IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MUSINGA & MURGOR, JJ.A.)

CIVIL APPEAL NO. 77 OF 2017

BETWEEN

STEPHEN MUREGI CHEGE.....APPELLANT

AND

THE INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS DEPARTMENT.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

JOHN MTAY SAIKWA.....4TH RESPONDENT

(An appeal from the Judgment and Orders of the High Court of Kenya at Nairobi (Lenaola, J.) delivered on 25th January, 2015

in

Petition No. 389B of 2014)

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JUDGMENT OF THE COURT

Introduction

1. The appellant herein, an advocate of the High Court of Kenya, challenges the High Court's judgment (Lenaola, J; as he then was), dismissing the appellant's petition seeking to stop his prosecution on a charge of theft of **Kshs.213,000,000/=.** In a nutshell, the appellant argued before the trial court that as an advocate, he was retained by the 4th respondent to act for him in a conveyancing transaction, where the 4th respondent was selling a property known as **LR. No. 209/8558, Nairobi (the suit property).** The purchase price was **Kshs.300,000,000/=.** A deposit of **Kshs.7,000,000/=** was paid to the 4th respondent and the balance of **Kshs.293,000,000/=** was deposited in the appellant's account.

2. The appellant asserted that upon receipt of the aforesaid sum, he disbursed it to various persons as instructed by the 4th respondent. However, the 4th respondent denied having ever given such instructions to the appellant. The 4th respondent lodged a complaint with the police, who conducted their investigations and as a result charged the appellant with the offence of stealing by agent contrary to **Section 283 (c)** of the **Penal Code** in **Criminal Case No. 1098 of 2014** before the Chief Magistrate's Court at Nairobi.

The appellant's case before the High Court

3. The appellant filed a petition seeking to stop his prosecution in the aforesaid criminal case. He sought a declaration that his prosecution is a violation of his rights under **Articles 28, 31, 47 and 50** of the **Constitution**. He stated that the 4th respondent, vide a letter dated 28th November, 2013, retained him as his advocate in the sale of the suit property; that by another undated letter, the 4th respondent appointed an agent, giving him powers to issue directives to the appellant with regard to disbursement of the funds held by him; and that on the strength of that letter and instructions given by the agent, the appellant disbursed to various people a total of **Kshs.213,000,000**/=.

4. The appellant also questioned the manner in which the investigations into his alleged criminal conduct had been carried out; arguing that the 1st, 2nd and 3rd respondents solely relied on the information given by the 4threspondent, without gathering any independent evidence.

The 4th respondent's case

5. The 4th respondent, the complainant in the aforesaid criminal case, stated that he retained the appellant as his advocate in the sale of the suit property; that the appellant failed to pay him Kshs.213,000,000/= being the balance of the purchase price deposited with him; that as a result he lodged a *bona fide* complaint with the police; and in his view, the appellant's prosecution for the said criminal offence was fully justified.

The 3rd respondent's case

6. The 3rd respondent, the Director of Public Prosecutions (DPP), submitted that upon thorough investigations of the complaint, he was satisfied that a criminal offence had been committed, as a result of which the appellant was charged in court. He further argued that the decision to charge the appellant was within the law; was neither irrational nor malicious; and therefore the appellant's petition had no basis in law.

The trial court's determination

7. The learned judge held that pursuant to **Article 157(6)(a)** of the **Constitution** the DPP has the constitutional mandate to commence criminal proceedings against any person in respect of any offence alleged to have been committed; that the 1st respondent, being in charge of the National Police Service, has the mandate of, *inter alia*, maintenance of law and order, investigation of crimes, collection of criminal intelligence, prevention and detection of crimes and apprehension of offenders.

8. Citing various authorities, the learned judge further held that since the DPP has the ultimate discretion in determining which complaint should lead to a criminal prosecution, unless it is shown that the power has been manifestly abused, the court should not interfere with the exercise of the DPP's constitutional mandate; that the High Court could not go into the merits and demerits of any intended charge to determine its veracity; that it is only the trial Magistrate who was properly seized of the matter and who has power to assess and determine the probity of the evidence presented; and that the appellant had not demonstrated that any of his constitutional rights were likely to be contravened as a result of the criminal charges that had been preferred against him. With that, the learned judge dismissed the appellant's petition.

Appeal before this Court

9. Being dissatisfied with that decision, the appellant preferred an appeal to this Court. In his Memorandum of Appeal, the appellant argued that the learned judge erred in law and fact in: failing to declare a nullity the charge preferred against him; holding that it was only the trial magistrate who had the power to determine the propriety of the criminal charge; failing to consider the evidence presented by the appellant to demonstrate that the charge was a clear abuse of the due process of the law; failing to consider that the respondents deliberately withheld from the appellant and the trial court evidence exonerating the appellant; and in denying the appellant a right to a fair trial by allowing a prosecution procured in total and flagrant breach of clear constitutional provisions.

10. The appellant, the 3rd and 4th respondents filed their respective submissions. The 1st and 2nd respondents did not put in any submissions. When the appeal came up for hearing, **Mr. Owino Opiyo** appeared for the appellant whereas **Mr. Kibicho** appeared for the 4th respondent. There was no appearance for the 1st, 2nd and 3rd respondents. However, **Mr. Jalson Makori**, Senior Principal Prosecution Counsel, filed submissions for and on behalf of the 3rd respondent.

The appellant's submissions

11. The appellant submitted that there was sufficient evidence that the 4th respondent had given him written instructions to disburse funds to various parties. That evidence was in form of thumb printed letters that had been submitted to the National Registration Bureau for verification. There was a document examiner's report that showed that the 4th respondent had thumb printed the said instruction letters. The appellant said that he was charged in court before the finger print expert's report had been made. Had the 2nd and 3rd respondents considered that report they would have withdrawn the criminal case; this was a critical issue that the learned judge failed to consider, the appellant asserted.

12. The appellant further submitted that the learned judge failed to consider that the 2nd respondent had written a letter dated 18th December, 2014 to the 3rd respondent exonerating the appellant. The 3rd respondent opined that the issues on which the dispute revolved touches on Advocate/Client relationship which was within the ambit of civil law. For those reason, the 3rd respondent had recommended closure of the police file.

13. The appellant further faulted the learned judge for holding that the issues presented before the High Court ought to be dealt with by the trial Magistrate's court, yet there were Constitutional issues that required determination by the High Court, such as, whether it was proper in law for the respondents to use criminal proceedings as a pawn to resolve civil disputes. In that regard, the appellant cited this Court's decision in

> **COMMISSIONER OF POLICE & ANOTHER v KENYA COMMERCIAL BANK LIMITED & 4 OTHERS [2013] eKL**, where the Court held that **"it is not in the public interest or in the interest of the administration of justice to use criminal**

justice process as a pawn in civil disputes. It is unconcionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court."

14. Lastly, the appellant submitted that **Article 157(11)** of the **Constitution** guarantees that **"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."** In his view, the High Court ought to have intervened so as to prohibit the abuse of the legal process by the respondents.

15. The 3rd respondent, by way of written submission drawn by **Mr. Makori,** opposed the appeal. He submitted that the DPP's decision to charge the appellant with the aforesaid criminal offence was based on sufficiency of evidence; and was not actuated by any extraneous consideration.

16. Mr. Makori further submitted that courts should not usurp the constitutional mandate of the DPP conferred by **Article 157** of the **Constitution**, unless it is demonstrated that the DPP acted contrary to natural justice or his actions are oppressive and amount to an abuse of the process of the court. He cited this Court's decision in **JORAM MWENDA GUANTAI v THE CHIEF MAGISTRATE [2007] 2 E.A. 170,** where the court held:

"The High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of process of the court and is oppressive and vexatious, the judge has the power to intervene and the High Court has an inherent power and duty to serve fair treatment for all persons who are brought before the court or to a subordinate court to prevent an abuse of the process of the court."

17. The fact that the appellant is an advocate does not bar the DPP from commencing criminal proceedings against him, based on the evidence on record, if in the course of his legal dealings with his client the advocate commits a criminal offence, Mr. Makori submitted. He cited **MICHAEL MONARI & ANOTHER v COMMISSIONER OF POLICE & 3 OTHERS, Misc. Application No. 68 of 2011,** where Warsame, J. (as he then was), held that:

"The police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is for the trial court. ….. As long as the prosecution and those charged with the responsibility of making decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene."

18. The 4th respondent vehemently opposed the appeal. He denied having issued any instructions to the appellant to disburse the sale proceeds to any third party; he asserted that upon the appellant's receipt of Kshs.293,000,000/=, the appellant paid him Kshs.22,000,000/=; thereafter he was unable to reach the appellant, which prompted him to lodge a complaint at CID headquarters, where the appellant deposited Kshs.16,000,000/= and a further sum of Kshs.50,000,000/=. The appellant had not paid the rest of the sale proceeds, the 4th respondent stated, and therefore the issues that he had advanced in his petition ought to form his defence in the criminal proceedings.

19. The 4th respondent further submitted that allowing the appeal would be tantamount to usurping the powers vested upon the Magistrates' court to hear and determine the criminal case that the appellant is facing. He cited **MICHAEL MONARI & ANOTHER v THE COMMISSIONER OF POLICE** & **3 OTHERS** (supra). **Evaluation of the submissions & determination**

20. The central issue for our consideration and determination in this appeal is whether the learned judge erred in law in declining to quash the criminal charges preferred against the appellant by the DPP, the 3rd respondent, following investigations conducted by the 2nd respondent.

The appellant advanced various arguments as summarized earlier in an effort to show that the respondents' conduct amounted to abuse of the court process, was in bad faith, oppressive and constituted a breach of his constitutional rights.

21. **Article 157(6) (a)** of the **Constitution** grants the DPP power to 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. But in the exercise of his wide constitutional mandate as generally conferred under **Article 157**, the DPP should always have regard to the public interest, the interests of the administration of justice and the need to avoid abuse of the legal process. See **Article 157(11).**

22. The appellant's position is that there is no evidence that he committed any criminal offence, and he attached to his affidavits in support of the petition and the interlocutory application that he had filed various documents in an effort to demonstrate that he had disbursed the sale proceeds with the 4th respondent's written instructions; and that the Director of Criminal Investigations had even come to the conclusion that the 4th respondent's denial that he had not thumb printed the written instructions was hollow. For those reasons, he urged the High Court to prohibit his prosecution.

23. On the other hand, the respondents argued that there was sufficient evidence to sustain a criminal charge against the appellant and urged the High Court not to interfere with the criminal court's judicial mandate to hear the case, evaluate the evidence tendered by both sides and arrive at a well informed decision.

24. Dismissing the petition, the learned judge held:

"31. It seems to me therefore that, I am being asked to evaluate the evidence on record to determine whether the 3rd Respondent was justified in instituting any criminal charge against the Petitioner. This would necessarily necessitate my probing into the

veracity of the allegations made by all the parties. Unfortunately my powers in that regard are very limited because I cannot make a determination as to that justiciability of criminal proceedings which have already commenced without delving into the merit of the case."

25. He went on to further state:

"34. It is only the trial Magistrate in the Court where the Petitioner is facing criminal charge, who is properly seized of the matter, who has the power to assess and determine the probity of the evidence presented. No matter how aggrieved the Petitioner is, therefore this is not the appropriate time or indeed the forum to prove his innocence. It is in fact in his best interest that the wheels of justice are quickly set rolling so that he can have his day in the Chief Magistrate's Court."

26. In a matter such as the one that gave rise to this appeal, the Court has to carefully weigh and balance between the State powers of prosecution that are vested upon the DPP under **Article 157** of the **Constitution,** against a person's constitutional rights as provided in the Bill of Rights, which, as per **Article 19(1)** of the **Constitution**, **"is an integral part of Kenya's democratic State and is the framework for social, economic and cultural practices."**

The Bill of Rights applies to all law and binds all State organs and all persons. However, in their application, the rights and fundamental freedoms are to be enjoyed to the greatest extent that is consistent with the nature of the right or fundamental freedom. The Court has to ensure that a person's constitutional rights and freedoms are not arbitrarily or capriciously trampled upon by the State or any State organ, but without unnecessarily interfering with the DPP's power to carry out his constitutional mandate. The Court can only interfere with the DPP's constitutional mandate where there is clear evidence of violation of a person's rights or freedom, or where the DPP or the police have clearly abused their constitutional powers.

27. In **DIRECTOR OF PUBLIC PROSECUTIONS v MARTIN MAINA & 4 OTHERS [2017] eKLR**, this Court considered the grounds upon which criminal prosecution may be prohibited. The Court cited with approval the decision by the Supreme Court of India in **STATE OF MAHARASTRA & OTHERS v ARUN GULAB GAWALI & OTHERS, Criminal Appeal No. 590 of 2007**. The grounds are as follows:

"(i) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice;

(ii) Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction;

(iii) Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; and

(iv) Where the allegations constitute an offence alleged but there is either no legal evidence adduced clearly or manifestly fails to prove the charge."

28. Where the allegations in the first information or complaint against an accused person or a suspect, at their face value or upon investigations by the police or other investigative offices, reveal commission of a criminal offence and the DPP, being so satisfied, chooses to commence criminal proceedings, the task of evaluating the weight of that evidence against any evidence that may be tendered by the accused person or suspect falls upon the trial court, not the Superior Court hearing a petition or application to prohibit prosecution.

29. There are issues that can only be determined upon hearing and cross examination of witnesses. The appellant sought to rely on a multiplicity of documents attached to his affidavit to demonstrate that the respondents' case was not well founded. Most of those documents had been disputed by the respondents.

30. In such instances, the accuracy and veracity of the documents could only be established in a hearing where the documents are produced and witnesses cross examined.

31. In our view, the appellant did not demonstrate that the institution of the criminal case amounted to abuse of the Court process or that his constitutional rights and freedoms had been violated because of the commencement of the criminal proceedings.

32. We echo the views of the Supreme Court of India in **STATE OF MAHARASHTRA & OTHERS VARUN GULAB & OTHERS** (supra) that:

"The power of quashing criminal proceedings has to be exercised very sparingly with circumspection and that too in the rarest of rare cases."

33. We have said enough, we believe, to demonstrate that this appeal is for dismissal, which we hereby do.

The appellant shall bear the costs of the appeal.

Dated and delivered at Nairobi this 28th day of September, 2018.

P.N. WAKI

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JUDGE OF APPEAL

D.K. MUSINGA

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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