



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KOOME, SICHALE & J. MOHAMMED, JJ.A)**

**CIVIL APPEAL NO. 138 OF 2015**

**GORDON NGATIA MURIUKI.....APPELLANT**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTIONS (DPP)...1ST RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE (IGNPS).....2ND RESPONDENT**

**VIVO ENERGY KENYA LIMITED.....AFFECTED PARTY**

*(Being an Appeal against the whole of the judgment of the High Court of Kenya in Nairobi (Hon Mr. Justice G. V. Odunga) given at Nairobi on 25<sup>th</sup> February 2014*

*in*

*High Court JR Application No. 243 of 2014)*

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**JUDGMENT OF THE COURT**

[1] Sometimes in July 2014, Gordon Ngatia Muriuki (appellant) filed a judicial review application before the High Court seeking an order to prohibit the Inspector General of Police from arresting and charging him with a criminal offence. The said application was heard in the High Court (Odunga J.) and by a judgment dated the 25<sup>th</sup> February 2014, it was dismissed. Aggrieved by the said order of dismissal, the appellant appeals before this Court raising two grounds of appeal;- faulting the trial Judge for disregarding the fact that the issue of warrants of arrests against him was settled in another suit being HC Petition Number 207 of 2014; failing to find and hold that the procedure employed to apprehend and prosecute the appellant was improper, irrational and contrary to the Constitution.

[2] When this appeal came up for hearing on 23<sup>rd</sup> January 2017; counsel for the appellant although duly served with the hearing notice did not attend court. Mr Ashimosi learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents applied to have the appeal dismissed for non-attendance under Rule 102 of the Court Rules. We were minded to do so and dismiss the appeal for non - attendance but Dr. Khaminwa learned counsel for the affected parties, while agreeing with Mr. Ashimosi that the appeal should be dismissed for want of prosecution, also urged us to issue a judgment dismissing the appeal on merit.

[3] Dr Khaminwa went on to submit the appeal lacks merit because the appellant is facing charges for an

offence known in law before a Court of competent jurisdiction which is established according to the Constitution. Counsel made reference to a leading Text Book **De Smith's Judicial Review** 6<sup>th</sup> Edition where the learned authors have discussed criminal justice systems and prosecutorial powers as thus;

**“Even where matters are within the court’s jurisdiction there is a marked reluctance exercise that supervisory jurisdictions over police decisions to investigate, charge, and administer cautions; and decisions of the DPP to prosecute, continue or discontinue criminal prosecutions. The court will generally do so only if there is a grave abuse of power or a clear breach of the police or prosecuting authority’s settled policy. Claimants will also be expected to use other alternative remedies (such as an application) to the relevant criminal court to dismiss or stay the criminal proceedings on the ground that they are an abuse of the process, or to utilise any route of appeal that may exist.”**

[4] According to Dr. Khaminwa, the instant appeal is an abuse of the court process, as the appellant is facing charges before the Magistrate’s Court for the offence of stealing goods worth colossal sums of money; whatever complaints the appellant has, should be addressed before the trial court; judicial review process is not involved with the merit hearing and the learned Judge of the High Court properly directed himself on the law and dismissed the appellant’s application for review; as a matter of policy courts of law only interfere in very glaring cases where there is abuse of the process or an applicant is charged with an offence not known to law. Counsel urged us to dismiss the appeal.

[5] What has given rise to the present appeal was an application for judicial review by the appellant where he had sought an order prohibiting the 2<sup>nd</sup> respondent from arresting him or charging him with criminal offences. According to the appellant he was summoned to record a statement before the Director of Criminal Investigations (DCI) sometimes in July 2013 in regard to some purported lubricants/petroleum products that were allegedly stolen from Shell Petroleum Company. The appellant stated that he denied any knowledge of the allegations, and since then he was not aware the police wanted to interrogate him further. He however stated that he learnt later that some people were arrested and charged with related offences of theft of petroleum products before the Magistrate’s court at Mombasa and one of the accused persons was one **Musa Zuberi** whom he used to lend money to be repaid with interest. The appellant said he was surprised to read in the **Daily Nation** of 25<sup>th</sup> April 2014 that he was wanted by the Economic Crime Unit of CID and his picture and identity card were published in the said paper as a wanted criminal. He contended that the advertisement was actuated by malice. It is on those grounds that he applied to quash the said warrants of his arrest and prohibit any intended criminal charges.

