



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES ACT

ACEC REV. E002 OF 2020

REPUBLIC.....PROSECUTOR/APPLICANT

VERSUS

RICHARD LANGAT KERICH.....1ST ACCUSED/RESPONDENT

MARWA FADHILI CHACHA.....2ND ACCUSED/RESPONDENT

DAVID KIPRUTO CHINGI.....3RD ACCUSED/RESPONDENT

PETER NGUNJIRI WAMBUGU.....4TH ACCUSED/RESPONDENT

NDIBA WARIOKO.....5TH ACCUSED/RESPONDENT

MERIDIAN MEDICAL CENTRE.....6TH ACCUSED/RESPONDENT

RULING

INTRODUCTION

1. The accused persons herein for record purpose took their plea on 7/10/2013 before DM KULEKYO then Ag. Chief Magistrate, to several charges in respect of tender for the provision of medical scheme for civil servants and disciplined services awarded to Meridian Medical Centre Ltd to the tune of Ksh.116,935,500.
2. Their trial has been ongoing before the Anti-Corruption Chief Magistrates court at Nairobi wherein a trial of 39 witnesses have since testified and their evidence recorded.
3. For the purposes of this ruling the prosecution on 21/3/2020 concluded taking of the evidence in chief of the Investigating Officer who testified as PW39, whereupon Mr. Monda, the recorded prosecutor made an oral application, under the provisions of Section 214 of the Criminal Procedure Code, to make an amendment to the sums in the charge sheet from the original amended figure of Kshs.43,498,125 to a figure of Kshs.46,080,937.45 based on the evidence tendered by PW39 – IGNATIUS WEKESA.
4. As expected the said application was opposed by the accused persons through their Advocates on record and by a ruling issued on 23rd day of July, 2020 the learned Magistrate (L.N. Mugambi) dismissed the said application in the following terms: -

“The above judicial authorities demonstrate that the right to recall witnesses after an amendment of the charge is available to the accused person and nothing stops her from demanding it. The likelihood of the accused exercising that option here is this not preposterous since the defence in its submissions intimated it was one of the rights under consideration if this application is allowed.

I find that granting this application will most definitely impede expeditious trial in this case. Taking into account it has already taken us seven years, any further delay would be unreasonable especially coming when the matter is almost coming to a close. The accused right to an expeditious trial will obviously be infringed without any fault on their part but solely due to prosecutions failure to exercise proper diligence of introducing this amendment at the most convenient time.

To allow the amendment at this stage therefore will not in my view be in the best interest of justice. The prosecution cannot use the opportunity provided for the amendment of the charge to expand, the extent of possible liability in this case against the accused persons who have defended themselves against culpability for the lesser amount for the last seven years. Furthermore, the potential to prolong the trial should accused exercise the right to recall witnesses for cross examination is real and will lead to further delay in the finalization of the case.”

APPLICATION

5. Being aggrieved by the correctness, legality and or propriety of that decision, the applicant (DPP) approached this court by way of a letter dated 24/7/2020, pursuant to Article 165(6)(7) of the Constitution and Sections 362 and 364 of the Criminal Procedure Code on the ground that no objection was raised in respect of accused persons in Count III and therefore the court erred in upholding objections by Advocates for 4th, 5th and 6th accused persons, which had no bearing on Count III.

6. It was contended that the application was made at an appropriate time and that the intended amendment was based on the figures which were on the statement by the Investigation Officer, which had been supplied to the defence and which they had adopted as part of its material, therefore they will not be prejudiced, as the application was based on Section 214 of CPC, which allow the prosecution to file amended charge sheet.

SUBMISSIONS

7. Directions were given to the effect that the application be heard by way of Affidavits and written submissions, which were duly filed and which for the purposes of this ruling I will summarize as follows: -

APPLICANT'S SUBMISSIONS

8. It was submitted that the intended amendment was in respect of the 1st and 2nd accused person only, who did not file any written submissions in opposing the intended amendment. It was contended that the application was not opposed, hence the trial magistrate erred in rejecting the same. It was submitted that the amendment was necessitated by the cross examination of the witness and since the accused persons were aware of the statement, there would be no prejudice suffered should the application be allowed. It was contended that the trial Magistrate failed to take into account the provisions of Article 159 of the Constitution and Sections 214 and 382 of the Criminal Procedure Code.

9. It was submitted further that the right to recall witnesses upon an amendment was not mandatory and therefore the trial court misapprehended the exercise of discretion, in so far as the intended amendment was concerned. It was contended that the trial Magistrate did not deal with each count separately and on its own merit.

