



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW NO. 26 OF 2014
(FORMERLY HCT NRB JR NO. 205 OF 2013)

IN THE MATTER OF AND DECISION OF THE LABOUR DEPARTMENT TO CHARGE THE APPLICANT WITH THE OFFENCE OF WILFUL FAILURE TO MAKE PAYMENT OR TENDER WAGES PAYABLE TO AN EMPLOYEE CONTRARY TO SECTION 17(1) AND (10) OF THE EMPLOYMENT ACT IN NAIROBI (MILIMANI LAW COURTS) RESIDENT MAGISTRATE’S COURT CRIMINAL CASE NO. 517 OF 2012

BETWEEN

REPUBLIC APPLICANT

VERSUS

DEPARTMENT OF LABOUR 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

RESIDENT MAGISTRATE’S COURT MILIMANI LAW COURTS 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

PHILIP OMONDI EXPARTE APPLICANT

M/S Omolo for exparte applicant

M/S Ndege for 1st and 2nd respondent

M/S Chege for 3rd and 4th respondent

JUDGMENT

1. This matter commenced in the High Court as Judicial Review No. 205 of 2013 and was transferred to this court by Odunga J.
2. The substantive notice of motion application dated 24th June 2013 is based on the grounds set out in the exparte applicant’s statutory statement accompanying the application for leave both dated

14th June 2013.

3. Leave was granted on 17th June 2013, and the leave operated as a stay of proceedings in the criminal case before the **Nairobi (Milimani Law Courts) Resident Magistrate Court, Milimani Criminal Case Number 517 of 2012.**
4. The exparte applicant seeks;
 - a. An order of certiorari to bring into this Honourable Court to quash the decision of the 1st respondent to charge and prosecute the exparte applicant with the offence of wilful failure to make payments or tender wages payable to an employee contrary to section 17(1) and (10) of the employment Act in **Nairobi (Milimani Law Courts) Resident Magistrate's Court criminal case no. 517 of 2012.**
 - b. An order of prohibition prohibiting the 1st respondent and the 2nd respondent from further prosecuting, adducing evidence, compelling the applicant to attend court mentions or carrying on with proceedings in Nairobi (**Milimani Law Courts) Criminal case no. 517 of 2012** or any other proceedings based on the same facts and circumstances against the exparte applicant.
 - c. An order of prohibition prohibiting the 3rd respondent from taking evidence or conducting further proceedings in **Nairobi (Milimani Law Courts) Resident Magistrate Court, criminal case no. 517 of 2012** or any other proceedings based on the same facts and circumstances against the exparte applicant.
 - d. Costs of and incidental to this application be provided for.
5. The application is based on the following facts set out in the statutory statement dated 14th June 2013;
6. The applicant served as a chief executive officer of Akamba Public Road services Limited (*'the company'*) from 11th November 2010.
7. On 28th May 2012, the employment of the applicant was terminated by the company vide a letter of same date on account of insolvency of the company.
8. The company was put under receivership by a court order in **Nairobi winding up cause no. 12 of 2012** on 19th June 2012. In terms of the court order, the official receiver was appointed as an interim liquidator to manage the affairs of the company.
9. The respondents instituted criminal charges against the exparte applicant together with the directors of the company for failure to pay wages of workers amounting to Kshs.17,868,046.00. The exparte applicant states that the respondent did not do due diligence on the state of the company before instituting the criminal charges to find out that the company was not in a position to pay its employees including the exparte applicant himself. This was the reason the employment of the applicant was terminated and the company owed the exparte applicant outstanding salary in the sum of Kshs.16,506,800.00. That the decision to institute criminal charges against the exparte applicant was malicious, ill informed, unfair and unreasonable and the court should grant the judicial review orders sought.
10. The application is opposed by all the respondents vide a replying affidavit sworn by Robinson Twanga, on 4th September 2013 on the grounds that proper investigations were conducted upon receipt of **Police file and CID inquiry file no. 4/2010** on 29th June 2010. It was established that the exparte applicant being the chief executive officer of the company and being in the control and management of the company had failed to pay the respondents earned salaries to date. That upon investigations and analyzing the evidence, charges were preferred against the exparte applicant for breaching section 178 of the Employment Act which provides;

“(1) subject to this Act, an employer shall pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service directly, in the currency of Kenya – ”

and

(10) a person who –

Subject to section 19 wilfully fails to make payment of or to tender the wages earned by or payable to an employee in accordance with sub section (1);

Commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.”

11.The respondents rely on section 23 of the penal code which provides that;

“where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in the control or management of the affairs or activities of such company, body, corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, though no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.” as the justification for the steps taken against the exparte applicant.

12.That the applicant is before a competent court of law before which he will be granted a fair hearing which includes opportunity to defend himself and therefore it cannot be rightly said that the respondents have violated his rights under Articles 41 of the constitution of Kenya 2010.

13.Furthermore, under section 35 of the Labour Institutions Act No. 12 of 2007 which provides;

“(1) a labour officer may, for the purposes of monitoring or enforcing compliance with any labour law –

(k) without prejudice to the powers of the Attorney General, institute proceedings in respect of any contravention of any provision of this Act or for any offence committed by an employer under this Act or any other law.”

14.Respondent is empowered to institute charges against any errant employer as is the case with the exparte applicant and for this purpose section 39 of the Labour Institutions Act provides that where a director, chairman, manager, secretary or other officer of a legal body is shown to have consented to, connived or facilitated by negligence commission of an offence by the legal entity, shall be deemed to have committed an offence.

15.For this reason, the respondents submit that the applicant has been lawfully charged and denies any malice on their part in instituting the criminal charges against the exparte applicant. The respondents pray that the application be dismissed for being misconceived and without basis.

Determination

16.The issues for determination are;

- i. Whether the exparte applicant has met the requisite conditions for the grant of the orders sought.
- ii. Whether the applicant is entitled to the reliefs sought.

Issue i

17. In the case of **Stanley Munga Githunguri Vs. Republic [1986] KLR**, the Court as per Madan J. observed as follows;

“The Attorney General in Kenya by section 26 of the Constitution is given unfettered discretion to institute and undertake criminal proceedings against any person “in any case in which he considers it desirable so to do” this discretion should be exercised in a Quasi-judicial way. That is, it should not be exercised arbitrarily, oppressively or contrary to public policy”

18. In HCCC at Nairobi, petition no. 153 of 2013 consolidated with **Petition No. 369 of 2013, Thuita Mwangi and 2 others Vs. EACC and 3 others eKLR [2013]** Majaja J. observed;

“The discretionary power vested in the DPP is not an open cheque and such discretion must be exercised within the four corners of the constitution. It must be exercised reasonably, within the law and to promote the policies and objects of the law which are set out in section 4 of the office of the Director of Public Prosecutions Act. These objects are as follows; diversity of the people of Kenya, impartiality and general equity, the rules of natural justice, promotion of public confidence in the integrity of the office, the need to serve the cause of justice, prevent abuse of the legal process and public interest, protection of sovereignty of the people, secure the observance of democratic values and principles and promotion of constitutionalism.”

19. The Judge went to state [43];

*“The court may intervene where it is shown that the impugned criminal proceedings are instituted for other means other than the honest enforcement of criminal law, or are otherwise an abuse of the court process. As Kuloba J. observed in **Vincent Kibiego Saina Vs. Attorney General High Court misc. civil application no. 839 of 1999** (unreported) at pages 20, 21, “if a criminal prosecution is seen as amounting to an abuse of the process of the court the court will interfere and stop it. This power to prevent such prosecutions is of great constitutional importance. It has never been doubted. It is readily used and if there are circumstances of abuse of the process of the court the court will, unresistingly step in to stop it.”*

20. In the present case, the exparte applicant has been charged with others being a managing director of Akamba Public Road Services within Nairobi County between the month of September 2011 and June 2012, failed to pay wages earned amounting to Kenya Shillings seventeen million eight thousand and sixty eight four hundred and sixty eight four hundred and forty six (Kshs. 17,868,046).

21. The exparte applicant as the chief executive of the company was not a director of the company and was not a signatory to any of the bank accounts held and run by the company. The employment of the exparte applicant was terminated on 28th May 2012 and himself was not paid Kshs.16,507,800.00 at the time of termination. The termination of exparte applicant’s employment occurred before the criminal charges were preferred against him and at the time the company had been placed under receivership.

22. The remedy available to the employees is provided for under the provisions of section 66, 67 and 68 of the Employment Act, 2007 as follows;

“66(1) where an application made to him in writing by an employee or his representative the minister is satisfied that –

- a. *The employer of an employee has become insolvent,*
- b. *The employment of the employee has been terminated; and*
- c. *The appropriate date the employee was entitled to be paid the whole or part of any debt to which*

this part applies the minister shall, subject to section 69, pay the employee out of the National Social Security Fund, the amount to which, in the opinion of the minister, the employee is entitled to in respect of the debt.”

23. The aforesaid provisions clearly provide a remedy to be used by the labour officer on behalf of the employees to recover unpaid balances in case of insolvency of the employer.

24. The cause taken by the labour office in changing the ex parte applicant is not likely to yield any tangible benefit to the many employees affected by the inability of the company to pay wages and other debts by fact of insolvency and an order of receivership.

25. Black’s law Dictionary, Ninth Edition defines ‘insolvency’ as follows;

“the condition of being unable to pay debts as they fall due or in the usual course of business”.

26. The circumstances of this case do not depict, the ex parte applicant as a person who ‘wilfully’ refused to pay the salaries of his employees. The applicant was unable for reasons beyond his control to pay his own salary and that of his employees. The ex parte applicant was removed from employment before the criminal charges were preferred against him and was not a director of the company. Payment of the salaries of the employees of the company was clearly beyond him by the time the criminal charges were preferred against him.

27. In **Beatrice Ngonyo Kamau & 2 others Vs. Commissioner of Police and the Director of Criminal Investigations Department & another, petition no. 251 of 2012 [2013] eKLR**, Lenaola J. captured the legal requirements for the DPP to institute charges thus;

“[22]. The point being made above is that the DPP though not subject to control in exercise of his powers to prosecute criminal offences, must exercise that power on reasonable grounds.

Reasonable grounds it must be noted cannot amount to the DPP being asked to prove the charge against an accused person at the commencement of the trial but merely show a prima facie case before mounting a prosecution. The proof of the charge is made at trial.”

28. On the facts of this case, the court is of the view that the labour officer, being the agent of the DPP had no *prima facie* case against the ex parte applicant to warrant institution of the charge of wilful failure to pay wages to the employees when the ex parte applicant clearly had no ability to do so.

29. To this extent, the charges against the applicant are unreasonable, vexatious and an affront on the right of the applicant to be treated fairly and in accordance with the law.

30. Accordingly, the application is granted and the court makes the following orders;

- a. An order of certiorari is issued to bring into this court to quash the decision of the 1st respondent to charge and prosecute the applicant with the offence of wilful failure to make payment or tender wages payable to an employee contrary to section 17(1) and (10) of the Employment Act in **Nairobi (Milimani Law Courts) Resident Magistrate’s Court criminal case no. 517 of 2012.**
- b. An order of prohibition, prohibiting the 1st and the 2nd respondents from further prosecuting, adducing evidence, or compelling the ex parte applicant to attend court mentions or carrying on with proceedings in **Nairobi (Milimani Law Courts) criminal case no. 517 of 2012** or any other proceedings based on the same facts and / or related facts.
- c. The 1st respondent to pay the costs of the suit.

Dated and delivered at Nairobi this 31st day of May, 2016.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE