



**Republic v Weke & 6 others (Anti-Corruption and Economic Crimes Revision E007 of 2024)
[2024] KEHC 8388 (KLR) (Anti-Corruption and Economic Crimes) (10 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8388 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES REVISION E007 OF 2024**

EN MAINA, J

JULY 10, 2024

BETWEEN

REPUBLIC APPLICANT

AND

NICHOLAS KARUME WEKE 1ST ACCUSED

ABRAHAM KIPCHIRCHIR SAAT 2ND ACCUSED

PETER OYODO OMENDA 3RD ACCUSED

CALEB INDATSIA MBAYI 4TH ACCUSED

BRUNO MUGAMBI 5TH ACCUSED

SILAS MASINDE SIMIYU 6TH ACCUSED

MICHAEL MAINA MBEVI 7TH ACCUSED

(Being a revision of the ruling delivered in ACC No. 20 of 2015 Republic v Nicholas Karume & Others delivered on 21st May 2024 by Hon. T.T. Nzyoki (Chief Magistrate))

JUDGMENT

1. The Applicant is aggrieved by the trial court’s ruling delivered on 21st May 2024 in ACC 20 of 2015: Republic v Nicholas Karume and Others where the court rejected its application to withdraw the charges against the 1st, 3rd and 5th accused persons under Section 87(a) of the Criminal Procedure Code.
2. The application is expressed to be brought under Article 165(6) and (7) of *the Constitution* as read with Section 362 of the Criminal Procedure Code which give this court the powers to call for and examine



- the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.
3. In the trial court the accused persons are charged corruption related offenses, to wit:-
 - a. 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](#) No. 3 of 2003, and
 - b. Inappropriate influence on Evaluation Contrary to Section 38(1)(b) as read with Section 38(2) (a) of the Public Procurement and Disposal Act.
 - c. Abuse of Office contrary to Section 46 as read with Section 48 of the [Anti-Corruption and Economic Crimes Act](#) No. 3 of 2003.
 4. The gravamen of this application is that upon the Applicant reviewing the evidence in its possession it has come to the realisation that it is not sufficient to sustain the charges against the accused person and that the application is not opposed by the Respondent although it is objected to by the Ethics and Anti-Corruption Commission (EACC). It is contended that the ruling delivered on 21st May 2024 dismissed the application on the basis that the application was not based on sound reasoning and was intended to defeat the judgement of the Supreme Court; that the trial court misapprehended the decision of the Supreme Court in the Consolidated Petition No. 39 of 2019 and 40 of 2019 Praxidis Namoni Saisi & 7 Others v DPP & 2 Others; that the refusal to grant leave to withdraw the case is a usurpation of the Respondent's mandate under Article 157(6) of [the Constitution](#) and further that the Applicant shall be gravely prejudiced by the ruling delivered which amounts to a wrongful exercise of the court's discretion. Further that it is in the interest of justice that the proceedings in ACC No. 20 of 2015 are stayed pending hearing and determination of this Application and that this application should be heard at the earliest.
 5. In the supporting Affidavit of Naomi Isoe, a Prosecution Counsel working with the Applicant, sworn on 10th June 2024 she concedes that the DPP/Applicant can only withdraw a criminal prosecution with the leave of the Court but contends that the court cannot withhold such leave on a whim, or place conditions on how or why the DPP can withdraw ought to do so. She contends that in exercising its discretion under Section 87 (a) and (b) of the Criminal Procedure Code, the court cannot control the prosecutor or appear to litigate and engage in a back and forth with the prosecution; she reiterates that the Applicant is gravely prejudiced by the ruling of 21st May 2024 as it was made in the wrongful exercise of the court's discretionary powers and contends that it is in the interest of justice that this application be allowed.
 6. This being a straight forward application I saw no need to summon the DPP and the accused persons to a hearing and so proceeded to consider the application without hearing the parties as I am entitled to do so under Section 365 of the Criminal Procedure Code. For that reason, other than the application, the grounds and supporting affidavit, there are no submissions for this court to consider.
 7. It is also instructive that in regard to this application this court did not have to call for the record of the trial court as the impugned ruling was availed to it and it is of itself sufficient for this court to make a determination.



8. Article 165(6) and (7) of *the Constitution* vest this court with supervisory jurisdiction over subordinate courts in the following terms:

“(6). The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7). For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

9. The provisions of Article 165 (6) and (7) are actualized in Section 362 of the Criminal Procedure Code which provides that:-

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

10. It is trite and there is no dispute that the DPP/Applicant has exclusive power to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence (Article 157 6(a). The DPP/Applicant is by the same Constitution vested with power to discontinue any criminal proceedings at any stage before judgment is delivered. The only fetter is that such withdrawal must be with the permission of the court as provided in Article 157 (8) which states: -

“(8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.”

11. It is therefore clear to me that whereas the DPP/Applicant has exclusive power to direct criminal proceedings that power is not absolute. There are instances where that power can be curtailed by the court in exercise of its discretion as provided in Article 157 (8) of *the Constitution* and Section 87 of the Criminal Procedure Code.

