



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 16 OF 2019

REPUBLIC.....APPELLANT

VERSUS

LUCY WANJIKU KABOGO & 12 OTHERS.....RESPONDENTS

(Appeal against the Ruling in Criminal Case No. 435 of 2016 of the

Senior Principal Magistrate's Court at Kilifi Law Court -

Hon. J M Kituku, SPM dated 10th June 2019)

CORAM:

Hon. Justice R. Nyakundi

Mr Mwangi for the State

Kinaro for the Respondents

JUDGMENT

Background

The Respondent's listed above were charged jointly and severally before the trial court with offences relating to stealing under the penal code chapter 63 of the Laws of Kenya. They were charged as below;

Count 1

Lucy Wanjugu Kibogo, Jacob Kazungu Khonde, Johnson Nyamawi Gabo, Timothy Malingi Koe, Paul Tedo Mwazo, John Kahindi Kalume, Dickson Mwamgone Tembo, Lenox Mwadzoya Mwasira and Josphine Felix Muramba were charged with charged with the offence of stealing. That on diverse dates between 19th September 2016 and 12th October 2016 at Kilifi County within the Republic of Kenya jointly stole Ksh. 9,230,645 from account number 1000170198 in the name of the county treasury Kilifi, the property of Kilifi county government domiciled at Central Bank of Kenya.

In the alternative charge, **Lucy Wanjugu Kibogo** was charged with the offence of handling stolen goods contrary to section 322 (2) of the penal code. That on diverse dates between 4th and 12th October 2016 at Jamii Bora Bank, Kiongozi branch Nairobi within Nairobi County otherwise than in the course of stealing, dishonestly received Ksh. 9,230,645 in an account number 100177878002 domiciled at the said bank in the name of Zohali services limited, knowing or having to believe them to be stolen goods.

Count 2

Lucy Wanjugu Kibogo, Johnson Nyamawi Gabo, Timothy Malingi Koe, Paul Tedo Mwazo, John Kahindi Kalume, Lenox Mwadzoya Mwasira, Daniel Baha Nguma were charged with the offence of stealing that on diverse dates between 19th September

2016 and 12th October 2016 at Kilifi county within the republic of Kenya, jointly stole Kshs. 6,102,950 from account number 1000170198 in the name of the County treasury Kilifi, the property of Kilifi county government domiciled at central bank of Kenya.

In the alternative charge, **LUCY WANJUGU KIBOGO** was charged with handling stolen goods contrary to section 322 91) (2) of the penal code that on diverse dates between 7th and 9th November 2016, at Equity Bank Kilimani Branch in Nairobi within Nairobi county, otherwise than in the course of stealing, dishonestly received Kshs. 6,102,950 in an account number 0170298737354 domiciled in the said bank in the name of Jahazi investment Company limited, knowing or having reason to believe them to be stolen goods.

Count 3

Lucy Wambui Kibogo was charged with the offence of forgery contrary to section 345 as read with section 349 of the Penal Code that on 4th October 2016 in Nairobi town within Nairobi County with the intent to defraud forged a certain document namely a Local service Order number 0944650 purported to be a Local order of the county Government of Kilifi.

Count 4

Lucy Wanjugu Kibogo was charged with the offence of making a document without authority contrary to Section 357 of the Penal Code that on 4th October 2016 in Nairobi town within Nairobi county with the intent to defraud and without lawful authority or excuse made a local service order number 0944650 purporting it to be a local service order issued by Kilifi county government.

Count 5

Lucy Wanjugu Kibogo was charged with the offence of uttering a false document contrary to section 353 of the penal code that on 4th October 2016 at Jamii Bora bank, Kiongozi branch within Nairobi county, knowingly and fraudulently uttered a forged local service order 0944650 to Anthony Tabani, the operations manager Jamii Bora bank Kiongozi Branch purporting to be of the county government of Kilifi.

Count 6

Lucy Wanjugu Kibogo was charged with the offence of forgery contrary to section 345 of the penal code that on 21st march 2016 in Nairobi town, within Nairobi County, with the intent to defraud forged a Local Purchase order number 2120206 purported to be a local purchase order of the county government of Kilifi.

Count 7

Lucy Wanjugu Kibogo was charged with the offence of uttering a false document contrary to section 353 of the Penal Code that on 10th October 2016 at Equity bank Kilimani branch within Nairobi County knowingly and fraudulently uttered a forged Local Purchase Order number 2120206 to Philip Mukuria Wanjeri the branch manager Equity Bank Kilimani branch purported to be a Local Purchase order of the Kilifi County government.

