



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
PETITION NO. 5 OF 2015

BETWEEN

ELEKIA OCHOLA ODARI 1ST PETITIONER

GEORGE AMENYA ASIYO 2ND PETITIONER

DANIEL ODHIAMBO OTUONDO 3RD PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

ETHICS AND ANTI CORRUPTION COMMISSION 2ND RESPONDENT

JUDGMENT

Introduction

1. The petitioners before the court are public officers. The 1st petitioner is the Migori County Supply Chain Manager. The 2nd petitioner is the Migori County Director of Water and the 3rd petitioner is the Homa Bay County Deputy Director of Water. They are have been charged with various offences under the *Anti-Corruption and Economic Crimes Act (Act No. 3 of 2003)* in **Homa Bay Chief Magistrates Court Anti-Corruption Case No. 790 of 2015** as follows;

- a. Willful failure to comply with the law and regulations relating to procurement contrary to **section 45(2)(b)** as read with **section 48(1)(a)** of the *Anti-Corruption and Economic Crimes Act*. The particulars of the offence are that on or about 13th March 2014 at Migori County Offices within Migori County the petitioners being the persons concerned with the public procurement process jointly and willfully failed to comply with the law relating to procurement to wit **section 29 and 74** of the *Public Procurement and Disposal Act, 2005* and **Regulation 62** of the *Public Procurement and Disposal Regulations, 2006* by directly procuring water pipes from Speedway Technical Company Limited without approval of the Tender Committee.
- b. Abuse of office contrary to **section 46** as read with **section 48(1)(a)** of the *Anti-Corruption and Economic Crimes Act*. The particulars of the offence are that on 13th March 2014 at Migori County offices, the petitioners being employees of Migori County jointly used their offices to improperly confer a benefit of Kshs. 7,004,500/- on Speedway Technical Company Limited through irregular procurement supply of water pipes.
- c. Willful failure to comply with the law and regulations relating to procurement contrary to **section 45(2)(b)** as read with **section 48(1)(a)** of the *Anti-Corruption and Economic Crimes Act*. The

particulars are that on 13th March 2013 at the Migori County offices, the petitioners being persons concerned with use of public funds jointly and willfully failed to comply with the law relating to procurement to wit **section 27(3)** of the **Public Procurement and Disposal Act** as read with **Regulation 17(3)** and **(4)** of the **Public Procurement and Disposal Regulations, 2006** by not carrying out an inspections and acceptance of the water pipes supplied by Speedway Technical Company Limited before payment was made to the said company.

2. In the petition dated 7th December 2015, the petitioners seek the following reliefs;

a. An order of prohibition do issue and directed at the respondents prohibiting them from proceeding with prosecuting the petitioners with any imagined offences relating to the evaluation, award or execution of tender for the supply of water pipes in a manner inconsistent with the Constitution and provisions of the law.

b. An order of prohibition do issue against the 1st Respondents prohibiting it from proceeding with prosecuting and/or removing the petitioners from the list of witnesses with the sole purpose of weakening the cases against the real wrongdoers or in any way acting in violation of Article 157(11) of the Constitution.

c. An order declaring that the Respondents have usurped the role of the Public Procurement Oversight Authority and are therefore in breach of the Constitution.

d. A declaration that the Respondents are in breach of Articles 3, 10,25, 50, 157 and 232 of the Constitution in the manner they have handled and treated the petitioners and that for such violations their actions are null and void to the extent of the violations.

e. A declaration that the 2nd respondent is perpetuating breaches of the law, the Constitution of Kenya and carrying out and legalizing impunity contrary to the Constitution and exhibiting arrogance and highhandedness in performance of their public duties contrary to the law.

f. Damages for violation of the Petitioners rights under the Constitution.

g. Costs of the Petition be borne by the Respondents.

The facts

3. The facts are set out in the 1st petitioner's depositions sworn on 7th December 2015 in support of the petition in support of the Notice of Motion dated 7th December 2015 seeking conservatory orders. The 1st petitioner also filed a supplementary affidavit sworn on 28th January 2016.

4. The petition is opposed by the 1st respondent through the replying affidavit of Ammon Oluoch Ojwang, the counsel representing the 2nd respondent, sworn on 16th December 2015 and by the 2nd respondent through the replying affidavit of Wycliffe Sirengo, a forensic investigator with the Ethics and Anti-Corruption Commission, sworn on 14th December 2015.

