



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL 9 OF 2009

TIMON OTIENO MBOGA.....PETITIONER

VERSUS

HON. ATTORNEY GENERAL.....RESPONDENT

RULING

This petition is brought pursuant to the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedom of the Individual) High Court Practice and Procedure Rules, 2006 (the Rules) and seeks six (6) substantive prayers, namely:-

- (a) stay of proceedings in Eldama Ravine Resident Magistrate's Court Criminal Case No.751 of 2009 in which the petitioner is charged.
- (b) a declaration that the charges in Eldama Ravine Resident Magistrate's Court Criminal Case No.751 of 2009 offend section 77 (1) of the Constitution.
- (c) a declaration that the petitioner's rights have grossly been violated and an order that charges be withdrawn.
- (d) an anticipatory bail pending the arrest of the petitioner in connection with other bailable charges
- (e) the petitioner to execute bond
- (f) any other order that the court may deem expedient

The petition is supported by an affidavit. The court on 25th September, 2009 granted to the petitioner bail pending arrest, and a prayer for stay of proceedings having been overtaken by events, the only question outstanding is whether section 77(1) of the Constitution has been violated.

The High Court is empowered by section 84 of the Constitution to enforce and protect fundamental rights and freedoms of the individual as guaranteed by the Constitution. The rules provide the procedure of moving the court where there is allegation of violation of these rights. Specifically, Rules 11 and 19 require that where such allegation has been made, an application by way of a petition shall be made to the High Court.

In accordance with those rules the Attorney-General was served but having failed to respond within 14 days of service, the matter was set down for hearing. As a matter of fact, learned counsel for the respondent indicated that he did not wish to oppose the application. I have duly considered the application, affidavit in support as well as the annexures. I have also taken into account the authorities cited by counsel for the petitioner. What is the petitioner's allegations?

The Petitioner has been working for the Kenya Forest Services in Koibatek District as the District Forest Officer. He has since been

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transferred to Kwale District in the same capacity. It is his contention that there has been bad blood between him and the Deputy OCPD, Koibatek Police Division, a Mr. Michael Mutawa Machanji. The differences arose from various letters allegedly written by the petitioner concerning the said Deputy OCPD which in the latter's view were defamatory. A demand letter was addressed to the petitioner by the Deputy OCPD's advocates.

Two years before this (in 2007), the police had investigated an alleged crime against the petitioner. The investigations were finalized and he was informed verbally that no criminal proceedings would be instituted. However, on 4th August, 2009, only about three weeks after the demand letter to the petitioner and a response from the Kenya Forest Service legal officer, the petitioner was arrested and charged in Eldama Ravine Resident Magistrate's Court Criminal Case No.751 of 2009 with the offence of obtaining money by false pretences and the offence of giving false information. The offence is alleged to have been committed in 2007. Prior to this, the Deputy OCPD sent police officers to the Kenya Forest Services where they harassed warders interfering with their work of preventing unlawful loggers from harvesting forest produce. Through his instigation, the provincial administration descended upon the petitioner and his staff on the claim that the petitioner was involved in the unlawful harvesting of forest produce.

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When the petitioner was subsequently arrested, he was detained in police custody without bail until the following day when he was charged. The petitioner's application for bail was vehemently opposed by the prosecution. Even after all this, the petitioner has received information that there is a plan by the police to have his arrested over some other crimes when he returns to Eldama-Ravine to hand over.

I have considered these averments. I have stated that the petitioner faced two charges, namely obtaining money by false pretences and giving false information to a person employed in the public service. The offences are alleged to have been committed in August, 2007. It is not clear why it took the state upto September, 2009 to bring the charges. The Deputy OCPD and the petitioner had disagreed over some letters written by the petitioner complaining of the Police Check Unit, Nakuru and other Government officials who are alleged to have caused loss to the Government through reckless and unlawful acts. The Deputy OCPD threatened to institute civil proceedings if the petitioner did not apologize.

In order to flex his muscle, the Deputy OCPD resurrected a dead charge and using legal and court process caused the petitioner to be arrested, detained overnight at the police station and even opposed his application for bail arguing that investigations were not complete.

Investigating a crime of obtaining money by false pretences and giving false information cannot take two years unless the officers involved are grossly incompetent. But clearly this was another opportunity to avenge the “*negative*” letters written by the petitioner. A court of justice will not allow its process to be used (abused) in settlement of personal scores.

In **Mills V. Cooper** (1967) 2 All ER 100 at P.104, Lord Parker CJ said-

“...every court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the court.”

May, L.J in **R. V. Grays Justices, Exparte Graham**, (1982) 3 All ER 653, on the other hand emphasized that –

“Before there can properly be said to be an abuse of the process of the court, there must be some element of mala fides on the part of the prosecuting authority.”

The court in that case observed that in discouraging delay in prosecuting suspects, it was not in any way creating or imposing limitation period in criminal proceedings. The court is only interested in ensuring that it (or its process) is not used improperly to harass or oppress law abiding citizens. Close home in the case of **Githunguri V. R** (1985) KLR 91, it was held

that charging a suspect several years after the alleged commission of the offence, and after the charges had been dropped was vexatious, harassing, an abuse of the court process and contrary to public policy. It may also constitute abuse of office. The charges against the petitioner were brought purposely to harass him. Use of one’s office to intimidate others has no room in the modern society.

For these reasons it is declared that the charges against the petitioner in Resident Magistrate Criminal Case No.751 of 2009 are unconstitutional, malicious, oppressive and brought in bad faith and ought to be withdrawn forthwith.

Dated and Delivered at Nakuru this 2nd day of October, 2009.

W. OUKO

JUDGE