REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION & ECONOMICS CRIMES DIVISION

CORAM: MUMBI NGUGI J

ACEC APPEAL NO E005 OF 2021

DAVID NJILITHIA MBERIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The appellant/applicant (hereafter 'the applicant') is the Member of County Assembly for Karen, Nairobi City County. He was charged in Milimani Anti-Corruption Case No. 7 of 2019 with three offences under section 6(1)(a) as read with section 18 of the Bribery Act No. 47 of 2016. He was found guilty as charged in counts II, III and IV. For the offence in Count II, he was sentenced to a fine of Kshs. 300,000 in default to serve 12 months' imprisonment. For the offence in Count III, he was to pay a fine of Kshs. 200,000 in default to serve 12 months' imprisonment while for the offence in Count IV, he was sentenced to a fine of Kshs. 200,000 in default to serve 12 months' imprisonment on each count, the sentences to run consecutively.

2. In addition to the sentences on the three counts, the trial court directed that the applicant shall forthwith be barred from holding public office as a member of County Assembly in accordance with the law. The court further directed that a certified copy of the judgment, sentence and order be forthwith served upon the Speaker of the Nairobi City County Assembly for his compliance and record.

3. Aggrieved by both his conviction and sentence, the applicant has filed the present appeal. He also filed an application dated 5th March 2021 under sections 356 and 357 of the Criminal Procedure Code, Article 194 of the Constitution, section 63(4) of the Anti-corruption and Economic Crimes Act and section 18(8) of the Bribery Act. He seeks, *inter alia*, the following orders:

> ***i. That the Court be pleased to stay the execution of the sentence and order made on 25th February 2021 barring the Applicant from serving as a Member of the County Assembly pending the hearing and determination of the application.***
>
> ***ii. That the Court be pleased to stay the execution of the sentence and order made on 25th February 2021, barring the Applicant from serving as a member of County Assembly pending the hearing and determination of the appeal, HCACECA/E005/2021.***

4. In his affidavit in support of the application, the applicant deposes that he was convicted in Milimani Anti-Corruption Case No. 7 of 2019 of three offences all under section 6(1)(a) as read together with section 18 of the Bribery Act No. 47 of 2016. The trial court had also, consequent to his conviction, barred him from holding his public office and had directed that the judgment be sent to the Speaker of the County Assembly for action. The applicant contends that upon receipt of the judgment, the Speaker will declare his seat vacant, thereby rendering his appeal against conviction and sentence nugatory.

5. He further contends that it would be prejudicial and irreparable for him to lose his seat should his conviction be eventually quashed and the sentence set aside, thereby compromising his constitutional right of appeal under article 50(2)(q). The applicant contends that his appeal has overwhelming chances of success because his sentencing under section 18(8) of the Bribery Act barring him from serving as an elected Member of County Assembly is outlawed by Article 194 of the Constitution and section 63(4) of ACECA. He has sought orders from this court as the trial court declined to hear his application for stay on the basis that it was *functus officio*.

6. In response to the application, the respondent filed grounds of opposition dated 12th March 2021. The respondent contends, first, that the appeal is not arguable and has no chance of success since the evidence on record adduced by the prosecution during the trial was sufficient to support both the conviction and sentence. The respondent argues further that the application is misconceived as the trial magistrate acted within the law and there was no illegality in passing the sentence barring the applicant from holding public office. It is the respondent's case, finally, that the applicant was properly convicted and is serving a lawful sentence.

7. The application was canvassed by way of written submissions which were highlighted during the virtual hearing on 22nd March 2021. The applicant was represented by Learned Counsel, Mr. Koceyo, Mr. Awele and Mr. Kurauka, while Ms. Ndombi appeared for the respondent.

The Applicant's submissions

8. Learned Counsel, Mr. Awele, submitted that the applicant would confine himself to the sentencing section dealing with vacation of office. He informed the court that the applicant had already paid the fine of Kshs. 700,000 in fulfilment of the sentence. According to the applicant, the only issue for the court's determination was whether he was entitled to an order of stay of execution of the sentence and order made on 25th February 2021 barring him from serving as a Member of County Assembly pending the hearing and determination of his appeal before this court.

9. The applicant submitted that the Learned Magistrate fundamentally erred by construing section 18(8) of the Bribery Act in isolation so that it operates to remove a state or public officer from office, thereby creating a vacancy in the said office. It was his submission that the said section reads that it applies in accordance with the provisions of the Constitution, which means that the said measure is subject to the Constitution, the Anti-Corruption and Economic Crimes Act (ACECA), the Public Officers Ethics Act, 2003 and the Leadership and Integrity Act, 2012.

10. According to the applicant, the office of a Member of County Assembly is a constitutional state office established pursuant to Article 177. That pursuant to Article 193 (3) of the Constitution, a vacancy in the office of a Member of County Assembly cannot be triggered on grounds enumerated under Article 193(2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted. It was his contention therefore that this application is distinct from the usual applications for stay pending appeal and is not subject to any other test. The applicant placed reliance for this submission on the decision in **Patrick Muguro Mwangi & Another v Zakariah Eliud Gichohi & 2 Others (2013) eKLR** on the interpretation of Article 193(3).

11. The appellant further asserted, while surmising that the sentence meted out by the trial court was based on Article 193(2)(f) on a vacancy arising from a Member of County Assembly serving a sentence of imprisonment of six months, that payment of a fine is not a ground warranting the barring of the applicant from holding office. He relied in support on the South African decision in **Jaga v Donges, NO and Another 1950(4) SA 653(a)** cited with approval by this court in the case of **Francis Mwangi v Ethics and Anti-Corruption Commission (EACC) and 3 Others (2016) eKLR**. He urged the court to grant the orders that he seeks and stay the sentence imposed by the trial court.

The Respondent's Submissions

12. The respondent relied on its grounds of opposition and submissions dated 12th and 19th March 2021 respectively. Learned Counsel, Ms. Ndombi, submitted that the trial court did not err in applying the provisions of section 18(8) of the Bribery Act. The respondent cited Article 10 of the Constitution that sets out the national values and principles binding public officers, specifically Article 10(2) (c) on good governance, transparency and accountability. The respondent further cited Article 73(2) (c) which provides for selfless service and honesty in execution of public duties as a guiding principle of leadership and integrity.

13. In relation to section 18(8) of the Bribery Act, the respondent submitted that the consequence of a convicted state or public officer being barred from office advances the principles outlined under Article 10 and 73 of the Constitution in consonance with the holding of this court in the case of **Moses Kasaine Lenolkulal v DPP (2019) eKLR**. In its view, the applicant's grounds of appeal lack merit. It submitted that the trial court had properly analysed the evidence adduced by the prosecution and defence in arriving at a proper and lawful conviction and sentence and the application for stay pending appeal should be dismissed as it has no merit.

Analysis and Determination

14. I have considered the pleadings and submissions of the parties. I believe that two issues arise in this matter. First, whether the appellant has made out a case for stay of the judgment and sentence against him. The second issue flows from the first: whether the provisions of Article 193 of the Constitution are sufficient, in the absence of a proper basis having been laid for stay of the judgment and sentence, to issue the orders of stay sought by the applicant.

15. The applicant was charged under the provisions of the Bribery Act. Section 18(8) of the Act which is the basis of the limb of the sentence of the trial court challenged in the present application, provides as follows:

> ***"If the convicted person is a State officer or a public officer, such person shall be barred from holding public office, in accordance with the provisions of the Constitution, the Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003), the Public Officer Ethics Act, 2003 (No. 4 of 2003), and the Leadership and Integrity Act, 2012 (No. 19 of 2012)."***

16. The impugned order No.4 of the sentenced based on the above provision reproduced verbatim is as follows:

> ***"In view of the provisions of section 18(b) (sic) of the Bribery Act No. 47 of 2016 the 1st accused shall forthwith be barred from holding public office as a Member of County Assembly in accordance with the law and therefore a certified copy of the judgment herein and this sentence order shall be forthwith served upon the Speaker of Nairobi City County Assembly for his compliance***

and record."

