



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CONSTITUTIONAL PETITION NO.67 OF 2014**

F S S ..... **PETITIONER**

**VERSUS**

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

R M S ..... **2<sup>ND</sup> RESPONDENT**

F M S ..... **3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. The petitioner and the 2<sup>nd</sup> respondent are, respectively, former husband and wife who were married on 20<sup>th</sup> January 2012 under Muslim Law, and between them had one child namely W S born on 28<sup>th</sup> November 2012. The 3<sup>rd</sup> respondent is the 2<sup>nd</sup> respondent's mother. The petitioner and the 2<sup>nd</sup> respondent were divorced on 15<sup>th</sup> January 2013 according to Certificate of Divorce issued in Mombasa, serial no. [Particulars withheld] registered on 27<sup>th</sup> February 2013.
2. Subsequently, the 2<sup>nd</sup> Respondent filed proceedings in Children's Court Tononoka Case No.63 of 2013 for maintenance which resulted in an appeal in the High Court at Mombasa, Civil Appeal No.12 of 2013. The appellate court confirmed the orders of the Children's Court that the petitioner pays maintenance and enjoys visitation rights over the child.
3. Following the filing of various criminal charges against the petitioner upon complaints by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, the Petitioner brought these proceedings seeking, primarily, the termination of the criminal charges among other reliefs on the ground that the charges were malicious and a breach of the petitioner's constitutional rights.

**THE ISSUE FOR DETERMINATION**

4. The issue for determination in these proceedings is therefore whether the criminal charges against the petitioner will be terminated for being a breach of the petitioner's constitutional rights.

**THE PETITIONER'S CASE**

5. In the present proceedings, the petitioner accuses the 2<sup>nd</sup> and 3<sup>rd</sup> respondents of making various

criminal complaints against him leading to his arrest and unfair prosecution by the 1<sup>st</sup> respondent. The petitioner also claims that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents seem to have some influence at the Central Police Station in Mombasa, where they have made the criminal complaints.

6. The criminal charges facing the petitioner are as follows:
  - a. **Criminal Case No. 528 of 2013: R vs F S S:** On a charge of stealing in a dwelling house contrary to section 279 (b) of the Penal Code. The 3<sup>rd</sup> respondent is the complainant. The particulars are that on 1<sup>st</sup> February 2013 at Ingilani Area in Mombasa District in Coast Province, the petitioner stole 5 gold bracelets, 7 gold bangles and 1 gold necklace all valued at Kshs.700,000/- the property of the 3<sup>rd</sup> respondent. He was released on a cash bail of Kshs.20,000/-
  - b. **Criminal Case No. 1000 of 2013: R vs F S S:** On a charge of offensive conduct on 22<sup>nd</sup> April, 2013, against the 3<sup>rd</sup> respondent while using abusing words with intent to provoke a breach of peace contrary to section 94 (1) of the Penal Code. He is also charged with resisting arrest contrary to section 253 (b) of the Penal Code. The prosecution applied to withdraw this case under section 87 (a) of the Criminal Procedure Code on 14<sup>th</sup> June 2013 but the trial court denied this application. The prosecution thereafter sought a revision of the decision by filing Mombasa HC Criminal Revision No. 72 of 2013 (Muya, J) which application was also denied.
  - c. **Criminal Case No. 1056 of 2014: R vs F S S & 2 Others:** On a charge of creating disturbance in a manner likely to cause a breach of the peace contrary to section 95 (1)(b) of the Penal Code. The 3<sup>rd</sup> respondent is the complainant. The particulars are that on the 28<sup>th</sup> day of April 2014 in Kibokoni Old Town within Mombasa County, the accused together with S A S and A A A, “*jointly did create a disturbance in a manner that was likely to cause a breach of the peace to one F M S by shouting at her and calling her names (Prostitute) and threatening to beat her using fists.*” They were released on cash bail of Kshs.10,000/- each. It would appear that the 2<sup>nd</sup> and 3<sup>rd</sup> accused were subsequently discharged some time on 4<sup>th</sup> November 2014.
  - d. **Criminal Case No. 1126 of 2014: R vs F S S:** On a charge that on the 21<sup>st</sup> day of April 2013, along Old Kilindini road in Mombasa County, the petitioner did unlawfully assault R M S (the 2<sup>nd</sup> respondent) thereby causing her actual bodily harm contrary to section 251 of the Penal Code. The complainant's statement states that the petitioner pushed her and caused her to fall to the ground in the street, hurting her left knee and her right shoulder in the process.
  - e. **Criminal Case No. 1496 of 2014: R vs F S S:** On a charge of defilement contrary to section 3(2) as read with section 8 (4) of the Sexual Offences Act, No. 4 of 2006. The complainant is his son, W S and the 2<sup>nd</sup> respondent is listed as a witness. The petitioner also faces an alternative charge of indecent act with the child contrary to section 11(1) of the Sexual Offences Act. The incident is alleged to have occurred on 13<sup>th</sup> August 2014.

It is the petitioner's case that the respondents are abusing the process of criminal justice to settle family disputes involving the petitioner with the intention of denying the petitioner his right to visit his son W S. One of the criminal charges leveled against him is for the alleged defilement of his son, W S, resulting in the Chief Magistrate's Court denying the petitioner access to the child.

## **THE PETITION**

7. This petition dated 4<sup>th</sup> November 2014 was filed on 6<sup>th</sup> November 2014 and seeks the following orders:
  - a. *A declaration that the Petitioner's Constitutional Rights have been breached and are being breached.*
  - b. *A declaration that the prosecution in Criminal Case numbers 528 of 2013, 1000 of 2013, 1056 of*

- 2014, 1126 of 2014 and 496 of 2014 are violating the petitioner's rights.
- c. An order vacating the order stopping the petitioner rights and access to the minor child W S.
  - d. A declaration that the 1<sup>st</sup> respondent has acted unlawfully and against the constitution in prosecuting the petitioner and has thus breached its constitutional mandate
  - e. Any other relief the court may deem fit and just to grant.
- b. The petitioner also filed simultaneously, Chamber Summons application dated 4<sup>th</sup> November 2014 under Certificate of Urgency seeking orders
    - a. That this application be certified as urgent and service of the same in the first be dispensed with.
    - b. That a conservatory order be issued prohibiting and restraining the 1<sup>st</sup> respondent from prosecuting and or continuing to prosecute the petitioner in the Chief Magistrates Court in Criminal Cases Numbers 28 of 2013, 1000 of 2013, 1056 of 2014, 1126 of 2014 and 496 of 2014 pending the hearing and determination of this petition.
    - c. That a conservatory order be issued prohibiting and restraining the Chief Magistrates Court or any other trial court from hearing, proceeding with and determining the Criminal matters Numbers 28 of 2013, 1000 of 2013, 1056 of 2014, 1126 of 2014 and 496 of 2014 pending the hearing and determination of this petition.
    - d. That this honorable court restore the visitation rights of the petitioner with regards to his child W S as ordered by the Children's Court and the High Court in Children's Case No. 63 of 2013 and High Court Civil Appeal No. 12 of 2013.
  - c. The application came before this court on 11<sup>th</sup> November 2014 when, with the consent of counsel for all parties, it was agreed that:
    - a. Hearing of the main petition dated 4<sup>th</sup> November 2014 is set for the 26<sup>th</sup> November 2014 at 2:30pm.
    - b. Mombasa CMCr. Case No. 1126 of 2014 scheduled for the 19<sup>th</sup> November 2014 be stayed until then.
    - c. The Chamber Summons dated 4<sup>th</sup> November, 2014 is abandoned with costs in the cause.
    - d. The respondents to file replying affidavits within 10 days.
    - e. Petitioner is at liberty to file further affidavit if necessary within 3 days service.

### **THE RESPONDENTS' CASE**

4. The 1<sup>st</sup> respondent in opposing the petition filed Grounds of Opposition dated 20<sup>th</sup> November 2014. In summary, the grounds are that the petitioner has not shown how his right has been breached, that there was no evidence that the 1<sup>st</sup> respondent had in preferring the criminal prosecutions acted maliciously or capriciously, that the 1<sup>st</sup> respondent was working within its mandate, that the petition is premature and an attempt to usurp the duty of the trial court, that there was no evidence that the trial courts or the police are being used by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and finally that the order sought to vacate the termination of access of the petitioner to the minor W S cannot issue as it was entered into by consent of the parties in Criminal Case No. 1496 of 2014 as one of the bond/bail terms, and in consideration that the charges involved the alleged defilement of the minor by the petitioner.
5. The 1<sup>st</sup> respondent also filed a Replying Affidavit sworn by NO.79196 Corporal Mark Kaloki on 20<sup>th</sup> November 2014, an investigating officer based at Central Police Station, deponing on facts relayed to him by the respective investigating officers in each of the criminal charges. In summary, it was stated that the police having received the various complaints, and being mindful that the parties were involved in a family dispute, carried out impartial and independent investigations and established that there was sufficient evidence to charge the petitioner as they did. The affidavit annexed the charge sheets and statements from each case, and a medical report of the defilement charge.
6. The 3<sup>rd</sup> respondent swore a Replying Affidavit on 24<sup>th</sup> November 2014 in response to the petition deponing that the relationship between the petitioner and the 2<sup>nd</sup> respondent had been bad before the birth of the minor W S, that the petitioner had been allowed access to the child before the maintenance suit was filed; and that after the Children's Court granted him 8 hours access, the 2<sup>nd</sup>

- respondent appealed on the grounds that the time was too long since the child was still a baby in need of the mother's care. She claimed that the Appeal to the High Court was settled by consent of the parties to reduce the time for access. She accused the petitioner of attempting to frustrate the visitation routine by obtaining a restraining order against the 2<sup>nd</sup> respondent and causing unnecessary commotion whenever he visited the child. It was denied that the criminal charges were the product of malice. In her Supplementary Affidavit sworn on 1<sup>st</sup> December 2014, the 3<sup>rd</sup> respondent reiterates that the petition is calculated to draw unnecessary sympathy for the petitioner and to cover his crimes under the guise of “bad blood” and “family disputes”. She annexed copies of three letters authored on her behalf to the Police and Prosecution, accusing them of falling prey to the petitioner's intimidation antics to get out of the criminal charges, urging them to independently investigate the crimes and prosecute the petitioner.
7. Although appearance was entered for the 2<sup>nd</sup> respondent on 26<sup>th</sup> November 2014 *vide* Notice of Appointment of Advocates by M/S. Gikandi & Co. Advocates, the 2<sup>nd</sup> defendant did not file any documents to oppose the petition.
  8. The Petition was heard on the 26<sup>th</sup> November 2014, 2<sup>nd</sup> December 2014 and on 5<sup>th</sup> December 2014 when Counsel for the parties – Mr. Magolo for the petitioner, Mr. Obwotsa for the 1<sup>st</sup> Respondent, Mr. Gikandi for the 2<sup>nd</sup> Respondent and Mr. Nabwana for the 3<sup>rd</sup> Respondent made their respective submissions and judgment was reserved for 12<sup>th</sup> February 2015, and subsequently deferred to 6<sup>th</sup> March 2015.

### **Submissions**

9. The petitioner submitted that the criminal proceedings were brought with the sole purpose of harassing the petitioner into abandoning his right to access the child of his marriage to the 2<sup>nd</sup> respondent following their divorce. Counsel submitted that -

*“All the criminal proceedings are going on as the civil proceedings involving the minor are also going on. The criminal proceedings show a desire by the 2<sup>nd</sup> respondent that the Petitioner does not have access to the child. Application to the High Court after initial order of the Children Court. The irresistible conclusion is that there are serious and determined intention to curtail completely the right of the petitioner to see the child and curtail it.”*

10. Conceding to the position of law that the High Court cannot try criminal cases against the petitioner, counsel urged that –

