of the law. They are orders issued where administrative bodies exercise their powers *ultra vires* their jurisdiction and in *mala fides*. I find that the Petitioner has not demonstrated that the 1st and 2nd Respondents have abused their authority in investigating and charging him. Therefore, the first and second prayers as sought have no merit.

The Petitioner also sought for a declaration that the 1st and 2nd Respondents should as a condition precedent seek directions from the 3rd Respondent on issues touching on human rights. The Office of the Director of Public Prosecutions is distinct from the Office of the Attorney General. Pursuant to the provisions of **Article 157(10)** of the Constitution, the Director of Public Prosecutions shall not be under the direction or control of any person or authority while exercising his or her powers or functions. The Director of Public Prosecutions is also given power under **Article 157(4)** '**to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.**' However, this court may interfere with the powers of the Director of Public Prosecutions as conferred on him under the two Articles where it is demonstrated that he has acted against the Constitution or any other written law. May I emphasize that the Attorney General does not have powers in the conduct of criminal investigations. Therefore, the

prayer sought against him is discordant with the Constitution and must therefore fail.

Conclusion

Having considered the entire Petition, I find that the same lacks merit and I proceed to dismiss it. Each party shall bear its own costs.

DATED and SIGNED this 11th day of February, 2016.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of;

- 1. Mr. Onyango for the Petitioner.**
- 2. Miss Espira for the 2nd Respondent.**