



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI

ACEC REV. NO. 5 OF 2019

SOSPETER ODEKE OJAMONG....APPLICANT/1ST ACCUSED

BERNARD KRADE YAITE.....2ND ACCUSED

EORNARD WANDA OBIMBI..... 3RD ACCUSED

ALLAN EKWENY OMACHARI..... 4TH ACCUSED

SAMUEL OSEKO OMBUI..... 5TH ACCUSED

EDNA ADHIAMBO ODOYO.....6TH ACCUSED

RENISH AMOLLO.....7TH ACCUSED

SEBASTIAN HALLENSLEBEN.....8TH ACCUSED

MADAM R. ENTERPRISES.....9TH ACCUSED

VERSUS

REPUBLIC.....RESPONDENT

RULING

INTRODUCTION

1. On 4th July 2018, the Applicant herein Sospeter Odeke Ojamong the current governor Busia County jointly with 8 others were arraigned before Milimani Chief Magistrate's Court vide Anti-Corruption Case NO. 23/18 facing various corruption related charges. Among the charges (counts) preferred against the respondents either individually or jointly are; conspiracy to commit an offence of economic crime; engaging in a project without prior planning; abuse of office; willful failure to comply with the law relating to management of funds; fraudulently making payments from public revenue for services not rendered; fraudulent acquisition of public property and failure to pay taxes.

2. Upon entering a plea of not guilty, prosecution lined up a total of twenty witnesses. After conducting a pre-trial conference, the court directed prosecution to supply to the defence all relevant documents, inventory and exhibits intended to be relied on during the trial. Pursuant to those directions, the prosecution supplied the defence a bundle of documents on 20th July 2018.

3. However, on 21st January 2019, the Respondents made an application to the trial court that they be allowed to supply additional evidence being a certificate under section 65(8) of the Evidence Act Cap 80 Laws of Kenya on the ground that the certificate in relation to some emails from (Timon Mboga Otieno (who is deceased) and Justus O. Juma dated between 13th January 2016 to 29th January 2016) were in advertently omitted during the service of the said documents.

4. The above application was opposed through the Applicant's replying affidavit sworn on the 25th January 2019 averring that in deciding this matter, the court can only exercise its discretion to grant leave to supply the certificate if sufficient and reasonable explanation is furnished. He expressed himself that the Applicant had not availed any reasonable explanation why they did not file and avail the certificate

in time.

5. On 28th January 2019, when parties appeared for hearing of the above application, the Respondents served him as well as the 4th Applicants advocates with an affidavit sworn on 25th January 2019 by Timothy Wahome whereby the Respondent sought the lower court's leave to supply the defence with a list of 14 additional documents. Consequently, the Applicant's counsel raised a preliminary objection and sought to have the said affidavit expunged from the record. The Respondent in response to the Preliminary objection prayed for an amendment to the application dated 21st January 2019 to include 14 documents particularized in their affidavit.

6. In a ruling delivered on 1st February 2019, the trial court allowed the Respondent's application in its entirety and directed that even the documents sought to be supplied to the Applicants be served upon all of them.

The Pleadings

7. The above ruling instigated the 1st Applicant to file under certificate of urgency a Notice of Motion application dated 11th February 2019 and filed on 14th February 2019 under Rules 362, 364, 365 and 367 of the Criminal Procedure Code and Articles 48 and 50 of the Constitution of Kenya 2010 seeking the following orders:-

1. Spent

2. That this court be pleased to call up, revise and vacate the orders of Honourable Douglas Ogoti made in the Anti-Corruption and Economic Crimes Case No. 48 of 2018 Republic v Hon. Sospeter Ojaamong & 8 Others and rendered on 1st February, 2019 allowing prosecution to supply the defence with additional documents particularized in the application dated 21st January 2019 and the affidavit dated 25th January 2019.

3. That this Honourable Court be pleased to grant such other or further orders as may be appropriate.

4. THAT cost of this application be provided for.

8. The above application was anchored on grounds that :-

1. That the application dated 21st January 2019 together with the affidavit dated 25th January 2019 were not served on six out of the eight accused persons, thereby denying them the right to be heard as guaranteed under Article 50 of the Constitution.

2. The orders granted to the DPP premised on the unheard application constituted unjustified violation of the rights to be heard as they were never granted the opportunity to canvass or counter the application.

3. The prosecution failed to provide proof that the documents which they sought to produce were actually obtained during the first investigation which culminated into ACEC no. 48 of 2018.

4. The DPP failed to provide any cogent or plausible reason for the delay/non provision of the documents at the pre-trial stage, which circumstances smack of intentional and unjustified concealment of evidence.

9. The Respondent on their hand filed a replying affidavit sworn on the 26th February 2019 by Maryanne Mwangi in opposition to the instant application averring that; already the trial court being cognizant of the fact that disclosure is a continuous process had made directions that any further disclosure of documents be made by way of an application filed in court hence, they filed an application before the trial court dated January 21st January 2019 seeking leave to supply further documents to the Accused persons.

10. The 2nd and 5th accused persons also filed replying affidavits sworn on the 27th and 25th February 2019 respectively supporting the above grounds by the 1st Accused.

11. When the matter came up for hearing, Mr. Ligunya counsel for the applicant basically adopted the averments contained in the affidavit in support. He contended that, the issue before court is whether the trial court was proper in determining the application dated 21st January 2019 without giving the other six accused persons an opportunity to be heard. He further questioned the trial court's move in delivering a ruling touching on the said application which had not been argued yet the subject before him was a preliminary objection challenging introduction of a further affidavit sworn by one Timothy Wahome on the 25th January 2019.

12. According to Mr. Ligunya, the ruling delivered by Hon. Ogoti on 1st February 2019 was improper and premature and parties had only canvassed on the preliminary objection and not the application itself. Learned counsel went further to argue that it was only the 1st, 2nd and 4th accused persons who were served with the application and the others were not.

13. In response to Mr. Ligunya's submissions, M/s Mwangi opposed the application. She also adopted the contents contained in the replying affidavit to the application arguing that the trial court did properly allow the application admitting additional evidence pursuant to the High Court ruling in Rev. Case No. 20/18 and in compliance with Section 65 of the Evidence Act.

14. She further submitted that parties had argued both the preliminary objection and the substantive motion hence the ruling was on both. It is the learned counsel's submission that the additional evidence sought to be introduced was part of the initial investigations save for the inadvertent omission in supplying them during the pre-trial proceedings.

15. M/s Mwangi urged the court to find that, Mr. Ligunya had purported to hold the interest of other accused persons and indeed submitted on their behalf. She posed the question whether failure to serve the rest of the accused persons was prejudicial in any way. Finally, Mrs. Mwangi asserted that Article 50 of the Constitution has not been violated and that sufficient notice had been given and the documents in question supplied.

16. In his rejoinder, Mr. Ligunya submitted that it cannot be assumed that he was representing some of the accused persons without instructions. Counsel opined that only the preliminary objection was canvassed and not the application itself.

Analysis and determination

17. I have considered the application herein, affidavit in support, replying affidavit and oral submissions by both counsel. Issues that emerge for determination are:

a. Whether the application dated 21st January 2019 was argued before delivery of the ruling dated 1st February 2019.

b. Whether the ruling delivered on 1st February 2019 was illegal, incorrect or improper.

c. Whether failure to serve all accused persons with the application dated 21st January 2019 amounts to an illegality.

18. The law governing revision is anchored under Article 165 (6) and (7) and operationalized under Section 362 and 364 of the CPC. Article 165 (6) confers to the High Court supervisory powers over subordinate courts, or person, body or authority exercising quasi judicial function. In exercise of that power Article 165 (7) provides that; High Court may call for the record of any proceedings before any subordinate court or person, body or authority herein above referred and may give any order or direction it considers appropriate to ensure their fair administration of justice.

19. To reinforce the above constitutional provision, Section 362 of the CPC states 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 correctness, legality or propriety of any finding, sentence or order recorded or passed, and to the regularity of any proceedings of any such subordinate court”.

20. The authority to exercise revision powers is purely a matter of discretion which the presiding judge must exercise judicially and reasonably to meet the ends of justice for both sides. **(See Abraham Wafula vs R (2013) eKLR (Bungoma HC Cr. Rev. No. 21/13).**

21. It is trite that, an application for revision is not meant to circumvent the right to appeal against the impugned orders, decision or sentence. It is purely meant to correct a wrong, illegality or impropriety which may not necessarily require an appeal to be filed.

22. Before me, is the issue whether the ruling delivered on 1st February 2019 determined the application dated 21st January 2019. I have perused the application dated 21st January 2019, a further affidavit sworn by Timothy Wahome on 25th January 2019 seeking to have 14 documents admitted as evidence. It is clear from the ruling that it determined both the preliminary objection and the application itself and finally allowed the prayers sought thus admitting the said documents. Was the application dated 21st January 2019 ever argued? According to the applicant, it was not heard. On the other hand it is the respondent's position that it was argued together with the preliminary objection.

23. From the record, on 28th January 2019, the respondent herein (Republic) intimated their preparedness to proceed with the hearing of the application dated 21st January 2019. However, Mr. Ligunya raised concern over an affidavit sworn by one Wahome served upon them that very morning. He raised a preliminary objection urging the court to expunge it from the court record before proceeding with the hearing of the application. He termed the affidavit as an ambush.

24. In response, Miss Mwangi went ahead and argued the application trying to justify the rationale behind the introduction of additional evidence. Mr. Orenge for the applicant also challenged the introduction of the affidavit and basically associated himself with the submissions of Mr. Ligunya.

25. It is therefore apparent that what was argued on 28th January 2019 was the preliminary objection to admit the affidavit of one Timothy Wahome dated 25th January 2018. Ideally, the hearing of the application dated 21st January 2019 was not substantively canvassed as the trial court was first invited to make a determination on the admissibility of the impugned affidavit.

26. Although there is no clear demarcation between the facts relied on in persuading the court to admit or not to admit the affidavit and

prayers in the main application, the record is clear that the trial court was supposed to have determined on the preliminary objection first before inviting the parties to address him on the substantive application or direct that the two be heard together as they are related.

27. In the circumstances, the ruling delivered on 1st February 2019 determining both the preliminary objection and main application when actually it is the preliminary objection alone which was argued is premature and a violation of Article 50 (1) of the Constitution. The right to a fair hearing is a fundamental right which cannot be compromised or limited (see Article 25 of the Constitution). In the case of **JMK vs MWM & Ano. (2015) eKLR** the court of appeal held that:

“... courts of this land have been consistent in the importance of observing the rules of natural justice and a petitioner being a person who is likely to be a directly affected by a decision before a decision is made”.

In **Mbaki and Another vs Macharia and Another (2005) EA 206 at page 210**, the court of appeal had this to say:

“The right to be heard is a valued right. It would offend all nations of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard”.

28. By the trial court proceeding in determining the substantive application before affording parties to constructively argue the application was itself an improper act and an irregularity on the face of the proceedings.

29. In the circumstances, it is my holding that the applicant and his co-accused were entitled to a fair hearing in arguing the application dated 21st January 2019. Although the 2nd, 3rd, 5th and 6th, 7th, 8th never challenged the ruling as having been made without them being served with the application, that position has been brought to the attention of the court in conformity with Section 362 of the CPC through the instant application.

30. Although Mr. Ligunya appeared to have represented their interests, he had no instructions to do so. Equally, Mr. Ligunya should not argue their case as though he is representing them. Nevertheless, a court has powers to issue revisionary orders if it comes to its knowledge that an illegality or impropriety or irregularity has been committed thus leading to or likely to lead to a miscarriage of justice. The mode through which the court gets to know an illegality or impropriety is immaterial.

31. In the interest of justice, the respondent ought to have served the application dated 21st January 2019 upon all accused persons. Having held that failure to serve all accused persons and failure to hear substantively the application dated 21st January 2019 was an improper act and amounted to an irregularity, it is my conviction that justice demands that the ruling of the court dated 1st February 2019 be set aside and the court therefore urged to hear and determine the application dated 21st January 2019 together with the preliminary objection after serving the rest of the accused persons. I have however noted that in their prayer No. 2, the applicants have referred to the lower court case as ACC 48/18 instead of 23/18. I believe this was a typing error or an oversight which is curable.

32. Despite the fact that the court has already made its position known, the same might change depending on how persuasive the accused persons will be after ventilating their case. Accordingly, the application dated 11th February 2019 is allowed with orders that:

- a. The ruling of Hon. Ogoti dated and delivered on 1st February 2019 in ACC Case No. 23/18 be and is hereby set aside.**
- b. That the application dated 21st January 2019 pending before the trial court in ACC No. 23/18 be served upon all accused persons.**
- c. That the preliminary objection orally raised before the trial court on 28th January 2019 be canvassed together with the application dated 21st January 2019 on priority basis.**

DATED, DELIVERED AND SIGNED AT NAIROBI ON THIS 27th DAY OF MARCH, 2019.

J.N. ONYIEGO

JUDGE