17. The applicant asks this court to stay the judgment and sentence of the trial court pending the hearing of his appeal. Although the appeal was ready for hearing on the day this application was canvassed, the applicant did not wish to proceed with it. According to the applicant, as a state officer, the declaration of a vacancy in his office ought to be stayed pursuant to the provisions of Article 193 of the Constitution pending the hearing and determination of the appeal. The question of whether the judgment and sentence should be stayed before the substantive appeal is heard required to be determined first as it would become moot the minute the substantive appeal is heard.

18. It was his argument further that the benefit of Article 193(3) is only relevant and justiciable during the pendency of the appeal. The minute the appeal is heard, the applicant runs the risk that the Speaker may declare his seat vacant. He argued, further, that whatever the outcome of the appeal, the benefit of Article 193(3) is lost once the appeal is heard. The court should therefore ensure that the applicant, who has a right of appeal all the way to the Supreme Court, gets the benefit of what he is constitutionally entitled to.

19. From the arguments set out above, I believe that there are two distinct limbs in this matter. The first relates to what is substantively before this court for determination, which is an appeal against a criminal conviction. The applicant has been convicted of a criminal offence and has paid the penalty imposed on him in the sentence, a fine of Kshs 700,000. He has preferred an appeal against his conviction and sentence. In my view, this court is required to exercise its jurisdiction to deal with the questions that arise within the purview of the criminal law. In exercising its jurisdiction in that regard, the court is required to address the question whether the applicant has demonstrated a basis for staying the judgment and sentence of the trial court.

20. As I observed in the ruling in this matter dated 16th April 2021, stay of execution of sentence and judgment in criminal cases is granted only in exceptional circumstances. In its decision in **Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others [2018] eKLR**, the Court of Appeal observed as follows:

> ***"…for a purely criminal appeal, stay is granted only (in) exceptional circumstances and the threshold for grant of relief such as bail pending appeal is a lot higher in that one needs demonstrate an appeal with overwhelming chances of success (See OPONDO vs. R [1978] KLR 251) whereas in civil stay of execution all one needs show is a single arguable point which is not one that must necessarily succeed."***

(Emphasis added)

21. As a court directing its mind to the appeal against criminal conviction and sentence of the applicant, the court is, in my view, thus required to be satisfied that the applicant's appeal has overwhelming chances of success before it can exercise jurisdiction to grant orders of stay pending appeal.

22. The applicant was convicted and sentenced under the provisions of the Bribery Act, section 18(8) of which I have set out earlier in this analysis. The applicant is a state officer as defined in Article 260 of the Constitution. He has been convicted of a bribery offence in accordance with the provisions of the Bribery Act. In directing that the applicant is barred from holding public office and that the judgment of the court should be forwarded to the Speaker of the County Assembly of Nairobi, the court was acting in accordance with the statutory requirements under the Bribery Act. The applicant has not argued that the court has meted out an erroneous or manifestly excessive sentence.

23. Indeed, in arguing his application for stay pending appeal, the applicant has not challenged the sentence of the court in relation to his conviction for bribery. He has not attempted to show the court that his appeal has overwhelming chances of success, which is a critical consideration in determining whether or not to issue orders of stay of the judgment and sentence of the trial court. As a court seized of an application for stay of a judgment and sentence in a criminal conviction, this court does not have anything before it that satisfies it that there is a basis for issuing the orders that the applicant seeks.

24. The applicant has however, sought to remove his application from the critical requirements in determining whether to grant orders of stay of sentence and judgment, and this is the second limb of the issues for consideration in this matter. The applicant has argued that he is entitled to orders of stay solely because of the provisions of Article 193(3) of the Constitution and section 63(4) of ACECA. Further, that these provisions exclude application of section 18(8) of the Bribery Act as the applicant holds office subject to Article 194 of the Constitution that provides for removal from office of a Member of County Assembly.

