



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR CASE NO. 225 OF 2015

REPUBLIC.....APPLICANT

VERSUS

THE DIRECTOR OF REPUBLIC PROSECUTIONS.....RESPONDENT

AND

ABDI SAHAL ALI.....1ST INTERESTED PARTY

MOHAMUD H. MOHAMED.....2ND INTERESTED PARTY

DR. SOFIA MOHAMED.....3RD INTERESTED PARTY

JAWAHIR KEYNAN.....4TH INTERESTED PARTY

RAHMA DEKOW.....5TH INTERESTED PARTY

KENETH RUTERE.....6TH INTERESTED PARTY

MOHAMED HASSAN7TH INTERESTED PARTY

MOHAMUD ADEN BARE.....8TH INTERESTED PARTY

ETHICS & ANTI-CORRUPTION

COMMISSION9TH INTERESTED PARTY

EX-PARTE

NATHIF JAMA ADAN

JUDGEMENT

1. The ex-parte Applicant, Nathif Jama Adan, is the Governor of the County of Garissa. On 3rd July,

2015 he appeared before the 9th Interested Party, the Ethics and Anti-Corruption Commission (EACC) where he was cautioned against charges that were to be preferred against him before the Magistrates' Court at Garissa on 20th July, 2015.

2. The proposed charges are:

“Count I

Abuse of Office contrary to Section 45 as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act, 2003

Particulars of offence: Between 1st February, 2014 and 19th March, 2014 at Garissa County Headquarters, Garissa County, being the Governor of the Garissa County, used his office to improperly confer a benefit to E-Plus Medical Services Limited (Kenya Red Cross Society) by negotiating and executing a contract for the provision of ambulance services to Garissa County Government with the said E-Plus Medical Services Limited whereas due procurement and accounting procedures were not followed.

Count II

Wilful failure to comply with the law relating to management of public funds contrary to Section 45(2) (b) as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act, 2003.

Particulars of offence: On or about the 19th day of March, 2014 at Garissa County Headquarters, Garissa County, being the Governor of the Garissa County, carelessly failed to comply with the law relating to the use of public funds to wit Section 196 (3) of the Public Finance Management Act, by executing a contract with E-Plus Medical Services Limited (Kenya Red Cross Society) for the provision of ambulance services to the Garissa County Government, an obligation which had financial implication on the County Government of Garissa since no budgetary provision had been made.

Count III

Engaging in a project without prior planning contrary to Section 45 (2)(c) as read with Section 48(1) of the Anti-Corruption & Economic Crimes Act, 2003

Particulars of offence: On or about the 19th day of March, 2014 at the Garissa County Headquarters, Garissa County, being the Governor of the Garissa County Government, an officer concerned with the use of public funds, engaged in a project without proper planning, to wit signing the contract for the leasing of ambulance services for the Garissa County from E-Plus Medical Services Limited (Kenya Red Cross Society), without any budgetary provisions.”

3. The Applicant was to be charged together with Abdi Sahal Ali, Mohamud H Mohamed, Dr. Sofia Mohamed, Jawahir Keynan, Rahma Dekow, Keneth Rutere, Mohamed Hassan and Mohamud Aden Bare who are the 1st to 8th interested parties respectively in these proceedings.
4. On 15th July, 2015 the Applicant moved this Court and obtained leave to commence these judicial review proceedings. At the same time, the decision of the EACC requiring him to appear for plea before the Magistrates' Court at Garissa was stayed pending *inter-partes* hearing. The stay order was on 22nd July, 2015, by consent, extended pending the hearing and determination of the Applicant's substantive application.
5. The Director of Public Prosecutions is the Respondent.
6. Through the Notice of Motion Application dated 20th July, 2015 and filed in Court on 21st July, 2015 the Applicant prays for:

“1. An ORDER OF PROHIBITION directed against the Respondent, prohibiting him and his agents, employees and servants from commencing, proceeding with charging, prosecution, and/or preferring any criminal charges against the Applicant before any competent court in Kenya in so far as the same relates to the procurement of ambulances by the County Government of Garissa from the Kenya Red Cross and its derivatives.

2. An ORDER OF CERTIORARI to remove and bring to this Honourable Court for purpose of quashing the decision of the Respondent to charge and prosecute the Applicant.

