



**Lenasalia & 3 others v Director of Public Prosecutions (Appeal
E004 of 2023) [2024] KEHC 9552 (KLR) (17 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9552 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

APPEAL E004 OF 2023

F GIKONYO, J

JULY 17, 2024

BETWEEN

JOSEPHINE NAAMO LENASALIA 1ST APPELLANT

LINUS MILTON LENOLNGENJE 2ND APPELLANT

BENARD LTARASI LESURMAT 3RD APPELLANT

LILIAN BALANGA. 4TH APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

(Being an Appeal from the Ruling of the Chief Magistrate Court- Hon. Thomas. T. Nzyoki delivered on July 13, 2023, in the Milimani Anti-Corruption Case No. 3 Of 2019)

JUDGMENT

Interlocutory appeal

1. The Appellants were charged with the offence of abuse of office contrary to Section 46 as read with Section 48(1) of the *Anti-Corruption and Economic Crimes Act* No.3 of 2003. The 1st, 2nd, 3rd, and 4th Appellants were charged with the offence of abuse of office under Count VII, IX, XI, & XII respectively of the charge sheet dated April 5, 2019.
2. The particulars of the offence are stipulated therein.
3. The prosecution lined up 11 witnesses in support of its case.
4. After the prosecution closed their case, the trial court, Hon. Thomas T. Nzyoki, delivered a ruling dated July 13, 2023.



5. The Appellants were acquitted of count I of the offence in the charge sheet. However, the Court found that they have a case to answer on the offence of abuse of office.
6. Being dissatisfied by the trial court's ruling that they had a case to answer in relation to the charge of abuse of office, the Appellants filed this Appeal.
7. The amended Petition of Appeal dated July 27, 2023 cites the following 11 grounds of appeal;
 - i. That the Learned Trial Magistrate erred in law and in fact by failing to acquit the appellants from other counts in the charge sheet, despite acquitting the appellants of count 1 in the charge sheet without which other charges could not stand.
 - ii. That the Learned Trial Magistrate erred in law by failing to take into account the fact that for one to have abused public office the thing conferred must be in the nature of a benefit and in a Supporting Affidavit sworn by Wesley Nyamache the Principal Prosecution Counsel that there was no benefit earned from Oryx Service Station by the Appellants rather the County Government of Samburu got value for their money as per the tender for the supply of fuel to the said County
 - iii. That the Learned Trial Magistrate erred in law and in fact by failing note that there was no money lost despite the affidavit of the prosecution which stated that the County Government of Samburu confirmed that no money was lost with respect to the tender awarded to Oryx Service Station for supply of fuel to the said County.
 - iv. That the Learned Trial Magistrate erred in law and in fact by failing to take into account the Prosecution's sworn Affidavits that the County Government of Samburu confirmed that they got value for money following their request for supply of fuel from Oryx Service Station and evidence tendered from the all the Prosecution witnesses confirmed that all payments made by the Appellants. were for the fuel supplied.
 - v. That the Learned Trial Magistrate erred in law and in fact by failing to find defect in the charge sheet despite finding that the payment vouchers summary did not disclose the amounts derived from the Local Purchase Orders recovered from Oryx Service Station.
 - vi. That the Learned Trial Magistrate erred in law and in fact by finding that the Appellants have a case to answer despite the fact that they were not involved in the prequalification process of tender and the Oryx Service Station was already in business with the County Government of Samburu at the time of their appointment.
 - vii. That the Learned Trial Magistrate erred in law by failing to take into account that the Prosecution failed to show that the Conflict of Interest disclosure by the then County Governor, Moses Lenolkulal Kasaine, was not disclosed to the Appellants who took their various positions post the disclosure of the conflict of interest which took place in 2013, the 4th , 6th and 9th Appellants were appointed and commenced to work in 2014 and the 8th Appellant was appointed and commenced to work in 2018.
 - viii. That the Learned Trial Magistrate erred in law by failing to find that the key elements of abuse of office have not been established by the Prosecution to call for an explanation from the Appellants.
 - ix. That the Learned Trial Magistrate erred in law and fact by failing to take into account that no evidence was provided by the Prosecution that the Appellants were beneficiaries of or participants in the business of Oryx Service Station.



- x. That the Learned Trial Magistrate erred in law and fact by failing to take into account that the evidence tendered by the prosecution witnesses that the Appellants not only paid for fuel supplied from Oryx Service Station but to also other prequalified suppliers.
 - xi. That the Learned Trial Magistrate erred in law and fact by failing to find that the Appellants had no knowledge of the former Governor's, Moses Lenolkulal Kasaine, connection with Oryx Service Station.
8. The appellants prayed for the Appeal herein to be allowed, an order of not guilty and acquittal of the appellants of the charge in counts VII, IX, XI, and XII and their discharge thereof unless otherwise lawfully held, orders quashing the Counts VII, IX, XI, and XII which the Appellants are accused of, any other relief and/ or order that this Honourable Court may deem fit to grant.

