



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA

PETITION NO. 1 OF 2016

(J. A. MAKAU - J)

JOHN PAUL ODHIAMBO.....PETITIONER

VERSUS

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

THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. The Petitioner **ODHIAMBO OBONYO** on behalf of **JOHN ODHIAMBO** through a petition dated 10th July 2016 sought the following reliefs:-
 1. *A stay off the proceedings in Criminal Case in PMCRC 124 of 2015 at Ukwala Law Court.*
 2. *That the matter before Principal Magistrate's Court at Ukwala and scheduled for a defence hearing on the 12th February, 2016 and if this application is not heard the accused will be denied his fundamental Rights as enshrined in the stated rights under the Constitution of Kenya.*
 3. *Costs incidental to the proceedings.*
2. The petition is brought pursuant to **Article 21, 22, 23 and 50 of the Constitution of Kenya 2010**, which is on the face of the petition but not in the body of the petition.
3. The petitioner's case is briefly that the petitioner is an Advocate of the High Court of Kenya representing the accused **JOHN PAUL ODHIAMBO** in **PMCRC Case No. 124 of 2015** at Ukwala Law Courts, that the trial magistrate relied on facts which were fatally erroneous in putting the accused on his defence, that based on that the petitioner filed an application for acquittal of the accused as the charge sheet was fatally defective, which application was dismissed, that petitioner filed further application for leave to file an application for review of the said orders, which application was granted, that subsequently the case was set down for defence hearing on **12.2.2016** in absence of the defence counsel notwithstanding the accused had not filed his application for Review since the proceedings had not been typed, that the court must obey its own orders, that putting the accused on his defence before his application had been heard is manifestly unjust and erroneous, and that based on the above grounds the petitioner prayed for a stay of proceedings in **PMCRC 124 of 2015** pending the hearing and determination of this matter and the application for review.
4. The petitioner filed supporting affidavit dated 4th March 2016 in support of the petition attaching a copy of the lower court proceedings "**JPO1**" and deponed that the charge sheet was defective as the date of commission of the offence as stated in the charge sheet was the date the accused was arrested and that the accused was no where near the scene of commission of the offence on the date thereto, that the accused was arrested on 19th November 2015 and brought to court on 23rd

March 2015 in violation of his fundamental constitutional rights, that the prosecution's evidence was riddled with inconsistencies and the trial court erred in putting the accused on his defence. It is further deposed that alterations or amendments of the charge or substitution or additional of a new charge can only be made before the close of the pleadings which has already been overtaken by events. The petitioner consequently prayed for acquittal.

5. The 1st Respondent filed a Replying affidavit dated 31st March 2016 opposing the said petition and conceding to there being errors on the particulars of the offence as regards the correct date by inserting 19.3.2014 instead of 19.3.2015 as per charge sheet “**NLI**,” that on the delay the Respondent stated the prosecution gave explanation as evidenced in a copy of the proceedings before trial court on page 11, that the trial court made a ruling on matters raised on 23.10.2015, that there was no violation of fundamental rights and freedoms occasioned to the petitioner, that the matters raised in the petition were judicially addressed by the trial court, and any dissatisfaction should have been raised through an appeal, or review or revision of the subject decision, that the petition is frivolous, an abuse of the court process and the petition is only intended to delay just conclusion of the trial.
6. I have very carefully perused the petition, affidavit in support and annexures thereto, the Replying Affidavit and annexures thereto, written submissions by petitioner and authorities attached thereto, written submissions by the 1st Respondent and authority in support. The issues for consideration as I understand the petition and submissions can be summarized as follows:-
 1. ***Whether the petitioner in his claim of violation of fundamental rights and freedom has met the constitutional threshold to be granted constitutional reliefs sought: and/or whether the matters raised by the petitioner are constitutional ones and whether the same can be addressed by application of constitutional provisions?***
 2. ***Whether the Petition is frivolous and/or abuse of the court process?***
7. Under the Constitution of Kenya (**Protection of Rights and Fundamental Freedoms**) Practice and Procedure Rules, 2013, Under Rule 4(1) and (2) it is provided:

“4 (1) Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.

(2) In addition to a person acting in their own interest, court proceedings under sub rule (1) may be instituted by-

- i. ***a person acting on behalf of another person who cannot act in their own name;***
- ii. ***a person acting as a member of, or in the interest of, a group or class of persons;***
- iii. ***a person acting in the public interest; or***
- iv. ***an association acting in the interest of one or more of its members.”***

8. Under Rule 10 (1) (2) (a-g) The Constitution of Kenya (**Protection of Rights of Fundamental Freedoms**) Practice and Procedure Rules, 2013 it is further provided:-

“10 (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.

2. ***The petition shall disclose the following-***

- a. ***the petitioner's name and address;***
- b. ***the facts relied upon;***
- c. ***the constitutional provision violated;***
- d. ***the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;***
- e. ***details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;***

- f. *the petition shall be signed by the petitioner or the advocate of the petitioner; and*
- g. *the relief sought by the petitioner,”*

9. In the case of **Anarita Karimi Njeru V. The Republic (1976-1980) I KLR 1272** The court hearing Constitutional application held thus:-

“----- if a person is seeking redress from the High Court on a matter which involves a reference to constitution, it is important that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”

10. Further in the case of **Mumo Matemu V. Trusted Society of Human Rights Alliance & 5 Others Civil Appeal No. 290 of 2012**, Court of Appeal at Nairobi held thus:-

“the petitioner before the High Court referred to articles 1, 2, 3, 4, 10, 19, 20 and 73 of the Constitution in its title but provided little or no particulars as to the allegations and the the manner of the alleged infringements hence did not meet the principle in Anarita Kirimi Njeru case requiring that constitutional petitions be pleaded with reasonable precision. [Anarita Karimi Njeru v. Republic (1976-1980) KLR 1272]”

11. The petitioner in his petition has not disclosed as required by the provisions of the Constitution facts relied upon, Constitutional provision violated, and the particulars of the violation nor has he specifically stated the constitutional reliefs sought and further the reliefs sought in this petition with all due respect are not clear and are 1 believe uncertainable as the petitioner sought or prayed for:-

“a) That the fundamental rights of the accused in this matter to equal protection before the law will be violated by the 1st and 2nd respondents if the matter proceeds without review.

b) That the criminal case Number 124/2015 be stayed until the hearing and determination of this Application”

12. The constitutional reliefs which a petitioner can seek or be granted are well set out under **Article 23 of the Constitution of Kenya 2010**. **Article 23 (3) of the Constitution of Kenya 2010** provides:-

“(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including:-

1. *a declaration of rights;*
2. *an injunction;*
3. *a conservatory order;*
4. *a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;*
5. *an order for compensation; and*
6. *an order of judicial review.*

13. The Petitioner in the instant petition did not seek any of the constitutional reliefs as set out under **Article 23 (3) of the Constitutional of Kenya**. He did not set out with reasonable degree of precision that of which he complained of, nor did he state in the body of the petition the facts, the constitutional provisions with particulars of violation, by whom and in what manner they were violated nor the constitutional reliefs sought.

14. The matter raised by petitioner have already been judicially addressed and a decision made. The petitioner was heard and decision made in respect of his application. He was given right of appeal which he has not yet exercised. He has in this petition not raised any violation or infringement or breach of his constitutional rights as regards fair hearing as enshrined under **Article 50 of the**

Constitution of Kenya which provides:-

Article 50 (1) (2) (a), (q):-

“(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right-

(a) to be presumed innocent until the contrary proved:

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

15. The petitioner's main complaint is against the decision made by the court for reasons given in his petition. The court after hearing parties is obliged to give a decision and the fact that the court's decision is against party's expectation or wishes do not amount to a violation of fundamental Rights and freedoms or violation of constitutional rights. The petitioner in the instant matter may have good grounds of appeal but good grounds of appeal by themselves without facts establishing violation of constitutional provisions and particulars of violation cannot in my view be a basis for filing a constitutional Reference and especially where the law provides other avenues for seeking redress such as seeking review, revision or filing an appeal.

16. In view of the above I am satisfied that the petitioner in his claim of violation of fundamental rights and freedoms has failed to meet the constitutional threshold to be granted any constitutional reliefs and further more when he has failed to state the constitutional reliefs sought in his petition. The court should in my view not be left to speculate on the reliefs sought as is the case in this matter. The matters raised by the petitioner are in my view not constitutional issues and as such, they cannot be addressed by the application of constitutional provisions but by other provisions provided by other laws. The matter in my view would best be dealt with either in an appeal or in an application for review or revision. The petitioner's client, the accused, underwent all the stages of the hearing of the case upto the time the trial court ordered that he has a case to answer without raising any complaint as regards violation or breach or infringement of his constitutional rights. The issues raised came after the court declined to acquit the accused on no case to answer and after it rejected the petitioner's application for Review. I have perused the proceedings and all pleadings and the only step that is remaining is for the accused to give his defence or decline to do in accordance with his constitutional rights as enshrined in the constitution of Kenya 2010.

17. The accused is not estopped in his defences from raising the matters he has raised in his petition at the time of his defence and the court will be obligated to deal with the same. That by giving his defence or declining to do so will pave way for trial court to consider all issues before it and if the accused is aggrieved by the decision thereto, will have his constitutional rights to challenge the judgment on appeal and in doing so he will be exercising his constitutional rights to challenge the trial court's judgment on appeal. The Accused in the petition sought that this court acquit him of the charges he is facing at the trial court. This with all due respect would be wrongful and unconstitutional for this court to acquit him on a matter pending before a lower court. What the petitioner is seeking is for the High Court to interfere with independence of the judiciary and control the trial court's proceedings contrary to the provisions of the law and even when the trial is not before this court. The petitioner is wrong in seeking such unconstitutional relief and relief which is contrary to the provisions of the law.

18. **Article 160 (1) of constitution of Kenya 2010 prohibits** what the petitioner is asking this court to do.

Article 160 (1) of the constitution of Kenya 2010 provides:-

“(1) In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.”

19. The petitioner sought stay of the proceedings in **P.M.Criminal Case No. 124 of 2015 of Ukwala Law Courts**. I have already stated hereinabove that this is not one of the constitutional reliefs provided for in our constitution. So what are the guiding principles in granting stay of prosecution or proceedings in a Criminal Case? In this country most of the criminal cases are tried in the magistrates courts whereas the High Courts tries a few offences mostly murder or manslaughter. The purposes of trials are obviously to ascertain the truths of charges or charges levelled against an accused person through reception, evaluation and analysis of evidence adduced against an an accused person.

20. The prosecution is an independent institution which has powers to exercise prosecutorial powers in public interest.

Article 157 (6) (a) (10) and (11) of the Constitution of Kenya 2010 provides.

1. ***There is established the office of Director of Public Prosecutions.***
2. -----.
3. -----
4.
5.
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;***
 - b. -----
 - c.
7. -----
8.
9.
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 is or her powers or functions, shall not be under the direction or control of any person or authority.***
11. ***In exercising the powers conferred by this Article, the Director of Public Prosecutions shall 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.***
- 12.....

21. It is in the Public interest and Public Policy that a person reasonably suspected of having committed a crime should be tried in an independent court and if proved guilty, convicted and punished. The justice system does not guarantee an accused that trial courts would be infallible but only guarantees an accused that his constitutional rights including presumption of innocence and fair trial as enshrined under **Article 50 of the Constitution** would be enforced, thus he would get justice. Justice includes the public interest in getting the truths of the charges as well as interest in both the society and the accused in a fair process.

22. In stopping the D.P.P.'s prosecutorial powers the court should be guided by the following general principles, in a trial in exercises of such process as an institution the court should not interfere as it is the Public interest and Policy that a person reasonably suspected to have committed an offence should be tried by an independent court and if proved guilty he convicted and punished and if not proved guilty he be set at liberty, that the constitutional independence of other institution should be respected, that prosecution can be stayed or stopped only if there are good reasons to show there is an abuse of prosecutorial powers and of great significant the courts should restrain themselves even where there appear to be good reasons as a party has an opportunity to put his defence or address the court in his defence and state what he is aggrieved with, that there is no need of having parallel trials at the same

time and lastly justice system do not guarantee an accused person courts would not error in its hearing the matter or that it would be perfect but hasten constitutional rights which include fair trial and assumption of innocence amongst other rights as set out in **Article 50 of the constitution**. **The society's** interest in getting the truth cannot be guaranteed by staying the proceedings or stopping the prosecution for both the society and the accused person need the truth to come out and which can only be guaranteed by a fair trial.

23. The petitioner in praying for stay of the proceedings of P.M. criminal case No. 124 of 2015 has not stated the constitutional provisions which has been violated, in what manner and by whom. This court cannot interfere with constitutional independence of the Office of the Director of Public Prosecution by ordering stay of the proceedings in the on going prosecution of the accused at Ukwala PMCR 124 of 2015. The petitioner has not put forward any good reasons for reliefs sought and even if he did, I find that the petitioner will have an opportunity to put his defence forward and give those good reasons he has as to why the prosecution's case cannot succeed. That by staying the proceedings at the lower court or proceeding as sought by the petitioner to acquit the accused in a matter not before this court would be interfering with the independence of the trial court and would amount to having parallel trials of the accused at the same time. The petitioner is guaranteed that his constitutional rights to a trial and presumption of his innocence till proved guilty and as he has no course to be apprehensive, as his constitutional rights would be guaranteed in the trial. The petitioner before the trial court never raised the issue to the effect that he did not have a fair trial and that his presumption of innocence was violated in anyway. The trial court noted the petitioner was applying delaying tactics in the matter pending before it. I have carefully perused the trial court's proceedings and this petition before this court and I have no doubt that the accused has no interest in having this matter expeditiously determined. The petition has not in my view met the constitutional threshold to warrant granting orders sought and this petition was filed to delay determination of the trial and is as such an abuse of the court process.

24. I have evaluated petitioner's grounds for seeking stay of the proceedings before Principal Magistrate's court in criminal case No. 124 of 2015 at Ukwala and I am satisfied that the High Court is not the right forum to seek such a reliefs as the trial court which has been hearing the matter is still doing so, is best equipped to deal with quality, sufficiency and all issues relating to the evidence gathered in support of the charge. The trial court has gathered the evidence and it ought to deal with the legal issues concerning the deficiency (if any) of the charge. It would in my view be subversion of the law regarding criminal trials if the High Court would at such a stage usurp the functions of the trial court. It would further in view of the stage of this matter and taking into account that the accused has been put on his defence for the High Court to start interfering with independence of the trial court by descending into the arena to find out whether the charge is defective and whether the decision on the case to answer was arrived at properly. The accused was nevertheless granted leave to appeal against the ruling on case to answer and never moved to the High Court on appeal. The trial at this stage is being handled by a qualified, competent and independent Judicial officer whose final judgment is expected to comply with provisions of **Section 169 of the Criminal procedure code** and whose judgment is supposed to contain the point or points for determination, the decision on each point and reasons for the decision. The issues of concern and as raised by the petitioner shall be considered and the accused shall not be prejudiced. The petitioner at the lower court never raised the issue of there being unfair trial but that he was not happy with the outcome of the rulings of the trial court. I find the basis for the petitioner's misapprehension and the fears for the outcome unfounded as once judgment is delivered either in his favour or otherwise he won't be prejudiced as there is room to challenge the unfavourable decision. There has to be an end to litigation and stay do not result into an end of litigation but delays it, let the matter proceed to hearing and be determined as it is almost concluded and any aggrieved party shall be at liberty to pursue the matter at the next forum provided by law.

25. The upshot is that the petition is without merits and the same is dismissed. That though this matter is not of public interest I shall in the interest of justice order that each party bears its own costs.

I direct the Deputy Registrar of this court to supply a copy of this Judgment to the trial Magistrate and D.P.P. for their records and information.

DATED AT SIAYA THIS 2ND DAY OF JUNE, 2016.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN PRESENCE OF:

Mr. Obonyo for the Petitioner.

Mr. E. Ombati for the 1st Respondent

No appearance for the 2nd Respondent.

Court Clerk:

1. Kevin Odhiambo

2. Mohammed Akideh

J. A. MAKAU

JUDGE