25. Article 193(2) provides for disqualification from election as a Member of a County Assembly, and two of the grounds for disqualification provided at sub-article (2) are:

> ***(f) is serving a sentence of imprisonment of at least six months; or***
>
> ***(g) has been found, in accordance with any law, to have misused or abused a State office or public office or to have contravened Chapter Six.***

26. The applicant relies in particular on Article 193 (3) which states that:

> ***(3) A person is not disqualified under clause (2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted.***

27. The applicant relies also on section 63 of ACECA which is titled ***"Suspension, etc., if convicted of corruption or economic crime"*** which states that:

(1) A public officer who is convicted of corruption or economic crime shall be suspended without pay with effect from the date of the conviction pending the outcome of any appeals.

(2) The public officer ceases to be suspended if the conviction is overturned on appeal.

(3) The public officer shall be dismissed if—

(a) the time period for appealing against the conviction expires without the conviction being appealed; or

(b) the conviction is upheld on appeal.

(4) This section does not apply with respect to an office if the Constitution limits or provides for the grounds upon which a holder of the office may be removed or the circumstances in which the office must be vacated.

28. The applicant is correct with regard to the textual provisions of the Constitution and ACECA. Three considerations, however, come to mind with respect to these provisions. The first and the most relevant for present purposes is whether these provisions are sufficient to require a court dealing with a criminal appeal to grant orders of stay of the judgment and sentence of the trial court when no material has been placed before it that meets the criteria for grant of stay of a judgment and sentence in a criminal matter. In my view, the response is in the negative, a view that I take for the reasons set out below.

29. First, the Bribery Act was enacted in 2016. Its preamble states that it is "***AN ACT of Parliament to provide for the prevention, investigation and punishment of bribery, and for connected purposes."*** In enacting the Act, Parliament was aware of the provisions of the Constitution and ACECA, yet it expressly provided that a public or state officer convicted of corruption shall be barred from holding public officer. In my view, the applicant having been properly found by a court of competent jurisdiction to be guilty of the offence of bribery under section 6 of the Bribery Act, the trial court properly made the declaration required under section 18(8) that the applicant is not fit to hold public office, and to direct the transmission of the judgment and sentence to the Speaker of the County Assembly of Nairobi. The decision of the trial court was in accord with the intention of the legislature in enacting the Bribery Act.

30. The second consideration relates to who has the duty to consider whether or not the applicant is entitled to the 'benefit' of Article 193(3) of the Constitution. In my view, that is a responsibility that falls on the Speaker of the County Assembly. The court seized of the criminal trial having done what it is required to do by statute, the question that the applicant asks the court to answer in the present application can only be addressed to the Speaker upon receipt of the judgment and sentence which includes the declaration that the applicant is unfit to hold public office.

31. Put differently, the appropriate time and forum for determining whether the applicant's seat should be declared vacant as a result of his conviction for the offence of bribery is when the judgment and sentence is presented to the Speaker, and he acts in accordance with his constitutional and statutory mandate. To ask this court to issue the orders directed at the Speaker to prevent him from acting in accordance with the statutory requirements upon conviction of the applicant is to be speculative in anticipating the actions of the Speaker. Like the court, the Speaker is under an obligation, as provided under the Constitution, to abide by the Constitution. Should he fail to, then the applicant is entitled to raise a constitutional issue, in an appropriate forum and appropriate proceedings, relating to his entitlement to the 'benefit' of Article 193(3).

32. The applicant has relied on the decision of Lenaola J (as he then was) in **Patrick Muguro Mwangi & Another vs Zakary Eliud Gichohi and 2 others** (supra) in which he stated as follows:

"8. Is the 3rd Respondent by fact of conviction and sentence alone disqualified from running as Governor? Clearly not because Article 193(3) was enacted to apply to persons in his situation and for good reason. A conviction can only be final when all possibility of appeal or review thereof has been exhausted. In his case, that possibility has not been exhausted because his appeal, although filed, is yet to be determined.

