



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILINAMI LAW COURTS
MISC APPLICATION 853 OF 2000
VICTOR OKUMU OKWATCHO APPLICANT

VERSUS
ATTORNEY GENERAL DEFENDANT

R U L I N G

Victor Okumu Okwachto, was charged of stealing by agent, contrary to Section 283 (c) of the Penal Code. The particulars of the offence reads at “on the 15 th day of November, 1999 in Nairobi within the Nairobi area, beaing an agent to AGGREY KIDYVAI CHABEDA, stole cash

Kshs.1,846,981/90 which he had been received by him for and on account of AGGREY KIDYVAI CHABEDA”.

Victor denied the offence in the Magistrate’s court, and subsequently moved to the High Court, seeking leave to apply for orders of Judicial Review. He was granted leave but the Judge declined to order leave to operate as a stay to criminal proceedings. Later, the Learned Chief Justice who, gave directions also declined to order that the leave so granted do operate as a stay to criminal proceedings in the Magistrate’s court.

Victor thereafter filed a Notice of Motion application seeking orders of prohibition to stop the “Chief Magistrate or any other Magistrate from hearing on further hearing and or determining Chief Magistrate’s Criminal Case No.5182/2000, Republic vs Vincent Okumu Okwachto.

The order was also directed to the Attorney General prohibiting him or any other prosecutor from prosecuting or further prosecuting the Chief Magistate’s Criminal Case No.5182, Nairobi i.e. Republic vs Vincent Okumu Okwachto. In the court file is a Notice of Preliminary objection filed by the Attorney General complaining about non compliance with some provisions of Order LIII Rule 1(3) of the Civil Procedure Code.

Nevertheless when the parties appeared before me, they argued the main Notice of Motion application for prohibition, and not the issues the preliminary objection The replying affidavit was sworn by Eliud Kobia

a Police Constable attached to the Central Police station in Nairobi, and also the investigating officer. It is dated 12th September, 2000.

Mr. Kamunde, counsel for the applicant relied on the statement of facts and the affidavit.

He described the applicant as a Director of Total Recall Ltd and the complainant Mr. Aggrey Chabeda, a Director of Esese Engineering Ltd.

The advocate took the court through the various paragraphs of the statement filed by the applicant and submitted that the dispute involves Esese Engineering Ltd and Total Recall Ltd, both being limited liability companies. That there is no dispute between Victor and Aggrey the directors of the two companies.

The advocate submitted that the dispute is of a civil nature, that's why the applicant complains that the criminal prosecution is being used to harass him. Miss Rakama for the Attorney General relied on the replying affidavit filed by the investigating officer. She contended that the applicant had a criminal intent as shown by the averments in the replying affidavit. She referred to the agreement entered into by Total Recall Ltd and Esese Engineering Ltd dated 8th September, 1999. Its headed

“DEBT COLLECTION ASSIGNMENTS”. Paragraph 2 thereof reads, “All payments should be in the name of Esese Engineering ” .

Miss Rakama complained that the applicant caused a cheque to be addressed to Total Recall Ltd contrary to the agreement. She then referred the court to the cheque from KARI of Kshs.2,986,782/70 issued in the name of Total Recall Ltd contrary to the agreement already referred to. The cheque was issued to the applicant's company, but the applicant did not disclose this, prompting several letters to be written to KARI by Esese Engineering Ltd, still demanding the same amount of money. KARI confirmed in their letter dated 18th January, 2000, that they had paid that cheque to Total Recall Ltd through Kenya Commercial Bank. These facts are in fact contained in the replying affidavit at paragraphs 8,9,10,11,12,13,14 and 15.

I noted that the contents of the above paragraph of the replying affidavit were not replied to by a further affidavit or otherwise by the applicant. What the applicant's counsel submitted in reply was that the applicant had not denied having received the cheque from KARI. He referred the court to a letter dated 30.11.99 and submitted that because of this letter, there was no intent to steal from the applicant. I decided to read the letter of 30th November, 1999 in which the applicant is said to have admitted receipt of the cheque from KARI.

The letter is written by A.G.K CHABEDA Managing Director of Esese Engineering the complainants in the Criminal Case. The letter was written to the applicant Victor Okwachto. The letter read in full, “Dear Mr. Okwachto,

RE: KARI – OUTSTANDING ACCOUNTS Further to our telephone conversation this morning, find attached a letter from M/s KENYA AGRICULTURAL RESEARCH INSTITUTE ref. KARI/4/001/Vol. 111/29 dated 15th November, 1999 and copied to yourselves. Kindly confirm that you are in receipt of the above funds. We wish on our part to confirm that you personally informed me that you had received the principal amount and that you have ensured that we are paid by BANKERS Cheque because in your own words “KARI cheques are known to bounce”. Further to the above you indicated that KARI had promised to pay the balance at a later date as they were waiting for donor funds. We asked you to confirm this date which you promised to do. The above were discussed at a meeting held between our part and Mr.

Jabali and yourself on behalf of TOTAL RECALL LTD. It comes as a shock to me therefore that on my reading the contents of the attached letter to you on telephone, you are unable to confirm receipt of the same. I expect that you shall make good the balance of moneys you have withheld before the close of business today.

Yours faithfully,

For: ESESE ENGINEERING LIMITED

Signed

A.G.K. CHABEDA

MANAGING DIRECTOR

With the greatest respect to Mr. Kamunde for Victor Okwachho, the applicant, I do not find that this letter helps the applicant's case in anyway. In fact the letter reveals the "fraud" on the applicants part. In the letter, Mr. Chabeda is quoting what the applicant told him, that he received only a part payment of the debt from KARI, who "promised to pay the balance at a later date as they were waiting for donor funds....".

This information was false and Victor the applicant must have known that it was, because he received the big cheque of Kshs.2,986,782/70 which sum included the 15% debt

collection fee, payable to his company. The cheque was made payable to his company as has already been stated. Victor was charged with the criminal offence on 20th June, 2000, and on 21st July, 2000, he moved this court for orders of Judicial Review.

I find this application to have been filed in bad faith to circumvent the Criminal proceedings commenced in the Chief Magistrate's court. Further, I am satisfied that there is no merit whatsoever in this application for orders of PROHIBITION against the Chief Magistrate's court and the Attorney General, the prosecutor. I therefore proceed to dismiss the application with costs to the respondents. I direct the Chief Magistrate's court to hear and or continue to hear and determine Chief Magistrate's Criminal Case No. 5182 of 2000 at Nairobi, Republic vs Victor Okumu Okwachho.

Dated at Nairobi this 12th day of September, 2002.

JOYCE ALUOCH

HIGH COURT JUDGE