



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION
REVISION APPLICATION NO. 42 OF 2019

THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT

VERSUS

PETER AGUKO ABOK..... 1ST RESPONDENT
GEORGE ANYANGO OLOO.....2ND RESPONDENT
GEORGE OMOLLO ODAWA.....3RD RESPONDENT
ANTHONY KIPRONO KOGO.....4TH RESPONDENT
DAVID NYAPIDA OYOSI..... 5TH RESPONDENT
JOHN NYEERA MANGO.....6TH RESPONDENT
JOHN COLLINS ONYANGO.....7TH RESPONDENT
BONIFACE ORORI SIMBA.....8TH RESPONDENT
WILLIAM BILL OMODING.....9TH RESPONDENT
JIMMY WAPNGANA NABWERA.....10TH RESPONDENT
ALEX JIMMY MKABWA.....11TH RESPONDENT
MARY DORIS GOIMA MICHIEKA..... 12TH RESPONDENT
KENNEDY OTAWA MUSEBE..... 13TH RESPONDENT
MICHAEL OBORA.....14TH RESPONDENT
JOASH ODHIAMBO DACHE..... 15TH RESPONDENT
DENIS SEBASTIAN MULAA..... 16TH RESPONDENT
JOSIAH OKUMU..... 17TH RESPONDENT
OKUMU OGWANG ODINDO.....18TH RESPONDENT
INNOCENT OBIRI MOMANYI.....19TH RESPONDENT

OSCAR ODHIAMBO OGUNDE.....	20 TH RESPONDENT
VINCENT MAKONJIO OGENGE.....	21 ST RESPONDENT
LYDIA OWINO.....	22 ND RESPONDENT
ZHANG JING.....	23 RD RESPONDENT
JOHN ZEYUN YANG.....	24 TH RESPONDENT
ANTHONY CHEBULOBIS KISAKA.....	25 TH RESPONDENT
NELSON OUMA ONYANGO.....	26 TH RESPONDENT
HENRY OGWANG ODINDO.....	27 TH RESPONDENT
EMMANUEL SONGORO.....	28 TH RESPONDENT
MOSES WEKESA.....	29 TH RESPONDENT
GODFREY MAINA MWANGI.....	30 TH RESPONDENT
FREDRICK CHERE ONYANGO.....	31 ST RESPONDENT
ALBERT OJANGO OMONDO.....	32 ND RESPONDENT
AMELIA JACKELINE OTIENO.....	33 RD RESPONDENT
TERESIA ACHIENG' OCHAKA.....	34 TH RESPONDENT
ERDERMANN PROPERTY LIMIED.....	35 TH RESPONDENT
SYMBION KENYA LIMITED.....	36 TH RESPONDENT

RULING

1. On 9th September, 2019, Peter Aguk Abok and 35 others were arraigned before the Anti-Corruption Court Milimani vide ACC Nos. 25/2019 and 26/2019 facing corruption related charges. Having returned a plea of not guilty, the accused persons were released on various bail terms and conditions.

2. For purposes of its ruling on the application for bail, the court consolidated the two files and delivered its ruling on 9/09/2019 under file No. 26/2019. It was during the hearing of the bail application that the court invited the prosecution also to address the issue of disclosure to which Mr. Kihara intimated that they had about 250 documents to disclose some of which had more than 1,000 pages. Mr. Kihara also disclosed that they had 65 witnesses whom they intended to call.

3. In its ruling delivered on 9/09/2019, the court *suo motto* made remarks stating that;

“anti corruption matters are complex matters hence requiring a different approach in handling them from the inception the absence of the law governing their uniqueness notwithstanding”.

The court further observed that anti corruption matters were complex because they involve many accused persons, many charges, a lot of documentation and many witnesses cutting across cases thus posing a challenge on the hearing and disposal of cases. The honorable magistrate also noted that there was no law nor precedents clearly governing disclosure of evidence in conformity with Article 50(2)(j) and (4) and Article 24 and 25 of the Constitution.

4. In the learned Magistrate’s view, lack of express provisions regarding disclosure, maximum number of charges to be preferred and the extent of disclosure has posed a challenge in terms of delayed prosecution and determination of the matters, apathy in hearing anti-corruption cases, presentation of evidence by the prosecution and analysis of evidence by the trial court.

5. Consequently, the Learned Magistrate made the following directions;

1) The prosecution to make disclosure in every prosecution file.

2) From today henceforth, the investigative agencies and the DPP to ensure that disclosure in each prosecution file must be done count by count.

3) All disclosures should be captured in an inventory to be signed by both parties i.e prosecution and defence and filed in court.

4) Each item to be presented in the inventory singularly.

5) The documents be disclosed in such manners to have indexes paginated.

6) On the issue of bail/bond, I have considered the nature of offences brought against the accused persons, the amount of money alleged to have been lost, the presumption of innocence and the court's duty to ensure that in admitting the accused to bond the main purpose is to ensure that they attend court.

6. Aggrieved by the said ruling and in particular the direction for disclosure count by count, the DPP moved to this court pursuant to Article 165(6) and (7) of the Constitution of Kenya 2010 and Sections 362 and 364 of the Criminal Procedure Code, citing all accused persons as respondents seeking orders as follows;

1) That the Honourable Court be pleased to certify this application as urgent and heard *ex parte* in the first instance and on priority basis.

2) That the Honourable Court be pleased to stay the order dated 9th September, 2019 specifically directing all investigative agencies and the Director of Public Prosecutions in Anti-Corruption and Economic cases to ensure disclosure in each charge sheet to be done count by count until the hearing and final determination of this application *inter partes*.

3) That this Honourable Court be pleased to call for and examine the record of the proceedings in the Anti-Corruption Chief Magistrate's court Nairobi at Milimani in Milimani Anti-corruption case Number, 25 and 26 of 2019 Republic vs. Peter Aguko Abok & 35 others for the purposes of satisfying itself and pronouncing the correctness, legality or propriety of the order issued on 9th September, 2019 by Hon. D. Ogoti.

4) That the Court be pleased to review, vary, reverse and/or alter the orders relating to specific disclosure on each count in Anti-Corruption Chief Magistrate's Court Nairobi at Milimani AntiCorruption Case Number, 25 & 26 of 2019 Republic vs. Peter Aguko Abok & 35 others.

5) That the Honourable Court be pleased to make any other order that it deems fit in the interests of justice.

7. The application is anchored on grounds that disclosure of evidence count by count was contrary to the constitutional duty requiring reasonable access to all the evidence by the accused persons; that there was no legal basis upon which the order was anchored nor was there any indication that the prosecution had failed to discharge its disclosure mandate under Article 50(2) (c) (j); that disclosure of evidence is obligatory, continuous and expensive.

8. The application is further supported by an affidavit sworn on 25/09/2019 by Mary Gateru Senior Assistant Director of Public Prosecutions. It was averred that the court made the order *suo motto* without the prosecution being given an opportunity to place its material evidence; that the prosecution intends to produce 1,500pages of evidence which cuts across all counts hence the direction to present this case count per count was tantamount to directing the applicant on how to present its case contrary to Article 157 of the Constitution.

9. The application having been certified urgent on 25/09/2019, the same was served upon the accused persons as respondents some of who filed their affidavits in response.

10. During the pendency of the Revision application, the 29th accused person (29th respondent) through the law firm of Nyamodi & Co. Advocates filed a notice of motion dated 7th November, 2019 pursuant to *Articles 23 and 165 (4) , 159, 258 and 259 of the Constitution and Rules 3 and 19 of the Constitution (Protection of rights and fundamental freedoms/ practice and procedure rules, 2013)* seeking orders as follows;

a. That this application be certified urgent and be heard *ex parte* in the first instance.

b. That this application be heard in priority to any other matter in this revision

c. That this court be pleased to certify this matter as one raising a substantial question of law under Article 165(4) of the Constitution which should be heard by an uneven number of Judges, being not less than three (3) assigned by the Honourable Chief Justice.

d. That this Honourable Court be pleased to refer this matter to the Chief Justice for empanelment of a bench as provided for by Article 165 (4) of the constitution.

e. That the costs of this application be in the cause.

11. The application is premised upon grounds set out on the face of it and affidavit in support sworn on 7th November, 2019 by Nyamodi Counsel for the applicant. The gravamen of the application is that the direction by the trial court on disclosure of material evidence count by count was in conformity with Article 50(2)(j) whose spirit the order seeks to promote thus raising a serious question of constitutional interpretation and that the outcome will have a significant impact on the extent of the rights of the accused persons.

12. In response to the 29th Respondent's application, the 10th and 18th respondents, filed a replying affidavit on 18/11/2019 supporting the application. Equally, the 23rd, 24th and 35th accused persons filed their joint replying affidavit on 18/12/2019 supporting the application. Apparently, the DPP did not oppose the application.

13. When the application by Mr. Nyamodi came up for hearing on 17/12/2019, both parties agreed by consent to have the matter (revision **Application**) referred to the CJ to constitute a three Judge bench to hear and determine the Constitutional question on the disclosure of evidence count by count. However, the court declined to refer the matter to the CJ based on the consent sought to be recorded and adopted as an order of the court. Parties were then directed to file Skeleton submissions to support their position.

14. Consequently, the 19th Respondent filed his submissions through the firm of Katwa Kigen supporting the position that the issue in question is a novel one and raises substantial constitutional issue which has never been canvassed before any court of law thus the need for a three judge bench. To support this position counsel referred to various case law expressing what constitutes a novel question and substantial constitutional question inter alia *Eric Gitari vs. A.G. (2016)eKLR and Martin Nyaga and others vs. Speaker County Assembly of Embu & 4 others and amicus (2014)eKLR* where the court emphasized the principles applicable when making a declaration under Article 165(4) to include; whether the matter is a novel point; whether the matter is itself requires a substantial amount of time to be disposed of; the effect of the prayer sought in the Petition and, the level of public interest.

15. The 20th and 36th Respondents filed their skeleton submissions on 6/01/2020 supporting the application. The court was referred to the opinion in *Delmonte Kenya Limited v County Government of Murang'a & 2 others [2016]eKLR and Okiya Omtatah Okoiti vs. IEBC and 3 others (2016)eKLR* in which the principles for consideration before referring a case to the CJ for empanelment of a three judge bench as elucidated in Martin Nyaga Wambora 's case (supra) were restated.

16. Similar submissions and authorities were made and cited by the 29th respondent (applicant) in persuading the court to refer the matter to the CJ. Similarly, the 3rd and 9th respondents filed their submissions on 7/01/2020 supporting the grounds that the issue in question raises a novel question and a complex one. On the other hand, prosecution filed their submissions on 7/01/2020 restating the averments contained in their revision application despite agreeing with the 29th Respondent's application on grounds that the issues raised are weighty and will affect several cases in the criminal justice system.

Analysis and determination

17. I have considered the application herein, the responses thereto and submissions by various counsel on record. The only issue that crystalize for determination is whether the application for revision dated 25/09/2019 meets the threshold set out under Article 165(4) of the Constitution to warrant referral to the CJ for empanelment of an uneven number of Judges not less than three to hear the matter.

18. This court's authority to make the orders sought is anchored in both Article 165(3)(a) (b) (d) and (4).

“Sub-Article (3) provides that-subject to Clause 5, the High Court shall have-

- (a) unlimited original jurisdiction in criminal and civil matters;**
- (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;**
- (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;**
- (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-**

- (i) the question whether any law is inconsistent with or in contravention of this Constitution;**
- (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;**
- (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and**
- (iv) a question relating to conflict of laws under Article 191; and**

(e) Any other jurisdiction, original or appellate, conferred on it by legislation.

Sub-Article 4 – Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.”

19. The issue in question is whether the direction that the prosecution at the pre-trial stage should furnish or disclose evidence or materials it intends to rely on amounts to a substantial question of law to warrant a referral to the CJ to empanel a bench of uneven number of judges.

20. When considering whether there is sufficient ground/s to issue a certificate referring the matter to the CJ, the court is duty bound to take into account whether there is a substantial question of law to warrant empanelment of uneven number of judges. To determine this aspect comprehensively, courts have articulated the issue in various forums and basically agreed on certain salient legal considerations to be taken

into account. Such parameters were outlined in the case of County Government of Meru vs. Ethics and Anticorruption Commission (2014)eKLR where the court stated as follows;

a. The grant of a certificate under Article 165(4) of the Constitution is an exception rather than the rule.

b. The substantial question of law is a question to be determined in the circumstances of the case. Substantial issue of law is not necessarily a weighty one or one that raises a novel issue of law or fact or even one that is complex. Many provisions of our Constitution are untested and bring forth novel issues yet it is not every day that we call upon the Chief Justice to empanel a bench of not less than three judges.

c. Public interest may be considered but is not necessarily a decisive factor. It is in the nature of petitions filed to enforce the provisions of the Constitution to be matters of public interest generally.

21. Similar position was held in Martin Nyaga Wambora and others vs. Speaker County Assembly of Embu and 4 others where the court summarized factors for consideration before referring a file for empanelment of a bench as follows;

a. Whether the matter is complex

b. Whether the matter raises a novel point

c. Whether the matter by itself requires a substantial amount of time to be disposed of.

d. The effect of the prayers sought in the petition and

e. The level of public interest generated by the petition

22. The above principles can generally be traced to an Indian Supreme Court decision in Chunilal V. Mehta The Century Spinning And Manufacturing Co. AIR 1962 SC 1314 where it was held;

“a substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial.”

23. Before this court pending consideration is a revision application brought vide a written letter by the DPP. Ideally, there is no substantive suit filed by any of the parties either by way of a Constitutional Petition or Judicial Review Application. The issues being raised were generated by the trial court *suo motto* in the order or form of giving directions. The prosecution being aggrieved decided to challenge the direction as being incorrect, improper or illegal.

24. The respondents herein had no role to play with regard to the *suo motto* orders issued by the court. The respondents who are accused persons were literally dragged into this application. They did not make any application giving rise to the directions issued by the trial court. In my view, they are not principle parties for purposes of the revision application. The orders sought in the revision application are directed at the trial court which made the offending or impugned orders. In fact, the respondents who have now hijacked and possessed the revision application are not even the applicants nor are they supposed to be respondents.

25. In the circumstances, they have no independent application against anybody nor is there any application seeking orders against them to warrant framing a substantial issue to be determined by a three judge bench. In essence, there is no dispute or cause of action between the DPP and the respondents who are accused persons. The forum under which the application has been made in my humble view is a wrong one and the orders sought cannot issue in a vacuum.

26. In the absence of a suit or dispute by the respondents or against them, they cannot claim a legal right or interest to refer the review application to the CJ for empanelment of a three Judge bench. They did not complain nor raise any issue before the trial court regarding the violation, denial, infringement or threat to their rights or fundamental freedoms. They did not raise any issue regarding the interpretation of the Constitution hence their clamour that their rights under Article 50(1) are being violated is just but an afterthought.

27. On that ground alone the respondents among them the applicants (29th respondent) have no locus in the revision application and therefore have no capacity to move the court to refer the file to the CJ on a nonexistent suit or claim by or against them.

28. Even assuming for a moment that they have an interest by virtue of being accused persons in the revision application to which they are accused persons, does the revision application meet the threshold under Article 165(4) of the Constitution. The court is being asked to find whether the direction of the trial court for the prosecution to disclose material evidence count by count is a substantial constitutional, novel or complex issue.

29. Can this court adequately determine the legality, impropriety or incorrectness of the impugned magistrate's order?

30. The whole application revolves around interpretation of Article 50 (2)(b) and (j) which provides ;

(2)(b) The accused person has the right to a fair trial, which includes the right ***to be informed of the charge, with sufficient detail to answer it;***

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

31. Does this provision entail supply and or disclosure of evidence count by count? A revision application is an ordinary application which does not at all pose any complexity in determining whether the court acted legally incorrectly or improperly. This cannot be said to be a complex or substantial constitutional issue requiring a three (3) Judge bench to determine. It is all about the interpretation of Article 50(2) which several courts have addressed themselves to though not specifically in the manner presented before this court.

32. To refer this revision application to the CJ in my opinion will amount to further delay in the prosecution of the lower court case. In my view, before a court refers a matter for empanelment of a three judge bench or five, it must act with extreme caution not to refer everything and anything to the CJ for constitution of a bench as a matter of course. There must be an extremely deserving case and circumstances that require the input of extra brains to be able to resolve a weighty matter touching on a complex or novel issue or substantial question which in ordinary circumstances a single judge cannot manage without great difficulty. In the circumstances, I do not find any merit in the application dated 7/11/2019 and the same is accordingly dismissed.

33. Although I have stated that there is no substantive application by or against the respondents, I will exercise my discretion under Section 362(2) of the CPC to allow their participation as interested parties only on grounds that the orders likely to be made in the revision application will have an indirect impact on their interest.

34. Having dismissed the application dated 7/11/2019, I hereby direct that hearing of the revision application do proceed to hearing on a convenient date to both parties as this court may determine.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND DAY OF JANUARY, 2020.

.....

J. N. ONYIEGO

JUDGE