[6] The motion was opposed; Chief Inspector **Joseph Wambua** contended that a complaint was recorded at the CID by the Security Manager of VIVO Energy Kenya Ltd (formerly Shell Company Ltd) on 23<sup>rd</sup> March 2013 of loss of petroleum goods in transit. The applicant was a former employee of Bayussuf where he was employed as a truck driver and he was charged with the duty of transporting various kinds of lubricants/petroleum products from Mombasa to Nairobi. Investigations were carried out that revealed massive loss of goods destined for Nairobi and the truck drivers of Bayussuf and staff of VIVO Energy were implicated in the said loss. It was further contended that all efforts to reach the appellant were unsuccessful; the appellant was also a licensed fire arm holder which was issued in unclear circumstances and for those reasons it was necessary to interrogate the appellant and since he could not be traced through his telephone number and from his house, warrants were obtained for his arrest and a newspaper advertisement. The police denied any wrong doing; or having acted under direction of anybody except within their mandate as provided for under Article 244 of the Constitution and Section 24 and 35 of the National Police Act which is inter alia to investigate crimes and to apprehend offenders.

[7] The learned trial Judge fastidiously considered all the issues and being guided by decided cases such as **Meixner & Another vs Attorney General** [2005] 2 KLR 189 and **Commissioner of Police & Another exparte Michael Monari & Another** [2012] e KLR the Judge in dismissing the motion stated as follows in a pertinent paragraph of judgement;-

**“It is therefore clear that the police are clearly mandated to investigate the commission of**

criminal offences and in so doing they have powers *inter alia* to take statements. The 3<sup>rd</sup> respondent has enumerated the facts which led him to undertake the investigations in question and to seek statements from the applicant. It is not the mandate of this court in these proceedings to minutely examine the nature of the evidence in possession of the prosecution in order to determine whether or not that evidence will (sic) mount a conviction. The decision whether or not to commence a criminal proceeding is at the discretion of the Director of Public Prosecution and whereas that discretion must be exercised bona fide and ought not to be abused, concrete evidence must be presented before the court in order for the court to interfere with the exercise of the discretion. An order of prohibition is an order of serious nature and cannot and should not be granted lightly.”

[8] We have considered the grounds of appeal, the entire record of appeal and submissions by counsel for the affected parties. We agree with Dr. Khaminwa that suits of this nature where parties seek to freeze criminal proceedings have become a daily fare in our courts nowadays. This Court has had occasion to determine similar issues and there is a wealth of jurisprudence on this Court’s jurisdiction to issue orders prohibiting criminal proceedings. For example in the case of;- **Eng. Michael Sistu Kamau vs. Ethics and Anti- Corruption Commission and 3 others** CA No Nai 173 of 2013, is one such case where, several decisions of this Court regarding the same issue of whether this Court has jurisdiction to issue an order of stay of criminal proceedings were reviewed and in conclusion, the court made the following remarks in a pertinent portion of the said ruling;

**“It is a constitutional right for everyone to be accorded a fair trial before a Court of law. The interests of the applicant must also be considered within the law and within the overarching parameters that Judicial authority is exercised according to the purposes and the principles set out in the Constitution. Every Court and every Institution that is created by the Constitution has their own mandate to promote and protect the principles and purposes of the Constitution. For the Court of Appeal to stay a proceeding before the magistrate’s court that has the statutory mandate to try criminal cases under the Anti-Corruption and Economic Crimes Act, the violation of the law and the Constitution must be blatant and glaring. The Court of Appeal is supposed to settle appeals after matters have been processed in the High Court and in doing so, Article 259 (1) of the Constitution requires that the Constitution be interpreted in a manner that promotes, its purposes, values and principles, advances, the rule of law, human rights and fundamental rights and freedoms in the bill of rights and permits development of the law and contributes to good governance. In the instant case the judge was not satisfied that even as the issues were to be thrashed by a Bench of judges, the applicant did not demonstrate how his rights would be violated if the conservatory orders were not issued”.**

[9] The appellant wishes to have the police stopped from arresting him and charging him with criminal offences, yet as found by the trial court, that is the mandate of the police, to investigate crime and apprehend offenders. We are aware the practice of seeking to freeze criminal proceedings is perhaps borrowed from the *locus classicus* case of; **Githunguri v Republic** (1985) KLR page 92 who was challenging the powers of the Attorney General to reopen a criminal prosecution that had been closed several years ago. This was the gist of the holding;-

**“The Attorney-General is given unfettered discretion to institute and undertake criminal proceedings by section 26 of the constitution but this discretion should be exercised in a judicious way. It should not be exercised arbitrarily, oppressively or contrary to public policy.**

.....

**The preferment of a charge against any person nine years after the alleged commission of the offence, six years after full inquiry in respect of it and five years after the decision of the office of the Attorney-General not to prosecute and to close the file is vexatious, harassing an abuse of the process of the court and contrary to public policy unless a good and valid**

**reason exists for doing so, such as the discovery of important and credible evidence or the return from abroad of the person concerned.”**

Nonetheless we also recognize the facts of this appeal are totally distinguishable from the **Githuguri** case, they are also different from those of the case of; **Christopher Ndarathi Muraguru vs. Kenya Anti-Corruption Commission & Ano. CA Nai 43 of 2006 [2006] IKLR 77** because **Murugaru** was challenging a demand by the Ethics and Anti- Corruption Commission to disclose his wealth and its source which material was deemed as incriminatory of him.

**[10]** We are in total agreement with the findings by the learned trial Judge that the purpose of judicial review is not to sabotage the mandate of other bodies such as the National Police Force from undertaking their own mandate as per the law. Judicial review is an avenue to check excesses of power or instances of illegalities. Courts are reluctant to freeze proceedings before a court of law that has jurisdiction to try criminal cases; only in instances where there are trumped up charges (that cannot be founded in law) or the prosecution is not undertaken according to law, or it is actuated by malice and meant to harass the appellant, having no basis at all in law or in fact. It is in that rare occasion that the Court of Appeal has intervened by dint of its inherent jurisdiction to ensure the ends of justice and prevent the abuse of the process as indeed this is a country that is governed by the Constitution and the dictates of the rule of law.

**[11]** Does this case fall within the above parameters? The allegations against the appellant were investigated by the police, it is within their mandate and he was charged before the magistrate’s court which is a creature of the Constitution and the Magistrates Court Act as well as other statutes which spell out the respective jurisdiction of each court of law or the Tribunals. In other words, the High Court or Court of Appeal for that matter have no jurisdiction to try criminal matters other than murder and treason for the latter while the Court of Appeal has no jurisdiction whatsoever to try criminal matters. The Court structure is supposed to act in harmony, not to sabotage one another. See the Supreme Court decision in the case of;- . **Peter Oduor Ngoge v. Hon. Francis Ole Kaparo & 5 others – Supreme Court Petition No. 2 of 2012** – [2012] eKLR, the judges interpreted the Supreme Court appellate jurisdiction thus:

**“In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of courts in the constitutional set-up, running up to the Court of Appeal have the professional competence and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court.”**

.....

**[12]** Has the Director of Criminal Investigations or the Inspector General of Police for that matter failed to carry out their duties and investigation thus proceeded to charge the appellant in the Magistrate’s court before establishing a *prima facie* case? We are not able to deduce on the face of the material that was before the High Court any failure of duty on the part of the DCI or the police, on the contrary, the respondents gave a detailed account of the complaints recorded with the police against the appellant and the fact that the police could not reach the appellant hence the warrants of his arrest were issued which is a normal procedure. It would also be premature to determine at this stage without calling evidence what the appellant regards as **“malicious prosecution”**.

**[13]** The second issue is whether by allowing the criminal proceedings to go on the appellant’s constitutional rights as enshrined in the Bill of Rights will be breached. As stated above, the Magistrate’s Court is a creature of the Constitution; it is also vested with powers to accord a fair trial and to promote the principles and purposes of the Constitution. The Magistrate’s Court is competent and capable of determining whether the charges facing the appellant are without basis and to order so as provided for under the relevant statutes. Nipping such powers from the court that is ordained by the Constitution will not serve but undermine due process. The appellant and others who fear to face charges need to be assured that our legal system is ring fenced with systems and structures to protect and safeguard rights that includes inalienable rights of appeal.

Accordingly, we are not satisfied this appeal has merit, it is hereby ordered dismissed.

**Dated and delivered at Nairobi this 31<sup>st</sup> Day of March, 2017.**

**M.K. KOOME**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**