*“The petitioner should wait for the trial court to decide. It is clear on the affidavit evidence before the court. We do not suggest that the [trial] court will not give justice or that we do not have a right of appeal. We only pray that we should not be asked to follow proceedings in the clear circumstances. There are proceedings before the Children Court over the child. The criminal proceedings are being unfairly used. ”*

11. For the DPP the provisions of Article 157 of the Constitution were set up in defence with a contention that it had not been shown that the DPP had abused the powers conferred upon him there-under and that the determination of the question whether there is sufficient evidence to prefer charges was the province of the DPP which decision would be tested in a criminal court upon trial in accordance with the law.
12. For the 2<sup>nd</sup> Respondent, it was argued that public interest in the detection, prevention and control of crime demanded the trial of the very serious charges against the petitioner and that it was not possible for the High Court to determine whether the allegations are true or not true as it did not have the tools and machinery - witness testimonies and cross-examination with documents and reports tendered - to deal with the question of guilt or otherwise of the petitioner.
13. The 3<sup>rd</sup> Respondent contended that no evidence of Malice had been shown and that the 3<sup>rd</sup> respondent had only made a complaint and it was the DPP who preferred charges based on the

evidence, and that the petition was merely a ruse for the petitioner to avoid prosecution in due process.

### **Caselaw authorities**

14. Of the cases relied on by counsel, I found the following relevant, and noted that counsel for the petitioner agreed with the legal position established in the decisions.

- a. **R vs AG & 4 others ex parte Kenneth Kariuki Githii** (2014) eKLR, HC Nairobi Misc. Appl. No. 151 of 2013 (Odunga, J.): This case was cited on the proposition that that only a trial court can make a finding whether or not a criminal offence was committed after hearing the evidence. The learned Judge in that case examined instances in which the court may terminate criminal proceedings, stating:

*“41. ....Similarly, it is not for this Court to stop the DPP in his tracks simply because the Court believes that the DPP ought to have done better. The constitutional discretion given to the DPP ought not to be lightly interfered with especially if on the evidence in his possession if true may well sustain a prosecution. Trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on his defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words I am not satisfied based on the material before me that the applicant will not receive a fair trial before the trial court more so as no allegations are made against the 5th respondent towards that direction. Therefore the mere insufficiency of evidence does not in my considered view justify the halting of a criminal trial.*

*42. However where the it is shown that even if the evidence in possession of the prosecution were true still no offence would be disclosed it would be an abdication of this Court’s constitutional mandate to allow such a prosecution to proceed.”*

- b. **Francis Mburu Mungai vs Director of Criminal Investigations & Another** (2006) eKLR, Nairobi HC Misc. Application No. 615 of 2005 (Nyamu, J.): In that case, the applicant sought an order of temporary injunction and a declaration that his rights and freedoms are being or are likely to be violated by the defendant/ respondent. The applicant claimed that the defendants intended to arrest him concerning a matter which is civil in nature. The defendant stated that they were yet to conclude investigations and so far had only bonded the applicant. It was argued also that s.72 (1) (e) allows the deprivation of liberty upon reasonable suspicion. The court dismissing the application held that:

*“...crime detection, prevention and control are also values recognized by our Constitution and the court has a duty to weigh these values against any alleged violation of the due process and in ascertaining whether the principle of legality is in place so as to justify any derogation. In this case it is alleged that the criminal process is being used in a manner that is civil but it is clear to the court that investigations have not been finalized and any alleged abuse at this stage appears to the court to be speculative. Under our Constitution pre - hearing investigations cannot be unconstitutional unless they purport to obtain evidence in an unlawful manner or they infringe on the rule against self incrimination or violate the right of the silence or because of the manner they have been conducted they seriously erode the presumption of innocence if and when the suspect is*

charged.”

- c. **John Swaka vs The Director of Public Prosecutions & 2 Others** (2013) eKLR, Nairobi HC Constitutional Petition No. 318 of 2011 (M. Ngugi and Majanja, JJ.): This case was cited on the view of the court that constitutional guarantees to citizens including those in relation to the right to trial must be read and interpreted in a realistic manner, balancing the interests of the accused with those of the victims and the greater societal interests.

### **Determination**

15. I respectfully agree with the position that as a general rule the High Court will defer to the DPP in exercise of his constitutional mandate in line with public interest for the prosecution of crime but will interfere where it is shown that there is no basis for the prosecution or the criminal process is being used for improper purposes of pursuing private civil law interests or it is otherwise a breach of the fundamental rights and freedoms of the accused. In a recent decision on a similar application, in the case of **Christopher Mbugua Kiiru v. The Inspector General of Police & 3 Ors.**, Mombasa HC Constitutional Petition No. 38 of 2013, I have held that –

*“In my view, the High Court must in determining an application for stay or striking out of criminal proceedings consider four significant matters, namely:*

- a. *the rule of law principle underpinning the discretion of the DPP to prosecute criminal cases without undue influence, direction or control by any other authority;*
- b. *the need to protect accused persons from violation of their fundamental rights and freedoms through unwarranted criminal prosecution;*
- c. *the need to ensure that the criminal process of the court is not abused to further or defeat private interests which are, or should be, the subject of civil proceedings or for other improper purposes; and*
- d. *as, an over-arching principle, the existence of fair trial guarantees for accused persons in the criminal process by virtue of Articles 25 and 50 of the Constitution of Kenya, 2010.”*

16. This is a case in which two sides – the petitioner on the one hand and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents on the other – accuse each other of attempting to manipulate the course of justice. There is admittedly “bad blood” between the two sides following the acrimonious divorce between the petitioner and the 2<sup>nd</sup> respondent. This culminated in the legal battle for the access of the child of the marriage, W S in various civil suits at the Tononoka Children's Court - cases no.s 63 and 89 of 2013, and the Mombasa HC Civil Appeal no. 12 of 2013 (an appeal from Tononoka Children's Case No. 63 of 2013).

17. The petitioner further filed Mombasa CMCC No. 929 of 2013 against the 2<sup>nd</sup> respondent and 2 others from which he obtained restraining orders against them on 23<sup>rd</sup> May 2013. The petitioner now complains that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are influencing the police and the 1<sup>st</sup> respondents, to his detriment, and, therefore, seeks an order declaring that his constitutional rights have been breached by the respondents as well as an order vacating the order stopping the petitioner from accessing his son.

18. The statements recorded by the police as provided in the various affidavits and the statements provided by the 1<sup>st</sup> respondent were, in the opinion of the DPP/prosecution who has the constitutional mandate to prosecute, sufficient to prefer charges against the petitioner.

19. Without making any finding in that regard so as not to embarrass the trial court, I am not able to hold from the affidavits presented to the court that the charges are without evidential basis. That is not to say that the charges must succeed at trial. I only confirm that there is material for which the DPP could properly prefer criminal charges. In these circumstances, and noting that the court has no jurisdiction to decide the merit of the criminal charges, I am not able to order that the prosecution of the petitioner in the charges before the court be terminated. The Ruling of Muya, J. in Mombasa HC Criminal Revision No. 72 of 2013 would appear to support this finding. The obvious existence of “bad blood” between the primary parties of the petition appears to have been

- considered by the police in their investigation before laying the charges and though numerous, each case is based on a different set of facts, the particulars thereof showing that the offences were allegedly committed on diverse dates between 1<sup>st</sup> February and 13<sup>th</sup> August 2013.
20. The consideration of prejudice and embarrassment to the defence in a situation where an accused person is charged with numerous counts in one charge sheet as held by the Court of Appeal in **Peter Ochieng v. Republic** (1982-88) 1 KAR 832 and the High Court in **Eliphaz Riungu v. Republic** Nairobi HC Misc Criminal 472 of 1996 must, in my view, hold good in cases of multiple criminal charges facing an accused in separate criminal cases prosecuted simultaneously. See also Nairobi Misc Criminal Application NO. 72 of 2012, **Alphonse Kondi Riaga v. Republic**, per Achode, J.
21. The overriding interest of the criminal justice system is to do justice in every case by punishing the guilty and acquitting the innocent through a fair trial in court. The Court in **Eliphaz Riungu v. Republic**, supra, put the public interest in criminal justice as follows: –

