



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

CRIMINAL REVISION NO 1 OF 2020

EVANS ODHIAMBO KIDERO.....APPLICANT

VS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

(Being an application for revision of the ruling in ACC No. 8 of 2019

(Hon. D. Ogoti (CM) dated 4th December 2019)

RULING ON REVISION

1. The applicant has filed the present application for revision in which he challenges a decision of the trial court in respect to an application by the prosecution dated 6th August 2019 seeking to consolidate Anti- corruption Case No 8 of 2019 in which he is the 1st accused, and Anti-Corruption Case No 17 of 2019-Republic v Joshua Aduma Owuor. In its ruling dated 4th December 2019 dismissing the application, the trial court made various observations and recommendations with respect to the charges facing the accused in the two cases.

2. According to the applicant, the trial court further proceeded, on 16th January 2020, to issue directions that accorded with the recommendations.

3. It is these directions that have precipitated the present application for revision. The applicant argues that notwithstanding the fact that the legal question before the trial court was on consolidation of charges, the court proceeded to direct the prosecution to amend the charges in ACC No 8 of 2019 by dropping some charges, and consolidating some counts or having other counts tried in ACC No. 17 of 2019. The applicant is also aggrieved that the trial court directed the prosecution to prepare new charge sheets along the said directions and for the accused to take fresh pleas. On 16th January 2020, the trial court directed the accused persons in ACC No 8 of 2019 to take fresh pleas on 21st January 2020 as recommend by the trial court.

4. The application before me is dated 20th January 2020 and was filed in court on 21st January 2020. It is expressed to be brought under the provisions of Article 25(c) 50(2), 165(6) and (7) and 259 of the Constitution, sections 362 and 364(1)(b) and 2 of the Criminal Procedure Code (CPC), the inherent powers of the court and all other enabling provisions of the law. The applicant seeks the following prayers in his application.

1. (spent)

2. Pending the hearing and determination of this application, the proceedings in Anti-Corruption Criminal Case No 8 of 2019 Republic v Evans Odhiambo Kidero and 15 Others be and are hereby stayed.

3. The High court do ad hereby calls for the record and proceedings of the trial court (Hon. D Ogoti) in Nairobi Chief Magistrate's Court Anti-Corruption Criminal Case No 8 of 2019 Republic v Evans Odhiambo Kidero and 15 Others for the purpose of ascertaining the correctness, legality and propriety of the directions given by the trial court on 4th December 2019 and to issue any other order or giving any directions tht is appropriate to ensure the fair administration of justice.

4. An order be and is hereby issued, quashing, and setting aside the following directions given by the trial court in the ruling delivered on 4th December 2019 which went beyond the ruling disallowing the respondent's application for consolidation:

a. *“The prosecution to consider counts VIII, X, XI, XIII, XV and XX in ACC 8 of 2019 and select among them which charges to prefer against he accused therein;*

b. *Have counts 1 to XV in Acc 8 of 2019 tried in Acc of 2019*

c. *Consider having counts II, IV and VII in ACC No. 8 of 2019 consolidated into one charge;*

d. *Prepare and present new charge sheets as directed above and below at the next mention for taking plea afresh;*

e. *In the new charge sheet for ACC 17 of 2019 have the current charges i.e XVII and count XIX in ACC 8 of 2019 consolidated into one charge”*

5. An order be and is hereby issued, quashing and setting aside the trial court’s directions that he accused person in Acc no 8 of 2019 take fresh pleas.

5. The application is supported by an affidavit sworn by Dr. Evans Odhiambo Kidero, the 1st accused and the applicant in the matter and is based on 13 grounds set out on the face of the application. The grounds in the application mirror closely the averments by the applicant in his affidavit in support of the application.

6. The first two grounds reiterate the facts relating to the application that was before the trial court and the decision and directions given by the court. The applicant argues in his third ground that despite dismissing the application for consolidation, the trial court gave the directions set out above, which were neither before the trial court for determination nor within the trial court’s powers, mandate or jurisdiction.

