REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC REVISION CASE NO. 2 OF 2018

(Formerly Meru HC Rev. No. 173 of 2018)

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST APPLICANT

ETHICS & ANTI CORRUPTION COMMISSION....2ND APPLICANT

V E R S U S

SALESA ADANO ABUDO .....RESPONDENT

(Being revision from the ruling delivered 12th February 2018 by honourable SM Mungai CM Isiolo Law courts)

RULING

Factual Background

1. The Respondent herein Salesa Adano Abudo was on 25th July 2013 arraigned before Isiolo CM's Court facing two counts relating to corruption. Count 1, he was charged of giving a bribe contrary to Section 5(2) as read with Section 18(1)(2) and (3) of the Bribery Act NO. 47/2016. Particulars were that, on the 8th July 2017, he promised to give Justus Nzomo the Independent Electoral and Boundaries Commission Coordinator for Saku Constituency in Marsabit County Kshs. 200,000/- as an inducement so as to appoint some persons he preferred to be appointed as Presiding Officers during the forthcoming general elections while knowing the acceptance of the promise would constitute improper performance of his duties.

2. Count 2; he was charged with giving a bribe contrary to Section 5(1) as read with Section 18(1)(2) and (3) of the Bribery Act No. 47 of 2016. Particulars were that; On the 11th day of July 2017, at about 2.00pm at Galaxy Hotel in Isiolo Town within Isiolo County he gave Justus Nzomo, the Independent Electoral and Boundaries Commission Coordinator for Saku Constituency in Marsabit County Kshs. 200,000/- as an inducement so as to appoint some persons he preferred to be appointed as presiding officers during the forthcoming general elections while knowing that acceptance of the money would constitute improper performance of his duties.

3. Having returned a plea of not guilty, the respondent was released on a personal bond of Kshs. 300,000/- with one surety of like amount or cash bail of Kshs. 20,000/-. Hearing was then fixed for 13th September 2017.

4. On 13th September 2017, Mr. Kaunde counsel for the respondent (accused) expressed his disappointment that he had not been supplied with witnesses' statements and exhibits as directed. prosecution admitted their failure justifying the delay with the submission of the file to the DPP for consent. The court then fixed the matter for mention on 25th October 2017. From the file record, the matter was next mentioned on 30th October 2017 and not 25th October 2017. On that day, prosecution applied for a further mention date arguing that the file was still with the DPP. The case was however fixed for hearing on 20th December 2017. Prosecution was directed to supply witnesses' statements two (2) weeks prior to the hearing date.

5. On 20th December 2017, again Mr. Kaunde complained that he had not been supplied with witnesses' statements and exhibits. He therefore applied to have the respondent (accused) discharged or acquitted. On their part, prosecution indicated that they had not received the file from the DPP. They again requested for one more month to comply with court's directions.

6. The court allowed an adjournment and fixed a mention date for 31st January 2018 to enable the prosecution report on the position of exhibits and then fix hearing date. The file was however mentioned on 25th January 2018 and rescheduled to 12th February 2018 owing to the trial court's engagement in Budget Workshop on 31st February 2018. On 12th February 2018, prosecution again applied for adjournment based on similar grounds as before. Learned prosecutor urged that consent had been delayed following the elevation of the DPP to the position of Cabinet Secretary. The application for further adjournment was vehemently opposed by Mr. Kaunde who prayed for the accused to be discharged under Section 89(5) of the Criminal Procedure Code.

7. In his short ruling delivered the same day (12th February 2018), the trial court dismissed the prosecution's application and discharged the accused under Section 210 of the Criminal Procedure Code for failure to adduce any evidence against him.

8. Aggrieved by the said decision, the DPP's office and EACC moved to the High Court Meru vide a Notice of Motion dated 17th April 2018 under **Revision Case No. 173/2018** seeking orders pursuant to Section 362 and 364 of the Criminal Procedure Code as follows;

> **i. That this application be certified as urgent and deserving to be heard on a priority basis.**
>
> **ii. That the court be pleased to revise the orders of the trial court of termination of Isiolo Anti-Corruption Case No. 1/2017 (Republic v Salesa Adano Abudo) under Section 210 of the Criminal Procedure Code (Cap 75 Laws of Kenya made on 12th February 2018).**
>
> **iii. That the court be pleased to revise and or reinstate the terminated case and place it for hearing before a Magistrate other than the Magistrate who terminated it.**
>
> **iv. That the court be pleased to give any other directions and orders as the circumstances of the case may warrant.**

9. The application is supported by an affidavit sworn by Daniel Masesi a Police Officer then seconded to the Ethics and Anti-Corruption Commission as an Investigator. He averred that, having investigated corruption related complaint against the respondent, he forwarded a preliminary report to the DPP who concurred with the investigations and recommended for the respondent to be charged. That he subsequently embarked on preparation and submission of a final report which he forwarded to the DPP for review but the same could not be acted upon as the DPP had vacated the office following his appointment as Cabinet Secretary.

10. He further averred that the termination of the case under Section 210 was; improper considering that there was good explanation as to why there was delay in supplying necessary documents hence the said action amounted to premature determination of the case; the decision was prejudicial thus cleansing the respondent without considering the case on merit; the trial court misapprehended the law by terminating the case under Section 210 of the CPC without considering that consent from the DPP was necessary thus compromising public interest as the complainant was not given an opportunity to ventilate the case; the decision was a set back to the fight against corruption and that unless set aside, it will set a bad precedent in the hearing of Anti-Corruption related cases.

11. In response, the respondent filed a replying affidavit sworn on 11th May 2018 opposing the application thereby supporting the trial Magistrate's decision. He gave a chronology of events preceding the termination of the case thus blaming the prosecution for violating his rights under Article 50 (2) (J) of the Constitution regarding the right to have the trial concluded without unreasonable delay. He submitted that having been acquitted under Section 210 of the Criminal Procedure Code, the appropriate option was to prefer an appeal and not revision. He further contended that Section 364(2) bars the Honourable Court from making adverse orders against him. Lastly, he contended that the application was filed out of malice, in bad faith and hence exposes the mediocrity with which investigations are conducted and that, the court should not be called upon to the prosecution's aid.

12. When the matter was presented before the Meru High Court, the same was transferred to Milimani Anti-Corruption and Economic Crimes Division being the court gazetted to hear and determine Ant-Corruption related matters. Consequently, the case was given case file **Revision No. 2/2018**.

13. On 28th October 2019, the court directed for service of the application upon the respondent and that parties to file their skeleton submissions. Consequently, the applicants filed their joint submissions on 11th December 2019. In response, the respondent filed his submissions on 26th February 2019.

Applicant's Submissions

14. During the hearing, M/s Kilimo holding brief for Mr. Kyeli for the applicants, basically reinstated the averments contained in the affidavit in support of the application for revision. Counsel submitted on two issues: Firstly, whether this court has the power to reverse an order of acquittal and secondly, whether the respondent's right to a fair trial was violated.

Whether this court has the power to reverse an order of acquittal

15. According to the applicants, revision is meant to ensure that proceedings before a Subordinate Court are legal and in compliance with the law. Counsel submitted that an acquittal under Section 210 of the Criminal Procedure Code can only occur after the prosecution's case has been closed. To support this proposition, counsel referred the court to the petition in the case of **Republic v. Hasmuk Meghji Shah (1984) eKLR** and **Republic vs. Sunday Samwel Bunguzo (2017) eKLR** where the court when reversing an acquittal under section 210 stated that;

> **"A reading of Section 210 clearly shows that an acquittal under that section can only occur after the prosecution's case has been closed. It envisages a situation where plea has been taken, the matter fixed for hearing and witnesses have testified."**

16. According to counsel, the acquittal under Section 210 was therefore irregular considering that the prosecution had not called any witness.

Whether the respondent's right to a fair trial was violated

17. It is the 2nd applicant's contention that having submitted their first investigation report to the DPP under Section 35 of ACECA, they were duty bound to prepare a final report in compliance with the procedure under the said Section. That by terminating the case under Section 210 of the Criminal Procedure Code, the complainant's right to fair trial under Section 25 of the Constitution was violated.

Respondent's Submissions

18. Through the firm of Kaumbi and Co. Advocates, the respondent filed his submissions on 26th February 2020. Mr. Mtenga holding brief for Mr. Kaumbi merely adopted the written submissions. According to Mr. Kaumbi, the application for revision is incompetent and indeed an abuse of the court process on grounds that; the applicant (EACC) does not have prosecutorial powers hence have no locus to prefer the said application and, that the applicants if aggrieved with the order, they should have filed an appeal against the acquittal and not revision application.

19. Learned counsel further submitted that Section 364(2) of the Criminal Procedure Code expressly bars the High Court from making any adverse or prejudicial findings against the respondent unless he was heard in his defence. That there was no proof that there was an application before the trial court upon discovery of new evidence which could not be availed during the course of the trial.

Determination

20. I have considered the application herein, affidavit in support, replying affidavit and submissions by counsel. Issues that emanate for determination are;

i. Whether this court has jurisdiction to entertain the application.

ii. Whether the 2nd applicant had a right to file for revision

iii. Whether the applicants have met the threshold for grant of revision orders.

Whether this court has jurisdiction to entertain the application

21. It is trite that assumption of jurisdiction in any Judicial proceedings is key in the determination of disputes and general administration of justice. Jurisdiction is a creation of either the Constitution or Statute. Where a court does not have jurisdiction to arbitrate over a dispute, it should cease exercising arbitration authority over that matter. See **John Kipng'eno Koech and two Others v. Nakuru County Assembly and Others (2013)eKLR** in which jurisdiction was defined as:-

> **"... the practical authority granted to a formally constituted legal body to deal with and make pronouncements on legal matters and by implication to administer justice within a defined area of responsibility. It is a scope, validity, legitimacy or authority to preside or adjudicate upon a matter."**

22. In the instant case, this court's authority has been summoned pursuant to Sections 362 and 364 of the Criminal Procedure Code. Under Article 165 (6) of the Constitution, the High Court has been bestowed with wide supervisory jurisdiction over subordinate courts, any person, body or authority exercising quasi-judicial function. Article 165(7) further provides;

> **"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 grant any direction it considers appropriate to enforce the fair administration of justice."**

23. To further operationalize Article 165 of the Constitution, Section 362 of the Criminal Procedure Code goes further to strengthen the supervisory role of the High Court over the Subordinate Courts by providing 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."**

24. In exercise of those wide discretionary powers, the court is duty bound to exercise the same reasonably and cautiously while focussing its mind on whether the orders sought to be revised were wrongly arrived at or based on misapprehension of the law or application of wrong principles of the law. See **Ferdinard Ndungu Waititu Babayao and 22 Others vs. Republic (2019) eKLR** and **Joseph Waweru vs. Republic (2014)eKLR**.

25. Considering the above quoted legal provisions, I have no doubt this court has jurisdiction to entertain the matter.

Whether the second applicant had the right to file the application herein

26. According to the respondent, the 2nd applicant (EACC) being the investigator have no *locus standi* to pray the role of a prosecutor by making this application. From the replying affidavit sworn by Daniel Masesi the Investigating Officer, the charges the respondent was facing were recommended by the EACC as the main investigating agency. It is clear from the revision application that it was jointly filed with the DPP being the prosecutor.

27. The inclusion of the EACC as a co-applicant can be traced to the statutory requirement under the Victim Protection Act Section 9(3) of the Act which provides that a victim's interest or concerns may be represented by the legal representative acting on his or her behalf. In support of this position, I am guided by the holding in the case of **Leonard Maina Mwangi case vs DPP and 2 Others (2017) eKLR** where the court allowed various stake holders among them, IPOA, Taxi Operators, witness protection office and bodaboda association to participate in the criminal proceedings as interested parties.

28. The inclusion of EACC in this proceedings is not prejudicial and the same is not illegal owing to their interest in the matter. I must however caution that, in the absence of the DPP, EACC could not move on their own or independently.

Whether the applicants have met the threshold for grant of revision orders

29. Having referred to the relevant provisions governing hearing and determination of revision applications, it is incumbent upon the applicants to prove that the trial court acted incorrectly, illegally or improperly or that the proceedings were irregular. The point of contention by the applicants in this application is that; the trial Magistrate misapprehended the law by terminating the case under Section 210 of Criminal Procedure Code which provision according to them only applies to situations where the prosecution has been given an opportunity to present their case, tendered evidence and then a ruling by the court.

30. Secondly, that there was reasonable cause for the delay in supplying the relevant witnesses' statements and exhibits because it was necessary to obtain the DPP's consent under Section 35 of ACECA before the case could proceed.

31. Although the respondent did not submit on this aspect, I would like to set the record straight on the correct position regarding what Section 35 of ACECA entails and whether the DPP's consent is applicable. For avoidance of doubt, I wish to reproduce Section 35 of ACECA which provides as follows;

> **"Sub 1 – Following an investigation the commission shall report to the Director of Public Prosecution on the results of the investigation.**
>
> **Sub-Section 2 – The commission's report shall include any recommendation the commission may have that a person be prosecuted for corruption or economic crime."**

32. The argument by the investigating officer and by extension the applicants that Section 35 of ACECA requires submission of a preliminary report and final report to the DPP before consent is obtained is in my humble view imaginary as it is not provided for anywhere under Section 35 above quoted. The requirement for consent by the A.G was only relevant under the repealed prevention of Corruption Act cap 65. Under the new regime (Section 35 of ACECA), the moment the EACC submits an investigation report to the DPP recommending prosecution, and upon the DPP approving and preferring charges which are presented in court for prosecution, there is nothing else remaining to execute further in the name of final report and consent. Under ACECA there is no requirement anywhere for the DPP's consent.

33. To buttress the fact that under Section 35 of ACECA there is no provision for consent by the DPP, I am guided by the Court of Appeal decision in the case of **Susan Mboo Ng'ang'a vs. Attorney General (sued for an on behalf of the Chief Magistrate's Court Nyeri Law Courts) and 2 Others (2017) eKLR** where the court held that;

> **"It would appear to us that the provisions of Section 12 of the Prevention of Corruption Act were not retained in Section 35 of the Anti-Corruption and Economic Crimes Act."**

34. From the above holding, the excuse by the prosecution that the prosecution file was with the DPP in the year 2017 awaiting consent was untenable and an attempt to cover up indolence on the prosecution's part and failure to provide exhibits as provided in law. I do agree with the trial court's sentiments that there was no reasonable explanation given to justify failure to supply witness statements and exhibits in time. Prosecution did not act with due diligence to heed to the court's directions. It is trite that it is not for the courts to come into the aid of litigants or parties in a dispute for so do it will amount to a court descending to the arena of litigation.

35. Having held that the delay by the prosecution in supplying the said documents was unreasonable thus defeating the spirit of Article 50(2) of the Constitution on expeditious delivery of justice, I will proceed to consider the key issue of termination of the case under Section 210 of the Criminal Procedure Code.

36. Section 210 of the Criminal Procedure Code provides that;

> **"If at the close of the evidence in support of the charge and after hearing such summing up, submission or argument as the prosecutor, the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him".**

37. On 12th February 2018 when the case was terminated, the same was scheduled for a mention for the prosecution to confirm compliance

with the court's directions to supply witnesses' statements and exhibits. The prosecution having confirmed that they had not complied citing similar grounds as had been referred to on several occasions before, Mr. Kaunde counsel for the respondent (accused) urged the court to discharge the accused under Section 89(5) of the Criminal Procedure Code. I am not convinced that Section 89(5) of the Criminal Procedure Code was applicable in the circumstance as that provision only deals with dismissal of a charge sheet (complaint) for non disclosure of an offence.

38. Be that as it may, the court went ahead and 'discharged' under Section 210 of the Criminal Procedure Code. From the sequence of events, it is worth noting that on the date the court terminated the case, there was no hearing scheduled. It was merely a mention date to confirm compliance of its directions and for further directions to be made. Since the prosecution had not tendered any evidence nor were they call to tender evidence and failed, the court had no power to apply Section 210 of the Criminal Procedure Code to make final orders as it did.

39. The proper procedure would have been for the court to fix the case for hearing and then on the hearing date demand for the prosecution to either comply with its directions and proceed with the case. Since the prosecution had not supplied witnesses' statements and exhibits, they would have failed to proceed as they could not call witnesses whose statements were not available or purport to produce exhibits which had not been supplied. That would have technically forced the prosecution either to withdraw their case under Section 87(a) of the CPC in which case the respondent would be liable to being re-arrested and charged afresh or they would have closed their case for failure to have any evidence to offer. It is in the latter scenario that the trial court would have properly and appropriately applied Section 210 of the CPC on grounds that the prosecution would have failed to adduce any evidence to prove their case on a prima facie basis and any aggrieved party would then follow the path of preferring an appeal.

40. In the absence of the stated procedure, it is my holding that the trial court hurriedly and prematurely terminated the case by making final orders in acquitting the accused (respondent) at the mention stage without proper factual basis and or legal foundation. I further hold that the trial court failed to properly analyse the applicability of Section 210 of CPC in the circumstances of the case thus calling for revision.

41. Having held as above, it is my finding that the trial court improperly and incorrectly acquitted the respondent (accused) and that the orders made on 12th February 2018 were not necessarily a subject of appeal as enunciated by Mr. Kaumbi for the respondent. Regarding the claim that the termination of the charges went against the spirit of public interest in the fight against corruption, I do not see the relevance of any public interest sought to be protected when the protector of the same interest decides to trample upon peoples' constitutional rights without justification. Both public and private interest are equally important and must be balanced and protected.

42. Accordingly, I am fully persuaded by the applicants' arguments and prayers that the application is merited and do hereby allow the same by reviewing, quashing and setting aside the trial court's decision ordering termination of the charges against the respondent on 12th February 2018 and therefore direct that;

a. the charges are hereby reinstated and the case to proceed from where it had reached before any other Magistrate with jurisdiction other than CM S.M. Mungai within Isiolo Law Courts or any other nearer court in the event there is no Magistrate with jurisdiction within Isiolo law courts.

b. Hearing of the case to be expedited without further delay.

c. The original file is hereby returned to the trial court for mention and further directions as soon as possible.

d. Summons to issue to the accused so as to appear for further directions.

DATED, DELIVERED and **SIGNED** in open court at **NAIROBI** this 8th day of April **2020.**

J. N. ONYIEGO

JUDGE