12. Moreover, Article 259(11) of *the Constitution* demands that the DPP/Applicant takes seriously the permission by the court. The sub-article states: -

“(11) If a function or power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation, with the approval or consent of, or on consultation with, another person, the function may be performed or the power exercised only on that advice, recommendation, with that approval or consent, or after that consultation, except to the extent that this Constitution provides otherwise.”

13. The argument that the court cannot stop the DPP from terminating a prosecution cannot therefore hold. However, since the power to grant permission to withdraw a case is discretionary the court is as is always the case, to exercise that discretion judicially. The point for determination therefore is whether or not the trial magistrate exercised his discretion judicially.

14. In this case it is alleged that the court did not exercise its discretion properly in rejecting the DPP/Applicant’s application to withdraw the criminal charges against the accused persons. It sought to



withdraw the same for reason that the accused persons had approached the Applicant and requested for a review of their case and that upon that review the DPP/Applicant had established that there was no sufficient evidence to sustain the charge. The trial magistrate considered that application in light of the decision of the Supreme Court in the case of *Saisi & 7 Others v Director of Public Prosecutions & 2 Others (Petition 39 and 40 of 2019)* where the accused persons were parties and where that court expressed itself as follows: -

“ Article 157(6) of *the Constitution* empowers the DPP to institute and undertake criminal proceedings against any person before any court in respect of any offense alleged to have been committed. Being one of the independent Constitutional offices established, Article 157(10) of *the Constitution* safeguards this independence by decreeing that the DPP shall not require the consent of any person or authority before commencement of proceedings, neither shall he be under the direction or control of any person. That is not to say that this power is absolute. Article 157(11) requires the DPP in exercise of his duties to have regard for public interest, interests of administration of justice and to prevent or avoid abuse of the legal process. . . Stemming from these provisions of the law, the courts have consistently held that whenever it seems that the DPP is utilizing criminal proceedings to abuse the court process, to settle scores or to put an accused person to great expense in a case which is clearly not otherwise prosecutable, then the court may intervene. . . The court found the following guidelines read alongside Article 157(11) of *the Constitution* to be a good gauge in the interrogation of alleged abuse of prosecutorial powers:

- i. Where institution/continuance of criminal proceedings against an accused person may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice;
- ii. Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceedings, e.g. want of sanction;
- iii. Where the allegations in the First Information Report or the complaint take at their face value and accepted in their entirety, do not constitute the offence alleged; or
- iv. Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.

It is our considered opinion that these are not issues concerning the propriety or otherwise of the decision by the DPP to charge them. These appear to be serious contentions of fact, evidence and interpretation of the law better suited to be examined by a trial court. From the circumstances of this case, we agree with the determination of the Court of Appeal that a distinction of the applicable procurement laws and whether the Appellants participated in the tender process hence liable to prosecution is a determination best arrived at upon consideration of viva voce evidence and through cross examination of witnesses.

Consequent upon our conclusion above, we finally order that;

- a. The 1st Appellant’s petition of Appeal dated October 25, 2019 and lodged on even date and the 2nd to 8th Appellants’ Petition of Appeal dated October 25, 2019 and lodged on October 29, 2019 are hereby dismissed.



- b. Anti-Corruption Case No 20 of 2015 before the Chief Magistrates' Court in Milimani to proceed and be heard on priority basis.
 - c. Each party to bear its own costs.”
15. As can be seen from the decision of the Supreme Court, when the accused persons approached the courts claiming that the DPP/Applicant was abusing its decision to charge by bringing baseless charges against them, the DPP/Applicant vehemently resisted their application and stated that it had credible evidence against them. The Supreme Court being persuaded that there were indeed contested issues of fact which were best left to the trial court to determine, dismissed the appeal by the accused persons and remitted the case back to the trial court for hearing. I have perused the ruling of the learned magistrate and I am not persuaded that he misapplied the decision of the Supreme Court. Like the trial magistrate I dare to ask what has changed now? Why is the DPP/Applicant speaking from both sides of his mouth? Now we have a case now we don't.
16. Whereas I agree with the DPP/Applicant's argument that the decision of the Supreme Court does not preclude it from bringing an application to withdraw the case, I find that the conduct of the DPP/Applicant looked at in totality in both cases raises suspicion that the application in the trial court was not made in good faith.
17. The trial magistrate delivered a reasoned ruling and clearly the refusal to grant permission was not done on a whim. The magistrate exercised his discretion as required under the law and I see no illegality, irregularity or impropriety in the order or the proceedings as would warrant this court to interfere.
18. My so finding is lent support by the decision of Ngugi J, as she then was, in the case of Republic v Muneh Wanjiku Ikigu [2016] eKLR where it was held that:-
- “The bottom line is that the power to withdraw cases must, under the Kenya Constitution, 2010, be exercised with due regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the court process. . . The power to initiate or withdraw cases can no longer be used whimsically and arbitrarily as a tool to oppress individuals or achieve goals other than those in the administration of justice.”
19. The upshot is that I find no merit in this application. Let the criminal case be heard to its final conclusion and let it be left to the trial court to determine whether or not there is sufficient evidence to support the charges. That is what public interest would dictate. The ruling of the trial court is upheld. The application is dismissed.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 10TH DAY OF JULY 2024.

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E N MAINA
JUDGE