Directions of the court

9. The appeal was canvassed by way of written submissions.

The appellants' submissions.

10. The appellants submitted that at all material times, the Appellants herein performed their duties to the best of their abilities and did not show any ulterior motive as alleged in the charge sheet. The duty of the Appellants was to ascertain that, that which was to be supplied has been supplied and as such they were to approve payments. The Vouchers and LPOs signed by the Appellants were for the fuel supplied and utilized by their departments, hence there was no loss of funds. Additionally, The Prosecution does not dispute this. The appellants further contend that the ODPP's Notice of Motion led by Counsel Nyamache, dated October 13, 2022, which was filed under Certificate of Urgency in a bid to withdraw the charges and stated on oath, that the county did not lose any money with respect to the tender awarded to Oryx Service Station and that the County got value for money. The appellants relied on *Ann Wangechi Mugo & 6 others V Republic e KLR (2022)*, section 2 of the *Anti-Corruption and Economic Crimes Act, 2003*, the lead Prosecution Counsel's supporting affidavit dated October 13, 2022, and ODPP's Notice of Motion led by Counsel Nyamache, dated October 13, 2022.
11. The appellants submitted that the Appellants herein did not use their office improperly neither did they confer benefits to themselves nor to any other person who was not entitled as payments made were squarely merited. The appellants contend that if there was an instant that they approved payment without certifying themselves that fuel had been supplied, then the ODPP would have been justified in charging them with abuse of office. Approving payment and/or signing vouchers cannot be termed as abuse of office unless the same was done without fuel being supplied. It should also be noted that there was a defect with the tabulation of the payment vouchers summary presented by the Prosecution. The Vouchers did not disclose the amounts derived from the Local Purchase Orders recovered from the Oryx Service Station.
12. The appellants submitted that the Prosecution did not adduce evidence that satisfies the elements of the crime of abuse of office. Additionally, there is no sufficient evidence that the appellants used their offices to confer benefits upon themselves or any other person to that regard; the Appellants performed their duties with all diligence without any ulterior motive. Moreover, the County Government got value for its money as to the supply of fuel. Such cannot be termed as abuse of office. The appellants contend that the Respondent has failed to tender any evidence to establish a prima facie case against the Appellants that they committed the offence of abuse of office and as such, this court should find that the Appellants have no case to answer due to discredited and insufficient evidence. an issue of no case to answer is an argument that the Prosecution has no prima facie case based on the evidence



tendered before the trial Court. The appellants relied on Criminal Procedure Code section 306 (1), Republic v Alex Mwanzia Mutangili [2017] eKLR, Republic v Alex Mwanzia Mutangili [2017] eKLR, and Republic v Alex Mwanzia Mutangili [2017] eKLR.

13. The appellants submitted that the appellants were not privy to any beneficial gains by the first accused persons, as per the charges. The 4th, 6th, and 9th Appellants were appointed and commenced to work in 2014 and the 8th Appellant was appointed and commenced to work in 2018. The declaration was made in 2013 before the appellants were employed. The appellants contend that the Appellants did not have any knowledge thereof as to the first accused involvement with Oryx Service Station. Additionally, the Appellants not only dealt with Oryx Service Station but also with other prequalified suppliers and there were no allegations that preferential treatment was accorded to Oryx Service Station. The price paid for fuel from Oryx Service Station and other suppliers was as per the prevailing market rates and there is no allegation that the fuel supplied to the County by Oryx Service Station was above the prevailing market price. The appellants relied on Erick Otieno Oyare v Republic [2022] eKLR, Declaration of Conflict of interest (dated April 5, 2013) and Ngida Kiloriti Meiseiki v Republic [2019] eKLR
14. The appellants submitted that the Prosecution failed to discharge its duty to prove the charge beyond any reasonable doubt as to the Appellants' involvement with Oryx Service Station as a service provider to the County Government. The Prosecution has also failed to tender the court with cogent evidence to establish that the Appellants committed the offence they were charged with. This offence therefore lacks actus reus and mens rea, the requirement that there must be conscious violations of procedures. The Appellants were not involved in any of the procurement processes neither were they aware of the 1st accused involvement with Oryx Service Station. The appellants therefore submit that the Appellants did not, in any way, confer benefits to the 1st accused trading as Oryx Service Station and the prosecution failed to discharge their duty as required by the law; to prove their case beyond any reasonable doubt.

