



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
IN THE ANTI –CORRUPTION AND ECONOMIC CRIMES DIVISION
HIGH COURT ACEC REVISION NO 2 OF 2021

ONESMUS MUTHOMI NJUKI & 19 OTHERS.....APPLICANTS

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONRESPONDENT

RULING

BACKGROUND

1. The Applicants were charged with various corruption related offenses in the Chief Magistrates Court at Milimani in ACC CASE E037 of 2020 to which charges are still pending trial and determination.
2. Of importance to the matters herein, in count 1 they all faced a charge of conspiracy to commit an offence of corruption contrary to Section 47(A) (3) as read with section 48 of the Anti-Corruption and Economic Crimes Act 2003, count 3 (ONESMUS MUTHOMI NJUKI) conflict of interest contrary to section 42(3) as read with section 48 of the Anti-corruption and Economic crimes Act 2003 count 4 (FRIDAH MUTHONI MURUNGI) abuse of office contrary to section 46 as read with section 48 of the Anti-Corruption and Economic Crimes Act 2003, in count 5(FRIDAH MUTHONI MURUNGI) wilful failure to comply with the laws, applicable procedures and guidelines relating to procurement contrary to section 45 (2) (b) as read with section 48 of the Anti-Corruption and Economic Crimes Act.
3. In count 6 (FRIDAH MUTHONI MURUNGI) wilful failure to comply with the law, applicable procedure and guidelines relating to procurement contrary to section 45 (2) (b) as read with section 48 of the Anti-corruption and Economic Crimes Act 2003, , Count 8 (FLORIDAH KIENDE NTWIGAH) wilful failure to comply with the laws and guidelines relating to procurement contrary to Section 45 (2) (b) as read with section 48 of Anti-Corruption & Economic Crimes Act 2003, Count 9 (LEE MWENDA MUNENE, JOSEPHAT MUTUGI NKONGE, EMILY NKATHA MURITHI and ELOS Y KARIITHI MATTI) wilful failure to comply with the law applicable to procurement contrary to section 45 as read with section 48 of Anti-Corruption & Economic Crimes Act 2003.
4. COUNT 10 (HIGHTON MURIITHI NJUE) abuse of office contrary to section 46 as read with 48 of Anti-Corruption & Economic Crimes Act 2003, count 11 (TERESIA KAGOJI MBURIA) abuse of office contrary to section 46 as read with section 48 of the Anti-Corruption and Economic Crimes Act 2003.
5. Count 7 (FRIDAH MUTHONI MURUNGI) failure to submit a project report to the National Environment Management Authority contrary to section 138(a) and (b) of the Environmental Management and Coordination Act, count 12 (KENNETH MUCUIYA NGAI, CAROLINE SHEILA WAMBUI and WESTOMAXX INVESTMENT LTD) fraudulent practices in procurement contrary to Section 66(1) and (2) as read with section 177 of the Public Procurement and Assets Disposal Act 2015.
6. Count 13 (KENNETH MUCUIYA NGAI, CAROLINE SHEILA WAMBUI and WESTOMAXX INBVESTMENT LTD) fraudulent acquisition of public property contrary to section 45 as read with Section 48 of Anti-Corruption & Economic Crimes Act 2003, Count 14 and 15 money laundering and count 16 unlawfully failing to pay taxes.
7. The applicants pleaded not guilty to the charges and by a Notice of Motion dated 6th October 2020 raised an objection before the trial court on the ground that the same did not have jurisdiction and that the charge sheet before the same did not disclose offences that were known in law, which application was supported by the affidavit of KENNETH MUCUYIA NGAI, in which it was deposed that the all the allegations in the charge sheet revolved around offences of corruption and economic crimes allegedly committed within THARAKA-NITHI COUNTY and therefore as per section 4(2) of Anti-Corruption & Economic Crimes Act, the jurisdiction of the court was restricted within the same region, whereas the applicants' are charge at the Chief Magistrates court at Nairobi.
8. The applicants therefore sought several orders, including that all the orders so far issued by the trial court be vacated.

9. The trial court gave directions on the said application, to the effect that since the issue of jurisdiction had been raised, the court was to deal with it in the first instant and upon hearing the parties, came to the conclusion that it had not come across any binding precedent in criminal practice and procedure, on what to do if and when it finds that it has no jurisdiction and whether to down its tools, as requested by the applicants and if so what then happens to the charges pending before it.

