



Tuko Media Limited & another v Republic (Anti-Corruption and Economic Crimes Revision E010 of 2022) [2023] KEHC 1260 (KLR) (Anti-Corruption and Economic Crimes) (23 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1260 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES REVISION E010 OF 2022
EN MAINA, J
FEBRUARY 23, 2023

BETWEEN

TUKO MEDIA LIMITED 1ST APPLICANT

JUNIOR DIDACUS MALOWA 2ND APPLICANT

AND

REPUBLIC RESPONDENT

(Being a revision against the orders made by Hon. E.K Nyutu (SPM) in ACC Case No. 10 of 2018 on 30th September 2021 in Nairobi Chief Magistrates Anti-Corruption Court.)

JUDGMENT

1. The Applicants filed a Notice of Motion Application under a Certificate of Urgency dated September 29, 2022, supported by an affidavit by Junior Didacus Malowa, the 2nd Applicant herein sworn on the same date.
2. The Application is made under Sections 362, 364 and 365 of the [Criminal Procedure Code](#) and Article 159(2) (d) of the [Constitution](#) and seeks the following orders:-
 - “ 1. That this Application be certified as extremely urgent and the same be heard ex parte in the first instance.
 2. That pending the hearing and determination of this Application, this Honourable court be pleased to stay the orders issued on September 26, 2022 and September 28, 2022, especially the consequential orders arising from the



proceedings touching on the Applicant s herein in Milimani Anti-Corruption court in case No. 10/2018.

3. That this Honourable court be pleased to revise, set aside and or vacate the orders issued on September 26, 2022 and September 28, 2022 permanently.
4. That this Honourable court to order that the sum of Kshs. 50,000 paid by the 2nd Applicant as fine be refunded to him.”

3. The Application is based on the following grounds:-

- “ 1 That on September 15, 2022, a DCI officer served summons upon the 1st Applicant’s office summoning the 2nd Applicant to court on September 26, 2022.
2. That on September 26, 2022, the court issued orders fining the 2nd Applicant Kshs.50,000/ = or serve six months in prison.
3. The Magistrate as an anti-corruption court exceeded its mandate and powers by sitting as a civil court to deliberate and decide on reputation of character that is civil and defamation in nature and has the correct avenue for redress.
4. The Honourable Magistrate made adverse orders with far reaching ramifications against the Applicant s who are not parties to the proceedings in the ACC Case No. 10 of 2018 Republic Vs Lilian Mbogo Omolo & 36 Others.
5. The magistrate ceased to be an impartial arbiter and became an active participant in the case.
6. The orders made against the Applicant s were irregular since there were no charges and/or application read or made against the Applicant s for proper response.
7. That the entire proceedings and subsequent sentencing are an affront to the principle of natural justice amounting to shifting the proof to the Applicant.
8. The jurisdiction in criminal cases starts with charge sheet and fair hearing with the accused/contemnor being accorded time and resource for defence.
9. The court embarked on a judicial misadventure that amounted to an abuse of the court process and judicial powers by intimidating the Applicant s.
10. In meting out the sentencing, the court misapplied the construction of sections 10(4) and 10(6) of the Magistrate Court Act, 2015 by sentencing the 2nd Applicant to six months while the act provides for a maximum of five (5) days.
11. The court further failed to appreciate the contents or true construction of sections 6 and 7 of the Defamation Act as read together with section 5 of the Judicature Act on the contempt proceedings.
12. The court’s decision was actuated with malice, harshness and the magistrate applied high handedness to the Applicant s yet it was supposed to be an impartial arbiter of the dispute before it.



13. To further prove malice, the court has issued two harsh orders in a span of three days.
 14. The order issued by the court is not clear as it failed to identify the person to comply with the orders since there is no entity by the name tuko.co.ke.
 15. The Court required the Applicant to comply with the orders of September 28, 2022 within forty-eight (48) hours from September 28, 2022 when the case was mention in court to confirm compliance.
 16. Unless this Honourable Court intervenes to grant the orders requested herein, the Applicant s stand to suffer irreparable losses.”
4. The background of this application is that on the September 12, 2022 the prosecution Counsel for the Respondent brought to the Learned Trial Courts’ attention an article published by Tuko.co.ke and aired on KBC Television concerning the testimony of one of its witnesses, David Mbogo, (PW4) in ACC 10 of 2018, Republic Versus Lilian Mbogo Omollo & 36 others given during the proceedings of 18th and March 25, 2022; the article published by Tuko.co.ke stated “NYS storekeeper struggles to explain the source of Lexus’ Range Rover Sports and Land Cruiser car to the court” and went into detail to state that the witness was put to task to explain how he bought a fleet of high-end vehicles whose registration numbers were also indicated as being KBD 001 Lexus Hybrid, KCW 001 Range Rover Sport and a KCD 001 Land Cruiser Prado, a parcel of property in Ruiru valued at over Kshs.200million and how his company known as Kichen Ventures received Ksh.8million. Apparently the said article was not a true reflection of the court proceedings for 18th and March 25, 2022 and so prosecution Counsel sought orders that he author of the article be summoned. It is the Applicant’s contention that following the summons the Applicant attended court on September 26, 2022 and was without being told what he was facing denied him of his liberty and fines Kshs.50,000 or six months imprisonment. He was also directed to publish an apology to the witness and to retract the Article. Consequently when the matter was mentioned on September 28, 2022 to confirm compliance, the court issued another order for compliance within 48 hours (JDM-3). It was then that the Applicants moved this court for revision of the orders of the lower court proceedings on the ground that they violated the Applicant’s rights under Articles 47 and 50 of the Constitution. However, on October 4, 2022 because there was no order staying the lower court proceedings, the trial court sentenced the 1st Applicant to five days in prison for failure to apologize to the witness and for failing to retract the article.

Analysis and determination

5. Learned Counsel for the Applicant framed three issues for determination which in my view can be ably summarized as follows:-

Whether the Learned Trial Court’s order issued on the September 26, 2022 was illegal, irregular, improper or incorrect as to warrant the grant of revisionary orders sought.
6. On this issue the Applicant faults the trial magistrate for condemning him without giving him a hearing. He contends that whereas the magistrate was within her powers and acted within the law to summon the Applicant, her subsequent actions to punish him for contempt without giving him a hearing was unprocedural. Learned Counsel for the Applicant submitted that contempt of court is quasi-criminal in nature and the contemnor is like an accused person and as such is entitled to the protections and procedures of the law; that as corroborated by the affidavit of Hellen Mutellah there was no procedural fairness in this case; that the prosecutor raised the issue which led, giving rise to



the punishment meted upon the Applicant, when the Applicant was not in court; that the Applicant was also not in court when on a subsequent appearance the court allowed Counsel appearing for the defence to comment on the prosecutor's application; that the Applicant was not present to defend himself and that the summons issued thereafter did not disclose the offence the Applicant was going to face and the consequences of that offence if any. Counsel stated that when the Applicant subsequently appeared in answer to the summons he was not warned of the consequences of whatever he was facing. It is therefore Counsel's submission that the 2nd Applicant was treated harshly, hurriedly and unheard and hence in an unprocedural manner and in contravention of Articles 47 and 50 of the Constitution. Counsel placed reliance on the following cases: *Rustam Hira v Charles Mbagaya & another* [2016] eKLR, *Samuel M N Mweru & others v National Land Commission & 2 Others* [2020] eKLR and the Blacks Law Dictionary 11th Edition.

7. Learned Counsel contended that the magistrate did not in any case have jurisdiction to punish the Applicant for what he described as reputational damage of a witness who did not even attend to prove that damage. Relying on the case of *Jacqueline Okuta & Another v Attorney General & 2 Others* [2017] eKLR and the case of *John Gisiri Mwana and 7 others v Republic* [2014] eKLR. Counsel submitted that the magistrate lacked jurisdiction to entertain a defamation claim in a criminal case and that therefore the orders for an apology and retraction of the article were issued irregularly and hence should be revised and set aside. Counsel asserted that the best avenue to deal with such a complaint is by way of lodging a complaint against the media house as provided in Sections 46L and 102 of the *Kenya Information and Communications Act*.
8. For the Respondents, it was argued that the Magistrate's Court is empowered to take cognizance of and to punish contempt of the court committed before it by a person and that the court has unlimited jurisdiction to punish for contempt under Section 10 of the *Magistrates' Courts Act* given that the Applicant's publication of the article the subject matter of the courts orders issued on September 26, 2022 had the effect of:-
 - i. Scandalizing or tending to scandalize or lower the judicial authority or dignity of the court;
 - ii. Prejudice, interfere or tend to interfere with the due course of the proceedings in ACC 10 of 2018 - R Vs Lilian Mbogo Omollo & 34 Others;
 - iii. Interfere or tend to interfere with and obstruct the administration of justice, all of which constitute contempt of court and punishable under Section 10 of the *Magistrates' Courts Act*.
9. Counsel for the Respondent contended that the assertions by the Applicants that the proceedings of the Trial court were unprocedural does not hold water as the reasons as to why he had been summoned were explained to him. Counsel stated that the Applicant was given an opportunity to respond to the allegations through his counsel and therefore, the statement in the Applicant's submissions that "without any charge or application made by the alleged complainant or prosecutor, without being told what he was facing and the consequences that could deny him liberty, was fined Kshs. 50,000" does not reflect the true occurrence.
10. Counsel submitted that the article giving rise to the impugned order had the effect of victimizing, intimidating, causing reputational damage and injuring the character not just of that witness but those who were yet to testify; that the Applicants were made aware of the reasons for the summons; that the court acted within its powers under Section 10 of the *Magistrates' Courts Act* and that the punishment meted was within the law and there is therefore nothing to review and this application should be



dismissed. Counsel placed reliance on the case of *Joseph Gikubi Mwathe v Daniel Kariuki Njamwea & another* [2021] eKLR and the case of Econet wireless Kenya Ltd v Minister for Information & Communication of Kenya.

