REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION. NO. 430 OF 2015

JOHNSTONE MUTHAMA…….....PETITIONERS

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS....1ST RESPONDENT

THE CABINET SECRETARY FOR INTERIOR AND

COORDINATION OF NATIONAL GOVERNMENT..2ND RESPONDENT

INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

JAPHETH MURIIRA MUROKO.....INTERESTED PARTY

RULING

1. On 8th October 2015 when the Petitioners counsel appeared before me to argue an application for conservatory orders, I declined to grant the Petitioner any ex parte orders but directed that service of both the Petition and the application be effected upon the Respondents. The Petitioner duly obliged and effected service.

2. The Petitioner then sought orders to restrain and prohibit his prosecution. He alleged that a press statement issued by the 1st Respondent on 5th October 2015 had prompted his prosecution. The Petitioner also sought a certification of the Petition as one raising substantial questions of law pursuant to Article 165 (4) of the Constitution.

3. Come the 12th day of October 2015, the Petitioner made another appearance before me. The Respondents also appeared. The Petitioner's Counsel Dr. Khaminwa disclosed to the court (and indeed availed a copy of the charge sheet) that the Petitioner had been indicted and charged with an offence under Section 96 (a) the Penal Code (Cap 63) Laws of Kenya. The Petitioner though was yet to take the plea.

4. Dr. Khaminwa, who appeared alongside Hon. Orengo, also disclosed to the court that a compromise had been struck with the Respondents, following issuance of summons to the Petitioner. The Petitioner would attend court and take a plea on the due date. This was with regard to the charges under Section 96 (a) of the Penal Code. The charge sheet, which I have perused discloses that the Petitioner is to be charged alongside the Interested Party. Dr. Maingi appearing for the 1st and 3rd Respondents confirmed Khaminwa's assertions.

5. Then, Dr. Khaminwa indicated that he wished the court to hear him on the third prayer of the application. The prayer sought that the matter to be referred to the Chief Justice for the empanelment of a bench of at least three judges to dispose of both the application as well as the Petition.

6. Dr. Khaminwa submitted that the issues raised by the Petition were of fundamental import. He pin-pointed the fact that the court was being invited to make a determination and a Constitutional interpretation of the process of investigation as undertaken pursuant to Constitutional provisions relating to both the 1st and 3rd Respondents and what role, if any, the 2nd Respondent may play in such process. Linked to this was whether the right to fair trial was to be observed from the time of investigations and the effect of violation of that right or non-observance.

7. Finally, Dr. Khaminwa pointed out that the Petition raised the issue as to whether the offence of incitement to violence contrary to Section 96 (a) of the Penal Code (Cap 63) Laws of Kenya was inconsistent with the Constitution in so far as it shifts the burden of proof to an accused person. The accused has, allegedly, under the Section the burden of establishing that an alleged utterance was legal and did not amount to an incitement to violence. According to Dr. Khaminwa, section 96 (a) of the Penal Code was inconsistent with and contravened Article 50 (fair hearing generally) and, in particular, Articles 50 (2) (b) & (2) (i) as to presumption of innocence and right to remain silent respectively.

8. For the record Dr. Maingi as well as Mr. Kuria were ready to proceed with the application. The court too was ready. Dr. Khaminwa was however not ready for the sole reason that he wanted the issue of empanelment under Article 165 (4) determined first. Dr. Khaminwa however asked the court to grant interim conservatory orders, 'even' on the courts own motion. Ms. Anyango Opiyo , advocating for the Interested Party, supported Dr. Khaminwa.

Of empanelment of a bench

9. The power to empanel a bench is not a remit to be highly exercised. It arises when "circumstances are special and the jurisdiction to be exercised is not ordinary " see Mwongo J in **Evangelical Mission for Africa & Another –v- Kimani Gachihi & Another [2014] e KLR.**

10. The question regarding the instances under which a matter ought to be referred to the Chief Justice under Article 165(4) has been considered in various decisions of this Court. Yet in all the cases a running theme that can be easily identified is that the court must be cognizance of the fact that the process of empanelment takes some time and justice must always be dispensed without delay: see **Harrison Kinyanjui v Attorney General & Another [2012]eKLR** and **Community Advocacy & Awareness Trust and Others v Attorney Genera Nbi HCCP N. 243 of 2011.** Each case though must always be considered on its own merits , even if there exist guidelines.

1. To prompt the Chief Justice, the court must be satisfied that the Petition raises a substantial question of law under Article 165 (3) (b) of (d). In this regard, it would be appropriate to call to mind the decision of the Supreme Court of India in the case of **Chunilal Mehta v Century Spinning and Manufacturing Co. AIR 1962 SC 1314**, where the court held that:

> **" A 'substantial question of law' is one which is of general public importance or which directly and substantially affects the rights of the parties and which has not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd,, the question would not be substantial"**

12. In Meru Petition High Court Petition No. 16 of 2013 **Amos Kiumo & Others –v- Cabinet Secretary Internal and Coordination of National Court and others,** Lessit J also stated as follows:-

> **"The substantial question of law is a question to be determined in the circumstances of the**

case. Substantial issue of law is not necessarily a weight one or that raises a novel issue of law or fact or one that is complex. May provisions of our Constitution are …….and bring forth novel issues yet it is not everyday that we shall call upon the Chief Justice to empanel a bench of not less than 3 judges. Public interest may be considered but it is not necessarily a decisive factor. It is the nature of Petitions filed to enforce the provisions of our Constitution to be matters of Public interest generally. The court ought to take into account other provisions of the Constitution, the need to dispense justice without delay having regard to the subject matter and the opportunity ….the empanelling should be the exception rather than a [sic] rule. A higher burden is cast on the party who applies to court to certify the matter for reference to the Chief Justice".

