REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI

ACEC CRIMINAL REV. NO. 10 OF 2018

NJUGUNA MWANGI.....1ST APPLICANT

SAMUEL IRUNGU MWANGI.....2ND APPLICANT

VERSUS

REPUBLIC .....RESPONDENT

RULING

1. Njuguna Mwangi and Samuel Mwangi (herein referred to as "the 1st and 2nd applicants'' respectively), were arraigned before Milimani Chief Magistrate's Anti-Corruption Court on 15th August 2014 facing various corruption related charges vide Anti-Corruption Case No. 17/2014. In relation to Count 1 and 2, the 1st Applicant was charged with corruptly soliciting for a benefit contrary to Section 39 (3) (a) as read with Section 48 (1) of the Anti-Corruption and Economics Crimes Act No. 3 of 2003. In respect to Count 3, the Applicants jointly faced the charge of corruptly receiving a benefit contrary to Section 39 (3) (a) as read with Section 48 (1) of the Anti-Corruption and Economics Crimes Act No. 3 of 2003.

2. In the course of the trial, the court admitted in evidence certain documentary evidence produced by one James Wachira (PW6) being transcripts marked as PMFI-7 and PMF1-9 despite objections raised by the defence not to on grounds that; the said witness (PW6) had not attached a certificate to show that he was proficient to translate the relevant languages; that he had not affirmed his understanding of Sheng, English, Kikuyu and Kiswahili languages; that nobody had identified nor indicated that they were familiar with those languages.

3. In his ruling delivered on 20th April 2018, the trial magistrate dismissed the objection holding that the admission of the impugned transcripts was procedural, lawful and did not in any way amount to a violation of the Applicants' fundamental rights envisaged under Article 50 (4) of the Constitution.

4. Aggrieved by the said finding (ruling), the Applicants by a notice of motion dated and filed under certificate of urgency on 5th July 2018 pursuant to Article 159 (6) of the Constitution, Sections 362 and 364 (1) (b) of the Criminal Procedure Code and the inherent jurisdiction of the court, sought revisionary orders as hereunder:

> **(1) Spent.**
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> **(2) That the honourable court be pleased to call and examine the record of the court file in the Chief Magistrate's Court Anti-Corruption Case No. 17/2014 (Milimani Court) for the purpose of satisfying itself as to the correctness, legality or propriety of the ruling of the 20th April, 2018.**
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> **(3) That the honourable court be pleased to issue revisionary orders to revise and set aside the orders of the learned honourable trial Magistrate G.H. Oduor CM admitting into evidence the transcripts marked PMFI.7 and PMF9 in the ruling of the 20th April 2018 and substitute it with an order striking out the admissions and production of two transcripts PMF1.7 and PMF1-9 by the PW6.**

5. The Application is predicated upon grounds set out on the face of it and affidavit in support deponed on 5th July 2018 by the 1st Applicant with the 2nd Applicant's authority. Upon perusal of the Application on the same day it was filed, the court directed the Applicants to serve the Respondent and fixed the same for interpartes hearing on 18th July 2018. In response to the Application, the Respondent filed grounds of opposition on 18th July 2018 arguing that the proceedings conducted before the Chief Magistrate's Court were correct, legal, regular and procedural hence admission of the exhibits in question by the court was not an error but purely exercise of its discretion which if incorrectly applied would only attract an appeal and not a revision.

6. When the matter came up for interpartes hearing, parties agreed to dispose of the same by way of written submissions. On 31st July 2018, Mr. Munene for the 1st and 2nd Applicants and Mr. Keter holding brief for Arusei for the 1st Applicant appeared for highlighting on their submissions. Unfortunately, there was neither appearance on the Respondent's part despite having taken the hearing date by consent nor filing of submissions in response. The matter therefore proceeded exparte with Mr. Munene highlighting on the Applicants' submissions.

7. In their submissions, Mr. Munene urged the court to find that the admission of the transcripts admitted as Prosecution exhibits No.7 and 9 was illegal and irregular in that the witness (PW6) did not state that he understood English and Kiswahili and that he was proficient. Counsel submitted that the admission of the said transcripts was contrary to the finding and test set out in **Kisumu High Court Cr. Appeal No. 266/2001 between Luke Ouma Ochieng vs Republic.**

8. Counsel reproduced the contentious portion in the transcription reading as follows:

> **"....I James Wachira do certify that I have translated the Kikuyu and Sheng portions in the original transcript to the best of my knowledge and ability. The conversation is in the Sheng, English, Kiswahili and Kikuu all languages which I am proficient in. Richard Mbithi has translated the Kamba portions...".**

9. Learned counsel further urged the court to exercise its wide discretion under Article 165 (6) (7) and Section 362 of the Criminal Procedure Code without limiting itself to situations where there is an error on the face of the record or new issues having emerged. In support of this position, counsel referred the court to the case of **R vs Jared Wakhule Tubei & another (2013) e KLR.** Lastly, Mr. Munene pleaded with the court to set aside the trial court's orders dismissing the objection and admitting PMFI-7 and 9 as exhibits by substituting the same with orders upholding their objection.

