



Barno & 4 others v Director of Public Prosecution (Anti-Corruption and Economic Crimes Revision E005 of 2023) [2023] KEHC 18788 (KLR) (Anti-Corruption and Economic Crimes) (22 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18788 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES REVISION E005 OF 2023**

EN MAINA, J

JUNE 22, 2023

BETWEEN

**DAVID SOME BARNO 1ST APPLICANT
ESTHER CHEBET BARNO 2ND APPLICANT
DASAHE INVESTMENT LIMITED 3RD APPLICANT
KEIBUKWO INVESTMENT LIMITED 4TH APPLICANT
OLOMOTTI ESTATE LIMITED 5TH APPLICANT**

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

(Being an application for revision against the Ruling of Hon. E K. Nyutu SPM delivered on 22nd May 2023 in Anti-Corruption Chief Magistrates' Court at Nairobi, ACC No. 33 of 2018; Republic vs. Mohamed Swazuri Abdalla and 16 others)

JUDGMENT

1. The applicants herein being dissatisfied with the ruling of the trial court that rejected the Respondent's application to withdraw the criminal prosecution facing them in Chief Magistrates Court ACC No. 33 of 2018 filed this revision application seeking to have the ruling overturned.
2. The application is made by way of a Notice of Motion dated June 9, 2023 and is supported by the affidavit of David Some Barno (the 1st Applicant) sworn on even date. It is expressed to be brought under articles 10, 48, 157(6)(c), 157(11) and 159 of the *Constitution* and sections 87 (a), 362 and 364(1) of the *Criminal Procedure Code*.



3. The grounds for the application are stated to be that:-

- a. The present application relates to ongoing proceedings before the Anti-Corruption Chief Magistrates' Court at Nairobi, Anti-Corruption Criminal Case. No. 33 of 2018 Republic vs. Mohamed Swazuri Abdalla and 16 Others. The Applicants herein are the 13th, 14th, 15, 16th and 17th Accused, respectively. The hearing before the trial court (The Honourable E.K Nyutu SPM) is slated to continue on 1st September 2023.
- b. The Office of the Director of Public Prosecution, the Respondent herein, filed an Application dated March 29, 2023 seeking withdrawal of the charges against the Applicants herein, under provisions of section 87(a) of the *Criminal Procedure Code* (Chapter 75 of the Laws of Kenya).
- c. The basis of the respondent's application was that upon further review of the evidence, the respondent determined and decided to withdraw the charges against the Applicants under section 87(a) of the *Criminal Procedure Code*. More prosaically, the Director of Public Prosecution exercised his independent decision not to prosecute the Applicants.
- d. However, by a Ruling dated March 22, 2023, the trial Court, (the Honourable Magistrate E.R Nyutu SPM) dismissed the application of the Director of Public Prosecution, and essentially forced/compelled the Director of Public Prosecutions to prosecute the Applicants.
- e. The decision of trial court is openly per incuriam. The trial court misinterpreted the tenor of provisions of article 157(11) of *the Constitution* of Kenya, 2010, in exercise of the mandate under article 157(6) of *the Constitution*.
- f. The basis of the trial Court's determination was principally that the application for withdrawal of charges was being made after five (5) years and after 23 witnesses had testified. In this construct the. Honourable Court erred in the following basic respects:
 - i. Under article of the *Constitution*, the Director of Public Prosecutions has jurisdiction to terminate prosecution any time before judgment is delivered.
 - ii. Article 157(6)(c) does not consider longevity of time and or number of witnesses,
 - iii. The Director of Public Prosecutions/ is independent.
 - iv. The Director of Public Prosecutions cannot be compelled to prosecute the Applicants.
 - v. The reasons to warrant a withdrawal are supposed to satisfy the Director of Public Prosecutions, not satisfy the Court, because the or not to prosecute is the independent decision of the Director of Public Prosecutions, not the Court's.



- g. It is thus imperative that this Honourable Court under the provisions of article 165(6) of the *Constitution* and section 362 and of the *Criminal Procedure Code*, steps in to redress this violation of the Respondent's mandate by the trial court and preserve the integrity of the *Constitution*. It is critical for the Honourable Court to render itself on the matter before next hearing date on 1st September 2023r and or order reservation of any Ruling of the trial court.
 - h. It is in the interest of fair administration of justice and the Rule of Law that the application filed herewith is admitted urgently for the urgent reliefs thereof to safeguard and -obviate violation of the Applicants' fundamental rights and Legitimate expectation. The Applicants have been forced to face a prosecution, where the Prosecutor has determined that they do not deserve a prosecution, and should be discharged.”
4. The above grounds are reiterated in the supporting affidavit.
 5. This being an application for revision which is fairly straight- forward this court saw no need to hear the parties (see section 365 of the *Criminal Procedure Code*) which states:-
 - “ 365. Discretion of court as to hearing parties
 - No party has a right to be heard either personally or by an advocate before the High Court when exercising its powers of revision:
 - Provided that the court may, when exercising those powers, hear any party either personally or by an advocate, and nothing in this Section shall affect Section 364(2).”
 6. The decision not to hear the parties is more especially because the application is made by the accused persons themselves and as such no adverse ruling is envisaged to be made against them. Moreover, what is impugned is the decision of the trial court but not the decision of the Respondent. The Respondent being the party that made an application that was dismissed by the court it would have been a misnomer for this court to ask it to respond to the application.
 7. The genesis of this application is the Notice of Motion dated March 29, 2023 which the Deputy Director of Public Prosecutions Jacinta Nyamosi filed in Chief Magistrates court ACC No. 33 of 2018 which has seventeen accused persons including the Applicants herein. By the Notice of Motion, the Deputy Director of Public Prosecutions sought leave to withdraw the charges against the 13th,14th,15th,16th and 17th accused persons now the Applicants herein.
 8. The gravamen of the application was that the Director of Public Prosecutions had reviewed the evidence in its possession and come to the conclusion that it was necessary to review the decision to charge the applicants and it was therefore in the interest of justice that permission to withdraw the charges be granted.
 9. The trial Magistrate upon considering the application delivered a reasoned ruling dated May 22, 2023. In which it dismissed the application, trial magistrate having come to the conclusion that it did not meet the threshold set out in article 157 (11) of the *Constitution*; that it was neither in the public interest or in the interest of the administration of justice to withdraw the charges; that the public had a stake in the case as the same involved public funds and the public interest behooved the case to be heard on merit and the innocence or guilt of the accused persons be established on sound principles of law; that the timing of the discretion to make the application to withdraw the charges five(5) years



and twenty three (23) witnesses later and at the tail end of the prosecution case does not fall within the rules of reason and justice as envisaged in settled precedent; that it is the legitimate expectation of the public to see justice is done and the case must therefore come to a logical and meritorious conclusion where any acquittal or conviction is purely on the basis of evidence placed before the court and not on any other short cut. Further that it had not been demonstrated to the court that the charges against the applicants are an abuse of the court process; that it is curious that the new evidence which suddenly emerged at the tail end could not be placed before the court so that it could make an independent decision; that the timing of the application was an abuse of the court process as it had a direct bearing on the legal maxim that justice must not only be done but it must be seen to be done.

Analysis and determination

10. The power of the Director of Public Prosecutions to terminate a prosecution derives from section 87 of the Criminal Procedure Code and article 157 (6) (c) of the *Constitution* which provide:-Section 87 of the Criminal Procedure Code:-

“ 87. Withdrawal from prosecution in trials before subordinate courts.

In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Director of Public Prosecutions, at any [Rev. 2012] *Criminal Procedure Code* cap. 75 C44 - 38 [Issue 1] time before judgment is pronounced, withdraw from the prosecution of any person,”Article 157 of the *Constitution*: -

“ 157

(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may-

(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).”

11. Whereas the Director of Public Prosecutions does not exercise his powers or functions under the direct or control of any person or authority both section 87 of the Criminal Procedure Code and article 157 (8) of the *Constitution* requires him to seek the consent/permission of the court to discontinue a prosecution. Sub-article (8) states:-

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

12. The above being the position the power to terminate/withdraw a criminal case even under Section 87 of the *Criminal Procedure Code* may only be exercised in accordance with article 157 (8) of the *Constitution* and no prosecution can be determined without the permission of the court.

13. Article 157(8) of the *Constitution* does not detail the conditions which a court must consider when faced with an application for withdrawal by the Director of Public Prosecution and such leave is therefore in the discretion of the court and whereas there is no fetter to that discretion it is trite that the discretion of a court must always be exercised judicially. The discretion is not to be exercised unreasonably.



14. In this case trial court considered the application by the Director of Public Prosecution and in the exercise of that discretion it rejected the application. What this court is being invited to do therefore is to determine whether the trial magistrate exercised her discretion correctly and to interfere with that exercise of discretion if it finds otherwise.
15. It has long been established that an appellate court will not interfere with the discretion of the trial court “unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a wrong, decision that was erroneously or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been a misjustice;...”(see the case of *Mbogo & another v Shah* [1968] EA P.93).
16. The Supreme Court of Kenya has reiterated the above principle in several cases. In the case of *Apungu Arthur Kibira v Independent & Electoral Boundaries Commission & 3 others* [2019] eKLR the court stated:-

“(35) The decision by the Court was made in exercise of its discretionary powers under Rule 5 of the Rules aforesaid. In essence, the Court of Appeal had the mandate to evaluate the matter before it, consider the mitigating circumstances and make a determination that was, in its opinion, just, considerate and fair. The limitation to this court’s interference with the exercise of judicial discretion was well expressed in *Daniel Kimani Njibia v Francis Mwangi Kimani & another* SC Application No 3 of 2014; [2015] eKLR (*Daniel Kimani*) where this court stated thus [paragraph 21]:

“Not all decisions of the Court of Appeal are subject to appeal before this court. One category of decisions we perceive as falling outside the set of questions appealable to this Court, is the discretionary pronouncements appurtenant to the Appellate Court’s mandate. Such discretionary decisions which originate directly from the Appellate Court, are by no means the occasion to turn this court into a first appellate court, as that would stand in conflict with the terms of the *Constitution*.”

.....

(37) It is also the law that discretionary power is to be exercised in a manner that is not capricious or whimsical, and that judicial officers to whom this power is donated should exercise the same judiciously. That is why, and we agree, with *Stanley Kang’ethe Kinyanjui v Toney Ketter & 2 others* Civil Application No Nai 31 of 2012, where it was stated that a responsibility is bestowed upon Courts to ensure that the exercise of the discretionary powers donated to them is not exercised in any manner that would prejudice any party coming before it. In the context of the present appeal, therefore, the Appellant challenges and faults the Court of Appeal in the exercise of its discretionary power under Article 159(2)(d) of the *Constitution* as read with Rule 5 aforesaid. He thus alleges that the Court of Appeal improperly exercised its powers by dismissing the appeal on a technicality or procedural defect without considering its merits.

.....



- (39) We reiterate that in an appeal from a decision based on an exercise of discretionary powers, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious. This was as determined in the New Zealand Supreme Court case of *Kacem v Bashir* (2010) NZSC 112; (2011) 2 NZLR 1 (Kacem) where it was held [paragraph 32]:

“In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case, the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.”

- (40) Further, in *Deynes Muriithi & 4 others v Law Society of Kenya & another*, SC Application No 12 of 2015; [2016] eKLR this court stated inter alia that the Court may only interfere with the exercise of discretion by another Court where there is plain and clear misapplication of the law.”

17. I have perused the impugned ruling. The trial magistrate addressed her mind to the principles which would have correctly guided her in determining whether or not to grant permission to the Director of Public Prosecutions to terminate the case as against the Applicants. I am unable to find that the trial magistrate’s discretion was exercised whimsically or unreasonably or that she took into account an irrelevant factor or ignored a relevant factor. It is also my finding that the Applicants shall not suffer grave injustice as the trial court is enjoined to ensure that their right to a fair trial is observed until the end of the trial. Moreover, in the event that the charges against the Applicants are not proved to the required standard then the court will have no choice but to acquit them.
18. Moreover, in considering an application for revision under section 382 of the *Criminal Procedure Code* and bearing in mind that this is not a general appeal, this court is enjoined to satisfy itself only as to the correctness, legality or propriety of the finding of the trial court. I have not seen anything incorrect, illegal, improper or irregular about the decision of the trial magistrate as would warrant this court to interfere with her decision.
19. In the upshot I find no merit in this application and the same is dismissed.

SIGNED, DATED AND DELIVERED ELECTRONICALLY ON THIS 22ND DAY OF JUNE 2023.

E N MAINA

JUDGE

