IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE MAKHANDIA, KIAGE & OTIENO-ODEK JJA)

CRIMINAL APPEAL No. 182 OF 2018

PATRICK WANZALA MULWOTO.....APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS .....RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Kakamega, (Njagi J.) delivered on 4th April 2018

in

HC Cr. Petition No. 3 of 2017)

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JUDGMENT OF THE COURT

1. The appellant filed a constitutional petition dated 2nd May 2017 at the High Court in Kakamega seeking an order to stay his arraignment and trial before the Mumias Senior Principal Magistrate's Court in Criminal Case No. 93 of 2013 and Criminal Case No. 126 of 2014. The appellant sought further orders to declare as null and void all orders and proceedings emanating from the two criminal cases before the magistrates' court. The grounds in support of the constitutional petition were that the criminal proceedings were a mistrial, null and void and were being conducted in gross violation of the appellant's fundamental rights and freedoms.

2. The respondent in opposing the constitutional petition avowed that it was bad in law, frivolous and an abuse of court process. That the petition was misplaced, incompetent and against mandatory provisions of law.

3. The factual matrix in support of the petition were that on diverse dates in 2013 and 2014, the appellant was arrested by the District Criminal Investigation Officer of Mumias East District and arraigned before the magistrate's court and charged with various counts ranging from personation, obtaining money be false pretences, forging documents and uttering forged documents. That in 2014, the Mumias District Criminal Investigation Officers raided his office in his absence and without a valid search warrant recovered documents some of which were being used against him in the two criminal cases.

4. Upon hearing the parties, the learned judge dismissed the petition as lacking in merit. In dismissing the petition, the judge expressed:

> *28. The petitioner has not shown that there is any abuse of the powers bestowed upon the Director of Public Prosecutions in prosecuting him in the two cases. The petitioner has failed to show that the trials in Mumias Criminal Cases No. 123 of 2013 and 93 of 2014 are being conducted in contravention of the order of the court dated 3rd December 2014….. The court finds no basis for declaring the proceedings in the two cases a mistrial. There is no basis for terminating the two cases. The petition lacks merit and is dismissed with costs to the respondent.*

5. Aggrieved by dismissal of his petition, the appellant has lodged the instant appeal citing the following grounds in his memorandum of appeal.

> i. The judge erred in failing to take directions on the mode of proceedings whether by way of oral or written submissions and highlighting thereby allowing documents to be filed on record haphazardly without formal leave.
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> ii. The judge failed to note that the State Counsel who filed written submissions on 4th October 2017 was not on record for the respondent and did so and proceeded with highlighting before Hon. Ruth Sitati J. in Kakamega unlawfully and went on to rely on the

said written submissions heavily in the impugned ruling.

iii. The judge erred in failing to evaluate the evidence before him before arriving at the impugned ruling dated 4th April 2018.

iv. The judge did not have regard to any of the list of authorities filed by the appellant when he at the same time cited several authorities submitted by the respondent.

v. The judge erred in failing to note that he verbally directed counsel for the appellant on 23rd May 2018 to file the exhibit memos as they were and supply the State Counsel with his copy and thereafter proceeding to expunge the same in his ruling.

iv.The judge failed to properly evaluate the evidence before him when the appellant had clearly stated that he had the option of filing contempt proceedings.

6. At the hearing of the instant appeal, the appellant was represented by Ms Omoro holding brief for Ms Hellen Kuke. The respondent was represented by learned counsel Mr. Victor Mule. Both parties filed written submissions in the appeal.

APPELLANT'S SUBMISSIONS

7. Counsel for the appellant relied entirely on the written submissions as filed. The appellant recapped the grounds in support of the appeal and submitted that the issue in contestation is how the learned judge arrived at his ruling considering that the existing laws gave the court original unfettered jurisdiction to hear and determine a constitutional petition.

8. After rehashing the backgrounds facts that led to the filing of the petition, the appellant cited **Article 22 (1) of the Constitution** which enforces the Bill of Rights. Likewise, the appellant cited **Article 165 (3) (b) of the Constitution** which confers upon the High Court jurisdiction to determine whether a fundamental right has been denied, violated, infringed or threatened. It was submitted that the provisions of **Articles 22 (1) and 165 (3) of the Constitution** vests jurisdiction on the High Court to determine a constitutional petition. That the judge erred in the impugned ruling for failing to determine the constitutional petition as pleaded.