10. The court therefore took the action provided for under section 76(1) of the Criminal Procedure Code, which states that whenever a doubt arises as to the court by which an offence should be tried, the court entertaining the doubt may report the circumstances to the High Court and the High Court shall decide by which Court the offence shall be inquired into or tried.

11. For the purposes of that inquiry the court identified the following issues:

a) That there are two local jurisdictions in the case

b) That there are offences under several regimes of law that is to say, Anti-Corruption and Economic Crimes Act, Proceeds of Crime and Anti-Money Laundering Act, Public Assets Disposal Act and Environmental Management Act

c) That Anti-Corruption & Economic Crimes Act allows Special Magistrates to trial other offences charged under Criminal Procedure Code.

12. It is on the basis of that determination, that this matter was referred to this court and whereas the registry registered the same as revision based on the issues raised, the court gave direction that the parties be notified to appear before it for directions.

13. The applicants' on 18th May 2021 filed a preliminary objection and asked this court to determine the following issues:

(a) Whether the application is properly before the court by way of revision in the absence of a substantive decision by the trial court and whether the court should remit the application back to the trial court for substantive determination

(b) Whether the trial court can invoke the provision of section 76 of CPC to refer to the application challenging its jurisdiction under section 4(2) of Anti-Corruption and Economic Crimes Act, which expressly ousts the application of Criminal Procedure Code, on the jurisdictional question

(c) Whether the issues herein should be referred to a differently constituted court in view of this court's view in ACECA Misc. Application No E029 of 2020

SUBMISSIONS.

14. On the issue of jurisdiction, it was submitted by the Applicants, that courts derive their jurisdiction from the Constitution, statutes and principles laid down in the precedent, as was stated, in the matter of interim independent electoral commission [2011] eKLR and Republic vs. Karisa Chengo & 2 others [2017] eKLR.

15. It was stated that the criminal jurisdiction of the magistrates Court is set out under section 6 of the Magistrates Courts Act, which provides that the court shall exercise jurisdiction conferred on it by the Criminal Procedure Code and any other written law and that sections 71 and 72 provides for the ordinary place of inquiry and trial, to be within the local limits of whose jurisdiction the offence was committed.

16. As regards section 4(2) of the Anti-Corruption and Economic Crimes Act, the offences are to be tried by the special magistrate within the local limits where the offence is committed or where they are more than one, for such area, by one of them appointed by the Chief Justice, or one appointed by the chief justice for that particular case, as was confirmed in Republic V Inspector General of Police & 2 others Ex parte Boniface Nginyo Mwaura [2019] eKLR.

17. It was therefore contended that the proceedings in question ought to have been instituted before the Anti-Corruption Court in THARAKA NTHI COUNTY where the offences allegedly took place, or in Embu, Meru or Isiolo, as if the trial were to proceed before the present court, substantial public resources will be expended to facilitate the transportation of witnesses and to deny the applicants an adequate opportunity to avail witnesses in court, which will amount to a violation of their rights to fair trial under Article 50 of the Constitution.

18. It was submitted that the court under section 81 of the Criminal Procedure Code has jurisdiction to transfer cases from one court to another, where it appears that a fair trial cannot be had in any criminal court subordinate thereto.

19. The respondent submitted that in filing the case in Nairobi, the respondent considered various issues, including, that the offences were committed in various jurisdictions, the offence involved the County Governor of Tharaka Nthi, who has a great following and clout, thus posing a security concern, many of the witnesses from the area, can be easily manipulated and that the case involved many accused persons and therefore separating them by way of trial in different jurisdictions, is not in accordance with statutory and decisional law.

20. On the question of jurisdiction, it was contended that the trial court has jurisdiction because the offences were committed in multiple jurisdictions and the accused persons had on their own volition presented themselves before the trial court, jorum opala otieno vs. the DPP [2021] eKLR was cited in support.

21. It was contended that the trial court erroneously noted that the Anti-Corruption and Economic Crimes Act was silent on the scenario where an offence was committed in more than one jurisdiction, the charge though anchored under the Act relies on particulars from other

legal regimes of law and where the charge sheet contain counts from multiple regimes, as this was specifically provided for under Section 5 of the Act.

22. It was submitted that sections 71 and 74 of the Criminal Procedure Code, provides that the offences may be tried by any court having jurisdiction over of those areas, as stated in, VICTOR MUISYO VS REPUBLIC [2004] eKLR, R Vs RUTH WANJIKU MURAYA &7 others [20015] eKLR and STEPHEN WANYEE GICHUHI V R [2008] e KLR.

