



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

PETITION NO.9 OF 2012

HONOURABLE WASHINGTON JAKOYO MIDIWO.....APPELLANT

VERSUS

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

THE COMMISSIONER OF POLICE.....2ND RESPONDENT

THE DIRECTOR C.I.D.....3RD RESPONDENT

THE CHIEF MAGISTRATE, NAIROBI LAW COURTS....4TH RESPONDENT

J U D G M E N T

INTRODUCTION

1. This decision concerns whether the court should intervene and quash the warrants of arrest issued by the Chief Magistrate's Court, sitting at Milimani, vide Misc. Criminal Case No. 489 of 2012, for the arrest of the petitioner herein. The Court has also been asked to quash any decision to institute criminal charges, to prosecute and or to commit the petitioner to trial on the basis of the statements recorded with the 3rd Respondent in late 2012 touching on the alleged plot hatched to assassinate the Hon. Raila Odinga the then Prime Minister of the Republic of Kenya.

THE FACTS

2. The facts necessary for determination of this dispute are largely not in dispute and are set out in the parties' dispositions.. The Petitioner herein was the member of parliament for Gem Constituency as well as the Parliamentary Chief Whip of the Orange Democratic Movement Party. On or around the 7th of April 2012, the petitioner attended a funeral of the late Dr. Leah Gondi within Bondo Constituency in Siaya County. He was in the company of the then Prime Minister of the Republic of Kenya Hon. Raila Odinga as well as other political leaders.

3. At the said funeral, the petitioner publicly made a statement to the effect that he had received classified information that a plot had been hatched to assassinate the Prime Minister. After the funeral service, the petitioner was accompanied by the Prime Minister and other political leaders to his rural home in Gem Constituency where they stayed up to around 8:00pm. As soon as the guests had departed, the DCIO Bondo and the OCPD Siaya came to the petitioner's home and demanded that he accompanies them to Bondo Police Station to record a statement regarding the statement he had made earlier in the day regarding the alleged plot to assassinate the Prime Minister. During all these happenings, members of the

media fraternity were present.

4. At Bondo Police Station, it was mutually agreed that the petitioner would record a statement at the CID headquarters in Nairobi on 10th April 2012. As was agreed, the petitioner did record a statement at the CID headquarters in Nairobi before the Deputy Director of CID. On 11th April 2012, the petitioner was again invited to the CID headquarters where he recorded a further statement and it was further agreed that he would avail witnesses to record their statements. At the time of recording his statement, the petitioner emphatically refused to reveal the source of his information.

5. On 20th April 2012, the DPP ordered that the petitioner be arrested and charged with the offence of giving false information. Subsequently, warrants of his arrest were issued by the 5th respondent. The petitioner complains that the DPP made a decision to have him arrested and charged despite the fact that he was willing to bring forth witness to corroborate his statement. Further that he only got to know that the police after him through the media.

THE PETITIONER'S CASE

6. The petitioner's case is contained in his petition dated 25th April 2012 and in the affidavit sworn in support on the same day by one Beatrice Akinyi Muganda, the wife of the Petitioner and his submissions.

7. The petitioner complains that the directive by the DPP specifically through the media that the petitioner be arrested was made in bad faith and ultra vires his powers as limited by Article 157(4) of the Constitution as well as a violation of the doctrine of separation of powers. The petitioner contends that the decision to prosecute him was marred with malice and contrary to the provisions of Article 157 of the Constitution which empowers the DPP to order investigations and not arrests.

8. The petitioner contends that there was no prima facie evidence to support any charges against him and that any intended prosecutions were based on ulterior motive, actuated by malice and an abuse of the Court process. It is his case that the decision to arrest him undermines the citizens' right to give information to form a basis for investigations and that the decision was made for the sole purpose of intimidating him. He avers that the prosecution was intended to humiliate and embarrass him seeing as he is a public figure and a politician. To support the allegation that there was ulterior motives and abuse of process in his intended arrest and prosecution, the petitioner points to the dramatic raids by police to his home in Gem, the haste by the DPP to order for his arrest and prosecution, the media display and publicity of his intended arrest and prosecution and the refusal to take witness statements from the witnesses he was willing to avail.

9. The petitioner further complains that as a result of the police raids to his home in Gem and the media publicity of his intended arrest and prosecution, the petitioner has suffered humiliation and a plethora of his rights as guaranteed under the constitution . He enumerates them as follows: His right to personal liberty and dignity, freedom from mental and physical torture as guaranteed under Article 28(d), freedom from from inhuman and degrading treatment , right to equal protection of the law and his right to privacy. The petitioner urged the court to examine all the facts and intervene. He called in aid several international conventions and authorities including the following **REP VS.- ATTORNEY GENERAL EXP KIPNGENO ARAP NGENY HC CIVIL APP. NO. 406 OF 2001, KCB LTD & 2 OTHERS VS.- COMMISSIONER OF POLICE & ANOR (NAIROBI HC PETITION NO. 218 OF 2011, ERIC CHERUIYOT KOTUT VS.- JUDICIAL COMMISSION OF INQUIRY INTO GOLDENBERG AFFAIRS NAIROBI MISC. CIVIL APP. NO. 416 OF 2006**

RESPONDENTS' CASE

CASE FOR THE DPP

10. The DPP, the 1st respondent, opposes the petition and has filed a replying affidavit in opposition thereto, sworn by James Mungai Warui, a Principal prosecution counsel in the Office of the DPP. DPP

submits that it received the investigations file with a report and recommendations from the Commissioner of Police, the 2nd Respondent herein on 19th April 2012. The DPP independently reviewed and analyzed the evidence contained in the investigations file that was submitted, including 25 witness statements, documentary exhibits and statements of the petitioner as required by the law. It is on the basis of the review that the DPP issued directions to prosecute the petitioner. The DPP states that he reached an independent finding that there was sufficient evidence to charge the petitioners with offence of giving false information to a person employed in the Public Service contrary to section 129(a) of the *Penal Code*. The DPP maintains that the decision to charge the petitioners was informed by the sufficiency of the evidence on record and the public interest and not any other consideration. That as such, the subsequent issuance of warrants of arrests by the 5th Respondent was not in any way vexatious, malicious or an abuse of the process of court as alleged.

11. The DPP contends that the accuracy and correctness of the evidence and facts gathered in the investigations can only be tested by the trial court during a hearing and it is on that basis that the innocence or otherwise of the petitioner would be determined by the court. The DPP further argues that the right forum for the complaints and challenges raised by the petitioner would be the trial court which would have the advantage of reviewing the evidence and listening to witnesses before reaching a decision. Further that the petitioner adamantly refused to divulge the source of his information and failed to call witnesses to corroborate his statement

12. In submissions, the DPP submits that the petitioners have not demonstrated that the 1st, 2nd and 3rd respondents lacked jurisdiction, acted in excess of jurisdiction or departed from the rules of natural justice in conducting investigations and in directing that the petitioners be charged. Further, that an order of prohibition does not lie to correct the course, practice or procedure of an inferior tribunal. The Court of Appeal case in **KENYA NATIONAL EXAMINATION COUNCIL V. REPUBLIC, EX-PARTE GEOFFREY GATHINJI NJOROGE CIVIL APPEAL NO. 266 OF 1996**, was cited in support of this proposition.

13. The DPP asserts the independence of his office noting that under **Article 157(10)** the office is free from control or direction of any person or authority in the commencement of criminal proceedings. Counsel for the DPP relied on several cases including; **KINANO KIBANYA VS.- REPUBLIC CRIMINAL APPLICATION NO. 453 OF 2003 AND MEXINER & ANOTHER VS.- THE ATTORNEY GENERAL, CIVIL APPEAL NO. 131 OF 2005** for the proposition that the Court should exercise extreme care not to interfere with the constitutional power of the DPP to institute and undertake criminal proceedings and should only interfere with the independent judgment of the DPP if it is shown that the exercise of his powers is contrary to the Constitution, is in bad faith or amounts to an abuse of process.

14. The DPP denies the petitioner's allegations of violation of his constitutional rights. He submitted that the petitioner has not demonstrated how his rights have been contravened. That no specific allegations have been made in regards to the various Articles of the Constitution mentioned. He relied on the case of **MATIBA VS.- AG [1990] KLR 666** where it was held that allegations of breach of constitutional rights must be pleaded with precision.