3. Costs of the Application be provided for.”

7. From the papers filed in Court by the parties in this matter, it emerges that through Tender Notice No. CGG/T/109/13-14, the County Government of Garissa invited bids for the procurement of thirty ambulances. The bids were to be submitted by 10th February, 2014.
8. In February, 2014 Emergency Plus Medical Services (E-Plus), a company fully owned by Kenya Red Cross Society submitted a proposal for the provision of emergency rescue ambulance services to Garissa County. The tender for the purchase of ambulances was abandoned and the County Government of Garissa ended up leasing seven ambulances from E-Plus at the sum of Kshs.600,000/= per month per unit. The contract was executed on 19th March, 2014.
9. Upon receiving a complaint concerning the procurement, the EACC carried out investigations and concluded that some provisions of the now repealed Public Procurement and Disposal Act, 2005 (PP&DA, 2005) had been breached leading to commission of offences under the Anti-Corruption and Economic Crimes Act, 2003 (ACECA). The EACC therefore recommended the prosecution of the Applicant and the 1st to 8th interested parties. The DPP concurred with the recommendations hence the directive to the Applicant to appear at the Magistrates’ Court at Garissa for plea.
10. The Applicant challenges the decisions of the EACC and the DPP on several grounds. It is the Applicant’s case that the criminal charges preferred against him relate to a restricted and direct procurement of ambulances by the County Government of Garissa which is allowed by sections 73, 74 and 75 of the PP&DA, 2005. It would therefore be unlawful for him to be charged over a matter which is allowed by the law. The DPP’s decision, in the Applicant’s view, is thus unreasonable, illegal and amounts to gross abuse of the court process.
11. The Applicant avers that there was no basis for charging him as he is not a member of the Tender Committee which is the body that made the decision to lease the ambulances from E-plus. According to the Applicant, the composition of the Tender Committee of the County Government of Garissa is governed by the Public Procurement and Disposal (County Government) Regulations, 2013 and as per the said Regulations a governor is not a member of the tender committee of a county government.
12. Another ground which the Applicant cites in support of his application is that the investigation of the matter by the EACC was based on directions and orders by a senior politician from the ruling Jubilee Coalition who demanded that the Applicant be prosecuted. It is the Applicant’s position that the senior and powerful politician gave an ultimatum to the EACC’s Secretariat to prosecute the Applicant and threatened that if they did not forward the file to the DPP for prosecution then the entire Secretariat was to be dismissed during the reading of the Ethics and Anti-Corruption Amendment Bill then pending before Parliament which sought the reorganisation of the EACC. It is the Applicant’s case therefore that the recommendation by the EACC to prosecute him was aimed at securing the jobs of those in the EACC Secretariat.
13. The Applicant also avers that this matter is based on inter-clan feud and a group of pastoralists settling age old inter-clan disputes using the instruments of State. Further, that the criminal charges are informed by the political and clan dynamics of Garissa County and have nothing to do with his criminal culpability or otherwise.
14. The Applicant produced an extract from the minutes of a meeting held on 14th March, 2014 by the Garissa County Government Tender Committee to show that the decision to lease the ambulances was made by the Tender Committee vide Agenda No. 1/06/2013-2014.
15. It is the Applicant’s case that before the Tender Committee picked on E-Plus it considered another proposal by St. John Ambulance.

16. The 1st to 8th interested parties did not file any affidavit. They indicated through their counsel that they were supporting the Applicant's case and they filed written submissions to that effect.
17. The DPP opposed the application through a replying affidavit sworn on 20th July, 2015 by Hellen Kalimi Mutellah a prosecution counsel. Through the said affidavit, the DPP's case is that investigations by the EACC revealed that the open tender had been abandoned and single sourcing resorted to for no justifiable reason.
18. It is the DPP's position that the Applicant led a delegation to the office of the Managing Director of E-Plus for negotiations and the negotiations led to the execution of a contract for outsourcing of the provision of seven emergency ambulances to the County at a contract sum of Kshs.600,000/= per month per unit.
19. It is the DPP's case that the investigations also revealed that St. John Ambulance was never contacted by the County Government of Garissa in respect of the acquisition of ambulance services yet it had the capacity to provide ambulance services at a cheaper rate of between Kshs.300,000/= and Kshs. 400,000/=.
20. According to the DPP, the decision to adopt the leasing option was reached at a meeting chaired by the Applicant on 17th February, 2014. This was followed by the meeting of 14th March, 2014 in which the tender was awarded to E-Plus.
21. It is the DPP's case that the actions of the County Government of Garissa breached sections 26(6), 29(3) and 74 of the PP&DA, 2005 thus resulting in commission of offences under the ACECA.
22. The 9th Interested Party opposed the application through grounds of opposition dated 21st July, 2015 and a replying affidavit sworn on 14th August, 2015 by Abraham Kemboi, an investigator with the EACC.
23. In summary the EACC's case is that it is empowered by the Constitution and the Ethics and Anti-Corruption Commission Act, 2011 to investigate and recommend to the DPP the prosecution of any act or the conduct of any person that in its opinion constitutes corruption, economic crime or violation of code of ethics. The EACC therefore asserts that its decision to recommend the prosecution of the Applicant before a competent Court for an offence known in law was thus arrived at upon the proper exercise of its constitutional and statutory mandate.
24. It is the EACC's case that this Court, in exercising its judicial review mandate, cannot look at the sufficiency of the evidence against the Applicant nor determine whether or not the contents of the charges are defective in substance or form.
25. It is the EACC's view that the Applicant is trying to ventilate his defence through these proceedings and he should not be allowed to convert a judicial review court into a trial court. The EACC contends that it is the trial court that is best equipped to deal with the issue whether or not there is adequate evidence to sustain the charges facing the Applicant.
26. The affidavit of Abraham Kemboi discloses that the EACC commenced investigations upon receipt of a memorandum detailing various allegations of corruption, including irregular leasing of ambulances, against officials of the County Government of Garissa. The affidavit is detailed on what investigations revealed, and the conclusions of the investigators.
27. The Applicant swore a further affidavit on 12th October, 2015 in response to the replying affidavit of the EACC. According to the Applicant, the memorandum that triggered the investigations was effectuated by malice, bad faith and littered with bile and vitriolic statements.
28. The Applicant insists that his investigation was based on a directive to the EACC by a very powerful Jubilee operative. He reiterated that direct procurement is provided for by the PP&DA, 2005 and actions allowed by the law cannot be criminalised.
29. On the choice of E-Plus, in preference to St. John Ambulance, the Applicant avers that obtaining money for value is central to procurement and cost and non-cost factors are taken into account in making a procurement decision. Further, that if St. John Ambulance had any grievance about the procurement, it ought to have resorted to the mechanism provided by the PP&DA, 2005.
30. As for the abandonment of open tendering in favour of direct tendering, the Applicant deposes that it is not a criminal offence to pick one procurement method over another.
31. The Applicant explains that his visit to the offices of Kenya Red Cross Society was to get a proper understanding and clarification of the proposal and the components of the services generally provided by the company.
32. It is the Applicant's case that the matter of tendering for ambulance services was brought up by

the County Executive in charge of Health in the meeting of 17th February, 2014 as the same was a priority project for the County. The Applicant maintains that the actual procurement was done by the Tender Committee in their meeting of 14th March, 2014.

33. In regard to his signing of the contract, the Applicant avers that the same was ceremonial and it cannot amount to a criminal offence.
34. The parties supported their affidavit evidence with submissions.
35. Although the advocates for the parties identified a number of issues for the determination of the Court, I am of the opinion that all those issues lead to the question whether the facts of this case warrant the issuance of the orders sought by the Applicant.
36. The advocates for the parties wisely did not question the supervisory jurisdiction of this Court over the DPP and the EACC. Nevertheless, it is important to state the law for purposes of record. In **Guantai v Chief Magistrate**, EALR [2007] 2 EA 170 the Court of Appeal expressed the jurisdiction of this Court in that regard as follows:

“Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. It was succinctly put in *Stanley Munga Githunguri v Republic* [1985] KLR 91 that if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and that the High Court has an inherent power and a duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”

37. The power of the DPP to prosecute is secured by the Constitution of the land. That power, like the power given to the EACC to investigate corruption and economic crimes, **“must be exercised responsibly, in accordance with the laws of the land and in good faith.”**-See the decision of the Court of Appeal in **Commissioner of Police and the Director of Criminal Investigation Department & another v Kenya Commercial Bank & 4 others** [2013] eKLR.
38. In carrying out its supervisory mandate, the Court should not stray into the remit of the prosecutor to decide whether or not to mount a prosecution. This warning, which I find necessary to restate, was conveyed by Lord Viscount Dilhorne in his speech in the case of **Director of Public Prosecutions v Humphrys** [1976] 2 All ER 497 at page 511 thus:

“A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval.