DETERMINATION

23. Having taken into account the submissions by the Advocates for the parties herein, the following issues are identified for determination:

- a) Whether the matter is properly before the court by way of revision
- b) Whether the trial court properly invoked this court's jurisdiction
- c) What order should the court make as regards the issues identified by the trial court.

WHETHER THE MATTER IS A REVISION

24. On this issue, I must point out that the trial court having not made any determination on the application which was before him and opted to refer the same to this court, under the provisions of section 76(1) of the Criminal Procedure Code, the same could not strictly be classified as a revision.

It is clear to my mind that the case was wrongly registered as a revision and should have been registered as a CASE STATED, as what the trial court sought was for this court to provide direction, on the matters which it considered, in his view as not clear.

25. Section 76(1) Criminal Procedure Code states that, whenever a doubt arises as to the court by which an offence should be tried, the court entertaining the doubt may report the circumstances to the High Court and the High Court shall decide by which court the offence shall be inquired into or tried. The issue therefore, for determination, is whether in this case there was a doubt as to which court the offences herein should have been tried.

26. The trial court for the purposes of this ruling, identified, that there were two local jurisdictions involved in this matter, and therefore confronted with objection on his jurisdiction, opted to refer the same to this court for clarification, instead of ruling on whether it had jurisdiction or not, as he was of the view that no superior court had pronounced itself on this issue as regards Special Magistrates application under Anti-Corruption & Economic Crimes Act. The court was also at a loss of what to do with the charges before it should he come to the determination, as he was invited to, by the applicants, that it did not have jurisdiction.

27. This therefore gave the court the jurisdiction under the supervisory powers provided for in Article 165(6) of the Constitution and sections 5 and 12(3) of the High Court (Organisation and Administration) Act, which specially provides that the Court shall exercise jurisdiction over references from the subordinate courts, in addition to the General Jurisdiction of the High Court under Article 165(3) (e) of the Constitution.

28. The supervisory jurisdiction of this court is a broad-based authority, with no limitation on the nature of cases and can be exercised at any time, either at the invitation of the parties, the lower court or by the court on its own motion, see DPP vs. PERRY MANSUKHA KASANGARA & 8 OTHERS [2020] e KLR.

29. Whereas the application was registered as a Revision , which is exercised by the court under section 362 of the Criminal Procedure Code , which enable the court to call for and examine the records of any criminal proceedings, before a subordinate court for the purposes of satisfying itself with the correctness , legality or propriety of the finding, sentence, or order recorded or passed , the trial court as stated herein did not make any finding and therefore could not invoke the courts revision jurisdiction.

30. In view of the provisions of Article 159(2)(d) of the Constitution which requires that justice be administered without undue regard to procedural technicalities, I find and hold that the error as regards the labelling of the matter is not fatal to the application before the court.

WHETHER THE TRIAL COURT PROPERLY INVOKED THE COURTS JURISDICTION

31. The objection as raised by the applicants shows that they challenged the jurisdiction of the trial court on the basis of the provisions of section 4 of the Anti –Corruption and Economic Crimes Act, which provides in clear terms that the court with jurisdiction, in anti-corruption causes in the first instant, is the court within the local limits where the offence is alleged to had been committed.

32. As submitted by the applicants, the law as regards the place of filing causes under Anti- Corruption and Economic Crimes Act, is with no doubt clearly set in the Act and the same in my view does not rise any doubt. As regards this cause, a perusal of the charge sheet shows that the offences were allegedly committed at Tharaka Nthi County Government in Kathwana Town within Tharaka Nthi County and it is only the offences in count 13, count 14 and count 15 in relation to the withdrawal of the monies allegedly obtained from Tharaka Nthi but withdrawn from Consolidated Bank in Embu, when was executed outside the Jurisdiction of Tharaka-Nithi but were part of transactions arising from the same area and there was a nexus between the said offences and could therefore be heard together.

33. The law of the place of for trial of the offences under the Anti –Corruption and Economic Crimes Act is specifically provided for under

section 4 of the Act, which provides that the offences specified under the Act shall be tried by a special magistrate appointed under section 3(1). The Act provide that the special magistrate for the area can also try any offence, other than those specified in the Act, with which the accused person is charged within the same trial under the Criminal Procedure Code. This position is confirmed in NGUBUINI V REPUBLIC 1987 KLR 517.