Count 8

Sarah Wangui Kamau, Jacob Kazungu Khonde, Johnson Nyamawi Gabo, Timothy Malingi Koe, Paul Teido Mwazo, John Kahindi Kalume, Dickson Mwamgone Tembo, Lennox Mwadzoya Mwasirya, Josephine Felix Muramba were charged with stealing contrary to section 268 (1) of the as read with Section 275 of the penal code that on diverse dates between 19th September 2016 and 12th October 2016 at Kilifi county within the republic of Kenya, jointly stole Kshs. 11,331,140 from account number 1000170198 in the name of the County treasury Kilifi, the property of Kilifi County government domiciled at central bank of Kenya.

In the alternative count, **Sarah Wangui Kamau** was charged with handling stolen goods contrary to section 322 (1) (2) of the penal code that on diverse dates between 3rd and 11th October 2016 at Equity bank, Ngara branch in Nairobi within Nairobi county, otherwise than in the course of stealing, dishonestly received Kshs. 11,331,140 in an account number 0910267713058 domiciled at the said bank in the name of Daima One Enterprises, knowing or having reason to believe them to be stolen goods.

Count 9

Stephen Mutua Ngunzy, Jacob Kazungu Khonde, Johnson Nyamawi Gabo, Timothy Malingi Koe, Paul Teido Mwazo, John Kahindi Kalume And Lenox Mwadzoya Mwasira were charged with the offence of stealing contrary to section 268 (1) as read with section 275 of the penal code that on diverse dates between 3rd October 2016 and 12th October 2016 at kilifi county within the republic of kenya jointly stole Kshs. 6,700,952 from account number 1000170198 in the name of the County treasury Kilifi, the property of Kilifi County government domiciled at central bank Kenya.

In the alternative, **Stephen Mutua Ngunzi** was charged with the offence of forgery contrary to section 345 as read with section 349 of the penal Code that on diverse dates between 3rd and 28th October 2016 at consolidated bank, Umoja branch in Nairobi, otherwise than in the course of stealing, dishonestly received Kshs. 6,700,952 in an account number 10131202000052 domiciled at the said bank in the name of Kilingi Investments Company limited, knowing or having reason to believe them to be stolen goods.

Count 10

Stephen Mutua Ngunzi was charged with the offence of making a document without authority contrary to section 357 (a) of the Penal Code that on 5th October 2016 in Nairobi town within Nairobi county, with an intent to defraud forged a Local Purchase order number 1288217 purported to be a Local Purchase Order of the county government of Kilifi.

Count 11

Stephen Mutua Ngunzi was charged with the offence of making a document without authority contrary to section 357 (a) of the Penal Code that on 5th October 2016 in Nairobi town within Nairobi county, with an intent to defraud forged a Local Purchase order number 1288217 purported to be a Local Purchase Order of the county government of Kilifi.

Count 12

Stephen Mutua Ngunzi was charged with the offence of uttering a false document contrary to Section 353 of the Penal Code that on 5th October 2016 at Consolidated bank Umoja branch within Nairobi County, knowing and fraudulently uttered a forged Local Purchase Order number 1288217 to Elizabeth Muthui bank operations officer purported to be a Local purchase Order of the County Government of Kilifi.

Count 13

Samuel Buku Macharia, Jacob Kazungu Khonde, Johnson Nyamawi Gabo, Timothy Malingi Ko, Paul Teido Mwazo, John Kahindi Kalume and Lenox Mwadzoya Mwasira were charged with the offence of stealing contrary to section 268 as read together with section 275 of the Penal Code that on diverse dates between 3rd October and 12th October 2016 at Kilifi County within the republic of Kenya, jointly stole Kshs. 7,840,910 from account number 1000170198 in the name of the County treasury of Kilifi, the property of Kilifi County Government domiciled at Central Bank of Kenya.

In the alternative count, **Samuel Buku Macharia** was charged with the offence of handling stolen goods contrary to section 322 (1) (2) of the Penal Code that on diverse dates between 3rd and 12th October at Diamond Trust bank village market branch within Nairobi county, otherwise than in the course of stealing, dishonestly received Kshs. 7,840,910 in an account number 025625001 domiciled at the said bank in the name of leadership edge associates Limited, knowing or having reason to believe them to be stolen goods.

Count 14

Samuel Buku Macharia was charged with the offence of forgery contrary to section 345 as read together with section 349 of the Penal Code that on 3rd October 2016 at Diamond Trust Bank village market branch, with intent to defraud or to deceive, forged a Local Service Order number 1151251 purported to be a Local Service Order of the County Government of Kilifi.

Count 15

Samuel Buku Macharia was charged with the offence of making a document contrary to section 357 (a) of the Penal Code that on 3rd October 2016 in Nairobi town within Nairobi County, with intent to defraud and without lawful authority or excuse made a document namely a Local Service Order number 1151251 purporting it to be a Local Service order issued by Kilifi County government

Count 16

Samuel Buku Macharia was charged with the offence of uttering a false document contrary to Section 353 of the Penal code that on 3rd October 2016 at Diamond Trust Bank Village market branch in Nairobi within Nairobi County, knowingly and fraudulently uttered a forged Local Purchase Order number 1151251 to Naftali Mwangi a teller purported to be a Local Service order of the County Government of Kilifi.

Count 17

Lucy Wanjugu Kabogo, Sarah Wangui Kamau, Stephen Mutua Ngunzi, Samuel Buku Macharia, Jacob Kazungu Khonde, Johnson Nyamawi Gabo, Timothy Malingi Koe, Paul Teido Mwazo, John Kahindi Kalume, Dickson Mwangone Tembo, Lenox Mwadzoya Mwasira, Josephine Felix Muramba and Daniel Baha Nguma were charged with the offence of conspiracy to commit a felony contrary to section 393 of the penal code that on diverse dates between 19th September to 7th October 2016 at unknown place within the republic of Kenya, jointly conspired to commit a felony namely stealing of Kshs. 51,569,775.40 from account number 1000170198 domiciled at Central bank of Kenya in the name of the County treasury, Kilifi and the property of Kilifi County Government

Count 18

Jacob Kazungu Khonde, Johnson Nyamawi Gabo, Timothy Malingi Koe, Paul Teido Mwazo, John Kahindi Kalume, Dickson Mwangone Tembo, Lenox Mwadzoya Mwasirya, Josephine Felix Muramba and Daniel Baha Nguma were charged with the

offence of stealing by a person employed in the public Service contrary to section 280 of the penal code that on diverse dates between 19th September and 7th October 2016 in Kilifi town within Kilifi County, being persons employed in the public service with the County government of Kilifi, jointly stole Kshs. 51,569,775.40 the property of the County Government of Kilifi which came into their possession by virtue of their employment

Brief Facts

Accused 1-4 were arraigned before the trial court in December 2016 where they jointly and severally faced four main charges with four alternative charges to which they all pleaded not guilty. On 5th July 2017, the prosecution notified the trial court that they wished to consolidate criminal case number 435 of 2016 with criminal case number 440 of 2016. The said consolidation was done on 12th June 2016 and only one charge was preferred; conspiracy to commit a felony contrary to section 393 of the Penal Code. The trial court scheduled a two-day hearing on 24th and 25th August 2017.

On 24th August 2017 the matter did not proceed at the behest of the prosecution and the matter was adjourned to 25th August 2017 when only one prosecution witness testified. On 25th August 2017, the matter was adjourned to 7th and 8th September 2017.

As of 31st July 2018, thirteen prosecution witnesses had testified and referred to twenty-nine documents. On this day, the matter did not proceed again as the prosecution told the trial court that its witness was in Singapore. The matter was adjourned to 27th and 28th August 2018. On 27th August, 2018, when the matter came up for hearing, the prosecution applied for amendment of charges which the trial court allowed vide the ruling dated 12th October 2018. On 30th April 2019, the County public prosecutor appearing together with the state prosecutor, informed the court that he had instructions from ODPP to withdraw the charges by dint of Article 157 (6) of the constitution as read together with the ODPP Act citing that the accused persons had been charged in Malindi EACC no 4 of 2019 with various charges some under the Anti-corruption and Economic Crimes Act.

This development was opposed by the defence on grounds of prejudice and double jeopardy. After analyzing submissions advanced by both parties, the trial court disallowed the application to terminate the case and ordered that the same proceed.

Dissatisfied with the ruling of the trial court, the prosecution preferred the present appeal against the whole of the ruling dated 10th June 2019 on the following grounds;

1. THAT the learned Honourable magistrate erred in law and in fact by disallowing the DPP's to withdraw the said case under Section 87 (a) of the Criminal Procedure Code.

2. THAT the learned Honourable Magistrate acted beyond his constitutional discretion and contrary to Article 157 of the Constitution and Section 87 (a) of the Criminal Procedure Code by further directing the DPP in what he ought to do in the said Ruling.

3. THAT the Learned Honourable Magistrate did not bring out any exceptional circumstances that had not been exhibited by the DPP so as to warrant the dismissal of the application to withdraw the case.

4. THAT the learned Honourable Magistrate misdirected himself as to the facts of the current case and the new Anti-corruption case that has been instituted in Malindi Chief Magistrate's Court in reaching his decision.

5. THAT it is in the interest of justice and proper working of a criminal justice system that the Director of Public Prosecution needs to be accorded the discretion to withdraw charges at any time before judgment.

6. THAT the learned honourable magistrate ignored the fact that new evidence or facts had emerged which was not available at the time of arrest and investigation of the accused, further the initial decision to prosecute the accused person is no longer desirable and tenable as they have already been charged in the fresh matter with more accused persons.

Submissions on Appeal

The appellant submits that the trial court disregarded the provisions of Article 157 of the constitution by failing to grant them the mandate to exercise their discretion as per the provisions of Section 87 (a) of the Penal Code.

They relied on the authorities of *Republic vs Sekento [2019] eKLR*, *Republic V Aguvasu [2019] eKLR* and *Republic V Hasmukh Meghji Shah [1984]eKLR*.

The respondents submitted that the invocation of section 87 (a) of the CPC by the DPP was an abuse of the court process as the application lacked in merit. That the ruling by the trial court was well considered and interpreted thus urged that the appeal fail.

Analysis and Determination

This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, reevaluate and analyze it and come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See *Okeno v R (1972) EA 32*, *Eric Onyango Odeng' V R (2014) eKLR*.

I have considered the grounds of appeal, the respective submissions and the record and the issue for determination is whether the application by DPP under Section 87 (a) of the CPC is merited.

With regard to the powers of the Director of Public Prosecution the constitution under Article 157 (6), (7), (8), (10) and (11) vested him with express powers to prosecute all criminal cases on behalf of the state. The broad language of the Director of Public Prosecution to initiate, take down, continue or choose to discontinue any criminal prosecution before a court of law.

According to section 87(a) of the CPC the public prosecutor may with the consent of the court at any time before judgment withdraw from the prosecution of any person and upon withdrawal:

a) If it's made before the accused person is called upon to make his defence, he shall be discharged, but the discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts.

b) If is made after the accused person is called upon to make his defence he shall be acquitted the exercise of judicial discretion in determining between the two parameters is to ascertain that the derived power on both ways is reasonable and rationale to the objective sought to be achieved.

The above section gives discretion to the court to accept or reject the application by the DPP. In exercising the said discretion, the court must address itself to the circumstances of the case before it.

The discretion of the DPP is further subjected to the principles anticipated by Article 157 (11) of the Constitution that the said discretion ought to be exercised judiciously.

The decision appealed from was made in exercise of the discretionary power of the court. As was stated in ***Mbogo and Another V Shah [1968] E.A. 93*** it is well settled:

“...that this court will not interfere with the exercise of...discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

The constitutional independence, discretion and strategy of the Director of Public Prosecution are considered to be the cornerstones of an effective and efficient criminal justice of any country. In terms of Article 157 (6), (7), (8), (9), and (10) of the Constitution.

“The Director of Public Prosecution has power to institute and undertake criminal proceedings against any person before any court other than a Court martial. In respect of any offence against the law in Kenya. He has the power to take over, and continue any such criminal proceedings that may have been instituted by any other person or authority. To discontinue at any stage before judgement is delivered any such proceedings, instituted or undertaken by himself or another person.”

This power is vested in the Director of Public Prosecution to the exclusion of any other person or authority. It is worth appreciating from the constitutional perspective as stated in ***R V Brown [1997] 3 ALL ER; -***

“It ought to now be appreciated in our view that certain decisions involved in the prosecution process are of their nature, unsusceptible of judicial review. They include decisions whether or not to prosecute, to enter a nolle prosequi, to proceed ex officio, whether or not to present evidence and, which is usually an aspect of one or other of those decisions, decisions as to the particular charge to be laid or prosecuted. The integrity of the judicial process, particularly, it's independence and impartiality and the public perception thereof, would be compromised if the Courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what.”

In the instant case the learned trial magistrate declined an application by the Director of Public Prosecution to withdraw the charges against the accused persons in terms of section 87(A) of the Criminal Procedure Code. In doing so that exercise of discretion triggered this appeal. From the onset it must be stated that the exercise of discretion comprises an area of autonomy for the Courts or Tribunals under Article 50 (1) of the Constitution.

However, in that context judicial discretion as the power donated to judicial officers to make decisions in adjudication of cases must not be exercised with caprice or whim, or a pattern of bias or exercising it beyond her or his authority under the law.

In Black's Law Dictionary judicial discretion is defined as; -

“The exercise of judgement by a judge or Court based on what is fair under the circumstances and guided by the rules and principles of law; a Court's power to act or not to act when a litigant is not entitled to demand the act as a matter of right.”