1ST ACCUSED SUBMISSIONS

10. It was submitted that the proposed amendment to the charge sheet would substantially change the amount the prosecution alleged that the accused had obtained by false pretense which would then go to the root of the evidence tendered. It was contended that the trial magistrate rightfully held that the amendment would have been highly prejudicial to the accused person who have undergone the trial for seven (7) years. Reliance was placed on the following cases: -

a) **REPUBLIC v JUDITH ACHOLA MULALA [2019] eKLR** on the scope of Revisional jurisdiction.

b) **JOSEPH WAWERU v REPUBLIC [2014] eKLR** on the need for the court to be satisfied that there exist to a sufficient extend circumstances entitling it to vary order or decisions of the lower our if it is shown that it acted upon a wrong principle.

2ND AND 3RD ACCUSED SUBMISSIONS.

11. It was submitted that Article 105(6) and (7) of the Constitution only related to Judicial Review and not application for review. It was submitted that the trial court was entitled to suo moto reject an amendment which was made at the tail end of the trial and therefore the application was incompetent. It was contended that the application for Revision was expressly barred by the provision of Section 364 of the Criminal Procedure Code and the application before the court should be struck out.

4TH AND 6TH ACCUSED SUBMISSIONS

12. On their behalf, Mr. Wandugi, submitted that where an appeal lies against a decision of the trial court, as per the provision of Section 364(5) of the Criminal Procedure Code, the court may not be moved by way of revision. It was submitted that where a court exercises discretion, as in the present case, then the applicant must show that the said discretion was not properly exercise. In support of the line of submission reliance was placed on the case of **LEON OJIAMBO OJIAN & ANOTHER v LILIAN MUSHELE WAFULA & ANOTHER [2018] eKLR**.

13. It was submitted further that the applicant has not shown that the trial court abused the exercise of Judicial discretion, to enable this curt interfere with its decision. It was stated that the jurisdiction of the court under Section 362 of the CPC, is only limited to the issue of correctness, legally and propriety of the decision. It was contended that the application to amend the charge sheet was made after the matter had been in court for seven (7) years and the last of 39 witnesses called and therefore the Chief Magistrate was entitled to reject it under the provision of Article 50(2) (e) of the Constitution.

5TH ACCUSED SUBMISSIONS

14. It was submitted that the same had a right to a fair and expeditious hearing under Article 50 of the Constitution and that throughout the trial the same had endeavoured to answer the charges brought against them, through which they uncovered the error in the amounts stated in Count III and IV of the charge sheet, which the Investigating Officer was unable to explain through re-examination, leading to the application before the trial court, which if allowed would be prejudicial to the accused persons.

15. It was contended that the trial had taken over five (5) years and should the court allow the prosecution to amend the charge sheet, the accused persons will have to recall all the witnesses, which would lead to a longer period of time to conclude the matter, to the detriment of the accused persons. In support of the submissions, the case of **REPUBLIC v MICHAEL EZRA MULYOOWA [2015] eKLR** where the court held that if the prosecution was to be allowed to amend or substitute the charge, then it would mean that the trial of the Respondent would take a longer period, if he chose to exercise his right to recall all the 17 witnesses who had testified for cross examination.

16. In a rejoinder, Mr. Monda submitted that the right to appeal had not crystalized, as the prosecution had not closed its case and therefore Section 364(5) was not applicable. It was submitted that there was an apparent error on the face of the record and therefore the discretion was not properly exercised, since there was no objection to the amendment of Count III.

DETERMINATION

17. I have taken into account the affidavits, submissions by the parties herein and the authorities in support of their respective position, as regards the application for revision filed by the prosecution herein. The following facts remain undisputed. That the Respondents have been facing trial for a period of about seven (7) years and that the prosecution to prove its case, has called and had examined a total of thirty-nine (39) witnesses.

18. It is further not in dispute that the prosecution had called its final witness, as PW39 who was examined, cross examined and re-examined, when the application for amendment of the charge sheet was made by the prosecution, arising from the content of his evidence, which the trial court dismissed upon reasons stated in paragraph 4 herein, which the court is being asked to revise.

