



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.156 OF 2016

(An Appeal arising out of the conviction and sentence of Hon. Omido (SPM) delivered on 25th November 2016 in Nairobi Miscellaneous Criminal Application No.1 of 2014)

STEPHEN JOSEPH VAZ.....1ST APPELLANT

QUEENIE PHILOMONA VAZ.....2ND APPELLANT

VERSUS

GLADYS ROSE FERNANDES.....RESPONDENT

JUDGMENT

The Appellants were aggrieved by the decision rendered by Hon. J.M. Omido (PM) on 25th November 2016 whereby the court allowed the Respondent to institute private prosecution against the Appellants. The Respondent had applied to the court that she be granted leave to institute private prosecution against the Appellants because she was of the view that the police and the Director of Public Prosecutions had either neglected or refused to prosecute the Appellants despite the fact that investigations had revealed that a criminal act had been committed by the Appellants.

In their petition of appeal, the Appellants raised several grounds of appeal challenging the decision of the trial court. The Appellants were of the view that the proceedings leading upto the decision were incurably defective in that a necessary party, *i.e.* the Director of Public Prosecutions was not included in the proceedings. The Appellants reiterated that the Director of Public Prosecutions ought to have been served with the requisite notice of commencement of proceedings before the Respondent prosecuted the same. The Appellants stated that since the order that was being sought was directed at the Director of Public Prosecutions, rules of natural justice and the **Constitution** demanded that the said office be made a party to the proceedings. The Appellants were aggrieved that the trial court had granted leave to the Respondent to institute private prosecution yet the threshold to justify that decision had not been met. The Appellants were aggrieved that the trial court had failed to take into consideration the fact that there existed a long standing grudge between the Appellants and the Respondent that motivated the filing of the application. They faulted the trial magistrate for failing to take into consideration their submission before reaching the impugned decision. In the premises therefore, the Appellants urged the court to allow the appeal, set aside the Ruling delivered on 25th November 2016 and substitute it with an order of this court dismissing the said application with costs.

Prior to the hearing of the appeal, counsel for the parties to this appeal filed written submission in support of their respective opposing positions. During the hearing of the appeal, this court heard oral rival submission made by Mr. Kenyatta for the Appellants and by Mr. Kimathi for the Respondent. Mr. Kenyatta submitted that it was imperative that the office of the Director of Public Prosecutions be enjoined in any application where a party is seeking the leave of court to institute private prosecution. He cited **Section 28(2)** of the **Office of the Director of Public Prosecutions Act** which requires notice to be issued before such leave is sought. In the present appeal, it was the Appellants' contention that such notice was not served. He relied on the case of **Otieno Clifford -vs- Republic [2016] eKLR** in support of his submission. Learned counsel submitted that the Respondent made serious allegations against the Office of the Director of Public Prosecutions which required that the said office be served before any legitimate decision could be rendered in regard to the application for leave to file private prosecution.

Learned counsel explained that the Respondent had claimed that the Director of Public Prosecutions had failed or refused to prosecute the Appellants despite the fact that there was sufficient evidence for such prosecution to be mounted. The Respondent in particular claimed that the Director of Public Prosecution had abdicated his responsibility. He submitted that since specific allegations had been made against the Office of the Director of Public Prosecutions, he should have been granted an opportunity to respond to the allegations. The omission by the Respondent to enjoin the Office of the Director of Public Prosecutions as a party in the proceedings rendered the proceedings fatally defective and a nullity. He further submitted that, in allowing the application, the trial court had infringed the independence of the Office of the Director of Public Prosecutions. He pointed out that the Director of Public Prosecutions had the constitutional mandate to determine whether there was sufficient evidence to mount a prosecution and not a complainant who had lodged a criminal complaint.

Learned counsel explained that the dispute between the Appellants and the Respondent related the manner in which the affairs of a limited liability company, Advanced Catering Services Limited was being run. The dispute involved whether or not the signatories to a bank account operated by the company were lawfully changed. Whereas the Appellants asserted that the change of mandate was procedural, it was the Respondent's case that the mandates were forged. The Appellants assert that the bank had conducted its own internal investigations and reached the conclusion that the mandates were properly executed. The Respondent was dissatisfied and filed a complaint with the Criminal Investigation Directorate. Investigations were conducted. The Director of Criminal Investigations found that there was no basis for the complaint lodged by the Appellants. The Director of Public Prosecutions agreed with the Director of Criminal Investigations.

Mr. Kenyatta submitted that **Article 157(10)** of the **Constitution** and **Section 5(4)(e)** of the **Office of the Director of Public Prosecutions Act** grants the Director of Public Prosecution discretion to determine who should be prosecuted without interference from any party. Learned counsel was of the view that the Respondent's application seeking leave to institute private prosecution, without involving the Office of the Director of Public Prosecutions, was a direct assault on the mandate of that office. He urged the court not to be persuaded by the Respondent's assertion that she had commissioned private investigations which established that indeed a crime had been committed. On this issue, he relied on the case of **Michael Sistu Mwaura Kamau –vs- Ethics and Anti-Corruption Authority [2016] eKLR**. He finally submitted that the trial court erred when it failed to consider that the application had been motivated by a long running family feud which had nothing to do with the commission of any criminal offence. The Appellants were of the view that the Respondent sought to prosecute them in pursuit of a vendetta and as a way of revenging against the 1st Appellant. The intended private prosecution was intended to achieve an ulterior motive. The threshold set for instituting private prosecution in **Floriculture International Limited & Others -vs- The Attorney General Nairobi High Court Miscellaneous Civil Application No.114 of 1997** had not been met. He urged the appeal to be allowed.

Mr. Kimathi for the Respondent opposed the appeal. He submitted that the Appellants did not have a right of appeal. He cited **Sections 88 and 347** of the **Criminal Procedure Code** in regard to who has a right of appeal where the issue in dispute is the granting or refusal of leave to institute private prosecution. He stated that the Appellants could only approach this court by way of revision and not by way of an appeal. He relied on the case of **Kakuta Maimai Hamisi –vs- Peris Pesu Tobiko & 2 Others [2013] eKLR**. He urged the court not to be persuaded by the Appellants' interpretation of **Section 28(2)** of the **Office of the Director of Public Prosecutions Act**. He submitted that the section could not be read in isolation as it only require the Director of Public Prosecutions to be informed before a party seeks leave to institute private prosecution. He explained that the Respondent wrote a letter to the Director of Public Prosecutions on 3rd October 2013 requesting for information why he had decided not to prosecute the Appellants. The Director of Public Prosecutions did not respond to the letter. After the court had granted leave, the Respondent informed the Director of Public Prosecutions that the matter would be coming up in court on 17th January 2017 when the Respondent intended to commence private prosecution.

Learned counsel submitted that the Director of Public Prosecutions had the mandate to either take over or terminate the proceedings. The Respondent denied the suggestion that she intended to mount a private prosecution without the knowledge of the Director of Public Prosecutions. In that regard, she relied on the case of **Isaac Aluoch Polo Aluochier –vs- Stephen Kalonzo Musyoka & Others [2013] eKLR**. Learned counsel was of the view that the Director of Public Prosecutions did not suffer any prejudice when a formal notice to institute private prosecution was not filed. He was of the view that failure to give notice was not fatal to the Respondent's case but rather a procedural technicality.

Regarding the facts of the case, learned counsel submitted that the Appellants had changed the mandate of the signatories of the company's accounts in the bank without authority. The signature of the Respondent was forged to secure the change of mandate. The bank instituted internal investigation which established that indeed the mandate forms had been manipulated. She was of the view that the signatures to the mandate were forged and therefore there was sufficient basis for the Appellants to be prosecuted. The Respondent was justified in seeking to institute private prosecution when the Director of Public Prosecutions failed to discharge his mandate to prosecute the Appellants. He urged the court to dismiss the appeal.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the facts of the case and reach its own independent determination whether or not to uphold the decision of the trial court. In the present appeal, there are several issues that came to the fore for determination. The first issue is whether the Appellants had the right to lodge an appeal against the decision of the trial court granting leave to the Respondent to institute private prosecution against them. The Respondent argued that the Appellants did not have such a right of appeal against the decision. The Respondent cited **Sections 88 and 347** of the **Criminal Procedure Code** in support of this proposition. The Appellants insisted they that they had the right of appeal.

The plain reading of **Section 347** of the **Criminal Procedure Code** can lead to the interpretation that is only a person who has been convicted who can appeal against a decision rendered by the trial court in a criminal case. **Article 50(2)(q)** of the **Constitution** seems to also imply that the right of appeal in a criminal case, accrues to a person who has been convicted. This court is of the view that the Appellants were directly affected by the decision rendered by the trial court. The order issued by the trial court, if enforced, means that the Appellants would be subjected to private prosecution by the Respondent. This court is not persuaded that a person who is aggrieved by a decision of a subordinate court in a criminal matter cannot appeal the decision to the High Court merely because that decision does not amount to a conviction. With the expanded human rights provisions contained in **Chapter 4** of the **Constitution**, it would amount to a restrictive reading of the **Constitution** and **Statute** to hold that a person affected by a decision rendered in criminal proceedings cannot appeal against that decision because the decision does not amount to a conviction. The fair trial articles of the **Constitution**, including **Article 25** demands from that this court interprets the provisions of the **Constitution** and **Statutes** so as to enforce and uphold the rights and fundamental freedom of the individual. In this appeal, this court therefore holds that the Appellants had the right to appeal against the decision rendered by the trial court to this court.

The second and more fundamental issue is whether the proceedings before the trial court were invalidated by virtue of the fact that the Director of Public Prosecutions was not made a party to the proceedings. It was common ground that the Respondent's application before the subordinate court was pursuant to an allegation that the Director of Public Prosecution had refused to exercise his constitutional and statutory mandate to prosecute the Appellants. It is not disputed that the Respondent was aggrieved by the Director of Public Prosecution alleged inaction in not taking up and prosecuting the complaint lodged by the Respondent with the Director of Criminal Investigations. **Article 157**, and specifically **Article 157(6)** of the **Constitution** grants powers of prosecution to the Director of Public Prosecutions. In exercise of the powers, **Article 157(10)** of the **Constitution** provides thus:

“The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”

The independence of the Office of the Director of Public Prosecutions is reiterated under **Section 6** of the **Office of the Director of Public Prosecutions Act**. **Section 23** of the **Act** provides thus:

“(1) Notwithstanding the provisions of any other law, it shall be the function of the Director to –

(a) decide to prosecute or not to prosecute in relation to an offence;

(b) institute, conduct and control prosecutions for any offence;

(c) carry out any necessary functions incidental to instituting and conducting such criminal prosecutions; and

(d) take over and conduct a prosecution for an offence brought by any person or authority, with the consent of that person.”

Section 28 of the **Act** grants any person the right to institute private prosecution. It provides thus:

“(1) Notwithstanding any provision under this Act, or any other written law, any person may institute private prosecution.

(2) Any person who institutes private prosecution shall, within thirty days of instituting such proceedings, notify the Director in writing of such prosecution.

(3) In accordance with Article 157 of the Constitution and this Act, the Director may undertake, take over or discontinue any private prosecution.”

The main thrust of the Appellant’s appeal is that the Respondent filed the application seeking leave to institute private prosecution without including the Director of Public Prosecutions as a necessary and mandatory party. The Appellants further argued that the Respondent did not give notice to the Director of Public Prosecutions as envisaged by **Section 28(2)** of the **Office of Director of Public Prosecutions Act**. On her part, the Respondent submitted that she complied with the provisions of the law when she instituted the proceedings before the subordinate court seeking leave to lodge private prosecution against the Appellants. The Respondent alluded to a letter that she had written to the Director of Public Prosecutions dated on 3rd October 2013, which according to her, constituted the notice envisaged under **Section 28(2)** of the **Act**. The Respondent further submitted that it was not necessary to include the Director of Public Prosecutions as a party in the proceedings before the subordinate court. The Respondent justified this position by stating that she informed the Director of Public Prosecutions about the order issued by the subordinate court after she had been granted the leave to institute private prosecution against the Appellants.

This court has carefully re-evaluated the rival arguments made in regard to the above issue. It was clear to the court that **Article 157** of the **Constitution** and **Section 23** of the **Office of the Director of Public Prosecutions Act** envisage that the Director of Public Prosecutions is a necessary and mandatory party in any proceedings where criminal prosecutions are either contemplated or are intended to be filed in court. In the present appeal, it was apparent that the Respondent’s application before the subordinate court seeking leave to institute private prosecution against the Appellants was fundamentally and fatally defective in that the Director of Public Prosecutions was not made a party to the proceedings.

A perusal of the proceedings of the trial court clearly shows that the thrust of the Respondent’s arguments while seeking leave to institute private prosecution against the Appellants was targeted at the Office of the Director of Public Prosecutions. The Respondent complained that the Director of Public Prosecutions had abdicated his responsibility to prosecute the Appellants in spite of the fact that cogent evidence had been presented to him. It is a fundamental principle of fair trial and equity that no party can be condemned without being given a hearing. In the present appeal, the Respondent purported to make a case against the Director of Public Prosecutions without including the Director of Public Prosecutions as a party in the proceedings before the subordinate court. The Director of Public Prosecutions was therefore denied the opportunity to respond to the serious allegation of alleged dereliction of duty that was laid against him. This court is of the considered view that the reason a party intending to institute private prosecution is required to give notice of such intention under **Section 28(2)** of the **Office of the Director of Public Prosecutions Act** is so as to enable the Director of Public Prosecutions to be put on notice and also be given an opportunity to respond to the allegations made in the application.

In the premises therefore, this court agrees with the Appellant that the application filed by the Respondent before the subordinate court was incurably defective and ought not to have been entertained by the trial court, firstly, because there was no evidence that the Respondent had given the statutory notice envisaged under **Section 28(2)** of the **Office of the Director of Public Prosecutions Act** of her intention to institute a private prosecution, and secondly, her failure to enjoin the Director of Public Prosecutions as a necessary party in the proceedings rendered the subsequent orders issued against the Director of Public Prosecutions incapable of execution on account of the fact that the Director of Public Prosecutions was not given an opportunity to respond to the allegations made against the Office by the Respondent. The appeal shall be allowed. The decision made by the trial court on 25th November 2016 is set aside and substituted by an order of this court dismissing the application. There shall be no orders as to costs.

DATED AT NAIROBI THIS 28TH DAY OF JUNE 2018

L. KIMARU

JUDGE