REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Criminal Appeal 445, 448 & 452 of 2012

REBECCA MWIKALI NABUTOLA ……APPLICANT

VERSUS

REPUBLIC ……..……. RESPONDENT

CONSOLIDATED WITH

DUNCAN MURIUKI KAGUURA ……APPLICANT

VERSUS

REPUBLIC …….. RESPONDENT

CONSOLIDATED WITH

ONG'ONG'A ACHIENG…….. APPLICNT

VERSUS

REPUBLIC …… RESPONDENT

RULING

These applications are consolidated. The three applicants were convicted of various offences, jointly and severally ranging from conspiracy to defraud contrary to Section 317 of the Penal code, abuse of office contrary to Section 46 as read with Section 48 of the Anti Corruption and Economic Crimes Act No. 3 of 2003, willful failure to comply with the law relating to procurement contrary to Section 45 (2) (b) as read with Section 48 of the Anti-Corruption and Economic Crimes Act aforesaid, fraudulently making payment from public revenues for services not rendered contrary to Section 45 (2) (a) (iii) as read with Section 48 of the Anti Corruption and Economic Crimes Act No. 3 of 2003 aforesaid, conflict of interest contrary to Section 42 (3) as read with Section 48 of the Anti – Corruption and Economic Crimes Act No. 3 of 2003 and fraudulent acquisition of public property contrary to section 45 (1) (a) as read with Section 48 (1) and (2) of the Anti-corruption and Economic Crimes Act.

Upon conviction they were each sentenced to varying sentences of fines and imprisonment. Aggrieved by the said convictions and sentences, each of the three applicants has lodged an appeal. There are now before me the three applications cited hereinabove, for orders that the applicants be granted bail/bond pending the hearing and determination of the said appeals. There is a related order sought to the effect that the court stays the execution of the sentences imposed by the lower court pending the outcome of the

said appeals. The applications are supported by affidavits sworn by the respective applicants alongside several annexures related to the trial of the lower court. The applications are opposed by the Republic and replying affidavits have been filed to that effect.

In these applications, the first applicant is represented by Mrs. Mwenesi. The second applicant is represented by Mr. Nderitu and Mr. Wagara while the third applicant is represented by Mr. Saendi, Mr. Kithi and Mr. Ochola. The Republic is represented by Mr. Mungai Warui. Upon directions all the applicants filed written submissions upon which the Republic filed replies thereto. From the outset I commend all learned counsel on record for those submissions.

The applications are properly before the court by virtue of the provisions of Sections 356 and 357 of the Criminal Procedure Code which allow this court to grant bail or stay execution of any sentence that may have been imposed by trial court pending the hearing and determination of the appeals.

In their respective petitions of appeal, each applicant has set out the grounds upon which they challenge the convictions and sentences imposed by the lower court. I do not deem it necessary to set out the said grounds, but shall in the process of addressing the issues raised, mention the salient points contained therein.

The proceedings in the lower court were conducted by two magistrates. From the beginning of the prosecution case up to the stage where the applicants were found to have a case to answer the case was heard by Mrs. C. W. Githua, a Chief Magistrate, who was then promoted to a High Court Judge. The proceedings were taken over by Ms. L. Nyambura, then a Principal Magistrate and now also a High Court Judge. I hasten to point out that when the judgment was being pronounced Ms. L. Nyambura was then a Senior Principal Magistrate.

After the close of the prosecution case the then learned trial magistrate made the following ruling.

"**Having considered the evidence on record, alongside the submissions made by all the parties (counsels) herein, this court is satisfied that the prosecution had made a prima facie case against each of the accused persons. I therefore find that each accused person has a case to answer and is hereby put on his/ her defence under Section 211 of the Criminal Procedure Code."**

This was on 16th September, 2011. Thereafter the record of the lower court reads as follows,

"6.10.2011

Before Hon. Nyambura (Ms) P.M.

Prosecutor

Court Clerk – Bosire

Accused 1 to 3 - present

Court – The ruling will be read in open court by L. Nyambura on behalf of C.W. Githua (Mrs.) who has now been elevated to the position of the High Court Judge.

L. NYAMBURA (MS)

PRINCIPAL MAGISRATE

6.10.2011

Wagra for 2nd and 4th accused persons

Okundi for 3rd accused person

Saende for 1st accused person absent

Prosecutor – I have no instruction to hold brief for Mr. Warui for the state

L. NYAMBURA (MS)

PRINCIPAL MAGISRATE

6.10.2011

Miss Kamau holding for Mr. Warui for the state.

L. NYAMBURA (MS)

PRINCIPAL MAGISRATE

6.10.2011

Court – Ruling read in open court in the presence of accused person and their counsels.

L. NYAMBURA (MS)

PRINCIPAL MAGISRATE

6.10.2011

Court – C.W. Githua (Mrs.) has now been elevated to the position of High Court Judge. Section 200 of the Criminal Procedure Code has been explained to the accused person and their counsels and they responded as follows:-

L. NYAMBURA (MS)

PRINCIPAL MAGISRATE

6.10.2011

Wagara – On behalf of the 1st and 4th accused persons, we will proceed with the matter from where it had reached. We will put in sworn statements and call four witnesses. We can take a hearing date. We do not wish to start the matter a fresh.

L. NYAMBURA (Ms)

PRINCIPAL MAGISRATE

6.10.2011

Okundi – On behalf of the 3rd accused person, we wish to proceed with the matter from where it has reached. 3rd accused person will give sworn statement. No witness. We can take a hearing date.

L. NYAMBURA (MS)

PRINCIPAL MAGISRATE

6.10.2011

1st accused – I will proceed with the matter from where it had reached.

L. NYAMBURA (MS)

PRINCIPAL MAGISRATE

6.10.2011

Same day

Mr. Warui Mungai for the state now is present.

L. NYAMBURA (MS)

PRINCIPAL MAGISRATE

6.10.2011

Wagara - We can take hearing dates

L. NYAMBURA (MS)

PRINCIPAL MAGISRATE

6.10.2011

Court – By consent all the parties defence hearing on 13th, 14th 15th December, 2011.

L. NYAMBURA (MS)

PRINCIPAL MAGISRATE

6.10.2011"

After the above record the case was adjourned for reasons that appear on record but on 13th February, 2012 the court convened for further hearing. The relevant record reads as follows in part.

"Court – on 6.10.2011, parties elected to proceed with the matter from where it had reached.

Section 200 of Criminal Procedure Code having been explained to them today its Defence hearing and parties are ready to proceed.

Section 211 of Criminal Procedure Code compiled with.

L. NYAMBURA (MS)

PRINCIPAL MAGISRATE

13.2.2012"

All learned counsel for the applicants have raised a preliminary point of law that the learned trial magistrate (as she then was) failed to comply with Section 200 of the Criminal Procedure Code when she took over the hearing of the case from Mrs. C. W. Githua. Section 200 (3) of the Criminal Procedure Code reads as follows,

"**Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand any witness be resummoned and re-heard and the succeeding magistrate shall inform the accused person of that right".**

It is the submission of the learned counsel for the applicants that the record of the proceedings did not show that the trial court complied with the said section. That being the case, then the proceedings that followed were a nullity. The learned counsel for the Republic on the other hand in reply, submits that the record is clear and that the learned trial magistrate (as she then was) complied with the provisions of Section 200 and no injustice has been occasioned to the applicants.

From the record, I have no doubt whatsoever that some communication was made to the applicants and their counsel relating to Section 200. This is because of what their learned counsel on record then replied to such communication. The question that begs an answer is whether or not that communication was in full compliance with the provisions of the said Section. This issue is not new in criminal proceedings and the Court of Appeal and the High Court has been seized of that issue severally.

In the case of **Ndegwa Vs Republic (1985) eKLR 534** the court of appeal had the following to say,

"1. The provisions of Section 200 of the Criminal Procedure Code (Cap 75) ought to be used very sparingly; and only in cases where the exigencies of the circumstances are not likely but will defeat the ends of justice if the succeeding magistrate is not allowed to adopt or continue a criminal trial started by a predecessor.

2. The provisions of Section 200 should not be invoked where the part heard trial is a short one and could be conveniently started de novo. Furthermore, it should not be invoked where the witnesses are still available locally and the passage of time was short so as not to cause or produce any accountable loss of memory on their part, whether actual or presumed to prejudice the prosecution.

3. No rule of natural justice, statutory protection and evidence of common sense should be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject since he is the most sacrosanct individual in the system of our legal administration.

4. The statutory and time honored formula that the magistrate making judgment should himself see, hear and assess and gauge the demeanour and credibility of witnesses should always be maintained.

5. A magistrate who did not observe the evidence is not in a position to assess the position, credibility and personal demeanour of witnesses."

The learned counsel for the Republic rightly observes that the applicants are educated people (there was no objection in that observation by their learned counsel) and that they were represented by counsel throughout except the 1st accused when the proceedings were recorded on 6th October, 2011.

In **Criminal Case No. 151 Of 2010 Moses Mwangi Karanja vs The Republic** the succeeding magistrate recorded as follows,

"Section 200 complied with

Counsel – hearing can proceed from where we left".

This court observed that the learned trial magistrate fell short of the statutory requirement envisaged by the above section. In **Criminal Appeal No. 135 of 2004 Richard Charo Mole Vs Republic** the Court of Appeal held that the failure to comply therewith would in appropriate cases render the trial a nullity. I am aware of **Criminal Appeal No. 106 of 2009 Bob Ayub "alias" Edward Gabriel Mbwana "alias" Robert Mandiga Vs Republic** the Court of Appeal addressed the above provisions and said as follows,

"The record before us, the relevant part of which we have reproduced above clearly shows that the Judge did not comply as was required of him with the provisions of Section 200 (3) of the Criminal Procedure Code which as per Section 201 (2) was to apply *mutatis mutandis* in this case. He did not explain to the appellant his right to demand the recall and re-hearing of any witness as was required under that provision. Miss Oundo counters that by saying the appellant was represented by an Advocate and so there was no need for that. Our short answer to that is that, it was the appellant who was on trial and the duty of the court was to the appellant and not to his advocate. The written law makes that duty mandatory. The mere mention in the judgment that Section 200 was complied with is hollow without any evidence on record"- See also **Criminal Appeal No. 310 of 2008 Paul Kithinji vs Republic.**

The court of appeal has in the past delivered inconsistent decisions in respect of this issue. For example in **Criminal Appeal No. 80 Of 2004 Willis Ochieng Odero Vs The Republic** in addressing the issue relating to non compliance with the provision of Section 200 of the Criminal Procedure Code, the court said as follows,

"**Itis clear from the responses of the accused persons that some explanation was given to them concerning the rights. They decided that it would be in their benefit if the trial proceeded from the where the trial magistrate reached. There is no note whether the succeeding magistrate informed the accused persons of their right to re-summon witnesses. However, the accused person's responses were categorical implying that they wanted the succeeding magistrate to pick up from where his predecessor has left. In our view the appellants were made aware of their rights under Section 200 of the Criminal Procedure Code. It would have been different if there was no note indicating compliance with that section."**

It is worth noting that the position of the Court of Appeal above is contrary to the holding by the same court in **Criminal Appeal No. 15 Of 2007 Eric Omondi "Alias" Gor Vs Republic (Unreported).** I shall revert to this issue shortly herein below.

There have been some submissions that Section 211 of the Criminal Procedure Code was not complied with. I have noted the submissions but do not think that the final decision of this ruling will turn on the compliance or otherwise of this particular section. I observe in passing however, that the requirement is that the charge facing an accused person should be read and explained again in accordance with Section 207(1) of the Criminal Procedure Code. Considering that at that stage the accused person has actively participated in the trial and knows the charges he or she is facing, the requirements thereof is a reminder.

The grounds upon which an applicant may be released on bail have been ventilated adequately by all counsel on record. See **Mundia vs Republic 1986 KLR 623, Somo vs Republic (1972) EA 476 Ademba vs Republic (1983) KLR 442**. It is incumbent for the applicants to show at this stage that their appeals have overwhelming chances of being successful, that there are exceptional and unusual circumstances; that the appeals are likely to be delayed such that the applicants may serve their sentences or substantial parts thereof by the time the hearing is reached among other considerations.

I bear in mind that the appeals lodged by the applicants are yet to be argued based on the grounds set out in the petitions of appeal. In an application for bail pending the hearing of the said appeals, only an overview of the shortcomings or otherwise has been presented. Further, to delve any deeper may preempt the hearing and especially so when this court may not be seized of the hearing. However, to make an informed decision I have identified several salient issues as brought out by both the learned counsel for the applicants and the Republic.

The issue of duplicity and mis -joinder has not been adequately addressed in the judgment of the lower court. Common intention is a necessary ingredient in charges involving more than one party. This issue has also not been adequately addressed, if at all, in the said judgment. There appears also to be a shifting of both the onus of proof and burden of proof as identified by some of the applicants. Duplicity of charges carries the risks of visiting the accused with double jeopardy especially when it comes to punishment.

Another issue that has been raised by the applicants is the proportionality and consistency of the sentences handed down by the same court in different cases. That would of necessity form an arguable ground on appeal.

And so with the brief observations above, I must now answer the several issues that impact on such applications. From the material before me, the applicants have presented arguable appeals. But that is not enough because an arguable appeal may not necessarily carry overwhelming chances of success. Do those chances exist?

Having gone through the record and especially the issue raised relating to Section 200 (3) of the Criminal Procedure Code I subscribe to the following position. The requirement to comply with the provision thereof is mandatory. The record of the trial court must of necessity contain the fact that the trial court, in this case the succeeding magistrate, has informed the accused person of the right to recall or rehear any witness. The reply by the accused person must also be placed on the record and the order relating thereto should be signed by the succeeding magistrate. It is not enough for counsel to state that they have taken instructions because, as the Court of Appeal has said, the duty of the court is to the accused person and not the advocate. Short of that the trial is vitiated. With profound respect, the record before me falls short of that.

It will be noted that I have restrained myself from addressing the issue of evidence, and this is well informed. In the event that a retrial is sought and allowed, then any comment made at this stage would be prejudicial not only the applicants but also to the Republic. Having said so, I am persuaded, considering the totality of all the submissions placed before me, that the applicant's appeals have overwhelming chances of being successful. Do they qualify to be released on bail?

They are all Kenyan citizens and the fear that they are flight risk has not been property justified. From the record, they never posed any threat of jumping bail during the trial in the lower court and so, the answer is yes. The three applications hereby succeed.

Each applicant shall be released on executing a bond of Kshs. 1,000,000/= (one million) with one surety of equal sum **OR** by depositing cash bail of Kshs. 500,000/= (five hundred thousand). The sureties shall be approved by the Deputy Registrar of this court. In addition, all applicants shall deposit their respective passport with the court.

Orders accordingly.

Dated and delivered at Nairobi this 30th day of November, 2012.

A. MBOGHOLI MSAGHA
JUDGE