



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI

ACEC PETITION NO. 30 OF 2018

MARY NGECHI.....PETITIONER

VERSUS

THE ETHICS AND ANTI-CORRUPTION COMMISSION.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

JUDGMENT

Introduction

1. Mary Ngechi herein referred to as the petitioner came to this court vide a petition dated 5th October 2018 and filed on the 9th October 2018 pursuant to Articles 1, 2, 6, 10, 9, 20, 21, 22, 23, 25, 27, 47, 50, 79, 165, 232 (1), 253, 258 and 259 of the Constitution, Section 138 of the Criminal Procedure Code and Sections 2, 3, 4, 5, and 6 of the Director of Public Prosecutions office seeking the following reliefs:

(1) An order of declaration declaring that the continued trial of the petitioner in Anti-Corruption Case No. 19/2010 is unconstitutional and therefore illegal and void.

(2) An order of declaration declaring that the ongoing criminal trials of the petition in Anti-Corruption Cr. Case No. 19/2010 offends the principle of double jeopardy and amounts to a violation of the petitioner's constitutional rights, should be stopped forthwith.

(3) An order of declaration declaring that as a result of the petitioners constitutional acts of the respondents, the ongoing criminal trials of the petitioner in Anti-Corruption Cr. Case No. 19/2010 amounts to mistrial and or unfair trial and is a breach on the part of the respondents, and the same should be stopped forthwith.

(4) An order permanently stopping the trial of ACC No. 19/2010.

(5) Costs of the petition and

(6) Any other orders that the honourable court may deem just and fit to grant as the justice of this case may permit.

2. The petition is premised upon grounds stated on the face of it and an affidavit in support sworn by the petitioner on 5th October 2018. Simultaneously filed with the petition is a notice of motion seeking that:

(1) Spent.

(2) Pending hearing and determination of this application and the petition, there be a stay of proceedings against the petitioner/applicant in Anti-Corruption Cr. Case No. 19/2010.

(3) Any further order or other orders permissible under Article 23 of the Constitution or any other law in the best interest of the petitioner/applicant and justice in the circumstances as the honourable court may deem fair, reasonable and just to grant.

(4) Costs of this application be awarded to the petitioner/applicant.

3. The matter was certified urgent by the duty Judge before the Criminal Division on 9th October 2018 and directions for service of the application made. Subsequently, the matter was transferred to this division on grounds of jurisdiction conferred upon it to handle anti-corruption matters.

4. Upon being served, the 1st respondent filed a replying affidavit sworn on the 12th November 2018 by Tabu Lwanga an investigator working with EACC. On their part, the 2nd respondent responded through an affidavit sworn on 27th November 2018 by Millicent Samita prosecution counsel working with the DPP. On 24th January 2019, parties agreed to dispose of the matter by way of written submissions.

The Petitioner's Case

5. The petitioner was arraigned before the Nairobi Chief Magistrate Anti-Corruption Court on 29th April 2010 vide ACC No. 19/2010 facing two counts namely;

(1) Conspiracy to commit an offence of corruption contrary to Section 47 A (3) as read with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3/2003.

(2) Fraudulent acquisition of Public Property Contrary to Section 48 of the Anti-Corruption and Economic Crimes Act No. 3/2003.

6. That on the same day, the petitioner was again arraigned in the same court in ACC No. 20/2010 where she was faced with 2 counts relating to Knowingly giving misleading document to principal contrary to Section 41 (2) as read with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3/2003. In the alternative, she was charged with an alternative count of uttering false document to principal contrary to section 41(2) as read with section 48 of ACECA.

7. The petitioner claimed that having been convicted in respect of ACC No. 20/2010 on 15th May 2018 and sentenced to 3 years imprisonment and in addition pay a fine of KShs.52 million being a mandatory sentence from the benefit realized in the course of committing the offence of unlawfully acquiring public property, she should not have been separately charged again in ACC 20/10. It was her averment that since the charges arose out of the same transaction, they will attract a similar amount of mandatory sentence if convicted. She contended that if convicted in Anti-Corruption Case No. 19/2010, she will be liable to pay again a mandatory sentence of 52,000,000/= million a subject already dealt with under ACC No. 19/2010 for the offence of unlawfully acquiring public property to wit KShs.13 million.

8. The petitioner averred that, the recommendation for prosecution by the 1st respondent and her subsequent prosecution by the 2nd respondent in ACC No. 19/2010 was made in bad faith, malicious and an abuse of office by the respondents. That since the issues raised in ACC No. 20/10 arose out of the same set of facts, circumstances and same witnesses just like in ACC No. 19/2010, it amounts to a violation of her constitutional rights to a fair hearing and fair trial contrary to Article 50 and Fair Administrative Action under Article 47 of the Constitution to be subjected to the same rigours of criminal proceedings.

9. It is the petitioner's claim that the respondents failed to follow the laid down procedures, do due diligence in conducting investigations and prosecuting her. That the second respondent failed to exercise his constitutional mandate properly as contemplated under Article 157 (11) of the Constitution thus acting against public interest, interest of justice and the need to prevent abuse of legal process. She contended that her prosecution under file No. 19/2010 is unjust, traumatic, unreasonably expensive and against the spirit and intentions of the administration of criminal law, justice, the constitution and without prosecution policy.

10. In his submission, Mr. Mogikoyo basically relied on the averments contained in the affidavit in support of the petition and the submissions filed on 19th March 2013. Learned counsel submitted that the continued prosecution of the petitioner in ACC No. 19/2010 is an assault against Article 50 (2) (0) of the constitution which provides that every accused person has a right to a fair trial which includes the right not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted.

11. Counsel further referred the court to Section 138 of the Criminal Procedure Code Cap 75 which states that a person who has been tried, convicted or acquitted should not be liable to be tried again on the same facts for the same offence. To bolster his argument, Mr. Mogikoyo referred the court to the decision in the case of **R vs Danson Mugunya Cr. Appeal No. 21/2016(2016) eKLR** at Page 7, in which the court held that:

“First the plea of Autrefois acquit or formal acquittal is grounded on the universal maximum of common law of England that no man is to be brought into jeopardy of his life, more than once for the same offence. And hence it is allowed as a consequence, that when a man is once fairly not guilty upon an indictment or prosecution, before any court having competent jurisdiction of the offence he may plead such acquittal in bar of any subsequent accusation for the same crime”

12. Counsel contended that the ongoing criminal trial before the lower court amounts to double jeopardy and the same is purely nothing but harassment of the petitioner. That the circumstances and set of facts is similar in the following respects:

(a) In both cases, the petitioner is charged under ACECA.

(b) Police file is the same.

(c) Petitioner was taken to court the same day.

(d) Date of arrest in both cases is the same i.e. 28th April 2010.

(e) The buyer and seller of the property the subject matter in both cases is the same.

(f) Witnesses are the same and the section offended in both files is Section 48 of ACECA.

13. Mr. Mogikoyo submitted that although the petitioner was not specifically charged with fraudulent acquisition of Kshs.13,000,000/= in ACC No. 20/2010, the same was considered by the court in ACC No. 19/2010 thus the source of the mandatory sentence of 52 million.

The 1st Respondent's Case

14. Relying on the affidavit of Tabu Lwanga sworn on 12th November 2018, the 1st respondent admitted that the petitioner was separately but concurrently charged with various charges as stated in the petition under ACC No. 20/2010 and ACC No. 19/2010. It was however contended that the charges preferred are different and distinct under two different statutes which contain difference ingredients. It was further stated that the petition had been filed a bit too late hence an afterthought following the conviction of the petitioner in ACC No. 20/2010.

15. It was averred that the 1st respondent did not abuse its powers as it acted properly according to its constitutional and statutory mandate. That there is no bar in law not to prosecute the petitioner for any subsequent but different offence hence the rule of double jeopardy does not apply.

16. In submission, M/s Grace Maina relied on their submissions dated 1st March 2019 and filed the same day which is basically a replica of the averments contained in their replying affidavit. It was M/s Maina's submission that the charges the petitioner is facing are not the same as the charges in ACC No. 19/2010 and that the ingredients are not the same.

17. That autrefois convict or acquit does not protect a person from further prosecution for a different offence on the same facts simply because he had been prosecuted on those facts and convicted. To support this position counsel referred to the case of **Connelly vs DPP 1964 2 ALL ER 401** where the court held that:

“What has to be considered is whether the crime or offence charged in the later indictment is the same or is substantially the same as the crime charged in a former indictment and that the facts under examination on the witnesses being called in the later proceedings are same as those earlier proceedings”.

18. Learned counsel further made reference to a decision in the case of **Nicholas Kipsigei Ngechi and 6 others vs Republic (2016) eKLR** in which the court principally associated itself with the holding in **Connelly vs DPP (Supra)**.

The 2nd Respondent's Response

19. The second respondent relied on the averments contained in the replying affidavit of Millicent Samita contending that the charges in the two criminal cases referred to are distinct and dissimilar. That the petitioner is inviting the court to consider issues of sentence before the conclusion of the trial hence an act of speculation.

20. It was further stated that; the issues raised ought to have been raised at the plea stage before the trial court which had the mechanism to deal with it; there was no proof of any elements of abuse of office nor application of excess mandate; there is no legal basis to declare the ongoing criminal proceedings a mistrial and that there was no violation of any principles governing principles of double jeopardy.

21. The respondent filed their written submissions on 5th March 2019 setting out six issues for determination as follows: whether the charges in ACC 20/2010 and 19/10 are similar; whether the determination and consideration of ACC 20/2010 discharged the petitioner from trial in ACC 19/2010; whether the petitioner is subjected to double jeopardy; whether the ongoing trial is illegal, unconstitutional, malicious and abuse of state power; whether the trial of the petitioner in ACC 19/2010 violates her constitutional rights and is contrary to public interest and, whether the petitioner is entitled to an order of stay of proceedings.

22. Principally, the 2nd petitioner adopted more or less the same approach like the 1st respondent arguing that the charges and the ingredients are basically distinct and that the element of double jeopardy is not applicable.

23. M/s Gakobo submitted that for the doctrine of double jeopardy to arise, there must be proof that a matter has been fully decided by a court of competent jurisdiction so that the principle of resjudicata applies. To support that proposition, counsel referred to a decision in the case of **Nicholas Kipsiegei Ngetich and 6 others vs R (2016) eKLR and Regina vs 2 (2005) 3 ALL ER 95**.

24. Relying on the decision in the case of **Bitange Ndemo vs Director of Public Prosecutions and 4 others (2016) eKLR**, counsel contended that matters of contravention of constitutional rights are not hypothetical or abstracts but must be demonstrated by the aggrieved party. Counsel submitted that the DPP properly exercised his mandate vide Article 157 (10) of the Constitution.

25. Regarding stay of proceedings, counsel submitted that the court should act sparingly and only in exceptional circumstances. To support this proposition counsel referred the court to the decision in the case of **Goddy Mwakio & another vs Republic (2011) eKLR and R vs the Kenya Anti-Corruption Commission & 2 Others Civil Application No. 51/2008**.

Analysis and Determination

26. Having considered the petition, grounds and affidavits in support, responses thereto and submissions of both counsel, issues that arise are:

(a) Whether the respondents acted in contravention of the Constitution in recommending and prosecuting the petitioner with related charges in separate cases.

(b) Whether the petitioner is likely to suffer double jeopardy.

(a) Whether the respondents acted in contravention of the Constitution in recommending and prosecuting the petitioner with related charges in separate cases

27. The petitioner's apprehension in this petition as I understood it is that, she has been subjected to double prosecution in two similar and related but separate criminal proceedings namely; ACC 20/10 already concluded and convicted and, ACC No. 19/10 which is ongoing. Her fear is drawn out of the fact that although separately charged, the charges are basically the same arising out of the same set of facts, circumstances and the evidence. That if convicted again, she is likely to suffer double punishment especially where it relates to the mandatory sentence which has already been dealt with in ACC No. 20/10 in which she was sentenced to a mandatory fine of Ksh.52,000,000/=.

28. The law governing the doctrine of double jeopardy is enshrined both in the Constitution and the statute (the Criminal Procedure Code Cap 75 Laws of Kenya) besides a multiplicity of case law.

29. What does the principle of double jeopardy mean? The Black Law Dictionary defines double jeopardy as: the fact of being prosecuted or sentenced twice for substantially the same offence. The principle of double jeopardy is recognised in our Constitution the Supreme Law of the land under Article 50 (2) (0) of the Constitution which provides:

“Every accused person has the right to a fair trial which includes the right not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted”.

30. The above provision is operationalised by Section 138 of the CPC which provides that:

“A person who has been once tried by a court of competent jurisdiction for an offence and convicted or acquitted of that offence shall while the conviction or acquittal has not been reversed or set aside not be liable to be tried again on the same facts for the same offence”.

31. Pursuant to Article 79 of the Constitution, the office of the 1st respondent was created and the power to investigate and recommend prosecution bestowed upon it under Section 11 (1) (d) and 13 (2) of EACCA and Section 35 of ACECA. The commission (1st respondent) is obligated to forward its recommendation to the DPP for prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under the Act.

32. The DPP is equally conferred with constitutional authority under Article 157 (10) to act independently in making decisions as to who is to charge and who not to be charged. Both offices have their powers insulated by the Constitution and statute to act independently without subjecting themselves to anybody's directions or control, external factors or influence or even seek consent or authority from anybody.

33. The DPP is enjoined under Article 157 (11) of the Constitution to exercise his duties diligently in commencing prosecution on any criminal proceedings taking into account the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. The DPP does not have unlimited open cheque to do whimsically whatever he wants at will. He is under some measure of control and whatever he does, it must be in accordance with the law. The powers donated to him are people driven and therefore accountable to the people of Kenya on whose behalf he is exercising those powers.

34. He must therefore act with utmost fidelity to the law without abusing or misusing those powers to settle personal scores or simply act maliciously with the sole purpose of punishing somebody.

35. Where there is proof of abuse of power by the commission or the DPP in exercise of their duties thereby acting in breach of any constitutional or statutory powers, it is the duty of the court to intervene and correct the situation by setting aside such actions or breaches. However, courts must act also with extreme caution not to unreasonably gag the operations of such independent state agencies or organs so as to give them room for effective operation. (**See Paul Nganga Nyaga vs Attorney General and 3 Others (20130 eKLR)** where the court stated that:

“This court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they acted in contravention of the Constitution”.

36. Similar position was held in the case of **ACEC Petition No. 23 of 2018 Peter Nganga Mburu & 2 Others vs DPP (2018) eKLR** where the court held that:

“The DPP in directing that investigations be undertaken is not subject to the direction and control of any person, body or authority. If it is however shown that the decision made is against the tenets of the Constitution and has been made in bad faith the same shall be reviewed”.

37. For this court to make orders sought, the petitioner must prove in the pleadings with precision that indeed a particular provision of the Constitution has been violated and the nature of the violation (See Anarita Karimi Njeru vs R (1979) IKLR.)

38. According to the 1st respondent, they did carry out their investigations pursuant to complaints received against the petitioner and others. They then recommended to the DPP as per the law. The DPP having reviewed the evidence presented two separate charges before the Chief Magistrate's Court Anti-Corruption Court Vide ACC No. 19/2010 and 20/19. Subsequently, the trial commenced and ACC No. 20/10 was concluded ahead of the other. The petitioner admittedly was convicted and sentenced.

39. The other case now being challenged and the subject of these proceedings is still pending. According to the respondents, they acted with utmost good faith and without abusing their office.

40. Once a charge sheet is presented before a trial court, each party including the trial court is under obligation to question or object to the validity or legality of the charges before court. At the plea stage or in the course of the trial before the close of the prosecution case, the court can entertain such objections and recommend amendment of the charges or where appropriate discharge the accused.

41. In the instant case, no objection was ever raised until 2018 after the conclusion of ACC 20/19. After having perused the two charge sheets, it is clear that the offences are wholly related in that they all arose out of the same transaction. At its best, the court should have on its own motion or invitation of either party consolidated the two cases. Nonetheless, both parties kept quiet until one case was completed.

42. It is admitted that the charges on the face of it are related although distinct in terms of the statement of the offence. The petitioner is not challenging the manner and style in which the offences in ACC 19/2010 were presented. She is only apprehensive that if proved, she is likely to suffer double punishment in terms of the mandatory sentence.

43. I have not been sufficiently persuaded that the respondents did not do proper investigation and that the recommendation to prosecute and subsequent prosecution was actuated with malice. When the respondents presented the two cases on the same day, they did not know which one was to be finalized first. Can anyone claim that there was malice in prosecuting the petitioner in ACC No. 20/10 to which she has been convicted? Obviously, the answer is no. The position would have changed if ACC No. 19/10 had been finalized first.

44. I do not see any malice, abuse of office nor ill motive in recommending the prosecution herein. Although the respondents are duty bound to present a water tight case, the same need not be 100% error free in order to secure a conviction. The fact that there may occur an error in the manner in which the charges are drafted or presented is not a ground to discredit the entire process. At least there is room for amendment or correction or even raise it on appeal after the conclusion of the case. That the petitioner and her lawyer could not see any wrong in proceeding with the two cases concurrently since 2010 until 2018 is inconceivable.

45. For sure there is no proof of any abuse of power, acts of malice on the part of the respondents nor violation of any unconstitutional or statutory provision. The respondents executed properly their mandate and the rest is for the trial court to determine after hearing evidence from both sides.

(b) Whether the charges under ACC No. 19/10 amounts to double jeopardy

46. As stated elsewhere in this judgment, the doctrine of double jeopardy is covered under Article 50 (2) (0) of the Constitution and Section 138 of the CPC. To prove double jeopardy, one must prove that firstly, he or she has once been tried by a court of competent jurisdiction and convicted or acquitted. Secondly, that such conviction or acquittal has not been reversed or set aside and thirdly, he should not be tried again on the same facts for the same offence.

47. For the sake of proper understanding and clarity, I wish to reproduce the relevant charges the subject of these proceedings. Under file No. 19/10 the petitioner was charged with two counts as follows: Conspiracy to commit an offence of corruption contrary to Section 47 A (3) as read with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3/2003. Particulars are that on unknown dates between December 2008 and April 2009 in the City of Nairobi within the then Nairobi Province in the Republic of Kenya conspired together to commit an offence of corruption by entering into agreement to defrauding the ministry of Local Government and the City Council of Nairobi the sum of Kshs.283,200,000/= by purporting it to be the purchase price payable through the Nairobi City Council for LR 14759/2 to be used as public cemetery.

48. The second count was on fraudulent acquisition of public property contrary to Section 45 (1) a as read with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3/2003. Particulars are that, on the 24th February 2009 in the city of Nairobi, fraudulently acquired, through E.N. Omotii & Co. Advocates, public property belonging to the ministry of local government and the city council of Nairobi to wit the sum of Kshs. 13,000,000/=.

49. Regarding ACC No. 20/2010, she was again charged together with others with knowingly giving a misleading document to principal contrary to Section 41 (2) as read with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3/2003. Particulars are that, on or about 10th November 2008 at city Hall in Nairobi, being employees of City Council of Nairobi tasked respectively as chair and secretary Tender Evaluation Committee knowingly gave a misleading report of the minutes of the deliberations of the said tender evaluation committee purporting that the tender evaluation committee had unanimously agreed that the land tendered by M/s Naen Rech was suitable for cemetery use, an act which was to the detriment of the city council of Nairobi in that it misled the council into procuring land not suitable for cemetery use.

50. Second count is knowingly giving false document to principal contrary to Section 41 (2) as read with Section 48 of Anti-Corruption and Economic Crimes Act No. 3 of 2003. Particulars are that, on or about 12th November 2008 at City Hall in Nairobi, being an employee of City Council of Nairobi as Director of Legal Affairs, knowingly gave to the council's tender committee, a false valuation report in respect of land which the council was in the process of acquiring for cemetery use, an act which was to the detriment of the city council of Nairobi in

that it misled the council into procuring land at a price far above the prevailing market price for land in a similar location as the land provided. In the alternative, she is charged with uttering a false document contrary to Section 353 of the penal code.

51. From the face of it, the two sets of charges both in ACC 19/10 and 20/10 are not similar in terms of the statement of the offence and particulars. In other words, the ingredients are not the same. The applicant must prove that she has been convicted or acquitted of similar offence.

52. In the case of Nicholas Kipsigei Ngetich and six others vs R (2016) eKLR the court had this to say on double jeopardy based on the doctrine of autrefois acquit or convict;

“the rule against double jeopardy does not forbid the state from presenting different offences at consecutive trials even though they came out of the same occurrence. The test is whether such a course has led to fundamental unfairness”.

53. While Mr. Mogikoyo has invited the court to consider the fact that the petitioner has already been convicted and ordered to pay a mandatory sentence, 52 million, there is no dispute that these charges as preferred are distinct although the circumstances under which they arose are similar.

54. Although I am in agreement with Mr. Mogikoyo that the petitioner is undergoing double process, the ingredients relating to the charges are not similar. Therefore, there has not been any conviction on the charges preferred under ACC case No. 19/10.

55. Mr. Mogikoyo's fear is merely speculative. I have looked at the decision in Danson Mugunya cited by Mr. Mogikoyo. The facts are different and distinguishable from this case. In Mugunya case, it was the state appealing against an acquittal which Section 348 A (1) of the CPC then did not allow the state to appeal against an order of acquittal.

56. The doctrine of autrefois acquit or convict is basically looking at the conviction or acquittal not the sentence. Each offence has its own prescribed sentence which in the appropriate circumstances will apply.

57. In my opinion, the issue herein should have been raised before the trial court in the first instance without waiting for 8 years to raise it as constitutional petition. If there will be any conviction and an illegal sentence imposed, the petitioner shall be at liberty to appeal against the sentence.

58. For the above reasons stated, I do not find any of the reliefs sought applicable. Accordingly, the petition is hereby dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF AUGUST, 2019.

J.N. ONYIEGO

JUDGE