



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION
ANTI-CORRUPTION REVISION CASE NO. 51 OF 2019

*(Being Revision from the Ruling of the Chief Magistrate's Court at Milimani, Nairobi (L. N. Mugambi
(Mr.) dated 16th October, 2019)*

HON. KALPESH JAYANTILAL M.C.A JUJA WARD.....1ST APPLICANT
HON. CYRUS OMONDI M.C.A KAHAWA WENDANI.....2ND APPLICANT
HON. SAMUEL KIMANI WANJIKU M.C.A. KINOO WARD..... 3RD APPLICANT
HON. SOLOMON KINUTHIA M.C.A. NDENDERU..... 4TH APPLICANT
HON. NAPHTALI NGUGI MUNYAKA M.C.A. SIGONA WARD.....5TH APPLICANT
HON. ELIUD NGUGI NGIGE M.C.A. MUGUGA WARD..... 6TH APPLICANT
HON. PETER KARUA NGIGI M.C.A. LIMURU EAST7TH APPLICANT
HON. SIMON KAMAU KIMANI M.C.A KOMOTHAI..... 8TH APPLICANT
HON. MARTIN NJOROGE M.C.A. CHANIA.....9TH APPLICANT
HON. STEPHEN MAINA KAHINGA M.C.A. NDARUGU10TH APPLICANT
HON. PETER MUHINDI KIOI M.C.A. NACHU.....11TH APPLICANT
HON. LUCIE NJERI KOIGI NOMINATED M.C.A.....12TH APPLICANT
ERIC MUTURA MBUGUA SPEAKER BUNGE
MASHINANI KIAMBU COUNTY CHAPTER 13TH APPLICANT
MICHAEL KINYANJUI MBURU CLERK BUNGE
MASHINANI KIAMBU COUNTY CHAPTER.....14TH APPLICANT

V E R S U S

REPUBLIC

AND

FERDINAND NDUNGU WAITITU BABAYAO.....	1ST ACCUSED
SUSAN WANGARI NDUNGU.....	2ND ACCUSED
LUKA MWANGI WAHINYA (alias LUCAS)	3RD ACCUSED
CHARLES CHEGE MBUTHIA.....	4TH ACCUSED
BETH WANGECHI MBURU.....	5TH ACCUSED
ZACHARIA NJENGA MBUGUA	6TH ACCUSED
JOYCE NGINA MUSYOKA.....	7TH ACCUSED
SIMON KABOCHO KANG'ETHE.....	8TH ACCUSED
ANSELM GACHUKIA WANJIKU	9TH ACCUSED
SAMUEL MUIGAI MUGO.....	10TH ACCUSED
TESTIMONY ENTERPRISES LIMITED.....	11TH ACCUSED
SAIKA TWO ESTATE DEVELOPERS LIMITED.....	12TH ACCUSED
BIENVENUE DELTA HOTEL	13TH ACCUSED

RULING

1. On 29th July 2017, Ferdinard Ndungu Waititu Baba Yao Governor Kiambu County was together with 12 others arraigned before the Milimani Anti-Corruption Chief Magistrate's Court vide ACC No. 22 of 2019 facing various corruption related charges. After entering a plea of not guilty against the accused persons, the court fixed the matter for pre-trial directions.
2. Before hearing could commence, the trial court was on 9th September 2019 confronted with a Notice of Motion of even date. Out of the fourteen applicants in the said application, Twelve of them described themselves as members of the County Assembly Kiambu County and the other two, as members of an organization known as Bunge Mashinani Kiambu County Chapter whose alleged mandate entails lobbying for good governance and public participation Kiambu County.
3. Among the prayers sought in the said application were-
 - a) **That this honourable court grants leave to the applicants to participate in the proceedings herein by having a counsel hold-watching brief on their behalf.**
 - b) **That counsel for the applicants be granted reasonable access to the prosecution file.**
 - c) **That counsel for the applicants be allowed to make submissions on points of law or other**

matters that may arise at various stages of the trial as this court may determine.

d) That this honourable court sets any further terms on the scope of participation by the applicants as it may deem fit.

4. The application was premised on the grounds set out on the face of it and averments contained in the affidavit sworn on 6th September 2019 by Solomon Kinuthia the 4th applicant (MCA) with authority from the rest of the applicants stating that: the people of Kiambu are directly and indirectly affected by the offences under trial in the criminal proceedings: members of Kiambu County Assembly have a direct interest in the proceedings herein being the democratically elected representatives of the people of Kiambu: the alleged loss of finances affects the interest of Kiambu people; the participation of MCAs is in conformity with the discharge of their legislative mandate under Article 50 and for the common interest of Kiambu people; Bunge Mashinani Kiambu Chapter constitutes a section of members of the public from the grass roots and that, there will be no prejudice suffered if allowed to participate just as the EACC are.

5. In opposition to the said application, the DPP stated that; the application amounted to an abuse of the court process; the applicants had failed to prove that they were victims as envisaged under the Victims Protection Act; they had no identifiable stake or legal interest; the people of Kiambu were adequately represented by the DPP; the applicants are likely to cloud the proceedings with political undertones with a likelihood of obstructing the administration of justice; the applicants were free to attend and observe public hearings in open court; oversight role of the County Assembly does not stretch to judicial proceedings (litigation) and, that no prejudice would be suffered if their application was not allowed.

6. On the other hand, the 9th accused one Anselim Gachukia Wanjiku vide her replying affidavit sworn on 3rd October 2019 associated with the DPP's sentiments and opposed the application arguing that the applicants were politicians whose oversight mandate does not encompass court litigation.

7. Equally, the 1st accused (Governor) through an affidavit sworn on 3rd October 2019 and filed on 4th October 2019 opposed the application on grounds that; it was incompetent, defective and an abuse of the court process; that the applicants had no *locus standi* as they had no authority from the County Assembly of Kiambu and that, the applicants were not complainants.

8. On his part, the 3rd accused filed grounds of opposition arguing that the applicants had not demonstrated legitimate identifiable locus; were not qualified to be victims under Victim Protection Act and, that the application was frivolous.

9. After both parties canvassed the application through their respective submissions and authorities, the trial Magistrate dismissed the application on grounds that; the legal existence of the lobby group known as Bunge ya Mashinani was not a recognized legal entity; there was no proof that the two representatives were the legitimate leaders with authority to represent the interest of the group and that, the MCAs had no proof that they had authorization from Kiambu County Assembly being the recognized institution through which MCAs transact Assembly business.

10. The learned Magistrate however recognized the fact that Kiambu residents have a legal interest in the criminal proceedings being the victims or losers of the alleged stolen resources. He therefore dismissed the claim by the DPP that the Kiambu people are adequately represented by his office. In his view, the Kiambu residents can either apply to be represented through the County Government of Kiambu; Kiambu County Assembly or any properly registered community based organization with proven record.

11. Aggrieved by the said ruling, the applicants moved to this court by way of revision vide a letter dated 29th October 2019 addressed to this court citing the following grounds-

a) The learned Magistrate failed to appreciate that the applicants made the application to

hold a watching brief first on their own behalf as residents of Kiambu County and secondly, as the representatives of the residents of Kiambu County.

b) The learned Magistrate was wrong in finding that the only way through which the members of the County Assembly could channel the electorate concerns is through a collective decision processed through the County Assembly.c) The learned Magistrate was wrong in making a speculation and a finding of fact as to why IPOA was allowed to participate in the trial of the accused persons in the case of Leonard Maina Mwangi Versus Director of Public Prosecution & 2 Others [2017]eKLR contrary to the observation of the trial High Court which observed the following in paragraph 40 “in this case we have all categories of victims. They include the family members of the deceased persons; the Law Society of Kenya, IJM, Witness Protection and taxi owners’ and boda boda fraternity. Others include special category of overseers, IPOA”

d) The learned Magistrate erred in holding that although the MCAs had an oversight role; they were restricted to the County Assembly which holding is contrary to Article 50, is discriminatory and has no legal basis.

