

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
MISCELLANEOUS CAUSE NO. 212 OF 2018

ACP BAKALEEKE SIRAJI:.....APPLICANT

VERSUS

ATTORNEY GENERAL:.....RESPONDENT

BEFORE HON. JUSTICE MUSA SSEKAANA

RULING

The applicant brought this application against the respondent by way of notice of motion under Article 120 of the Constitution and Section 36 of the Judicature Act Cap 13 seeking orders for;

1. A declaration that criminal proceedings against the applicant vide CRB 47 of 2018 is an abuse of discretion of the DPP contrary to public interest, administration of justice and abuse of legal process in itself.
2. A declaration that the DPP acted irrationally in consenting to the charges against the applicant vide CRB 47 of 2018.
3. An order of certiorari that proceedings in CRB No.47 of 2018 against the applicant be quashed until complete investigations are done.
4. An Order of Prohibition that the DPP be prohibited from prosecuting the applicant IN CRB 47 OF 2018 on the face value of the file.
5. An order for award of general damages

The application was supported by the affidavit of the applicant which in principle states that;

1. The applicant is a serving police officer at the Rank of Assistant Commissioner of Police albeit on suspension.
2. The applicant was suspended from duty on the 17th day of April, 2018 on allegations of unlawful arrest and confiscation of property of 3 Korean Nationals.
3. The respondent's employees (DPP) irrationally consented to the charges despite the fact that there was no evidence on face value of the file which has prejudiced the applicant.

4. That having discretion does not mean abuse of office and or acting irrationally.
5. The actions of the respondent are an abuse of discretion and against public interest.

The respondent did not oppose this application or they never filed any affidavit in reply.

The applicant's counsel was directed to file written submissions which were considered by this court.

The Applicant was represented by Mr. Ssenfuka Robert of Nakachwa & Partners Advocates whereas the respondent was not represented and by the time of writing this ruling they had not filed any submissions.

Counsel for the applicant submitted that the applicant according to his affidavit is facing trumped up charges by the Director of Public Prosecutions (DPP). In paragraph 6, the applicant states that the charges were sanctioned upon the request of the CID Commander, Kampala metropolitan.

Counsel further submitted that the DPP at the time of consenting to charges knew / knows that investigations are not complete and that the charges ought not to be consented to at the stage they are at but is working under the direction of another person! Contrary to article 120 (6) of the constitution a thing which depicts incompetence of the office of the Director of Public Prosecutions (DPP), for failure to make independent analysis in the matter but rather follow requests from police a department they ought to be advising.

The applicant's counsel further contended that there is no scintilla of evidence to sustain the said charges against him and that the aforementioned actions of the DPP were unreasonable, arbitrary and contrary to public policy.

Counsel submitted that the application is meritorious since the office of the DPP is a public office and exercised his powers arbitrarily and unreasonably. The office of the DPP is established by Article 120 of the constitution with a mandate to be in charge of all criminal prosecutions save for those in the court martial. Article 120(5) of the 1995 constitution is to the effect that;

“In exercising his or her powers under this Article, the DPP shall have regard to the Public interest, the interest of administration of justice and the need to prevent abuse of legal process”

Article 120(6) of the 1995 constitution is to the effect that;

In exercise of the functions conferred on him/her by this Article, the DPP shall not be subject to the direction or control by any person or authority.

It was counsel's submission that whereas the DPP is independent and has discretion in prosecutions, the DPP is accountable to the people and should perform his functions in regard to public interest, interest of administration of justice and the need to prevent abuse of legal

process. In the event the DPP performs his functions in a manner that is parallel and opposite to these constitutional parameters, then the applicant can invoke an order of judicial review.

Under **Section 36 (1) of the Judicature Act Cap 13**: The High Court may make an order, as the case may be, of—mandamus, requiring any act to be done; prohibition, prohibiting any proceedings or matter; or certiorari, removing any proceedings or matter to the High Court.

In **UNZI GODFREY LICHU versus MOYO DISTRICT LOCAL GOVERNMENT & Anor Misc Cause No. 0097 OF 2016** court held that: Judicial review of administrative action is a procedure by which a person who has been affected by a particular administrative decision, action or failure to act of a public authority, may make an application to the High Court, which may provide a remedy if it decides that the authority has acted unlawfully. While it has been said that the grounds of judicial review “defy precise definition,” most, if not all, are concerned either with the processes by which a decision was made or the scope of the power of the decision-maker.

A public authority will be found to have acted unlawfully if it has made a decision or done something: without the legal power to do so (unlawful on the grounds of illegality); or so unreasonable that no reasonable decision-maker could have come to the same decision or done the same thing (unlawful on the grounds of reasonableness); or without observing the rules of natural justice (unlawful on the grounds of procedural impropriety or fairness).

The applicant in this case is in principle asking the court to interfere with the authority of the DPP’s office on grounds that the DPP irrationally consented to the charges against him despite the fact that there was no evidence on face value of the file which has prejudiced the applicant.

Irrationality was defined by Lord Diplock in **Council of Civil Service (1984) AC 110** as “Wednesbury reasonableness” he cited the decision in **Associated Provincial Pictures Houses Ltd vs Wednesbury Corporation (1984) K.B 223** wherein it was stated that irrationality is born out instances when the decision making authority acts so unreasonably that in the eyes of the court hearing the application, no reasonable authority properly directing itself to the facts and the law would make such decisions.

The DPP under **Article 120 (3)** of our constitution has powers to institute criminal proceedings against any person or authority in any court with competent jurisdiction other than a court martial.

Counsel for the applicant submitted that the DPP should perform his functions reasonably. He cannot sanction the file without proper evidence merely because he was directed by the KMP CID Commander to do so.

Counsel reiterated that in performing his duties, the DPP exercises a public function. In the event he unreasonably exercises those powers, then his decision can be challenged by way of judicial review for purposes of promoting and protecting constitutional safeguards under article 120(5) of the constitution.

Determination

In the instant case, the applicant is being charged of offences relating to abuse of office, conspiracy to defraud and kidnapping with intent to confine a person and it is within the mandate of the DPP to prosecute such criminal charges. To challenge the DPP's decision, the applicant ought to prove to this court that the DPP acted irrationally in decision to prosecute the applicant.

In **Hon. Winfred K Masiko & ors vs DPP & ors Civil Misc. App No 15 of 2009** where the applicants brought an application for judicial review seeking orders of certiorari, declaration and prohibition against the respondents contending that the DPP acted irrationally by preferring charges against them. Court held;

"...court has analyzed the arguments on either side. It is of the view that indeed the DPP acted irrationally by preferring charges against the applicants who were shareholders of the company instead of preferring those charges against the company itself as a legal entity and in accordance with section 53 of the Magistrates Courts Act. The commission recommendations focused on the company and not its shareholders or its employees upon the above account certiorari shall issue to quash the decisions of the first and second respondents to prefer charges against and conduct prosecution against the applicants instead of the RUGADA Ltd..."

This court agrees with the submission of counsel for the applicant that decisions of DPP are subject to Judicial review. In exercise of his powers under the Constitution of discontinuing a prosecution, the DPP is in effect performing an administrative act in nature akin to exercise of a quasi-judicial function, which it must be presumed will be exercised fairly and honestly within the ambit of the wide discretion bestowed on him by the Constitution, but he must keep within the legal limits of the exercise of his powers as laid down by the Constitution. See **Matalulu v Director of Public Prosecutions [2003] 4 LRC 712; Sharma v Browne-Antoine et al [2006] UKPC 75 [2007] 1 WLR 780**

In light of the above authorities, it is clear that this court has jurisdiction to allow an application for judicial review when appropriately brought against the decisions of DPP.

However, it should be noted that the Constitutional court has warned against challenging criminal proceedings in a civil court.

In the case of **Dr. Tiberius Muhebwa vs Uganda Constitutional Petition No. 09 of 2012** and also in **Constitutional Petition No. 10 of 2008 Jim Muhwezi & 3 Others vs Attorney General and Inspector General of Government**, the court cautioned against the stopping of criminal trials on allegations that the trial would not be free and fair. In the latter case, court noted further as follows;

"The trial court is capable of fairly and accurately pronouncing itself on the matter without prejudice to the accused. Where any prejudice occurs the appeal system of this country is capable of providing a remedy. Was it to be otherwise, a situation would arise whereby anyone charged with an offence would rush to the Constitutional court with a request to stop the prosecution pending hearing his challenge against the prosecution. In due course, this court would find itself engaged in petitions to stop criminal prosecutions and nothing else. This could result into a breakdown of the administration of the criminal justice system and affect the smooth operation of the Constitutional Court"

It can be deduced from the above cases and by analogy, challenging criminal trials in a civil court will likely cause confusion in the criminal justice system.

In the case **Hussein Badda vs Iganga District Land Board & 4 others HCMA No. 479 of 2011** citing High Court Miscellaneous Application No. 348 of 2001 **Arthur Rukikeire vs Uganda Telecom Ltd** Justice Mwangusya (as he then was) court further noted;

“I do not know how this court would determine that an arrest is unlawful or that prosecution is false unless the criminal culpability of the applicant is being determined by this court which would not be the case. I also do not know whether even if it was possible for this court to grant the prayer the applicant would be discharged of any criminal liability. The only pleas that I know of that would prevent a person from being prosecuted are pleas of autrefois convict or acquit and not an order arising out of a trial in a civil suit.”

In another case of **Sarah Kulata Basangwa vs Inspectorate of Government in Miscellaneous No. 465 of 2011** the said Judge held;

“In my view it is not proper for a court sitting in a civil matter to bar proceedings in a criminal trial because the circumstances under which a person is brought before a criminal court and the defences available for the accused before that court should be handled by the same court which can ably investigate them and determine them in one way or the other rather asking another Court to bar the proceedings. This application arises out of an application that seeks to bar proceedings in a criminal trial and I decline to grant it.”

I entirely agree with the views espoused in the above authorities. This court being a civil court cannot delve into propriety of criminal proceedings in a criminal court or whether the evidence is sufficient to sustain the charges brought against the applicant.

There is an appeal system in criminal trial system through which the applicant can challenge of proceedings in the criminal court.

In this case, the applicant is being charged with abuse of office, conspiracy to defraud, kidnapping or abducting with intent to confine and conspiracy to commit a felony as contained in the charge sheet. The applicant has failed to prove irrationality, procedural impropriety or illegality on the office of DPP in arriving at his decision to prosecute: short of which this application would fail.

The House of Lords held in **Imperial Tobacco Ltd vs Att. Gen. [1981] A.C 718** that where criminal proceedings have been properly instituted and are not vexatious or an abuse of the court process, it is not a proper exercise of the court’s discretion to grant a declaration to the defendant in those proceedings that the facts alleged by the prosecution do not in law prove the offence charged.

The applicant in this case has failed to show any grounds of review for the decision of DPP to sanction charges that are being preferred on any of the known grounds of Illegality, irrationality and Procedural impropriety.

In the final result for the reasons stated herein above, this application fails and is hereby dismissed with no order as to costs.

It is so ordered.

SSEKAANA MUSA
JUDGE
27th/02/2019