Analysis and Determination

10. After considering the Application herein, grounds and affidavit in support, grounds of opposition and submissions by the Applicants' counsel, only one issue emerge for determination; **Whether the admission of the transcripts in question was incorrect, improper/ illegal and irregular thus subject to revision under Section 362 of the CPC.**

11. The law governing exercise of authority on revisionary orders by the High Court is anchored under Article 165 (6) (7) of the Constitution, Section 362 and 364 (1) of the Criminal Procedure Code. Article 165 (6) provides thus:

> **"The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising judicial or quasi judicial function, but not over a superior court.**
>
> Sub Clause (7) – **for purposes of clause 6, the High Court may called for the record of any proceedings before any subordinate court or person, body or authority referred in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice".**

12. To effect the aforesaid constitutional provision, Section 362 of the Criminal procedure code cap 75 laws of Kenya goes further to provide that:

> **"The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court".**
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> Additionally, Section 364 (1) of cap 75 does state as hereunder:
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> **"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 order.**
>
> **(c) .....**
>
> **(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of a revision shall be entertained at the insistence of the party who would have appealed".**

13. It is trite that exercise of revisionary orders by the High Court is a matter of judicial discretion which must be exercised judicially by the court within the confines of Section 362 and 364 (1) of the CPC and not a substitution to institution of an appeal **(See Abraham Wafula vs Republic (2013) e KLR (Bungoma HC CR REV. No. 21/2013)**.

14. What is the effect of admitting an exhibit by the trial court after overruling an objection raised by the defence or prosecution challenging such admission? Production and admission of exhibits in the course of a trial is governed by laid down procedural and legal requirements whether in criminal or civil proceedings. Ordinarily, objections do arise when a party attempts to produce a document or materials relied on

to prove one's case depending on the circumstances and attendant legal provisions governing such production. Depending on the nature of evidence and Exhibit sought to be produced, courts quite often do make interlocutory rulings allowing or disallowing production of such exhibits.

15. In a situation such as the instant case which is challenging the admission of certain exhibits for failure to comply with certain legal requirements or standards before production and admission, it is perfectly within the purview or discretion of the trial court to determine the element of admissibility based on the relent law. The consequence of such admission improper or otherwise, would attract a ground of appeal by either party upon conclusion of the case depending on whether there is a conviction or not. That is why the **luke Ouma Ochieng vs R**(supra) case is not relevant to this case as it was referring to a situation of an accused person who had already been convicted based on production of exhibits that had been objected to at the trial stage. The admissibility of exhibits objected to should be challenged or raised after conclusion of the trial at the appeal stage and not at the admission stage or in the middle of a trial.

16. The production and admission of the said exhibits does not amount to condemnation of the accused person. It is not automatic that the Applicants will be adversely affected by being convicted. In case of a conviction based on those exhibits, the Applicants shall have a remedy by way of an appeal. The power to admit exhibits or not is purely a matter of interpretation of the law by a trial court. It will be prejudicial to the trial and the eventual outcome of the case which is ongoing if this court were to make a finding that the admission was wrong. A court handling an application of this nature must act with extreme caution and restraint not to unnecessarily invoke revisionary powers thereby interfering with the trial court's proceedings thus prematurely jeopardising the appeal process. Courts are not infallible as mistakes may occur but there are properly prescribed remedies e.g appeals where appropriate.

17. It would be a bad precedent for the High Court to intervene and annul each order made by a trial court in admitting each exhibit against the wish of the defence or prosecution. To allow such a scenario under revisionary powers would amount to anarchy in litigation thus entertaining several mini appeals in the middle of a trial of a case in the guise of exercising revisionary powers thus micromanaging and clogging the legal system by extension unreasonably delaying the expeditious disposal of cases and administration of justice.

18. Practically, it is inconceivable that every ruling on admission or non-admission of exhibit(s) by a trial court would automatically attract or generate a ground of revision. The grounds cited herein do not fall within the confines of an error envisaged under Section 362 of the CPC to call for revision. The Applicants have not been prejudiced by the admission of exhibits at this stage. The case is yet to be finalised. They will have a basis on appeal at the conclusion of the case in the event they are found guilty.

19. In the interest of justice, I find this application untenable and misplaced with the sole purpose of delaying the trial and trying to prematurely strangle the process of criminal litigation. It does not meet the legal standards or threshold for revisionary orders to issue **(See R vs Wekesa Enock & another (2010) eKLR)**. Accordingly, the application herein is dismissed for lack of merit. It is hereby ordered that the original file be returned to the trial court to proceed and fast track the hearing of the case.

Order accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27th DAY OF SEPTEMBER, 2018.

J.N. ONYIEGO

JUDGE