12. The application is supported by grounds that the applicants are residents of Kiambu and therefore entitled to watching brief status without authorization from anybody; that having recognized the legal interest or stake of the Kiambu people in the proceedings, the Hon. Magistrate had no right whatsoever to deny them that right which even in international best practices is recognized. In support of that position, reference was made to the case of Samuel Angasa Onuko vs Speaker Country Assembly of Kisii & 4 Others (2014)eKLR where an MCA petitioned against the Speaker of the County Assembly seeking to nullify irregular employment exercise without proper authority.

13. That if IPOA and EACC could be recognized to participate in criminal proceedings as was held in the case of Leonard Maina Mwangi v DPP and 2 Others (supra). Why would the Kiambu residents be denied an opportunity yet they are directly and indirectly affected.

14. In submission, Mr. Gathenji appearing for the applicants reiterated the content in the revision application arguing that the court having established that Kiambu public had a stake, he had no reason not to allow the applicants to appear as watching brief without seeking authority from anybody. Counsel, submitted that there is no law prohibiting the applicants from appearing as watching brief in proceedings where their interest is at stake.

15. That in the case of Leonard Maina Mwangi v DPP and 2 others (supra) the court allowed organizations such as IPOA, taxi operators and boda boda fraternity Kenya and IJM to participate in the proceedings.

16. In response, the DPP filed 13 grounds of opposition summarized as; lack of legal capacity by Bunge ya Mashinani group; lack of identifiable stake or legal interest by the applicants; applicants are not victims under the Victim Protection Act; there is adequate representation by the DPP; allowing participation of the applicants will cloud the proceedings thus delay and compromise hearing and fair trial; MCA’s oversight does not extend to litigation and, no prejudice will be occasioned if they do not participate.

17. In submission, Mr. Monda appearing for the DPP supported the finding of the trial court. He reiterated the grounds of opposition cited. Counsel questioned the reluctance by the applicants (MCAs) in seeking authority from the County Assembly. Counsel stated that the court properly distinguished the authorities cited. He urged that the applicants should follow the procedure or options given by the court.

18. The 2nd accused also relied on grounds of opposition dated 11th December 2019 and filed the same day basically restating what they stated before the trial court which facts I have already reproduced herein above. During the hearing, there was no attendance on the part of the accused persons.

Determination

19. I have carefully examined the record of the trial court, application for revision and responses thereto. I have been invited to revise the orders of the trial court pursuant to Article 165(6) and (7) of the Constitution and Sections 362 and 364 of the Criminal Procedure Code.

20. Supervisory jurisdiction over Subordinate Courts is donated by Article 165 (6) while Sub-Article 7 empowers the High Court to call for the record of any proceedings before the subordinate court or persons, body or authority referred to in Clause 6, and may make any order or give any directions it considers appropriate to ensure a fair administration of justice.

21. Further supervisory authority is donated by Section 362 of the CPC which provides that-

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

22. It is worth noting that Article 165(7) has expanded the mandate of the High Court beyond the confines of Section 362 of the Criminal Procedure Code. In other words, the High Court is not strictly bound by the elements stipulated under Section 362 and 364 of the Criminal Procedure Code.

23. Before a High Court could act and interfere with the impugned order or decision, it must first interrogate the said order or decision to ascertain whether the trial court acted on a wrong legal principle thereby misapprehending the law hence compromising the interest of justice (see **Joseph Waweru v Republic (2014)eKLR and Thomas Patrick Cholmondeley vs Republic (2008)eKLR**).

24. It is trite that the High Court’s revisionary jurisdiction is not a matter of course. It must strictly apply or be invoked where there is a glaring omission or act to warrant exercise of its discretionary powers in favour of the applicant. See **Joseph Nduvi vs Republic (2019)eKLR**.

25. In the instant case, the only issue for determination is whether the trial Magistrate properly pronounced himself in holding that the applicants do not directly or indirectly qualify to watch brief on behalf of the Kiambu residents.

26. The gravamen of the application herein is the prayer by the applicants seeking to be recognized in their individual capacity as representing the interest of Kiambu residents.

27. The genesis of the right of a victim to actively take part in criminal proceedings can be traced to Article 50(1) which guarantees the right to every person to have a dispute heard in open court by application of the law before an independent tribunal or court or body and, Article 50(9) of the Constitution which engineered legislation of an Act providing for the protection of rights and welfare of victims of offences. Consequently, the Victim Protection Act 2014 was enacted and assented to in 14th September 2014.