5. As the charges against the petitioners show, the issue at the heart of their case is a tender for the supply of water pipes within Migori County issued in 2014 and awarded to Speedway Technical Company Limited on 13th March 2014 for a sum of Kshs 7 million. The petitioners claim that the 2nd respondent raised integrity issues surrounding the tender. They contend that they initially recorded statements and supplied all the necessary information regarding the tender to the 2nd respondent whose officers assured them that they would only be required to assist further investigations or be called upon as state witnesses should they be required in the future.

6. The petitioners were shocked when, over a year later, they were summoned to record statements at

Migori Police Station on 2nd December 2015, arrested and subsequently charged at the Homa Bay Chief Magistrates Court for offences relating to the tender.

The Submissions

7. The petitioners' supported their case by oral and written submissions. Their core contention is that in exercising the state power to prosecute, the 1st respondent is bound by **Article 157(11)** of the Constitution to have regard to the values and principles of the Constitution under **Article 10** of the Constitution and in particular to act in the public interest, the interest of administration of justice and the need to prevent abuse of the legal process.

8. The petitioners contend that the respondents have not complied with the **Public Procurement and Disposal Act, 2006** which regulates the tender process before prosecuting the petitioners. They argue that the **Public Procurement and Disposal Act, 2006** creates the Procurement Oversight Authority which ought to have been consulted before taking steps to prosecute them. Learned counsel for the petitioners, Mr Ojuro, relied on the case of **Stanley Munga Githunguri v Republic NRB HC Misc. App. No. 271 of 1985 [1986]eKLR** where the court held that the powers conferred on the office of the Attorney General, which was the repository of public prosecutorial power under the former Constitution, ought to be exercised fairly and reasonably and not arbitrarily or oppressively. He also cited **Vincent Kibiego Saina v Attorney General NRB HC Misc. Civil App. No. 839 of 1999 (Unreported)** and **Rosemary Wanja Mwagiru and 2 Others v Attorney General NRB Petition No. 165 of 2011 [2013]eKLR**. In support of this argument the petitioners further contend that in a letter dated 6th November 2015 from the the 1st respondent addressed to the 2nd respondent, requesting for more information and further investigation buttresses the point that the provisions of the **Public Procurement and Disposal Act** were not complied with by the respondents and that investigations were incomplete.

9. The petitioners also complain that the provisions of **Article 27** of the Constitution were violated as they were the only members of the Tender Committee who have been subjected to prosecution. They submit that they are entitled to equal treatment before the law and the right to equal protection and equal benefit of the law which has been violated by the discriminatory treatment they have been subjected to.

10. The petitioners further complain that their rights were violated when the 1st respondent preferred charges against them yet the 2nd respondent had assured them over a year earlier that they were in good standing. Counsel relied on the **Stanley Munga Githunguri Case** where the court stopped a prosecution commenced 8 years after the Attorney General had given the accused assurances that he would not prosecute him.

11. The petitioners also complain that to date they have not been given documents and witness statements to enable them defend themselves. The petitioners rely on the provision of **Article 232** of the Constitution which embody the principles and values of the public service. The petitioners contend that their prosecution is without merit and ought to be stopped as they may be suspended from the employment to their detriment.

12. The position taken by the 1st respondent is that it received the investigations file from the 2nd respondent and upon perusal formed the view that various offences against the petitioners had been disclosed. It directed that the petitioners be charged through the letter dated 6th November 2014 subject to further inquiries and evidence being taken to clarify the issues raised by it. Counsel submitted that the court could not stop the pending proceedings as the constitutionality of the **Anti-Corruption and Economic Crimes Act** had been impugned. Mr Oluoch submitted that the petitioners have not demonstrated that the intended prosecution is an abuse of the court process. Counsel maintained that the petitioners will have a fair trial where they will be given an opportunity to challenge the evidence against them.

13. Mr Oluoch further submitted that the Office of the Director of Public Prosecutions had the sole authority to prosecute the petitioners under **Article 157** of the Constitution and that the Office had never

given any assurances or undertakings to the petitioners that they would not be prosecuted. He urged that the case against the petitioners be dismissed.

14. The 2nd respondent opposed the petition and submitted that on the basis of the replying affidavit of Wycliffe Sirengo there was sufficient evidence to charge the petitioners with offences under the ***Anti-Corruption and Economic Crimes Act***.

