Tokoyi & 8 others v Director of Public Prosecution & another (Judicial Review E159 of 2022) [2023] KEHC 18965 (KLR) (Judicial Review) (22 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18965 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW E159 OF 2022

JM CHIGITI, J

JUNE 22, 2023

IN THE MATTER OF: AN APPLICATION BY THE APPLICANTS FOR THE JUDICIAL REVIEW ORDER OF CERTIORARI

AND

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

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF: ARTICLE 157 OF THE CONSTITUTION OF KENYA ON THE POWERS AND/OR MANDATES OF THE DIRECTORATE OF PUBLIC PROSECUTION

BETWEEN

CORNELIO MABWERA TOKOYI ..... 1ST APPLICANT

JOHN MWANGI NJOROGE ..... 2ND APPLICANT

ZAKAYO KIPTEROI KURERE ..... 3RD APPLICANT

HOSEA WANJALA CHIKARA ..... 4TH APPLICANT

MOHAMED ADAN QALLA ..... 5TH APPLICANT

ZAKAYO KIPTEROI KURERE ..... 6TH APPLICANT

KIPKORIR WESLY SIGISIN ..... 7TH APPLICANT

ADAN KASSIM NUNOW ..... 8TH APPLICANT

WAMBUA KILONZO ..... 9TH APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTION ..... 1ST RESPONDENT

INDEPENDENT POLICE OVERSIGHT AUTHORITY ..... 2ND RESPONDENT

RULING

Brief Background:

1. What is before this court is a chamber summons dated November 7, 2022, wherein the *ex-parte* applicants sought for orders:

    1. That the application be certified as urgent and apt for hearing on priority and leave be granted to the applicants to apply for the following judicial review orders:

        a. A declaration and finding that the applicants did not have any involvement and/or premeditation of the incident that happened at Mosimba on the June 2, 2022.

        b. Certiorari to bring into the High Court for the purpose of quashing the decision to charge the applicants with the offence of murder/grievous harm.

        c. Prohibition to bring into the High Court for the purpose of prohibiting the respondents from interfering directly and or indirectly with the discharge of mandate of the applicants and/or further charges in relation to the 'Masimba incident'.

    2. That the leave so granted do act as a stay of the decision to charge the applicants with offence of murder/grievous harm.

    3. That costs of this application be provided for.

    4. Any other order that this honourable court will be pleased to issue in the circumstances.

2. The application is supported by a verifying affidavit of Cornelio Nabwera Tokoyi, and a statutory statement, both dated November 7, 2022 verifying the following grounds:

    1. The applicants are actively serving Kenya as part of the Police Service Unit under GSU; whose primary mandate is to control rioters, mobs and civil disturbance.

    2. That on November 4, 2022, the Independent Policing Oversight Authority (IPOA) issued a signal to SP (Superintendent) Mr Omusungu, SOA (Staff Officer Administration) GSU headquarters to bring the applicants to their office. That upon arrival, they were informed to proceed to Kibra Police Station where their fingerprints were taken, booked under OB number 20/04/11 2022 at around 1239hrs and later locked in the police cells.

    3. Later that day at around 6.00pm, the applicants were issued a form under section 52(1) of the *National Police Service Act*; which form was the conditional precedent to their release. requiring the applicants to attend IPOA Headquarters on November 9, 2022 for investigations of the offences of murder/grievous harm.

4. The arrest and possible preference of charges levelled against the applicants are with regards to an incident that happened on June 1, 2022 at Masimba Centre while they were discharging their mandate as prescribed in the law.

5. The applicants are apprehensive that upon arrival at the IPOA headquarters, the applicants will be charged without due process being followed.

The Applicants Case:

3. The applicants are strongly persuaded that they have an arguable case necessitating the grant of leave for reasons that the respondents intend to charge the applicants with the offenses of murder under the *Penal Code*, sections 203 & 204 which provide as follows:

> " S.203 Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
>
> S.204 Any person who convicted of murder shall be sentenced to death."

4. They rely on the case of *Republic v County Government of Embu Ex parte Peterson Kamau Muto t/a Embu Medical and Dental Clinic & 6 others* [2022] eKLR which observed that:

> " It is therefore clear from the above that in an application for leave such as the present one, this court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before court and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave."

5. It is also their case that the respondents intend to charge them with the offences of causing grievous harm under section 234 of the *Penal Code* which states that:

> " Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life."

6. The applicants rely on the case of *Palmer v R* [1971] AC 814 where it was held that:

> " It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances ... Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary".

7. The supporting affidavit sets out that at the material time relevant to the incident that is in issue, the applicants acted in self-defence and took all the necessary measures to contain the situation but they were overpowered by the angry crowd necessitating the use of live bullets. They rely on the case of Deane v R where it was observed that depending on the circumstances at hand, a police officer cannot wait until he is struck before striking in self-defence.

8. The applicants are convinced that they will be prejudiced in terms of their right to liberty being curtailed if the application is not allowed and they risk losing their job.

9. The applicants are yet to be charged and this is a clear indication that the said decision to charge is yet to be implemented. Thus, there is need to prevent the implementation of the said decision until the legality of the respondents' decision is established, in light of the prejudice pleaded by the applicants.

1St Respondent's Case

10. The 1st respondent relies on section 24 of the *National Police Service Act* which mandates the police to investigate any complaint brought to their attention in order to determine whether a criminal offence has been committed and the outcomes can either exonerate or incriminate the applicants.

11. The 1st respondent argues that it is in the public interest that complaints made to the police are investigated and the perpetrators of crimes are charged and prosecuted. He argues that the applicants have not disclosed which of their rights have been infringed or threatened by the 1st respondent for this court to exercise its jurisdiction to come to their protection.

12. It is the 1st respondent 's case that the applicants have not proven to this court the action of the 1st respondent which they are praying for prohibition orders. They believe that the applicants have not shown to this honourable court on which matter the 1st respondent has made a decision to charge. They argue that the applicants case is based on mere suspicion and conjecture which is an abuse of the court process.

The 2Nd Respondent's Case:

13. According to the 2nd respondent, the applicants are challenging the decision to charge them for the offences of murder against four persons and grievous harm against six pursuant to section 203 as read with section 204 and 234 of the *Penal Code* with the sole intention of preventing the 1st and 2nd respondents from setting criminal proceedings in motion where he would first be required to take plea.

14. The 2nd respondent submits that due legal process was followed by the 2nd respondent which is a state agency established under and in accordance with section 3 of the *Independent Policing Oversight Authority Act*, No 35 of 2011, (cap 88) (hereinafter referred to as the IPOA Act) with the primary objective of providing civilian oversight over the work of the Police.

15. Section 5 of the IPOA Act outlines the objectives of the 1st respondent which include among others;

    i. Hold the police accountable to the public in the performance of their functions;

    ii. Give effect to the provisions of article 244 of the *Constitution* that the police shall strive for professionalism and discipline and shall promote and practice transparency and accountability; and

    iii. Ensure independent oversight of the handling of complaints by the National Police Service.

16. The 2nd respondent submits that it is mandated by section 7 of the Act thereof which gives it powers to investigate member(s) of the National Police Service on its own motion or on receipt of a complaint from the member(s) of the public.

17. As such, on the June 3, 2022 the 2nd respondent learnt from the media about the alleged fatal shooting of members of the public within Masimba area by members of the National Police Service. As mandated by law the 2nd respondent conducted its independent investigations into the matter by interviewing and recording sworn statements of all witnesses involved in the alleged shooting as well as independently collected and analyzed other: relevant corroborating documentary evidence (including but not limited to police documents and medical evidence) in establishing the case herein. Moreover,

the 2nd respondent also independently and objectively interviewed and recorded sworn statements of the applicants as persons of interest and thereby accorded them the opportunity to give their version on the events under inquiry.

18. Having conducted its full investigations as mandated by law, the 2nd respondent prepared its final investigations report capturing the (witnesses' statements accounts, documentary supporting documents, the findings and recommendations thereof and the same forwarded together with the investigation file to the Office of the Director of Public Prosecutions, the 1st respondent herein for the requisite independent perusal 'and direction. This was done pursuant to section 6 of the Act which is in line with section 29(1)(a) of the Act that stipulates-

> " The authority may after completing an investigation into a complaint under this Act where the inquiry in the authority's opinion, discloses a criminal act by a member of the service, recommend the prosecution of that member to the Director of Public Prosecutions. "

19. That as mandated by law, having perused the 2nd respondent's report investigation file the 1st respondent concurred and found the applicants culpable for the offences of murder and grievous harm and found that they should be charged accordingly. On whether the conduct of the investigations is a violation of an individual's constitutional rights, we refer to the case of *Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others* [2019] eKLR where the court dealt with a related question as to whether conduct of investigation (as in this case) can constitute violation of rights. It was therefore held interalia-

> "...In our view, it would be within the mandate of an investigative body to receive complaints and to investigate them. Such bodies or entities cannot be faulted for acting on the complaints as in so doing, they would be acting within their constitutional and statutory duty." Further, we rely on the case of *Josephat Koli Nanok & another v Ethics and Anti-Corruption Commission* (2018) eKLR, where court stated that "by undertaking investigations an investigating entity does not violate any constitutional rights, and that violation of rights may only occur in the manner in which the investigative mandate is executed. In that event, the petitioner would be under an obligation to demonstrate that his or her rights have been violated by the manner of investigation and attendant processes."

20. The 2nd respondent submit that the applicants have not demonstrated in any way the manner in which the respondents have infringed their rights or acted contrary to the law by way of illegality, irrationality or procedural impropriety. The respondents acted within the precincts of the law by conducting investigations and charging the applicants for the 2nd and 1st respondents respectively. in this regard we also rely of the case of *Republic v Director Public Prosecutions & another Exparte Justus Ongera* [2019] eKLR where court in reiterating the decision in *Republic vs National Transport and Safety Authority & 10 others Ex-parte James Maina Mugo* 2010 found that issuance of judicial review orders can in summary be classified from the viewpoint of focusing on an illegality, irrationality and lastly procedural impropriety in decision making.

21. The applicants claim intimation therefore that the arrival at the decision to charge them is flawed legally or otherwise is baseless and as such a clear ploy to obstruct and forestall justice that is being sought by the victim's family as well as justice sought for the sake of public interest.

22. Further, it is their submission that by seeking a declaration that they had no involvement or premeditation with regard to the Masimba incident, the applicants seek to invoke this honorable court to take the role of a trial court which is tantamount to usurping the powers of the trial court and as such an abuse of court process since they raise matters of evidence which are within the competence and

should be canvassed before a trial court vide the intended criminal charge that they are hereby seeking to curtail through this application. They make reference to the case of Fredrick Masaghwe Mukasa v Director of Public Prosecutions & 3 others [2016] eKLR where the 1st respondent was sued and thereby made similar submissions as herein and the same was upheld. They therefore rely on the said case that went on appeal and the Court of Appeal cited the case of *Joshua Okungu & another v The Chief Magistrate's Court, Anti-Corruption Court at Nairobi & another* [2014] eKLR where it was held-

> " ...that a petitioner has a good defence in the criminal process is a ground that ought not to be relied upon by a court in order to halt criminal process undertaken bona fides, since that defence is always open to the petitioner in those proceedings..."

23. Further to the foregoing, the 1st respondent's is equally an independent body established and mandated under article 157 of the *Constitution* and the *Office of the Director of Public Prosecutions Act* No 2 of 2013. As a general principle, once the 1st respondent has in exercise of its constitutional prerogative, directed that an individual(s)s be charged (the applicants for this matter), that same ought not to be interrupted unless the 1st respondent (the ODPP for this matter) is abusing his powers. Hence, the applicant must establish the mental element that would justify the quashing and/or barring the 2nd respondent's decision to recommend prosecution and the 1st respondent actually concurring thereof and subsequently deciding to charge.

24. Once again, the Court of Appeal in *Fredrick Masaghwe Mukasa v Director of Public Prosecutions & 3 others* [2016] eKLR made reference to the provisions of -

> "
>
> " Article 157
>
> (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may-
>
> 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;
>
> (10) 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.
>
> The salient provisions of article 157 of the *Constitution* underscore the powers of the DPP and the manner in which such powers mays be exercised. The said provision further underscores the independence of the office of the DPP by providing that in the exercise of its powers or functions shall not be under the direction or control of any person or authority. ...We observe that the recommendations of the 4th respondent calling for the prosecution of the appellant were not necessarily binding on the 1st respondent. In exercise of its constitutional and statutory duty, the 1st respondent was duty bound to consider the same and exercise its discretion whether or not to institute criminal charges against the appellant based on the evidence presented. That in our view is what the 1st respondent did. it is within the 1st respondent's mandate to consider the recommendation and make an independent decision whether to charge the appellant or not."

25. We further make reference to the case of Ezekiel A. Omollo v DPP & 2 others E002 of 2020 where the 1st respondent was sued and made similar submissions as herein. The court made reference to the case of *George Joshua Okungu & another v The Chief Magistrates Court, Nairobi & another* [2014] eKLR which we also hereby cite; where it was held:

> " ...the law is that the court ought not to usurp the constitutional mandate of the Director of Public Prosecutions or the authority charged with the prosecution of criminal offences to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The 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..."

26. On the third issue with regard to the issue of grant of leave, it is our view that leave should not be granted as the applicants have not demonstrated how the decision to charge is illegal, irrational or unfair to them. They have not demonstrated how the decision to charge raises a serious issue that is arguable before court and have only based their application on presumptuous speculations. The applicants were fully aware as to the reason for their visit at the IPOA offices and the reason for their presence at the Kibra Police Station as is evidenced by annexure GA2 of our Replying affidavit and the contents therein. In this regard, we rely on the case of Republic v Nairobi City County Assembly Service Board Ex parte Applicant Pauline Sarah Akuku [20221 eKLR where Dr Gakeri was in agreement with the sentiments of Mativo J. in *Republic v Kenya Revenue Authority Commissioner Ex Parte Keycorp Reals Advisory Limited* [2019] eKLR that for leave to be granted the application must raise arguable issues.

27. On the issue of leave operating as stay, it is our view that in the unlikely event that leave is granted, the same should not operate as stay as the action seeking to be stayed, that is, the decision to charge has already been spent. This is evidenced by the annexure "GA1" which clearly shows that the 1st respondent had already made the decision to charge by directing that the officers named therein be charged with murder and grievous harm. Further the same is buttressed by annexure "GA2" where the 1st respondent directs the Inspector General's office to liaise with the 2nd respondent and the GSU commandant to apprehend and arrest the GSU officers attached to Mike Company (the applicants herein). Based on the foregoing, it is our view that the decision to charge the applicants was already dealt with and the only thing that is remaining is for the applicants to be presented before court to answer to their charges/take plea. It is trite law that once a decision is complete/implemented, an order seeking to stay the same cannot issue as it would be inefficacious. We refer to the case of Republic v Nairobi City County Assembly Service Board Ex parte Applicant Pauline Sarah Akuku [2022] eKLR where Dr Gakeri in agreeing with the findings of Nyamweya J. in Sauti Communications Limited v Communications authority of Kenya [20201 eKLR: reiterated "the circumstances under which a court may grant a direction that the grant of leave do operate as a stay of proceedings or of a decision, and the factors to be taken into account by the courts in this regard were laid down in the said decisions and in various decisions by Kenyan courts." According to the Judge in important consideration is whether the decision sought to be stayed has been fully implemented. This aspect was considered in Jared Benson Kangwana v Attorney General HCCC No 446 of 1995, Taib Ali Taib v Minister for Local Government & others HC Misc No 158 of 2006, Republic v Cabinet Secretary for Transport and Infrastructure & 4 others, Exparte Kenya Country Bus Owners Association & 8 others [2014] eKLR and *James Opiyo Wandayi v Kenya National Assembly and 2 others* (supra) where judges held that where the decision sought to be stayed is complete. the court cannot stay the same unless it is a continuing process in which the case the court considers the completeness or continuing nature of the implementation.

28. The court herein was also guided by the sentiments of Odunga J. in *Beatrice Kwamboka v Leader of Majority Party of the Nairobi County Assembly* [2016] eKLR where the learned judge held:

> "Apart from the foregoing the court must also look at the likely effect of granting the stay to the proceedings in question. In other words, the court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable outcome. What the court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of alms which are aimed at placing the parties before the court on equal footing and see where the scales so justice lie considering the fact that it is the business of the court, so far as possible to secure that any transitional motions before the court do not render nugatory the ultimate end of justice. The court in exercising discretion, should therefore always opt for the lower rather than the higher risk of injustice. "

29. From the foregoing, it is our view that the court ought not to grant a stay with regard to the decision to charge as doing so would subvert the above set out principle of placing all parties before court on equal footing with regards to the scales of justice.

30. The upshot of this submissions is that the application is speculative and has no merit and the decision to charge has already been made and ought not and cannot be stopped. The applicants have not demonstrated how their rights have been violated in order to warrant the grant of the prerogative orders. Further, it is our view that it is in the applicants' interest that they be arraigned before the trial court and the said criminal case be tried, tested whereupon the applicants will have an opportunity to challenge the evidence so obtained at the trial court by way of cross examination and the matter duly concluded in order to bring closure and to avoid delay of justice. This application should be dismissed with the directive to have the applicant take plea and trial process to commence thereof.

Analysis And Determination:

31. Upon hearing the appellant's application and having carefully considered the matters deponed in the supporting affidavit together with the documents annexed thereto, the responses by the respondents, the annexures thereto, the grounds of opposition and the written and oral submissions of the parties.

32. The law under order 53 rule 1(4) of the *Civil Procedure Rules* provides as follows in respect to the issue of leave operating as stay:

> "The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise."

33. In the case of *Taib A. Taib v The Minister for Local Government & others* Mombasa HCMISCA No 158 of 2006 the court observed as follows: -

> "As injunctions are not available against the government and public officers, stay is a very important aspect of the judicial review jurisdiction...In judicial review applications the court should always ensure that the ex parte applicant's application is not rendered nugatory by the acts of the respondent during the pendency of the application and therefore where the order is efficacious the court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited the purpose of a stay order in judicial review proceedings is to prevent the decision maker

from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act...."

34. The principles were also echoed by Odunga J in *James Opiyo Wandayi v Kenya National Assembly & 2 others* [2016] eKLR where he held as follows;

> "42. The principles that guide the grant of an order that the leave do operate as stay of the proceedings in question have been crystalized over a period of time in this jurisdiction. Where, the decision sought to be quashed has been implemented, leave ought not to operate as a stay since where a decision has been implemented stay is no longer efficacious as there may be nothing remaining to be stayed. It is only in cases where either the decision has not been implemented or where the same is in the course of implementation and its implementation has not come to an end that stay may be granted."

35. The reason for the leave was explained by Waki J. (as he then was), in *Republic v County Council of Kwale & Another Ex Parte Kondo & 57 others*, Mombasa HCMCA No 384 of 1996 as follows:

> "The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration."

36. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter-partes hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially.

37. It is also trite that in an application for leave, the court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before court and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. In the present application, the applicant has filed a chamber summons application seeking judicial review orders instead of one seeking leave to institute judicial review orders.

38. In *Uwe Meixner & another v Attorney General* [2005] eKLR, it was held that the leave of court is a prerequisite to making a substantive application for judicial review with a view to filtering out frivolous applications and the grant or refusal involves an exercise of judicial discretion and the test to be applied is whether the applicant has an arguable case. Thus, the first step in the judicial review procedure involves the mandatory "leave stage."

Disposition:

39. Upon a cursory perusal of the evidence before court I am persuaded that the application has merit. The applicants have made out an arguable case. From the material available to this court I am of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter-partes hearing of the substantive application for judicial review.

    Orders:

    1. Leave in terms of prayer 1 B and C of the application dated November 7, 2022.
    2. Prayer 1 A is dismissed.
    3. The leave shall operate as a stay pending the hearing and determination of this suit.
    4. The applicants shall file and serve the substantive application within 14 day of today's date.
    5. The respondents shall file and serve their responses to the application within 14 days of service.
    6. The applicants shall thereafter file and serve their submissions within 7 days.
    7. The respondents shall thereafter file and serve their submissions within 7 days of service.
    8. The matter shall be mentioned on September 18, 2023 for further directions.
    9. Costs shall follow the event.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JUNE, 2023.

J. CHIGITI (SC)

JUDGE