34. The issue which was before the trial court by way of objection, was whether the court which was gazetted to hear Anti-Corruption matter in Nairobi, had territorial jurisdiction to hear and determine the cause herein, noting from the charge sheet that the same arose from Tharaka Nthi which was outside its jurisdiction. The matters raised by the trial court for reference to this court were not placed before it for determination on the question of jurisdiction, it was either the same had jurisdiction or not and the applicants had a legitimate expectation of a determination thereon.

35. Having been invited to answer the question as to which court has jurisdiction, in the matter herein, what then is the correct position? Section 4 of the Anti- Corruption and Economic Crimes Act, makes it clear that the matter should have been filed at the court with local limit jurisdiction over Tharaka Nthi or any nearer court with jurisdiction. This position was stated by this court in JORAM OPALA OTIENO V DPP & OTHERS [2021] eKLR where the court stated

“35. As regards offences under the Anti-Corruption and Economic Crimes Act Cap 65, Section 4 of the Act provides that the offences under the Act shall be tried by the special magistrates from the area within which it was committed or by a special magistrate appointed for the case or where there are more special magistrates than one for such area, by one of them as may be specified in this behalf by the Chief Justice.

36. It therefore follows, that unless there are special circumstances the cases should be filed in court within the local limit where the offence was committed or within the local limits where the accused as apprehended or is in custody for a charge for the offence or has appeared in answer to summons. As regards Anti-Corruption matter, the place for charging is as per Section 4 of the Act”.

36. It was submitted by the applicant that in Opala case the court arrived at a different determination, a clear reading of the decision shows otherwise. The only distinction between that case and this cause is that the issue of jurisdiction was not raised before the trial court, but before this court as a ground upon which the applicants sought for transfer of those proceedings to the court within local limits.

37. In answer therefore to the questions raised by the trial court, assuming that there was a doubt in its mind as to the place of trial, there was no uncertainty as to where the offence was alleged to had been committed, as the same could be discerned from the charge sheet, the clear answer then is that the court did not have jurisdiction in the first instance, as the matter arose outside its geographical or territorial jurisdiction in the first instant.

38. On the second issue of multiple jurisdictions, Section 74of the Criminal Procedure Code clarify the situation where the place of offence is uncertain, akin to what the trial court had invited the court to give directions on , in the following manner; when (a) it is uncertain in which of the several local areas an offence was committed or (b) an offence is committed partly in one area and partly in another (c) an offence is a continuing one and continues to be committed in more than one local area or (d) an offence consists of several acts done in different local areas, it may be tried by a court having jurisdiction over any of those local areas .

39. Section 6 of the penal code further provide an answer to the question raised by the trial court in the following terms:

“6. Offences committed partly within and partly beyond the jurisdiction When an act which, if wholly done within the jurisdiction of the court, would be an offence against this Code, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or makes any part of such act may be tried and punished under this Code in the same manner as if such act had been done wholly within the jurisdiction”.

40. It therefore follows that this issue is also clear and needed no guidance by this court, the trial court only needed to seek guidance for the express provisions of the law and decide on the objection which was placed before it.

41. On the question by the trial court of happens where the accused persons are charged with multiple offences, as in this case , where in addition to charges under the Anti-Corruption Crimes Act, the accused persons are charged with offences under other regime of laws, the answer to that question is provided for under section 4(2) of the Act, which allows the special magistrates to try other offences as was confirmed in VICTOR MUISYO vs. R [2004] e KLR and R vs. MURAYA &7 OTHERS [2015] eKLR which stated that criminal case arising from the same facts or same series of facts should be heard and determined by one court. This position is further confirmed by Section 135(c) of the Criminal Procedure Code.

42. On what the court had to do with the charges if and when it found that it did not have jurisdiction, I take the view that It is not the duty of the court to decide on what to do with the charges once it came to the conclusion that it did not have the territorial jurisdiction. The answer is provided for in the case of Owners of Motor Vessel Lilian ‘SS’ V Caltex Oil Kenya Ltd. (1989) eKLR the court has no powers to make one more step. However, provides for transfer of cases from one magistrate to another within jurisdiction at Section 79. And from one court to another by the high court in section 81 of the Criminal Procedure Code and therefore there is no lacuna in law.

43. Since the issues as to why this matter was filed in Nairobi and not at the court of the local limit was not determined by the trial court nor was it raised before this court, I shall not at this stage of the proceedings make any comments thereon. For record purposes it must be stated that the matter could as well be tried in Nairobi but there must be justification for that court to assume jurisdiction, which was not the case in the matter before the court.

44. It is not open to the Director of Public Prosecution to unilaterally decide the place of trial. In addition to the direction given under ACECA, the Criminal Procedure Code also provides statutory guidance under section72 which states that the trial should ordinarily be by a

court within the local limits of whose jurisdiction the thing has been done or the consequence has ensued.

45. I am in agreement with the courts observation in the case of **REPUBLIC v. INSPECTOR GENERAL OF POLICE & 2 OTHERS EX PARTE BONIFACE NGINYO MWAURA [2019] e KLR** thus

“ 46. While section 72 of the Criminal Procedure Code gives discretion as to the place of trial, it must be borne that Article 50(2) of the Constitution provides certain constitutional safeguards as regards criminal trials, including the right to have a trial begin and conclude without unreasonable delay, to be present when being tried and to adduce and challenge evidence. These constitutional provisions inform the requirement that the trial should be held at a venue which is easily accessible by the Accused person and the witnesses, and are the justification for the territorial limits of courts’ jurisdiction in criminal cases.

46. I am in this regard persuaded by and in agreement with the Supreme Court of Philippines in the case of **Union Bank of the Philippines and Desi Tomas vs People of the Philippines, G.R. No. 192565** where it was held as follows:

“Venue is an essential element of jurisdiction in criminal cases. It determines not only the place where the criminal action is to be instituted, but also the court that has the jurisdiction to try and hear the case. The reason for this rule is two-fold. First, the jurisdiction of trial courts is limited to well-defined territories such that a trial court can only hear and try cases involving crimes committed within its territorial jurisdiction. Second, laying the venue in the *locus criminis* is grounded on the necessity and justice of having an accused on trial in the municipality of province where witnesses and other facilities for his defense are available.”

DISPOSITION

47. What orders should this court make having found that the trial court does not have geographical or territorial jurisdiction in the first instant? The applicant had asked the court to remit the matter back to the trial court for determination and having stated the correct position, remitting this matter back to the same court will not serve the interest of justice. I am therefore persuaded that in the absence of any reason which will make the trial of the applicants before the court with local jurisdiction or any of the nearer courts with jurisdiction, this matter should be transferred from the Anti- Corruption Court at Mililani to the nearest Court with the local limit, having taken into account the fact that one of the accused persons is the Governor of County Government of THARAKA NTHI.

48. I therefore direct that this case be tried or inquired into by a court of the nearest local limit jurisdiction to try the same and accordingly direct that the file herein be transferred from the Anti-Corruption Court at Nairobi and be placed before a gazetted Magistrate in Embu for trial and determination, unless reasons are advanced by the prosecution as to why fair trial cannot be expected in the said court.

49. I further take the view that these cases involving loss of money from the County Government should as far as possible be filed and tried in the local Courts, so that the local citizen, be given a chance to attend trials so as to see and hear for themselves the massive loss of county funds, rather than the same being filed far away in Nairobi , which makes it look like the said funds are stolen from the national government with the hope that this will bring to an end alleged excessive loss of county funds which is a mockery of the purposed for which devolution found its way into Articles 174 and 175 of the Constitution .

50. And it is ordered.

SIGNED DATED AND DELIVERED AT NAIROBI VIRTUALLY THIS 19TH DAY OF OCTOBER 2021

J. WAKIAGA

JUDGE.

IN THE PRESENCE OF

DR. MUTHONI/KARANJA FOR 12TH,18TH 21ST ACCUSED PERSONS

MR. SALUNYI FOR MR. NYAMODI FOR 1ST, 13TH, 14TH, 15TH , 17TH , 19TH , 20TH ACCUSED PERSON

MR. MUCHIRI FOR MR. OMARI FOR 8TH ACCUSED

MR. GITUMA FOR MR. MORARA FOR 10TH ACCUSED

MS NJARI FOR MS MWANGI FOR 4TH , 6TH,, 9TH AND 11TH ACCUSED PERSONS

MRS KINYANJUI WITH MS MUTELLAH FOR DPP

COURT ASSISTANTS: CAROLINE/HOPE

J. WAKIAGA

JUDGE.