REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI

CRIMINAL APPEAL NO. 11 OF 2019

EVANS ODHIAMBO KIDERO .....APPLICANT/APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant herein Evans Odhiambo Kidero together with 10 others were arraigned before Nairobi Chief Magistrate's Court on 9th August 2018 under ACC No. 32/2018 facing various corruption related charges.

2. In particular, the appellant was charged with three counts. In respect of Count I, he was charged with nine others with the offence of conspiracy to commit an offence of corruption contrary to Section 47A (3) as read with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. Particulars state that, on diverse dates between 16th January 2014 and 25th January 2016 within Nairobi City County in the Republic of Kenya, jointly conspired to commit an offence of corruption, namely, fraud leading to loss of public funds in the sum of Kenya Shillings Two Hundred and thirteen million, three hundred and twenty seven thousand three hundred shillings (Kshs.213,327,300/=) for services not rendered.

3. In count 2, he was charged with dealing with suspect property contrary to Section 47(1) as read out with Section 47 (2) (a) and 48 of the Anti-Corruption and Economic Crimes Act No. 3/2003. Particulars are that, on or about 29th day of August 2014, within Nairobi City County in the Republic of Kenya, being the Governor of Nairobi County government and a person whose functions concerned the management and use of revenue received a benefit of Kshs.14,000,000/= from Lodwar Wholesalers Ltd, having reason to believe that the said amount was acquired in the course of corrupt conduct.

4. With regard to count 3, he was charged with dealing with suspect property contrary to Section 47 (1) as read with Sections 47 (2) (a) and 48 of the Anti-Corruption and Economic Crimes Act No. 3/2003. Particulars provide that, on or about 11th day of September 2014 within Nairobi City County in the Republic of Kenya, being the governor of Nairobi City County government and person whose function concerned the management and use of revenue, received a benefit of Kshs.10,000,000/= from Lodwar Wholesalers Ltd, having reason to believe that the said monies were acquired in the course of corrupt conduct.

5. After entering a plea of not guilty, the appellant (accused) was admitted on bail and the trial process commenced. However, before the substantive hearing could take off, the appellant herein filed a notice of motion dated 4th March 2019 stating that; count 1 as registered amounts to duplicity in so far it relates to an offence of conspiracy to commit an offence and also corruption under Section 47 of ACECA and fraud under Section 45 of the ACECA; that the charge in respect of count 1 is bad in law for want of particulars in so far as the same does not provide with specificity particulars of the offence; that offences of dealing with suspect property against accused 1 set out in count 2 and 3 be severed and tried separately.

6. Equally, the 8th to 11th accused persons filed a notice of motion dated 5th March 2019 challenging the trial court's jurisdiction in entertaining charges relating to payment and or assessment of taxes which allegedly falls entirely within the tax tribunal; that an order to issue declining to admit counts XXXIV and XXXV of the charge sheet for failing to disclose a reasonable offence

7. On 25th March 2019, the honourable magistrate delivered a detailed ruling dismissing the two applications. Aggrieved by the said ruling, the appellant herein moved to this court on appeal vide petition No. 11/2019 challenging the said ruling citing nine grounds of appeal as follows:

> **(1) The learned magistrate erred in fact and in law by suo moto consolidating the Appellant's application dated 4th March 2019 with that of the 8th to 11th accused persons' thereby completely conflating quite distinct questions of law and ultimately occasioning a miscarriage of justice.**

(2) The learned magistrate erred in law in failing to determine and hold that Count 1 of the charge sheet dated 9th August 2018 as framed did not disclose an offence known in law.

(3) The learned magistrate erred in law in failing to determine and hold that count I of the Charge Sheet dated 9th August 2018 as framed was bad for duplicity, incurably defective and fatal.

(4) The learned magistrate erred in law in holding that Count I in the charge sheet dated 9th August, 2018 could and should be tried together with Counts II and III in the said charge sheet.

(5) The learned magistrate erred in law in determining and holding that Count II in the Charge Sheet dated 9th August 2018 was not deficient for want of particulars of the offence and therefore incurably bad and defective.

