



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A.)

CRIMINAL APPEAL NO. 56 OF 2015

BETWEEN

WYCLIFFE OPARANYA AMBETSA APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kakamega, (Mrima, J.) dated 19th March, 2015

in

HCRC. NO. 39 OF 2013)

JUDGMENT OF THE COURT

1. On 25th May, 2013, the appellant presented a petition before the High Court of Kenya at Kakamega seeking two substantive orders:
 - a. **a declaration that his prosecution in Criminal Case No. 122 of 2013 before the Senior Principal Magistrate's Court, Butere, is unlawful and a violation of his right to a fair trial;**
 - b. **an order of prohibition to prohibit the Senior Principal Magistrate, Butere, or any other court, from proceeding with his trial in the aforesaid criminal case or in any other proceedings commenced on the basis of the same complaint.**
2. The petition was supported by an affidavit sworn by the appellant. In the criminal case, it was alleged that the appellant had assaulted one **John Ojuang Waka** (the complainant) on 17th August, 2008 at Mabole Village in Butere District, occasioning him actual bodily harm. The complainant was a political supporter of a rival group.
3. The appellant stated that he had been informed of the allegations of assault in July, 2008 by Acting Inspector **Aloyce Mboya**, the investigating officer, but subsequently the file was closed for lack of evidence. However, sometimes in 2013 the police file was re-opened and subsequently the aforesaid criminal case instituted against the appellant, who had since been elected as the

Governor of Kakamega County.

4. The appellant viewed the aforesaid criminal proceedings as having been engineered by his political opponents to frustrate and embarrass him as the Governor of Kakamega County, hence the orders sought.
5. A reply to the petition by way of an affidavit sworn by the one **Okoth John**, a prosecution counsel in the office of the Director of Public Prosecutions, Kakamega County, was filed. The respondent opposed the petition, terming it as scandalous, frivolous, and vexatious and an abuse of the court process. The respondent further stated that the petition was an attempt by the appellant to interfere with the police mandate of investigations, and also intended to curtail the powers of the Director of Public Prosecutions as provided for under **Article 157** of the **Constitution of Kenya, 2010**.
6. Upon consideration of the petition, which was canvassed by way of written submissions only, the High Court (**Mrima, J.**) found it lacking in merit and dismissed it with costs. That is the brief background to this appeal.
7. The appellant's memorandum raised 8 grounds of appeal which may be summarized as follows: that the learned judge erred in law in admitting the affidavit sworn by John Okoth that was headed, "*Reply to petition*", since the appropriate rules require a State organ that is responding to a petition to file a replying affidavit, in failing to appreciate that the institution of the prosecution of the appellant was due to pressure from the Kenya National Commission on Human Rights and hence an abuse of the process of the court and a violation by the respondents of his powers under **Article 157 (10)** of the **Constitution**, in failing to find that the delay in instituting the proceedings was a violation of **Article 47** of the **Constitution**, in questioning the authenticity of the statement of Acting Inspector Alloyce Mboya, and, by ignoring the authorities cited by the appellant.
8. Before this Court, the parties filed comprehensive submissions and **Mr. Musiega**, the appellant's learned counsel, orally highlighted certain portions of the written submissions, while **Mr. Ketoo**, learned Prosecutions Counsel, relied entirely on his written submissions.
9. Turning to the appellant's 1st & 2nd grounds of appeal, his contention was that **rule 15 (1)** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms)** Practice and Procedure Rules, 2013 stipulates that the Attorney General or any other State organ "*shall within fourteen days of service of a petition respond by way of a replying affidavit*", yet what was filed was a document entitled "*Reply to Petition*". The appellant contended that the respondent's affidavit ought to have been struck out for that reason.
10. The learned judge invoked the Provisions of **Article 159 (2) (d)** of the **Constitution** and treated the affidavit sworn by John Okoth as a replying affidavit, since the heading *per se* had not occasioned any injustice or prejudice to the appellant. We entirely agree. The appellant did not demonstrate that the judge's application of **Article 159 (2) (d)** of the **Constitution** was injudicious in any way. We find no merit in **grounds 1** and **2** and dismiss them.
11. We turn to the appellant's contention that his prosecution was as a result of pressure brought to bear upon the respondent by the Kenya National Commission on Human Rights (*the Commission*). The learned judge observed that the complainant had lodged a complaint with the Commission, saying that his complaint to the OCPD, Butere Police Division, about police inaction had borne no fruit. The appellant's contention was that the Commission is not an agent of the respondent for purposes of expediting investigations through pressure on the police. In the appellant's view, the respondent violated **Article 157 (10)** of the **Constitution** which states that:

“(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”

12. The respondent's response to the above ground was that the mere fact that the appellant's prosecution was partially as a result of pressure from the Commission does not mean that the respondent had surrendered his Constitutional mandate to the Commission. He also submitted that the Commission was acting within its powers as stipulated under **Article 59 (2)** of the **Constitution**.
13. Although the appellant did not specify the nature of action or pressure that was allegedly exerted upon the respondent by the Commission resulting to prosecution of the appellant, we must point out that **Article 59 (2) (e)** of the **Constitution** stipulates one of the powers of the Commission in the following words:
- “(e) to receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated.”**
14. We need to add that the Commission is also empowered by **Article 59 (2) (i)** to investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. The complainant in this case had allegedly been assaulted by the appellant on 17th August, 2008. There had been unexplained delay in finalizing police investigations and his complaints to the police had not been acted upon. The Commission, in writing to the Provincial Police Officer, Western Province, on 21st April, 2011 about the delay in completing investigation, was acting within its constitutional mandate.
15. Further, the record shows that the respondent merely took up the appellant's case at the prosecution stage, not at the investigative stage. As rightly observed by the learned judge, the National Police Service and the Director of Public Prosecutions are part of the criminal justice system in Kenya, vested with specific legal mandates.
16. Under **section 24** of The **National Police Service Act, 2011**, the functions of the police include investigation of crimes, apprehension of offenders and enforcement of all laws, among others. **Article 157 (2) (b)** of the **Constitution** empowers the Director of Public Prosecutions to take over and continue any criminal proceedings commenced by another person or authority, with the permission of that person or authority. This is what the respondent did in this matter.
17. We do not agree that the respondent breached the provisions of **Article 157 (10)** of the **Constitution**. **Ground 3** of the appeal must therefore fail.
18. Turning to **grounds 4, 5 and 6** that relate to the delay in prosecuting the appellant, the appellant's argument was that the delay infringed on his Constitutional right to a fair trial as guaranteed under **Article 50** of the **Constitution** and that it amounted to abuse of the process of the court. He further contended that the prosecution was aimed at achieving an ulterior motive by his political competitors.
19. The record of appeal showed that the OCPD, Butere, had written to the Provincial Police Officer, Western Province, on 28th July, 2011 explaining why the investigations took a long time. The main one was that the police had experienced difficulties in getting the appellant to record his statement. At the material time, the appellant was a Cabinet Minister. The Administration Police Officers who were then guarding the appellant and who were key witnesses had been transferred to various places and the investigating officer had difficulties in tracing them.
20. Acting Inspector Alloyce Mboya also stated that the appellant's manager, one **Fred Mukanda**, had refused to record a statement, ostensibly because the appellant had not instructed him to do so. There was however nothing to indicate that the police investigation file had been closed, though there had been inactivity for quite some time, until 21st April, 2011 when the Commission wrote to the then Provincial Police boss, Western Province.

21.The High Court, citing **MARTIN V TAURANGA DISTRICT COURT** (1995) 2 LRC 788, held that delay to prosecute a case cannot, in itself be taken to be a basis of stopping a prosecution case, it is the effect of the delay that had to be considered. The learned judge stated:

“For a Petitioner to succeed on such a limb, he has to go further and demonstrate by way of credible evidence that as a result of the delay, a trial fair to him cannot be possible. No such allegations have, however, been made in the petition before Court. The Court has equally not been addressed on the nature of the prejudice that the petitioner stands to suffer which prejudice infringes on his right to a fair trial. No allegations were brought forth that the petitioner will not be able to secure the attendance of some witnesses or that due to the passage of time witnesses’ memories have faded.”

We respectfully agree with the learned judge’s holding as quoted hereinabove.

22.Did the appellant prove that his prosecution is an abuse of the process of the court? We do not think so. Abuse of court process occurs when criminal proceedings are instituted for an ulterior motive or for a purpose of personal or other gains than a determination as to whether an accused person did actually commit an offence, which he is reasonably suspected to have committed. See **GITHUNGURI V REPUBLIC** [1986] KLR 1, **REPUBLIC V ATTORNEY GENERAL & ANOTHER** ex parte NG’ENY [2001] KLR 612.

23.In this matter, the investigating officer was satisfied that there was sufficient evidence upon which the appellant could be arraigned in court to stand trial for assault. It was not for the High Court to determine the sufficiency of the evidence. That is within the province of the trial court. In the words of this Court in **MEIXNER & ANOTHER V ATTORNEY GENERAL** [2005] 2 KLR 189:

“It is the trial court which is best equipped to deal with quality and sufficiency of the evidence to support the charge ... it would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the functions of a trial court.”

24.All in all, we are satisfied that the learned judge considered all the submissions made by both parties and having done so arrived at the right decision. We find no merit in this appeal and dismiss it in its entirety.

DATED and delivered at Kisumu this 29th day of July, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.