



**REPUBLIC OF KENYA**

**High Court at Garissa**

**Petition 1 of 2012**

**ISMAIL MOHAMED GARAT ALIAS KORIO.....1<sup>ST</sup> PETITIONER**

**MOHAMED GABOW KHARBAT.....2<sup>ND</sup> PETITIONER**

**MOHAMUD MOHAMED ADEN.....3<sup>RD</sup> PETITIONER**

**ABDI GEDI.....4<sup>TH</sup> PETITIONER**

**ABDI HAJI MOHAMED.....5<sup>TH</sup> PETITIONER**

**HUSSEIN HAJI MOHAMED ROBLE.....6<sup>TH</sup> PETITIONER**

**VERSUS**

**THE SENIOR PRINCIPAL MAGISTRATE GARISSA.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> RESPONDENT**

**AMBIO DUALE FIRIN.....INTERESTED PARTY**

**JUDGEMENT**

**Introduction and Background**

1. By a petition dated 20<sup>th</sup> February 2012 and filed on 21<sup>st</sup> February 2012 the six Petitioners described as civic leaders in the County of Garissa have moved this court pursuant to Article 22 of the Constitution of Kenya 2010 seeking orders against the Senior Principal Magistrate Garissa and the Director of Public Prosecutions (Respondents) as follows:

i. A declaration that the commencement and prosecution of charges against the Petitioners in Criminal Case No 256 of 2012 is in violation of their constitutional right to fair administrative action.

ii. An order quashing the criminal proceedings in Criminal Case No. 256 of 2012 before the 1<sup>st</sup> Respondent.

iii. An order quashing the decision of the 2<sup>nd</sup> Respondent to commence and sustain criminal proceedings in Criminal Case No. 256 of 2012 before the 1<sup>st</sup> Respondent.

iv. Costs of this Petition

2. The Petitioners had, by a Notice of Motion dated 20<sup>th</sup> February 2012 brought under certificate of urgency, moved the court seeking a conservatory order staying the execution of warrants of arrest issued against them together with the proceedings in Criminal Case No. 256 of 2012 that was pending before the 1<sup>st</sup> Respondent pending the hearing and determination of the application inter partes and subsequently the hearing and determination of the Petition. Upon service and appearance of all parties a consent order was entered enjoining Ambio Dualle Firin as an interested party and a conservatory order issued staying execution of warrants of arrest and Criminal Proceedings against the Petitioners in Criminal Case No. 256 of 2012 pending hearing and determination of this petition.

### **Petitioners' case**

3. The gist of the Petitioners' case is that of violation and infringement of their constitutional rights to an expeditious, efficient, lawful, reasonable and procedurally fair administrative action. They base this claim on allegations that on 17<sup>th</sup> February 2012 they learned through the media that criminal charges had been preferred against them at the Garissa Senior Principal Magistrate's Court in criminal case No. 256 of 2012; that warrants of arrest had been issued against each of them in respect of the said criminal proceedings; that the 2<sup>nd</sup> Respondent proceeded to take the matter before the 1<sup>st</sup> Respondent without notifying them and the 1<sup>st</sup> Respondent allowed the matter to proceed in the absence of the Petitioners; that they had not been notified of any charge that had been preferred against them, neither were they granted an opportunity to be present in court to plead to the charges; that the action by the Respondents is unlawful and a breach of their fundamental rights and freedoms.

4. In the affidavit sworn on 20<sup>th</sup> February 2012 in support of the Notice of Motion the 1<sup>st</sup> Petitioner deposes that neither of the Petitioners had been summoned to appear and neither had they taken plea before any court in any criminal charges. He further deposes that sometime in June 2011 he had been summoned by the police in relation to a complaint by the interested party to which he had nothing to do with.

5. In his oral submissions learned counsel for the Petitioners told the court that the Petitioners are seeking enforcement of their right under Article 50 (1) (b) to be informed of the charges facing them in detail and a right to be present and be tried in respect thereof. He submitted that the file containing the charge sheet was presented before the 1<sup>st</sup> Respondent and warrants of arrest issued for reason that the Petitioners were not in court. He submitted that the process in the lower court leading to the issuance of warrants of arrest was flawed because the basis for issuing warrants of arrest was not demonstrated.

