



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL APPEAL CASE NO. E055 OF 2020**

**NOKIA CORPORATION.....1<sup>ST</sup> APPELLANT**

**ROSCHIER ATTORNEYS LTD.....2<sup>ND</sup> APPELLANT**

**RAJEEV SURI.....3<sup>RD</sup> APPELLANT**

**AAPO SAARIKIVI.....4<sup>TH</sup> APPELLANT**

**VERSUS**

**TECHNOSERVICES LIMITED.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTION.....2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATIONS.....3<sup>RD</sup> RESPONDENT**

**NOKIA SOLUTIONS AND NETWORK KENYA LIMITED.....4<sup>TH</sup> RESPONDENT**

**RULING**

The 4 appellants, **NOKIA CORPORATION, ROSCHIER ATTORNEYS LTD, RAJEEV SURI** and **AAPO SAARIKIVI**, filed this appeal on 21.12.2020, being an appeal against the finding of the Hon. Esther K. Kimilu (PM) in Chief Magistrate Criminal Application No. 4465 of 2019 delivered on 8.12.2020 simultaneously filed with the appeal was a Notice of Motion application (wrongly dated 17.9.2020). The main prayers in the said motion were ordered of stay of execution of the Honourable Principal Magistrate as above stated. The appellant/applicants also prayed for costs.

Upon service of the said application, the respondents duly filed their replying affidavits. By agreement of the parties, both the applicants and the Respondents proceeded to file written submissions.

However, before the said application could be heard inter parties on its merit, the appellants filed a Notice of withdrawal of the Appeal and the Notice of Motion Application dated 17.12.2020. The same was duly served upon the Respondents.

When the parties appeared before the court on 25.5.2021, and after brief observations on the issue of the withdrawal, it came out clearly that the withdrawal of the appeal and the application could not be challenged. The reasoning herein was that since the appeal and the application belonged to the appellants who filed them before the court, it is also their right to have the same withdrawn. That a party cannot be compelled to proceed with a case he has abandoned and does not wish to pursue any further. This court found this reasoning sound and left the issue of withdrawal at that.

The 1<sup>st</sup> respondent however, while conceding that it would be a futile exercise to challenge the withdrawal, urged the court to allow the same, subject to costs being awarded to the 1<sup>st</sup> Respondent. The appellants and the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents were of a contrary position, thereby necessitating that submissions be made on the issue of costs.

This ruling is therefore on whether or not the 1<sup>st</sup> Respondent is entitled to an award of costs in this matter.

Mr. Kuyo, appearing together with Mr. Monari for the appellants submitted that these are criminal proceedings which do not attract costs, and that the advocate's remuneration order does not provide for costs in criminal cases. That as appellants, they are the ones who were

dragged to court. It was urged that the 1<sup>st</sup> Respondent must be ordered to take care of his costs.

For the state, Mr. Mutuma took the position that the DPP would not be pursuing any costs. He pleaded that this matter be put to rest.

For the 1<sup>st</sup> Respondent, Mr. Ataka submitted that the appellants cannot run away from the fact that they appealed, and that it costs money to defend an appeal. That costs ordinarily follow the cause. That the appellants must be made to know that there are consequences of subjecting the 1<sup>st</sup> Respondent to months of preparation.

Counsel conceded that the Criminal Procedure Code is silent on the issue of costs, but the court ought to find that a party should be made to bear costs especially on private prosecution. That the Advocate's Act provides for costs at Rule 49(a) of the Remuneration order.

It was further submitted that there are costs awardable under section 171 of the Criminal Procedure Code and that by parity of reasoning, the court should award costs in this matter, which the Deputy Registrar could then proceed to tax.

To counter these submissions, counsel for the appellants submitted that Rule 49(a) of the advocates Remuneration Order deals with advocate and client costs, and not party and party costs. And that costs under section 171 of the criminal Procedure Code, are costs additional to a penalty imposed upon a conviction. And that under the section, a private prosecutor may be ordered to pay the accused.

I have considered the 3 sets of submissions. A short history of this matter would help in the determination of the issue herein. This matter commenced when the 1<sup>st</sup> Respondent filed an application before the magistrates' court (Misc. Cr. Appl. No. 4465/2019) seeking leave to institute private criminal prosecution proceedings against the 4 appellants. By a ruling delivered on 8.12.2020, the Hon. Esther K. Kimilu Principal Magistrate, granted the prayer for leave. Aggrieved, the appellants filed for appeal and the application for stay. It is this appeal and the application that have been withdrawn by the appellant and on which the 1<sup>st</sup> Respondent now seeks costs.

It must be stated from the onset that the proceedings that the 1<sup>st</sup> Respondent sought to commence against the appellants, though as a private prosecutor, were criminal in nature. The application for leave was brought to court under section 88 of the Criminal Procedure Code, Cap 75 Laws of Kenya. And in granting the said leave, the learned principal magistrate was clearly persuaded that the 1<sup>st</sup> Respondent had met the requirements for grant of leave to institute private criminal proceedings as laid down in the celebrated case of **Floriculture International Limited and others Versus Attorney General (NAI) Misc. Civ. Appl. No. 114/1997**, that;

- i. THAT a report of the alleged offence was made to the Attorney General or the police or other appropriate public prosecutor, to accord either of them a reasonable opportunity to commence or take over the criminal process, or to raise objection (if any) against prosecuting; that is to say, the complainant must firstly exhaust the public machinery of prosecution before embarking on it himself; and***
- ii. THAT the Attorney General or other public prosecutor seized of the complaint has taken a decision on the report and declined to institute or conduct the criminal proceedings, or that he has maintained a more than usual and unreasonable reticence, and either the decision or reticence must be clearly demonstrated, and,***
- iii. THAT the failure or refusal by the state agency(ies) to prosecute is culpable and, in the circumstances, without reasonable cause, and that there is no good reason why a prosecution should not be undertaken or persuaded, and***
- iv. THAT unless the suspect is prosecuted and prosecuted at the given point of time, there is a clear likelihood of a failure of public and private justice, and***
- v. THE basis for the locos standi, such as that he has suffered special and exceptional and substantial injury or damage, peculiarly personal to him and that he is not motivated by malice, politics, or same ulterior considerations devoid of good faith, and***
- vi. THAT demonstrable, grounds exist for believing that a grave social evil is being allowed to flourish unchecked because of the inaction of a pusillanimous Attorney General or police force guilty of a capricious, corrupt or biased failure to prosecute, and that the private prosecution is an initiative to counter act the culpable refusal or failure to prosecute or to neutralize the attempts of crooked people to stifle criminal justice”.***

Article 157(6) of the constitution of Kenya bestows on the office of the Director of Public Prosecutions the constitutional duty to institute and undertake Criminal prosecution against any person. This is the constitutional duty of the office of Director of Public Prosecutions in as far as public prosecution is concerned. The constitution at sub-section(b), gives the Director of Public Prosecutions the authority to take over such other prosecutions that may have been instituted or undertaken by another person or authority.

Apart from the constitution, a number of statutes avails the right to institute or undertake private prosecution of criminal cases. One such statute is the Criminal Procedure Code (section 88) as already shown above. Second is the office of the Director of Public Prosecution, Act No. 2 of 2013, which at section 28 expressly acknowledge the right of any person to institute private prosecution. The one element that flows through this is that the Director of Public Prosecutions would in all instances of such private prosecution reserve the right to take over the prosecution of such cases.

The deduction I get from this is that a private prosecutor assumes the role of a public prosecutor in those cases where leave has been granted. His work is synonymous with the work of the public prosecutor in as far as both their roles aim at proving criminal liability or culpability of the person accused or arraigned before the court on a criminal charge. And this synonymity in the roles of the private and public prosecutor is

confirmed by the fact that the Public Prosecutor would always be obligated, if he so wishes, to take over the conduct of cases instituted and prosecuted by the private prosecutor. Playing the same role as the public prosecutor, the private prosecutor must be deemed to enjoy, as I hereby find, only the same rights as enjoyed by the public prosecutor.

The issue therefore for determination herein, is whether the 1<sup>st</sup> Respondent is entitled to award of costs on the withdrawn petition of appeal and the application for stay. I must say that the 2 sides did not accord this court the opportunity of considering in depth submissions on this score. I however find it proper to consider how the courts have dealt with the issue of costs in criminal cases.

In the case of *Katuwa Munyao Versus Edward Jacob (1982)eKLR*, the Hon. Justice Chesoni, (as he then was, considered the issue of costs under section 32 of the penal code. the section reads;

***“Subject to limitations imposed by section 171 of the criminal procedure code, a court may order any person convicted of an offence to pay the costs of and the incidental to the prosecution or any part thereof.”***

Section 171(1) of the criminal procedure code directs that a court may order a person convicted of an offence to pay to the public or private prosecutor, such reasonable costs in addition to the penalty imposed. And at sub-section (2) in case of an acquittal, the court may order the private prosecutor to pay the acquitted accused person such reasonable costs. The proviso to these 2 scenarios is that such costs would not exceed Kshs.20,000/=.

In dealing with this issue, the Hon. Justice Chesoni (as he then was), dismissed he plea for costs on the basis that the convicting court did not specifically state the sum awarded thus;

***“The requirement to specify the sum awarded being statutorily mandatory, failure to specify such a sum in the conviction or order is fatal to the award as it renders the award null and void and of no effect”.***

The court proceeded to nullify the award of the deputy Registrar after a successful private prosecution.

It is worth noting at this stage that both the Penal Code (section 32) and the Criminal Procedure Code (section 171) only give mention to costs upon successful conviction or acquittal. In our present, the prosecution has not achieved any conviction or acquittal.

In the more recent case of *Republic Versus AKK (2021)eKLR*, the Honourable Mr. Justice J. M. Bw’onwon’ga sitting at the High Court of Kabarnet, dealing with a situation such as herein, held;

***“It is equally important to point out that where a prosecution is brought by either a public or private prosecutor, the proceedings are in fact brought on behalf of the Crown (now the Republic), and the common law principle is applicable that no costs should be allowed unless in exceptional circumstances are shown.”***

The Honourable Judge went on to castigate the “borrowing of the practice that is followed in civil trials into criminal trials which is not authorized in law”

The same Judge in *Robert Kariuki Njagi Versus John Njagi Kiragu (2018)eKLR*, Embu again held;

***“In very exceptional circumstances that an order for payment of costs made in criminal matters .... The same is not based on any statutory law.”***

This court has not been shown any statutory provision on award of costs in criminal cases in the manner in which the 1<sup>st</sup> Respondent has pleaded. The court has also not been convinced on the existence of any extra ordinary circumstances in this case that would warrant grant of any costs to the 1<sup>st</sup> Respondent. To this extent, I agree with the decisions of the learned Judges in the cases above.

So, is the 1<sup>st</sup> Respondent entitled to costs under the Advocates Act, and the Remuneration order. The court was referred to Rule 49 of the Remuneration order as the enabling subsidiary legislation. With respect Rule 49A, on costs in criminal cases read;

***“Costs in criminal cases, whether in the High Court or subordinate courts, if not agreed or ordered, shall be taxed as between Advocate and client under schedule 5”***

The Remuneration order therefore provides for costs in criminal cases as costs between Advocate and client. The court has not been shown any provision in the Advocates Act or the Remuneration order allowing for an award of costs to a prosecutor, public or private in criminal cases. On my part, I cannot fathom the practicability or the reasonableness of the prosecutor in criminal cases being awarded costs whenever they present anyone for trial in court. And the situation is not different from that in our instant cases since the appeal and the application for stay withdrawn by the appellant were a consequence of the action of the 1<sup>st</sup> Respondent itself of seeking to privately prosecute the appellants.

I accordingly therefore find that the 1<sup>st</sup> Respondents plea for costs herein is not based on any law. The same lacks merit and is dismissed.

For avoidance of doubt, and in view of the Notice of Withdrawal filed herein and dated 3.5.2021, this petition of appeal and the Notice of motion dated 17.12.2020 are hereby marked as withdrawn. Orders accordingly.

**D. O. OGEMBO**

**JUDGE**

**6.7.2021.**

Court:

Ruling read out in open court (on-line) in the presence of Mr. Ataka for the 1<sup>st</sup> Respondent, Mr. Ndung'u holding brief for Mr. Kuyo for the appellants and Ms. Chege for the state (2<sup>nd</sup> and 3<sup>rd</sup> Respondents)

**D. O. OGEMBO**

**JUDGE**

**6.7.2021.**

**Mr. Ataka:**

We seek leave to appeal. We also ask for certified copies of the proceedings, ruling and the order.

**Mr. Ndungu:**

We leave it to the court.

**Ms. Chege:**

We only request for a certified copy of the ruling.

**Court:**

It is hereby ordered as follows:-

*i. Leave to appeal is granted.*

*ii. Certified of proceedings, ruling and order to be prepared in same to be supplied to the parties as requested upon payment of the requisite fees.*

**D. O. OGEMBO**

**JUDGE**

**6.7.2021.**