(6) The learned magistrate erred in law in holding there was no misjoinder in respect to Counts I and II on one hand and Counts IV to XXXV on the other hand, in the Charge Sheet dated 9th August 2018.

(7) The learned magistrate erred in fact and in law by holding that a challenge to the propriety of the ingredients of a charge, and in this respect, the existence or lack thereof of the *actus reus,* can only be relied upon the close of the prosecution's case.

(8) The learned magistrate erred in fact and in law by determining *per incuriam* that the decision by the DPP to charge the appellant with the offence of conspiracy, alongside 2 other offences, does not prejudice the appellant.

(9) That the learned magistrate erred in fact and in law by determining the case for misjoinder of counts as merely a case management issue rather than a question of the substantive right to a fair hearing as encapsulated under Article 50 (2) (e) of the Constitution.

8. From the onset, I wish to clarify that the appeal herein does not emanate from a decision or order of a fully heard and determined case. It is an interlocutory appeal lodged pursuant to an order dismissing an application made in the course of the trial.

Petitioner's Submissions

9. Senior Counsel Mr. Orengo teaming up with Senior Counsel Prof. Ojienda, Mr. Havi and J. Soweto highlighted on their submissions filed on 10th August 2019 and a list of authorities. Learned counsel broke down the appeal into three limbs namely; Jurisdiction of the court; Duplicity and defective charge and, misjoinder and overloaded charge sheet.

10. It was the appellant's submission that the charges as drawn in respect of count I were bad for duplicity, incurably and fatally defective. It was the appellant's further contention that count 1 does not disclose an offence known in law thus contravening Article 50 (2) (d) of the Constitution. Mr. Orengo submitted that, Count I is bad in law for duplicity as it encompasses two separate offences under the Anti-Corruption and Economic Crimes Act No. 3/2003 hence prejudicial and embarrassing. Further, that count I does not disclose with sufficient detail the charge against the appellant contrary to Article 50 (2) (b) of the Constitution which requires an accused to be informed with sufficient detail the charges preferred.

11. Learned counsel urged that, count I being a charge of conspiracy cannot be preferred together with Count II and III which are substantive charges. That there is no similarity nor nexus between the 2nd, and 3rd counts on one hand, and then 1st and the 4th – 35th counts. That the rationale behind this argument is that the appellant cannot sit through a trial involving 35 counts out of which only 3 relate to him.

12. Counsel invited the court to invoke its jurisdiction under Articles 19, 23, 65 (3) and (b) and Article 165 (6) and (7) of the Constitution to entertain the appeal.

13. Mr. Orengo contended that the absence of an express provision in law to provide for interlocutory appeals is not prejudicial as the same is a procedural technicality which is covered by the right to a fair hearing guaranteed under the Constitution under Article 50 (1). Counsel therefore invited the court to exercise its inherent jurisdiction to intervene and restore justice. To support this position learned counsel referred the court to the case of **Equity Bank Limited vs West Link Mbo Limited (2013) eKLR** where the court stated that:

"courts of law exist to administer justice between competing rights and interests of different parties but within the confines of the law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a court implicitly without its being derived from the Constitution or statute. Such power enables the judiciary to deliver their constitutional mandate....".

14. Learned counsel referred the court to the decision in the case of **R vs Ahmed Abolfathi Mohamed and Another (2018) eKLR** and **Dr. Fred Matiang'i vs Miguna Miguna Misc. Cr. A Nai /18 (UR)** where both courts granted orders of stay notwithstanding the fact that there is no provision granting the court jurisdiction to grant the orders sought. The court was further referred to the decision in **Thomas Patrick Gilbert Cholmondeley vs R (2008) eKLR** where the court affirmed that it had jurisdiction to hear an interlocutory appeal only where it involves a violation of a fundamental constitutional right.

15. It was Mr. Orengo's submission that criminal prosecution which is commenced without proper factual foundation is suspect for ulterior motive or improper purpose. To buttress this proposition, counsel made reference to the decision in the case of **George Joshua Okungu and Another vs Chief Magistrate's Anti-Corruption Court at Nairobi and Another (2014) eKLR**.

16. Regarding a defective charge, Senior Counsel Mr. Orengo faulted the manner and style in which count one where the appellant is charged with conspiracy to commit an offence of corruption contrary to Section 47 (b) as read with Section 48 of the ACECA was framed. He contended that the charge comprises of two offences namely, corruption which includes fraud and economic crimes which is defined under Section 45 of ACECA as involving dishonesty. That the particulars as framed are not consistent with the statement of the offence thus creating a distinct offence namely "fraud leading to loss of public funds".

17. It was therefore submitted that the charge is duplex as the appellant may not know exactly what he is charged with. To support this proposition the court was referred to holding in the case of **R vs Sowedi Kauta s/s Tanywamugwabi Cr. App 74/1993** where the court stated that a charge in one count with two distinct offences was undesirable. Further reference was made to the decision in the case of **Cherere vs Republic Cr. Appeal No. 75/1995** where the court held that:

> **"... where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called account".**

18. Mr. Orengo therefore urged the court not to compel the appellant to go on with a trial on a defective charge. Learned counsel urged the court to uphold remarks made in **Stanley Munga Githunguri vs R** where the court stated that a charge is the foundation of a criminal trial and that a prosecution is not to be made good by what it turns up. That it is good or bad when it starts.

19. It was further urged that the charge lacks specificity in content as the appellant does not understand the specific charge he is facing and that he is wrongly joined with several other accused persons hence a misjoinder and an act contravening Section 136 of the CPC. That lack of specificity is a fundamental breach of one's constitutional right. To buttress on this argument counsel placed reliance on this court's decision in the case of **Michael Sistu Kamau in petition number 22/18 Nairobi** where the court found that a charge which does not specify the exact section which an accused person is charged with is bad in law and amounts to a breach of one's fundamental right to affair trial.

20. Turning on the charge of conspiracy vs substantive offence, Mr. Orengo submitted that, the appellant cannot be charged of two substantive charges with the offence of conspiracy. He thus urged that count II and III cannot stand at the same time with Count I. He contended that a charge of conspiracy cannot be preferred together with a charge for a specific completed offence arising out of conspiracy. To fortify this stand counsel relied on the decision in the case of **R vs Cooper and Campton (2 ALL ER 1947) 701, Uganda vs Milenge and Another (1970) EA 269** and **Kinyanjui vs Republic Cr. Appeal No. 141/1986**.

Overloading of Charge Sheet and Misjoinder

21. Concerning grounds 6 and 9 on overloading of the charge and misjoinder, Mr. Orengo submitted that under Section 135 of the CPC, only offences founded in the same facts or a similar character may be preferred together and that where a court is of the opinion that a person may be embarrassed in his defence by reason of being charged together with other people, it may order that such person be tried separately. That for the appellant to be tried with 3 counts out of 35 in a group of so many accused persons is a disparate charge. He therefore urged the court to find in favour of the appellant that there was a misjoinder of charges. To strengthen this expression, counsel relied on the wording in the case of **Malebe vs R (1952) KLR 320** where the court held that:

> **"on the face of it the charge sheet was defective for misjoinder of the appellants as well as misjoinder of the offences committed during different dates and months. This misjoinder occasioned a failure of justice. Being an incurable defective (sic) the trial was a nullity".**

Respondent's Submissions

22. M/s Sigei holding brief for M/s Aluda Principal Counsel appearing for the state relied on their written submissions dated 13th May 2019. Regarding whether count II discloses an offence in law she submitted that the offence of conspiracy to commit an offence of corruption does not amount to a defective charge or non-existent offence. Counsel submitted that the offence of corruption is defined under Section 39, 44, 46 and 47 as including bribery, fraud, embezzlement, misappropriation of public funds, abuse of office, breach of trust, or an offence involving dishonesty in connection with any tax, vote or imposed levy under any Act, or under any other written law.

23. As whether the charge sheet is bad for duplicity and misjoinder of persons, counsel submitted that in each of the 35 counts, the charges are distinct and known in law and having understood the charges at the plea stage the appellant was able to respond by entering a plea of not guilty.

24. She contended that the charge of conspiracy to commit an offence of corruption is known in law vis a vis the offence of fraud leading to loss of public funds which does not exist. She further stated that Section 45 of the ACECA only creates an offence known as fraudulent acquisition of public property and not the offence of fraud leading to loss of public funds as alleged by the appellant.

25. M/s Sigei submitted that Section 134 of the CPC requires only particulars of the offence giving reasonable information as to the nature of the offence charged. Counsel further relied on Section 135 arguing that the charges were properly drawn and preferred as the offences arose out of the same facts or a series of offences of the same set of facts or a similar character. To support this submission, counsel referred the court to the decision in the case of **Omboga vs R (1983) KLR 340**.

26. Counsel also made reference to the holding in **Cr. appeal No. 232 of 2012 Rebecca Mwikali Nabutola and 2 others vs R** where the court stated that:

> **".... I support the view that the inclusion of the charges of conspiracy together with substantive offences did not render the charges as drafted defective or undesirable".**

27. Learned counsel argued that even if the court were to find that the charges amounts to duplicity, no injustice will be occasioned. This position was supported by placing reliance on the decision in the case of **Cherere S/o Gakure vs R (1955) 622 EACC.**.

28. Concerning overloaded charges, it was contended that the same was not correct since the 11 accused persons face distinct counts and neither of the accused persons faces more than 12 counts as guided in the case of **Ochieng vs Republic (1985)** as captioned in the case of **Kipleting Keino and Kibet Mengich vs Republic Cr. Appeal No. 99/1998**.

29. The court was further referred to the decision in the case of **Makhura and Another vs the state 1986 BLR 36** where one accused was charged with 177 counts and the court held as follows:

> **"indeed, the modern practice now in England is to permit indictments to contain up to about 20 counts with one accused and sometimes up to about 40 with many accused if justice requires this to be done in the exceptional circumstances of the case. In the end this question of requiring the prosecution to elect upon which counts it will proceed is one for the discretion of the magistrate..."**

Trial court's finding

30. Learned magistrate found that charges as drawn are not defective nor was there a misjoinder. In arriving at this finding, learned Magistrate sought guidance from Archbold Criminal proceedings, evidence and practice 10th Edition which states that- it is not desirable to add a charge of conspiracy on an effective substantive charge except under the following circumstances – where it is in the interest of justice; where there is evidence but no evidence that the conspirator did commit the offence and, the charges of substantive offences do not adequately represent the overall criminality discovery by evidence. Touching on joinder, the trial court held that there was no prejudice.

31. Concerning the overloaded charge, he found that the appellant was only charged with three counts and not more than 12 as stipulated in the OCHIENG case (supra).

Determination

32. I have considered the grounds of appeal and submissions herein. Issues for determination are:

(a) Whether this court has jurisdiction to entertain the appeal.

(b) If the answer to (a) is in the affirmative, whether the charges before court are bad in law on account of:

(i) non disclosure of the particulars of the charge.

(ii) Whether the charges as drawn amounts to duplicity.

(c) Whether there is misjoinder of charges.

(d) Whether the charges are overloaded.

Whether this court has jurisdiction to entertain the appeal

33. As stated elsewhere in this judgment, the appeal before this court is a culmination of a ruling dismissing an application by the appellants and his co-accused seeking to have the charges declared defective and a nullity. The appeal is therefore interlocutory in nature. As correctly admitted by Senior Counsel Mr. Orengo, there is no express provision governing lodgement of interlocutory appeals.

34. Ordinarily, any appeal challenging conviction or acquittal from the lower court to the high court is provided under Section 347 (a) and 354 (3) of the CPC. The general practice has been that, whenever an interlocutory application or objection is disallowed before the trial court, the applicant or objector would only wait until the conclusion of the case and in case of a conviction, file an appeal citing the same grounds for determination by the appellate court. The rationale behind this is to avoid clogging the trial court or litigation system from unnecessary interruptions or delay.

35. However, with the development of jurisprudence and given the liberal and more transformative constitutional dispensation in Kenya, there is a paradigm shift in terms of constitutional and statutory interpretation. A more purposive approach has been adopted to promote the interest of justice by filling gaps where the law is not expressly provided.

36. It then follows that, where a party raises issues which do substantively affect his or her constitutional rights and there is no law providing for a remedy, the high court can assume jurisdiction and make necessary declarations under Article 165 (3) and Article 23 (1) of the Constitution.

37. The high court therefore has inherent powers or jurisdiction to intervene and make necessary determination or finding of any kind where the issues raised threatens or violates one's constitutional rights or fundamental freedoms. The key consideration is that substantive justice must be done and be seen to be done even when there is no provision or law in existence governing a given situation or circumstance.

38. I do agree with the finding in the case of **Equity Bank Limited vs West Link Mbo Ltd (2013) eKLR** where the court held that:

"Courts of law exist to administer justice and in so doing they must of necessity balance between competing interests and interests of different parties but within the confines of the law to ensure that justice is met".

39. It therefore follows that where the issues giving rise to the appeal are alleging violation of one's constitutional rights, this court is duty bound to assess and examine the extent to which such violation can be remedied either by way of declaration and quashing the criminal proceedings or by giving directional guidance in the manner in which the violation is to be remedied or corrected.

40. What right is the appellant seeking to protect from violation? The appellant is arguing that the charges as drawn do not disclose the full particulars of the charge and that the charge of conspiracy is lumped together with fraud hence bad on account of duplicity. From the face of it, each count has been drawn against a specific offence and particulars. Obviously, the issues raised before the trial court and before me now are not substantive constitutional issues but rather procedural issues which have a remedy at the close of the proceedings. The offences are specific for any reasonable person to understand what the is being charged with. The element of lack of specificity is too remote in the circumstances and the circumstances under Michael Sistu Kamau's case are totally different as in this case the offended provision is stated.

41. In my, view the issue of non disclosure of particulars in a charge sheet or duplicity of charges cannot be escalated to the level of substantive constitutional violations.

42. Where there are other avenues or remedy like appealing against the decision at the close of the trial, parties should be patient and wait up to the end of the trial to avoid unnecessary delay. In fact, to bring on board interlocutory appeals on account of duplicity of charges or non disclosure of particulars in the charge sheet will amount to lowering the bar too low on determination of constitutional issues.

43. I do agree with honourable Majanja's determination in the case of **Henry Nyachio Ondara vs R (2019) eKLR** where he held that:

"It is clear from the foregoing that the right of appeal under Section 347 of the CPC is only given to a person who has been convicted and sentenced. There is no right of appeal conferred against an interlocutory ruling such as the one made by the trial court rejecting the applicant's counsel's application to start the case denovo".

44. Similar position was held in **Thomas Patrick Gilbert Cholmodeley vs R (Supra)** where the court recognised that where there is proof of breach of a fundamental right an interlocutory appeal can apply. However, the court went on to add that,

"in ordinary criminal trials, there is generally no interlocutory appeals for Section 379(1) of the Criminal Procedure Code allows only appeals from persons who have been convicted of some offence. The appellant has not been convicted of any offence. As far as we understand, the position, the basis of an appeal cannot be that an order made in the course of a trial is highly prejudicial to an accused person.... The fact that a trial judge has made an adverse ruling against an accused person in a criminal trial does not and cannot mean that the judge will inevitably convict. The Judge might as well acquit in the end and the adverse ruling, even if it amounted to a breach of a fundamental rights, falls by the wayside and cause no harm to such an accused person".

45. Courts should be cautious not to overstep its mandate by micromanaging affairs of criminal proceedings before a trial court. There are legal mechanisms properly so provided and recognized to take care of situations such as the one complained of. If every objection was to attract an appeal based on a liberal constitutional interpretation, every appeal might as well qualify to be a case of violation of one's fundamental rights. Substantive justice will not be done if proceedings were to be declared null and void simply because of a simple error or omission which at the end of proceedings might be declared as credible under Section 382 of the CPC.

46. In my view, the allegations raised before this court challenging issues of non disclosure of full particulars or duplicity of charges does not qualify as breach of one's fundamental rights. **(See William S.K. Rutto & Another vs Attorney General Nairobi HCC No. 1192/05 (2010) e KLR)** where the court stated that **"the fact that a charge is defective does not raise a constitutional issue".**

47. Taking into account the circumstances underlying the filing of this appeal, the remedy lies in the due process up to the end of the trial. With that finding, I do not need to belabour in determining whether the charges amount to duplicity or does not disclose full particulars as that will jeopardise the finding of the judge who will be hearing the appeal in the event of a conviction.

Misjoinder and overloading of Charges

48. According to the appellant, he ought to have been charged separately instead of being lumped up together with 10 other accused persons in 35 counts. He claimed that there was no relationship between counts I, II and III to which he has been charged with the rest of the 32 counts facing his co-accused hence the need for a separate trial. Again, the question will be, can a party whose application challenging misjoinder of charges has been dismissed file an interlocutory appeal to challenge the same. What fundamental right has been violated by being tried together with some accused persons on charges arising out of the same chain of events, circumstances and facts pursuant to Section 135 of the CPC?

49. Indeed, the trial court did not find any prejudice by the appellant being charged together with the other accused persons. The rejection of this application by the trial court in exercise of discretion cannot form a basis of filing an interlocutory appeal. There is no fundamental right violated by proceeding with the joint charge. If there will be any prejudice at the end of the trial by virtue of the alleged misjoinder, then there will be a remedy by way of appeal. It was not necessary to file this appeal on account of that particular issue and I do not need to dwell in length determination on what constitutes joinder or misjoinder and its consequences.

50. Regarding overloaded charges, this has been a thorny issue attracting heated and immense discussions both in court and various forums. It is a critical subject which goes to the core of one's fundamental rights in fair hearing which includes expeditious hearing and determination

of the matter. At least, in the Kenyan legal system I am not aware of any provision that fixes the maximum or minimum number of charges or counts that one has to be charged with at any one given time. **See Eliphaz Riungu vs R (1977) eKLR**. However, various courts have endeavoured to address this issue but without finality or definite answer.

51. According to the appellant, to be charged of 3 counts out of 35 counts, will most likely jeopardise or embarrass his defence in preparation and unnecessary delay thus contravening Article 50 (2) (e) on the right of expeditious delivery of justice. The question then which begs for an answer is, what is the appropriate number of counts that should be preferred so as not to offend Article 50 (2) (e) of the Constitution?

52. In the case of **Eliphaz Riungu vs R (Supra)** the appellant was charged with others in a charge sheet containing 93 counts out of which he was facing 3 counts. The court had this to say:

> **"coming now to the charge sheet in the Chief Magistrate's criminal case No. 2208 of 1995, we find that the accused persons are jointly charged on 93 counts. we suppose that a witness or two will be called to introduce and testify in respect of each count. From the nature of the offences it is not unreasonable to assume that there will be very many documents to be produced in evidence. Recording of evidence even in respect of the first twenty counts will take a considerable length of time. As this taking of evidence in respect of the 90 counts continues, the appellant (Eliphaz Riungu) is expected to patiently sit in the dock waiting for his turn to listen to the evidence in the last three counts. We think public interest demands that whatever goes on in a criminal trial should be in the interest of justice. And the Constitution which is the mother of all laws clearly states that the accused shall be afforded a fair hearing within reasonable time. Justice demand that the guilty be appropriately punished and the innocent be left free. A long trial which is likely to lead into confusion of prosecution case as to result into acquittal of the guilty is certainly not in interest of public interest and justice".**

53. Further in the case of **Peter Ochieng vs R (1985) eKLR** the court stated that:

> **"there is one other matter to which we should refer. It is unreasonable to charge an accused person with so many counts in one charge sheet. That alone may occasion prejudice. It is proper for a court to put the prosecution to its election at the inception of the trial as to the counts upon which it wishes to proceed. Usually, though not in invariably, no more than twelve counts should be held in one charge sheet".**

The same position was stated in the case of **Kipleting Keino and Kibet Mengich vs R. Cr. Appeal No. 99 of 1998**.

54. In a similar scenario, the high court in **Criminal appeal No. 544/1999 Kamau John Kinyanju vs Republic (2004) eKLR** could not find a charge sheet containing 22 counts against the appellant prejudicial. At Page 14 of its judgment, the court held as follows:

> **"In our view, a charge is said to be overloaded when multifarious counts are brought against an accused person involving different aspects of criminal law. When such an accused person is charged, he would be prejudiced in presenting his defence. The test to be applied to arrive at a conclusion that a charge is overloaded is whether or not the counts brought against the accused prejudices or embarrasses him in the presentation of his defence. In the instant case, there was no proof that the fact that the appellant was charged with twenty two counts he was prejudiced in his defence".**

55. The law governing joinder of charges is Section 135 of the CPC which provides that:

> **(1) Any offences, whether frivolous or misdemeanours, may be charged together in the same charge or enjoined if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character.**
>
> **(2) Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count.**
>
> **(3) Where, before trial, at any stage of a trial, the court is of the opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence in the same charge or information, or that for any other reason it is desirable to order that the person be tried separately for any other or more offences charged in a charge or information, the court may order a separate trial of any count or counts of that charge or information.**

56. From the above provision and case law quoted, it is apparent that in determining whether the charge is overloaded or not, the key parameter to employ is whether the number of counts preferred is likely to embarrass the defence, cause inconvenience or frustration to the prosecution in presenting their case effectively, or cause difficulty to the court in terms of directing and managing the trial in an orderly, convenient, efficient and prudent manner without compromising the ends of justice.

57. As stated in **Eliphaz Riungu Case (Supra)** and in **Malebe vs R (1982) KLR 32,** there are no clear-cut set rules regarding the number of counts to prefer against an accused person. Each criminal case shall be determined on its own merits. What matters is not the numerical number of counts but rather the impracticality in managing the trial and the inconvenience or embarrassment such overloaded charge may most likely occasion either on the defence, prosecution or even the court.

58. For orderly management of court business, effective prosecution, adequate preparation of the defence and, timely determination of the trial, it is incumbent upon the court to direct the prosecution to elect at the earliest opportunity possible especially at the pre-trial stage, on the need to present fewer charges preferably not more than 12 counts in any one given charge sheet for clarity and proper understanding of court proceedings by all parties

59. The court is also duty bound at the pre-trial stage to weigh on the nature of the charges presented before it, number of witnesses lined up to testify, the volume or number of exhibits intended to be produced and then direct that the charges be severed and separate trials be conducted. Applying the wisdom held in the Ochieng and Eliphaz Riungu cases cited above, magistrates and judges should be in charge of court business taking into account that an overloaded charge sheet may as well be a decoy to secure an acquittal of accused persons. No prosecutor under normal circumstances can effectively prosecute a case with say 50 or 100 counts with hundreds of exhibits and expect a properly well corroborated case free from inconsistencies.

60. Even for a court to do a judgment making reference to each count and the voluminous exhibits against their corroboration is a night mere. It is upon the courts to rise to the occasion and direct the prosecution on the correct number of counts to be tried jointly and where not possible direct on the correct number of counts to be tried separately without necessarily overstepping into the DPP's mandate.

61. In the instant case, the trial is ongoing. Plea was taken on 9th August 2018 and trial commenced. As I am writing this judgment using the original court file ten witnesses have testified and there appears to be smooth flow of evidence with short cross examination implying that the matter is not likely to delay hence no fear of any violation of any right based on prolonged trial and time wasting due to overloaded charge sheet. Other than for the claim that the appellant is facing 3 counts out of a total of 35 counts, he has not established how or what difficult he is likely to experience in preparing for his defence in respect of 3 counts. In any event, he is only facing three counts and not twelve in a single charge sheet. Considering that the 35 counts arose out of the same facts or a series of similar events and, considering that the trial is moving faster, justice will demand that the matter proceeds as preferred. I do not see any prejudice suffered or likely to be suffered in the circumstances.

62. Regarding the likelihood that the trial court is likely to take long, the same is taken care of by the Chief Justice's directive that proceedings in Anti-Corruption cases shall proceed on a day to day basis. The question of waiting for a long period before determination of the case is not there unless intermeddled by numerous applications such as this one by both parties.

63. In the circumstances of this case, there is no sufficient ground submitted to warrant an order for a separate trial. For those reasons, it is my finding that the appeal herein is not merited and the same is dismissed. The trial court is directed to ensure speedy hearings and determination of the case.

Right of appeal 14 days

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF AUGUST 2019

J.N. ONYIEGO

JUDGE