



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION**

**ACEC CRIMINAL APPEAL NO 24 OF 2019**

**JAMES AMBUSO OMONDI.....APPELLANT**

**VS**

**REPUBLIC.....RESPONDENT**

(Being an appeal from the ruling in Milimani Anti Corruption Case No 5 of 2019 Republic vs James Ambuso Omondi (Hon Nyuto SPM dated 12<sup>th</sup> August 2019)

**JUDGMENT**

1. The appellant has filed an application dated 3<sup>rd</sup> September 2019 to which is annexed an affidavit in support and a Petition of Appeal also dated 3<sup>rd</sup> September 2019 against the ruling of the trial court (Hon. Nyutu (SPM)) dated 22<sup>nd</sup> August 2019. The ruling was made pursuant to the appellant's motion dated 13<sup>th</sup> August 2019 in **Anti Corruption Case No 5 of 2019- Republic vs James Ambuso Omondi**. In the said application, he sought at prayer 2 that pending the hearing of the appeal, the court grants an order that there be stay of proceedings in the said case. Prayer 3 of the said application sought an order that pending the hearing and determination of the appeal, evidence or the documents relating to his Safaricom Mpesa account No \*\*\*\*\* and Kenya Commercial Bank (KCB) Account No. \*\*\*\*\* should not be referred to and produced in the hearing of Anti-corruption Case No. 5 of 2019 pending at the Chief Magistrate's Court.
2. On 5<sup>th</sup> November 2019, this court (Onyiego J) issued interim orders staying the hearing of the criminal case against the appellant pending hearing of his appeal. He also directed that the parties file submissions on the matter, and that it be heard before me on 25<sup>th</sup> November 2019. Learned Counsel for the appellant, Mr. Namada, filed written submissions dated 25<sup>th</sup> November 2019 which he highlighted at the hearing of the appeal on the same date.
3. In his submissions, Mr. Namada observed that the appellant had filed a similar application before the trial court. In his second substantive prayer before the said court, the appellant had prayed that the court declares documents and evidence relating to the accused's Mpesa account and KCB account obtained by EACC officers are not admissible in the criminal case against him. The basis of this application was that the documents had been obtained in violation of sections 23(4), 26, 27 and 28 of the Anti-corruption and Economic Crimes Act (ACECA) as read with Articles 47(1) and (2) and 50 (1) of the Constitution.
4. It was his further submission that at the hearing of the motion before the trial court, he had brought to the court's attention that the issues relating to the said sections that he was raising had been considered by both the High Court and the Court of Appeal. The appellants contention before the trial court was that Ethics and Anti-Corruption (EACC) officers had unilaterally and *ex parte* moved the court in Milimani and Kibera in 3 miscellaneous applications and without service of the warrants on the appellant, had obtained warrants to search his account, obtained privileged documents, and made copies which they intended to rely on in the prosecution of the appellant.
5. It was his submission that a similar scenario had played out in **Petition No 122 of 2015- Tom Ojienda vs EACC** and Lenaola J (as he then was) had declared warrants obtained in that manner as unconstitutional and void for all intents and purposes and had proceeded to quash them as illegal. Mr. Namada further submitted that he had brought to the attention of the trial court the fact that the DPP had appealed against the decision of Lenaola J and the Court of Appeal had analysed the provisions and had indicated that under ACECA it is clear that notice of any such proceedings either in court or otherwise to obtain such material is mandatory and there is no way of going round the provision. His submission was that if the process is not followed, the result is an illegality. He argued that he had brought to the attention of the trial court the fact that it is bound by the decision of the Court of Appeal; that the fruits of an illegality are illegal, and it would be illegal to allow the fruit of an illegal act to be used in a court of law; and that the trial court had a duty to suppress any evidence obtained in such manner.
6. It was his submission further that the trial court had skirted around the issue and in allowing the case to proceed with the evidence, the trial magistrate held that she could not decide on the merits of the matter as the court that gave the warrants was a court of concurrent jurisdiction. Mr. Namada submitted that what the trial court had done was to avoid a binding decision of the Court of Appeal, which would set a bad precedent and result in a state of anarchy and uncertainty in the administration of justice, which this court should not allow.