### **2<sup>nd</sup> Respondents' case**

6. The petition has been opposed by the 2<sup>nd</sup> Respondent. Through a replying affidavit sworn on 31<sup>st</sup> August 2012 by Chief Inspector Julius Ombati Deputy DCIO Garissa it is deposed that the criminal case was procedurally reported to the police by the interested party Ambio Duelle Firin vide Occurrence Book (OB) No. 63 of 20<sup>th</sup> May 2011 and investigations commenced; that all the six Petitioners were served through the Town Clerk Garissa Municipality to compel attendance before a police officer under section 22 of the Police Act Cap 84 Laws of Kenya (now repealed by the National Police Service Act No. 11A of 2011); that the said notices required all the six Petitioners to appear before the investigator at the DCIO Office on diverse dates to assist in investigations (copies of notices annexed and marked 'jm2 a-f'); that the Petitioners acknowledged having received the notices through their legal representative Mr. H. B Mosi by a letter dated 3<sup>rd</sup> June 2011 (copy of letter annexed and marked 'jm3'); that all the six Petitioners accompanied by their counsel attended before the investigating officer on diverse dates, were interrogated, voluntarily recorded and signed statements under inquiry (copies of statements annexed and marked 'jm4 a-f'); that further investigations were carried out by recording statements from prosecution witnesses and search warrants sought and granted by the court to investigate the Petitioners' accounts at Gulf African Bank, Garissa (copies annexed and marked 'jm5 a-b'); that certain questioned documents and exhibits were forwarded to the Government forensic document examiner for analysis (annexure marked 'jm6'); that the investigation file was forwarded to the 2<sup>nd</sup> Respondent who directed through a letter dated 9<sup>th</sup> January 2012 that the Petitioners be charged for various offences (copy of letter annexed and marked 'jm7'); that the Petitioners face various charges before the 1<sup>st</sup> Respondent as per the attached charge sheet (annexed and marked 'jm8'); that the application for warrants of arrest was made after the Petitioners failed to appear to the police station when they were summoned through their mobile phones to do so; that the Petitioners could not appear in court to face charges without being formally arrested so as to take their fingerprints and for record purposes.

7. In addition to the grounds opposing the petition contained in the replying affidavit, learned state counsel made oral submissions during the hearing of this Petition. He told the court that the proceedings were instituted procedurally by invoking the provisions of section 89 of the Criminal Procedure Code, notices issued and statements taken by the police after the review of which the 2<sup>nd</sup> Respondent instructed that criminal charges be preferred against the Petitioners. Upon being summoned to attend to the police and failure to attend the 1<sup>st</sup> Respondent invoked the provisions of section 90 of the Criminal Procedure Code and issued warrants of arrest. Counsel further submitted that the Petitioners, in their claim on infringement and violation of their rights have not met the constitutional threshold; that the decision by the 2<sup>nd</sup> Respondent was in order and that in exercising his discretion the 2<sup>nd</sup> Respondent is guided by the interest in the administration of justice and the need to prevent abuse of process; that the Petitioners have not demonstrated how actions of the 1<sup>st</sup> Respondent have threatened their rights; that the duty of this court is limited to protecting existing rights and not creating new ones and that in exercising that jurisdiction the court is under obligation to protect the rights of all parties. Counsel asked the court to dismiss the petition.

### **The Interested Party's case**

8. The interested party deposes in her replying affidavit 26<sup>th</sup> April 2012 she reported to the police after the Petitioners defrauded her of Kshs 5,500,000 and police commenced investigations into the claim leading to criminal charges; that it is not for this court to determine the sufficiency or otherwise of the evidence that will be adduced; that the actions of the Respondents is lawful and cannot be in breach of the right to liberty which is not absolute and that the Petitioners have not demonstrated how their constitutional rights have been violated. In addition to the grounds contained in the affidavit, learned counsel for the interested party made written submissions and attached a bundle of authorities in support of their case. He also made oral submissions during the hearing of the petition.

9. The gist of the case for the interested party as can be discerned from the pleadings is that the rights and the alleged infringement must be identified in order for the court to intervene; that the Petitioners have not demonstrated how the Respondents' action violates their rights or infringes on their constitutional rights; that the Petitioners make generalized complaints on lack of information on the

charges and have therefore failed to demonstrate infringement of their rights; that it cannot be true that the Petitioners were not informed of the charges because by a letter dated 3<sup>rd</sup> July 2011 the Petitioners were aware of the matter and had instructed an advocate; that the Petitioners are not claiming that this court has denied them right to appear in court to vindicate themselves but are asking the court to give them orders so that they can go free; that the allegations by the interested party that the Petitioners have obtained Kshs 5,500,000 from her are serious and the Petitioners are asking for orders to stay proceedings that have not even started; that the Petitioners are trying to pre-empt the proceedings in the lower court and it is not for this court to analyse the evidence; that without clearly identifying the rights that have been violated amounts to abuse of this court's process and ought to be dismissed with costs.