The respondent's submission.

15. The respondent submitted that the appeal herein lacks merit and the same should be dismissed.
16. The respondent submitted that the basis of putting an accused on his defence is founded on the prosecution establishing a prima facie case. The respondent contends that the standard of establishing a case beyond reasonable doubt after the close of the prosecution's case is not required in determining whether or not the accused has a case to answer. This can only be done after an accused has been called to tender a defence. Only then can the court critically examine the evidence under a microscope. The respondent relied on Ramanlal Trambaklal Bhatt Vs Republic (1957) E.A. 332, and Anthony Njue Njeru V Republic [2006] eKLR Criminal Appeal 77 of 2006.
17. The respondent submitted that there is no right of appeal at the close of the prosecution's case. The respondent relied on Thomas Patrick Gilbert Cholmondeley V Republic [2008] eKLR, Criminal Appeal No. 116 of 2007 and Martin Makhakha V Republic [2019] eKLR.
18. The respondent submitted that this should shy away from delving into the matters of evidence in this appeal, as it is the trial court which is best equipped to test the veracity, accuracy, admissibility and reliability of the evidence including the claims made by the appellant. The respondent relied on Beatrice Ngonyo Kamau Vs DCI & Anor [2013] eKLR, and Alfred N Mutual V Ethics & Anti-Corruption Commission (EACC) & 4 Others [2016] eKLR.



ANALYSIS AND DETERMINATION

19. This being a first appeal, the duty of the court is to analyze and re-evaluate afresh the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify – See *Okeno –V- Republic* (1972) EA 32 and *Kiilu & Another –Vs- Republic* (2005) 1KLR 174.
20. This court has considered the grounds of appeal, the record of the lower court, and the submissions by the respective advocates for the parties.
21. This is an interlocutory appeal, despite attempts by the appellants to draw a connection between the charges subject of this appeal with those for which they were acquitted on the basis that they had not case to answer.

Issue

22. The issue, therefore, is whether there are exceptional circumstances to compel the court to determine the interlocutory appeal.

Interlocutory appeal: no case to answer

23. This is an appeal on an interlocutory decision of the trial court in which the trial court found the appellants have a case to answer and placed them on their defence.
24. In light of the jurisprudence around the subject of interlocutory appeal in criminal cases, the question the court should answer is, whether there are exceptional circumstances which compel this court to entertain the interlocutory appeal.

Interlocutory appeals generally

25. The subject of interlocutory appeals is treated as special as different jurisdictions have taken a variety of different approaches to the question of whether a party may appeal a ruling prior to final judgment disposing of all issues in a case. See (Christopher Staker, 1999¹).
26. The general rule is, to treat interlocutory appeal as an exceptional remedy, grantable in limited instances, such as, where the interlocutory order is dispositive of the main case.
27. Other instances include, where the interlocutory appeal is on a matter of great public importance which might become moot unless the appellate court deals with it at interlocutory appeal, and concerns an area or subject that is yet to settle in law. This prevents continuing uncertainty about the issue, and in certain circumstances helps in the consistent application of the law across cases in the same courts.
28. In other instances, resolution of a point of law in an interlocutory appeal, may render unnecessary a lengthy and costly trial on certain allegations of fact.
29. However, interlocutory appeals may be disruptive of the proceedings, particularly if there are many issues on which parties are seeking such appeals, and particularly once trial has actually commenced. It is not strange that, litigants have used interlocutory appeals to stall prosecution of criminal cases and other cases, generally. Such kinds of litigants have gained a new tag; the gamers.

¹ Appeal and Revision, Commentary on the Rome Statute of the International Criminal Court 869, 1031 (Otto Triffterer Ed., 1999)



30. It also holds true that, treating interlocutory appeal as exceptional remedy helps to avoid frivolous appeals which are brought primarily for the purpose of delay noting the wise adage; delay is always the ally of the offender, and denies justice.
31. Concerns also abound, that, an overly liberal regime which allows interlocutory appeals, may also overstretch the scarce resources of the appellate or review court- including time and personnel- particularly when a substantial number of interlocutory appeals are filed.
32. The foregoing is the general framework which guide regimes developed for interlocutory appeals.

