



REPUBLIC OF KENYA
ANTI-CORRUPTION & ECONOMIC CRIMES
COURT AT NAIROBI
ANTI-CORRUPTION CASE NO. 7 OF 2017

REPUBLIC.....PETITIONER

VERSUS

HENRY NGUGI NJERU alias

PATRICK HENRY NGUGI NJERU alias

PATRICK HENRY NGUGI DOUGLAS.....RESPONDENT

RULING ON REVISION

1. This court was moved by the Applicant for revision under Sections 362 & 364 of the Criminal Procedure Code Cap. 75. Section 362 Criminal Procedure Code provides:-

“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”.

Section 364 Criminal Procedure Code provides:-

“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)**

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence: Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

2. The application was made on the ground that the orders made by Hon. L.N. Mugambi (Mr) Chief Magistrate on 24th August 2017 in ACC No. 15 of 2017 are illegal, incorrect and improper.

3. This court called for the lower court file for perusal and the applicant was directed to serve the

respondent with the application. The respondent was served for hearing for 9th October 2017 through his advocate Mr. Ombeta on 18th September 2017. Neither the respondent nor his counsel appeared for the hearing of this application.

4. In her submissions Miss Ndambiri for the applicant told the court that the Hon. Chief Magistrate rejected the charge sheet and discharged the respondent under the mistaken belief that the respondent ought to have been charged under the Bribery Act. Relying on Section 27(2) of the Bribery Act and Section 23(3) (e) of the Interpretation of General Provisions Act (Cap 2 Laws of Kenya) it was her submission that the charges before the court were properly before the said court. She further submitted that **count 3** of the charge sheet had been brought under the National Police Service Act and there was no reason why he rejected it.

5. I have before me the lower court record. While rejecting the charge the Hon. Chief Magistrate had this to say:

“In essence therefore, it means if an investigation was commenced under the old Act, but by the time Section 39 of ACECA was being repealed, it was not yet completed, then following the commencement of the Bribery Act, the new Act takes over and such charges or report of that investigations (sic) can only be expressed to be under the new Act and not the old provision, of ACECA as the prosecution attempts to do in this case. Consequently, I decline to accept the charges as framed *suo moto* for non-compliance with the law as clearly expressed. I discharge the accused under section 89(5) of the Criminal Procedure Code”

6. The Bribery Act No. 47 of 2016 became operational on 13th January 2017. Section 23 of the said Act repealed Section 39 of the Anti-Corruption & Economic Crimes Act (ACECA).

Section 27 of the Bribery Act is the one dealing with pending cases instituted under ACECA. At Section 27(1) it provides:-

“This Section applies with respect to bribery offences or suspected bribery offences under the Anti-Corruption & Economic Crimes Act 2003.

(2)- “Any investigation or prosecution or court proceedings instituted before the commencement of this Act based on an offence under this Act shall, with the necessary modifications, be treated or continued as if they were instituted under this Act.”

7. On the interpretation of repealed laws and the repealing written laws Section 23(3) (e) of the Interpretation & General Provisions Act 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 was 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.”

8. Article 50(2) (n) of the Constitution of Kenya 2010 provides:-

“Every accused person has the right to a fair trial, which includes the right-

– not to be convicted for an act or omission that at the time it was committed or omitted was not –

i) An offence in Kenya; or

ii) A crime under international law.”

9. There is no dispute that corruptly soliciting a benefit was an offence under the repealed Section 39 of Anti-Corruption & Economic Crimes Act. Receiving a bribe upon requests is similarly an offence, under the Bribery Act. The two are one and the same offence, and cannot be said to have been introduced under the Bribery Act. Section 27 (2) of the Bribery Act is specific that such offences which were committed, investigated and instituted before the commencement of the Bribery Act ought to be treated or continued with necessary modifications as if they were instituted under the new Act.

10. Section 27 (2) of the Bribery Act has thus specifically made provision for these pending classes. Would section 23(3) (e) of the Interpretation General Provisions Act be applicable in the circumstances of this case? A reading of the said section 23(3) (e) (supra) shows its intention to be the preservation of investigations and proceedings of a repealed written law upto the conclusion of the matter under the said law. On the other hand the intention of section 27 (2) of the Bribery Act is to have the investigations and proceedings continue under the new Act and not the repealed section 39 of the ACECA.

11. My view is that section 23 (3) (c) (Cap. 2 Laws of Kenya) being a provision of general application would not apply where there is a specific provision dealing with the repealed law. I find no ambiguity in Section 27(2) of the Bribery Act hence the inapplicability of Section 23(3) (e) of the Interpretation & General Provisions Act.

12. The Hon. Chief Magistrate may have been right in his decision to some extent but not wholly. If his line of thinking was adopted the charge would have been under the Bribery Act but the particulars in the charge sheet would show that the offence was committed under the regime of the repealed law. This would cause challenges.

13. On the other hand, the State may also to some extent be correct. From the Director Public Prosecutions, the challenge would however be, reconciling the offence under the repealed law so as to proceed as if it was instituted under the new Act, in line with Section 27 (2) of the Bribery Act.

14. As stated earlier the offence stated in the 1st & 2nd counts of the charge sheet is clearly set out in the repealed section 39 of Anti-Corruption & Economic Crimes Act and section 6 of the Bribery Act. My view is that the charge sheet must be crafted in such a way so as to cater for:

(i) the repealed section 39 (ACECA) since that is what covers the particulars; (ii) section 6 of the (Bribery Act) since that is what covers the offence; (iii) finally section 27(2) of the (Bribery Act) as that is the provision that directs on how matters investigated and/or prosecuted and court proceedings commenced prior to the new Act would be conducted.

15. Once this is done then the respondent should be arraigned in court to answer to the appropriate charges. Otherwise charging him under either section 39 (repealed) of ACECA **only** or under section 6 of the Bribery Act **only** would cause challenges. **Count 3** of the charge sheet was not affected by section 39 Anti-Corruption & Economic Crimes Act or the Bribery Act and plea on it ought to have been taken by the learned Magistrate.

16. I therefore find that the charge in respect of Counts 1 & 2 was not properly drafted and the Hon. Chief Magistrate was right in rejecting it and discharging the respondent under Section 89 (5) Criminal Procedure Code but only as far as counts 1 & 2 were concerned. He erred in rejecting **count 3** and discharging the respondent on the same. The Order rejecting count 3 and discharging the respondent is therefore set aside, and substituted with an order reinstating it with directions that plea be taken on it.

17. A rejected charge sheet is however not a bar to further proceedings. I therefore direct the State through the Office of the Director of Public Prosecutions to prepare and register a fresh charge sheet as per the direction at paragraph 14 of this Ruling within the next 21 days. Thereafter the respondent to be served to appear for plea on the 3 counts before a competent Magistrate other than Mr. L.N. Mugambi: Chief Magistrate.

Dated, Signed and delivered this 13th day of October, 2017 in open court at Nairobi

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H.I. ONG'UDI

JUDGE