



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CONSTITUTIONAL & HUMAN RIGHTS DIVISION,NAIROBI

PETITION. NO. 224 OF 2015

BETWEEN

JANE WAWIRA MUGO.....1ST PETITIONER

NICHOLAS GICHOHI.....2ND PETITIONER

AND

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

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

DIRECTOR OF CRIMINAL PROSECUTIONS.....3RD RESPONDENT

AND

JULIET MUKAMI THEURI.....INTERESTED PARTY

JUDGMENT

Introduction

1. The Petitioners seek to challenge the 1st Respondent's prosecutorial powers as well as the process of investigations that led to the Petitioners' arrest and ultimate arraignment in court. It is the Petitioner's contention that the Respondents abused the provision of Article 157(11) of the Constitution. The Petitioners also allege that Articles 157(11) of the Constitution. The Petitioners also claim allege that Articles 27, 47, 49 and 50 of the Constitution have also been violated.

2. The Petitioners seek to quash the decision of the 1st Respondent to prosecute the Petitioners in Milimani Criminal Cases No. 894 of 2015, 888 of 2015 and 889 of 2015.

3. The Petition was opposed by both the Respondents as well as the Interested Party.

Basic background facts

4. The background facts are hardly in dispute. The facts may be retrieved from the Petition and the various affidavits filed in support by the Petitioners. The affidavits were filed on 27 May 2015, 29 May

2015 and 17 June 2015. The Respondents also filed a Replying Affidavit on 8 June 2015.

5. The 1st Petitioner states that she is a licensed private investigator. That in January 2015, she was instructed by the 2nd Petitioner to investigate the Interested Party for allegedly obtaining money by false pretence in the matter of the purchase by the 2nd Petitioner of all that property known as Title No. Kajiado/Loodariak/8497. The Petitioners following revelations through the 1st Petitioner's investigations lodged a complaint with the Police Service under OB No. 66/19/03/2015. Both Petitioners were however shortly arrested for impersonation of police officers apparently following a complaint by the Interested Party in May 2015. The Petitioners were then promptly charged with the offence of impersonation in Criminal Case No. 894 of 2015.

6. The 1st Petitioner was also charged with abduction and confinement in Criminal case No. 889 of 2015 following the private investigations conducted by herself at the instance of one George Khaniri on a Mr Afzal Ahmedali Shah. George Khaniri had already lodged a complaint over Mr. Afzal Ahmedali Shah's conduct with the police service under OB No. 22/17/04/2014.

7. Finally, the 1st Petitioner is also charged with the abduction of one Geoffrey Gichuhi Gaitho in Criminal case No. 888 of 2015. The 1st Petitioner states that she had been instructed by the spouse to the said Geoffrey Gichuhi Gaitho to investigate infidelity on the part of her husband.

8. The Respondents do not contest the facts but add that the 1st Petitioner allegedly exceeded her brief as a private investigator in all the instances.

9. In the case of the Interested Party, the Petitioners' arrest was prompted by the Interested Party after the Petitioners allegedly harassed the Interested Party in the latter's law firm whilst pretending to be police officers. In the case of Afzal Ahmedali Shah, the Respondents state that the Petitioner unlawfully confined the said Afzal Ahmedali Shah to more than six hours until some payment was made in settlement of some monetary payment. Finally, in the case of Geoffrey Gichuhi Gaitho, the 1st Petitioner is alleged to have intimidated and snatched the complainant's phone to enable the Petitioner to access private messages and videos.

Petitioners' case

10. The Petitioners' case is straight forward.

11. The Petitioners seek an order to stop their prosecution. They state that the Respondents have behaved in total violation of the Constitution in failing to investigate both the Interested Party as well as the said Afzal Ahmedali Shah. The Petitioners also state that there has been a violation of Article 47 of the Constitution as the Respondents never gave the Petitioners any information for charging them.

12. Finally, the Petitioners claim that their right to information has been violated by the Respondent denying the Petitioners access to the evidence that the Respondents seek to rely on in prosecuting the Petitioners. The Petitioner also contend that the criminal charges against them have been brought in bad faith and with ulterior motives as the 1st Petitioner had lodged complaints against the same police officers now handling the criminal charges against the Petitioners.

13. Respondents' case

The Respondents' case is contained largely in the Replying Affidavit of Corporal Steven Wachira.

14. The Respondents assert that the investigations undertaken following complaints had revealed that the Petitioners were criminally culpable hence the decision by 1st Respondent to institute criminal proceedings against the Petitioners. The Respondents further contend that the Petitioners' rights have not been violated in any way as the Petitioners were informed of the reasons for their arrest under Article 49

of the Constitution. Further, the Respondents state that the Petitioners are yet to request for the evidence to be tendered in the criminal proceedings for the simple reason that the Petitioners are yet to take plea.

15. The Respondents contend that the Petitioners have not proved their case to the requisite standards.

Arguments by the Parties

16. The Petitioners were represented by Ms. Angela Mwadumbo who urged the Petitioners' case orally before me besides having filed written submissions. Ms. Frida Ombogo appeared for the Respondents while Mr. Guandaru Thuita argued the Interested Party's case.

Petitioners' submissions

17. The Petitioners' counsel submitted that the Petitioners' constitutional rights had been grossly violated.

18. Counsel submitted that the Petitioners were never afforded equal protection of the law as they were never given any chance to record cautionary statements before being taken to court. Instead, the Petitioners in all the instances when they were arrested and charged were taken to court the next day following their arrests. Counsel was of the view that the complaints could not be lodged and on the same day the investigations are completed and the suspects then charged in court the following day. Counsel stated that the charges seemed to have been long laid and the process of initiating the criminal proceedings was simply settled once the 1st Petitioner had complained to the Independent Policing Oversight Authority.

19. Counsel stated that the Respondents had abused their constitutional powers and the court was enjoined to intervene and stop the criminal proceedings.

20. In support of the Petitioners' case, Ms. Mwadumbo referred to the cases of **Peter George Anthony D'Costa vs. The Attorney General & Another [2013] e KLR** for the proposition that the court has inherent powers to intervene and stop any abuse of the court process, and that where the process was not being honestly and properly used then the process had to be halted. Reference was also made to the cases of **Mitesh Mahendrakumar Shah vs. Commissioner of Police & 3 Others [2012] e KLR** and **Mohammed Gulamhussein Fazal Karmali vs. The Chief Magistrates' Court Nairobi & another [2006] e KLR** for the same proposition.

21. In urging the court to halt the criminal proceedings, Ms. Mwadumbo submitted that the facts of the case illustrated that the criminal process was being used and applied vindictively and vexatiously. Her reasoning was that, the 1st Petitioner had lodged a complaint against the police service with the Independent Policing Oversight Authority.

Respondents' submissions

22. The Respondents' counsel submitted that the Respondents were simply executing their constitutional duties following legitimate complaints lodged by individuals who had also recorded detailed statements with the Respondents. Counsel submitted that the complaint by the 1st Petitioner to the Independent Policing Oversight Authority against one police officer could not have prompted the criminal proceedings as the said Authority is an independent body and can not in any way be influenced.

23. Counsel denied that any of the Petitioners' rights had been violated and then relying on the case of **Modevao vs. Department of Labour** submitted that the public interest dictated that the court process be always allowed to run its course. Counsel also referred to the case of **R vs. Commissioner of Police Ex P Michael Monari & another [2012] e KLR** for the proposition that the police were under a duty to investigate all crime and complaints once made.

24. The Respondents' counsel referred the court to the decision in **Beatrice Ngunyo Kamau & Others vs. Commissioner of Police & 3 Others [2013] e KLR** where it was held that:

“[22] The point being made above is that the DPP though not subject to control in exercise of his powers to prosecute criminal offences, must exercise that power on reasonable grounds. Reasonable grounds, it must be noted, cannot amount to the DPP being asked to prove the charge against an accused person at the commencement of the trial but merely show a prima facie case before mounting a prosecution. The proof of the charge is made at trial”.

25. Ms. Ombogo concluded by stating that the Respondents had shown that there was merit in the prosecution of the Petitioners. Additionally, the Petitioners would have the opportunity to challenge any evidence tendered before the trial court.

26. The Interested Party’s counsel supported the Respondents’ submissions whilst adding that the Petitioners had not established that there was any connivance between any of the complainants, including the Interested Party, and the Respondents.

Discussion and Determinations

27. The Petitioners’ alleged that their rights under Articles 27(4), 27(5), 47(1), 49(2), 50(1), 50(2)(a), 50(2) (j) and 50(4) of the Constitution had been violated. The Petitioners also alleged that the 1st Respondent had acted in complete violation of Article 157(11) of the Constitution. In consequence the Petitioners seek to have the court quash their impending trials in Criminal Cases Number 894 of 2015, 888 of 2015 and 889 of 2015 all pending before the Magistrates’ Court at Milimani Nairobi.

28. The core question for determination is whether the criminal proceedings ought to be halted for the alleged violation of the Petitioners’ rights and or the alleged abuse by the Respondents of the investigatory and prosecutorial powers.

29. There is no doubt that the 1st 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, initiate 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) the National Police Service is mandated to investigate criminal offences and also enforce the law. The Constitution however also dictates that the Respondents must act within its confines and the court will always be called upon to intervene where any act or omission is inconsistent with the Constitution: see Article 165(3)(d)(ii) and 157(11) of the Constitution as well as the case of **Ndarua vs. Republic [2002] 1 EA 205**.

30. It is clear from Articles 157 and 245 of the Constitution that the 1st Respondent may direct the police service on who and what to investigate while the 1st Respondent must act free of any person’s control or direction. The 1st Respondent’s powers to prosecute will however be interfered with where it is shown by tangible evidence that the 1st Respondent in exercising his wide prosecutorial powers has acted; i) against the public interest (ii) against the interests of the administration of justice and; iii) has abused the legal process: see Article 157(11).

31. An array of cases also establish the propositions that where the criminal justice system is being used for any other reason other than its known purpose or that where the prosecution as commenced has no foundation basis then the court will invoke its inherent jurisdiction and prohibit the prosecution: see for example **Githunguri vs. Republic [1985] KLR 91**, **Jared Benson Kangwana vs. The Attorney General, H.C. Misc. Appl. No. 446 of 1995**, **Republic vs. Attorney General Ex P Kipngeno Arap Ngeny High Court Civil Application 406 of 2001**, **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69**, **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi [2007] 2 EA 170**, **Republic vs. Chief Magistrates’ Court Mombasa Ex P Ganijee & Another [2002] 2 KLR 703** and also **Kenya Commercial Bank Limited & 2 Others vs. Commissioner of Police & Another HCCP No. 218 of 2011 (NBI)** among others.

32. In **Githunguri vs. Republic (Supra)**, the court observed as follows;

“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.....”

33. The above appreciation is to be extended to the fact that the 1st and 2nd Respondents as constitutional offices ought to be allowed to operate and perform their respective constitutional mandates within the confines of the Constitution and with minimal or no superintendence by even the court. It is in the public interest that criminals are brought to justice through the due process which also ensure that the criminal justice process is not brought into disrepute: see **Godfrey Mutahi Ngunyi vs. Director of Public Prosecutions & 4 Others [2015]eKLR**. Intervention by the court should only be in the case of exceptional circumstances; otherwise constitutional bodies ought to be left to undertake their constitutional mandates without interference.

34. In the instant case, the Petitioners claim that the Respondents have been driven by malice in commencing their prosecution. The Petitioners point to the Respondents’ alleged failure to investigate the complaint properly. The Petitioners also point to the fact that the 1st Petitioner had lodged a complaint with the Independent Policing Oversight Authority and additionally to the fact that the complaints were lodged at the Nairobi Area police station, instead of Parklands Area police station.

35. I have reviewed the affidavits filed alongside all the documents annexed.

36. There is no dispute that complaints were lodged with the Respondents by third parties, one of them being the Interested Party. The complainants alleged criminal malfeasance on the part of the Petitioners. The 2nd and 3rd Respondents had to oblige Section 24 of the National Police Service Act and investigate the complaints. Failure to do so would have meant a failure in the exercise of their constitutional and statutory obligations: see **Republic vs. Commissioner of Police and Another Ex P Michael Monari & Another [2012]eKLR**. It would have also meant failing the very public that employs and pays the Respondents. The investigations were not even self generated to prompt an inference of malice. The complainants were ordinary citizens seeking justice.

37. The Petitioners complain that in all the instances, they were quickly arraigned in court the day following their arrest. That is the law, a constitutional edict. Article 49(1)(f) of the Constitution expressly provides that an arrested person be brought and placed under judicial authority not later than twenty four hours after being arrested and to be, at the first court appearance, charged. The fact consequently that the Petitioners were arraigned in court immediately would not go to point to the fact that their arrest and subsequent prosecution was preordained.

38. The fact that the Petitioners were brought to court within 24 hours of their arrest would however bring to question when the complaints were made and when the arrests were made. As already stated, the police service must investigate complaints once lodged with them. The Petitioners complain that the complaints were never investigated. The Respondents contend otherwise.

39. The complaint which led to the Petitioners’ arrest and subsequent indictment on offence of impersonating police officers in Criminal Case No. 894 of 2015 was lodged on 14th May 2015. The same day the Petitioners were arrested and the next day on 15th May 2015 they were arraigned in court. The charge sheet reveals that the Director of Public Prosecutions has lined up four witnesses including the complainant. That would be an indication that there were investigations undertaken to even end up with the additional witnesses. Besides, the law does not prohibit the Respondents from arraigning in court arrested suspects and causing them to be charged. Indeed, the criminal law procedure allows for the detention of suspects and accused persons even pending the finalization of investigations.

40. I am unable to find, on the basis of the evidence availed to me, that the Respondents did not investigate the complaint by the Interested Party but were rather simply determined to lay trumped up charges against the Petitioners.

41. The 1st Petitioner also faces two other distinct charges of abduction with intent to confine and wrongful confinement contrary to Section 259 and 263 of the Penal Code. The charges were registered in Criminal Cases No. 888 of 2015 and 889 of 2015 at Milimani Court Nairobi. The 1st Petitioner was, with regard to these two cases, once again arrested on 14th May 2015 and appeared in court on 18th May 2015. The incidents relating to the two alleged offences are stated in the particulars of the offence to have chanced in December 2014 and March 2015. The complaint in Criminal Case No. 888 of 2015 was made on 30th April 2015, that was full two weeks prior to the 1st Petitioner's arrest. I would agree with the Respondents that the complaint must have been investigated hence the witnesses lined up.

42. With regard to Criminal Case No. 889 of 2015, there is no indication whatsoever when the complaint was made. Once again, the Respondents have lined up witnesses. The Respondents also insist that the complaints were investigated and the investigations revealed the 1st Petitioner's criminal culpability.

43. I have read and reviewed the evidence availed by both parties. I am unable to fault the Respondents. On the face of the documents the Respondents appear to have had a reasonable basis to commence the prosecution in all the instances. The 1st Petitioner claims that the evidence reveals that the 1st Petitioner was able to bring a creditor and his debtor to a negotiating table and that there was no incident of abduction or confinement. However, it would only be appropriate that such evidence is tendered before the trial court and sieved thereat rather than before this court.

44. Ideally, it is not for this court to sieve the evidence settled upon by the 1st Respondent. The trial court is enjoined to undertake such a task and ascertain the veracity as well as the sufficiency thereof. As was stated in the case of **Danson Buya Mungatana vs. Attorney General & 2 Others [2012] eKLR**.

“The duty of the Court in a Constitutional Petition is not about analyzing the sufficiency of evidence. That must be left to the trial court. It will suffice for the Respondents to demonstrate that they have a reasonable or probable case that an offence may have been committed and therefore the accused persons should stand trial”.

45. The evidence now tendered by the 1st Petitioner as to being a registered private investigator who is licenced to carry walkie-talkies is much more relevant before the trial court where the 1st Petitioner may use the same to mount her defence, than before this court: see **Meme vs. Republic & Another [2004] 1 KLR 637**.

46. Malice was also alleged by the Petitioners by stating that the purpose of the prosecution was to intimidate the Petitioners as the 1st Petitioner had lodged a complaint with the Independent Policing Oversight Authority.

47. In my view, the Petitioners were not able to establish that there was an irrefutable nexus between their prosecution and the complaint lodged with the Independent Policing Oversight Authority. The evidence was simply lacking and all the Petitioners could do was to invite the court to conjecture by relating the fact that the matter was being dealt with at Nairobi Area Police Station. I hold the view that the explanation by the Respondents that the complaint to Independent Policing Oversight Authority was made by the 1st Petitioner against an officer stationed at Parklands Police Station ought to be plausible explanation as to why the Petitioners' cases were being handled from Nairobi Area Police Station.

48. Additionally too, I see no reason why the Respondents duty to investigate crime and prosecute possible offenders including, in good faith, those who have complained to the Independent Policing Oversight Authority, ought to be halted simply by reason of a complaint. In the instant case, it has further not been contested that the independent investigations on the alleged misconduct by a member of the police service is still continuing.

49. The Petitioners also complained that their right to fair administrative action was inhibited when the Respondents did not avail them an opportunity to contest or reply to the complaints. Nothing in the

Constitution bound the Respondents to involve the Petitioners and for all circumstances, nothing stops the Respondents from involving the suspects. It is not mandatory however as the same Constitution adequately provides for the requisite safeguards under Article 49(1). Under the Article, the arrested person is entitled to be informed of the reasons of his arrest and also to be informed of the right to remain silent among other rights. I did not hear the Petitioners to complain that their right under Article 49(1) and Article 50(2)(b) had been violated and in the circumstances of this case no prejudice has been illustrated as having been fetched upon and suffered by the Petitioners.

50. The Petitioners also complained that they had been locked out of the evidence that the Respondents intended to tender during trial and hence the right to a fair trial was being impeded. In this regard, the Petitioners stated that their right to information under Article 35 had been violated.

51. Article 50(2)(j) of the Constitution demands of the prosecution a duty to inform an accused person of the evidence and to grant reasonable access to the same. In the instant case, it is not in dispute that the Petitioners are yet to take their pleas. It is at that stage of the proceedings in any criminal trial that accused persons ought to be availed with the evidence. The process must always continue however to ensure that an accused person has a reasonable opportunity to prepare his or her defense and not be caught up by surprise. The brazen reference by the Petitioners to Article 35 of the Constitution would therefore find no place in the circumstances.

Conclusion

52. Having considered the circumstances of this case together with the facts as laid before me, I am not convinced that Respondents in initiating Petitioners' prosecution acted in abuse of their respective offices to warrant any intervention in the criminal cases. I am further not convinced that any of the Petitioners' constitutional rights have been violated. The Petition ought to fail and fails in its entirety as no evidence was placed before me to convince me otherwise.

Epilogue and disposal

53. There is no doubt that the 1st Petitioner is engaged in a perilous business or undertaking. She is a private eye. She will in the course of her business cross many ungodly paths perhaps. She will create enemies of the people she is tasked to investigate. She must however, like all private investigators act within the confines of the law. Where she therefore is alleged to have crossed the line, the Respondents may be invited to act as happened in the instant case. I find that the circumstances of the Respondents' intervention in the instant case appeared to have been justified, both legally and factually, and this court ought not to interfere at all.

54. The prosecutions as commenced by the Respondents may proceed. I am unable to make any orders in favour of the Petitioners for the reasons advanced above.

55. In the result I dismiss the Petition but with no order as to costs.

Dated, signed and delivered at Nairobi this 7th day of September 2016.

J.L ONGUTO

JUDGE