15. In response to the petitioners' contention that he entitled to the witness statements and other evidentiary material before plea was taken and the right to be informed of the charge with sufficient detail to answer it, the DPP submits that **Article 35** does not apply in respect of evidence gathered in the course of investigation as **Article 50** is very specific to the rights of the accused. He submitted that the provisions of **Article 50** were satisfied when the provisions of the **Criminal Procedure Code** were followed which provide that the trial commences at when the accused is called upon to plead and it is at that stage that the petitioner is entitled to all the evidence in possession of the prosecution.

16. Further on the issue of media publicity, the DPP argued the freedom of the media was a guarantee under the constitution and they had the right to report whatever it is they saw fit. Counsel was however quick to add that the Court was not governed by what was reported by the media houses. It has an independent mind and has a duty of maintaining the rule of law.

CASE FOR THE ATTORNEY GENERAL

17. Counsel acting for the 2nd to 5th Respondents filed grounds of opposition dated 10th May, 2012. Counsel focused her submission on the issue whether there was any infringement of the fundamental rights of the petitioner. She adopted the submissions of the DPP and argued that where there was an allegation of a breach of a fundamental right, the petitioner had the duty to demonstrate with precision, the rights that have been violated and the manner in which those rights have been violated. Counsel relied on the case of **ANARITA KARIMI NJERU VS.- REPUBLIC [1979]KLR54**

COURT'S DETERMINATION.

GENERAL PRINCIPLES

18. The State's prosecutorial powers are vested in the DPP under **Article 157** of the Constitution, the pertinent part being **Sub-Article 6** which provides as follows;

(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.”

Such exercise of power is not subject to the direction or control by any authority as is stipulated under **Article 157(10)** as follows:

(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 direction or control of any person or authority.

19. These provisions are also replicated under **section 6** of the *Office of the Director of Public Prosecutions Act, No. 2 of 2013* as follows;

6. Pursuant to Article 157(10) of the Constitution, the Director shall—

“(a) not require the consent of any person or authority for the commencement of criminal proceedings;

(b) not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law; and

(c) be subject only to the Constitution and the law.”

20. However, the discretionary power vested in the DPP is not a free hall and such discretion must be exercised in accordance with the provisions of the constitution. It must be exercised reasonably and within the law. It must be exercised in a way that promotes the objects laid out in section 4 of the ODPP Act. These objects are ; the diversity of the people of Kenya, impartiality and gender equity, the rules of natural justice, promotion of public confidence in the integrity of the Office, the need to discharge the functions of the Office on behalf of the people of Kenya, the need to serve the cause of justice, prevent abuse of the legal process and public interest, protection of the sovereignty of the people, secure the observance of democratic values and principles and promotion of constitutionalism. The court may intervene if it is demonstrated that the impugned proceedings are based on malice and propagated by ulterior motives. see. **THUITA MWANGI & 2 OTHERS VS.- ETHICS & ANTI-CORRUPTION COMMISSION & 3 OTHERS[2013] EKLR**

INTENDED PROSECUTION BASED ON MALICE?

21. One of the grounds raised by the petitioner in his petition is that the decision by the DPP to have him arrested and prosecuted is unfounded. He argues that there are no cogent reasons raised by the DPP to have him arrested leave alone prosecuting him. He also states that he was denied his right to access the evidence and the information that the DPP was relying on in ordering his arrest. He goes ahead to expound the fact that he had witnesses who were willing to corroborate his story and goes to a great length to justify why he should not be charged.

22. Despite the fact that the arguments by the petitioner are fine-tuned, the Court at this point is not the right forum to tender the justifications concerning veracity of these allegations. I will agree with the DPP that as was stated in *MEIXNER & ANOTHER V ATTORNEY GENERAL (SUPRA)*, “*It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. It would be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.*” Also in *BEATRICE NGONYO KAMAU & 2 OTHERS V COMMISSIONER OF POLICE AND THE DIRECTOR OF CRIMINAL INVESTIGATIONS DEPARTMENT & ANOTHER PETITION 251 of 2012 [2013]eKLR*, , Lenaola J., put it as follows: “**The point being made above is that the DPP though not subject to control in exercise of his powers to prosecute criminal offences, must exercise that power on reasonable grounds. Reasonable grounds, it must be noted, cannot amount to the DPP being asked to prove the charge against an accused person at the commencement of the trial but merely show a prima facie case before mounting a prosecution. The proof of the charge is made at trial.**”

23. The Commissioner of Police conducted his investigations and after satisfactorily finalizing them, he forwarded them to the DPP. The DPP applied his independent mind and decided that based on the investigations an offence had been committed. He then ordered that the petitioner be charged. The petitioner has not demonstrated that the DPP in arriving at his decision acted capriciously, in bad faith, has abused the process or that he did not act independently. The petitioner has also not shown that issuing a warrant of arrest was based on malice or driven by ulterior motives. The complaints by the petitioner seem to be more on the mode of carrying investigations than the decision by the DPP to prosecute. I therefore do not find a reason to prompt the court's intervention.

RIGHT OF ACCESS TO EVIDENCE

24. The petitioner contends that he was denied witness statements and other evidentiary material. Under **Article 50(2)** one of the elements of a fair trial is the right, “***to be informed of the charge, with sufficient detail to answer it.***” **Article 50(2)(b)** provides that a person charged has the right, *to be informed of the charge, with sufficient detail to answer it* “**while Article 50(2)(j) provides that a person charged has a right, to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.**” According to the petitioner, ‘trial’ includes plea taking and the question is whether the requirements of the fair trial under the **Article 50(2)(j)** contemplate that all prosecution material be availed to the accused before plea taking.

25. On the other hand, the respondents are of the view that the right to access evidence under Article 50(2)(j) is only limited to a person who has already taken plea. The High court in *THUITA MWANGI & 2 OTHERS VS.- EACC (Supra)* has quoted the Court of Appeal in the case of *Thomas PATRICK CHOLMONDELEY V REPUBLIC (Supra)* where it had this to say, “**We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under section 77 of our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items. If for any reason the prosecution thinks it ought not to disclose any piece of evidence in its possession, for example, on the basis of public interest immunity, they must put their case before the trial judge or magistrate who will then decide whether the claim by the prosecution not to disclose is or is not justified. The position is the same in various commonwealth countries.**”

26. The court in Thuita Mwangi(supra) concluded that

"The right to be provided with material the prosecution wishes to rely on is not a one-off event but is a process that continues throughout the trial period from the time the trial starts when the plea is taken. The reality is that there will be instances where all the information relating to investigation may not all be available at the time of charging the suspect or taking the plea. The disclosure of evidence, both inculpatory and exculpatory, is easily dealt with during the trial as the duty to provide the material is a continuing one and the magistrate is entitled to give such orders and directions as are necessary to effect this right. When the fresh material is provided, the accused is entitled to have the time and opportunity to prepare their defence"

In light of the above I find that the right to information is a continuing one that can easily be enforced by the trial court.

PRE-TRIAL MEDIA PUBLICITY

27. The petitioner also complains of being exposed to media publicity at the behest of the respondents. He stated that the media personalities were present when the Police stormed his home in Gem. He also complains that he learnt his intended arrest via the media while he had on previous occasions presented himself to the police voluntarily. He states that as a result his dignity was insulted and he was subjected to humiliation and embarrassment. That he was subjected to trial and conviction by the fourth estate and he thus doubts he will go through an impartial trial once charged.

28 The issue of media publicity has been subject in many human rights suits. I would however concur with the sentiments in the case of ***WILLIAM S.K. RUTO & ANOTHER V ATTORNEY GENERAL, HC CIVIL SUIT NO. 1192 OF 2005*** where it was stated that; **"The applicants will be tried by qualified, competent and independent judicial officers who are not easily influenced by statements made by politicians to the press. In our country today, such statements are the order of the day and it is our view that the courts will rise above such utterances. We find no basis for the applicant's fears."**

CONCLUSION

29. It is my finding that the petitioner has failed to demonstrate that the intended prosecution was driven by any other purpose but justice and enforcement of the law. The same is hereby dismissed with costs to the respondents.

Orders accordingly.

Dated. Signed and delivered this 2nd November, 2015

H. K. CHEMITEI

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