9. The judge was faulted for dismissing the petition without giving the appellant audience to highlight his grievances nor did the judge consider the evidence presented thus arriving at the impugned conclusion. That the judge erred and failed to acknowledge that the prosecution persistently relied upon documents that were illegally seized from the appellant's premises. That the judge overlooked the intention of **Article 159 of the Constitution** by adhering to rules of procedure rather than substantive justice. That the judge erred for stating that the appellant had the option of instituting contempt proceedings rather than a constitutional petition. In this context the appellant submitted there is no law that bars one from instituting a new suit or petition despite having the option to institute contempt proceedings. The appellant submitted the judge erred and failed to appreciate that the petition met the threshold for filing a constitutional petition as enunciated in the case of **Anarita Karimi Njeru – v- R (1976-80) 1 KLR 1283** and in the case of **Mumo Matemu – v – Trusted Society of Human Rights Alliance, [2013] eKLR**.

10. Based on the foregoing submissions, the appellant urged this Court to set aside the ruling by the learned judge and quash the on-going criminal cases Nos. 93 of 2013 and 126 of 2014 in the Senior Principal Magistrate's Court at Mumias.

RESPONDENT'S SUBMISSIONS

11. The respondent in opposing the appeal submitted that the learned judge did not err in hearing the constitutional petition by way of affidavit evidence and written submissions. That the appellant's counsel made submissions on 3rd August 2018 and the respondent's counsel made submissions in reply on 5th October 2018. That **Rule 20 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013** allows the court to hear and determine a constitutional petition by way of affidavits, written submissions or oral evidence. That guided by the aforestated **Rule 20**, there was no procedural lapse in the hearing and determination of the appellant's constitutional petition in the High Court.

12. Submitting on the ground that a different state counsel appeared before the learned judge, it was submitted that **Rule 15 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013** permits any authorized state counsel to represent the respondent.

13. The respondent further submitted that the judge properly evaluated the evidence on record and considered the judicial authorities that were cited to him. That the main issue in the constitutional petition was illegally obtained evidence. That the issue was succinctly considered and determined by the judge. Counsel submitted that the judge having considered and evaluated the evidence on record, he did not err in stating that the appellant had an option to pursue contempt proceedings.

14. In conclusion, the respondent submitted that the record of appeal in this matter was incomplete as it lacked vital documents including the petition and its supporting affidavit, the written submissions filed by the parties and the grounds of opposition to the constitutional petition. Counsel cited the decision of this Court in **Muchoki Kanyonyo – v- Stephen Kuiyukia Kanyonyo [2012] eKLR** where this Court upheld the striking out of a record of appeal which is incomplete.

ANALYSIS and DETERMINATION

15. The appeal before us is founded on a constitutional petition whereby the appellant sought before the High Court an order to quash proceedings in two criminal cases where he was the accused. The appellant filed a supplementary record of appeal in this matter which aptly

demonstrated that the criminal proceedings had commenced and several witnesses had testified. Being cognizant that there are pending criminal proceedings relevant to this appeal, we restrain ourselves from commenting on facts that may embarrass or prejudge the proceedings before the trial magistrate.

16. The gist of the appellant's petition before the High Court was that the two criminal proceedings before the trial magistrate were a mistrial, null and void and in gross violation of his fundamental rights and freedoms. The grounds in support of the petition were that the Police conducted a raid at his office without a valid search warrant; that the appellant did not stand a chance of receiving a fair trial where the Police have obtained evidence in total disregard of the appellant's rights under the Constitution; that the Police took action against the appellant without any formal criminal complaint having been lodged; that in the absence of any formal complaint, the Police were engaged in witch hunt.

17. In this matter, we have considered the written submissions filed by both parties and the grounds of appeal as stated in the memorandum of appeal.

18. The appellant's key contestation is that the learned judge erred in law in hearing and determining the constitutional petition without giving him an opportunity to make oral highlight of the written submissions. In this context, the appellant is alleging that his right to be heard was violated. In ***Mbaki & Others – v- Macharia & Another*** ***(2005) 2 EA 206***, at page **210,** this Court stated as follows:

> "*The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."*

19. The right to present a case and evidence can be done in writing or orally. Oral/personal hearing is not a mandatory requirement for a fair hearing process unless circumstances are so exceptional that without oral hearing a person cannot put up an effective defence. For instance, where complex legal and technical questions are involved oral hearing becomes a part of fair hearing. In the absence of a statutory requirement for oral hearing a court can decide a matter taking into consideration the facts and circumstances of every case.

20. Comparatively, in **Union of India – v- J. P. Mitter, 1971 (1) SCC 396 (21 January 1971)** the court refused to quash the order of the President of India in a dispute relating to the age of high Court judge on the ground that the President did not grant oral hearing even on request. The court was of the view that when the person has been given an opportunity to submit his case in writing, there is no violation of the principles of natural justice if oral hearing is not granted.

21. In this matter, we re-affirm that the right to be heard is one of the cornerstone principles of the rules of natural justice as well as fair trial. The content of what amounts to the hearing of the parties in any proceedings can take either the form of oral or written evidence. Where the evidence in support of an application is by way of affidavit, the deponent cannot be heard to say that he was denied the right of a hearing simply because he had not adduced oral evidence. (See **New Plast Industries – v - Commissioner of Lands and Another (SCZ Judgment No. 8 of 2001) [2001] ZMSC 19 (9 May 2001).**

22. In the instant matter, whereas the appellant contends that he was not given an opportunity to make oral submissions, the record of appeal as per the ruling of the court reveals that the appellant's advocate, a Mr. Ndombi, made oral submissions that were supported by a list of authorities. Conversely, the State filed written submissions that were highlighted by brief remarks in court. Going by the record of appeal, we find the contestation by the appellant that the judge erred in failing to take directions on the mode of proceedings either by written or oral submissions has no merit. The appellant was heard and his counsel a Mr. Ndombi made submissions on his behalf.

23. Another ground urged in this appeal is that the learned judge did not take into consideration the list of authorities filed by the appellant. Before us, the appellant has neither cited nor pointed the judicial authorities allegedly not taken into consideration by the judge. We find that the record of appeal is incomplete to the extent that the written submissions and the list of authorities filed by the appellant and respondent before the learned judge are not in the record. In the absence of the appellant's written submissions and list of authorities aforestated, we are impelled to invoke the provisions of **Section 107 (1) of the Evidence Act** which provides as follows:

> *107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

24. Guided by the provisions of **Section 107 (1) of the Evidence Act**, we find that in this appeal, the appellant has failed to put before us material that would satisfy us that the authorities he cited before the learned judge were not considered. This ground of appeal has no merit and fails.

25. An omnibus ground urged in the appeal is that the judge erred and failed to evaluate the evidence on record in arriving at his decision. We have analyzed the ruling of the court dated 4th April 2018. There is a heading in the impugned ruling titled analysis and determination. It contains the evaluation and reasoning by the judge leading to his findings and determination. We note that salient legal principles are espoused in the ruling. For instance, the judge correctly states that an investigation into an alleged commission of an offence does not amount to a violation of a constitutional right; that a prosecution by itself is not a violation of fundamental rights. We further note from the ruling that the judge appraised the charge sheets in the two criminal cases and considered the inventory of documents as filed by the investigating officer. In considering the inventory, the judge determined whether the inventory was admissible as the documents were not attached to any affidavit. On our part, having re-appraised the ruling and reasoning of the judge, we are satisfied the learned judge properly evaluated the evidence on record and aptly applied the correct principles of law.

26. A ground urged in the appeal is that the judge failed to note that the State Counsel who appeared before the court was not properly on record. This ground has no merit. Any State Counsel employed by or attached to the office of the respondent may appear in court and make submissions for and on behalf of the respondent.

27. In his memorandum of appeal, the appellant has urged to quash the two criminal cases now pending before the Mumias Senior Principal Magistrate's court. As an appellate court, we are enjoined to re-evaluate the evidence on record to find if the prayer sought by the appellant can be granted. Having evaluated the evidence on record, we find that there is no evidence pointing towards abuse of power by the respondent that can lead us to quash the two criminal proceedings. There is no concrete evidence of mistrial that has been pointed out to us. A determination of mistrial can only take place at the conclusion of a trial. In the instant matter, the trial process is on-going and we are unable to make a finding of mistrial when the trial has not been concluded. We believe that the trial magistrate's court is competent to decipher and determine any issues of fact and law that may prejudice the appellant in his trial and defence. We refrain from usurping the powers of the magistrate's court to exercise its jurisdictional competence to hear and determine the two criminal cases now pending before the court.

28. For the various reasons stated above, we find that this appeal has no merit and is hereby dismissed. Accordingly, we decline to quash the on-going criminal cases being Mumias SPMC Criminal Case No. 93 of 2013 and SPMC Criminal Case No. 126 of 2014.

Dated and Delivered at Kisumu this 31st day of July, 2019.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR