



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISCELLANEOUS CRIMINAL APPL. NO. 47 OF 2014

JANE JELAGAT ROTICHAPPLICANT

VERSUS

THE MAGISTRATES ANTI-CORRUPTION COURT ELDORET.....1ST RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSION.....2ND RESPONDENT

INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....4TH RESPONDENT

JUDGMENT

1. The applicant prays for an order of *prohibition* to stop the 1st respondent from proceeding with criminal charges against her. The proceedings are in Anti-Corruption Court, Eldoret in criminal case number 2 of 2014 *Republic v Jane Jelagat Rotich* (Hereinafter *the criminal case*). The applicant also craves an order of *certiorari* to remove into the High Court and quash the decision made by the Director of Public Prosecutions to prefer the charges in the criminal case. Lastly, the applicant prays for an order of *mandamus* to compel the respondents to “*diligently carry out the respective mandates of their offices and further avail their reports on the results of their investigations.*”

2. The applicant is the Principal of Moi Girls High School, Eldoret. By virtue of that position, she is the secretary of the school’s Board of Governors. It is alleged that on or about 24th September 2012, the applicant and the school bursar abused their offices by issuing a Local Purchase Order for a school bus to Kenya Grange Vehicles Industries Limited. The cost of the bus was Kshs. 10,500,000 or thereabouts. The applicant, as the accounting officer of the school, is also charged for failure to comply with section 48 (1) of the Public Procurement and Disposal Act 2005. The 2nd respondent, the Ethics and Anti-Corruption Commission, had investigated the matter. It had forwarded a report and its recommendations to the 4th respondent (the Director of Public Prosecutions). The latter recommended that the applicant and the school bursar, David Kiptanui Limo, be charged for the offences.

3. The 4th respondent preferred corruption and abuse of office charges against the applicant in the criminal case at the Eldoret Magistrates Anti-Corruption Court (the 1st respondent). The applicant is facing four counts of economic crimes as particularized in annexure *J* of her supporting deposition. The offences were allegedly committed between May and December 2012. Being aggrieved by that decision, the applicant sought and was granted; leave to apply for the writs of *certiorari*, *mandamus* and *prohibition*

against the respondents. The substantive notice of motion is dated 18th June 2014.

4. The gravamen of the motion is that the applicant was not a member of the Parents Teachers Association executive subcommittee that dealt with the purchase. It is pleaded that she played a “*minimal or subordinate role if any*” in the tendering and purchase of the bus; and, that the committee received quotations from *three* companies- Truck World Limited, Ace Motors Limited and Kenya Grange Vehicle Industries Limited. The applicant stated that on 5th November 2012 the Board of Governors executive committee held a meeting which she attended in her capacity as the principal or secretary. The meeting deliberated among other matters, the purchase of the bus. She claimed that the committee held another meeting on 8th November 2012 when it was decided that a Local Purchase Order be raised to Kenya Grange Vehicles Industries Limited at the cost of Kshs. 10,500,000. The applicant claims she was a *mere participant* at the meeting.

5. The applicant claims that on 25th March 2014, the respondents, without proper investigations being carried out, caused her to be arrested and charged in the criminal case. The applicant averred that she was shocked by the turn of events.

6. Those matters are deposed to at length in her deposition sworn on 18th June 2014. I will set out *in extenso* paragraphs 2 to 10 of the affidavit-

“2. That I know of my knowledge after reading the minutes of the previous Parents Teachers Association meetings held sometime in the year 2011, that the said Parents Teachers Association (PTA) Executive Committee in their meeting held on 1st July 2011 passed a resolution to procure a school bus.

3. That I know of my knowledge after reading the minutes of the previous Parents Teachers Association meetings that thereafter the PTA Executive Committee proceeded to set up a subcommittee to look into the purchase of the school bus, the said committee comprised of the following persons: a) Mrs. Tarus; b) Mr. Mitamita; c) Engineer Aduke; d) Mrs. Ngeny; e) Archbishop Khazenzi. I was not a member of the said committee (Annexed, marked and produced hereto as exhibit “A” are the minutes of 1st July, 2011).

4. That I also know of my knowledge after reading the minutes of the previous Parents Teachers Association meetings that the said PTA subcommittee on the purchase of the school bus proceeded to call for quotations from well-known bus supplying companies.

5. That further to paragraph (4) above the PTA subcommittee on the purchase of the school bus caused an e-mail to be sent to various bus supplying companies asking for quotations for the purchase of the school bus in question. (Annexed, marked and produced hereto as Exhibit “B” are copies of e-mail communication sourcing for quotations)

6. That I know of my own knowledge that indeed the school did receive quotations from the following bus supplying companies: a) Truck World Limited; b) Ace Motors Limited; c) Kenya Grange Vehicle Industries Limited(Annexed, marked and produced hereto as Exhibit “C” are copies of the quotations which were received by the school).

7. That I know of my own knowledge that on the 13th August 2012 the PTA subcommittee on the purchase of the school bus held a meeting to confirm progress in the acquisition of the bus at which meeting a number of recommendations were made. (Annexed, marked and produced hereto as Exhibit “D” are copies of the minutes of the subcommittee of 13th August 2012)

8. That I also know of my own knowledge that further on 31st August 2012 the PTA Executive Committee held a meeting to discuss various matters affecting the school which included but were not limited to the source of the funding for the purchase of the school bus. (Annexed, marked and

produced hereto as Exhibit “E” are copies of the minutes of the executive committee of 31st August 2012)

9. That I also know of my own knowledge that on 5th November 2012 the Board of Governors Executive Committee held a meeting wherein I was in attendance in my capacity as the Principal/ Secretary. This meeting discussed among other issues affecting the school, the purchase of the school bus. (Annexed, marked and produced hereto as Exhibit “F” are copies of the minutes of the meeting of 5th November, 2012).

10. That I also know of my own knowledge that on the 8th November, 2012 the Tender Committee held a meeting chaired by one Mrs. Mengech which meeting I also attended. In the said meeting it was agreed that a Local Purchase Order be raised to a company known as Kenya Grange Vehicles Industries Limited at the cost of Kshs. 10,500,000/-. The court should note that I was a mere participant in the said meeting.”

7. The applicant deposed further that the tender process was not an “individual venture but rather a collective responsibility undertaken by a duly constituted tender committee”. She averred that her role was to give life to the decisions of the Board of Governors and the Parents Teachers Association. Her view is that the respondents shirked their responsibility by failing to carry out fair and exhaustive inquiries into the tender or to appreciate her fringe responsibilities in the matter. It was submitted by her learned counsel that it beats logic that the applicant, who had the least role in the tendering process, is now burdened with the duty of justifying the decision of the committee and the various school organs. In a nutshell, the applicant’s case is that the charges are unfounded, unfair, false and malicious.

8. The application is contested. There is a replying affidavit sworn by Emmanuel Arunga on behalf of the 2nd respondent. It is dated 26th June 2014. The same deponent has sworn a further affidavit dated 23rd July 2014. The 2nd respondent’s case is that it conducted elaborate investigations in line with its mandate under the law. Further that the investigations revealed the applicant had abused her office or committed economic crimes. He deposed that the Commission received a report in November 2012 that the applicant had irregularly purchased the bus. The investigations revealed the following-

“(a) On the 14th September 2009, school’s Board of Governors’ executive committee approved the purchase of a new school bus (62-67 seater). This was also approved by the PTA annual general meeting held on the 6th November 2010 as one of the PTA projects, scheduled for implementation during the 2011/2012 Financial Year at a cost of Kshs. 11,450,000.

(b) The bus project was funded by public funds and therefore the implementation of the project and more particularly, the procurement of the contract for purchase of the bus was subject to the provisions of the Public Procurement & Disposals Act, 2006 and the Regulations and Rules made there under.

(c) The procurement of the bus was subjected to restrictive, direct procurement methods when it ought to have been procured through open tendering. Request for quotations was also used.

(d) The value of the subject procurement (school bus) was Kshs. 11.45 million which was above the threshold prescribed in the regulation for use of restricted, direct procurement method or request for quotations.

