REPUBLIC OF KENYA

High Court at Bungoma

Revision Case 26 of 2012

REPUBLIC.....PROSECUTOR

versus

JARED WAKHULE TUBEI.....1ST ACCUSED/RESPONDENT

MARYFLORENCE WANDER.....2ND ACCUSED/RESPONDENT

RULING

PRELIMINARIES

Competence of revision application

[1] This application raises questions of the correctness, legality, propriety and regularity of a decision of a trial court. When such matters are raised, simply attract revisionary sparks of the court, and the court can even move *suo motto*. Invariably, the High Court, should inherently exercise its supervisory powers under Article 165(6) & (7) of the Constitution, and may call for, and examine the record, finding or order of or a proceeding in a subordinate court in order to be satisfied of their correctness, legality, propriety or regularity. This is so because the supervisory jurisdiction is by its very nature aimed at ensuring that the subordinate courts operate within the law when discharging their judicial functions. There is therefore no constitutional or legal necessity that an appeal should be filed on such matters, or before the court could exercise its supervisory authority. The application before the court is therefore competent.

[2] Quite contrary to the submissions by learned counsel Mr. Ombito, I wish to point out that, the exercise of supervisory power of the High court, particularly under Article 165(6) & (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.

Influence by EACC

[3] The other argument by Mr. Makali that the letter by EACC compromises the independence of DPP, is neither here nor there. EACC is a state organ and the investigator herein. It is under a statutory duty to bring any useful information to the attention of the DPP. The letter by EACC does not therefore amount to directing the DPP or in any manner compromising the independence of the DPP.

Ignorance of law

[4] Mr. Ombito has argued that the prosecution should have known the law applicable before filing criminal proceedings against the accused persons, and so they are prevented from feigning ignorance of the law by the maxim *ignorantia juris non excusat.* TheCourt of Appeal interpreted sections 35 and 36 of

the Anti-Corruption and economic crimes Act (hereafter ACECA) in their decision in **COURT OF APPEAL AT NAIROBI CIVIL APPEAL NO 331 OF 2010 NICHOLAS MURIUKI KANGANGI V ATTORNEY GENERAL.** The judgment in that case was delivered on 29th July, 2011 when the criminal case had already been filed. The EACC, and its predecessor, KACC had operated under the impression that cognizance offences of bribery may not require to follow the elaborate process under section 35 of ACECA, and that section 23 of ACECA was sufficient. Let me not say much as the Court of Appeal has already settled that issue. Therefore, for purposes of this application, I do not see much turning on the argument by Mr. Ombito.

THE APPLICATION

[5] The Prosecution, has applied for a revision of the order of the trial court which;

a) Rejected the application by the Prosecution to withdraw the charges against the accused persons under section 87(a) of the Criminal Procedure Code (CPC), and

b) Ordered the case to proceed for further hearing.

[6] The review of the correctness, legality and impropriety of the above order of the trial court is underpinned by the Constitution, and applicable legal framework. I should be guided by the case of **COURT OF APPEAL AT NAIROBI CIVIL APPEAL NO 331 OF 2010 NICHOLAS MURIUKI KANGANGI V ATTORNEY GENERAL**. This case is relevant to the issue at hand in a pointed manner, in that the circumstances in that case is a neat fit to the present case. I believe, had it been brought to the attention of the trial court, perhaps the trial court may have taken a different position on the matter altogether. The relevant part is found in the ultimate decision of the Court of Appeal when it held that:-

Accordingly...we order that the three charges before the Magistrate's court be forthwith terminated, the charges not having been brought to court in accordance with the Act. The termination, however, does not prevent KACC from complying with the provisions of the Act and reinstituting the charges should it be deemed necessary. We repeat that we have rejected the appellant's prayer that he be acquitted on the charges.

Essence of the Kangangi case

[7] The essence of this decision of the Court of Appeal, is that, charges mounted contrary to the provisions of the Anti-corruption and Economic Crimes Act, are a nullity. Such charges should be terminated forthwith except, subject to the Constitution, the termination should not abate the prospects of re-institute similar charges as long as the necessary procedures set out in the law have been followed. Therefore, the trial courts when confronted with similar issue, as a matter of judicial precedent, should act in accordance with the decision, and give it practical grip within the provisions of the new Constitution.

What the Constitution says about discontinuance of proceeding

[8] Section 87(a) of the CPC provides for discontinuance of a criminal proceeding, except it must be read in consonance with Article 157(6)(c), (7),(8) and (11) of the Constitution. Under Article 157(6) of the Constitution, the Prosecution may discontinue criminal proceedings at any stage before judgment is delivered. The discontinuance however must be done with the permission of the court. This practice is quite a departure from the notorious practice of *nolle proseque*-an arbitrary decision by the prosecution to terminate proceedings whenever they felt like it without assigning any reasons. The constitutional requirement now is that, in making the application for discontinuance, the prosecution must be guided by Article 157(11) of the Constitution, the accused must participate, and then the court may or may not give its permission to the discontinuance of a proceeding depending on the circumstances of the case and the reasons given for the discontinuance. Let me set out Article 157(11) as it prescribes the important constitutional considerations in an application for discontinuance. It provides:-

157(11) In exercising the powers conferred by this Article, the Director of Public Prosecution shall have regard to the public interest, the interest lf the administration of justice and the need to prevent and avoid abuse of the legal process.

[9] In the present case, the major reason for the prosecution's application to discontinue the criminal proceeding is based on the fact that the proceeding before the trial court was instituted in contravention of ACECA. Section 35 of ACECA requires the Ethics and Anti-corruption Commission (successor of Kenya Anti-corruption Commission) to make a report to the DPP, of the results of investigation with recommendations to prosecute the suspects or otherwise, and the DPP should accept the recommendations before a proceeding is mounted in court. This was not done as was the case in the Kangangi case, hence the circumstances and the decision in the Kangangi case apply *mutatis mutandis*.

A nullity cannot be proceeded with

[10] The *ratio decidendi* of the decision in the Kangangi case is clearly ascertainable. It is based on the principle of nullity. In law, a proceeding which is a nullity, is void, nothing and therefore it cannot be legally proceeded with whatsoever. The order of the trial court that the prosecution should proceed with the hearing of the criminal trial was therefore erroneous and is not supported by law. Legally, there was nothing to proceed with, and it was not legally possible for the trial court to have rejected a discontinuance, and then ordered the case to proceed to trial. The trial court should therefore have given its permission, and one way or the other, ordered the termination of the proceeding forthwith.

Should the discontinuance be an acquittal or conditional discharge?

[11] The only discretion the trial court had in the circumstances of the case was to determine whether the termination was to result into an acquittal or not, which should have depended on what the Constitution, the applicable laws and decided cases say. A consideration of sound constitutional principles would have guided judicious exercise of discretion by the trial court in the matter, to wit; the principle of nullity, and then balancing among the rights of the accused, the public interest, the interest of the administration of justice, and the need to prevent and avoid abuse of the legal process.

[12] Constitutionally, in deciding whether the discontinuance will be an acquittal or not, the trial court should start by looking at the stage at which the proceeding has been discontinued. If discontinuance is after the prosecution has closed its case, the accused shall be acquitted under Article 157(7) of the Constitution, and Article 50(o) will apply to shield the accused, on the principle of *double jeopardy*, from being charged again on similar charges.

[13] On the other hand, in all other situations which do not fall under Article 157(7), there is a rebuttable presumption that the discontinuance is not a bar for future prosecution. This thinking is derived from the fact that, by not providing that every discontinuance results into an acquittal, the Constitution intended the court to determine whether the circumstances of the case are such that an acquittal should or should not be ordered. The role of the court in administration of justice is the constitutional philosophy in which the Kangangi case finds support. The objects, purposes and values of the Constitution are discernible from the wording of the Constitution, that in an application for discontinuance, the trial court shall have regard *to the public interest involved, the interest* of the administration of justice, and the need to prevent and avoid abuse of the legal process. The Constitution has entrenchedthe fight against corruption by providing for the establishment of a premier institution under Article 79, and for robust procedures and mechanisms of delivering its mandate under Article 80. I believe, the Kangangi case recognized that fighting corruption and economic crimes is a matter of great public interest and so discontinuance of cases which are of similar circumstances as those in the Kangangi case should be terminated in a manner that will not compromise prospects of future prosecution unless it is a case falling under article 157(7) of the Constitution. These are the jurisprudential considerations that must underpin the decision of the trial court. It is therefore acutely important for the court to exercise its discretion with wise circumspect by evaluating the public interest involved, and weighing it against the rights of the accused under the Constitution as to give effect to the objects of the Constitution on dispensation of public justice in criminal sphere. The compelling-state-interest principle will become useful in this novel balancing act by

the court in the apportionment of proper proportion of weight to the constitutional duty of the State to bring offenders to book through investigations and prosecution.

[14] As I said earlier, the criminal case was poised for termination no matter what, and the reasons given by the trial court cannot not change that basic fact and law. Perhaps, the reasons given by the trial court would have been useful in deciding whether the discontinuance should be an acquittal or not. The decision of the trial court was not therefore correct, legal or proper at all, and there is no amount of reasons that would give it any constitutional grounding. It is hereby quashed.

[15] In this case, although the case has been in court for an year, there are no circumstances which would weigh heavily on the court as to order an acquittal. The reasons given by the trial court were not sufficient. Indeed, they do not apply, are at a very high level of generalization, and speculative; to wit, 1) that the application to discontinue the proceeding was aimed at delaying the case further[note; refusal to terminate it prolonged a nullity], and 2) that the application was a ploy to fix the loose ends of the case.

[16] I find that the fight against corruption is a public interest issue, and prosecution of those investigated for corruption and economic crimes is a matter of the administration of justice. I also find that, there is no evidence of any abuse of, or intention on the part of the prosecution to abuse the process of the court. The upshot is that:-

a) I accordingly order that the charges before the Magistrate's court be forthwith terminated, the charges not having been brought to court in accordance with the Anti-corruption and Economic Crimes Act.

b) The termination, however, does not prevent the EACC from complying with the provisions of the Act, and the DPP reinstituting the charges should it be deemed necessary.

Dated, signed and delivered in open court at Bungoma this 18th day of March, 2013

F. GIKONYO
JUDGE

In the presence of:

Mr. Ombito for 1st Respondent

Mr. Murunga for 2nd Defendant

Mr. Kibelion for State

Ruling read in open court.

F. GIKONYO
JUDGE