13. Odunga J in **Martin Nyaga & Others –v- The Speaker County Assembly of Embu** Petition no. 7 & 8 of 2014 made it even clearer in discerning the factors to be considered . So said he:

"**It is therefore my view that a matter be considered to raise a substantial question of law if inter alia any or all of the following factors are present.**

Whether the matter is moot in the same that a matter raises a novel point, whether the matter by its nature requires a substantial amount of time to be disposed off. The effects of the prayers sought in the Petition and the interest generated by the Petition".

14. The Petitioner herein has given a repertory of the Articles allegedly infringed, violated or contravened.

15. Most of the issues raised relate to the broad question as to the court's powers to stay a parallel criminal justice process. They may be fundamental as Dr. Khaminwa put it but I am not satisfied that they are of substantial depth to invoke the precincts of Article 165 (4). It is beyond controversy that this court as well as the Court of Appeal have dealt with like applications and Petitions .To prompt the Chief Justice under Article 165 (4) simply because the issue is one of stay of parallel criminal proceedings would lead to an avalanche of empanelment. The reason being that due to the infinite variety of cases where the issue of stay of criminal proceedings arise, a bench may have to be empanelled every time an application is filed. This may not promote the values and principles of the Constitution and may lead to delay in disposal of cases and disputes generally: see **Coalition for Reform and Democracy & 2 Others –v- Republic of Kenya & Another (No. 1) [2015]eKLR** where the court was emphatic that:

"**Judicial resources in terms of judicial officers in this country are very scarce empanelling a bench usually has the consequence of delaying the cases which are already in the queue hence worsening the problem of backlogs in this Country".**

16. During the brief oral arguments,I did not hear either Mr. Kuria or Dr. Maingi to strongly oppose the request for reference to the Chief Justice for purposes of empanelment even though they both indicated that the Petition did not raise any substantial issues of law.

17. Notwithstanding the aforestated, one particular issue is eye-catching. The Petition raises a pertinent question as to the constitutionality of Section 96 (a) of the Penal Code as to incitement to violence and disobedience of the law. The section appears to shift the burden of prove to an accused person. Would this offend Articles 50(1), 50(2) (a) and or 50(2)(i) of the Constitution?

18. I am conscious of the fact that all laws which were in force immediately before the effective date ought to be construed with the necessary alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with the Constitution: See Section 6 of the Sixth Schedule to the Constitution.

19. I am however also conscious of the fact that long before the promulgation of the Constitution in 2010, the Court of Appeal had, in **R-v- Subordinate Court of the First Class Magistrates' court at City Hall *Ex Parte* Joginder Singh & Another [2006] 1 E A 330,** stated that even though in criminal proceedings

it is always for the prosecution to prove its case beyond reasonable doubt, it was possible that in certain cases the burden could shift and legally so from the prosecutor to the accused. Would the Court of Appeal have reached the same decision, if it was faced with a similar question accompanied by the current Constitution where some rights cannot be derogated and not the repealed Constitution? Perhaps it would have, perhaps not. On my part, I hold the view that there is substantial question of law raised by the Petitioners in this regard.

20. I must also take note of the ripple effect. A determination on the constitutionality of burden shifting in the case of criminal as well as quasi-criminal cases would have grave effects on various offences. For example would it still be the law that those found in possession of stolen items have the burden to disapprove their guilt as was held in **Malingi –v- Republic [1989] KLR 225** or will the non-derogable rights under Article 50 take further shape hence and lead to such offences, as currently crafted, being deemed unconstitutional. What would be the status of Section 111 of the Evidence Act (Cap 80) laws of Kenya.

21. I am prepared to find ,which I do, and hold that this matter be certified as raising a substantial question of law under Article 165(3)(d) and that the same ought to be referred to the Chief Justice to empanel an uneven number of judges by not less than three to hear the matter, as prayed by the Petitioner.

22. The core question raised in the Petition is whether Section 96 of the Penal code (Cap 63) Laws of Kenya is inconsistent with and contravenes the Article 50 of the Constitution and ,if so, whether by implication Section 111 of the Evidence Act is also unconstitutional.

Interim relief

23. Dr.Khaminwa also asked me to, *suo moto*, make orders of stay of the intended prosecution. This is against the backdrop of the fact that the Petitioner and the Respondents had agreed that the Petitioner attends court and takes a plea on the criminal charge. I agree with Dr. Khaminwa that this court has powers to make such orders. I may indeed add that the court should be ready to fashion in the most appropriate terms such orders as may be necessary for the ends of justice and which help to protect or enforce the Constitution and any rights guaranteed thereunder .

24. I am however not satisfied in the circumstances of this case that the same move is now warranted. I stated on 8th October 2015 that that there are appropriate Constitutional safeguards, not national safeguards as Dr Khaminwa sought to make believe, to ensure that the Petitioner's rights are upheld even when he appears before a criminal trial court. That view, for the time being, still stands given also that the Petitioner opted not to have the application for conservatory orders heard on its merits, even with the Respondents willing to be heard. I will not prompt any bench that may be constituted to hear the matter.

25. I decline to issue any interim conservatory orders of stay.

26. Orders accordingly.

Dated at Nairobi this 13th of October 2015 and duly signed and delivered in open court.

J.L. ONGUTO

JUDGE