If there is power...to stop a prosecution on indictment in limine, it is in my view a power that should only be exercised in the most exceptional circumstances.”

39. Still on the same subject, earlier at page 509, his Lordship had stated:

“Where an indictment has been properly preferred in accordance with the provisions of that Act, has a judge power to quash it and to decline to allow the trial to proceed merely because he thinks that a prosecution of the accused for that offence should not have been instituted? I think there is no such general power and that to recognise the existence of such a degree of omnipotence is ... unacceptable in any country acknowledging the rule of law. But saying this does not mean that there is no such general power to control procedure of a court so as to avoid unfairness.”

Lord Viscount Dilhorne therefore appreciates that where prosecutorial power is used to attain unfair outcomes, the Court will step in to stop the prosecution.

40. The EACC must exercise its investigative powers in a manner that promotes fairness, avoids oppression and does not abuse its procedures. On the other hand, the Constitution (Article 157

- (11)) commands that the DPP “**shall have regard to public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process**” in exercise of prosecutorial power.
41. Having stated the law, as I understand it, I will now weigh the Applicant’s case against the law. The Applicant’s case is that there was a material error of fact in the decision to prosecute him. In brief, the Applicant’s case is that the decision by the DPP to prefer charges against him based on the decision made by the Tender Committee was a clear indication of a material error of fact in that he is not a member of the Committee. Further, that the DPP’s decision was based on a material error of fact since the actions of the Tender Committee which forms the basis of the prosecution were in fact taken within the provisions of the PP&DA, 2005. It is the Applicant’s position that criminalisation of a legitimate exercise of power amounts to an error of fact.
42. The Applicant relied on the decisions in **Secretary of State for Education and Science v Metropolitan Borough of Tameside [1976] 3 All ER 665** and **Regina v Criminal Injuries Compensation Board ex parte A (A.P.) [1998] Q.B. 670** in support of the proposition that misunderstanding or ignorance of an established and relevant fact by a decision maker is a ground for grant of judicial review.
43. The Applicant’s counsel does indeed hit the bull’s eye when he submits that misunderstanding or ignorance of an established and relevant fact is a ground for grant of orders in judicial review proceedings. This principle of law was clearly brought out by Scarman LJ in **Secretary of State for Education and Science v Metropolitan Borough of Tameside (Supra)** when he stated at page 675 that:

“Secondly, I do not accept that the scope of judicial review is limited quite to the extent suggested by counsel for Secretary of State. I would add a further situation to those specified by him; misunderstanding or ignorance of an established and relevant fact...

Lord Denning MR has briefly referred to some of the case law on the matter; and in the short time available I have looked to see if there is authority which would belie what I believe to be the law, and there is none. I think that the law, which I believe to exist, follows from the cases to which Lord Denning MR has referred, and is really to be deduced from a well-known passage in Professor de Smith’s Judicial Review of Administrative Action, where he says:

‘Secondly, a court may hold that it can interfere if the competent authority has misdirected itself by applying a wrong legal test to the question before it, or by misunderstanding the nature of the matter in respect of which it has to be satisfied. Such criteria are sufficiently elastic to justify either a broad or a narrow test of validity; and they seem to have become increasingly popular. Thirdly, a court may state its readiness to interfere if there are no grounds on which a reasonable authority could have been satisfied as to the existence of the conditions precedent. This test can be combined with the first and the second.’”

44. The Applicant herein is inviting this Court to determine that the procurement by the County Government of Garissa was in compliance with the provisions of the PP&DA, 2005. It is a dicey invitation in that the DPP and the EACC claim that the procurement breached the provisions of the PP&DA, 2005. If the Applicant’s application fails, any comments I make on the legality or otherwise of the procurement may prejudice the criminal trial.
45. From the affidavits placed before this Court, each side has an arguable case and in such circumstances it is only the trial court which can reach a decision after considering the facts and the law. The statements of the witnesses can only come to life during the hearing of the case. It is then that the parties can get the opportunity to test the evidence by way of cross-examination. In my view, the DPP did not misunderstand or ignore any established or relevant fact before deciding to prosecute the Applicant. The Applicant’s claim for judicial review on this ground therefore fails.
46. The second ground on which the Applicant seeks orders is that the decision to charge him was made in bad faith and tainted with illegality. It is the Applicant’s assertion that direct procurement was opted for since there was an urgent need for ambulances to help save lives. It is the

- Applicant's contention that North Eastern Kenya has suffered marginalisation by successive governments and the County Government of Garissa found it necessary to remedy this situation by procuring ambulance services. Further, that the Kenya Red Cross which was awarded the tender is a high profile company with an excellent track record in health service delivery in the entire country.
47. It is the Applicant's case therefore that the decision to prosecute him was so irrational and in complete defiance of logic. It was also illegal, the Applicant says. Reliance is placed on the decision in **Republic v Inspector General of Police ex-parte Patrick Nderitu [2015] eKLR**.
48. The DPP's response is that the mere fact that intended or ongoing criminal proceedings are in all likelihood likely to fail is not a ground for prohibiting a prosecution. Further, that there is only need to establish reasonable suspicion before preferring charges and so long as the mandate to prosecute is exercised reasonably, the High Court will be reluctant to intervene. The decisions in **George Joshua Okungu & another v Chief Magistrate Anti-Corruption at Nairobi & another [2014] eKLR** and **Republic v Commissioner of Police & another ex parte Michael Monari & another [2012] eKLR** were relied on in support of the submissions.
49. I have already stated why it is risky for this Court to make a determination on the legality or otherwise of the procurement the subject of these proceedings. My understanding is that the prosecution's proposed prosecution is not whether direct procurement is legal. The question is whether in the course of the entire procurement criminal incidents occurred. It would amount to assumption of prosecutorial power to decide that on the strength of the evidence gathered, the Applicant will not be convicted.
50. There are rules and procedures established by the Constitution and the laws pertaining to criminal trials which can only be engaged in a criminal trial. Attempting to import those rules and procedures into judicial review proceedings will amount to abuse of process by this court.
51. The Applicant asserts that his intended prosecution is an abuse of power and the orders sought should be granted. In support of the proposition that this court has power to halt a prosecution commenced in abuse of power, the Applicant cited the decisions in **George Joshua Okungu (supra); Guantai (supra); Kuria & 3 others v Attorney General [2002] 2 KLR 69**; and the speech of Lord Salmon in **Humphrys (supra)**.
52. Lord Salmon did indeed stress that the power of a court to prevent a prosecution that is oppressive, vexatious and mounted in abuse of the process of the court is of "**great constitutional importance and should be jealously preserved.**" I entirely agree with the statement. The court has a duty to guard against abuse of investigative and prosecutorial powers by State agencies.
53. However, it is upon an applicant to establish that a prosecution is oppressive, vexatious, commenced in bad faith and an abuse of the court process. The Applicant has not established how the DPP and the EACC have abused their powers. His claim that his prosecution was commenced upon the directive of a powerful Jubilee Coalition operative was not backed by evidence. Even the name of the said politician was not revealed.
54. There was a claim that EACC employees were acting to preserve their jobs. That does not explain the decision of the DPP to prosecute. The decision to prosecute solely belongs to the DPP. The DPP acts independently of the investigative agencies. If indeed a person in the ruling coalition leaned on the EACC, there is no evidence that the same pressure was applied on the DPP. The claim that the EACC did not act independently therefore fails for lack of evidence.
55. I have covered all the grounds upon which the Applicant based his application. The 1st to 8th interested parties relied on arguments similar to those of the Applicant. Their arguments have therefore not changed the course of the application.
56. In view of what I have said, it follows that the Applicant's case has no merit. The same is therefore dismissed. There will be no order as to costs.

Dated, signed and delivered at Nairobi this 19th day of April, 2016.

W. KORIR,

JUDGE OF THE HIGH COURT