REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISCELLANEOUS CRIMINAL APPLICATION NO. 127 OF 2018

ZAKAYO HENRY ANGOYIA.....APPLICANT

VERSUS

THE OFFICER COMMANDING STATION,

TURBO.....1ST RESPONDENT

THE OFFICER COMMANDING

POLICE DIVISION, LUMAKANDA.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

[1] This Ruling is in respect of the application dated **5 October 2018**. It was filed herein by the Applicant pursuant to **Article 22, 29(a) and (b), 31(b) and 50(e)** of the **Constitution** for orders that **Criminal Case No. 1636 of 2017** in the Chief Magistrate's Court at Eldoret be terminated; that the Applicant's goods which were the subject matter of **Miscellaneous Criminal Application No. 15 of 2017** in the High Court at Eldoret be restored to him; and that the costs be in the cause.

[2] The application was premised on the grounds that the Applicant's constitutional rights as enshrined in **Articles 29(a) and (b), 31(b) and 50(e)** have been violated; and that the OCS, Turbo Police Station, was in contempt of the direct orders of the Court when he incarcerated the Applicant. In support of those grounds, the Applicant relied on his affidavit, sworn on **5 October 2018**, in which he averred that he was the applicant in **High Court Miscellaneous Criminal Application No. 15 of 2017: Zakayo Henry Angoyia vs. The Officer Commanding Station, Turbo Police Station and 2 Others,** wherein he was admitted to a cash bail of **Kshs. 10,000/=.** He added that, in its ruling, the Court **(Hon. Ogembo, J.)** ordered the Applicant to present himself at Turbo Police Station on **18 April 2017** in respect of the charges that the Police intended to prefer against him.

[3] It was further the contention of the Applicant that before he could comply with the Court Order, he was arrested on the **16 April 2017** by the OCS, Turbo Police Station and incarcerated from **16 April 2017** to **18 April 2017** for no apparent reason; and that when he was presented before court on **18 April 2017**, the Director of Public Prosecutions did not give any reason for his incarceration; and that thereafter the court file went missing and has never been found to date. He added that the State has also refused to give him copies of the statements and documents they intend to rely on before the lower court, in violation of **Article 50** of the **Constitution.**

[4] In his submissions before the Court, the Applicant narrated how the Police raided his cinema hall at **Mwambo Trading Centre** on 10 **January 2017** and confiscated his property, namely:

[a] 1 48 inch TV LED with its remote control appliance;

[b] 1 LG DVD Player with its remote control appliance;

[c] 16 computer software discs;

[d] 16 music data discs.

[5] According to the Applicant, it was in consequence of that raid that he approached the Court vide his **Miscellaneous Application No. 15**

of 20 January 2017, seeking that the items be returned to him; and that in response to that application, the Respondents filed a Replying Affidavit contending that he had been found in possession of bhang. Consequently, an order was made that he be charged with the offence of being in possession of bhang; and so he was arrested on **16 April 2017** and was charged but that the file went missing and has therefore not been afforded an opportunity to refute the allegations against him. He added that it was in the light of the forgoing that he filed the instant application. He relied on **Kakamega High Court Miscellaneous Criminal Application No. 36 of 2008: Charles Likoko Lisambu vs. Republic** and **Nairobi High Court Criminal Appeal No. 1002 of 2002: Joseph Kamau Gitau vs. Republic** in urging the Court to terminate the lower court proceedings; and to order that his property be returned to him by the OCS, Turbo Police Station.

[6] Ms. Kagali for the State opposed the application. She relied on the Replying Affidavit sworn by **CI Joshua Arende** on **8 November 2018,** which was filed herein on **13 December 2018**. According to her, the application is an abuse of the court process, granted that a similar application had been filed by the Applicant and had been dismissed on **11 April 2017** by **Hon. Ogembo, J.** She submitted that the property whose release the Applicant now seeks were adversely dealt with and are intended to be produced as exhibits before the lower court in **Criminal Case No. 1636 of 2017,** which is pending. She added that, contrary to the Applicant's allegations that the court file is missing, the lower court case was only put on hold because of the numerous applications that the Applicant had filed, which impacted on the progress of the lower court case.

[7] Regarding allegations that he was falsely accused of having been found in possession of bhang, it was the submission of **Ms. Kagali** that those are issues that will fall for determination before the lower court; and that the Applicant will therefore have an opportunity to cross-examine the Prosecution Witnesses to his satisfaction. She urged the Court to therefore dismiss the application contending that the authorities cited by the Applicant are both distinguishable from the facts of this case.

[8] I have given due consideration to the application, the grounds upon which it has been laid as explicated in the Supporting Affidavit as well as the averments set out in the Replying Affidavit sworn by the OCS, Turbo Police Station. There appears to be no dispute that Police Officers conducted a raid at the Applicant's business premises in **January 2017** and thereupon seized the items that are the subject of the instant application. In the same vein, the parties are in agreement that the Applicant was subsequently charged before the lower court in connection with that raid; with the Police alleging that the Applicant was also found in possession of bhang. Hence, the Applicant was accordingly arraigned before the lower court vide **Criminal Case No. 1636 of 2017;** and all indications are that that case is still pending hearing.

[9] The Applicant has however moved the Court seeking termination of the lower court proceedings on the ground that the case amounts to an infringement of his constitutional rights. He cited **Articles 22, 29(a) and (b), 31(b) and 50(c)** of the **Constitution** which generally provide for the right to, and protection of, freedom and security of the person as well as the right to privacy. There can be no doubt that the Applicant, just as any other individual in this jurisdiction, is entitled to the enjoyment of the fundamental rights mentioned; and is therefore at liberty to seek redress in respect of any perceived violation or threat of violation thereof. This however is not a Petition for redress in respect of infringement of the right to freedom, security or privacy. It appears to me to be more of a process issue; and the question for my determination is whether, upon the material presented before this court, the remedy sought, namely, termination of **Criminal Case No.1636 of 2017** and release of the property seized from the Applicant by the Police, is available.

[10] I say so because freedom of the person under **Article 29** and the right to privacy under **Article 31** are not part of the non-derogable rights set out in **Article 25 of the Constitution.** Hence the question to pose is whether the raid and seizure by the Police of the Applicant's property; as well as his arrest and subsequent arraignment in court were warranted; and therefore justifiable in an open and democratic society such as ours. The response given by the Respondents, and which I find plausible, is that there was justifiable cause for the arrest and arraignment of the Applicant; and that his case is pending before the lower court. It is contended, *inter alia*, that the Applicant was found in possession of bhang. Needless to say that possession of *bhang* or *cannabis*, is an offence under **Section 3** of the **Narcotic Drugs and Psychotropic Substances (Control) Act, No. 4 of 1994.**

[11] The foregoing being the case, it cannot be said that the arrest and prosecution of the Application, including the seizure of his property is a contravention of the Constitution. Indeed the Constitution, in **Article 245(4)** thereof, gives the Inspector General of Police power and autonomy when it comes to the investigation of any particular offence. Similarly, **Article 157(6)** of the Constitution is explicit that the Director of Public Prosecutions has the power to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed. Indeed, **Article 157(10)** leaves no doubt at all as to the decisional independence of the Director of Public Prosecutions. It states that:

> **"The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority."**

[12] In the premises, where a decision to prosecute has been made by the Director of Public Prosecutions, the process must be left to run its course; and it would hardly be the remit of this Court to interfere with that process as, ultimately the decision will be that of the trial court to determine whether or not the charges have any basis. Hence in **Republic vs. Commissioner of Police and Another *ex parte* Michael Monari & Another [2012] eKLR** it 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 left to the trial court...As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene."**

[13] Likewise, in **Nairobi HC Judicial Review Application No.78 of 2015: Republic –vs- Director of Public Prosecution & Another Ex-parte Chamanlal Vrajlal Kamani & 2 Others, Hon. Odunga, J.** expressed the view, with which I entirely agree, that:

> *"The court ...ought not to usurp the Constitutional and Statutory mandate of the Respondent and the interested party to investigate and undertake prosecution in the exercise of the discretion conferred upon them. It was in recognition of this fact that the House of Lords in Director of Public Prosecutions –vs- Humphreys [1976] 2 All ER 497 at 511 cautioned that:*
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> *"A Judge must keep out of the arena. He should not have or appear to have responsibility for the institution of a prosecution. The functions of prosecutors and of Judges must not be blurred. If a Judge has power to decline to hear a case because he does not think it should be brought, then, it soon may be thought that the cases he allows to proceed are cases brought within his consent or approval…If there is a power…to stop a prosecution on indictment in limine, it is in my view a power that should be exercised in the most exceptional circumstances."*

[14] In arriving at the foregoing conclusion, I have given consideration to the two authorities that the Applicant relied on but find them unhelpful. The **Charles Likoko Lisambu Case** (supra) was in connection with allegations that the Applicant had been detained for a longer period than provided for in law before being arraigned in court. The court **(Hon. Ochieng, J.)** made this clear by stating that:

> **"...it must be understood that the violation was due to the delay in bringing the applicant to court, as opposed to the fact that he was arrested and charge after he had been earlier discharged..."**

[15] Similarly, the case of **Joseph Kamau Gitau vs. Republic** (supra) was a Judgment of the High Court rendered after the full hearing of an appeal; and the court was there dealing with the failure by the lower court to provide the Appellant with an interpreter; and failure to indicate the language of its communication with the Appellant; as well as the failure by the trial court to inform the Appellant of his right to have witnesses recalled after the amendment of the Charge. These are not the issues at play in this application. Moreover, it is noteworthy that the two decisions are pre-2010 decisions and that the constitutional terrain has since changed in many respects. In particular, even where there is found to be a violation, that does not necessarily nullify criminal proceedings.

[16] The foregoing being my view of the matter, I would dismiss the application dated **5 October 2018** and direct the parties to pursue the lower court case to its logical conclusion.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 20TH DAY OF FEBRUARY 2019

OLGA SEWE

JUDGE