REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEALS NOS 189 & 281 OF 2001 (CONSOLIDATED)

ALFRED MOCHAMA NYABEWA

ROBERT ASAVA EGANZA …… APPELLANT

VERSUS

REPUBLIC……..…..……..…..…. RESPONDENT

(From Original Conviction and Sentence in Criminal Case

No 1365 of 2000 of the Senior Resident Magistrate's

Court at Nairobi, C Githua (Mrs))

JUDGMENT

Criminal Appeal No 189 of 2001 and Criminal Appeal No 281 of 2001 are hereby consolidated.

The 1st applicant, Alfred Mochama Nyabewa (original A1); and the 2nd appellant, Robert Asava Eganza (original A2), were being prosecuted by the defunct Kenya Anti-Corruption Authority (KACA) on two charges of corruption in office contrary to section 3(1) as read with section 3(3)

(a)(i) of the Prevention of Corruption Act (cap 65, Laws of Kenya). They denied the charges before the learned Chief Magistrate, Nairobi. They were admitted to bail and the case listed for hearing before the learned Senior Resident Magistrate, C Githua (Mrs).

This appeal is against the decision of the learned trial magistrate in her ruling delivered on the 9th of February, 2001. That ruling was prompted by the *ex-parte* application made by learned counsel for the applicants. It was their submission that in view of the decision of the Constitutional Court in High Court Miscellaneous Criminal Application No 302/2000 which had declared KACA as unconstitutional body, the learned trial magistrate do proceed to terminate the on going prosecution before her in Cr Case No 1365/2000 as KACA who was the prosecuting body in that case and the case which had been taken up for constitutional reference, was no longer capable of conducting any further criminal prosecutions.

The Court was therefore urged to acquit the accused persons. The second prayer made to the Court was to order for the release of the exhibits namely some articles of clothing which had been taken from the accused persons by the investigating officers for KACA at the time of the arrest of the appellants.

The learned magistrate considered the matters urged by counsel for the appellants and dismissed the application.

In her ruling, the learned trial magistrate had this to say.

"I am doubtful whether section 67 (2) of the Constitution would be applicable in this case considering that the decision in Miscellaneous Application No 302/2000 did not emanate from a reference of this Court. Be that as it may, even if the provisions of s 67 (2) aforesaid were applicable and having carefully read the constitutional reference court ruling in Miscellaneous Criminal Application No 302/2000, I find that in finding/ declaring KACA unconstitutional, the three judge bench did not direct that all pending cases being prosecuted by KACA be terminated and accused persons acquitted.

In fact the Court ruled that the Attorney General should take steps in all those cases to ensure that justice was done."

The learned trial magistrate therefore declined to grant the orders sought to terminate the said case and acquit the accused persons. The trial court also dismissed the application for the release of exhibits which were allegedly taken away from the accused persons by the investigating officers. She was of the view that the application for the release of the said exhibits had been prematurely made as the hearing of the case had not even started. The trial court therefore ordered that the case be mentioned in a fortnight when the Attorney General would appear to indicate the steps he was taking in the matter.

The appellants being aggrieved by the decision of the learned trial magistrate, appealed to this Court. They duly served the Attorney General for the Republic with their petition of appeal and the AG was duly represented before me by Mr Okumu, learned senior principal state counsel.

Before this appeal came up for hearing, Mr Okumu on the 16th of February, 2001 appeared before the Chief Magistrate on a mention date and informed the learned magistrate in the presence of the counsel for the 1st appellant that he had instructions to take over the case from KACA. No further arguments were entertained on the matter as the learned Chief Magistrate referred the matter back to the trial court and by then this Court was seized of the matter. Perhaps it is necessary to state by way of background to this appeal, that before the KACA ruling was delivered by the Constitutional Court in Criminal Application No 302/2000, the appellants herein had also made an application for a constitutional reference under section 67(1) and section 84(3) of the Constitution before the learned trial magistrate.That application was opposed by Mr Wachanga who was then prosecuting the case for KACA. It was heard in full by the trial magistrate who reserved her ruling to await the outcome of the earlier constitutional reference before the High Court in Miscellaneous Criminal Application No 302 of 2000. After the decision was delivered, the learned trial magistrate went through it and on the 12th of January 2001 ruled as follows:

"In the light of the High Court ruling in Miscellaneous Criminal Application No 302/2000 which was conclusive on all issues raised by the defence term in its preliminary objection to this case, and which ruling is binding on this Court, I find no need to write any ruling on my own in the present application."

The trial court therefore fully adopted the decision of the Constitutional Court in Miscellaneous Criminal Application No 302 of 2000 and she ruled out any further reference to the Constitutional Court as the issues which had been raised before her had been fully covered by the Constitutional Court in the said decision. Pursuant to her ruling of 12th of January, 2001, learned counsel for the appellants now moved the trial magistrate *ex-parte* as I have already stated, to terminate the proceedings before her and acquit the accused persons.

This appeal therefore revolves round the decision of the Constitutional Court in HC Miscellaneous Criminal Application No 302/2000 wherein it was held as follows:-

"The end result of the foregoing is that, we uphold the submissions that the provisions of cap 65 establishing

KACA are unconstitutional and in conflict with the spirit and provisions of the Constitution especially section 26 thereof. It is also unconstitutional and contrary to the principle of separation of powers for KACA to be headed by a High Court judge; and finally that the sanction by the Attorney General to this

prosecution is not valid under the Constitution.

We bear in mind the provisions of section 26 of the Constitution but we are not a trial court, neither do we purport to exercise the powers of the Attorney General under section 26 of the Constitution. It now behoves the Attorney General to exercise his powers and mandate under section 26 of the Constitution and take whatever steps he may deem necessary to ensure that the ends of justice are met not only in the case where the applicants are the accused but in all other cases instituted by KACA in the Magistrate's Courts." Mr Avedi, learned counsel for the 2nd appellant quite admirably summed up their arguments in the Court below as follows:-

"Basically what the accused persons were telling the trial court is that in view of the decision of the Constitutional Court in the now celebrated HC Miscellaneous Criminal Application No 302/2000, the trial magistrate was entitled to set free the accused persons because the prosecuting body, KACA, had been declared to be illegal and therefore the proceedings before the Court were null and void following the decision of the Constitutional Court.

Following that decision, there can be no proper proceedings pending before the lower court. The AG cannot take over what is not there…….

We urge that this Court do make a declaration that the AG cannot take over what does not exist in law. There are no lawful charges pending before the Court below."

The submission of Mr Nyandieka, learned counsel for the 1st appellant before this Court was similar to that of Mr Avedi. He had this to say:

"I am urging the Court to hold that in view of the decision of the Constitutional Court in Cr Application

No 302/2000 and the decision of the Chief Justice in Criminal Application No 429/2000, I ask this Court to order that the charges pending before the lower court including the investigations carried out by KACA is a nullity.

The learned magistrate was not prepared to declare them as a nullity. I am urging this Court to overturn the decision of the Court below of the 9th of February, 2001 which is the subject of this appeal. The charge sheet clearly indicates that the investigations leading to the charges which were filed in Court were conducted by KACA and I am urging this Court to rule that such investigations are null and void. It is my submission that there is nothing which the AG can take over because all that KACA did was a nullity in law.

Once this Court declares the trial before the lower court as a nullity, then there will be nothing for the lower court to entertain. In effect, there will be no trial as the whole basis of the charge is a nullity. I am asking this Court to bar the AG from further prosecuting the appellants on what was investigated by KACA. They can conduct fresh investigations but not to rely on the investigations carried out by KACA."

Learned senior principal state counsel Mr Okumu who appeared for the Republic in this appeal submitted that he is on record in the Court below as having indicated that he had instructions from the Attorney General to take over the conduct in the proceedings in the Court below on behalf of the AG from KACA. Since the Republic has been cited as the respondent in these appeals, he has a right on behalf of the Attorney General to be heard on these appeals. His attempt to appear in the court below was obstructed by learned counsel for the 1st appellant on his preliminary objection that the Attorney General had no *locus standi* in the matter.

That issue was not resolved in the Court below as the appellants had moved to the High Court to challenge the ruling of 9th of February, 2001 and the lower court record had then been called by the superior court. Mr Okumu submitted that under the Criminal Procedure Code, (Cap 75, Laws of Kenya), the proper respondent in every criminal appeal is the Republic, represented by the Attorney General or someone instructed by him. He relied on the decision of *Rufus Ridolesbarger vs Brian Joh Robson* [1959]

EA 841 at page 844 letter H-1 where the Supreme Court had this to say.

"In the Kenyan case of *Nenes –v- R* (1935); 16 KLR 126, the Supreme Court of Kenya in its appellate jurisdiction, after considering the relevant sections of the Criminal Procedure Code, decided that a private prosecutor is not entitled to be heard on appeal, even if the Attorney General has intimated that he does not wish to be heard. In our opinion, this view is clearly right and under the Criminal Procedure Code, the proper respondent in every criminal appeal is the Crown (Republic), represented by the Attorney General or someone instructed by him."

I agree with the above proposition of law and observe that the present appeals were properly intituled as the Republic had been clearly shown as the respondent. The appeals having been filed against the Republic, the Attorney General is therefore entitled to representation and Mr Okumu, learned senior principal state counsel is therefore properly before this Court in these appeals even though the prosecution in the Court below were commenced by a body known as the Kenya Anti-Corruption Authority (KACA) with the consent of the Attorney General.

I wish to observe that even though KACA was declared by the Constitutional Court in Miscellaneous Criminal Application No 302/2000 to have been unconstitutionally established, the powers conferred on the

Attorney General under section 26(3) of the Constitution were not challenged and the same cannot be successfully challenged before any Court. That section provides as follows:-

"26 (3). The Attorney General shall have power in any case in which he considers it desirable so to do:

(a) to institute and undertake criminal proceedings against any person before any Court (other than a Court Martial) in respect of any offence alleged to have been committed by that person.

(b) to take over and continue any such criminal proceedings that have been instituted or undertaken by another person or authority; and

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority."

The Constitutional Court in the now celebrated KACA decision in Miscellaneous Criminal Appeal No 302/2000 was quite alive to the above constitutional powers conferred on the Attorney General and went on to state after declaring the prosecuting body known as KACA unconstitutional that:

"It now behoves the Attorney General to exercise his powers and mandate under section 26 of the Constitution and take whatever steps he may deem necessary to ensure that the ends of justice are met not only in the case where the applicants are the accused but in all other cases instituted by KACA in the Magistrates' Courts."

In a separate application Miscellaneous Criminal Application No 877 of 2000 which went before the Hon Chief Justice, Bernard Chunga in the exercise of his administrative duty to constitute a bench to hear a constitutional reference in which the prosecution by KACA was similarly being challenged in the Magistrate's Court, my Lord the Chief Justice quoted at length the decision of the Constitutional Court in Miscellaneous Application No 302/2000 and went on to make the following observation:-

"As I said in Criminal Application No 429 of 2000 on 6th of February, 2001, the ruling, findings, and decision of the three judges in Miscellaneous Application No 302 of 2000 remain and form part of the judicial laws and precedent in this country until and unless set aside through judicial process or by legislation. The rule of law requires that the ruling must be respected, given its due weight and followed in order to build a sound judicial and legal framework for this country."

I fully associate myself with the above observation by my Lord the Chief Justice. It follows therefore that

the learned trial magistrate, C W Githua correctly followed the decision of the Constitutional Court in Miscellaneous Application No 302 of 2000. That decision was applicable to all other cases in which KACA was still prosecuting in the subordinate courts. Nowhere in the decision was it stated that any trial in such cases where KACA was the prosecuting body should be terminated by the Courts and that the accused persons be acquitted as learned counsel for the appellants herein were urging the learned trial magistrate to do. That

Constitutional Court decision left room for the Attorney General to take whatever steps he deemed necessary with regard to the pending cases which were still being prosecuted by KACA in the subordinate courts. I think that learned counsel for the appellants were wrong when they attempted to shut out the Attorney General from being heard in the subordinate courts. The logical step in my view, was not to obstruct the

Attorney General from being heard in the matter. Indeed the decision of the Constitutional Court which counsel for the appellants were relying on, expressly gave the Attorney General the liberty to take whatever steps he deemed necessary in the exercise of his powers and mandate under section 26 of the Constitution.

I hold that the Attorney General has a right to be heard in all cases which had been instituted by KACA before it was declared as unconstitutional body by the Court. Equally entitled to be heard, are the accused persons or their duly appointed agents or counsel. It is only after hearing them, that the trial court could determine the issues raised one way or the other. If a party is not satisfied with such decision, he or she will be entitled to exercise his undoubted right of appeal. This is my understanding of the effect of the decision of the Constitutional Court in Miscellaneous Application No 302 of 2000 which I believe is quite often being misconstrued that the accused persons who were being prosecuted by KACA are now entitled automatically to be acquitted or discharged by the trial courts. That decision did not render the position of the Attorney General with regard to the KACA cases irrelevant or useless. Indeed, it is the Attorney General that had in the first instance donated to KACA the necessary consent to prosecute, and it cannot be said that after that consent was given he became *functus officio* since the Constitution empowers him even after giving any such consent to a private prosecutor or any authority to institute criminal proceedings in the name of the Republic, to take over such proceedings at any stage and to terminate the same before judgment is delivered.

The position which I have taken and I think rightly so, is that whether or not all the criminal proceedings which were being undertaken by KACA can be regarded as invalid by the Courts, the Attorney General on behalf of the Republic must first of all be heard in the matter. He has that residual right to be heard under the Constitution in every criminal prosecution whether instituted by him or not. The confusion that has arisen in this case and probably many others of like character, is that the parties have often failed to realize that even in a private prosecution, the prosecutor in law is the Republic at the instance of the private prosecutor, whoever he may be.

I therefore find no merit in those appeals. I uphold the findings of the learned trial magistrate on the two issues that had been raised before her. Accordingly, these appeals are dismissed.

I order that the case be remitted back to the learned trail magistrate for hearing. The appellants will therefore appear before the Chief Magistrate for mention on the 28th of May, 2001 for purposes of fixing a suitable hearing date.

It is so ordered.

Dated and delivered at Nairobi this 8th day of May, 2001

S.O. OGUK

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JUDGE