



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CRIMINAL APPLICATION NO. E338 OF 2021

IN THE MATTER OF

THE CONSTITUTION OF KENYA.

AND

IN THE MATTER OF

THE CRIMINAL PROCEDURE CODE (CAP 75) LAWS OF KENYA.

AND

IN THE CRIMINAL CASE NO. 1217 AND E3333 OF 2021

IN THE CHIEF MAGISTRATE'S COURT AT NAIROBI, MILIMANI.

AND

IN THE MATTER OF

APPLICATION FOR REVISION OF CONSOLIDATION ORDER.

AUGUSTINE KINYUA ITA.....1ST APPLICANT

SAMUEL KABATA.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The subject of the ruling herein, is a notice of motion application dated; 4th October 2021, brought under the provisions of; articles 50, 159(1)(2), 163(3)(6)(7) of the Constitution of Kenya, 2010 and sections; 362 and 364 of the Criminal Procedure Code (Cap 75) Laws of Kenya. It is based on the grounds on the face of it and an affidavit sworn by; the 1st applicant on his behalf and on behalf and authority of the 2nd applicant.
2. The applicant is seeking for an order that, the Honorable Court be pleased to exercise its discretion to; revise, review and set aside the orders of consolidation issued by Hon. D.M Ndungi on; 22nd September, 2021, vide, Chief Magistrate Criminal Case No(s); 1217 of 2020 and E3333 of 2020, at Milimani, Nairobi.
3. The background facts of the matter is that, the 1st applicant is charged in three counts, vide, criminal case No; 1217 of 2020 with the offences of; disobeying a lawful order contrary to; section 131 of the Penal Code, operating a private medical laboratory facility without approval contrary to; section 21 as read with section 39, of the Medical Laboratory Technicians and Technologists Act, No. 10 of 1999 (herein "the Act") and stocking expired laboratory reagents contrary to; Regulation 3(1) as read with Regulation 12 of the Legal Notice No. 113 of 2011.
4. The 2nd applicant is also charged in three counts; vide, criminal case No; E3333 of 2021, with the offences of; making a document

without authority contrary to; section 357(a) of the Penal Code, in two counts and acting as a Laboratory Technologist in a Health Institution in Kenya, without registration contrary to; section 19(1) as read with section 19(2).

5. Subsequently, the respondent applied to have the two cases consolidated on the ground inter alia that, the cases have similar witnesses and it would expedite the hearing thereof. The application was canvassed inter parties whereby, the learned trial Magistrate vide; a ruling dated; 28th September 2021, allowed the application.

6. However, the applicants are aggrieved and argue that, the learned trial Magistrate erred both in law and fact, in ordering consolidation of two cases, when they emanate from two, separate, unrelated subject matters and transactions. That, from the charges, it is very clear that, they relate to separate unrelated subject matter. That, charges in criminal case No. E3333 of 2020, are based on the allegations of forgery of documents by the 2nd applicant, and lack of license to practice as a Medical Laboratory Technician, whereas the charges in criminal case No. 1217 of 2020 involves the licensing or lack of it with respect to a laboratory within Scion Healthcare Limited. Furthermore, merely having similar witnesses does not in itself necessitate consolidation.

7. The applicants aver that; the following factors militate against consolidation of the cases:

a) In respect of counts 1 and 2 in criminal case No; E3333 of 2020, the charge sheet states that, the alleged offences were committed on an unknown date and an unknown place.

b) The alleged transactions in both cases allegedly took place on different dates.

c) The alleged facts in support of the case are distinctly different.

d) Testimony in one case shall not be applicable in the other.

8. The applicants further aver that, criminal liability is personal. That each accused person should be tried in his own case and should not be entangled in another accused person's case unnecessarily. Otherwise, one accused person will merely be a by-stander as the case relating to other accused person is underway.

9. In addition, the convenience the prosecution desires to obtain by the proposed consolidation should be balanced against the prejudice the accused persons shall suffer as a consequence of the consolidation of wholly unrelated cases. That, none of the accused persons can possibly be culpable for the alleged offences against his own case.

10. However, the application was opposed by the respondent vide grounds of opposition dated; 4th November 2021, which states as follows:

a) That the application is without merit as applicant has not demonstrated how the trial court's order was illegal, improper, and incorrect and/or the proceedings are illegal;

b) That section 135 of the Criminal procedure code provides that, the accused persons may be charged together in relation to the same or a series of transactions that arose from the same facts;

c) That, the trial court correctly applied the law and arrived to a proper finding in consolidating the charges against the applicants;

d) That, it is in the interest of justice that matters are heard by one trial court;

e) That, the application is superfluous, an abuse of the court process and should be dismissed in its entirety.

11. The application was disposed of vide filing of submissions. The applicant's submissions are dated; 8th November 2020. In a nutshell, the applicants argue that, consolidation should not be used for purposes of; sealing loopholes in the prosecution's case. Moreover, the two cases did not arise from similar facts nor existence of a series of offences or similar character.

12. That, the accused in criminal case No. E3333 of 2020, had not joined Scion Health Care Limited, when the transactions involving criminal case No. 1217 of 2020, took place nor was the accused in criminal case No. 1217 of 2020, the custodian of documents alleged to be forged as per the charge sheet, criminal case No. E3333 of 2020.

13. However, the respondent's skeleton submissions are dated; 29th November 2021, in which it is reiterated that, the prosecution applied for the cases to be consolidated on the grounds that, the witnesses in the cases being officers from, the Kenya Medical and Laboratory Board are similar. Furthermore, the offences took place at the same premises, despite a closure notice being issued to; the 1st applicant, hence, the trial court did not error in ordering consolidation of the matter.

14. The respondents further submit that, section 135(1) of the Criminal Procedure Code (cap 75) Laws of Kenya, allows for matters to be consolidated, as long as they are founded on similar facts or form part of a series of offences, as is the case in the present matter, where the offences are of same character and have similar witnesses. Moreover, no prejudice will be suffered since the applicants have been supplied with the witness statements, and therefore the matter will be expedited.

15. I have considered the application and I find that, the provisions of section 135 (1) of the *Criminal Procedure Code (cap 75) Laws of Kenya, that deals with consolidation of cases provides as follows;*

(1) Any offences, whether felonies or misdemeanors, may be charged together in the same charge or information, if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character.

16. In addition, the Supreme Court of Kenya, in the case of; *Law Society of Kenya v The Centre for Human Rights and Democracy (2013)*, stated as follows:

“The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it.”

17. In the same vein, the Supreme Court of India, in the case of; *Prem Lala Nahata & vs Chandni Prasad Sikaria (2007)* stated as follows on consolidation of cases: -

“...Consolidation is a process by which two or more causes or matters are by order of the Court combined or united and treated as one cause or matter. The main purpose of consolidation is therefore to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or causes pending in the court and it appears to the Court that, some common questions of law or fact arises in both or all the suits or that the rights to relief claimed in the suits are in respect of or arise out of the same transaction or series of transactions; or that for some other reason it is desirable to make an order consolidating the suits.”

18. In the light of the aforesaid, I have considered the two subject criminal cases and I find that; first and foremost, the dates of the occurrence of the offences in the matter No. 1217 of 2020 is stated to be between 2014 to 2020 and the year of occurrence of the offence in count 3, of the criminal case No. E3333 of 2020, is the year 2020. Further, the offences are said to have occurred within the same place, namely Scion HealthCare Limited. Thus, although the offence may have been committed at different times but the common threat is that, each accused is connected to it by virtue of the premises where the main events took place. In that regard, the witness in relation to the same are likely to be the same.

19. I further note that, the main complainant in both matters as gathered from the charge sheets is; Kenya Medical Laboratory Technicians and Technologists Board (KMLTTB). As such most of the witnesses will be from that organization.

20. Further, it is not prejudicial nor out of character and/or practice to prefer charges against more than one person, in the same charge sheet, wherein one of them is charged alone in some counts and jointly with others in other counts. In fact, the other charges in counts; 1 and 2 in criminal case No. E3333 of 2020, relates to a document, the accused is alleged to have used in committing the offence in count 3. The facts are therefore not distinct as argued by the applicants.

21. In fact, a further perusal of the charge sheets in the respective matters reveal that, witnesses; Daniel Kinyanjui, Hassan Noor and the investigating officer; No. 236146 C.I. Amon Adiema, are common witnesses in both matters. Thus, if the cases are consolidated they will be cost effective in terms of; time spent, financial costs, in addition to saving the otherwise unavailable Judicial time. In a nutshell, the hearing of the matter will be expedited. In my considered opinion, it will be in the interest of justice to allow the consolidation for the expeditious disposal of the matter.

22. I further find that, some of the issues raised by the applicants as to whether the accused in E3333 of 2020, was in the employment of the company as at the time of commission of offence or whether, there is nexus between the two matters will be a matter of evidence. The applicants should wait for the consolidated charge sheet to be availed in court to appreciate which charges will have been preferred against each one of them.

23. In the conclusion, I find that the order of the learned trial Magistrate rendered on 22nd September 2021, allowing the consolidation of the cases herein is not incorrect, improper, illegal, or irregular. I therefore dismiss the application.

DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 11TH DAY OF JANUARY 2022.

GRACE L. NZIOKA

JUDGE

In the presence of:

Nyamweya for both applicants

Ms Akunja for the respondent

Edwin Ombuna – Court Assistant