



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL DIVISION**

**MISC. CRIMINAL APPLICATION NO. 64 OF 2019**

**BETWEEN**

**CHRISPINE ODHIAMBO ATEGO.....1<sup>ST</sup> PETITIONER**

**TRIZA MWANYIKA.....2<sup>ND</sup> PETITIONER**

**TUBMAN OTIENO OCHOGO.....3<sup>RD</sup> PETITIONER**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT**

**RULING**

**Introduction.**

1. The petitioners herein were charged in Mombasa Chief Magistrates Court Anti-Corruption Case No. 6 of 2018. In the said trial they raised a preliminary objection which was upheld by the trial magistrate as follows:

**“As conceded by the counsel, the binding judicial authority in Engineer Michael Kamau case sets out the correct position. The position explained is that the accused persons cannot be prosecuted on the basis of recommendation to the Director of Public Prosecution by an improperly constituted Ethics and Anti-Corruption Commission. This seems to be the legal position regardless of the stage of the investigations when the commission ceases to have the right number of commissioners. The prosecuting counsel has not shown that the Director of Public Prosecution acted on information received from other sources other than the EACC.”**

2. In conclusion, the trial magistrate said that,

**“For avoidance of doubt, the Ethics and Anti-Corruption Commission was at liberty to act as appropriate if properly constituted in accordance with the constitution and the law.**

3. The state was aggrieved by the determination and they filed an application for revision of the said orders and Hon Njoki Mwangi J. in H.C. CR. Revision No. 384 of 2018 revised the said order upholding the preliminary objection for the reason that, what was brought as a preliminary objection required proof by way of affidavit evidence and therefore confused factual issues with points of law.

4. The Honourable Judge distinguished the holding in Michael Sistu Mwaura Kamau from the Petitioner’s case as the former was a Constitutional Petition and could not stand on the same footing as the instant case. The judge also faulted the trial magistrate for failing to cite the section of the law under which he discharged the Petitioners.

5. Subsequent to the ruling on revision in Criminal Case No. 384 of 2018, the Petitioners filed Petition No. 37 of 2019 pursuant to Articles 22, 23, 47, 79, 159, 165 and 250 of the Constitution of Kenya 2010 seeking for a Permanent Injunction to restrain the Respondent from charging them from the recommendation of the impugned investigations carried out between the period 25<sup>th</sup> May, 2015 and 18<sup>th</sup> January, 2016.

6. They also sought that their constitutional freedoms under the Bill of Rights be preserved. They also sought for costs of the Petition. The petition was filed concurrently with an application under Certificate of Urgency dated 7<sup>th</sup> May, 2019 and supported by affidavits of the 3 petitioners separately seeking stay of proceedings in Mombasa Chief Magistrates Court A.C.C No. 6 of 2018 pending hearing and determination of the Petition herein.

7. The Respondents/state filed grounds of opposition dated 23<sup>rd</sup> May, 2019 opposing the application to stay the proceedings in A.C.C No. 6 of 2018. The Application dated 7<sup>th</sup> May, 2019 was however withdrawn on 18<sup>th</sup> July, 2019 as having been overtaken by events and directions taken that the Petition is heard by way of written submissions after Lameck Okun swore and filed Replying Affidavit on 13<sup>th</sup> March, 2020 opposing the Petition.

8. The Petitioners in their joint submissions dated 13<sup>th</sup> October, 2020 and filed on even date argued that as much as the decision to charge is vested with the Director of Public Prosecutions the basis of the decision ought to be regular. It was contended that the decision to charge petitioners from recommendations of an impugned investigation was a gross violation of the law and a breach of their constitutional freedoms.

9. It was submitted that the constitution of EACC is of paramount importance as it determines the authenticity of investigations, recommendations and decisions made to charge any accused persons. It was argued that the commissions' officers lacked the legal capacity to purport to investigate this case for reasons that 3 commissioners resigned from the commission on 31<sup>st</sup> March, 2015, 30<sup>th</sup> April, 2015 and 12<sup>th</sup> May, 2015 respectively and therefore the commission was not properly constituted and lacked legal capacity to conduct and continue with investigations.

10. It was argued that the findings of the commission's officers were thus irregular. The Petitioners relied in the holding in Michael Sistu Mwaura Kamau vs EACC & 4 others in which the Court of Appeal held that EACC can only carry out investigative functions when the full membership of the commission is in office. It was submitted that the prosecution was founded on an illegality. The Petitioners also relied in the case of Ezekiel Kipkoech Chirchir vs Republic (2019) eKLR where it was held;

“This is the situation that prevails in the present case. On the authority above decision therefore which is binding on this court, I am constrained to find that the prosecution of the Appellant on the basis of a report and recommendations of the EACC while it was improperly constituted cannot stand.”

11. For the reason that EACC didn't have the minimum number of commissioners prescribed by Article 250 of the Constitution, the Petitioners urged the Court to injunct the Respondents from prosecuting them based on investigations carried out between 25<sup>th</sup> May, 2015 and 18<sup>th</sup> January, 2016 as the Constitutional freedoms of the petitioners was at stake and they sought the Court's protection.

12. The Respondents in their brief submissions confirmed that commissioners Jane Onsongo and Irene Keino resigned on 31<sup>st</sup> March, 2015 and 30<sup>th</sup> April, 2015 respectively followed by the resignation of the Chairman Mumo Matemu on 12<sup>th</sup> May, 2015. They however argued that from the holding in Michael Sistu Mwaura Kamau vs EACC & 4 others (2017) eKLR it was crystal clear that the functions of EACC and those of the commissioners are distinguished and the functions of investigation and making recommendations to the DPP belong corporately to EACC and not the Secretary or the secretariat alone.

13. The Respondents were in agreement that investigations and the recommendations to the DPP must be authorized and sanctioned by the commissioners who are required to exercise oversight over the secretariat, and overall to give strategic directions in the performance of its actions under the Act.

14. The Respondents argued that their response at paragraph 10 of the Replying Affidavit confirms that by the time the Commission was not properly constituted, the investigations against the 1<sup>st</sup> Petitioner had already been commenced and it is not based on the date he recorded his statement. In regard to the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners it was argued that the holding in Michael Sistu Mwaura Kamau vs EACC & 4 others (2017) eKLR held that the secretariat and the secretary are an integral part of the commission that provides technical, professional and administrative skills necessary to fulfill functions of the EACC.

15. It was submitted that all the requirements of the law were complied with and recommendations by EACC to DPP under Section 35 of ACECA was transmitted on 27<sup>th</sup> April, 2018 and the DPP sanctioned the prosecution of the petitioners on 13<sup>th</sup> June, 2018. It was argued that this matter was distinguishable from the case of Michael Sistu Mwaura Kamau vs EACC & 4 others (2017) eKLR.

16. The Respondents submitted that the Petitioners failed to demonstrate any of the Constitutional provisions that was violated to warrant the Court to grant the orders sought.

17. Having considered the Miscellaneous petition herein together with the supporting affidavits and the Replying affidavit as well as 3<sup>rd</sup> petitioner's supplementary affidavit sworn on 10<sup>th</sup> August, 2020, the issues for determination are;

- a) Whether investigations and recommendations to charge the petitioners was irregular and in violation of the law and the petitioners constitutional freedoms.
- b) Whether Constitutional freedoms of the petitioners was breached by being charged in Mombasa CMC ACC No. 6 of 2018.
- c) Whether the petitioners have satisfied the court that they are entitled to the equitable orders of permanent injunction to restrain the respondents from charging them.

18. It is not in dispute that, the Ethics and Anti-Corruption Commission had its commissioners including the chairman resign in succession of each other as from the 31<sup>st</sup> day of March, 2015, 30<sup>th</sup> April, 2015 and 12<sup>th</sup> May, 2015.

19. The petitioners relied heavily in the holding in Michael Sistu Mwaura Kamau v EACC & 4 OTHERS (2017) to support their position that the investigations conducted between 25<sup>th</sup> May, 2015 and 16<sup>th</sup> January, 2016 should not be used to charge them as the same were not authorized and sanctioned by a fully constituted commission. I have read through the decision above, and the Court of Appeal had this to say;

“This Appeal succeeds on the technical ground that the EACC was not properly constituted at the time it completed the investigations and forwarded its report and recommendations to the DPP. From the foregoing, Anti-Corruption constitutional edicts the parties are at liberty to proceed as they deem necessary on the basis of a properly constituted EACC and within the dictates of the constitution and the law.”

20. From the above holding, it is clear that the current petition is distinguished in that by the time investigations herein were commenced the commission had the minimum number of commissioners in place who sanctioned investigations against the petitioners. The 1<sup>st</sup> and the 2<sup>nd</sup> petitioner’s recorded their statements on 17<sup>th</sup> March, 2015 long before commissioners Jane Onsongo and Irene Keino resigned on 31<sup>st</sup> March, 2015 and 30<sup>th</sup> April, 2015 respectively. This is a confirmation that the investigations commenced and were sanctioned by a properly constituted commission.

21. Apart from the brief statement recorded by the 1<sup>st</sup> petitioner on 6<sup>th</sup> November, 2015 and 5<sup>th</sup> December, 2015 as well as the statement of the 3<sup>rd</sup> Petitioner recorded on the 17<sup>th</sup> June, 2015, it has not been shown that other witnesses in the trial before the trial magistrate were interrogated in the absence of a properly constituted commission.

22. The recommendation to the DPP to prosecute the petitioners was communicated by a letter dated 27<sup>th</sup> April, 2018, and the same was signed by the Chairman of the commission as well as the secretary to the commission. This date falls outside of the date when the Petitioners allege that the commission was not properly constituted.

23. In view of the foregoing, I find that the recommendation to charge the Petitioners was not irregular or in violation of the law and the Constitution. The same did not therefore infringe on their Constitutional freedoms.

24. On whether the Respondents should be permanently enjoined from charging the petitioners, Article 50 (2) (o) provides as follows;

“Fair hearing

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right;-

(a) .....

(o). not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted

25. The Petitioners herein have not been acquitted or convicted of the charges which they want this court to restrain the respondents from bringing against them. When the trial magistrate upheld the petitioners’ preliminary objection, he said that the commission was at liberty to act as appropriate if properly constituted in accordance with the Constitution and the law. In Michael Sistu Mwaura Kamau, the Court of Appeal also held that the parties are at liberty to proceed as they deem necessary on the basis of a properly constituted EACC and within the dictates of the Constitution and the law. This Court cannot therefore, issue injunctive orders to restrain the charging of the Petitioners for the reasons that it would not only go against the grain and spirit of the Constitution but are also offences that are of public interest as the provisions of Public Procurement & Disposal Act No. 3 of 2015 are alleged to have been breached. The application/petition disallowed.

It is so ordered.

Dated, signed and delivered at Mombasa this 11<sup>th</sup> day of February, 2021

HON. LADY JUSTICE A. ONG’INJO

JUDGE