11. The Magistrates court’s jurisdiction to punish contempt of court is provided for under Section 10 of the *Magistrates’ Court Act, 2015* which states: -

“ 10. Contempt of Court

- (1) Subject to the provisions of any other law, the Court shall have power to punish for contempt.
- (2) A person who, in the face of the Court —
 - (a) assaults, threatens, intimidates, or insults a magistrate, court administrator, judicial officer, or a witness, during a sitting or attendance in Court, or in going to or returning from the Court;
 - (b) interrupts or obstructs the proceedings of the Court; or
 - (c) without lawful excuse disobeys an order or direction of the Court in the course of the hearing of a proceeding, commits an offence.
- (3) In the case of civil proceedings, the willful disobedience of any judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court constitutes contempt of court.
- (4) In the case of criminal proceedings, the publication, whether by words, spoken or written, by signs, visible representation, or otherwise, of any matters or the doing of any other act which;
 - (a) scandalizes or tends to scandalize, or lowers or tends to lower the judicial authority or dignity of the court;
 - (b) prejudices, or interferes or tends to interfere with, the due course of any judicial proceedings; or



(c) interferes or tends to interfere with, or obstructs or tends to obstruct the administration of justice, constitutes contempt of court.

- (5) A police officer, with or without the assistance of any other person, may, by order of a judge of the Court, take into custody and detain a person who commits an offence under subsection (2) until the rising of the Court.
- (6) The Court may sentence a person who commits an offence under subsection (1) to imprisonment for a term not exceeding five days, or a fine not exceeding one hundred thousand shillings, or both.
- (7) A person may appeal against an order of the Court made by way of punishment for contempt of court as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the Court.
- (8) The Chief Justice may make Rules to regulate procedures relating to contempt of court.”

12. The jurisdiction of the court was considered further by Chepkwony J, in the case of *Joseph Gikubi Mwathe v Daniel Kariuki Njamweya & another* [2021] eKLR where she held and I agree:-

“

25. It is true that the High Court and Court of Appeal have the requisite unlimited jurisdiction to handle Contempt of Court application but the reading of Section 10 of the Magistrates’ Court Act shows that the Magistrate’s court also have concurrent jurisdiction to handle contempt of court when it comes to civil proceedings as provided under Section 10(3) of the Magistrate’s Court Act.”

13. A perusal of the certified copy of the proceedings reveals that on September 26, 2022, the Applicant’s Counsel, Mr. Mungla appeared before the trial court and made submissions on behalf of the Applicant. His exact words in regard to the impugned article were:

“Yes, we are aware that it is in respect of an article that was published by my client. My client informs me that a correspondent from Tuko.co.ke filed a by-line concerning this matter and thereafter complaints were raised causing it to be pulled down. If at all the court proceedings were reported inaccurately we deeply apologize for the same. I have advised my client on the need to verify information before publishing it”

14. It is apparent therefore that contrary to his assertions the 2nd Applicant knew why he had been summoned to court and was accorded a fair hearing. He was duly summoned through summons dated



September 12, 2022; he appeared in court on September 26, 2022 through his Advocate and was given an opportunity to address the court whereupon gave directions as to what was required of him. He was then given another date when he would report back to confirm compliance with the directions of the court.

15. Come the day of the subsequent mention the 2nd Applicant had not complied and the trial court upon considering the submissions by both sides exercised its jurisdiction under Section 10 of the Magistrates' Court Act to find the 2nd Applicant in contempt of court and sentenced him to a fine of Kshs.50,000/= in default 6 months imprisonment both in his personal capacity and as an editor of Tuko.co.ke. In addition, the Applicant was ordered to publish an apology to the witness affected in the same media platform and to publish a retraction in the same media platform within three (3) days. It is my finding that the trial magistrate acted within her powers under Section 10(6) of the Magistrates' Courts Act. The article had not only gone beyond inaccurate reporting but scandalizing the court.
16. In my view, taken in their totality, the proceedings do not reveal any procedural impropriety, incorrectness or illegality as would warrant a revision by this court. The learned magistrate properly exercised her jurisdiction under Section 10(6) of the Magistrates' Court Act to punish the Applicants for contempt, so as to uphold the dignity and integrity of the court. It is clear from the proceedings that she was not merely protecting the reputation of a witness as alleged. The Applicants, as a matter of fact, apologized for inaccurate reporting of the proceedings. The sanction imposed upon him by the trial court is not by any means an abuse of power by the trial magistrate. It is provided for in statute and whereas this court could perhaps have dealt with the matter differently it is trite that an appellate court cannot overturn the decision or order of a trial court merely on the ground that it would have come to a different decision. In other words, it cannot overturn an order or decision of the trial court and replace it with its own without justification.
17. However, it is apparent that the trial court exceeded the statutory penalty provided in Section 10(6) of the Magistrates' Court Act, which provides for imprisonment for a term not exceeding five days, or a fine not exceeding one hundred thousand shillings, or both. That is however curable by a revision by this court of the sentence to be a fine of Kshs.50,000/= in default five days imprisonment.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 23RD DAY OF FEBRUARY 2023

E N MAINA

JUDGE