9. Arguments were made that Article 193(3) is absurd and gives what Article 193(2) has taken away. The argument made in that regard may find favour in other circumstances, but in the instant case, it is logical, reasonable and in line with Article 50(2)(q) which grants every accused person the right "if convicted, to appeal or apply for review, by a higher Court as prescribed by Law". The Constitution if read wholistically would clearly point to the fact that Article 193(3) applies squarely in the 3rd Respondent's favour and not to the favour of the Petitioners."

33. It is to be noted that in the above decision, the court was concerned with a petition brought against the 3rd respondent, then a candidate running for the office of the Governor of Murang'a County, and the Independent Electoral and Boundaries Commission (IEBC). The petitioners had sought nullification of the 3rd respondent's nomination certificate on the basis that he was not ethically qualified to run for the office of governor having been convicted and sentenced to six months' imprisonment on the offence of obtaining money by false pretences. The decision of the court in the petition, as I understand it, is that the petition was unmerited as the 3rd respondent, though he had been convicted, still had a pending appeal.

34. The applicant has also sought support in the case of **Francis Mwangi v EACC & 3 Others** (supra). This was a petition by the 3rd respondent in the **Patrick Muguro Mwangi & Another vs Zakary Eliud Gichohi and 2 others** (supra). In the petition, the court was concerned with the question whether the petitioner was entitled to orders stopping his prosecution for having allegedly given false information to the EACC in a form submitted to the IEBC prior to the 2013 general elections. Question 'm' in the form inquired: ***"Have you ever been convicted of any offence and sentenced to serve imprisonment for a period of at least six months."*** In reaching the conclusion that the intended prosecution of the petitioner had been instituted for an ulterior purpose and should not be allowed to continue, the court

stated as follows:

> ***"60. In the case of the petitioner, he had been tried and convicted of an offence, and sentenced to a fine of Kshs 400,000, and in default of the fine, a prison term of six months. His interpretation of the requirements of clause 9(m) of the form was that as the sentence he had been given was a non-custodial sentence, the custodial sentence being applicable only if he did not raise the fine, he properly responded to the question in the negative. He has relied in this regard n the decision in Jaga vs Donges (supra), in which the Court, in discussing the intention of the legislature in the legislation in question in that matter, observed that:***
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> ***"By using the word "imprisonment" it intended, as was correctly held in Rex v Phakim (supra), to exclude a sentence of a fine even although that sentence was coupled with an alternative of imprisonment in default of payment of the fine. For the main punishment intended by the convicting court was the payment of a fine."***
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> ***61. I agree with the petitioner on this point, and find the reasoning of the Court in the Jaga vs Donges case unassailable. The main sentence to which the trial court sentenced the petitioner was payment of a fine. He would only be subject to imprisonment if he failed to pay the fine."***

35. The facts and circumstances of the **Francis Mwangi v EACC & 3 Others** case are clearly distinguishable from the facts of the present case. Section 18 (8) of the Bribery Act is clear that where a public or state officer is ***convicted*** of an offence under the Act-regardless of the penalty imposed-the officer shall be barred from holding public office.

36. The third consideration relates to the interpretation to be placed on Article 193(3). This consideration is alluded to in the decision of Lenaola J in the case of **Patrick Muguro Mwangi & Another vs Zakary Eliud Gichohi and 2 others** (supra) in which he observed that:

> ***"Arguments were made that Article 193(3) is absurd and gives what Article 193(2) has taken away. The argument made in that regard may find favour in other circumstances…."***

37. The circumstances of the applicant in this matter may well present the opportunity to interrogate what the implications of Article 193(3) and 99(3) relating to the position of Members of Parliament are vis a vis the entire constitutional and legislative framework established under Chapter 6 of the Constitution, ACECA, the Public Officers Ethics Act, the Leadership and Integrity Act, and the Bribery Act.

