REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMICE CRIME DIVISION MILIMANI

HC ACEC REV. NO. 5 OF 2017

REPUBLIC ....APPLICANT

VERSUS

JUMA KALUME KALAMA .... RESPONDENT

(*Pursuant to an order issued by the SPM Court at Voi in EACC Case No. 2 of 2017 R vs Juma Kalume Kaluma)*

RULING

1. Vide a letter dated 2nd August 2017, the director public prosecution (herein referred to as “the applicant”), sought revisionary orders in relation to the Voi SPM’s court’s orders made on 6th July 2017 in Anti-corruption Case No. 2/2017 pursuant to Sections 362 and 364 of the Criminal Procedure Code Cap 75 Laws of Kenya. It is the applicant’s contention that the said orders were illegal, incorrect and improper hence prayed for the honourable court to call for and examine the record in the aforesaid case so as to satisfy itself and pronounce on the legality, propriety and correctness of the findings and orders as well as the regularity of the proceedings giving rise thereto.

2. The application is premised on the ground that the respondent herein Juma Kalume Kalama was arraigned before the SPM’s Court Voi on 14th June 2017 facing two counts of criminal charges relating to corruption. Count one, he was charged of corruptly offering a benefit to a public officer contrary to Section 39 (3) (b) as read with Section 48(1) of the anti-corruption and Economic Crimes Act No. 3 of 2003. Count two, he was charged of corruptly giving a benefit contrary to Section 39 (3) (b) as read with Section 48 (1) of the Anti-Corruption and Economic Crimes Act No. 3/2003. According to the charge sheet, both offences were committed on 23rd December 2016.

3. That upon presentation of the charge sheet before the honourable court presided over By Hon. E.G. Nderitu for plea taking, the honourable Magistrate declined to take plea and dismissed the charges under Section 89(5) of the Criminal Procedure Code Cap 75 on the ground that the charges should have been preferred and filed under the Bribery Act and not under Section 39 (3) (b) of the anti corruption and economics Act No. 3/2003 which had been repealed by Section 23 of the Bribery Act which commenced operation on the 13th January 2017. The applicant therefore asserted that the rejection and subsequent dismissal of the charges by the honourable court claiming that the proper charge should have been under the Bribery Act was erroneous in view of the provision under Section 27 (2) of the Bribery Act.

4. It was further urged that the magistrate’s interpretation of the said section was also contrary to the provisions entrenched under Section 23 (3) (e) of the interpretation and general provisions Act Cap 2 Laws of Kenya which provides that:

> **“where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.”**

5. It is the applicant’s prayer that a finding be made by this honourable court that the orders finding the charges in Voi law courts EACC No. 2/2017 incompetent and the consequent rejection of the same under Section 89 (5) of the Criminal Procedure Code was illegal, improper and incorrect and; that an order do issue directing that the respondent be arraigned in court to take plea on the basis of the charges initially preferred or any other amended charges that may be preferred by the applicant.

6. Although served with the letter for revision, the applicant did not file any response immediately. When the matter came for hearing on 3rd May 2018, Mr. Mulandi Advocate offered to render probono legal services in representing the respondent. He sought an adjournment to file a replying affidavit in response. Vide a replying affidavit sworn on 5th June 2018 but filed on 6th June 2018, the respondent averred that he was illegally charged under a repealed law and that the trial court’s interpretation of the law and subsequent rejection of the charges and his discharge was regular and lawful hence no need for revision. He urged the court not to direct that he be charged afresh under the amended

charges on grounds that it will subject him to further suffering.

7. Prior to the hearing, the applicant filed written submissions dated 20th March 2013 and the respondent filed his on 6th June 2018. On 4th July 2018, counsels highlighted on their submissions. M/s Aluda representing the applicant reiterated the contents contained in their letter for revision which is also replicated in the written submissions thus urging the court to find that the trial court had misapprehended and wrongly interpreted the Bribery Act by rejecting the charges. M/s Aluda argued that the charges of corruptly soliciting or receiving a benefit were not carried over from the Anti-corruption and Economic Crimes Act.

8. To buttress her position, learned counsel referred the court to the case of **Geoffrey Kirinya Igweta vs Republic Cr. App. 81 of 2011** where Judge Ngah held that:

> **"At the time the appellant is alleged to have committed the offences for which he was convicted, the law that defined those offences was the relevant provisions of the Penal Code. Under Article 50 (2) (n) (i) of the Constitution those acts were only offences because they were so defined and punishable under particular provisions of the Penal Code. Much as the same acts may have been defined in the Sexual Offences Act, they cannot be said to have been offences under the Act, because this latter Act was not in existence. Put simply, the offence of defilement as defined under Section 8(1) and (3) of the Sexual Offences Act could not have been such an offence in 2004 before this Act was conceived and therefore in the words of article 50 (2) (n) of the Constitution the appellant could not have been tried and convicted for an act that at the time it was committed was not an offence".**

9. Learned counsel further submitted that the honourable court's interpretation if upheld would violate the accused's rights enshrined under Article 50 (2) (n) of the Constitution which provides that no one should be convicted for an act or omission that at the time it was committed was not an offence in Kenya or a crime under international law.