7. The applicant argues that despite the trial court terming these directions as ‘observations’ and ‘recommendations’, it proceeded to issue peremptory orders and directions that the respondent was required to comply with.

8. The applicant argues that he is dissatisfied with the decision of the trial court to the extent that in its directions, the court exceeded its powers on the matter that was before it for determination, and its decision was therefore unlawful. He contends further that the trial court unlawfully and illegally arrogated to itself powers to direct the respondent on how to exercise its mandate. His contention is that while the trial court correctly dismissed the respondent’s application for consolidation, it sought, through the back door and under the guise of observations and recommendations to claw back ‘his own ruin’ and give to the respondent what it could not get in the application.

9. It is the applicant’s contention that the trial court erred, misdirected and misconducted itself by purporting to make ‘observations’ and ‘recommendations’ while in fact issuing binding directions or orders, which the respondent was bound to comply with. In his view, these directions and observations made subsequent to disallowing the respondent’s application for consolidation are *ultra vires*, unlawful and cannot lie.

10. A further ground relied on is that the court’s ruling is incorrect, improper and illegal for several reasons. First, the office of the Director of Public Prosecutions as established under Article 157 of the Constitution is an independent office and is not subject to the direction or control of any person or authority. Secondly, that in the ruling, the trial court transformed itself into a prosecutor and became an active player in the litigation arena by directing the respondent on how to prepare new charge sheets.

11. His third reason is that the legal question before the trial court as presented in the application dated 6th August 2019 was whether an order of consolidation of ACC Nos. 8 and 17 of 2019 could be made, and nothing more. The trial court had, however, gone beyond the question before it and *suo moto* directed the prosecution to amend, consolidate and drop some charges and present new charge sheets for which the accused persons are to plead afresh.

12. While conceding that section 214 of the CPC allows the court to order for the alteration of a charge where it is defective in form or substance, his argument was that the directions given to the prosecution by the trial court in this case were not made pursuant to section 214 as the court did not make any finding that the charges in Anti-Corruption Criminal Case No 8 of 2019 were defective either in form or substance.

13. Finally, the applicant contends that he and his co-accused person’s right to fair trial as guaranteed under Article 50 of the Constitution will be violated if they are to plead to new charges which are unconstitutional and prepared under the direction and instruction of the trial court.

14. The applicant further contends that on 16th January 2020, the trial court directed that the accused persons in ACC No 8 of 2019 should take fresh pleas on the revised charges on 21st January 2020. He argues that should this application not be heard and determined urgently before he and his co-accused are compelled to take fresh pleas, their application will be rendered nugatory and the accused persons will have been condemned to an unfair process, which will taint the entire proceedings. In his view, this will result in a tainted process that will be rendered illegal from the outset. To avoid an injudicious use of judicial resources and time in proceeding with a flawed process, the applicant urges this court to stay the proceedings in ACC No 8 of 2019 pending the hearing and determination of this application.

Determination

15. I have considered the application before me and the impugned ruling of the trial court dated 4th December 2019. I note that the application was filed on 21st January 2020, the date when, according to the applicant, he and his co-accused were required to take fresh pleas in accordance with the directions of the trial court which they challenge in the present application.

16. The applicant asks the court to exercise powers of revision conferred on the court by Article 165(6) and (7) and sections 362 and 364(1)(b) and 2 of the CPC. Reference is also made to Articles 25(c) and 50(2) of the Constitution which relate to and guarantee the right to a fair hearing, and Article 259 on the interpretation of the Constitution.

17. Article 165 (6) and (7) clothe the High Court with supervisory powers over subordinate courts in the following terms:

(6) The High Court has supervisory jurisdiction over the

subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

18. At section 362, the CPC 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.

19. At section 364 (1)(b) and (2), the CPC provides, with respect to the powers of the High Court on revision, that:

(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

(a)...

