Director of Public Prosecutions v Ndemo (Civil Appeal 104 of 2017)
[2022] KECA 1136 (KLR) (21 October 2022) (Judgment)

Neutral citation: [2022] KECA 1136 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 104 OF 2017

HM OKWENGU, F SICHALE & J MOHAMMED, JJA

OCTOBER 21, 2022

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

AND

BITANGE NDEMO ..... RESPONDENT

(An appeal from the Judgment and Orders of the High Court of Kenya at Nairobi (Aburili, J.) dated 5th October 2016) in JR Misc Application No. 192 of 2016)

JUDGMENT

1. The Director of Public Prosecutions (the DPP), the appellant herein, has filed this appeal against the judgment of Aburilli J. dated October 5, 2016.

2. The appeal arises from a suit that had been filed at the Nairobi High Court judicial review division on May 20, 2016, in which the respondent herein had sought 3 declarations and orders of prohibition to prohibit the continuance of the Chief Magistrate's Court (Anti-Corruption Court) criminal case No 19 of 2014. The matter was heard by Aburili, J. who in a judgment delivered on October 5, 2016, allowed the motion and further directed each party to bear its own costs.

3. The appellant was aggrieved by the aforesaid judgment thus provoking the instant appeal vide a notice of appeal dated October 7, 2016 and a memorandum of appeal dated April 10, 2017, setting out 6 grounds of appeal. In a nutshell, the appellant complained that the learned judge failed to appreciate the role of the court in judicial review proceedings and instead assumed the role of an investigator by indulging in evaluation of the evidence that the appellant intended to rely on in the intended criminal trial; secondly, that the judge completely failed to appreciate the constitutional and legal mandate of the DPP under the *Constitution* of Kenya, 2010 and the *Office of the Director of Public Prosecutions Act*, by holding that the DPP had abused his constitutional and statutory mandate.

4. The brief facts in this appeal are as follows; in December 2005, the respondent was appointed the Principal Secretary in the Ministry of Information and Communications. Sometimes in the year 2009, the Ethics and Anti- Corruption Commission (hereinafter EACC), commenced an investigation into the members of the ministerial tender committee regarding allegations that the said committee was procuring non-existent land for the government.

5. On August 5, 2013, EACC forwarded the complete inquiry file to the appellant recommending the prosecution of the respondent amongst others, with a number of offences. On October 2, 2013, the appellant after evaluating and considering the investigations conducted by the EACC, ordered the inquiry file to be closed.

6. Subsequent thereafter, the appellant *vide* a letter dated May 13, 2014, appointed and directed Paul Muite SC, to review the inquiry file. On July 28, 2014, Paul Muite SC, rendered a preliminary opinion recommending that the respondent be charged with the offences earlier suggested by EACC. He however pointed out that this preliminary position would be decided at the conclusion of further investigations which at the time of the letter were allegedly in progress.

7. On August 26, 2014, Paul Muite SC, further wrote to the appellant upon completion of the further investigations, the scope of which were detailed in the letter in which he informed the appellant that it was planned to charge the respondent with the charges. On August 29, 2014, the charges were drawn by Paul Muite SC, and summons issued against the respondent to attend court on September 5, 2014, on which date he was arraigned in court and charged accordingly.

8. It was the respondent's contention that he was never questioned about, or required to respond to the alleged further new evidence nor was the alleged further evidence ever produced either to him or to the court. The respondent further contended that the appellant had in a discriminatory and selective manner unlawfully, maliciously and without any basis whatsoever recommended his prosecution. He viewed the respondent's action of prosecuting him as an abuse of the court process. The respondent further contended that the people recommended for prosecution had been shielded from prosecution in an attempt to embarrass, humiliate and coerce him, while others had been treated as prosecution witnesses in an attempt to deny him a defence, hence, an infringement of his fundamental rights and freedoms as enshrined in the *Constitution*. It was these allegations/contentions that led to filing of the judicial review proceedings before the High Court, the outcome of which is the subject of this appeal.