19. The revision powers of this court is statutory granted under Section 362 of the Criminal Procedure Code and Article 165(b) and 171 of the Constitution which allows the court to call for the proceedings in question to satisfy itself as to the correctness, regularity or legality of any decision or order by the trial court. The object of the revisional jurisdiction of the High Court, is to enable the court in appropriate cases, to correct manifests irregularities or illegalities and to give appropriate direction on the same. See **JOSEPH NDUVI MBUVI v REPUBLIC [2019] eKLR**

20. In **DPP v JACKSON CHERONO [2019] eKLR** the court had this to say on the seven issues.

“15. Criminal process is not all and only about the fair trial of the accused; there is also the interest of the complainant victim of the criminal offence as attested to the emerging judicial system of recognition of the victim’s interest by such legislation as Victim Protection Act No. 17 of 2014, particularly section 4 (2) (b) thereof) and the very provision for victim impact statements in criminal proceedings. See Part X of the Judiciary Criminal Procedure Bench Book, 2018, at pp. 93-4. Section 4 (2) (b) of the Victim Protection Act, 2014 provides as follows:

“(2) Subject to subsection (1), a court, administrative authority or person performing functions under this Act shall ensure that—

(a);

(b) Every victim is, as far as possible, given an opportunity to be heard and to respond before any decision affecting him or her is taken;”

16. The DPP’s allegation of bias on the part of the trial Court is not proper subject of a revision. The Counsel may have taken it up by an application for recusal of the trial Court, and this Court cannot deal with the question except in a valid appeal for determination thereon.

Conclusion

17. On the decision of the trial Court subject of the revision, I think it is plainly wrong to close the case for the Prosecution without regard to the interest of the complainant in the criminal complaint subject of the charge. The Court may have considered granting the complainant leave to prosecute the case privately in accordance with the law, and then deal with the defaulting Prosecutor in accordance with the provisions of the Advocates Act as officer of the Court.

18. The order closing the Prosecution case was made without jurisdiction and it must be declared null and void, as section 207 of the Criminal Procedure Code as interprets such closure by the Prosecution itself. Upon refusal of the adjournment, the Court shall have called upon the complaint to prosecute the case as a private Prosecution, and the Prosecution would only have been closed upon the complaint indicating that he had no further witnesses to call.”

21. I am persuaded by the above authorities and find that the application by the prosecution is properly before the court, as no right of appeal had arisen out of the ruling of the trial court, disallowing an application for amendment of the charge sheet.

22. The only issue therefore for determination is whether the ruling of the trial court impugned was irregular, illegal or incorrect. Whereas the law allows the prosecution to amend the charge sheet at any time before the close of the prosecution case, under Section 214 (1) of the Criminal Procedure Code, that power is subject to calling upon the accused person to plead to the altered charge and the same has a right to demand that witnesses or any of them be recalled and give their evidence a fresh or be further cross examined by the accused or his/her Advocate.

23. It is on the basis of this right, which made the court to exercise his discretion to reject the Applicant's application for amendment of the charge sheet, for the reasons stated in the ruling, which finds support in the decision in **REPUBLIC v EZRA MULYOOWA (Supra)**.

24. Having looked at the proceedings before the lower court and in particular the ruling complained of, I am of the view and find that the learned trial Magistrate, exercised his discretion properly in rejecting the application for amendment and it is not for this court to substitute the exercise of his discretion with his, by way of a revision as opposed to an appeal.

25. I have taken note of the period the trial has taken and how many amendments were allowed by the trial court, during the period of trial and having taken into account the right to fair trial under Article 50 of the constitution and the nature of the proposed amendment, which does not go to the root of the charges the accused persons are facing, but only as regards the mathematical calculation of the figures in question, agree with the trial court, that the right of the accused persons to expeditious trial, while weighted against the right of the prosecution to amend the charge sheet, tilt in favour of the accused person.

26. The other issue worth noting is whether having re-examined its last witness in the matter, the prosecution has closed its case so as the only issue which was remaining was for the prosecution to inform the court that it had closed its case PW39 being the last witness as Section 214 only allows an amendment before the close of the case and is silent when calling of the last witness means the close of the prosecution case.

27. I therefore find no merit on the application herein which I hereby dismiss and direct that the lower court file be placed before the trial court for further proceedings to its conclusion.

Dated, signed and delivered virtually at Nairobi this 27th day of January, 2021

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J. WAKIAGA

JUDGE

In the presence of:-

Ms Wangia for Mr. Monda for DPP

Ms Wandugi for Wandugi for 4th/6th Respondent

Mr. Wandugi for Bundotich for 1st Respondent

Ms Mongare for 5th Respondent

Court Assistant - Potishoi