



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 55 OF 2016

IN THE MATTER OF: FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 22,

23(1), 25©, 27, 28, 29, 47, 50, 159, 258 & 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: CONTRAVENTION AND THREATENED CONTRAVENTION

OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 22, 23(1),

25©, 27, 28, 29, 47, 50, 159, 258 & 259 OF THE CONSTITUTION OF KENYA

BETWEEN

1. FATMA NABHANY

2. EDDAH MWAKE NGWATU.....PETITIONERS

AND

1. DIRECTOR CRIMINAL INVESTIGATION DEPARTMENT

2. INSPECTOR GENERAL OF POLICE

3. DIRECTOR OF PUBLIC PROSECUTION

4. CHIEF MAGISTRATE COURT MOMBASA

5. HON. ATTORNEY-GENERAL.....RESPONDENTS

RULING

1.The Applicants, Fatma Nabhany and Eddah Mwake Ngwatu are charged along with twelve other accused persons with various offences under the East African Community Customs Management Act, 2004 and under the Penal Code, (Cap 63, Laws of Kenya), including conspiracy to contravene provisions of Section 193 as read with Section 203(e) of the EACCMA; aiding commission of an offence contrary to Section 20(a) of the Penal Code (Cap 63,Laws of Kenya), procuring of uncustomed goods contrary to Section 200(d) (iii) of the EACCMA, aiding the fraudulent evasion of duty, contrary to Section 208 as read with Section 209(2) of EACCMA, and other offences specified in the Charge Sheet in Mombasa

Criminal Case Number 2140 of 2016.

2.The Applicants claim that their rights under Articles 27 (equality and equal protection and benefit of the law), 28 (inherent right and the right to have the dignity protected) and Article 47 (the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair).

3.The Applicants case is that if the process of prosecution is allowed to take place, and they are asked to take a plea, it will trigger a course of action over which they have no control. They will be interdicted immediately and thus face a real prospect of losing their jobs or employment. It would also destroy their reputation, and they would be unable to secure other employment as their record would be tainted by virtue of their prosecution, even if they were to be acquitted later, or found innocent.

4. Mr. Anami counsel for the Applicants pleaded passionately for the Applicants that there be a stay for at least fourteen (14) days to enable the Applicants explain their case to the investigating officers, and show that they did not commit the alleged offences, and in particular because there is a warrant of arrest for one of the Applicants.

5. If the Applicants were to be bundled into court under a warrant of arrest, counsel argued, their right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair would no longer be under threat, but would be violated. Counsel therefore urged the court to allow the application in terms of paragraphs (c) and (d) of the Notice of Motion dated and filed on 3rd November, 2016 that –

(a)

(b)

(c) that there be a stay of proceedings in Mombasa Chief Magistrate’s Criminal Case No. 2140 of 2016, pending the hearing and determination of the Petition;

(d) that there be a stay of warrants of arrest given on 2nd November, 2016 in Criminal Case No. 2140 of 2016 against the Petitioners (Fatma Nabhany and Eddah Mwake Ngwatu), pending the hearing and determination of the Petition.

6.The Application was however opposed by Mr. Wangila, Senior Prosecution Counsel who relied upon the Replying Affidavit of Mary Kinyanjui Kamau sworn on 9th November, 2016 submitted that the rights of the Applicants as accused persons are fully protected and guaranteed under Articles 49 and 50 of the Constitution. Counsel relied upon the decision of the court in **Eliakim Okumu Oganga and 2 others vs. The Director of Public Prosecutions and 4 others**, where the court reiterated that the constitutional position that an accused person is ringed with constitutional armour and guaranteed to ensure fair trial.

7. The Applicants’ greatest fear is the events which a plea to the charges will trigger. The Applicants may be interdicted from their employment with no guarantee of the interdiction being lifted even if they were found not guilty after a full trial, or withdrawal of the charges.

8. Unfortunately, that is a matter which the court of judicial review has no control or mandate to consider in an application of this nature. It concerns terms and conditions of employment between the Applicants and their employer.

9. The real issues here are **firstly**, whether the court should intervene and stop even temporarily, the prosecution of the Applicants, and **secondly**, whether the warrant of arrest should be lifted.

10. The right to human dignity guaranteed under Article 27 of the Constitution is the parent of all rights. All other rights are hinged upon human dignity. It is to human dignity that we owe the rights to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause, (Article 28), the freedom from slavery, servitude and forced labour (Article 30), the right to fair administrative action (Article 47) and the right to bail and bond (Article 49) and the right to fair hearing,

including the right to be deemed innocent until proved guilty (Article 50).

11. Matters of investigation, detection and prevention of crime, are a preserve of the Inspector-General of Police under Article 245 (4) (a) &(c) of the Constitution. It is the constitutional function of the Director of Public Prosecutions under Article 157(6) to institute, take over or discontinue any proceedings, except that where the Director of Public Prosecutions discontinues a prosecution, he requires the permission of the court (Article 157(8)). The court referred to therein (157(8)), is the trial court not the judicial review court.

12. It is thus clear to me that this court has no mandate to arrest a prosecution at its infancy. There is no suggestion, and there was no material to show either 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 the decision was so devoid of logic that no person, properly exercising his mind and decision to charge the Petitioners or Applicants in Mombasa Chief Magistrate's Criminal Case No. 2140 of 2016.

13. The Applicants seek among other orders, an order to lift the warrants of arrest. The Applicants are a law abiding citizens, and are duty bound to attend to the investigation officers once summoned.

14. I therefore grant an order staying the warrant of arrest, on condition that upon her arrival in Kenya, the Second Applicant will within twenty four (24) hours of arrival into Kenya, on or before 22nd November, 2016, attend to the investigation officer in Mombasa. The First Applicant shall however attend the investigating officer, upon the next twenty four hours.

15. Save as aforesaid it is clear to me therefore that the Petition herein and the consequential Notice of Motion dated and filed on 3rd November, 2016, are at this stage misconceived and without merit. It is dismissed with no order as to costs.

Dated, Signed and Delivered at Mombasa this 9th day of November, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Anami for Applicants

Mr. Wangila for 1st – 3rd Respondents

Mr. Ngari for 4th and 5th Respondents

Mr. Daud Issack Court Assistant