10. Mr. Mulandi for the respondent adopted the averments in the replying affidavit of the respondent and the written submissions filed on 6th June 2018 arguing that the trial court's dismissal of the charge sheet was correct. Mr. Mulandi was however non-committal as to what law was applicable between the Anti-Corruption and Economic Crimes Act and the Bribery Act. Learned counsel asserted that to allow amended charges against the respondent would infringe on his right to a fair trial contrary to Article 50 (2) of the Constitution in that the trial has been delayed for a long period which is against the spirit of expeditious prosecution and delivery of justice.

11. To justify his arguments, Mr. Mulandi referred the court to the case of **Sigilai and Another vs Republic (2004) 2 eKLR 480** in which the court of appeal found that the principle law governing charge sheets is that an accused should be charged with an offence known in law and that where one is charged of a non-existent law, the charge should be declared defective and the applicants should not take plea. Mr. Mulandi urged the court to declare the respondent a free man without recommending any charges against him.

12. I have considered the application herein, replying affidavit by the respondent and rival submissions by both counsels. The only issue rendering itself for determination is whether the applicant is entitled to the orders sought pursuant to Sections 165 (6) (7) of the Constitution, Section 362 and 364 of the Criminal Procedure Code or better still whether accused should have been charged under the ACECA Section 39 (3) (b) now repealed or Section 5 of the Bribery Act.

13. Authority to exercise revisionary powers by the High Court over subordinate courts is a creature of Article 165 (6) and (7) of the Constitution which is the supreme law of the land and sections 362 and 364 of the Criminal Procedure Code. Article 165(6) provides as follows:

> **"the high court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi judicial function, but not over a superior court".**

Sub Article 7 goes further to provide that:

> **"For purposes of Clause 6, the high court may call for the record of any proceedings before subordinate court or person, body or authority referred to in Clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice".**

14. Section 362 of the Criminal Procedure Code provides thus:

> **"The high court may call for and require the record of any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate court".**

Section 364 (1) also provides that:

> **"In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the high court may-**
>
> > **(a)................**
> >
> > **(b) In the case of any other order other than an order of acquittal, alter or reverse the sentence.**

15. The mandate donated by the aforesaid provisions to oversee subordinate courts' operations in the course of discharging their judicial function is intended to restore consistence, predictability and alignment in the administration of justice in case of any illegality, irregularity or impropriety committed by a subordinate court. In the case of **Republic vs Jared Wakhule Tubei & Another (2013) eKLR,** the court had this to say:

> **"I wish to point out that the exercise of supervisory power of the high court, particularly under Article 165 (6) and (7) of the Constitution and Sections 362, 364 of the CPC is so wide, and is not limited to situations where there is an error on the face of the record, or new issues having emerged. It covers incorrect, illegal, improper or irregular proceedings, order or finding of the trial court".**

16. In the case of **Republic vs Enock Wekesa and Another (2010), e KLR J. Koome amplified the role of revisionary powers as follows**:

> **"This court is entitled to review the decision by the learned magistrate to determine whether it complies with legal standards".**

17. In the instant case, the respondent was arraigned before Voi SPM's Court on 14th June 2017 to take plea before Hon.Onkoba then holding the rank of an SRM. However, due to lack of jurisdiction over corruption related matters, the hon. Magistrate deferred and referred the plea taking to 20th June 2017 before Hon. Nderitu (SPM) who also deferred the same to 6th July 2017. On 6th July 2017, the court observed that accused had been charged under Section 39 of the Ant-corruption and Economic crimes Act which had been repealed.

18. In her ruling, the honourable court dismissed the charges under Section 89(5) of the Criminal Procedure Code on grounds that the charges ought to have been preferred under the Bribery Act in compliance with Section 27 being the transitional clause under that Act.

19. I have carefully considered the original court record and more particularly the charges preferred and presented before the presiding magistrate. Accused was charged with two counts allegedly committed on 23rd December 2016. He was however not charged immediately until 14th June 2017. Accused was then charged under the Anti-Corruption and Economic Crimes Act Section 39 (3) (b) as read out with Section 48 (1). It is not in dispute that Section 39 (3) (b) was repealed vide the Bribery Act No. 27 of 2016 which was assented to on 23rd December 2016 and commenced on January 2017. It therefore follows that the offence was committed and investigations instituted when Section 39 of the ACECA was operational but prosecution instituted and commenced after its repeal and after the commencement of the Bribery Act.

20. The key question is, which law should the respondent have been charged with? Is it under Section 39 (3) (b) of ACECA now repealed or the relevant provision in this case Section 5 of the Bribery Act? Alive of the possible confusion or consequences occasioned by repealed laws, the legislature in its wisdom provided a transitional clause under the Bribery Act courtesy of Section 27 (2) which provides:

> **"Any investigation or prosecution or court proceedings instituted before the commencement of this Act shall, with the necessary modifications be treated or continued as if they were instituted under this Act".**

21. What is the import of this saving or transitional clause? This provision is meant to breathe life into the previously commenced investigation or prosecution or court proceedings instituted under the repealed law and to midwife or ensure smooth delivery or transition of such investigation or prosecution or proceedings commenced or instituted during the lifetime of ACECA to the repealing or new Act. It is trite that no one should be charged of an offence that did not exist at the time it is alleged to have been committed. **(See Geoffrey Kirinya Igweta vs Republic (Supra)**. However, in this case the offence of bribery was and is inexistence both under the repealed law and current law Act save for the penalty which is stiffer under the Bribery Act than the one provided under the ACECA.

22. I have had the opportunity to look at the decision of my sister J. Ongudi's reasoning in the case of **Republic vs Henry Ngugi Njeru (2017)** where the chief magistrate in Milimani anti corruption court was said to have rejected and refused to admit a charge sheet in similar circumstances and the prosecution applied for revision. The honourable Judge was of the view that neither the repealed law (ACECA) nor the new Act (bribery Act) would stand on its own. The learned Judge advised on application of a mixed grill where the particulars of the charge would refer to both section 39 of ACECA and section 6 of the bribery Act to cover the offence. I do agree with the honourable Judge that reference must be made to both Acts in framing the charge sheet.

23. However, I do not agree that both Section 39 (3) (b) and Section 6 of the Bribery Act should appear at the same time for that will amount to duplicity of charges. Instead the charge should reflect a statement of the offence referring to Section 39 (3) (b) as read with Section 48(1) (now repealed) as read together with section 27(2) of the bribery Act no 47 of 2016. By indicating both Section 39 (3) (b) of ACECA and 27 (2) of Bribery Act the charges would have been modified to suit the requirement of Section 27 (2) of the Bribery Act. The statement of the offence and particulars must reflect the operative section of the offence and the time when the offence was committed hence the particulars of the offence and the penalty then applicable.

24. Section 27 (2) of the Bribery Act has provided safety measures to the effect that any investigation commenced or prosecution or court proceedings instituted prior to the repeal of ACECA, shall be treated or continued as though they were instituted under the bribery Act. If we were to take the interpretation taken by the trial magistrate, it will mean that court proceedings already instituted and are ongoing also be withdrawn and fresh charges under the bribery Act substituted. The operative word is, 'they shall be treated or continued as if they were' instituted under the bribery Act meaning that they should be preferred under the repealed Act but with necessary modification.

25. In the circumstances, the necessary modification would in my considered view be, the inclusion of the word "repealed" as read with section 27(2) of the bribery Act after the statement of the offence under ACECA. If parliament had intended offences previously investigated or prosecution or court proceedings instituted under the repealed Act to continue under the new Act, they should have stated so without using

the word as if. The enactment of the Bribery Act and consequent repeal of Section 39 of ACECA was in no way intended to set free those offenders caught in the transitional period. Equally it was not intended to subject offenders of offences committed under the old regime (ACECA) to suffer amore punitive sentence under the bribery Act than it was under ACECA being the relevant section for the offence in question.

26. Was the respondent charged with anon existent offence? It is not true that accused was charged of an offence which did not exist at the time he was charged as argued by Mr. Mulandi. It is also not true that the offence in question does not exist under the bribery Act as contended my m/s Aluda. The offences in question are those of corruptly offering and giving a bribe which is recognized both under the repealed law section 39 and the Bribery Act Section 5). The choice of words in either Act is merely semantic which does not change the status of the offence.

27. The intention of parliament is clear and discernible under Section 27 (2) of the Bribery Act hence section 23(3)(e) of the interpretation and general provisions Act cap 2(3) invoked and submitted by learned state counsel is not applicable. That provision is relevant in a situation where there is no specific provision governing the issue in question or in situations of an ambiguity.

28. It is my finding that the trial magistrate to some extent misapprehended the law by holding strictly that section 39(3) of Anti-corruption and economic crimes Act is completely not applicable. However, to the extent that the charge was not properly drafted to take into account both the ACECA and the bribery Act, the trial court would still have rejected the charge sheet and discharged the respondent under Section 89 (5) of Criminal Procedure Code. Fortunately, the said provision is not a bar to re-arresting the respondent and same charges preferred afresh with the necessary modifications as stated herein above.

29. Accordingly, the application for revision of the orders of Hon. E.G Nderitu in EACC No. 2/2017 made on 6th June 2017 is hereby allowed with orders that the applicant shall be at liberty to prefer proper charges under the Anti-corruption and Economic Crimes Act No. 3 of 2003 with necessary modifications and arraign the respondent before the SPM's Court at Voi to answer to the fresh charges.

Order accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF JULY, 2018.

J.N. ONYIEGO (JUDGE)

In the presence of:

M/S Aluda ....……......…............Counsel for the applicant

N/A…………………………………………………………Counsel for the respondent

Edwin ..……………………………………......…......… Court Assistant