



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 73 OF 2019

BIDCO AFRICA LIMITED.....APPELLANT

VS.

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

(Appeal from the ruling in Criminal case NO. 59 of 2016 at the Chief Magistrate's court

at Thika by Hon. J.M. Nang'ea on 18th September, 2019)

JUDGMENT

1. **KENNEDY MUTINDA MUSYIMI, JAMES WASHINGTON KWENDO, ROBERT AMBONYO ONDULA, ALEX KINAKA KINONE and ISAAC KITONGA** (all collectively referred to as accused), were charged before the Thika Chief Magistrate Court in **Criminal Case No. 5906 of 2016** (hereinafter the Criminal Case) with the offence of stealing by servant contrary to Section 281 of the **Penal Code**. When the alleged offence was committed the accused were employees of **BIDCO AFRICA LIMITED**, herein after **Bidco**. Plea before the Thika Magistrate's Court in the criminal case were taken by those accused was on 11th August, 2016. They pleaded not guilty.

2. By a Notice of Motion application dated 30th April, 2018 Bidco sought to take over the prosecution of the criminal case. That application was heard by the trial magistrate of that criminal case at Thika Chief Magistrate's Court. The trial magistrate by a Ruling dated 18th September, 2019 dismissed the application. This appeal is against that dismissal.

3. Bidco has brought the following grounds of appeal:-

(a) **THAT** the learned trial magistrate erred in fact and in law by failing to find that there was no merit in the Appellants application.

(b) **THAT** the learned trial magistrate erred in fact and in law by failing to appreciate that the appellant had lost a substantial amount of money.

(c) **THAT** the learned trial magistrate erred in fact and in law by failing to find that there are provisions of the law allowing for private persons to undertake private prosecution.

(d) **THAT** the trial magistrate erred in fact and in law by failing to appreciate that the law did not bar initiation of private prosecutions even after inception of a criminal case by the prosecutorial body.

(e) **THAT** the learned trial magistrate erred in fact and in law by failing to appreciate the submissions made by counsel for the appellant.

(f) **THAT** the learned trial magistrate erred in fact and in law by failing to appreciate the difficulties, challenges and resistance which the complainant was subjected to by the relevant law enforcement and prosecutorial bodies.

(g) **THAT** the learned trial magistrate erred in fact and in law by failing to appreciate that no prejudice will be occasioned on the Director of Public Prosecutions that the complainant be granted leave to undertake private prosecution.

4. The appeal is opposed by the **Director of public Prosecutions** (DPP).

5. **BIDCO** in its written submissions identified two issues in this appeal, namely:-

- (a) Whether a person (natural or corporate) can be permitted to institute private prosecution in criminal matters?
- (b) Whether the appellant has met the threshold for private prosecution.

6. **BIDCO** in its written submissions made reference to Section 28 of the Office of the **Director of Public Prosecutions Act** (hereinafter ODPP Act) and also to Article 157 of the **Constitution**. It further placed reliance on the cases of **OTIENO CLIFFORD RICHARD VS. REPUBLIC, High Court at Nairobi Misc. Civil Suit No. 720 of 2005, FLORICULTURE INTERNAITONAL LIMITED AND OTHERS, High Court Misc. Civil Application No. 114 of 1997** and **RUFUS RIDDLEBARGER V. BIRAN JOHN ROBSON (1959) EA 841**. **Bidco** surmised that law and those decided cases by stating that a private citizen can institute private prosecution where the court is satisfied that there has been a failure by the bodies charged with prosecution to carry out their mandate. **Bidco** emphasized that to initiate private prosecution, it was required to meet the requirements set out in the cases of **FLORICULTURE** (supra) which case was cited in the case of **ISAAC ALUOCH POLO ALUOCHIER VS. NATIONAL ALIANCE & 440 OTHERS (2017) eKLR** thus: -