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

20. A perusal and consideration of the application before me reveals that the applicant is aggrieved by the ‘observations’ and ‘recommendations’ made by the trial court in its ruling of 4th December. It is also aggrieved by the directions made on 16th January 2020 that the accused persons in ACC 8 of 2019 take plea in accordance with the charges preferred pursuant to the directions and ruling of the trial court.

21. As I understand the applicant, the directions of the trial court were not in accord with the provisions of section 214 of the CPC, and secondly, that the trial court should not have directed the office of the DPP to amend the charges as the DPP is an independent office under Article 157 of the Constitution and is not subject to the direction or control of any person or authority. His third argument is that the trial court became an active player in the litigation by directing the prosecution on how to prepare new charge sheets. He is aggrieved also that the trial court went outside what was in the application before it in making the directions that it did.

22. A determination of this application, in my view, turns on a consideration of the scope and ambit of section 214 of the CPC. This section, titled ‘**Variance between charge and evidence, and amendment of charge**’ provides that:

(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that—

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.

23. The applicant argues that the trial court should not have directed the prosecution on what to do with the charges as the Office of the DPP is an independent office and not subject to the control or direction of any person. That, in my view, is the correct constitutional position with regard to the exercise of prosecutorial powers such as making a determination on whether or not to prefer charges in any matter, and against

whom such charges should be preferred.

24. However, once a matter is before the court, the conduct of the proceedings falls within the jurisdiction of the court, to be exercised in accordance with the Constitution and the law. The law in this case with regard to the procedure to be followed in a trial is the CPC, which empowers the court, on its own motion, to direct that charges should be amended should it deem it necessary. I therefore find no basis for challenging the directions of the court on this ground.

25. The applicant argues that the directions were not given under section 214 of the CPC as the charges before the court were not found to be defective in form or substance. I observe, however, that section 214 vests jurisdiction in the court to issue directions with regard to amendment of charges if '*it appears to the court...*' As I see it, it is the responsibility of the court to ensure that the trial before it proceeds fairly and efficiently, with a view to ensuring the fair administration of justice, not just for an accused person, but in the interests of the public which has an interest in proper prosecution of offenders and, where culpability is established, conviction of the offenders.

26. Where the court takes the view that the charges as framed and presented before it are deficient in any manner that would hinder or defeat the ends of justice, the court would be failing in its duty, in my view, were it not to make the appropriate directions with respect to the substance and form of the charges before it. I say this bearing in mind the provisions of section 89 under which a magistrate is empowered to draw up or cause to be drawn up and sign a formal charge containing a statement of the offence with which an accused person is charged, or where of the opinion that a complaint or formal charge presented before the court does not disclose an offence, make an order declining to admit the complaint or formal charge.

27. The applicant is also aggrieved that the court made its directions after dismissing the prosecution's application for consolidation of charges, and in the same ruling. The question is whether the timing of the observations and recommendations is material and likely to affect the fair trial of the applicant. In my view, it is not. The court may just as easily have delivered its ruling on the application for consolidation, and thereafter given directions of the nature that are impugned in the present application.

28. The final ground of complaint is that by requiring the applicant and his co-accused to take pleas afresh on the charges amended in accordance with the directions of the court, their right to a fair hearing under Article 50(2) which, under Article 25(c), cannot be limited, will be violated. From the applicant's affidavit and the grounds on which the application is based, nothing is presented to show how the right to a fair hearing will be violated or affected in any way. The applicant and his co-accused will have a chance to take plea on such charges as the prosecution may prefer. They will have the right to all evidence that the prosecution intends to rely on. They will have the right to cross-examine witnesses and present their own witnesses. Indeed, the court has an obligation to ensure that all the rights that the accused are guaranteed under Article 50 are respected and protected. Pleading to amended charges, in my view, does not violate any rights of the applicant and his co-accused.

29. I accordingly find no incorrectness, impropriety or illegality in the decision of the trial court dated 4th December 2019 or the directions given on 16th January 2020. The application for revision is accordingly dismissed.

Dated and Signed at Nairobi this 23rd day of January 2020

MUMBI NGUGI

JUDGE