Republic v Director of Criminal Investigations & 3 others; Akaran (Exparte Applicant) (Miscellaneous Application E001 of 2024) [2024] KEHC 8135 (KLR) (27 June 2024) (Judgment)

Neutral citation: [2024] KEHC 8135 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

MISCELLANEOUS APPLICATION E001 OF 2024

OA SEWE, J

JUNE 27, 2024

IN THE MATTER OF BREACH AND/OR CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 25, 27, 28, 29(A) AND 50 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF AN APPLICATION BY JOHN ETORE AKARAN (SUBJECT) FOR ORDERS OF JUDICIAL REVIEW BY WAY OF PROHIBITION AND CERTIORARI

AND

IN THE MATTER OF DECISIONS MADE ON OR ABOUT THE 1ST DAY OF MARCH 2024, 7TH DAY OF MARCH 2024 AND 15TH DAY OF MARCH 2024 BY THE OFFICE OF THE DIRECTORATE OF CRIMINAL INVESTIGATIONS AT MTWAPA TO INSTITUTE CRIMINAL PROCEEDINGS AGAINST THE SUBJECT AND THE SUBSEQUENT COMMENCEMENT OF PROCEEDINGS BY THE DIRECTOR OF PUBLIC PROSECUTIONS

AND

IN THE MATTER OF CRIMINAL CASE NUMBERS E229, E262 AND 284 OF 2024: REPUBLIC V JOHN ETORE AKARAN

AND

IN THE MATTER OF THE PENAL CODE AND CRIMINAL PROCEDURE CODE CAP 63 AND 75 OF THE LAWS OF KENYA

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT CAP 26, LAWS OF KENYA

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE ACT CAP 21, LAWS OF KENYA, THE CONSTITUTION OF KENYA AND ALL OTHER ENABLING PROVISIONS OF THE LAW

BETWEEN

REPUBLIC .... APPLICANT

AND

THE DIRECTOR OF CRIMINAL INVESTIGATIONS .... 1ST RESPONDENT

THE DIRECTOR PUBLIC PROSECUTION .... 2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE .... 3RD RESPONDENT

THE CHIEF MAGISTRATE SHANZU .... 4TH RESPONDENT

AND

JOHN ETORE AKARAN .... EXPARTE APPLICANT

JUDGMENT

1. Upon being granted leave on 18th March 2024, the ex parte applicant, John Etore Akaran (hereinafter, the applicant) commenced his substantive judicial review application vide the Notice of Motion dated 19th March 2024. The said application is expressed to have been brought pursuant to Section 8(2) of the *Law Reform Act*, Section 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and Order 53 Rules 1 and 2 of the Civil Procedure Rules. It prays for orders that:

   a. Spent

   b. The Court be pleased to issue an order of Prohibition directed against the 1st, 2nd and 3rd respondents their servants and/or agents or any other person acting under their authority from arresting, charging and the subsequent prosecution of the applicant on any new future charges pending the hearing and determination of the instant matter.

   c. The Court be pleased to issue an order of Prohibition directed against the 1st, 2nd and 3rd respondents their servants and/or agents or any other person acting under their authority prohibiting them from conducting, prosecuting or in any other manner proceeding with the conduct of Criminal Case No. E229 of 2024: Republic v John Etore Akaran and Criminal Case No. 262 of 2024: Republic v John Etore Akaran which are both lodged at the Chief Magistrate's Court at Shanzu and/or against the ex parte applicant pending the full hearing and determination of the instant matter.

   d. The Court be pleased to issue an order of Prohibition directed to the 4th respondent prohibiting the 4th respondent or any other judicial officer acting under the authority of the 1st respondent from conducting any further criminal proceedings in Criminal Case No. E229 of 2024: Republic v John Etore Akaran and Criminal Case No. 262 of 2024: Republic v John Etore Akaran and or any other criminal proceedings that may be brought before it with regards to the ex parte applicant pending the hearing and determination of this matter.

   e. The Court be pleased to issue an order of Certiorari directed to the 1st, 2nd and 3rd respondents herein to bring forth before the court for the purposes of being quashed the decision to charge and prosecute the applicant vide Criminal Case No. E229 of 2024: Republic v John Etore Akaran and Criminal Case No. 262 of 2024: Republic v John Etore Akaran.

f. The Court be pleased to issue an order of stay of any proceeding in Criminal Case No. E229 of 2024: Republic v John Etore Akaran and Criminal Case No. 262 of 2024: Republic v John Etore Akaran.

2. The application is premised on the grounds that the applicant, as the director of a human rights non-governmental organization known as Sheria Na Haki Human Rights Institute, has been at the forefront of fighting for the land rights of the poor and vulnerable members of the society. He averred that he was, in that capacity, approached by members of a community known as Barani Community who are residents of Land Parcel No. MN/III/336 and MN/III/337 and the subsequent sub-divisions emanating therefrom, known as Jumba Ruins, with a request to ensure the protection of their proprietary rights.

3. The applicant averred that, prior thereto, the Barani Community members had made efforts to protect their proprietary rights through various associations such as Moonlight and Barani Polepole Self-Help group, which later merged to make Jumba La Mtwana Community. They alleged that the suit properties were illegally and unlawfully grabbed by powerful individuals with the help of law enforcement officers and armed goons around 2014. He identified some of the land grabbers to be Wairimu Konchella and her agents Lydia W. Gitaiga and Roy Mbugua. The applicant further averred that, over the years the trio had frustrated the community's efforts to have the suit property allocated to them by the Government.

4. The applicant further averred that, on the 15th February 2024, the County Government of Kilifi issued a notice freezing all the ongoing physical developments on the suit property. He added that, thereafter, on the 19th February 2024 he wrote a letter to Wairimu Konchella cautioning her to stop the construction of a perimeter fence on the suit property, on the strength of the letter from the County Government of Kilifi; only to be arrested by police officers stationed at Mtwapa Police Station. He was booked at Mtwapa Police Station but was thereafter released.

5. The applicant further averred that, On the 29th February 2024, he was re-arrested and instructed by the Police to withdraw a civil suit he had filed on 22nd February 2024 at Kilifi Chief Magistrates Court, namely MCC/ELC No. E023 of 2024: Etore John c/o Sheria Na Haki Human Rights Institute v Lydia W. Githaiga, Wairimu Konchella and Roy Mbugua. When he declined he was charged and arraigned before the Magistrate's Court at Shanzu on charges of robbery with violence in Criminal Case E229 of 2024: Republic v John Etore Akaran and was remanded until the 7th March 2024 when the court granted him bail.

6. The applicant further deposed that as his family members were processing his bail, he was informed that he was to be arraigned before another court on two additional counts of robbery with violence and one count of stealing in Criminal Case No. E262 of 2024 Republic v John Etore Akaran. He was again remanded at Shimo la Tewa Prison and was later released on bail on the 15th March 2024. The applicant further deposed that while his bail was being processed, he was again informed that he had another charge in a different criminal matter Criminal Case No. E284 of 2024: Republic v Jackson Mwangombe alias Jacky Chasimba, Shahame Khamisi, Ruwa Kakala and Samuel Fikirini, who are members of the Barani. The applicant asserted that this additional case appeared to be contrived because his name did not appear on the front page of the charge sheet, but was inserted in Count Two on a charge of robbery with violence. He pointed out that his co-accused in Criminal Case No. E284 of 2024 were the members and leaders of the Barani community.

7. Hence, it was the contention of the applicant that the criminal proceedings are wholly unjustified and were instituted in abuse of court process by the 1st and 2nd respondents. He urged the Court to note

that the complainants in the criminal cases are the respondents in the civil case No. MCC/ELC No. E023 of 2024; and therefore prayed that the orders sought by him be granted.

8. In response to the application, the respondents relied on the Replying Affidavit sworn by No. 92711 CPL Enos Ongoya, a police officer attached to the Directorate of Criminal Investigations, Kilifi South. He averred that their office received complaints of robbery from Stephen Karisa Mwaringa and Eric Kamata Musyoki against the applicant along with others. That after thorough investigations, recommendations were made to the 2nd respondent for the prosecution of the applicant for the offence of robbery with violence.

9. Cpl Ongoya confirmed that on 19th February 2024, their office once again received a distress call from Lydia Wambui Githaiga that unknown persons had come to her home to serve a court order that she was unaware of. He proceeded to the scene along with other police officers and found the applicant with two others aboard a motor vehicle make Nissan Note, Registration Number KCR 257T. They identified themselves and requested the applicant and his companions to accompany them to the police station for interrogation. Cpl Ongoya further confirmed that, the applicant was released on instructions to avail himself at the police station on the 20th February 2024 but did not show up; and that, in the intervening period other complaints were filed against the applicant. He therefore averred that the arrest of the applicant on 29th February 2024 was warranted.

10. The application was urged by way of written submissions. Accordingly, the applicant relied on his written submissions dated 22nd April 2024. He reiterated his stance that the institution of the criminal proceedings against him were done in bad faith and is a ploy by powerful land grabbers to grab the suit property at Jumba Ruins in Kilifi County. Counsel for the applicant made reference to several precedents as to the object of judicial review, such as Municipal Council of Mombasa v Republic, Umoja Consultants Ltd 2002 eKLR, Republic v Attorney General & 4 Others, ex parte Diamond Hashim Lalji 2014 eKLR and Republic v Attorney General, Ex Parte Kipngeno Arap Ngeny, Civil Appeal No. 406 of 2001, among others, to buttress her submissions.

11. The respondents similarly filed their respective submissions. Counsel for the 1st, 3rd and 4th respondents relied on the same authorities as aforementioned as well as the case of Republic v Commissioner of Police & Another, Ex Parte Michael Monari & Another 2012 eKLR to underscore the role of the Police to investigate crime. On behalf of the 2nd respondent reference was made to the case of Pastoli v Kabale District Local Government Council & Others 2008 2 EA 300, among other authorities. Counsel for the 2nd respondent emphasized the posturing that it is not unusual for civil and criminal proceedings to co-exist. She also relied on Diamond Hasham Lalji (supra) to augment her argument that the exercise of prosecutorial discretion enjoys some measure of judicial deference; and that the court can only intervene in exceptional cases.

12. The judicial review jurisdiction of the Court was discussed in the Ugandan case of Pastoli v Kabale District Local Government Council & Others, 2008 2 EA 300, in which it was held:

> In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union v Minister for the Civil Service 1985 AC 2; and also Francis BahikirweMuntu and others v Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR).Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality....Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no

reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: Re An Application by Bukoba Gymkhana Club 1963 EA 478 at page 479 paragraph "E".Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department 1990 AC 876)."

13. The applicant has, in essence, challenged the decision to charge and prosecute him in the two criminal cases aforementioned. Hence the basic issue for consideration is whether the decision can be faulted on the grounds of illegality, irrationality or procedural impropriety.

14. It is indubitable that the National Police Service is charged with inter alia the duty to carry out investigations into suspected criminal activities and to apprehend those culpable. Hence, in Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others 2016 eKLR, it was held:

> 42....the police are clearly mandated to investigate the commission of criminal offences and in so doing they have powers inter alia to take statements and conduct forensic investigations. In order for the applicant to succeed he must show that not only are the investigations which were being done by the police being carried out with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the predominant purpose is to further some other ulterior purpose and 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."

15. Similarly, in Republic v Commissioner of Police & Another, Ex Parte Michael Monari & Another (supra), it was held:

> 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. The predominant reason for the institution of the criminal case cannot therefore be said not to have been the vindication of the criminal justice. 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."

16. In the same vein, the 2nd respondent has the constitutional mandate to make independent decisions on whether or not a prosecution ought to be mounted. Article 157 of the Constitution is explicit that the DPP is not bound by any directions, control or recommendations made by any institution or body, being an independent public office. Consequently, the Court can only intervene in the exercise of the 2nd respondent's prosecutorial decision where it is shown that the decision was made in disregard of the public interest or for some ulterior motive.

17. Hence, in *Jirongo v Soy Developers Ltd & 9 others (Petition 38 of 2019*) 2021 KESC 32 (KLR) (16 July 2021) (Judgment), the Supreme Court held:

> 81.Under article 157(6) of *the Constitution*, the DPP is mandated to institute and undertake criminal proceedings against any person before any court. Article 157(6) provides as follows:

6. The Director of Public Prosecutions shall exercise State powers of prosecution and may-

    a. 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."

    Article 157(4) provides that:

    4. The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction."

    However, Article 157(11) stipulates that:

    11. 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."

    82. Although the DPP is thus not bound by any directions, control or recommendations made by any institution or body, being an independent public office, where it is shown that the expectations of article 157(11) have not been met, then the High Court under article 165(3)(d)(ii) can properly interrogate any question arising therefrom and make appropriate orders.

18. Likewise, in the case of Anthony Murimi Waigwe v Attorney General & 4 others 2020 eKLR, the court held: -

    48. It is no doubt clear that under Article 157 (1) of *the Constitution* the ODPP is enjoined in exercising the powers conferred by the aforesaid Article to have regard to public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process. Interest of the administration of justice dictates that only those whom the DPP believes have a prosecutable case against them be arraigned in Court and those who DPP believes have no prosecutable case against them be let free. This is why Article 159(2) of *the Constitution* is crying loudly everyday, every hour that "justice shall be done to all, irrespective of status". Justice demands that it should not be one way and for some of us but for all of us irrespective of who one is or one has.

    49. The Petitioner in support of interest of administration of justice Dictates referred to the National Prosecution policy, revised in 2015 at page 5 where it provides that: "Public Prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction. In other words, Public Prosecutors should ask themselves; would an impartial tribunal convict on the basis of the evidence available?

50. In the case of Republic v. Director of Public Prosecution & Another ex parte Kamani, Nairobi Judicial Review Application No. 78 of 2015 while quoting the case of R vs. *Attorney general ex Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001*; the Court held;

> "A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable."

19. Hence, in the Jirongo Case (supra) the Supreme Court relied on a decision rendered by the Supreme Court of India, namely RP Kapur v State of Punjab AIR 1960 SC 866 in which the factors to be considered by the court in similar circumstances were discussed. Hence, it was held that the Court can intervene:

a. 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; or

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

c. 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; or

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

20. In this instance, the respondents contend that complaints were filed which were investigated and the respective files forwarded to the 2nd respondent for appraisal. The 2nd respondent thereupon made an independent decision to prosecute. The decisions to arrest and prosecute were therefore within the respective mandates of the 1st, 2nd and 3rd respondents. As to whether there is sufficient evidence to back up the decisions is an entirely different matter. Indeed, authorities abound to show that the best forum for testing the sufficiency or otherwise of evidence is the trial court itself. For instance, in Erick Kibiwott & 2 Others v Director of Public Prosecution & 2 Others 2014 eKLR it was held that:

> ...In determining the issues raised herein the Court will therefore avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial court. In dealing with the merits of the application, it is trite that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of *the Constitution*. There mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings..."

21. Additionally, and more importantly, Article 50(1) of the Constitution provides that:

> '(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

22. Needless to mention that the essence of Article 50(1) of *the Constitution* is the concept of a fair hearing; and that it envisages the context of the fair hearing to be a public hearing before "...a court or, if appropriate, another independent and impartial tribunal or body..." in which the accused person is afforded all the safeguards set out in Article 50(2) of the Constitution. It is for the foregoing reasons that it is always preferable that disputes about facts, such as those raised herein by the applicant, be ventilated before the 4th respondent, which is itself a creature of *the Constitution* pursuant to Article 162 and 169 of the Constitution.

23. It is immaterial therefore that there is a pending civil case involving the parties. This is because Section 193A of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya, is explicit that:

> Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings."

24. In the premises, I would follow Michael Sistu Kamau & 12 Others v Ethics and Anti-Corruption Commission & 4 Others 2016 eKLR, wherein a three-judge bench held that:

> The trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words, unless the Petitioners demonstrate that the circumstances of the impugned process render it impossible for them to have a fair trial, the High Court ought not to interfere with the trial ... "

25. Indeed, the Supreme Court pointed out in Saisi & 7 Others v the DPP that:

> 88. It is our considered opinion that these are not issues concerning the propriety or otherwise of the decision by the DPP to charge them. These appear to be serious contentions of fact, evidence and interpretation of the law better suited to be examined by a trial court. Certainly, not for the High Court while exercising its judicial review jurisdiction. In Hussein Khalid and 16 others v *Attorney General & 2 others, SC Petition No 21 of 2017*; 2019 eKLR this court held that it was not for the High Court as a constitutional court to go through the merits and demerits of the case as that is the duty of the trial court. Similarly, and as we have held hereinabove, it not for the judicial review court to undertake the merits and demerits of a matter based on controverted evidence and contested interpretations of the law.
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> 89. We are emphatic that the High Court, whether sitting as a constitutional court or a judicial review, may only interfere where it is shown that under article 157(11) of *the Constitution*, criminal proceedings have been instituted for reasons other than enforcement of criminal law

or otherwise abuse of the court process. We reproduce the words of this court in Hussein Khalid and 16 others v Attorney General & 2 others supra as follows;

> "105 It is not in dispute that every statutory definition of an offence comprises ingredients or elements of the offence proof of which against the accused leads to conviction for the offence. Inevitably, proof or otherwise of elements of an offence is a question of fact and that largely depends on the evidence first adduced by the prosecution and where the accused is placed on his defence, the accused evidence in rebuttal. This in our view is an issue best left to the trial court as it will not only have the benefit of the evidence adduced but will weigh it against the elements of the offence in issue. It is not automatic that once a person is charged with an offence (s) he must be convicted. Every trial is specific to the parties involved and a blanket condemnation of the statutory provisions is in our view overreaching. The presumption of innocence remains paramount." Emphasis added

26. For the foregoing reasons, it is my considered view that the Notice of Motion dated 19th March 2024 lacks merit. The same is hereby dismissed with an order for each party to bear their own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 27TH DAY OF JUNE 2024

OLGA SEWE

JUDGE