Going by the application all what was required of the learned trial magistrate was to inquire whether by the director taking that step of withdraw he did breach any law. This is what the Court stated in ***Cascade Company Limited V Kenya Association of Music Production (KAMP) & Others Petition No. 7 of 2014*** thus; -

“In my view as long as the enabling legislation is constitutional, the Respondents actions ensuing therefrom are lawful unless, of

course, it can be demonstrated that the respondents have in their actions, breached those very provisions or have acted ultra vires to the act. Simply put, the respondents should not be inhibited unnecessarily from exercising their constitutional and statutory mandate.” (See Diamond Hasham Lalji & Another V AG [2018] eKLR, Mohit V DPP [2006] LRC 234.

Thus in this respect; -

“The exercise of prosecution discretion enjoys some measure of judicial deference and as numerous authorities establish, the Courts will interfere with the exercise of discretion sparingly and in exceptional and clearest cases.”

It troubles me that in the case at bar the learned trial magistrate took a decision of rejecting the application tilting more not to meet the ends of justice but to assist the accused persons.

In an inspiration jurisprudential principle, Mumbi J as she then was in *Kipoki Oreu Tasur V Inspector General of Police & 5 Others [2014] eKLR* had this to say; -

“The criminal justice system is a critical pillar of our society it is underpinned by constitution and it is proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society that it be allowed to function as it should, with no interference from any quarter or restraint from the superior Courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated.”

As reiterated earlier in this appeal, the rationale that underpins the reluctance of the Court’s to intervene in the director of prosecution decision making is primarily due to the explicit constitutional imperatives in Article 157, (6) (7), (8), (9) and (10). It is presumptive that the decision to initiate, commence, take over, continue or terminate or withdrawal of a criminal charge against any person is an exercise of informed judgment as to the likely outcome of the criminal trial. (In *Matalulu V ODPP [2003]4LRC 712, the Supreme Court of Fiji* stated that; -

“The great width of the DPP’s discretion and polycentric character of the official decision making in such matters, including policy and public interest. Considerations which are not susceptible of judicial review because it is within neither the constitution function nor the practical competence of the Courts to assess their merits.”

Bearing this in mind, the learned trial magistrate had no jurisdiction to intervene by declining to admit an application for withdrawal of the charges under section 87(A) of the Criminal Procedure Code against the accused persons. Simply because he disagreed with the decision of the DPP. It was not within the province of the trial court to conceive the circumstances in which such a decision was made to subject it to judicial discretion. The power of review is vested in the High Court and not the inferior Court or Tribunal that decision taken by the Learned Trial Magistrate was in excess of jurisdiction and is therefore susceptible to be reviewed by this Court. The significance margin of discretion bestowed upon the magistrate’s court was abused particularly in respect of the impugned decision.

I have perused the arguments of the respondents and I do not really fathom the connection between Articles 157, 6 (C) of the Constitution and the principle of double jeopardy or prejudice being touted as a defence to the appeal. In the case of;

“Platakou V. Greece (11th January, 2001) ECHR Bulut V Austria ECHR [1996] in fair trial rights there should be a fair balance between the parties. Each party must be afforded a reasonable opportunity to present his or her case including evidence, without any substantial disadvantage of a party vis a vis the other party.”

The contours and ambits of the canon on equality of arms and its application is anchored in Article 50 of the Constitution. Equality of the parties in the administration of justice is one of the most important tenet in achieving fundamental justice.

Preventing the Director of Public Prosecution to withdraw the charges under section 87 (A) of the Criminal Procedure Code was an infringement of fair trial guarantees firmly entrenched in the constitution. In this Appeal, the relief of withdrawal being sought by the DPP is provided for in the code and the Constitution. The question whether the application is pleaded with sufficient particularity or the general accusatory instrument to suffer a material defect for denial of the order was not within the discretion of the trial court.

In my considered view, the challenged ruling does contain essential violations of the provisions of the Criminal Procedure Code and the Constitution as alleged in the prosecution’s appeal for which this Court issues a writ of certiorari. The protection of legality of that withdrawal was well founded and the trial court confined itself only to the existence of inconvenience of the parties and not a violation of the law.

In this respect the appeal succeeds by quashing of the impugned order by the Learned Trial Magistrate. In addition, the earlier application on withdrawal of the charges under Section 87(A) of the Criminal Procedure Code by the prosecution counsel be deemed as granted.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 31ST DAY OF MARCH, 2022

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R. NYAKUNDI

JUDGE

In the presence of: -

1. Mr Kinaro for the Respondent
2. Mr Mwangi for the State