REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 53 OF 2016

IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE CONSTITUTION AND FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 20(2), 22, 47, 50, & 165 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: 1. ELIAKIM OKUMU OGENG

2. MOSES TOROTICH KIRUI

3. JUDY CHEPKOECH NGETICH

BETWEEN

ELIAKIM OKUMU OGENGA

MOSES TOROTICH KIRUI

JUDY CHEPKOECH NGETICH…...….APPLICANTS

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS

THE INSPECTOR-GENERAL OF THE KENYA POLICE SERVICE

THE DISTRICT CRIMINAL INVESTIGATIONS OFFICER MSA COUNTY

URBAN POLICE STATION, MOMBASA…….....RESPONDENTS

RULING

1. In the application dated 18th October, 2016 and filed on 19th October, 2016, the Petitioners/Applicants sought a host of orders including in accordance with the Petition of even date therewith, a conservatory order restraining the Director of Public Prosecutions from prosecuting the Applicants in Mombasa Criminal Case No. 152 of 2016 charging them with the offence of conspiracy to commit a felony contrary to Section 393 of the Penal Code (Cap 63, Laws of Kenya).

The Applicants' Case

2. Apart from attacking the Charge Sheet as being defective, the Applicants' counsel Mr. Igunza put emphasis upon paragraph 9 of the Affidavit of Judy Chepkoech Ngetich sworn on 18th October, 2016, in support of the Petition, and the Originating Notice of Motion, the subject of this Ruling.

3. The Applicants say that since similar charges against them had been withdrawn by the Director of Public Prosecutions (DPP) on the ground that there was no evidence to sustain such charges against them, no new evidence or material had been shown to them to warrant the preferment of similar charges against them. They charged that their intended prosecution was abuse of office by the Director of Public Prosecution, that the charges are tramped up, based upon **half-baked, skewed** investigations and only geared towards incarcerating the Applicants, and later abandon the charges and and thereby embarrass the Applicants. The Applicants say that they live in constant fear of arrest by the Second and Third Respondents. They plead that they are entitled to fair and just administrative action in terms of Article 47 of the Constitution, and the provisions of the Fair Administrative Action Act, 2015. They should not be subjected to one decision at one point and another decision at the later stage, and upon the same set of facts.

4. Mr. Igunza, counsel for the Applicants pleaded that the process is flawed, that the new charges lacked particulars, that the Applicants do not know what the transactions are for which they are being charged, and says that the new charges are a gross violation of the Petitioners rights. They therefore earnestly plead that the application be allowed.

The Respondents Case

5. The application was however opposed on behalf of all the Respondents. Mr. Muteti, Senior Deputy Director of Public Prosecutions, informed the court that he would argue against the application on pure points of law, as he had not filed any Affidavit in response thereto.

6. The Respondent's case was that, there was no material to show that the Director of Public Prosecutions was acting unlawfully, in excess of his authority or powers, or had taken into account irrelevant matter or consideration, or that the decision of the Respondents as a whole is unreasonable in the **Wednesbury** principles of unreasonableness that it was so devoid of logic that no person, properly exercising his mind and taking into account all relevant considerations would have come to that decision.

7. In addition, counsel argued, there was no basis for allegations of malice, or that the Director of Public Prosecutions had no power to charge the Applicants. Counsel was of the view that the application was misconceived and had no basis in law and the outcome of it should be one, dismissed.

8. It was this counsel's submission that whether or not the particulars of the charges were clear was a matter for the trial court, not this court. In support of this submission, counsel relied on the provisions of Sections 134-137, of the Criminal Procedure Code which govern the manner of framing charges, and the provision of particulars. There were two charges, counsel submitted, **one** conspiracy to steal a sum of Kshs. 1.9 million, and the **second**, stealing contrary to Section 268 as read with Section 275 of the Penal Code, and particulars are provided in respect of each count.