### **Determination of Issues**

10. I understand my singular duty as determining whether the Petitioners' rights have been violated by the Respondents. If I find this is the case, the attendant issue is to determine how those rights were violated. The Petitioners sued the Respondents directly without including the Attorney General in his representative capacity where government institutions or officers are sued in a case of civil nature. The 2<sup>nd</sup> Respondent was represented in court by the learned state counsel while there was no representation on behalf of the 1<sup>st</sup> Respondent although the submissions of the learned state counsel included the 1<sup>st</sup> Respondent. While I take into account that this was not done, I intend to address the substantive issue legal issues raised in this Petition.

11. The Petitioners have invoked Article 22 of the Constitution of Kenya 2010. Under Article 22 (1) and (2) any person has locus standi to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened and such person can act in his own interest or in the interest of another person or a group or class of persons. The Petitioners did not cite Article 23 that gives the courts authority to determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom. They also cite Article 50 of the constitution that guarantees right to fair hearing specifically the right to be informed of the charge with sufficient detail to answer it and the right to be present when being tried. I am alive to the fact that the criminal proceedings in the lower court had not commenced. I can state without fear of contradiction that the 2<sup>nd</sup> Respondent acting through the police was in the process of commencing criminal proceedings. The pleadings confirm that following a complaint by the interested party, the police in Garissa commenced investigations by issuing notices which were served on the Petitioners. There is no dispute that the notices were received and acted upon by the Petitioners' attendance before the police in company of their counsel. There is no doubt that criminal charges were drawn by the police as instructed by the 2<sup>nd</sup> Respondent and a criminal case file opened in the lower court being criminal case No. 256 of 2012 which lists the six Petitioners as accused persons. The case was presented before the 1<sup>st</sup> Respondent on 16<sup>th</sup> February 2012 during which time the prosecutor sought warrants of arrest against all the six Petitioners and the same was granted. The 1<sup>st</sup> Respondent fixed the case down for mention on 23<sup>rd</sup> February 2012. The case was not mentioned on that date because the Petitioners moved to this court seeking stay which they obtained through consent of all the parties dated 22<sup>nd</sup> February 2012.

12. The charge sheet lists various offences totalling to twelve (12) counts facing the Petitioners some individually and others jointly. It is not for this court to determine the culpability or otherwise of the Petitioners in respect of those charges. That is the mandate of the lower court. What is before me is the determination as to whether the rights of the Petitioners have been violated as claimed. In paragraph 7 of the Petition the Petitioners state that they had never been summoned to appear at any police station nor had they taken plea before any court; that they had not been notified of any charge that had been preferred against them nor granted opportunity to be present in court and because of this their rights as stated in this Petition have been violated. In my view it is erroneous and misleading to state that the Petitioners had never been summoned to appear at any police station. In the supporting affidavit sworn on 20<sup>th</sup> February 2012, the deponent Ismail Mohamed Garat admits to having been summoned by the police in respect of a complaint lodged by the interested party. The Petitioners also appear dishonest in not mentioning anything to do with the notices issued by the police to them to appear at the police station and the letter written by their advocate Mr. Mosi informing the DCIO that the advocate would accompany the

Petitioners to the Police Station. The Petitioners are also silent on the statement that they were summoned through their mobile phones to appear at the Police Station in respect of the complaint by the interested party. They are also silent on the statements they recorded with the police on the same matter.

13. The 2<sup>nd</sup> Respondent's stand is that he followed the laid down procedure in handling the investigations and commencing criminal charges against the Petitioners. He cites the provisions under the Criminal Procedure Code in support of that assertion. **Section 89 of the Criminal Procedure Code** provides the procedure in instituting a complaint. This can be done either by making a complaint before a magistrate or by bringing before the magistrate a person who has been arrested without warrant of arrest. **Section 90 (1) of the same Code** provides that upon receiving a complaint and having signed the charge in accordance with **section 89**, the magistrate may issue either summons or a warrant to compel the attendance of the accused person before court with jurisdiction to try the offence alleged to have been committed.

14. In paragraph 8 of the Petition it is stated that the action by the 2<sup>nd</sup> Respondent in taking the matter to the 1<sup>st</sup> Respondent without notifying them and the 1<sup>st</sup> Respondent's action in allowing matter to proceed in the absence of the Petitioners and issuing warrants of arrest violated and infringed the Petitioner's constitutional right to an expeditious, efficient, lawful, reasonable and procedurally fair administrative action. I must admit that I do not understand what the Petitioners mean by this paragraph. Are the Respondents out of procedure in their actions? I do not think so. Given that the 2<sup>nd</sup> Respondent has stated that the Petitioners were summoned to the police station through their mobile phones and failed to attend (there is no evidence denying this) and given that the Petitioners were aware of the criminal investigations against them (they are silent on this but this courts finds that there is evidence to support the same) and given further that the Petitioner had not been arrested by the police, the only option the 2<sup>nd</sup> Respondent had was to appear in court and ask for a warrant of arrest. I find the action by the 2<sup>nd</sup> Respondent in accordance with the provisions of the Criminal Procedure Code in respect to commencement of criminal proceedings (see sections 89 and 90). I also find that the actions of the 1<sup>st</sup> Respondent were in accordance with his judicial mandate and were not illegal.

15. I have read the many authorities cited by the interested party and those of the Petitioners. The first authority cited by the Petitioners, **Republic v. District Health Officer, Kisii & another ex parte Mageto & 11 others [2005] eKLR** does not assist their case. In that case the applicants had been aggrieved by actions of the respondents to close a rental premises without giving them a hearing. My view is that the second authority, **Civil Appeal No. 178 of 2002 Kiai Waweru & 2 others v. Gichuhi Macharia & another** does not assist the Petitioners as well. On the other hand the Interested Party has cited several authorities starting with **Meme v. Republic & Another [2004] eKLR** in which it was held, inter alia, that *'where a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed and that the applicant's instant application had not fully complied with the basic test of constitutional references; as it was founded on generalized complaints without any focus on fact, law or constitution. Hence it had nothing to do with constitutional rights of the appellant'*. In the **High Court of Kenya Civil Case No. 1192 of 2005 William S.K Ruto & another v. AG** the court held that that the applicant's right had not been violated in any way but instead the applicant was trying to pre-empt the prosecution case.

16. I have read all the pleadings, submissions and authorities with patience. I have carefully considered the Petitioner's case and my conclusion is that they have not established what rights have been infringed. I stated in this judgement that the Petitioners were aware of the criminal investigations going on against them and their silence on this is dishonest and misleading. I have also stated that the Respondents were acting within their lawful mandate. The law is clear on how criminal proceedings should be commenced and in my view law was followed. Perhaps my only comment is the manner in which the prosecutor in the lower court proceeded. He ought to have explained the circumstances under which the criminal case was before the court and the reasons why the accused persons were not in court. I also fault the 1<sup>st</sup> Respondents for not making enquiries regarding the matter. This failure does not in my view occasion

miscarriage of justice or amount to violation of the Petitioners' rights. Our progressive constitution guarantees rights and freedoms of individuals but these rights are not absolute. They must be balanced against other rights and freedoms (**see Githunguri v Republic [1986]**). The Petitioners have not appeared in court and actually it is by appearing in court that their rights can be protected. The court through due process will inquire into their involvement or otherwise in the criminal case and a determination made.

17. The Constitution and the law generally defines the rights and obligations of parties and guarantees equal treatment of all without discrimination and the courts in exercising the judicial authority on behalf of the citizenry shall bear in mind the principles of Article 159 especially the requirement to exercise that authority by according expeditious justice to all irrespective of status. The Respondents as well as the interested party have constitutional rights too. While this court is alive to the fact that the Petitioners are presumed innocent until proof to the contrary it is also alive to the legal requirement that anyone who breaches the law must face prosecution. What the Petitioners are facing are allegations of culpability in the criminal case under investigation and these allegations have to be tested through the legal proceedings before a court of law before their innocence or involvement can be determined.

18. I wish to state that when police arrest a suspect on suspicion of criminal involvement it is lawful to allow the legal process to continue to its conclusion. If those proceedings are informed by malice, then upon proof of the same there are remedies available under the law. As the matter stands before this court, there has been no demonstration that the rights of the Petitioners have been violated. The prayers sought by the Petitioners cannot issue. This would be tantamount to denying the Respondents and the Interested party the chance to have their case prosecuted to the final conclusion. If this court were to grant the prayers sought by the Petitioners it would be setting a bad precedent and would open the floodgates to other like minded people to rush to court to block intended criminal prosecutions on grounds that do not stand legal test.

19. In conclusion, I find and hold that the actions of the Respondents are not unlawful and do not breach fundamental rights and freedoms of the Petitioners. In the alternative, the Respondents actions are within the law and are being exercised within their lawful mandates. I also find and hold that the Petitioners have failed to establish and specify which rights have violated and how these rights have been violated. I therefore decline to grant prayers (a), (b) and(c) of the Petition dated 20<sup>th</sup> February 2012. The Petitioners will pay the costs to the Respondents and the Interested party. Those are the orders of this court.

**Stella N. Mutuku, Judge**

Dated, signed and delivered this 5<sup>th</sup> November 2012.