28. Section 9 of the Victim Protection Act is the underpinning provision governing the right of a victim in criminal proceedings thus providing that-

(1) A victim has a right to-

- a) be present at their trial either in person or through a representative of their choice;**
- b) have the trial begin and conclude without unreasonable delay;**
- c) give their views in any plea bargaining;**

d) ...

e) **be informed in advance of the evidence the prosecution and defence intends to rely on, and to have reasonable access to that evidence;**

f) **have the assistance of an interpreter provided by the State where the victim cannot understand the language used at the trial; and**

g) **be informed of the charge which the offender is facing in sufficient details.**

29. To further fortify the victim's (complainant's) rights, Section 13 provides –

“Where a victim is a complainant in a criminal case, the victim shall, either in person or through an advocate be entitled to-

(a)subject to the provisions of the Evidence Act, adduce evidence that has been left out;

(b) give oral evidence or written submissions.”

30. As defined under Section 2 of the Victim Protection Act, a victim is referred to as a natural person who suffers injury; loss or damage as a consequence of an offence.

31. Pursuant to Section 9(3) of the Act (VPA), a victim's interest or concerns may be represented by the legal representative acting on his or her behalf. Who is a victim's representative? Under Section 2 of the Victim Protection Act, a victim representative is defined as an individual designated by a victim or appointed by the court to act in the best interests of the victim.

32. In the instant case, the applicants are MCAs who by virtue of their position are residents of Kiambu County. The other two are only claiming to be representatives of Bunge Mashinani Kiambu Chapter. Who is the victim in the context of the obtaining criminal proceedings? The applicants argued that the victims are the Kiambu people who have suffered directly or indirectly by the alleged financial loss.

33. I am entirely in agreement with the trial court that the people of Kiambu have an identifiable or recognizable stake or legal interest in the criminal proceedings by dint of being the beneficiaries of the lost finances through the alleged corruption charges preferred against the accused persons. The people of Kiambu have a right to follow proceedings at all stages to be able to understand the progress of the case and if any evidence is left out by the prosecution, they will be able to intervene and seek production of such evidence in compliance with Section 13 of the Victim Protection Act.

34. It is therefore crucial that a person or body or a group of people who have an interest either direct or indirect in the outcome of criminal proceedings may be incorporated to play the role of watch dog over the prosecution especially in monitoring the manner in which presentation of evidence is conducted as well as watch over the general conduct of the proceedings in the interest of the victim.

35. Who appoints a victim's representative where the complainant or victim is not an individual? In this case, the victims admittedly are the residents of Kiambu. How can they confer their authority or mandate of legal representation in a court of law to protect or take care of their interest?

36. The 13th and 14th applicants are described as the Speaker and Clerk Bunge Mashinani Kiambu Chapter. These are members of an amorphous kind of organization which is not a legal entity. It cannot for all purposes and intent purport to represent the people of Kiambu as victims.

37. To allow such an organization to step into the arena of litigation in a situation such as this one will be akin to opening Pandora's box for anarchy and total misdirection in the criminal justice system. There must be an orderly structure and recognizable mode of identifying victim representation so as to secure adequately the objective for which the VPA was enacted. I do agree with the honourable Magistrate that

the two applicants have no recognizable or identifiable legal interest in the criminal proceedings herein other than cheap publicity.

38. What about the MCAs? The 12 MCAs are riding on the platform of being people's representatives.

39. The applicants are purporting to nominate a legal representative (Advocate) to represent the interest of Kiambu people. The word Kiambu people is a representation of a huge population. The entire population have not directly or indirectly nominated anybody as victims to represent their interest. Instead, the applicants have in the capacity of their official legislative position nominated themselves as representatives of the people of Kiambu.

40. Who appointed them as victims' representatives? Since the outcome is likely to affect Kiambu people generally, Kiambu people can be represented through a recognized agent from whom they can derive a feedback or who can be accountable by virtue of executing their mandate or being a representative of the victims. Legislative representative does not automatically translate to legal representation.