9. On the question of forum, counsel submitted that the question of the defectiveness of a charge cannot be raised in a Constitutional Petition. It is not the proper forum. The proper forum is the trial court. In this regard counsel relied on the decision of the Supreme Court of India in **DR. B. SINGH VS. UNION OF INDIA & OTHERS** on 11th March, 2004 in Writ (Petition) NO. 122 of 2004 where the court on the question of **"public interest"** litigation, the court observed –

> **"…Public Interest Litigation which has now come to occupy an important field in the administration of law should not be "publicity interest litigation" or "private interest litigation" or "politics interest litigation" or the latest trend "paise income litigation". If not properly and strictly regulated at least in certain vital areas or spheres and abuse averted it**

becomes also a tool in unscrupulous hands to release vendetta and wreck vengeance, as well to malign not only an incumbent to be in office but demoralise and deter reasonable or sensible and prudent people even agreeing to accept highly sensitive and responsible offices for fear of being brought into disrepute with baseless allegations. There must be real and genuine public interest involved in the litigation and concrete or credible basis for maintaining a cause before court and not merely an adventure of knight errant borne out of wishful thinking. It cannot also be invoked by a person or a body of persons to further his or their personal causes or satisfy his or their personal grudge and enmity. Courts of justice should not be allowed to be polluted by unscrupulous litigants by resorting to the extraordinary jurisdiction."

10. Mr. Muteti also relied upon the decision of this court in **Christopher Mbugua Kiiru vs. The Inspector-General of Police & 3 others [2015]eKLR** in which Muriithi J held **inter alia** –

"The judicial review or constitutional court cannot be used as a substitute to, or a summary procedure in lieu of, the full length criminal trial with fair trial protections before the magistrate's court ordained by the Criminal Procedure Code, unless it can be shown that the trial has offended or is likely to offend the accused person's constitutional rights or rights to natural justice."

11. Counsel for the Respondents also reiterated that the Director of Public Prosecutions reserves the discretion under Section 5(4)(e) of the Director of Public Prosecution Act, to review its decision to launch a prosecution or terminate such prosecution. There could be new material. The materials referred to and annexed to the Supporting Affidavit of Judy Chepkoech Mengich referred to antecedent facts, which were no longer applicable or stand alone. There is consequently no material upon which to impugn the decision to charge the Petitioners on similar charges which had earlier been withdrawn.

Analysis and Determination

12. The issue raised by the Petition and the concomitant Originating Notice of Motion is whether the Director of Public Prosecutions has power to charge a person with the same offence where charges had been withdrawn under Section 87(a) of the Criminal Procedure Code. Section 87(a) provides as follows –

"87. In a trial before a subordinate court, a public prosecutor may, with the consent of the court or in the instructions of the Director of Public Prosecutions, at any time before Judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal –

(a) if it is made before the accused person is called upon to make his defence, he shall be discharged , but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts;

(b) if it is made after the accused person is called upon to make his defence, he shall be acquitted."

13. The provisions of Section 87(a) are clear. It grants a public prosecutor discretion to withdraw charges on his own account, and in that event, the consent of the court is required. The public prosecutor may also withdraw the charges on instructions of the Director of Public Prosecutions, and in that event, the consent of the court does not appear to be required. The consequences of such withdrawal in either instance are the same. The accused person is entitled to be discharged. The withdrawal of charges does not however remove the **sword of Damocles** from the discharged person's head. It remains hanging on his/her head. The discharge does not operate as a bar to subsequent proceedings against his/her **on the same facts**.

14. This provision therefore precludes the Petitioners/Applicants from arguing that there are no new facts upon which they or anyone of them may subsequently be charged. There is no obligation on the Director

of Public Prosecutions to adduce new facts, except upon the trial itself.

15. The techniques which the courts have developed to curb the powers of the Director of Public Prosecutions is to ensure that the decision to prosecute is not motivated by malice or other ulterior motives, or that the decision is so unreasonable in that the Director of Public Prosecutions has taken into consideration irrelevant matters so that such decision cannot meet the test of reasonableness in the **Wednesbury** sense, that no decision-maker properly addressing his mind to the law, the facts and the circumstances of the case could have come to the decision to charge the Petitioners or Applicants on the same facts.

16. Lastly, the efficacy or defectiveness of charges is a matter for the trial court under both Section 89(5) and Sections 134-137 of the Criminal Procedure Code. The proper forum is the trial and not the High Court sitting on determination of alleged violation or infringement of the rights or fundamental freedom of an Applicant/Petitioner.

17. In the circumstances, I am of the considered view that the application is entirely misconceived, and has no basis in law.

18. The Originating Notice of Motion dated 18th October, 2016, and filed on 19th October, 2016 is therefore dismissed, with a direction that the Petitioners/Applicants do present themselves before the trial court, and seek the necessary rights as guaranteed under Articles 49 and 50 of the Constitution of Kenya, 2010.

19. There shall be orders accordingly.

Dated, Signed and Delivered at Mombasa this 2nd day of November, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Igunza for Applicants

Mr. Muteti for Respondents

Mr. Silas Kaunda Court Assistant