



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

MISCELLANEOUS CRIMINAL APPLICATION NO. 35 OF 2015

HASSAN GRIEVE MUNGAI WAIYAKIAPPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONRESPONDENT

RULING

The Notice of Motion application dated the 19th March, 2015 and which is expressed to be brought under section 88 and 89 of the Criminal Procedure Code and article 157 of the Constitution seeks orders for the Respondent to prosecute proposed accused persons namely;

- (1) John Mutava
- (2) Steve Muli
- (3) Jimmy Tomboko

In respect to charges of robbery with violence contrary to section 296(2) of the Penal Code.

The grounds are that the Constitution of Kenya mandates the Respondent to undertake such a prosecution.

Secondly, that the Respondent has taken too long to bring the said Accused persons to Court.

Thirdly, that there is enough evidence to sustain the charge.

The Respondent filed grounds of objection to the application on 8th June, 2015.

These grounds are that the orders sought are in the nature of a prerogative writ of mandamus and offend the clear provisions of section 8(1) of the Law Reform Act. Cap 26 Laws of Kenya, and the Court lacks jurisdiction to grant the orders sought in the manner sought by way of a criminal application.

Secondly, that the application is in curably defective, wanting in form and substance, grossly incompetent frivolous, vexatious and bad in law.

Thirdly, the orders sought offend the provision of article 157(6) and (10) of the Constitution of Kenya 2010.

A perusal of the present application does indicate that the prayers sought are in the main, to compel the

Respondent to prosecute three named individuals for the offence of robbery with violence contrary to section 296 (2) of the Penal Code.

It is shown to have been brought under section 88 and 89 of the Criminal Procedure Code and article 157 of the Constitution.

Section 88(1) of the Criminal Procedure Code provides,

“A magistrate trying a case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specifically authorized by the Director of Public Prosecution in this behalf shall be entitled to do so, without permission”.

In his supporting affidavit, the applicant at paragraph 7 depones that he did apply for private prosecution in the lower Court vide Miscellaneous Criminal No. 145 of 2013 but which application was disallowed.

After this application, which was properly before the lower Court under section 88(1) of the Criminal Procedure Code was disallowed, the applicant does not appear to have proceeded to lodge an appeal but he decided to file the present application before the High Court.

Section 88(1) and 89 of the Criminal Procedure Code are applicable in the lower Court.

The orders sought are in the nature of the prerogative writ off mandamus as they seek to compel the Respondent to prosecute.

The applicant ought to have approached the Court by way of Judicial Review, which is provided for under order 53 of the Civil Procedure Act and which is entitled – applications for mandamus, prohibition and certiorari.

The present application is also purportedly brought under article 157 of the Constitution. Article 157 of the Constitution establishes the offices of the Director of Public Prosecution and his powers.

Articles 157 (6) of the Constitution provides,

“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 off any offence alleged to have been committed.

(b) take over and continue any criminal proceedings commenced in any Court (other than a Court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

(c) Subject to clause (7) and (8), discontinue at any stage before Judgment is delivered, any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecution under paragraph (b):

(7)

(8)

(9)

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the directors or control of any person or authority”.

The orders sought by the applicant is for the Court to compel the Respondent to prosecute. This is contrary to the express provisions of article 157(10) of the Constitution.

This application has no merit and its dismissed.

Ruling delivered, dated and signed this **14th** day of **October, 2015**.

.....

M. MUYA

JUDGE

14TH OCTOBER, 2015

In the presence of:-

Learned Counsel for the Prosecution Mr. Masila

The Applicant in person present

Court Assistant Mr. Musundi