41. In public interest litigation such as the pending criminal proceedings herein, it will not be just to allow everybody to come on board and start claiming to be the people's representative. Behind the victims' legal representative (Advocate) there must be an authorizing victim. In this case, there is no proof of authorization or nomination by the victims in this case Kiambu residents. Courts will be faced with challenges if every day various Kiambu residents decides to come on board also with competing interests seeking to appear as watching brief for Kiambu people. There must be some criteria, order or measure of degree through which a victim's representative can be ascertained without losing sight of the very objective why the Act was enacted.

42. I am in agreement with the trial court that in their individual capacity, the 1st – 12th applicants have no recognizable legal capacity to represent Kiambu people outside their legislative function. As correctly advised, the Kiambu people have a legal stake in the proceedings and ought to be represented by a recognized agency duly authorized. These can be done as advised through the County Government or County Assembly nominating an advocate or any duly recognized body championing Kiambu residents' interests in some sphere of life.

43. To have a structured identifiable process will enable the court to sieve busy bodies from genuine litigants and not politicians seeking to play to the gallery. These will also salvage courts' precious time from unnecessary clogging and clouding of the justice system which will defeat the spirit of Article 50(2) on expeditious delivery of justice.

44. Regarding their participation in public hearings, courts are conducted in the open and nobody is restricted from attending. The applicants will be at liberty to attend court proceedings at all times. Mr. Gathenji placed a lot of reliance and weight in some case law among them the case of **Ken Samuel Angasa Onuko vs Speaker County Assembly Kisii County & 4 Others (supra)** where an MCA filed a petition challenging irregular employment. This is a civil suit which is ordinarily filed under Article 22(1) of the Constitution which provides-

“(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”

Sub-Section (2)

“In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-

(a) a person acting on behalf of another person who cannot act in their own name;

- (b) a person acting as a member of, or in the interest of, a group or class of persons.”**
- (c) a person acting in the public interest;**
- (d) an association acting in the interest of one or more of its members.**

45. Proceedings instituted under Article 22 as in the case of **Angasa** cannot be equated or compared to the application herein under VPA to appear as watching brief. The facts are therefore distinguishable. A petition under Article 22 of the Constitution is civil in nature and the appellants can pursue that route if they wish to recover the alleged stolen funds.

46. Regarding heavy reliance on **Leonard Maina Mwangi case vs DPP & 2 Others** (supra) where the court admitted taxi operators, boda boda organization and IPOA, the trial court addressed the peculiar facts between the two and distinguished the same. In the **Mwangi** case, the court justified their inclusion at paragraph 63 of the judgment arguing that; IPOA had a stake in the case as the accused persons were police officers; witness protection had a statutory mandate in rendering protection to witnesses; taxi operators and bodaboda had their members as victims of the murder crime and, the family as losers of their beloved ones hence perfectly fitting in the category of who victims under the VPA.

47. It is clear that the organizations named were representatives of their legally recognized statutory or registered bodies (organizations). The applicants are not representing their people through the Assembly. The Assembly is not even aware that they are in court in that capacity.

48. In this case, the applicants are not representing the County Assembly or County Government but generally Kiambu people. They have not come through any recognized body e.g their County Assembly in which they would have received authorization or a resolution authored by the Speaker of the County Assembly or Assembly Clerk or, seek the Assembly to demonstrate some authentic interest just like the LSK or Parliament does when playing their oversight role. For instance, in the case of LSK, not every Advocate will come to court and purport to represent lawyers’ interest without authorization from LSK. For orderly court business and management, courts should use their discretion to assess and determine genuine victim representatives from non-genuine personalities. Regarding the admission of EACC in the proceedings, this is a statutory investigative body who preferred the criminal charges which is at the centre of litigation hence their interest in participating.

49. In my view, the trial court quite extensively addressed the application and arrived at a well-reasoned and meritorious finding with wide options on how the applicants can participate in the proceedings. I do not find any error committed in the orders made to warrant revision.

50. Accordingly, the application is hereby dismissed and the orders of the trial court sustained. Proceedings to continue from where they have reached and the Deputy Registrar to return the original file to the trial court.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT **NAIROBI** THIS **29TH** DAY OF **JANUARY, 2020.**

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J. N. ONYIEGO

JUDGE