REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CONSTITUTIONAL PETITION NO. 1 OF 2014

MICHAEL M. GITAHI….....APPLICANT

VERSUS

ETHICS & ANTI-CORRUPTION

COMMISSION RESPONDENT.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

SENIOR PRINCIPAL MAGISTRATES'

COURT MUKURWEINI.....3RD RESPONDENT

JUDGMENT

On 23rd October, 2013, the petitioner was charged in the **Mukurweini Senior Principal Magistrates' Court Criminal Case No. 454 of 2013** with the offence of acting as an advocate while unqualified contrary to **section 31** as read with **section 85 (1)** of the **Advocates Act, Chapter 16 Laws of Kenya**. According the particulars of the offence, on or about the 31st day of October, 2012, the petitioner defended one Richard Gachoya Nyarangu in **Criminal Case No. 409 of 2013** at the Principal Magistrates' Court at Mukurweini while he was unqualified to act as an advocate.

When he was arraigned in court to answer to the charge, the petitioner urged the trial court to defer the plea because the offence with which he was charged was a subject of disciplinary proceedings against him by the advocates' Disciplinary Tribunal; in his view, it would be improper in law to try him of the offence arising from the same facts that constituted the charge against him before the Law Society's Tribunal. It was important, according to the petitioner, that before the plea is taken, the High Court takes up the issue and determines whether he is being tried for the same offence for which he has been charged by the Law Society of Kenya and therefore whether his constitutional right to a fair trial has been infringed.

The state did not oppose the application and the trial court too acceded to the petitioner's prayers. In allowing the application, the trial court was persuaded that indeed it is necessary for the High Court to determine first, the 'jurisdiction of EACC and LSK in prosecuting this case' and second, whether the petitioner, by being tried in magistrates' court, he was being subjected to double jeopardy.

Having been given the green light to pursue his cause in this Court, the petitioner opted to move it by

way of an originating notice of motion dated 10th January, 2014 in which he prayed for the following orders:-

> a. The petitioner's fundamental right to a fair trial has been infringed by the Ethics and Anti-Corruption Commission and the Director of Public Prosecutions by arresting and preferring criminal charges against the applicant in Mukurweini Criminal Case No. 454 of 2013;
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> b. In exercise of its supervisory powers this court does declare that the petitioner's arraignment in Mukurweini Criminal Case No. 454 of 203 unconstitutional;
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> c. The 1st and 2nd respondents be prohibited from proceeding with the prosecution of the petitioner in Mukurweini Senior Principal Magistrates Criminal Case No. 454 of 2013;
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> d. The 3rd respondent be prohibited from taking the applicant's plea or proceeding with the hearing of Criminal Case No. 454 of 2013; and
>
> e. The costs of the motion be provided for.

In the affidavit he swore in support of the motion, the petitioner deposed that he is an advocate of the High Court of Kenya and a member of the Law Society of Kenya. He says that, as a result of a complaint by the officers of the Ethics and Anti-Corruption Commission, he was charged on 7th October, 2013 by the Society before its Disciplinary Tribunal in **the Disciplinary Tribunal Cause No. 146 of 2013** for appearing for a suspect in a criminal trial without the requisite practising certificate. The petitioner pleaded guilty to the charge and was convicted accordingly; he was to be sentenced on 13th January, 2013. Though his motion was filed a year after the date of when he ought to have been sentenced, the nature of the sentence that may have been meted out against the petitioner is not apparent from the motion.

The petitioner contends that while the matter was pending for determination before the Disciplinary Tribunal, the Anti-Corruption Commission escalated the complaint it had instigated before that Tribunal to a criminal offence with which the appellant has now been charged in **Criminal Case No. 454 of 2013** at the Mukurweini Senior Principal Magistrates' Court.

The petitioner's gripe with his trial at the subordinate court is that the charge for which he is being tried is based on the same set of facts upon which the case against him at the Tribunal was founded and for which he was convicted on his own plea of guilty. In the petitioner's view, disciplining errant lawyers is the exclusive role of the Law Society and since it has disposed of the petitioner's case, the Anti-Corruption Commission and the Director of Public Prosecution have no business regurgitating the same matter in a separate forum; in any event, the Anti-Corruption Commission, so argues the petitioner, has no jurisdiction to commence or prosecute a case of the nature of the case against him.

In response to the petitioner's motion, Patrick Mbijiwe, an investigator at the Ethics and Anti-Corruption Commission swore a replying affidavit in which he outlined the real genesis of the criminal case against the petitioner.

According to Mr Mbijiwe, the Anti-Corruption Commission was out, from the very beginning, to investigate a complaint lodged by one Eunice Wambui Gaita that the petitioner had solicited from her the sum of Kshs. 20,000/= as a benefit allegedly to be transmitted to the presiding magistrate in **Mukurweini Principal Magistrate's Court Criminal Case No. 409 of 2012** in which the said Eunice Wambui Gaita was the complainant. The presiding magistrate was allegedly, supposed to be induced to convict the accused person in the criminal case regardless of the evidence presented at the trial.

With the help of electronic audio-visual devices, Mr Mbijiwe and his colleagues at the Commission ascertained that indeed the petitioner had solicited for the money for illicit purposes. In exercise of the Commission's mandate under the **Anti-Corruption & Economic Crimes Act, No. 3 of 2003,** they set a

trap and ensnared the petitioner soon after he had received the sum of money he had solicited for. Mr Mbijiwe has sworn that out of this money, Kshs. 12,000/= was fake and therefore even if the petitioner had escaped with his ill-gotten fortune, he would soon have realized that he had been 'conned'.

Be that as it may, the Commissioner's officers dutifully compiled their report and forwarded to the Director of Public Prosecutions for action.

One of would have thought that, in the absence of any evidence to the contrary, the Commission had made out a clear-cut case of soliciting and receiving a benefit contrary to **section 39(3)(a)** as read with **section 48(1)** of the **Anti-Corruption & Economic Crimes Act** but the Director of Public Prosecutions had other ideas; rather than prosecute the petitioner for the offence for which he had been investigated and for which evidence had been established, he returned the investigations file to the Commission and directed it to take statements from the magistrate who was presiding over the criminal case in which the petitioner had acted as a defence counsel and the Law Society of Kenya on the petitioner's status as an advocate.

It was after this second phase of investigations that the Commission established that the petitioner was not qualified to act as an advocate and by purporting to act as such he had contravened **section 31** as read with **section 85** of the Advocates Act; somehow, the Director of Public Prosecutions was satisfied that this was the appropriate offence for which the appellant could be and was indeed charged. The fate of the offence of soliciting and receiving a benefit is not clear, at least from the material before me.

The concern of this court, as far as I can gather from the petitioner's motion, is the constitutionality of the Director of Public Prosecution's preferred charges. From the tenor of the motion it appears that the same questions of constitutionality of the charge(s) would more or less still have arisen had the Director opted to charge the petitioner with the offences under the **Anti-Corruption & Economic Crimes Act** and therefore for purposes of determination of this motion, it matters not which of the two possible offences the petitioner should have been charged with or whether it would have been good sense to charge him with both.

I have carefully considered the submissions by Mr Theuri Mwangi for the Petitioner, Mr Julius Muraya for the 1st respondent and Mr Wanjohi for the rest of the respondents; they have to a large extent reiterated the factual background of the criminal case against the petitioner and only deviated the legal implications of the prosecution of the petitioner. While the petitioner's counsel contends that the prosecution of the petitioner in the magistrates' court contravenes the petitioner's rights to a fair trial, the respondents' counsel have on the other hand reiterated that this prosecution is well within the law and is constitutional.

If one has to frame questions for determination in this petition, the most immediate one would, in my view, be whether the disciplinary proceedings against the petitioner in **Disciplinary Cause No. 146 of 2013** constituted a trial as understood under **article 50(2)** of the Constitution. Closely related to this question is whether the petitioner's conviction by the Tribunal insulated him from any prosecution of an offence or offences known in law, and in this regard, the Advocates Act, irrespective of whether those offence arose from the petitioner's conduct which was the subject of scrutiny by the Disciplinary Tribunal; in other words, would the defence of autrefois acquit or autrefois convict be available to the petitioner or any other person simply because he has either been acquitted or convicted by a tribunal of the nature of Disciplinary Tribunal established under the Advocates Act? If these questions can be answered in the affirmative, the petitioner's petition ought to succeed; conversely, if their answers are in the negative, the petition will fail. Both the questions and the answers thereto, are, to a large extent intertwined and can very well be determined together.

The path to finding the correct answers to these questions should begin with the Constitution itself. **Article 50(1)** thereof guarantees every person a right to have any dispute capable of being resolved by law decided in a fair and public hearing by a court and, where appropriate another independent and impartial tribunal or body; I suppose that the Disciplinary Tribunal, established under **section 57** of the Act, would be such a tribunal or body.

Article 50(2) of the Constitution, however, is particular that it is only an accused person that has the right to a *fair trial* which concept has been defined to include a myriad of rights listed in **article 50(2) (a)** to **(q)** (both letters inclusive); amongst these rights is the right not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted.

An accused person in the sense of **article 50(2)** of the Constitution cannot be any other person except that person who, under **section 89** of the **Criminal Procedure Code (Cap. 75)** has been brought before a court of competent jurisdiction to answer to a charge formally drawn and which contains the statement of the offence.

For avoidance of doubt **section 138** of that Code provides:-

> ***138. Persons convicted or acquitted not to be tried again for same offence***
>
> ***A person who has been once tried by a court of competent jurisdiction for an offence and convicted or acquitted of that offence shall, while the conviction or acquittal has not been reversed or set aside, not be liable to be tried again on the same facts for the same offence. (Underlining mine).***

It therefore follows that the 'fair trial' referred to under article 50(2) can only be a trial founded on or initiated by a formal charge as contemplated under **section 89** of the Criminal Procedure Code; for ease of understanding, it is necessary to quote here this section verbatim:-

> ***89. Complaint and charge***
>
> ***(1) Proceedings may be instituted either by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without warrant.***
>
> ***(2) A person who believes from a reasonable and probable cause that an offence has been committed by another person may make a complaint thereof to a magistrate having jurisdiction.***
>
> ***(3) A complaint may be made orally or in writing, but, if made orally, shall be reduced to writing by the magistrate, and, in either case, shall be signed by the complainant and the magistrate.***
>
> ***(4) The magistrate, upon receiving a complaint, or where an accused person who has been arrested without a warrant is brought before him, shall, subject to the provisions of subsection (5), draw up or cause to be drawn up and shall sign a formal charge containing a statement of the offence with which the accused is charged, unless the charge is signed and presented by a police officer.***
>
> ***(5) Where the magistrate is of the opinion that a complaint or formal charge made or presented under this section does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for the order.***

This provision of the law is clear not only as to who initiates criminal proceedings but it is also instructive as to where and how such proceedings are initiated. One would fit the description of an 'accused' when a complaint is made against him by a person who believes that he has committed an offence and he is brought before a magistrate or, for that matter, a court of competent jurisdiction, to answer to the complaint or the formal charge. The complaint must be formally drawn and must contain the statement of offence. The statement of offence defines the offence or the provision of the law that has been contravened; this implies that the offence which a person is alleged to have committed must be an offence known in law. Any person who is a subject of proceedings where all these attributes accrue can authoritatively say, and legitimately so, that he has either been convicted or acquitted, depending on the outcome of the proceedings, and thus he cannot, in the words of **article 50(2) (o)** of the Constitution (which has been replicated in **section 138** of the **Criminal Procedure Code**) '*be tried of an offence in respect of an act or omission for which the accused person has previously been either acquitted or*

convicted.'

Having said so, the petitioner may have had the dispute between him and the Law Society resolved in a fair and public hearing before the Disciplinary Tribunal as contemplated under **article 50(1)** of the Constitution but that is the farthest it could go; it cannot be said, by any stretch of argument, that the Tribunal was a court of competent jurisdiction for it was not; neither can it be said that the petitioner was the accused nor the proceedings thereof were a trial as contemplated under **article 50 (2)** of the Constitution as read with **section 89** of the **Criminal Procedure Code**. It does not matter, therefore, that the petitioner may have been 'acquitted' or 'convicted' of the charges against him before the Disciplinary Tribunal whose stature, processes and jurisdiction are diametrically different from that of the institution contemplated under **section 89** of the Criminal Procedure Code.

It must also be noted that the tribunal before which the petitioner appeared is established under **Part XI** of the **Advocates Act** which basically deals with discipline of advocates; the provisions under this part mainly address complaints against the advocates, the manner of making those complaints, the body that has been established to addresses those complaints, which in this case is the Tribunal, and the disciplinary measures that this body may take against advocates who may be found to be wayward.

There are at least two provisions in the Advocates Act itself that clear any uncertainty with regard to extent of the disciplinary processes as opposed to the criminal processes based on the same conduct; these provisions are **section 85** and **section 60** of the Act. **Section 85(2)** provides as follows:-

> ***85. General penalty***
>
> ***(1) Any person who is guilty of an offence under this Act for which no penalty is otherwise provided shall be liable to a fine not exceeding one hundred thousand Shillings or to imprisonment for a term not exceeding two years or both.***
>
> ***(2) Any advocate who is guilty of an offence under this Act shall be liable, whether or not he has been charged with, convicted or acquitted of such offence, to proceedings under section 60***.

If there are any doubts as whether there are any offences created under the Act, **Section 85(1)** demonstrates that such offences not only exist but there are penal consequences which ensue whenever one is held to have contravened any of the provisions that create them. **Subsection (2)** clarifies the position that while one may have been charged in a court of law and either convicted or acquitted of the offence created under the Act, he is still susceptible to disciplinary proceedings under **section 60** of the Act; the converse is certainly true in the sense that where one has been subjected to the disciplinary proceedings he may still be prosecuted for the same conduct that was the subject of interrogation in the disciplinary proceedings.

The complaint against the petitioner and the proceedings that ensued fell under the category of disciplinary proceedings contemplated under **section 60** of the Act; that section provides as follows:-

> ***60. Complaints against advocates***
>
> ***(1) A complaint against an advocate of professional misconduct, which expression includes disgraceful or dishonourable conduct incompatible with the status of an advocate, may be made to the Tribunal by any person.***

Sections 60 and **85** of the Act give a clear illustration that the Advocates Act provides not only for disciplinary processes to rein in on the errant advocates but it also creates criminal offences for which those errant members of the bar may be prosecuted. Where an advocate is guilty of a misconduct that invites a disciplinary process, he may be prosecuted for the same conduct if it answers to an offence under the Act; in other words, both disciplinary and criminal processes are meant to run side by side and none is an alternative to the other.

In the case of **R (on application of Coke-Wallis) versus Institute of Chartered Accountants of England and Wales (2011) UKSC 1)** cited with approval by Majanja J in **Nairobi High Court Miscellaneous Application No. 516 of 2005 Republic versus Public Service Commission of Kenya *ex parte* James Nene Gachoka** the Supreme Court of England said:-

> "***The primary purpose of professional disciplinary proceedings is not to punish, but to protect the public, to maintain public confidence in the integrity of the profession and to uphold proper standards of behaviour".***

The Supreme Court held in that case that the principle of *autrefois acquit* did not apply to civil matters which were civil and not criminal proceedings.

In the case before me, the petitioner was convicted by the Disciplinary Tribunal on his own plea of guilty; although the charge before the Tribunal is not indicated, it is clear from the petitioner's own affidavit in support of his motion that he was holding himself out as an advocate when he was not qualified to act as such. **Section 31(2) (c)** of the Act is clear that such a conduct is an offence. It says:-

> ***31. Unqualified person not to act as advocate***
>
> ***(1) Subject to section 83, no unqualified person shall act as an advocate, or as such cause any summons or other process to issue, or institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction.***
>
> ***(2) Any person who contravenes subsection (1) shall—***
>
> > ***a. be deemed to be in contempt of the court in which he so acts or in which the suit or matter in relation to which he so acts is brought or taken, and may be punished accordingly; and***
> >
> > ***b. be incapable of maintaining any suit for any costs in respect of anything done by him in the course of so acting; and***
> >
> > ***c. in addition be guilty of an offence.***

The petitioner's conduct was the basis of the complaint against him at the Tribunal but it is also the foundation of the criminal proceedings in which he is the accused in **Mukurweini Senior Principal Magistrates Court Criminal Case No. 454 of 2013**; those proceedings are legitimate and in any event constitutional to the extent that that conduct has been criminalised under **section 31(2) (c)** of the Act. I note that the petitioner has not questioned the legality or the constitutionality of this provision of the law and hence it would, in my view, be futile to question any action taken in enforcement of that law as long as the action taken is *intra vires* the Act.

This leads me to the role of the 2nd respondent in the criminal case against the petitioner.

The role of the Director of Public Prosecutions to prosecute on behalf of the state is constitutional and it so provided in **article 157** of the **Constitution**. **Article 157 (6) is** categorical that:-

> ***157.***
>
> ***(1)…***
>
> ***(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;

Once the Director of Public Prosecutions formed the opinion that the petitioner had committed an offence, he had a constitutional obligation to institute and undertake criminal proceedings against him before the magistrates' court; I am persuaded, and no evidence was led to the contrary, that in undertaking this task, the Director had regard to the public interest as is required of him under **article 157(11)** of the Constitution. I do not find any basis to stop him from undertaking his constitutional functions.

Talking of the powers of the Director of Public Prosecutions to Prosecute, the House of Lords(Lord Justice Laws) in **Reg. versus Director of Public Prosecutions, Ex Parte Kebilene & Others (2002) 2AC 326** at page 351 said:-

"In the ordinary way, certainly, it is the Director's duty generally to enforce criminal law. If he is to decide not to enforce some particular statutory provision, in my judgment he will be required on a judicial review to point to a particular context which he is entitled to regard as giving rise to an objective public interest justifying the decision. Obviously, he may not so decide merely because he entertains the subjective view that Parliament should not have criminalised the kind of acts in question. No doubt he would never do so…So long as an offence is on the statute book, it will ordinarily be presumed that it is to be made good by action against the offenders; and this is so notwithstanding the Director's wide discretion whether or not to prosecute in any individual case…"

I would agree that where an offence has been established, the Director of Public Prosecution must act and prosecute unless it is in the public interest that the offender should not be prosecuted; I reckon such situations will escape prosecution in the name of public interest would be far and wide. That being the case, this court must resist any attempt to misuse it to halt or unnecessarily scuttle any due criminal process that in all its aspects is legitimate and constitutional.

In conclusion, going back to the questions I had raised and whose answers should settle this motion, I would answer them in the negative; in particular, considering the provisions of the law and the decisions I have cited, it is apparent that the disciplinary proceedings in **Disciplinary Tribunal Cause No. 146 of 2013** were not a trial contemplated in **article 50(2)** and **50(2) (o)** of the **Constitution**. The 'conviction' of the petitioner in that cause is not the 'conviction' referred to in **article 50(2) (o)** of the Constitution which, in my humble view, presupposes a trial duly commenced in the manner prescribed by the **Criminal Procedure Code**. It follows that the fact that petitioner was 'convicted' by a body which is concerned with nothing more that disciplining advocates is not a bar to the subsequent prosecution of the petitioner for the offences that arose from the same set of facts that comprised the misconduct for which he was convicted by the Disciplinary Tribunal.

I am inclined to hold that the petitioner was properly and legally charged in **Mukurweini Senior Principal Magistrates Court Criminal Case No. 454 of 2013**. If the criminal case is properly before court, there is no basis for any order to issue against that court. As for the Ethics & Anti-Corruption Commission, its role in the criminal case was no more than investigatory; there is nothing to suggest that it is prosecuting the case.

In the premises, the inevitable conclusion that I have come to is that the petitioner's originating motion dated 10th January, 2014 is misconceived and deficient of any merit. I dismiss it with costs to the respondents.

Dated, signed and delivered in open court this 2nd day of February, 2015

Ngaah Jairus

JUDGE