15. Apart from supporting the 1st respondent's position regarding the application of **Article 157** of the Constitution, Mr Waudo, learned counsel for the 2nd respondent, submitted that the petitioners have not made out a claim for breach of fundamental rights and freedoms protected under Part 2 of Chapter VI of the Bill of Rights. As regards the claim under **Article 27** of the Constitution, counsel submitted that there was no discrimination as the 1st respondent was entitled to charge the persons against whom there was sufficient evidence. Counsel relied on the case of ***Thuita Mwangi and 2 Others v Ethics and Anti-Corruption Commission and Others*** NRB Petition No. 153 of 2013[2013]eKLR.

16. The 2nd respondent maintained that the petitioners could not assert a claim under **Article 47** for fair administration action based on legitimate expectation since the 2nd respondent does not have prosecutorial powers and could not give the petitioners any assurances or undertakings in regard to their prosecution. He referred to ***Republic v Director of Public Prosecutions and Another exp. Chamanlal Vrajilal Kamani and 2 Others*** NRB JR No. 78 of 2015[2015]eKLR where the court held a public body cannot make a promise that is against the express letter of the law.

17. Finally and in response to the contention that the petitioners have not been furnished with witness statements and the evidence that the prosecution intends to rely on, Mr Waudo was of the view that the right to the prosecution evidence only arose once the petitioners were charged and that the right to receive such evidence was protected under **Article 50(2)** of the Constitution. He further submitted that this right was available throughout the trial as was held in ***Dennis Edmond Apaa and 2 Others v Ethics and Anti-Corruption Commission and Another*** NRB Petition No. 317 of 2012[2012]eKLR.

Disposition

18. The issue for determination in this case is whether the respondents' actions in investigating and prosecuting the petitioners violated their fundamental rights and freedoms. In order to determine this issue, we must appreciate the nature and extent of the State's prosecutorial power. Such power is vested in the Office of the Director of Public Prosecutions ("ODPP") under **Article 157** of the Constitution, the pertinent part which provides as follows;

(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—

- a. *institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.*

19. The decision to institute criminal proceedings by the ODPP is discretionary and is not subject to direction or control by any authority as **Article 157(10)** stipulates that;

(10) 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 or her powers or functions, shall not be under the direction or control of any person or authority.

20. These provisions are replicated under **section 6** of the ***Office of the Director of Public Prosecutions Act, No. 2 of 2013*** in the following terms;

6. Pursuant to Article 157(10) of the Constitution, the Director shall—

(a) not require the consent of any person or authority for the commencement of criminal proceedings;

(b) not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law; and

(c) be subject only to the Constitution and the law.

21. In the **Stanley Munga Githunguri Case** the Court observed as follows, regarding the Attorney General's powers to institute proceedings under the former Constitution;

The Attorney-General in Kenya by section 26 of the Constitution is given unfettered discretion to institute and undertake criminal proceedings against any person "in any case in which he considers it desirable so to do."...this discretion should be exercised in a quasi-judicial way. That is, it should not be exercised arbitrarily, oppressively or contrary to public policy..." [Emphasis added].

The discretionary power vested in the ODPP must be exercised reasonably, within the law and to promote the policies and objects of the law which are set out in **section 4** of the **Office of the Director of Public Prosecutions Act**. These objects are as follows; the diversity of the people of Kenya, impartiality and gender equity, the rules of natural justice, promotion of public confidence in the integrity of the Office, the need to discharge the functions of the Office on behalf of the people of Kenya, the need to serve the cause of justice, prevent abuse of the legal process and public interest, protection of the sovereignty of the people, secure the observance of democratic values and principles and promotion of constitutionalism.

22. The court may intervene where it is shown that the impugned criminal proceedings are instituted for other means other than the honest enforcement of criminal law, or are otherwise an abuse of the court process. As the Kuloba J., observed in **Vincent Kibiego Saina v Attorney General, High Court Misc Civil Appl. No. 839 of 1999 (Unreported)**;

If a criminal prosecution is seen as amounting to an abuse of the process of the court the court will interfere and stop it. This power to prevent such prosecutions is of great constitutional importance. It has never been doubted. It is jealously preserved. It is readily used, and if there are circumstances of abuse of the process of court the court will unhesitatingly step in to stop it.