*“We think that public interest demands that whatever goes on in a criminal trial should be in the interest of justice. And the constitution which is the mother of all laws clearly states that the accused shall be afforded a fair hearing with reasonable time. Justice demands that the guilty be appropriately punished and the innocent be let free. A long trial which is likely to lead into confusion of prosecution case as to result into acquittal of the guilty is certainly not in the interest of public interest and justice.”*

Neither, in my view, is it in public interest that the accused be prejudiced and embarrassed in his defence by the numerous counts he has to face in the same case, or numerous cases prosecuted against him simultaneously.

22. I consider that to subject an accused person to simultaneous prosecution in multiple cases will unconstitutionally dilute the accused’s right to a fair trial, which in terms of Article 25 of the Constitution cannot be limited. Nothing done in the interest of serving the accused person’s right to fair trial should be considered unfair to the respondents.
23. Accordingly, I find that the simultaneous prosecution of five criminal charges facing the accused will prejudice and embarrass him in his defence to the charges. I will therefore direct that the accused shall not be prosecuted for the five criminal charges at the same time but that the charges may be prosecuted one after another, as necessary. The court would, however, ordinarily not direct which of the criminal charges should be prosecuted first and in what sequence for the remainder of the charges. That would be for the DPP to determine having regard to logistics of the availability and convenience of the witnesses among other considerations.
24. However, this matter is made more complex by the fact that one of the charges facing the petitioner is for the defilement of his minor son. In accordance with Article 53 (2) of the constitution, “A child’s interests are of paramount importance in every matter concerning the child.” The court must therefore warn itself to ensure that its orders are in the best interests of the child. It must be in the interest of the child, as distinguished for the interest of either parent, to have the defilement charge against the petitioner father determined by full trial in order to provide a basis for the future relations with the said parent. The risk of the danger to the child, should this court terminate the charge, would, if true, be catastrophic to the child. On the other hand, a trial would if it results in an acquittal be beneficial to future relations of the child with his petitioner father. If the petitioner is found guilty of the defilement charge, the child will have been spared the trauma of relations with an abusive father.
25. It is also in the interest of the petitioner that his relationship with the child is restored quickly and this is not helped by the specter of criminal allegations of the nature of sexual abuse hovering over his head. If the petitioner is found guilty of the defilement charge he should be promptly punished for the security and peace of mind of the child. These considerations dictate that the criminal charge for defilement be heard in priority and determined expeditiously. During the period of the trial, again in the best interest of the child should the defilement charges be established, the access by the petitioner should be restrained but to be immediately and fully restored upon conclusion of the defilement case should it be decided in favour of the petitioner.

## **ORDERS**

26. Accordingly, for the reasons set out above, I make the following orders on the petitioner's Petition herein dated 4<sup>th</sup> November 2014: -

1. **Criminal Case No. 528 of 2013, R vs F S S.; Criminal Case No. 1000 of 2013, R vs F S S; Criminal Case No. 1056 of 2014: R vs F S S & 2 Others and Criminal Case No. 1126 of 2014 R vs F S S** are stayed pending the hearing and determination of **Criminal Case No. 1496 of 2014, R vs F S S.**
2. **Criminal Case No. 1496 of 2014, R vs F S S shall be heard on priority and where possible on daily basis until final determination.**
3. **The petitioner's access to the child the subject of the proceedings is restrained until final determination of the Criminal Case No. 1496 of 2014, or further orders of a competent court.**

27. On account of the matrimonial nature of the dispute between the primary parties which is the genesis of these proceedings, there shall be no order as to costs.

**DATED AND DELIVERED THIS 6<sup>TH</sup> DAY OF MARCH 2015.**

**EDWARD M. MURIITHI**

**JUDGE**

In the presence of: -

Mr. Ngure for Mr. Magolo for the Petitioner

Mr. Nabwana for the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents and holding brief for Mr. Wamotsa for 1<sup>st</sup> Respondent

Miss Linda - Court Assistant.