“17. The intended private prosecutor requires to satisfy the court that leave to institute private prosecution is merited. To demonstrate merit, I can find no better authority than the FLORICULTURE case adverted to elsewhere in this judgment. In the said case the following principles were enunciated:-

“For all these reasons criminal proceedings at the instance of a private person shall be allowed to start or to be maintained to the end only where it is shown by the private prosecutor;

- 1. That a report of the alleged offence was made to the attorney General or the police or other appropriate public prosecutor, to accord either of them a reasonable opportunity to commence or take over the criminal process, or to raise objection (if any) against prosecuting; that is to say, the complainant must firstly exhaust the public machinery of prosecution before embarking on it himself; and*
- 2. That the Attorney General or other public prosecutor seized of the complaint has taken a decision on the report and declined to institute or conduct the criminal proceedings; or that he has maintained a more than usual and reasonable reticence; and either the decision or reticence must be clearly demonstrated; and*
- 3. That the failure or refusal by the State agencies to prosecute is culpable and, in the circumstances, without reasonable cause, and that there is no good reason why a prosecution should not be undertaken or pursued; and*
- 4. That unless the suspect is prosecuted and prosecuted at the given point of time, there is a clear likelihood of a failure of public and private justice; and*
- 5. The basis for the locus standi, such as, that he has suffered special and exceptional and substantial injury or damage, peculiarly personal to him, and that he is not motivated by, malice, politics, or some ulterior considerations devoid of good faith, and*
- 6. That demonstrable grounds exist for believing that a grave social evil is being allowed to flourish unchecked because of the inaction of a pusillanimous Attorney General or police force guilty of a capricious, corrupt or biased failure to prosecute, and that the private prosecution is an initiative to counter act the act culpable refusal or failure to prosecute or to neutralize the attempts of crooked neutralize the attempts of crooked people to stifle criminal justice”.*

7. In **BIDCO**'s view **DPP** failed to institute criminal charges against the accused despite the fact that there was sufficient evidence to institute criminal charges. Further, that **Bidco** established that it suffered immeasurable financial loss but it had not been able to recover the same due to **DPP**'s complacency in the matter. That even though **Bidco** did supplied the internal audit which revealed the financial loss and that even though the accused took their plea, now more than 4 years ago, **DPP** had refused to prosecute the case. That it is because **DPP** had failed to prosecute the case against the accused that **Bidco** seeks Court's leave to proceed with the criminal case.

8. The appeal is opposed by **DPP**. **DPP** cited the case of **RUFUS RIBBLEBARGER VS. BRIAN JOHN ROBBSON (1959) EA 841** which case **DPP** argued shows circumstances under which the court should allow private prosecution. The holding of that case is as follows:-

“This being so, a private prosecution can only be given legitimacy and allowed by the court to be instituted or maintained if it serves as a remedy against a culpable inertia or partiality on the part of the public prosecuting authority. It must be shown to be taken only as a safeguard against extraordinary impropriety, capricious, corrupt or biased failure or refusal to prosecute by the public prosecuting agencies. The court will therefore, require to be satisfied by the private prosecutor, that the private proceedings are necessary because the Attorney General and his officers or the Police, do not wish to act on the complaint, and that they have declined to act or refused to take action, for culpable reasons.”

ANALYSIS

9. The status of the Thika magistrate's case (the criminal case) is that after the accused took their plea on 11th August, 2016 the actual trial has not to date commenced. In other words no evidence thus far has been adduced in that case. On 11th August, 2016, after plea were taken and the court ordered release of accused on bail, on terms, the trial court fixed a hearing on 24th October, 2016. I have painstakingly gone

through the proceedings of the trial court and I found that between October, 2016 when the trial was to commence and May, 2019 when **Bidco** filed an application to take over the prosecution of that criminal case the prosecution (DPP) applied for an adjournment on four different dates. The rest of the adjournment were either due to the trial magistrate not being present in court due to other official duties or due to non-attendance of one or other of the accused person. Indeed, on 15th May, 2019 the case was adjourned, even though **DPP** had three witnesses ready to testify because **Bidco** filed, before the trial court, an application to take over the prosecution of the case.

10. Although **Bidco**, in its present appeal and the **Notice of Motion** application before the trial court stated it was seeking to initiate private prosecution against the accused, that in fact was not what would happen. The position of the case before the trial court is that the case against the accused had commenced from the moment the accused took their plea. What then **Bidco** sought, before the trial court and now in this appeal, was to take over the trial that had been commenced by **DPP**. The trial court, by its ruling which is the subject of this appeal, rightly in my view appreciated that, that was what **Bidco** sought. The trial court stated:-

“9. There is no constitutional or statutory provision on whether a private prosecutor can take over a prosecution already instituted by the DPP as is the case there. Only the DPP is allowed to take over cases brought by a private prosecutor.”

11. Although I am of the opinion that the Constitution does not permit a private prosecutor to take over prosecution already commenced by DPP Section 88 of the Criminal Procedure Code (CPC) permissive, in that respect. That Section provides:-

“88(1) A magistrate trying a case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorized by the Attorney-General in this behalf shall be entitled to do so without permission.”

12. It should be noted that, that section gives a magistrate the power to permit a private prosecutor to take over a case he/she is trying. The implication of that section is that in a case that has already commenced before a magistrate, that magistrate may, grant leave to private prosecutor to take over.

13. The provisions in Section 88 of the Criminal Procedure Code, which seemingly permits a criminal trial, that has commenced, to be taken over by a private prosecutor is however subject to the Constitutional provision of Article 157. Article 157 (6) provides:-

“(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may:-

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and...”

14. It is clear from **Article 157(10)** that **DPP** cannot be directed in the exercise of his powers or function. **Article 157(10)** provides:-

“The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”

15. To further emphasise the fact that a private prosecutor cannot take over prosecution commenced by **DPP** Section 28 of the Director of Prosecutions Act clearly provides that a private prosecutor may initiate private prosecution but the section, while citing the constitution, does not permit a private prosecutor to take over prosecution commenced by DPP. I am therefore wholly persuaded by the finding of the trial in the ruling, the subject of this appeal thus:-

“10. The applicant made a complaint to the police who investigated the matter and subsequently proceedings were instituted against the accused persons who took plea on 11th August, 2016. However, the matter has never proceeded to hearing since then. This delay has been caused by both sides. The applicant is not blameless because when this matter for instance was slated for hearing on 3rd June, 2019, this application was brought instead of the applicant sending witnesses to testify.”

DISPOSITION

16. It is the determination of this Court that under the Constitution prosecutorial power is vested in **DPP** and once **DPP** has commenced prosecution, under Article 157(10) DPP cannot be directed in the exercise of that prosecutorial power. To permit a party to take over prosecution of a case commenced by DPP would be equivalent to allowing **DPP** to be directed in his prosecutorial power. Section 28 of ODPP Act only permits a private prosecutor to commence private prosecution. It does not permit taking over of DPP's prosecution.

17. Even if private prosecution was permitted of a case commenced by **DPP** I find that **BIDCO** failed the test set out in the **FLORICULTURE** case. **Bidco** did not shown it exhausted the public machinery of prosecution; and it failed to show DPP had failed to prosecute the case. As rightly stated by the trial court, the blame for the delay in prosecuting of the case cannot be laid at the door of **DPP**; and even though **Bidco** kept repeating, in its written submission, that it had suffered special damage through the alleged theft by the accused there was no proof that the delay in prosecuting the accused was solely caused by **DPP**.

18. In the end this appeal is found to be without merit and it is dismissed.

19. I order the lower court file to be returned to the Thika Chief Magistrate court and to be mentioned in that court on 17th June 2021 for directions.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 22ND DAY OF APRIL, 2021.

MARY KASANGO

JUDGE

Coram:

C/A:

For Appellant:

For Respondent:

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE