



REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL REVISION NO. 384 OF 2018

(Revision arising from the Mombasa Chief Magistrate's Anti-Corruption Court Case No. 6 OF 2018)

REPUBLIC APPLICANT

VERSUS

CHRISPINE ODHIAMBO ATEGO..... 1ST RESPONDENT

TRIZER MWANYIKA 2ND RESPONDENT

TUBMAN OTIENO ACHOGO 3RD RESPONDENT

RULING

1. The applicant through the Office of the Director of Public Prosecutions (ODPP) filed an application for revision dated 29th October, 2018 seeking the following orders:-

(i) That this court finds that the proceedings of 26th and 27th September 2018 and the ruling of the Learned Magistrate dated 18th October, 2018 are a nullity that cannot stand in law; and

(ii) That the orders made on 18th October, 2018 be revised and the matter be reinstated back to a court of competent jurisdiction other than Hon. J Nang'ea, CM.

2. The applicant further states that the Hon. Magistrate erred in law by discharging the respondents from the lower court case and therefore seeks determination of the following issues:-

a) Whether the Preliminary Objection raised by the respondents was on a point of law;

b) If the court was right in discharging the respondents based on the decision in Civil Appeal No. 102 of 2016, considering that case only applied to cases whose investigations were completed and matters instituted in court between 26th May, 2015 to 17th January, 2016; and

c) Whether a court can discharge the respondents without indication of the applicable law/section for the discharge and if it can, the effect of such a discharge.

Submissions

3. The applicant through its Counsel, Ms Mwaura submitted that the respondents were charged with two counts of different offences and that during the hearing, the defence Counsel raised a Preliminary Objection based on the Court of Appeal decision in **Eng. Michael Sistu Mwaura Kamau and Others –vs- EACC & Others [2017]** eKLR where the court held that the Ethics and Anti-Corruption Commission was not properly constituted when the respondent was charged.

4. Ms Mwaura further submitted that the court relied on the said decision to discharge the respondent and that no provisions of law were cited when the respondents were being discharged by the lower court. Counsel submitted that in the instant application the recommendations to charge the respondents were made on 27th April, 2018 by which time the EACC was properly constituted. She further stated that no documents were handed to the Learned Magistrate to show that the EACC was not properly constituted.

5. Ms Mwaura sought to rely on the case of **R vs Geoffrey Muiruri Muigai** [2009] eKLR where the court relied on the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd** [1969] EA 696 where the court held that a Preliminary Objection can only be raised on pure matters of law. The Prosecution Counsel further submitted that the Preliminary Objection raised in the lower court case, the subject of this revision, was based only on facts.

6. Counsel urged this court to deem the proceedings of 26th and 27th September, 2018 and the ruling pursuant thereto a nullity and prayed for the charges faced by the respondents herein to be reinstated.

7. The respondents through their Counsel, Mr. Amadi submitted that the Preliminary Objection raised in the lower court was purely on points of law as according to Article 250 of the Constitution of Kenya, a minimum of 3 Commissioners is provided for at the EACC.

8. Counsel further submitted that the Hon. Magistrate in his ruling took note that he was dealing with a matter of jurisdiction. He contended that although the provisions of the law under which the respondents were discharged were not cited, the said error should not be revisited.

9. Mr. Amadi further submitted that it is not in contention that between the 25th May 2015 and 18th January, 2016 the EACC was not properly constituted. He prayed for the revision application to be dismissed.

ANALYSIS AND DETERMINATION

The issue for determination is if the preliminary objection raised in the lower court court was properly upheld.

10. In line with the provisions of Article 250(1) of the Constitution of Kenya, the membership of the EACC is and must not be less than 3 and not more than 9 members.

11. In **Michael Sistu Mwaura Kamau & 12 Others vs Ethics and Anti-Corruption Commission & 4 Others (supra)**, an argument had been made that the EACC was not properly constituted when investigations, recommendations and a decision was made to charge the appellant therein. The court held that upon establishment of the EACC by an Act of Parliament, the EACC acquired the status of an independent commission established to protect the sovereignty of the people. Further, the court held that the Secretary to the Commission as well as the investigators were all appointed and were not members of the commission. They were appointed like all other staff by the Commissioners under Section 18 of the EACC Act. As such, the Secretariat (secretary and staff) could only act effectively and perform the commissioners' functions when the Commissioners were in office.

12. Section 18(3) of the Ethics and Anti-Corruption Commission Act provides that all the employees of the Commission are subject to instructions, orders and directions of the Commission which must emanate from or on behalf of the Commissioners. Therefore the ultimate decision as to who ought to be recommended to be charged must rest with the Commissioners.

13. In the arguments made herein, the Prosecution Counsel stated that the recommendations to charge the respondent herein were made on 27th April, 2018 by which time the EACC was properly constituted. The respondents through their Counsel, Mr. Amadi submitted that their preliminary objection in the lower court was not based on facts but was purely on points of law as according to Article 250 of the Constitution of Kenya, it provides for a minimum of 3 Commissioners at the Ethics and Anti-Corruption Commission.

14. This court was called upon to make a determination on whether the Preliminary Objection raised by the respondents was purely on a point of law. Having perused the lower court proceedings, I am of the considered view that the only way through which the lower court could have been apprised of the time when investigations were undertaken, recommendations made and a decision taken to charge the respondents could have been by way of affidavit evidence with supporting documentation. The legal aspect comprising the constitutional and statutory provisions applicable to the EACC which would have qualified as a Preliminary Objection is with regard to its mandate and the composition of the Commissioners as at the time the offence was investigated, recommendations made and a decision taken to charge the respondents.

15. The decision in **Mukisa Biscuit Manufacturers vs West End Distributors Ltd** (supra) which was relied on by the Prosecution Counsel provides that a Preliminary Objection consists of a point of law which has been pleaded, or which arises from clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

16. In this instance, the respondents' approach of raising a Preliminary Objection in the lower court was erroneous, for in so doing, they combined factual issues with points of law. The matter herein is distinguishable from the one in **Michael Sistu Mwaura Kamau & 12 Others vs Ethics and Anti-Corruption Commission & 4 Others (supra)** as in the said case the applicant in the lower court had filed a constitutional petition with supporting documentation. The said case can therefore not be held to stand on the same pedestal as this one where a Preliminary Objection was raised in the lower court. In the present matter, the Hon. Magistrate erred when he upheld the Preliminary Objection raised by the respondents.

17. Failure by the Hon. Magistrate to indicate the Section of the law upon which he discharged the respondents was a clear lapse on his part. A discharge is however not an acquittal and the Prosecution was therefore not barred from taking any other further necessary action it deemed fit.

18. Following the above analysis and determination, the result of the application for revision is that:-

- (i) In line with the provisions of Sections 362 and 364 of the Criminal Procedure Code, I hereby revise the decision of Hon. J. M. Nang'ea, Chief Magistrate dated 18th October, 2018. Mombasa Chief Magistrate's Court Anti-Corruption Court Case No. 6 of 2018 is hereby reinstated for hearing and determination before another court of competent jurisdiction, save for Hon. J. M. Nang'ea, Chief

Magistrate, whose orders form the subject of the present revision; and

(ii) The lower court file shall be returned to Hon. Makori, Chief Magistrate, Mombasa for mention and for giving of further directions as to the hearing of the lower court case within forty five (45) days of this ruling.

DELIVERED, DATED and SIGNED at MOMBASA on this 28th day of March, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Marindah, Prosecution Counsel, holding brief for Ms Mwaura for the DPP- applicant

Mr. Amadi holding brief for Mr. Kadima for the respondents

Mr. Oliver Musundi - Court Assistant