Kenya jurisprudence on interlocutory appeal

33. Kenya jurisprudence on interlocutory appeals in criminal cases and reasons thereto, was first stated by the Court of Appeal in *Thomas Patrick Gilbert Cholmondeley vs. Republic*², thus:

“We would, nevertheless, sound a caution against the exercise of the undoubted right of appeal under section 84 (7) of *the Constitution*. First the fact that a trial Judge has made an adverse ruling against an accused person in a criminal trial does not and cannot mean that the Judge will inevitably convict. The Judge might well acquit in the end and the adverse ruling, even if it amounted to a breach of fundamental right, falls by the wayside and causes no harm to such an accused. The advantage of that course is that the long delay in the hearing of the charge is avoided and in the event of a conviction the matter can be raised on appeal once and for all. In the present appeal the delay has spanned the period from 25th July, 2007 to date, nearly one year. The trial before the learned Judge will, however, resume and go on to its logical conclusion. We think it is against public policy that criminal trials should be held up in this fashion and it is our hope that lawyers practising at the criminal bar will appropriately advise their clients so as to avoid such unnecessary delays. We would add that in future if such appeals are brought the Court may well order that the hearing of the appeal be stayed pending the conclusion of the trial in the High Court.”

34. The question on interlocutory appeal arising from criminal cases was subsequently pronounced upon with finality by the Supreme Court in the case of Joseph Lendrix *Waswa v Republic Sup. Ct. Petition No. 23 of 2019*³; thus: -

“94. Flowing from the above, we are of the view that the right of appeal against interlocutory decisions is available to a party in a criminal trial but should be deferred, and await the final determination by the trial Court. A person seeking to appeal against an interlocutory decision must file their intended Notice of Appeal within 14 days of the trial Court’s judgment. However, exceptional circumstances may exist where an appeal on an interlocutory decision may be sparingly allowed. These include:

- a. Where the decision concerns the admissibility of evidence, which, if ruled inadmissible, would eliminate or substantially weaken the prosecution case;
- b. When the decision is of sufficient importance to the trial to justify it being determined on an interlocutory appeal;

² [2008] eKLR

³ [2020] eKLR



c. Where the decision entails the recusal of the trial Court to hear the cause.”

35. The practice to defer interlocutory appeal, has spread to other limbs of law. For instance, in election petitions, interlocutory appeals are deferred until final determination of the election petition. The debate is only on terminology; whether this jurisdiction is deferred or sequential to the final decision.
36. Our jurisprudence, therefore, is that, interlocutory appeal is in exercise of the undoubted right of appeal, yet, it is to be deferred until the final decision of the trial court, except where exceptional circumstances, may justify the interlocutory appeal to be determined forthwith. Some view this as a kind of frictional formulation in some sense. But, the practice is founded on sound policy reasons.
37. Therefore, contrary to the submission by the respondent, there is a right of appeal on a ruling of case to answer, except the right is deferred to await the final judgment in the trial. Thus, the issue here is; whether there exist exceptional circumstances to warrant determination of this interlocutory appeal?
38. This court is alive to the fact that a finding that a person has a case to answer and calling such person to defense is not a final decision.

Conclusion and orders

39. Scarcely a challenge is made of a finding of a case to answer through an interlocutory appeal-primarily such challenge is made in the defense. An interlocutory appeal is ordinarily deferred to await the final judgment. However, an interlocutory appeal may be allowed where exceptional circumstances stated elsewhere in this decision, exist. The approach is premised on sound policy reasons; to avoid unnecessary delay caused by interlocutory appeal or micro-management of the trial. See the case of Joseph Nduvi Mbuvi v Republic [2019] e KLR that: -

“It is, however my view that the jurisdiction should not be invoked so as to micro-manage the Lower Courts in the conduct and management of their proceedings for the simple reason that if every ruling of the Lower Court and which went against a party were to be subjected to the revisionary jurisdiction of the Court, floodgates would be opened and the Court would be inundated with such applications thus making it practically impossible for the Lower Courts to proceed with any case to its logical conclusion. Dealing with the right to appeal in interlocutory ruling in a criminal matter, the Court of Appeal in Thomas Patrick Gilbert Cholmondeley vs. Republic [2008] e KLR,...

40. Upon evaluation of the appeal, the appellants have not brought their circumstances within the exceptional remedy to compel the court to hear and determine the interlocutory appeal. To be put on their defense does not mean the trial court will convict them. The appellants will also not suffer any prejudice by the trial taking its full course given it has in-built staple and constitutional protections and safeguards.
41. Accordingly, the grounds cited for appeal in the amended petition of appeal should be reserved for any appeal they may file should the appellants be convicted.
42. In the circumstances, the interlocutory appeal is stayed and the trial against the appellants shall continue to its logical conclusion.
43. The original trial court’s file be unfastened from this file and be remitted back to the trial court for effectual conclusion of the trial.
44. Orders accordingly.



**DATED, SIGNED, AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE
APPLICATION THIS 17TH DAY OF JULY, 2024**

F. GIKONYO M

JUDGE

In the presence of: -

Ms. Masaba for Morara for appellants

Mwaseru and Nyamache for respondent

Raymond C/A

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