REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. CRIMINAL APPLICATION NO. 19 OF 2017

JOSEPH NJERU MUKUTHU.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

R U L I N G

1. This is a ruling on a notice of motion dated 4/10/2017 seeking for orders for review or quashing of the decision of the respondent to charge the applicant twice in Embu Criminal Case No. 570 of 2016 and Embu Criminal case No. 319 of 2017 for the same offence.

2. The application is supported by the affidavit of the applicant Joseph Njeru Mukuthu who states that he has been charged twice with the same offence for an incident that happened in 1994. The applicant states that the alleged incident cannot be properly articulated in any criminal court and is a violation of his constitutional rights.

3. As for Criminal Case No. 570 of 2016, the applicant states that he was charged with the offence of obtaining money by false pretences contrary to Section 313 of the Penal Code by falsely pretending that he was in a position to sell a portion of land measuring 0.25 acres, a fact that he knew to be false. The offence was allegedly committed on 16/11/1994. In a ruling delivered on 14/09/2016 by Hon. M.N. Gicheru the charges were rejected under Section 89(5) of the Criminal Procedure Code.

4. On 19/04/2017 the applicant was charged with the same offence in Criminal Case No. 319 of 2017 which is pending before Hon. V.O. Nyakundi.

5. The application was opposed relying on the affidavit of Ms. Brenda Nandwa a prosecution counsel with the respondent. She deposes that the applicant was not acquitted in Criminal Case No. 570 of 2016 and that the court only rejected the charges which act does not amount to an acquittal. Section 89(5) only applies to a formal charge that does not disclose an offence which the court can reject and it is not a bar to further prosecution. The respondent relied on the case of ***JOSEPH MWANGI MUIRU VS REPUBLIC [2011] eKLR.***

6. The principles of double jeopardy as stated in the case of ***STANLEY MUNGA GITHUNGURI VS REPUBLIC Nairobi Criminal Application No. 271 of 1985*** relied on by the applicant do not apply.

7. The issues arising from this application are two fold:-

(a) Whether discharge under Section 89(5) of the Criminal Procedure Code is a bar to subsequent prosecution.

(b) Whether the charge against the applicant in Criminal Case No. 319 of 2017 is a violation of his fundamental rights.

8. In his further affidavit, the applicant states that he was discharged in Criminal Case No. 570 of 2016 and his cash bail refunded. He states that charging him again in Criminal Case No. 319 of 2017 is a true circus and violation of his constitutional rights to freedom and to a fair trial.

9. Section 89(5) of the Criminal Procedure Code provides:-

Where the magistrate is of the opinion that a complaint or formal charge made or presented under this section does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for the order.

10. The section is very clear that the court has power to reject a defective or a wrongly framed charge. The prosecution is at liberty to amend the charge to which the accused person may be called upon to plead. Hon. M.N. Gicheru rejected the charges and made the following remarks:-

…..that the accused should not be arrested or charged unless and until the prosecution is ready to supply him with all the witness statements and all the other material that they will rely on at the trial.

11. The directions given by the honourable magistrate do not in any way imply that the applicant may not be charged afresh should the prosecution decide to bring an amended charge. It only gave conditions to be fulfilled by the prosecution in subsequent proceedings. The purpose of the directions was purposed to cure the problem of failure to supply witness statements by the prosecution despite demand by the applicant.

12. In the case of ***JOSEPH MWANGI MUIRU*** *(supra)* the Court of Appeal held:-

It is plain from Section 138 of CPC that a plea of ***autresfois acquit*** *can only arise where a person has been tried by a court of competent jurisdiction and acquitted.*

13. Section 138 of the Criminal Procedure Code provide that persons convicted or acquitted should not be tried again for the same offence. The applicant was not tried and acquitted in Criminal Case No. 570 of 2016. He was only discharged upon rejection of the charge under Section 89(5) which provision is not a bar to subsequent proceedings.

14. The applicant contended that being charged in Criminal Case No. 319 of 2017 with an offence that was allegedly committed in 1994 exposes him to double jeopardy and violates his fundamental rights.

15. It is not in dispute that the offence was allegedly committed in 1994 which is about 23 years ago. The respondent has not explained the delay in charging the applicant. The charges in the first case were rejected on 14/09/2016 for not disclosing any offence. If the respondent was serious in charging the applicant, the charges would have been amended and filed the following day. The court gave an order for refund of cash bail to the depositor upon rejecting the charges.

16. It was not until the 19/04/2017 that proceedings in the second case were instituted. This was about 7 months after the charge was rejected in the first case. Similarly there was no explanation in this

explanation for this delay from the respondent. The failure to explain the delay demonstrates bad faith and harassment on part of the respondent and if not checked, this kind of conduct would cause untold suffering to innocent Kenyans.

17. The applicant contended that his fundamental rights and freedoms were being violated. Article 50(2) of the Constitution provides that every accused person has the right to a fair trial which includes the right for expeditious disposal of his/her case. He is also entitled to be informed of the charge with sufficient detail to answer it and to have adequate time and facilities to prepare for a defence. The applicant is also entitled to have his trial begin and conclude without undue delay.

18. In the spirit of Article 50, the applicant ought to have been charged within a reasonable time after the alleged offence was committed. The respondent argued that there is no time limit within which the DPP should charge a person. It is correct there is no limit imposed by the statutory statute but this does not mean that the DPP has tn unlimited licnce to interfere with individual freedoms or to act contrary to public policy. The DPP must exercise his functions in such a manner that is in accordance with the law. The office is bound by Article 50 to ensure that the rights of every person or accused person are protected. The act of charging the applicant for a simple offence of obtaining by false pretences after a period of 23 years and failing to explain the delay even when the said action is challenged is an abuse of the due process of the court.

19. In the first case the prosecution were directed by the court to provide witness statements to the applicant but failed to do without an good reason. The prosecution has an obligation to supply statements to the accused person. This led to the magistrate in giving directions that the applicant should not be arrested or charged unless and until the prosecution is ready to supply him with all the witness statements and all other materials that they intend to rely on at the trial. The failure to supply statements is an indication that no investigation had been conducted in that case before the applicant was arraigned in court It is doubtful that investigations were conducted before the applicant was charged in the second case.

20. This court is aware of the provisions of Article 157(10) of the Constitution which provides that the DPP does not require the consent or authority of any person for the commencement of criminal proceedings and is not under the direction or control of any person. However, this provision is only valid in the event that the fundamental rights of citizens are not violated by either prolonged and unreasonable delay in instituting criminal proceedings.

21. I am of the considered opinion that the facts of this application call for the invoking of the inherent powers of the court to prevent harassment of the applicant and to halt the charges against the applicant which are an abuse of the due process of the court, are oppressive and vexatious. This application must succeed in any event.

22. The charges against the applicant in Criminal Case No. 319 of 2017 indicate that the complainant has a remedy under civil law subject to the Limitation of Actions Act. All is therefore not lost for the complainant.

23. The application is therefore allowed in the following terms:-

(i) That the charges in Criminal Case No. 319 of 2017 are hereby quashed.

(ii) That the surety if any is hereby discharged/ or cash bail be refunded.

(iii) That there shall be no orders as to cost.

24. It is hereby so ordered.

DATED, DELIVERED AND SIGNED AT EMBU THIS 20TH DAY OF DECEMBER, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Muriuki for Kahuthu for applicant

Applicant present

Ms. Manyal for respondent