



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**  
**PETITION NO. 164 OF 2016**

**BETWEEN**

**ASAAD KHAN ..... PETITIONER**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>st</sup> RESPONDENT**

**CORPORAL OBAO JOSEPH .....2<sup>nd</sup> RESPONDENT**

**CHIEF INSPECTOR NDOLO FIDELIS.....3<sup>rd</sup> RESPONDENT**

**AKIF VIRANI.....4<sup>th</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petitioner describes himself as a self-employed trader with business accounts with various business persons including the 4<sup>th</sup> Respondent. He confirms that the 4<sup>th</sup> Respondent supplied him with goods and after a delay in payment the 4<sup>th</sup> Respondent complained to the Police Service even though the 4<sup>th</sup> Respondent also owed the Petitioner money. The Petitioner was consequently summoned by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to appear before them. The Petitioner terms such treatment criminal and states that his constitutional rights under Articles 27,28, 29 and 159 of the Constitution have been contravened.

2. In consequence, the Petitioner seeks the following reliefs in the main:[sic]

- a. The Respondents be restrained from arresting and prosecuting the Petitioner*
- b. The Respondents be restrained against intimidating the Petitioner, subjecting him to indignity*
- c. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents be compelled to treat the Petitioner and the Respondent equally and in a no-discriminatory manner against the Petitioner*
- d. The Respondents do compensate the Petitioner for denial of his freedom and subjection to*

*indignity*

*e. The Respondents do pay the costs hereof*

### **Basic background facts**

3. The background facts appear straight forward and not in controversy.

4. The Petitioner deals in motor vehicle spare parts and repairs motor vehicles. The 4<sup>th</sup> Respondent deals in motor vehicle spare parts and accessories. They do so through their respective business names or companies.

5. On undisclosed date(s), the 4<sup>th</sup> Respondent supplied the Petitioner with spare parts and accessories worth Kshs 1.2 million. The Petitioner apparently failed to pay for the same. He then went mute on the 4<sup>th</sup> Respondent, switched off his phone and simply disappeared, according to the Respondents. The cheques the Petitioner had issued to the 4<sup>th</sup> Respondent were also returned unpaid.

6. On 24 April 2016 the 4<sup>th</sup> Respondent consequently, reported the matter to the Police Service and was attended to by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, who set to investigate the complaint and determine if the Petitioner was criminally culpable to warrant being charged in a court of law. The Respondents also issued summons to the Petitioner in the course of the investigations.

7. The Petitioner denies owing the 4<sup>th</sup> Respondent the amount of Kshs. 1,200,000/= and instead states that it is the 4<sup>th</sup> Respondent who owes the Petitioner. The denial and counter allegations have seen the Respondents investigate further and even rope in Documents' Examiner.

### ***The Petitioner's case***

8. The Petitioner's case is that the Respondents' actions in investigating him are only intended to harass the Petitioner as this is a purely civil dispute and the entire criminal process is being used to achieve the purpose of forcing the Petitioner to pay amounts he denies owing.

9. The Petitioner also states that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are not applying the law equally as they have failed to investigate and prosecute the 4<sup>th</sup> Respondent.

10. As a result the Petitioner contends that the Petitioner's rights to equal protection of the law, right to dignity and the right to freedom and security of person as respectively guaranteed under Articles 27, 28 and 29 of the Constitution have been violated or are under threat of violation.

### ***The Respondents' case***

11. Only the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents participated in these proceedings.

12. The Respondents' case may be discerned from the two Replying Affidavits sworn and filed by the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent depones to the fact that the investigations were prompted by a complaint lodged by the 4<sup>th</sup> Respondent with the Police Service.

13. The Respondents contend that they are simply exercising their constitutional duty to investigate the complaints and that this has been done within the ambit of the law. It is additionally contended that the Petition is pre-mature. The Respondents further add that the Petitioner has not been candid with both the court and the investigating officers.

14. It is also the Respondents' case that the Petitioner has not shown or established the manner in which the Respondents have violated the Petitioner's constitutional rights or how the Respondents have acted

contrary to the Constitution. According to the Respondents, the Petitioner has not proved his case to the requisite standards.

### **Arguments by the Parties**

15. The Petitioner's case was presented by Mr. A Khamati while Ms. J Kihara urged the Respondents' case. Both counsel effectively reiterated the parties' cases as outlined above.

16. Ms Kihara additionally stressed the need for this court to allow the police service as well as the Director of Public Prosecutions to perform their respective duties without any court interference. She urged the court to dismiss the petition, terming it "trivial".

17. Mr. Khamati focused on the need of the court to ensure that the police force even in the course of investigations did not wantonly and arbitrarily deny suspects their liberty. Mr Khamati also urged the court to ensure that the criminal justice system is not used for any other purpose.

### **Discussion and Determinations**

18. The core question for determination is whether the criminal proceedings herein which are at the real infancy stage of investigations ought to be halted for alleged abuse, by the Respondents, of the process and violations of the Petitioner's rights. The abuse allegedly fetched on the Respondents is that the criminal process is being used for purpose quite collateral to the intention of the criminal justice system.

19. There is no controversy that the 1<sup>st</sup> Respondent is enjoined through the Constitution under Article 157 as promoted and supplemented by the Office of the Director of Public Prosecutions Act No.2 of 2013 to undertake investigations, commence prosecutions and even terminate prosecutions. There is also no doubt that under Article 245(4) of the Constitution and the provisions of the National Police Service Act (Cap 84), in particular Section 24, the National Police Service is mandated to investigate criminal offences and also enforce the law.

20. The Constitution however also dictates that the Respondents do act within its confines: See Articles 157 and 244 of the Constitution. Article 244 in particular commands the National Police Service under whose wings the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents fall to "*comply with constitutional standards of human rights and fundamental freedoms*". Where therefore the constitutional muster is not met or where any act or omission is inconsistent with the Constitution then the court will always be called upon to intervene: see Article 165(3)(d)(ii) of the Constitution as well as the case of *as well as the case of Ndarua vs. Republic [2002] 1 EA 205.*

21. In the instant case the Petitioner does not contest the constitutional powers vested in the Respondents to investigate and curb crime through prosecution of offenders amongst other measures. Indeed, that should not be in dispute as any failure to investigate offences and prosecute offenders would mean a failure in the exercise of the Respondents' constitutional and statutory obligations: see **Republic vs. Commissioner of Police and Another Ex p Michael Monari & Another [2012]eKLR .**

22. There is also no dispute that the 4<sup>th</sup> Respondent lodged a complaint with the Police Service through the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The Petitioner however states that the process is being used for the wrong purpose and being abused. The Petitioner contends that the matter is a civil dispute. The Petitioner next contends that the summons to continue appearing before the investigators while the 4<sup>th</sup> Respondent is not similarly obliged are meant to put pressure on the Petitioner to settle the dispute.

23. It is true that where there is an abuse of the criminal justice process the court will intervene just the same way it does in civil proceedings and stay any such process to ensure that a proper administration of justice is attained and the public confidence in the process of litigation, whether criminal or civil, is also maintained. Thus in **Connelly vs. DPP [1964] 2 All E R 401 at 442**, Lord Devlin in asserting the powers of the court to intervene addressed the fundamental issue of the court interfering with the process brought

through the prerogative of the State as follows:

***“ Are courts to rely on the executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the executive of the responsibility for seeing that the process of law is not abused”***

24. Where therefore there is abuse of process the court will intervene: see **Williams vs. Spautz [1993] 2LRC 659 , Republic vs. Chief Magistrates Court at Mombasa Ex P Ganijee & another [2002] 2 KLR 703 and Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69.**

25. The central thesis of criminal law is that those suspected of voluntarily committing offence ought to be investigated and put to trial. Ordinary institution of investigatory and prosecutorial process or proceedings for a genuine purpose of obtaining conviction and punishment is thus not abuse. That would effectively be to use the court for the very process it was established. However if the purpose of any investigation or prosecution is to achieve a purpose separate from the intent of the criminal justice system then abuse of process must be deemed to have been established.

26. Criminal proceedings ought not to be invoked to settle personal scores or to advance personal interest. In **David Mathenge Ndirangu vs. Director of Public Prosecutions & 3 Others [2014] eKLR** at paras 37 & 39 in which the case of **R vs. Chief Magistrate’s Court at Mombasa Ex P Ganijee & Another [supra]** was cited with approval, the court was clear that:

***“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement or frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth...When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court...In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in...”***

27. A similar position had earlier been expressed in the cases of **R vs. Director of Public Prosecutions & Others Ex P Qian Guo Juan & Anor [2013]eKLR** and **Kuria & 3 Others vs. Attorney General [supra]**.

28. I have no quarrel with the principles and pronouncements discernible from the above case law. I however hasten to add that it does not however follow that criminal and civil proceedings cannot run concurrently. An investigation may be commenced by the Police service notwithstanding the existence of a civil claim. By the better reason as well, a civil claim may be commenced notwithstanding any on-going criminal proceedings or investigations. That, in my understanding, is what Section 193 A of the Criminal Procedure Code (Cap 75) stands for when it provides that :

***“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”***

29. Of course caution must be exercised where a seemingly civil dispute appears to have a criminal trajectory and investigations or prosecution is invited. In their discretion, both the Director of Public Prosecutions and the National Police service must decide whether it would be in the best interest of the administration of justice to run the two jurisdictions concurrently. In my view, an appropriate though not necessarily the exclusive question to ask is whether the two courts ( civil and criminal) are likely to decide in opposite directions given the specific facts of each case.

30. In the instant case, the Petitioner has alleged that the investigatory process is being to coax him into settling a disputed debt.

31. I have reviewed the facts as stated and do not think that the position is as stated by the Petitioner. It is clear that a complaint was made by the 4<sup>th</sup> Respondent and the other Respondents had to act. There is no evidence that the 4<sup>th</sup> Respondent influenced the other Respondents in any way. The evidence that is easily discernible and acceptable is that the Petitioner owes the 4<sup>th</sup> Respondent money. The counter claim by the Petitioner that he is also owed money appears doubtful in view of the findings, thus far unchallenged and untested, by the Document Examiner that certain invoices could have been forged. There is also preliminary evidence that the Petitioner issued cheques which were dishonoured upon presentment. I hold the view that the Respondents had a basis to commence investigations into an alleged offence . I also find and so hold that the 1<sup>st</sup> , 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have not abused their respective constitutional powers or the criminal justice process to warrant any interference by the court.

32. On the alleged violation of constitutional rights, the law is clear that it is incumbent upon a petitioner to not only plead but also prove his claims. There is no evidence before me that the Petitioner has not been accorded equal treatment under the law. The basis of this allegation was that the Petitioner had also lodged a complaint against the 4<sup>th</sup> Respondent which is yet to be investigated. The complaint was that the 4<sup>th</sup> Respondent used abusive language towards the Petitioner. By the Petitioner’s own admission however the Petitioner states at paragraph 5 of his Further Affidavit filed on 11 July 2016 that the complaint has been attended to and *“the 4<sup>th</sup> Respondent is currently on bond awaiting to be charged “*. That is not a fact that points towards bias or differentiation.

33. With regard to the allegation that the Petitioner’s right to security and freedom of person has been violated, it is my view and finding that the Petitioner did not avail the evidence to illustrate any such violation. To be summoned to attend before an investigating officer or even to be bonded to attend before an investigating officer would not fall in the realm of denying an individual his freedom of person. To amount to a violation of that right, there must not just exist a deprivation of physical freedom but the deprivation must be without any just cause and arbitrary. There is no evidence of such arbitrary deprivation of the Petitioner’s physical freedom. Likewise and in my view, the deprivation, if at all, was and is procedurally fair and in accordance with explicit provisions of statute ; being section 52 of the National Police Service Act,2011.

### **Conclusion and disposal**

34. Having considered the circumstances of this case together with the facts as laid before me, I am not convinced that the Respondents in investigating the Petitioner acted in abuse of their respective offices to warrant any intervention in the on-going criminal justice process. Further, in view of the fact that the investigations are still on-going, in the circumstances of this case, I would agree with the counsel for the Respondents that the Petition was premature, if not “trivial”.

35. The investigations may proceed and let the 1<sup>st</sup> Respondent freely determine whether or not to prosecute the Petitioner.

36. In the result, the Petition is dismissed but with no order as to costs.

**Dated, signed and delivered at Nairobi this 7<sup>th</sup> day of September, 2016.**

***J.L.ONGUTO***

**JUDGE**