



**Republic v Ndirangu (Criminal Appeal 28 of 2020)
[2022] KEHC 12040 (KLR) (Crim) (26 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12040 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CRIMINAL

CRIMINAL APPEAL 28 OF 2020

DO OGEMBO, J

JULY 26, 2022

BETWEEN

REPUBLIC APPELLANT

AND

JAMES KIMANI NDIRANGU RESPONDENT

*(Being an appeal against the ruling of the Honourable R. A. Oganyo
(Mrs.) Chief Magistrate, dated 1.8.2019, at the City Law Courts in
Preliminary Objection in Criminal Case No. 1070 of 2018 dated 1.8.2019)*

JUDGMENT

- 1 The appellant James Kimani Ndirangu was charged before the lower court on June 11, 2018 with 2 counts. On count I, he faced a charge of disobeying lawful orders contrary to section 131 of the [Penal Code](#). That on diverse dates between June 4, 2018 and June 9, 2018 in Nairobi, being a Director of Cash Gate Auctioneers he disobeyed a court order in respect of CMCC No 4193/2014 dated May 11, 2018 issued by Hon A N Makau, Senior Resident Magistrate, ordering him to released motor vehicle Registration No KBU 974 make Toyota Probox, to one Jackson Karanja unconditionally.
- 2 On count II, he faced a charge of giving false information to a person employed in public service contrary to section 129(a) of the [Penal Code](#). That on June 4, 2018, at Cash Gate Auctioneers office, 3rd floor Nature House, Tom Mboya Street, he informed No 2xxx5, IP Alex Khaemba and No 7xxxx8 Corporal Stephen Nderitu, both persons employed in the public service as police officers that he had stay orders in respect of the said case, which information he knew to be false thereby causing the 2 officers not to execute the order in CMCC 4193/2014 which they ought not to have done had the true state of facts relating to such information been given to them.



- 3 The case was listed for hearing before the Hon R A Oganyo Chief Magistrate, at the City Law Courts, Nairobi. However, before the hearing could commence, the appellant (accused raised a preliminary objection to the charges and urged the court to struck out the charges and set him free. It was argued on behalf of the appellant that section 131 of the Penal Code in which the charges are grounded applies only to the matter where there are no other matter pending in court. It was further submitted that the court did not have jurisdiction as it lay with the civil court where the alleged disobedience happened.
- 4 Counsel added that as the time the orders were served, the matter had been overtaken by events. That the vehicle was eventually released and matter settled. He relied on the 2 cases of Hussein Khalid and 16 others v Attorney General and 2 others (2014)eKLR and Ramadhan Salim v Evans M Maabi (2016)eKLR.
- 5 In the short response of counsel for the state, it was submitted that section 131 of the Penal Code still remains law, and that section 6 of the Judicature Act does not give an auctioneer any immunity as same only applies to judges and magistrates.
- 6 In the ruling delivered on August 1, 2019, the learned chief magistrate dismissed the objection and held that the issues raised therein needs evidence before determination and that section 6 of the Judicature Act does not give immunity to Auctioneers.
- 7 Aggrieved with this finding, the appellant has filed an appeal before this court. In the memorandum of appeal filed (amended) herein on January 29, 2020, he has listed 4 grounds of appeal as follows;-
1. That the learned magistrate failed to appreciate section 131 of the Penal Code and thus erred in law since it shows that, “if there is any other penalty or mode of proceedings expressly prescribed” That contempt of court order has been appreciated in Civil Procedure and one can be compelled to comply.
 2. That the learned magistrate erred in law when she failed to appreciate the fact that matters in question had been canvassed and determined by the civil court, hence multiplicity of cases is res judicata and cases have to come to an end.
 3. That the learned magistrate erred in law by adopting a defective charge sheet which does not disclose either mens rea or actus reus.
 4. That the learned magistrate erred in law by not appreciating the fact that the Judicature Act, grants immunity to an auctioneer acting in good faith.
- 8 The appellant has duly filed their submissions. However, despite several deferrals to enable the state file their response to the appeal and the submissions on the same, none had been placed on record as at the time of writing this judgment.
- 9 I have considered the submissions of the appellant herein as well as the proceedings of the lower court. Worth noting is that the preliminary objection of the appellant was raised before the trial court even before the court could take the evidence of any of the witnesses lined up. From the submissions of the appellant filed herein on March 3, 2020, the case of the appellant is to be determined on 3 issues;-

i. The issue of application of section 131 of the penal code.

10 Section 131 of the penal code states:

“Everyone who disobeys any order, warrant of command duly made issued or given by the court, officer or any person acting in any public capacity or duly authorized in that behalf,



is guilty of a misdemeanor and is liable, unless any other penalty or mode of proceeding is expressly prescribed in respect of the disobedience to imprisonment to two years.”

- 11 It was argued that since the *Judicature Act* gives guidelines of the law of contempt, then section 131 of the *Penal Code* above, does not apply. And that it is the civil court, *vide* CMCC 4193/2014 which is properly seized of the matter.
- 12 In my view, a number of issues may arise if this argument is to be taken up.
- 13 First, is the offence created under section 131 of the *Penal Code*, on its own, valid in law?
- 14 Second, does the existence of the civil case involving the same parties mean that any criminal elements arising from the same dispute cannot be prosecuted?
- 15 Third, is there any evidence that the aggrieved party took the option of pursuing for contempt against his adversary? And what are the specific facts of the civil case and its relationship with the criminal case? This court would not endeavor to answer on this probable issues that could as well be issues for determination in either or both the civil or criminal cases before the lower court.
- 16 This court is however, convinced that for a proper determination of this issue of applicability of section 131 of the penal code, the trial court must be given the opportunity to hear the full evidence of the parties and the respective submissions, if any.
- 17 The case of *Ramadhan Salim v Evans M Maabi Care of Murphy Auctioneers and Another* (2016)eKLR, relied on by the applicant, may be distinguishable with our present situation in so far in deals with civil proceedings of contempt before the subordinate court and not the application of section 131 of the *Penal Code*. the same situation pertains to the other case of *Joseph Lishenga v Muganda Wasulwa care of Keysian Auctioneers* (2018)eKLR.

ii. The issue of CMCC 4193/2014.

- 18 It was submitted by the applicant (appellant), that the above civil case has been completed and so these criminal proceedings cannot stand. Again, many issues come out of these submissions. What was the nature of the issues therein, determinations made on each, the direct relevance with the current case etc. and how would the criminal court make determinations on the issues raised before it if not by way of evidence being laid by the parties?” it is only through evidence of the parties that the trial court would be in a position to make its considered views on such issued raised.

iii. Whether an auctioneer is an officer of the court and protected under section 6 of the *Judicature Act*

- 19 It was submitted by the appellant, that the auctioneer (appellant) is an officer of the court who is protected under section 6 of the *judicature Act* in any action done in good faith. This is a point the prosecution side denied in their objections before the trial court. The finding of the trial court was terse and in the negative.
- 20 I have perused the said Act. The preamble to the Act states;

“An Act of parliament to make provision concerning the Jurisdiction of the High Court, the Court of Appeal and subordinate courts, and to make additional provision concerning the High Court, the Court of Appeal and subordinate courts and the judges and officers of courts.



- 21 Of course, following amendments, the Act also refers to the *Environment and Land Court* and the *Employment and Labour Relations Court* (Act Nos 20/2011 and 19/2011).
- 22 Section 6 of the said Act, refers to judges, magistrates, and persons acting judicially as being accorded immunity's while acting in good faith. Would it not then be necessary for an appellant, and auctioneers to lead evidence that in fact he falls within the meaning of Judicial officer, or Officer of the court envisaged under this section? And further, wouldn't it be necessary that the appellant, leads evidence to show that in carrying out his duties, he acted in good faith?
- 23 Of the charges against the appellant before the trial court, count II, is one of giving false information to a person employed in public service contrary to section 129(a) of the *Penal Code*. The particulars of the charge mentions the names of 2 police officers, IP Alex Khaemba and Corporal Stephen Nderitu. How would this charge be considered in the absence of any evidence being led on the issue of the information or the falsehood of the same? The denial of the appellant by way of submissions falls far short of the evidence that the court would require in making a determination on this court.
- 24 I agree and associate myself with the find of the Hon Justice Isaac Lenaola (as he then was in the case of *Hussein Khalid and 16 others v Attorney General and 2 others* (2014)eKLR Quoting from *Francis Mbugua v Commissioner of police and 2 others*, Pet No 79/2012 restated in *Elory Kraneveld v Attorney General and 2 others*, Pet. No 153/2012 that;
- “Whereas every person has a right to the protection of the *constitution*, it is not in all cases that orders as prayed are granted. I say so because the petitioner has conveniently forgotten that the *constitution* must be read holistically for its real meaning and import to be discerned. Our judicial system is not one where a judge is granted such powers as to investigate criminal complaints. That power lies in article 157(4) of the *constitution*. Further, whether or not investigations leading to the petitioners arrest disclosed an offence or not is not for this court to determine as I am not seized of the evidence presented against him. The petitioner has literally jumped the gum because he has presented his defence of innocence not before the trial court, but this court. His actions are premature.
- 25 And in *Kuria and 3 others v Attorney General* (2002) 2 KLR6 (also relied on by Justice Lenaola), the court held in part;
- “The effect of criminal prosecution on an accused person is diverse, but so also are their purpose in the society which is immense. There is public interest underlying every criminal prosecution, which while being jealously guarded, at the same time there is a private interest on the rights of an accused person to be protected, by whichever means..... given these bipolar considerations, it is imperative for the court to balance these considerations vis-a-vis the available evidence, an order of prohibition cannot also be given without any evidence that there is manipulation, abuse or misuse of the court process or that there is a danger to the right of the accused person to have a fair trial.”
- 27 It is the petitioner who relied on the Hussein Khalid case quoted above.
- 28 Lastly, courts have frowned against and discouraged termination of criminal trials mid-way by way of interlocutory applications. And for good cause. Cases ought to be determined on merit based on the evidence and the applicable law. And none other than the Court of Appeal of Kenya has come



out very authoritatively on this point. In the case of *Thomas Patrick Gilbert Cholmondeley v Republic* (2008)eKLR, the court held;

“First, the fact that the trial judge has made an adverse ruling against an accused person in a criminal trial does not end and cannot mean that the judge will inevitably convict. The judge might well acquit in the end and the adverse ruling if it amounted to a breach of a fundamental right, falls by the way side and causes no harm to such an accused. The advantage of that cause is that the long delay in hearing of the charge is avoided and in the event of a conviction, the matter can be raised on appeal once and for all..... we think it is against public policy that criminal trials should be held up in this fashion, and it is our hope that lawyers practicing at the criminal bar will appropriately advise their clients so as to avoid unnecessary delays. We should add that in future, if such appeals are brought the court of the appeal be stayed pending the conclusion of the trial in the High Court.”

29 The sum total is that I do not find any merit in the appeal filed herein by the appellant. The appellant’s appeal dated December 4, 2019 and filed on January 29, 2020 is accordingly wholly dismissed.

D.O. OGEMBO

JUDGE

26.07.2022

COURT

Judgment read out in open court in presence of the appellant and Ms. Chege for the state.

D. O. OGEMBO

JUDGE

26.07.2022