23. As the prosecutorial authority of the State is vested in the 1st respondent, it is only the 1st respondent who could give the petitioners assurances or undertakings forbearing to prosecute them. It is on this basis that I reject the petitioners' argument that the prosecution can be stopped on the ground of assurances given by the 2nd respondent. As counsel for the 2nd respondent pointed out, a legitimate expectation cannot be founded on a position that is clearly contrary to the Constitution and the law.

24. Have the petitioners shown that the respondents have abused their powers and violated the petitioners' rights. In considering this issue I must point out that this court is not the trial court and is not in a position to test the nature, credibility and veracity of the claims and counter claims regarding the procurement of the water pipes in Migori or the nature and extent of application of various provisions of the **Public Procurement and Disposal Act** and the regulations made thereunder. For one, the parties did not disclose all the information and material necessary for the court to make an informed decision on the issue. Further, any examination or analysis would be prejudicial to the petitioners should a trial ensue in the future. Since the petitioners have not demonstrated any ulterior motive for the prosecutions, I am prepared to accept that the ODPP had sufficient grounds to direct the prosecution of the petitioners who have now been charged.

25. I also reject the argument that the petitioners have suffered discrimination on account of the fact that they are the only members of the tender committee who have been subjected to prosecution. Such an

argument was rejected in *Hon. James Ondicho Gesami v Attorney General & 2 Others*, NRB Petition No. 376 of 2011 where the court observed that;

[68] The petitioner also argues that there has been failure of legal process and discrimination against him as he has been singled out for prosecution yet under Section 23(1) of the CDF Act, the Member of Parliament is only one member and should not be singled out for criminal prosecution. He also argues that such failure of legal process is manifested by his prosecution for the same offence that he is a witness to in Nyamira Criminal Case No 190 of 2011 Republic–v- Gilbert Ateyi Onsomu. [69]. With respect, I do not find anything discriminatory in the preferment of criminal charges against the petitioner. The DPP is at liberty to prefer charges against any party in respect of whom he finds sufficient evidence to prefer charges. I do not know of anything in the law that would require that all members of the CDF Committee for West Mugirango Constituency be prosecuted for alleged misappropriation of funds unless there was evidence against them. [Emphasis added]

26. As the petitioners have now been charged, **Article 50(2)** of the Constitution will apply to its fullest extent including the right of the petitioners to obtain in advance all the evidence the prosecution intends to rely on. Moreover, there is no allegation that petitioners will not obtain a fair trial.

27. The petitioners' case was also rooted in the argument that the issues raised by the 2nd respondent ought to have been pursued through the Procurement Regulatory Authority ("the Authority"), which is the successor of the Procurement Oversight Authority, established under **section 8** of the *Procurement and Public Disposal Act, 2015* ("the Act"). Under **section 9** of the Act, the Authority's mandate is to *inter alia* monitor assess and review the public procurement and asset disposal system to ensure that they respect the national values and other provisions of the Constitution, including **Article 227** and make recommendations for improvements; ensure that the procurement procedures established under this Act are complied with. **Section 9(2)** of the Act provides that, "*If in the course of monitoring in accordance with section 9(1)(a), the Authority is of the opinion that civil or criminal proceedings ought to be preferred against a State Organ, public entity, state officer or public officer, the Authority shall refer the matter to the relevant authorities.*"

28. I do not read **section 9(2)** of the Act to mandate the ODPP to seek approval or consult the Authority before directing a prosecution. Such a reading would run counter to **Article 157** of the Constitution for the reasons I have set out in paragraphs 18 and 19 above. The Authority is empowered to refer matter of a criminal or civil nature to any other relevant authority. In a case where a criminal offence is disclosed, such authority would be the ODPP. I would also add that the power of the Ethics and Anti-Corruption Commission to investigate corruption is not inconsistent with that of the Authority and nothing in the Act requires the Commission seek consent of the Authority to investigate procurement offences related to corruption and economic crimes or to refer such a matter to the ODPP. Since the ODPP is satisfied that an offence has been disclosed on the available material, the petitioner's prosecution cannot be interposed by the Authority.

29. The petitioners have not established a case for the reliefs sought. Their case lacks merit and it is now dismissed with no order as to costs.

DATED and DELIVERED at HOMA BAY this 1st day of March 2016.

D.S. MAJANJA

JUDGE

Mr Ojuro instructed by Otieno, Yogo and Ojuro and Company Advocates for the petitioner.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by Office of the Director of Public Prosecutions.

Mr Waudu, Advocate, instructed by the Ethics and Anti-Corruption Commission.