(e) The procurement entity (Moi Girls High School) did not obtain any written approval of its tender committee as required to use restricted or direct procurement method to purchase the school bus.

(f) The tender committee never authorised the school principal and the finance officer to issue any local purchase order (LPO) or enter into any form of contract with Kenya Grange Vehicle Industries Limited.

(g) No reasons were advanced in writing for use of alternative procurement methods as no records exist to that effect.

(h) The procurement entity did not meet the conditions for use of restricted procurement method as the procurement of school bus is not such a complex or specialised [matter] to warrant the use of the said method neither were there few known suppliers in the market for the school bus required. Moi Girls High School never sought tenders from at least 10 bidders.

(i) There was no formal contract signed between the procuring entity and the supplier Kenya Grange Vehicle Industries Limited and the school used the proforma invoices from the supplier to form the basis of the payments.”

9. The 1st, 3rd and 4th respondents also oppose the motion. First, there are grounds of opposition by the 4th respondent dated 27th June 2014. In addition, there is an affidavit sworn by Job Mulati. [Hhttp://kenyalaw.org/caselaw/admin/cases/edit/107222/wf/19366/e](http://kenyalaw.org/caselaw/admin/cases/edit/107222/wf/19366/e) deposes that the criteria of awarding the tender to Kenya Grange Vehicles Company Limited were suspect. The reason is that the LPO was prepared on 24th September 2012 which can only mean that the tender had already been awarded to the company prior to 1st October 2012. He avers that the applicant authorized a down payment of Kshs 5,000,000 on 11th October 2012. On 8th November 2012 the tender committee met and agreed that the school bus would be procured with the technical assistance of the Ministry of Public Works as per the Public Procurement and Disposal Act as specified in Min/TC/9/2012. However this was not taken into account by the applicant when she procured the school bus. The case of the 1st, 3rd and 4th respondents is that by the time the tender committee met to deliberate how the school bus was to be procured; the tender had already been awarded to Kenya Grange Vehicle Company Limited. In short, it was submitted that it was wrong for the applicant to award the tender single handedly.

10. The applicant has filed detailed written submissions dated 18th June 2014. There are further submissions dated 3rd November 2014 and a further list of authorities of the same date. The 2nd respondent's submissions are dated 22nd October 2014; those by the 1st, 3rd and 4th respondents are dated 16th September 2014. I have considered the pleadings, depositions, the annexed documents, precedents and the rival submissions.

11. These proceedings are by way of *judicial review*. As a general proposition judicial review proceedings are not concerned with the *merits* but with the decision making process. In order to succeed in an application for judicial review, the applicant has to show that the impugned decision is tainted with *illegality, irrationality or procedural impropriety*. Those terms were explained well by Odunga J recently in Republic v Inspector General of Police Ex-parte Patrick Nderitu Nairobi, High Court Judicial Review 130 of 2013 [2015] eKLR-

“Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”

12. There is a plethora of precedents on that subject. See generally Pastoli v Kabale District Local Government Council and Others [2008] 2 EA 300, (A persuasive but non-binding Ugandan decision), Council of Civil Unions v Minister for the Civil Service [1985] AC 2, An Application by Bukoba Gymkhana Club [1963] EA 478 at 479 and The Commissioner of Lands v Kunste Hotel Limited, Nairobi,

Court of Appeal, Civil Appeal 234 of 1995 [1997] eKLR.

13. If I understood the applicant correctly, she was saying that she played a peripheral or “minimal” role in procuring or buying the school bus; and, that there is no rational basis for her prosecution. The decision to charge the applicant was based on a report and recommendation of the 2nd respondent. The applicant’s learned counsel submitted that the applicant did not make the decision to purchase the bus. That decision was made by the Parents Teachers Association subcommittee. I was referred to exhibit A in her deposition. The applicant stated that she was not the principal of the school until May 2012. I was urged to find that all she did was to send emails for quotations as per exhibit B; and, that she did not participate in the deliberations of 13th August 2012 by the subcommittee. The applicant contends that three quotations were obtained as per exhibit C; and, that the decision to purchase the bus was taken to the Parents Teachers Association and ratified by the Board of Governors of the school. I was reminded that the applicant is a principal of the school and only sits in those organs as a *secretary*. There was a further submission that the monies expended were *not* public funds but *donations* from parents. It was submitted that they did not fall within the ambit of the Public Procurement and Disposal Act. I think those may be good arguments but presented to the wrong forum: they would constitute a robust defence to the criminal action. Like I stated, judicial review is not concerned with the *merits* of the decision; only the process.

14. The key consideration would be whether the respondents’ decisions and actions in prosecuting the applicant were tainted with *illegality, irrationality or procedural impropriety*. See Republic v Inspector General of Police Ex-parte Patrick Nderitu Nairobi, High Court Judicial Review 130 of 2013 [2015] eKLR. This Court is concerned about whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the respondents took into account relevant or irrelevant matters. See Municipal Council of Mombasa v Republic & Umoja Consultants Limited Civil Appeal No. 185 of 2001 cited with approval in Rahab Wanjiru Njuguna v Inspector General of Police & another Nairobi, High Court, Judicial Review 187 of 2013 [2013] eKLR, Kuria & 3 others v Attorney General [2002] 2 KLR 69, Council of Civil Unions v Minister for the Civil Service [1985] AC 2, An Application by Bukoba Gymkhana Club [1963] EA 478 at 479 and The Commissioner of Lands v Kunste Hotel Limited, Nairobi, Court of Appeal, Civil Appeal 234 of 1995 [1997] eKLR.

15. The 2nd respondent is established under Article 79 of the Constitution. Its functions are found in chapter six of the Constitution and section 11 of Ethics and Anti-Corruption Act. Section 11 (d) of Ethics and Anti-Corruption Act, 2011 mandates the 2nd respondent to “*investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption or violation of the codes of ethics or other matters prescribed under this Act or any other law enacted pursuant to chapter six of the Constitution.*” Failure to comply with procurement laws procedures and regulations is one such offence. The Commission’s powers under sections 11 and 35 of the Act include compilation of a report on the outcome of the investigations. The report is then transmitted to the Director of Public Prosecutions (4th respondent). That would seem to me to be what the Commission did in this case. The applicant concedes that she cooperated fully with the commission and forwarded documents requested by the Commission.

16. Article 157 of the Constitution grants the office of the Director of Public Prosecution the mandate to prosecute criminal matters. The 2nd respondent forwarded the report of its investigations to the 4th respondent. It recommended that the applicant and the school bursar David Kiptanui Limo be charged with the present offences. The two are deemed *innocent* until proved otherwise. They are entitled to equal protection of the law. Like I stated, the applicant seems to have a robust defence to the criminal action. Whether or not it is sound; or whether or not the charge will hold is the true province of the trial court upon tested evidence. That is the forum where the applicant will be entitled to a full hearing and a fair trial.

17. I am unable to hold on the materials before me that the 2nd or 4th respondents were acting outside the law or exceeded their jurisdiction to warrant the court to remove their decision to this court for quashing. I am not satisfied the two respondents have abused their powers; acted *mala fides*; operated *ultra vires* or used their power to achieve a collateral purpose. See Republic v Inspector General of Police Ex-parte

Patrick Nderitu Nairobi, High Court Judicial Review 130 of 2013 [2015] eKLR. The prayer for *certiorari* is thus on a legal quicksand.

18. The investigations may not have been up to scratch; the Commission may have recommended the prosecution of the applicant without a water-tight case; but it is not within the province of judicial review to interrogate the evidence or to supplant the criminal court. I have perused the charge sheet. It is alleged that the applicant was the accounting officer; that she failed to follow procurement procedures; and, that she abused her office. Those are mere *allegations* at the moment. She is deemed *innocent*. It may well turn out, as she says, that she was not culpable; that she should not be made to take the fall; that she has become a sacrificial lamb; that the funds were not public funds and so forth. If the applicant has a good defence, she will triumph. It is beyond me to say in judicial review proceedings.

19. That last point was succinctly captured in James Gesami v Attorney General & 2 others Nairobi, High Court Petition 376 of 2011 [2012] eKLR-

“With respect, I do not find anything discriminatory in the preferment of criminal charges against the petitioner. The DPP is at liberty to prefer charges against any party in respect of whom he finds sufficient evidence to prefer charges. I do not know of anything in the law that would require that all members of the CDF Committee for West Mugirango constituency be prosecuted for alleged misappropriation of funds unless there was evidence against them.”

20. In the present application there is no complaint that the magistrate court has no jurisdiction to try the applicant for the charges before that court or that the presiding magistrate has breached rules of natural justice. The writ of prohibition restrains abuse or excess power. See Meixner & another v Attorney General [2005] 2 KLR 189, Joram Mwenda Guantai v The Chief Magistrate [2007] 2 EA 170. To succeed in the prayer for prohibition, the applicant required to demonstrate that there is some impropriety or that the trial magistrate is acting contrary to the law or in excess of her jurisdiction. See John Wambua v The principal Magistrates Court Kibera Nairobi, High Court Miscellaneous Application 328 of 2000 [2000] eKLR.

21. Furthermore, the Criminal Procedure Code has sufficient safeguards to ring-fence the accused. In William Ruto & another v Attorney General Nairobi, High Court Civil Suit 1192 of 2005 [2010] eKLR, the court had this to say-

“The petitioners have questioned the competence of the charges that they face. In our view, it is not for this court to determine whether or not the charges as framed disclose an offence. There are adequate provisions in the Criminal Procedure Code (CPC) for instance Section 89 (5) CPC which can be used to address the issue. That section states as follows -

“89(5) where the magistrate is of the opinion that a complaint or formal charge made or presented under this section does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for the order.”

22. That leaves the prayer for mandamus. Mandamus aims at compelling the performance of a public duty. If a public officer fails to perform a duty imposed by statute to the detriment of a party, then mandamus may issue. See Kenya National Examination Council v Republic, Nairobi, Court of Appeal, Civil Appeal 266 of 1996 [1997] eKLR. In the present case, the 2nd respondent has conducted investigations under sections 11 (d) and 35 of the Ethics and Anti-Corruption Act, 2011. The 4th respondent has moved to prosecute the applicant under powers donated to him by Article 157 of the Constitution. I cannot then say the respondents have failed to perform a public duty. What the applicant contends is that the investigations were *shoddy* and that the prosecution is *unmerited* and driven by *malice*. The applicant is praying that the two respondents be compelled to *“diligently carry out the respective mandates of their offices and further avail their reports on the results of their investigations.”* The applicant is obviously dissatisfied with the investigations and charges. But it would be to turn logic onto its head to say the two respondents have not performed their statutory duties. Like I stated earlier, whether the investigations were shoddy or whether the charges can hold is the true province of the trial

court on tested evidence.

23. This Court cannot extend its tentacles to supervise the manner in which the 2nd respondent carries its investigative duties under the Act or to encroach on the Constitutional independence of the DPP ordained by article 157. There is of course a *caveat*: the two respondents must act in a *reasonable* manner. In default, the court may intervene. On the face of it, I am unable to hold that the two respondents have acted unreasonably. The prayer for mandamus is thus unavailable. The following passage in Republic v Commissioner of Police & another ex parte Michael Monari & another [2012] eKLR, is apt and on all fours with the present case-

“The police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene”.

24. The upshot is that no sufficient grounds have been laid to issue the writs for prohibition, certiorari or mandamus in this case. The applicant’s notice of motion dated 18th June 2014 is *dismissed*. In the interests of justice; and, considering that the criminal case is still pending; and, to avoid further prejudice to the applicant, I order that each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 12th day of March 2015.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open Court in the presence of:-

Ms. Odera for Ms. Mc’ Asila for the applicant.

Ms. Karanja for the 1st, 3rd and 4th respondents.

Ms. Natome for the 2nd respondent.

Mr. J. Kemboi, Court clerk.