7. Mr. Namada sought to distinguish the decision in **ACEC No 24 of 2019- Innocent Obiri vs EACC** in which this court distinguished the Court of Appeal decision in Prof. Tom Ojienda vs EACC in a case similar to the present one where the applicant had sought to suppress evidence gathered by EACC. It was his submission that in that case, the court held that the Court of Appeal decision was confined to ACEC cases, not to ordinary criminal cases. His submission was that the present matter is brought squarely under ACECA, and the lower court was bound to find that such evidence was illegal and could not be used in such proceedings.

8. Counsel further urged the court to be guided by the decision in **Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others [2019] eKLR**, making specific reference to paragraph 426 of the said decision on why illegal evidence should be suppressed. His submission was that in that case, the court was of the view that administration and prosecutorial authorities cannot use illegally obtained evidence to promote legal processes. Counsel further cited the case of **Weeks vs U 9 1914) 232 vs 383 of 1914** in which the court suppressed the use of papers wrongly seized from an accused to submit that courts should not hesitate to strike a blow for rule of law and legal processes by suppressing any evidence obtained in contravention of the law, as in this case. He urged the court to allow this appeal and the motion before the lower court.

9. In her submissions in reply, Ms. Nyauncho relied on a replying affidavit sworn on 25<sup>th</sup> September 2019 by Ann Gitau, a Prosecution Counsel. Her submissions were that the warrants to investigate the subject accounts were properly obtained vide Misc. Applications Nos 845 of 2014, 1167 of 2015, and 114 of 2015. That this was done in accordance with section 180 of the Evidence Act and sections 23 and 28 of ACECA. The documents that were required were set out at paragraph 4 of Ms. Gitau's affidavit.

10. Ms. Nyauncho submitted that the court before which the application was lodged was satisfied by the prayers sought and it granted the investigating officer orders to obtain the documents. It was her submission that section 23 of ACECA gives the EACC powers, privileges and immunities to investigate anti- corruption matters under the Criminal Procedure Code (CPC), the Evidence Act and the Police Act. She further submitted that section 27 (1) of ACECA provides for the requirement to provide information to EACC *ex parte* by an associate of the appellant.

11. According to Ms. Nyauncho, in this case, the information was being obtained from an associate of the appellant, defined as a person whom an investigating officer believed to have dealings with a person suspected of corruption or economic crimes. It was her submission that the bank and mobile service providers are the associates of the appellant from whom the Investigating Officer sought the information in accordance with section 27(1) of ACECA.

12. According to Ms. Nyauncho, sections 26 and 28 of ACECA do not make it mandatory for the EACC to give notice to a suspected person if it feels that the investigations will be jeopardised. Further, that section 180 of the Evidence Act does not also require that a suspect be given notice when investigations are being done. It was her submission that pursuant to section 180 of the Evidence Act, a judge or magistrate may by warrant authorise investigations of an account of any specified persons in any bank.

13. Ms. Nyauncho took the position therefore that from the above provisions, it was not necessary for EACC to issue notice to the appellant that they intended to investigate his account. She pointed out that the word 'may' is used in section 26 of ACECA, which means that it is not necessary for EACC to issue notice to a person who is under investigation.

14. With regard to the authorities relied on by the appellant, Ms. Nyauncho observed that the case of **Philomena Mbete Mwilu vs DPP** (supra) is not similar to this case. She noted that in that case, the court had come to the conclusion that there was no order authorising the DCI to investigate the Petitioner's accounts, which is different from this case. As regards the case of **Innocent Momanyi Obiri vs EACC**, her submission was that the court was not persuaded by the decision in the **Tom Ojienda** case. She urged the court to hold the same position as in **Innocent Obiri** in which it had noted that allowing the application by Obiri would deal a death blow to investigation of offences and not just economic crimes. In her view, allowing the application would create a dangerous precedent as investigations of criminal offences will be jeopardized, and it was in the interests of justice that the orders not be granted and the appeal be dismissed.

15. In his submissions in reply, Mr. Namada argued that in light of the Court of Appeal decision in the **Tom Ojienda** case, the DPP was still struggling to have a second bite at the cherry as all the arguments made by the DPP had been made before Lenaola J (as he then was) and the Court of Appeal, and the Court of Appeal had made a clear decisions contrary to the position taken by the DPP.

16. In his view, until the Court of Appeal or the Supreme Court reverses the decision, the position with respect to searches under ACECA remains as pronounced by the Court of Appeal. It was his submission that the Court had found that it was the intention of the legislature that a person of interest should be aware of the EACC's actions against him, and that in dealing with ACECA, the provisions of the Evidence Act and the Criminal Procedure Code do not apply as there are clear provisions on how to deal with matters coming under that Act, citing in support section 23 of ACECA.

17. I have considered the matter before me and the submissions in support. I note that despite the appeal having been placed for hearing before me, there was no record of appeal and the ruling of the lower court sought to be appealed against was not before the court. What was before the court was the application dated 3<sup>rd</sup> September 2019, interim orders in which were given on 5<sup>th</sup> November 2019. There is therefore no proper appeal before me on this matter.

18. I note further that under section 347 of the Criminal Procedure Code, an appeal lies to the High Court by the accused on a conviction. It provides as follows:

**347. Appeal to High Court**

**(1) Save as is in this Part provided—**

**(a) a person convicted on a trial held by a subordinate court of the first or second class may appeal to the High Court; and**

*(2) An appeal to the High Court may be on a matter of fact as well as on a matter of law.*

19. Section 348A allows the prosecution to appeal from an acquittal.

20. It appears to me, then, that there is no provision in the Criminal Procedure Code for appeals from orders of the trial court in the course of proceedings. In particular, there is no provision for interlocutory appeals against orders of the trial court admitting or failing to admit any evidence into the record. In its decision in **John Njenga Kamau v Republic [2014] eKLR** the court cited the above provisions of the Criminal Procedure Code, as well as section 354(3) of the said Code which contains the powers of the High Court on hearing of an appeal, which is to the following effect:

*(3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may—*

*(a) in an appeal from a conviction—*

*(i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or*

*(ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or*

*(iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;*

*(b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence;*

21. The court then went on to observe as follows:

*“...It is clear from the foregoing provisions of the Criminal Procedure Code that only a party who is convicted can file an appeal to this court. The Criminal Procedure Code does not envisage a situation where an accused or the prosecution may appeal to this court from an interlocutory ruling made by the trial court in the course of the trial. This court’s considered view is that the reason why such appeals are not allowed is deliberate and is not a lacunae in the law. If parties to a criminal trial were allowed to appeal against any interlocutory ruling made during trial, there is a possibility that parties to such trials, especially accused persons, may use the appeal process to frustrate the hearing and conclusion of the criminal case.”*

22. I fully agree with the sentiments of the court in the above matter. As I observed in **ACEC Miscellaneous Application No. 46 of 2019- Mukuria Ngamau & another v Republic**, to entertain applications for revision or appeals from rulings of trial courts on admissibility or otherwise of evidence is to micro-manage the trial process before subordinate courts. It would fetter the discretion of the trial court and hinder the expeditious trial of cases.

23. This position, in my view, also finds support in the decision of the Court of Appeal in **Thomas Patrick Gilbert Cholmondeley –vs- Republic [2008] eKLR** cited in **John Njenga Kamau v Republic (supra)**. Though the Court in the **Cholmondeley** case was dealing with section 379(1) of the CPC which deals with appeals from the High Court to the Court of Appeal, I believe that its observations are applicable with equal force to appeals from subordinate courts to the High court. The Court of Appeal stated as follows:

*“In ordinary criminal trials, there is generally no interlocutory appeals allowed for section 379 (1) of the Criminal Procedure Code allows only appeals by persons who have been convicted of some offence. The Appellant has not been convicted of any offence. As far as we understand the position the basis of an appeal cannot be that an order made in the course of a trial is highly prejudicial to an accused person;.....the fact that a trial Judge has made an adverse ruling against an accused person in a criminal trial does not and cannot mean that the Judge will inevitably convict. The Judge might well acquit in the end and the adverse ruling, even if it amounted to a breach of fundamental right, falls by the wayside and causes no harm to such an accused.”*

24. In the circumstances, aside from the fact that there is no proper appeal before me and the ruling appealed from is also not before the court, I am unable, for the above reasons, to enter into a consideration of the arguments made on the admissibility or otherwise of the documents in question. The appellant shall have a right of appeal to this court in accordance with the provisions of section 347 of the Criminal Procedure Code should the trial result in a conviction.

25. Accordingly, the appeal, such as it is, is struck out. The orders staying the proceedings in **ACC Case No. 5 of 2019** are hereby set aside and the trial court is at liberty to set a date for the hearing of the case against the appellant.

**Dated Delivered and Signed at Nairobi this 30<sup>th</sup> day of January 2020.**

**MUMBI NGUGI**

**JUDGE**