38. This court alluded to the constitutional challenge posed by a provision similar to section 63(4), being section 62(6) of ACECA, in its ruling in **Moses Kasaine Lenolkulal v DPP** (supra). The provisions of section 62(6) and 63(4) of ACECA, as well as Articles 193(3) and 194(1) (g) of the Constitution, appear to be in conflict with the letter and spirit of Chapter Six of the Constitution.

39. As I have observed above, this court is not engaged in the interpretation of the question whether the above provisions of the Constitution relied on by the applicant, as well as the statutory provisions relied on to support the applicant's claim to hold onto his public office despite the conviction for bribery, can withstand scrutiny given the overarching constitutional and legislative framework intended to confront and rid the public sector and society at large of the scourge of corruption.

40. What I can state is that there will be a need, at an appropriate forum and in appropriate proceedings, to reconcile the provisions at issue, for as has been observed in several decisions in our courts, the Constitution does not subvert itself. Mutunga, CJ and President underscored this principle in his dissenting opinion in **Advisory Opinions Application 2 of 2012- In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR** when he stated:

> ***".I see no reason a constitution that decrees non-discrimination would discriminate against women running for Parliament and the Senate. I see no constitutional basis for discrimination among women themselves as the consequence of the progressive realization of the two-thirds gender principle would entail. A constitution does not subvert itself."*** (Emphasis added)

41. Mutunga, CJ reiterated this point when, in his concurring opinion in Supreme Court **Advisory Opinion Reference 2 of 2013- In the Matter of the Speaker of the Senate & another [2013] eKLR** he observed as follows:

> ***"[184] If an interpretive framework were required to buttress this position, it would be the one reflected in the Ugandan case, Tinyefuza v Attorney-General Const. Pet. No 1 of 1996 (1997 UGCC 3). The Court of Appeal thus stated: "[T]he entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution."[7***
>
> ***][185] This is the same rule of interpretation that I previously alluded to in the Advisory Opinion on Gender, in stating that a Constitution does not subvert itself. I therefore reiterate what the majority opinion has stated – that it would be completely out of order for the Speaker of the National Assembly to interpret the powers of the National Assembly by only looking at Article 95 of the Constitution, without paying regard to Articles 96 and 110 of the Constitution which unequivocally incorporate the role of the Senate and of its Speaker.*** (Emphasis added)

42. As I observed earlier, however, the question whether the Constitution intended to provide a strong framework for the inculcation of ethics and integrity in leadership and to combat corruption by virtue of Articles 10 and Chapter Six while simultaneously undermining such framework by providing as it did in Articles 193(3), 194 and 99(3) in relation to state officers convicted of corruption offences is a question for another forum. Suffice to say that this court, has not been shown a basis for staying execution of a lawful judgment and sentence

imposed against the applicant by a court of competent jurisdiction under the Bribery Act.

43. What this court can do is put in place administrative directions that enable the applicant to expeditiously prosecute his appeal and, should his appeal be successful, protect his entitlement to hold the public office that he seeks to protect. This the court has already done.

44. When this matter came up before the court on 11th March 2021, I informed the parties that the proceedings of the trial court were ready, and that the applicant could proceed with his appeal. When the matter came up again on 22nd March 2021, Mr. Koceyo indicated that he was ready and open to proceeding with the substantive appeal on the basis of written submissions. However, Learned Counsel, Mr. Awele, who was appearing with Mr. Koceyo for the applicant, insisted that the applicant wished to argue the application for stay of judgment and sentence as applicant wished, to take advantage of the benefit provided by Article 193 (3) of the Constitution.

45. As I have already found, the applicant has not placed before this court anything that would entitle him to an order of stay of the sentence. The question of whether or not the Speaker will declare his seat vacant as a result of the conviction is not a question for determination by this court.

46. In the result, the application for stay of judgment and sentence is dismissed. The applicant is directed to proceed with his substantive appeal.

DATED SIGNED AND DELIVERED ELECTRONICALLY THIS 28TH DAY OF APRIL 2021

MUMBI NGUGI

JUDGE