9. When the appeal came before us for hearing on May 4, 2022, Mr Solomon Njeru learned counsel appeared for the appellant whereas Mr Ojiambo SC appeared for the respondent. Both parties intimated to the court that they would wholly rely on their written submissions.

10. It was submitted for the appellant that the learned judge erred in law and fact in interfering with and interrogating the decision of the DPP conferred by article 157 of the *Constitution* of Kenya, 2010 and further that the learned judge erred in law and fact in quashing the decision to prosecute and prohibiting prosecution without justification or on consequence of an error of law. Further, that the learned judge erred in law and fact in failing to hold that in a judicial review, a court ought not to interrogate the merits/demerits of the decision but the decision making process.

11. The learned judge was further faulted for impugning a decision to prosecute without having regard to the facts and submissions by the appellant; that it was a subversion of the law regulating criminal justice, if the High Court or a judicial review court usurps a function of a trial court in delving into the analysis of evidence and examination of facts, which is not the province of a judicial review court.

12. Consequently, we were urged to allow the appeal with costs.

13. For the respondent, it was submitted that neither in the memorandum of appeal nor in the written submissions has the appellant specified the manner in which the learned judge allegedly either failed to apply or misapplied the essential principles to the facts in the case before her and that the complaint that the court was wrong in holding that the appellant had abused his constitutional and statutory mandate was not substantiated. To the contrary, it was urged that the High Court was explicit in its judgment that in exercise of judicial review jurisdiction, it must exercise such powers of review over the decisions taken by the DPP very sparingly and with circumspection and it was cognizant that it was never the intention of the makers of the *Constitution* that the courts should superintend every move made by the DPP.

14. Regarding violation of the respondent's rights, it was submitted that these rights were not limited to acts of omissions only, such as the failure to disclose relevant material, but there were also actions of concealment as part of the discriminatory manner in which he was being treated; that the evidence showed that the appellant deliberately chose to overlook the alleged complicity of others and concealed possible evidence for the defence and emphasized other aspects so as to secure the conviction of the respondent at any costs. Further, that the information available against the respondent was at best preliminary, perfunctory and incomplete as in his letter of July 28, 2014 to the appellant, senior counsel had exhibited a heavy sense of impatience, urgency and impetuosity.

15. Consequently, it was submitted that the appellant had failed to establish that the learned judge erred in any respect and that accordingly, the orders she made were eminently justified. As a result, we were urged to dismiss the appellant's appeal in its totality and award costs of the same to the respondent.

16. We have carefully considered the record, the grounds of appeal, the rival submissions by the parties, the responses thereto, the cited authorities and the law. We are required as a first appellate court by rule 29 of the *Court of Appeal Rules*, to re-appraise the evidence and to draw inferences before coming to our own independent conclusion. See *Selle & another v Associated Motor Boat Co Ltd & others* (1968) EA 123.

17. It is indeed not in dispute that *vide* a motion dated May 20, 2016, filed in the judicial review division of the High Court in Nairobi, the respondent had sought several declarations and orders of prohibition as against the appellant. At paragraph 90 of the judgment and in considering whether the respondent was entitled to the orders being sought, the learned judge stated as follows:

> A declaration is a formal statement by the court pronouncing upon the existence or non-existence of a legal constitutional state of affairs. It declares what the legal position is and what are the rights of the parties. It does not contain an order which can be enforced against the respondents, as it only declares what is the legal position. It is not a coercive remedy, and can be carefully couched or tailored so as not to interfere with the activities of public authorities more than is necessary to ensure that those public authorities comply with the law. However, a declaration can also be used to pronounce upon the legality of a future situation and in that way the occurrence of illegal action is avoided."

18. Regarding orders for judicial review, the learned judge had this to say at paragraph 97 of the judgment:

> It is now established law that a courtought not to usurp the constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecutions in the exercise of the discretion conferred upon that office. And the mere fact that the ongoing criminal prosecution is bound to collapse is no ground for halting those proceedings by way judicial

review proceedings, since judicial review proceedings are not concerned with determination of the merits but with the decision making process." (Emphasis ours).

19. At paragraph 99 of the judgment, the learned judge went on to state as follows:

> However, if the applicant demonstrates that the criminal proceedings that the Director of Public Prosecutions or the police have commenced or intend to commence against him constitute an abuse of the legal process, the court will not hesitate to put a halt to such proceeding (s) or declare the proceedings as being in breach of the law."

20. In light of the above quotations from the judgment of the High Court, we are unable to agree with the contention by the appellant that the learned judge failed to appreciate the role of the court in judicial review proceedings and instead assumed the role of an investigator. It is manifestly evident that the trial judge understood her role in judicial review proceedings as shown by the excerpts of the impugned judgment.

21. Regarding the contention by the appellant that the learned judge assumed the role of an investigator by indulging in evaluation of the evidence that the appellant intended to rely on in the criminal trial, the learned judge at paragraph 109 of the judgment stated as follows:

> What is clear on record and what is not controverted by the respondents is that when the decision to review the earlier decision of the Director of Public Prosecutions as advised by the investigators not to prefer charges against the applicant was made as advised by Senior Counsel Paul Muite , the applicant was never called upon to respond to the new evidence which had been unearthed, and that to date, he has not been formally notified of the new evidence to enable him respond thereto." (emphasis ours).

22. Again at paragraph 111 of the judgment the learned judge continues to say:

> From the applicant's depositions and his counsel's submissions, it is clear that on the charges for which Senior Counsel Muite prepared summons to be served upon the applicant to appear in court to answer, the new evidence was never brought to the knowledge of the applicant and that is the reason why the applicant humbly submitted to the jurisdiction of the Chief Magistrate's Court to answer to those charges believing that the said charges were based on the earlier allegations which the applicant had responded to and recorded statements denying his involvement in the alleged crimes. In other words, the Director of Public Prosecutions kept as a secret the new evidence which counsel for the respondents maintained, was sufficient to nail the applicant to a conviction by the court." (Emphasis supplied).

23. From the circumstances of this case, how then can it be said that the learned judge assumed the role of an investigator by indulging in evaluation of the evidence that the appellant intended to rely on in the intended criminal trial when there was uncontroverted evidence before court that the evidence that the appellant intended to rely on to recharge the respondent had never been supplied to him or to the court?

24. We think we have said enough to demonstrate why this ground of appeal is without merit and the same must accordingly fail.

25. The learned judge was further faulted for failing to appreciate the constitutional and legal mandate of the DPP under the *Constitution* of Kenya, 2010 and the *office of the Director of Public Prosecutions Act*, by holding that the DPP had abused his constitutional and statutory mandate.

26. It is common ground that in 2009, EACC, commenced investigations into the members of the Ministerial Tender Committee, regarding allegations that the said committee was procuring non-existent land for the Government. As a result, the respondent recorded a number of statements with officers from EACC and the Directorate of Criminal Investigations. It is also not in dispute that on August 5, 2013, EACC forwarded the complete inquiry file to the appellant recommending prosecution of the respondent amongst others with a raft of offences. It is also not in dispute that on October 2, 2013, the appellant responded to EACC informing them that after considering the inquiry file, the evidence and the recommendations contained therein, the appellant was not satisfied that a criminal prosecution was warranted in the circumstances and accordingly directed the inquiry file to be closed.

27. Subsequent thereafter, the appellant *vide* a letter dated May 13, 2014, appointed and directed Paul Muite SC, to review the inquiry files as well as the decisions made in that respect and issue an opinion thereon, subsequent to which on July 28, 2014, Paul Muite SC, rendered a preliminary written opinion recommending that the respondent be charged with the earlier offences.

28. On August 29, 2014, charges were drawn by Paul Muite SC, and summons issued against the respondent to attend court on September 5, 2014, on which date he was arraigned in court and charged accordingly. It was the respondent's contention that he was never questioned about, or required to respond to the alleged further new evidence nor has the alleged further evidence ever been produced either to him or to the court, a fact which was not controverted by the appellant.

29. Article 157 of the *Constitution* of Kenya establishes the Office of the Director of Public Prosecutions which is an Independent Constitutional Office. Article 157(6) states that:

> (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."
>
> Sub article 10 thereof further provides:
>
> (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."
>
> Article 157(11) further stipulates:
>
> (11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process." (Emphasis ours).

30. Section 4 of the *Office of the Director of Public Prosecutions Act* No 2 of 2013 provides the guiding principles that ought to guide the office in the discharge of its functions which *inter alia* include promotion of public confidence in the integrity of the office and the need to serve the cause of justice and to prevent abuse of the legal process.

31. As stated above, it is indeed not in dispute that on August 5, 2013, EACC had recommended prosecution of the respondent with a raft of offences. On October 2, 2013, the appellant informed EACC that after considering the inquiry file and the evidence, the appellant was not satisfied that a criminal prosecution was warranted in the circumstances and subsequently directed the file to be closed. Subsequent thereafter on May 13, 2014, Paul Muite SC, was appointed to review the inquiry file and on July 28, 2014, he recommended that the respondent be charged with the earlier offences

suggested by EACC. The letter by Paul Muite SC, dated July 28, 2014, recommending charging of the respondent with the earlier offences recommended by the EACC read inter alia as follows;

> There is sufficient evidence to charge the following suspects:
>
> 1. Dr Bitange Ndemo....."
>
> Paragraph 6 of the letter further says:
>
> > "Dr Bitange Ndemo purchased a plot or plots which were then sold to the GoK. Details of these are subject of the ongoing CID investigations on the ground." (Emphasis added).
>
> The letter further continues:
>
> > "The exact charges will be finalized once the CID's further investigations are complete but will be around conspiracy, theft, and under the PublicProcurement Act." (Emphasis ours).

32. From the above statement, it would appear that at the time that Paul Muite SC, was writing this letter recommending charging of the respondent investigations were incomplete and the appellant was not even sure which offences the respondent ought to have been charged with. The decision recommending re-charging of the respondent was therefore certainly premature.

33. Our view concerning the above is fortified by the last paragraph of the letter which reads:

> Finally, let me clarify that I had intended to send my opinion upon conclusion of the further investigations as intimated in my email to you of July 18, 2014, but trust nevertheless this will enable you to give further directions in this _matter." (Emphasis supplied).

34. From the above, it is evident that Paul Muite, SC acted hastily in recommending to have the respondent charged with the earlier offences which had been rejected by the appellant even when investigations had not been concluded as per his own admission above. One wonders why there was so much hurry to charge the respondent even when investigations had not been completed.

More tellingly, Senior counsel concludes as follows in the letter:

> "Mr Erick Mutua, whose evidence is critical in securing convictions is willing to be a prosecution witness, although clearly implicated himself." (Emphasis added).

35. From the circumstances of this case, it is evident that the intended prosecution of the respondent was not only discriminatory and selective and certainly did not have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process as demanded by the provisions of article 157 (11) of the *Constitution* (supra). As a matter of fact, it is a serious indictment on the part of the office of the appellant and the same certainly erodes public confidence in the integrity of the office. Why was Mr Erick Mutua for example made a prosecution witness yet he had allegedly been a culprit?

36. Furthermore, *vide* a letter dated August 26, 2014 addressed to the appellant, Paul Muite SC, opined inter alia:

> It is recommended that Mr Erick Mutua, Kamotho Waiganjo, Peter Kalua and Peter Mutua Kanyi be prosecutions witnesses because their evidence as per the statements which they

have voluntarily given is crucial to securing convictions of those being charged." (Emphasis supplied).

37. From the wording of the passages in the two letters, which we have reproduced above, it is apparent that he appellant was hell bent on securing a conviction against the respondent amongst other persons at all costs. This is contrary to the appellant's own General Prosecutions Guidelines (clauses 15 and 19) which provides inter alia that the primary duty of a public prosecutor is to assist the court arrive at a just decision and not merely to secure a conviction.

38. In our view, and more so, coupled with the fact that the respondent was not even availed with the new evidence that was used to charge him afresh, it is apparent that the intended prosecution of the respondent was meant to achieve other ulterior motives rather than to advance the cause of justice.

39. In saying this we are alive to the fact that the appellant exercises state powers of prosecution in Kenya which is a closely guarded constitutional principle pursuant to article 157 (10) of the *Constitution* of Kenya (supra). Under this article the appellant does not require the consent of any person or authority for the commencement of criminal proceedings in the exercise of his or her powers or functions nor should he/she be under the direction or control of any person or authority.

40. As such even the courts should be slow in interfering with the constitutional mandate of the appellant as provided for in the *Constitution*, in exercise of his/her state powers of prosecution, unless there is justification for doing so. The appellant is required to have regard to public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process and the guiding principles provided under section 4 of the *Office of Director of Public Prosecutions Act* No 2 of 2013 which provides:

> "In fulfilling its mandate, the office shall be guided by the *Constitution* and the following fundamental principles: -
>
> a. the diversity of the people of Kenya;
>
> b. impartiality and gender equity;
>
> c. the rules of natural justice;
>
> d. promotion of public confidence in the integrity of the office;
>
> e. the need to discharge the functions of the office on behalf of the people of Kenya;
>
> f. the need to serve the cause of justice, prevent abuse of the legal process and public interest;
>
> g. protection of the sovereignty of the people;
>
> h. secure the observance of democratic values and principles; and
>
> i. promotion of constitutionalism".

41. Where the appellant acts contrary to these principles, the courts will not hesitate to interfere with the constitutional mandate of the appellant. As was stated persuasively by the Supreme Court of India in *State of Maharashtra & others v Arun Gulab & others*, criminal appeal No 590 of 2007:

> The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the court cannot be justified in

> embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the court do not confer an arbitrary jurisdiction to the court to act according to its whims or caprice. However, the court, under its inherent powers, can neither intervene at an uncalled for stage nor can it soft-pedal the course of justice at a crucial stage of investigation/proceedings.
>
> The provisions of articles 226, 227 of the *Constitution* of India and section 482 of the Code of Criminal Procedure, 1973 (hereinafter called as " Cr.P.C.") are a device to advance justice and not to frustrate it. The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of power of the court, but the more the power, the more due care and caution is to be exercised in invoking these powers."

42. We fully agree and associate ourselves with the above position.

43. From the circumstances of this case and for the reasons afore-stated and in light of the serious misapprehension in Senior Counsel, Paul Muite's letters dated 28th July and August 26, 2014 respectively (which leaves a lot to be desired), we are unable to agree with the appellant's contention that the learned judge failed to appreciate the constitutional and legal mandate of the DPP under the *Constitution* of Kenya, 2010 and the *Office of the Director of Public Prosecutions Act*, by holding that the DPP had abused his Constitutional and statutory mandate.

44. Indeed, as was stated by this court (differently constituted), in *Commissioner of Police & the Director of Criminal Investigation Department & another v Kenya Commercial Bank Ltd & 4 others* [2013] eKLR:

> "By the same token and in terms of article 157 (11) of the *Constitution*, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution. See *Githunguri v Republic* [1985] LLR 3090.
>
> It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score- settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See *Ndarua v R* [2002] 1EA 205. See also *Kuria & 3 others v Attorney General* [2002] 2KLR. " (Emphasis supplied)

55. We say no more save to state that the learned judge did not err in finding that the DPP had abused his constitutional and statutory mandate, and this ground also fails

56. We have considered the contention by the appellant that the learned judge erred in law and fact by considering extraneous and irrelevant factors such as competency of the prosecuting counsel and the circumstances under which that counsel had been appointed, thereby rendering the judgment and the orders made untenable in law. We are of a contrary view that the participation of Senior Muite, SC was not an irrelevant factor as it had impact on the independence of the DPP in making the decision to prosecute the respondent. We say so as it was manifestly clear for the reasons we have afore-stated that the intervention of Mr Muite SC, resulted in the appellant changing his decision not to prosecute the respondent, and led to the intended prosecution of the respondent that was not only selective and discriminatory, but also did not have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. It was meant to secure a conviction at all costs rather than advance the cause of justice and such prosecution cannot be allowed to stand.

57. We think we have said more than enough to demonstrate why this appeal is devoid of merit. Accordingly, it is hereby dismissed in its entirety with costs to the respondent.

58. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR