



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OKWENGU, GATEMBU & MURGOR, J.J.A)

CIVIL APPEAL NO. 150 OF 2018

BETWEEN

CCM..... APPELLANT

AND

OFFICER COMMANDING STATION MALINDI...1ST RESPONDENT

MNM.....2ND RESPONDENT

REPUBLIC..... 3RD RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Malindi, (Korir, J.) dated 18th October, 2018

in

Judicial Review No. 15 of 2017)

JUDGMENT OF THE COURT

[1] The appeal herein is from the judgment of the High Court (**Korir, J.**) in which an application for Judicial Review lodged by **CCM** the appellant herein was dismissed.

[2] The litigation originates from a report made by the appellant to the Malindi police station on the 30th November, 2015 and recorded as **OB No. [xxxx]** claiming that the 2nd respondent, **MNM** who is his wife, abandoned their matrimonial home and her children and abducted their last born child, whom she left with. The 1st respondent, to whom the report was made, only dealt with the issue of abduction but did not address the abandonment issue. The appellant claimed that the 1st respondent failed to act on the abandonment complaint and remained uncooperative on the issue.

[3] The appellant being aggrieved instituted the judicial review proceedings against the respondents seeking orders of mandamus to compel the 1st respondent to act on the complaint by the appellant made vide **OB No. [xxxx]** and prefer charges if necessary, and the 2nd respondent to be ordered to pay the cost of the application.

[4] The 1st respondent filed a reply through an affidavit sworn by **Inspector Charles Getende** (IP Gatende) who was the officer who investigated the appellants' complaint. IP Getende averred that investigations were mounted following the appellant's complaint and the police file forwarded to the Director of Public Prosecutions (DPP) thereafter whose after perusal arrived at the conclusion that the evidence was not sufficient to sustain a charge against the 2nd respondent. The 1st respondent maintained that the DPP properly exercised his powers **under Article 157** of the Constitution, and advised that the appellant's complaint was a civil matter and did not disclose any criminal acts.

[5] In considering whether the appellant had laid a basis for the issuance of the orders of mandamus the learned Judge of the High Court

found that the appellant never challenged the decision of the DPP not to prosecute, and that the appellant directed his complaint towards the wrong office. The learned Judge further found that the appellant never produced any evidence to demonstrate that the 1st respondent acted outside its mandate or failed to execute its lawful duties.

[6] The learned Judge dismissed the appellant's application for judicial review concluding as follows;

“Be that as it may, the ex-parte applicant is also to blame for this state of affairs. He has not exhibited any written communication showing that he asked the respondent for the progress or decision on the complaint he had made. Before an order of mandamus can issue, it must be clearly demonstrated that a public officer has refused to act and that the refusal is unlawful.”

[7] The appellant was aggrieved with this judgement and has now filed this appeal. In his memorandum of appeal, he has raised only one ground of appeal; that the learned judge erred on both points of law and fact by failing to note that the OB in question being **OB No [xxxx]** had not been attended to, and in making a misleading declaration that the same had been attended to by the respondent therein.

[8] The appellant was represented by **Mr. Otara** while the 1st and 3rd respondents were represented by **Mr. Munyuny**, and the 2nd respondent by **Mr. Oduor**. At the hearing, both parties relied on their filed written submissions.

[9] For the appellant it was submitted that the learned Judge erred by finding that the 1st respondent had acted on the report made by the appellant through OB No. [xxxx] when the respondent had acted on a different report made by the appellant through OB Nos [xxxx] and OB No. [xxxx].

[10] The 1st and 2nd respondents maintained that the appellant's report was acted upon and that the decision whether to prosecute or not, was a discretionary decision made by the DPP guided by the law and precedent; that the appellant did not raise any grounds challenging the decision of the DPP not to prosecute; that the 1st and 2nd respondents had rightfully discharged their mandate and did not act irrationally or illegally as to justify the issuance of orders of mandamus. The respondents concluded by submitting that the appellant's notice of motion filed on 17th August, 2018 was filed in contravention of the mandatory and express provisions of order 53 Rule 3(1) of the Civil Procedure Rules as it was filed outside the 21 days leave granted by the Court. The Court was thus urged to dismiss this appeal.

[11] The 3rd respondent echoed the 1st and 2nd respondents' submissions that the appellant failed to lay before the court a sufficient basis for issuance of the orders of mandamus, as he failed to demonstrate how the 1st respondent acted outside its mandate. [12] This being a first appeal, it is our duty to analyze and re-assess the evidence that was adduced before the trial court in order to reach our own conclusions in the matter. This duty was well stated by this Court in Selle -vs- Associated Motor Boat Co., [1968] EA 123, as follows:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect....”

[13] The main issue for consideration is whether the appellant laid a sufficient basis for the issuance of the order of mandamus. In Kenya National examination Council vs. Republic ex parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR, this Court having referred to Halsbury Laws of England paragraph 90 addressing the principles of mandamus stated as follows;

“What do this principles mean? They mean that an order of mandamus will compel the performance of duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.....”

To conclude this aspect of the matter, an order of mandamus compels the performance of public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same. If the complaint is that the duty had been wrongly performed, ie that the duty has not been performed according to the law then mandamus, is wrong remedy to apply for because like an order of prohibition, an order of mandamus cannot quash what has already been done.”

[14] From the above it is evident that before an order of mandamus can issue the court must be satisfied that there is a duty imposed by statute on the person against whom the order of mandamus is sought. Secondly, that the person has failed or refused to perform the statutory duty, and thirdly that the person seeking the orders has a legal right to have the duty performed and the failure or refusal to perform the duty is detrimental to him.

[15] The learned Judge like us, did not have the benefit of oral evidence and therefore relied on the affidavits that were before him. These are what we must review and analyze. The affidavits reveal a common ground that the appellant made a report to Malindi police station through

OB No. [xxxx] that his wife the 2nd respondent had abandoned their minor children on 25th October 2015 at midnight when she left and proceeded to an undisclosed destination. The appellant's position is that this report was not investigated or acted upon. The 1st respondent has maintained that this report was actually investigated, but that a decision was made not to prosecute.

[16] In *Commissioner of Lands vs Kunste Hotel Ltd* [1997] eKLR this Court asserted that “**judicial review is concerned with the decision making process and not the merits of the decision in respect of which the application for judicial review is made.**”

The issue therefore is not whether the decision made to prosecute or not to prosecute was proper but whether the report made by the appellant was acted upon, and if not whether the 2nd respondent deliberately failed or refused to act on the report.

[17] The appellant maintains that his report was not acted upon. He appears to deduce this conclusion from the fact that the 1st respondent did not institute proceedings against the 2nd respondent in regard to his complaint. He seeks an order of mandamus compelling the 1st respondent to investigate the 2nd respondent and prefer charges.

[18] In order for the appellant to succeed in the judicial review application, the appellant had to convince the court that the 1st respondent failed or refused to perform his duty. The 1st respondent's public duty as the Officer Commanding Station Malindi was to carry out investigations in regard to any complaints made at the police station. Much as the appellant alleges that no action was taken in regard to his complaint, he did not demonstrate that no investigations actually took place. The 1st respondent has on its part demonstrated that investigations actually took place by exhibiting through the affidavit of IP Gatende the investigation diary, witness statements and a brief to the Assistant DPP, showing the investigations taken and their view of the matter. The 3 complaints made by the appellant related to the same issue which was his wife leaving the matrimonial home taking with her one child and leaving two others. The appellant is therefore not being sincere when he maintains that the complaint relating to OB No [xxxx] was not investigated while conceding that the other two complaints were acted upon.

[19] The appellant's complaint as reported in the OB was;

“To the station is one CCM a resident of Kwachocha Village in Malindi and of telephone and he do submit a report that on the 25.10.2015 at around 00:00 hrs the reportees wife namely MNM ran away from home leaving behind 2 children aged 6 years and 4 years respectively and since then she has not returned back at home. The reportee now seeks police assistance.”

[20] It is evident that the appellant's judicial review application was anchored not on the failure to investigate the matter, but failure to institute proceedings against the 2nd respondent. Under **Article 157** of the Constitution the power and discretion to institute prosecutions lies with the DPP who exercises the power without control or direction from any person. **Article 157(11)** of the Constitution states that:

“In exercising the powers conferred by this Article the DPP shall have regard to the public interest, the interest of administration of justice and the need to prevent and avoid abuse of court process.”

[21] Thus it is the DPP who has the statutory duty to initiate criminal proceedings. That statutory duty does not lie with the 1st respondent, nor can he in any way direct or control the DPP. In determining whether the remedy of judicial review was appropriate the court had to make a finding on whether the 1st respondent made a decision and the propriety of the process followed in arriving at the decision to act or not to act on the appellant's report. From the record, it is evident that the 1st respondent conducted an investigation and found that the matter between the appellant and the interested party was purely civil and private in nature and that no criminal acts were disclosed or were worth pursuing further. The report was forwarded to the Office of the Director of Public Prosecutions. To that extent the 2nd respondent had performed its duty in a process that was regular and procedural.

[22] In addition, the circumstance of this case reveal that the report arose out of a dispute concerning the appellant and his wife. In making the complaint the appellant appeared to have been motivated by a need to punish his wife rather than a need to take care of the interest of his minor children. We therefore find that the DPP was right in refusing to allow the appellant to abuse the legal

process, by procuring charges that are motivated by malice against his wife. Finally, although the appellant was granted leave on 25th July 2017 to file his notice of motion for orders of mandamus under **Order 53 Rule 3(1)** of the Civil Procedure Rules, the appellant failed to comply with the timeline of 21 days. To that extent his motion before the court was defective for being filed out of time without leave.

[23] For the above reasons we find that the learned Judge was right in dismissing the application for judicial review. Accordingly, we find no merit in this appeal. It is dismissed with costs.

Dated and delivered at Mombasa this 25th day of July, 2019.

HANNAH OKWENGU

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR