REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J.

ACEC APPEAL NO 17 OF 2019

SOSPETER ODEKE OJAAMONG.................................APPELLANT

VS

REPUBLIC..1ST RESPONDENT

BERNARD KRADE YAITE.................................2ND RESPONDENT

LEONARD WANDA OBIMBIRA........................3RD RESPONDENT

ALLAN EKWENY OMACHARI.........................4TH RESPONDENT

SAMUL OEJO OMBUI...5TH RESPONDENT

EDNA ADHIAMBO ODOYO..............................6TH RESPONDENT

RENISH AMOLLO...7TH RESPONDENT

SEBASTIAN HALLENSLEBEN........................8TH RESPONDENT

MADAM R ENTERPRISES..............................9TH RESPONDENT

(Being an appeal from the Ruling and Orders of Hon. D. Ogoti (CM) in ACC No. 23 of 2018 delivered on 9th May 2019)

JUDGMENT

1. This appeal raises the question whether an appeal lies before this court from an interlocutory ruling of a trial court on the admissibility or otherwise of evidence.

2. The appellant is facing trial before the Chief Magistrate (Hon. D. Ogoti) in ACC No. 23 of 2018 in which he is charged with various corruption offences. In his ruling dated 9th May 2019, the trial court declined to disallow the reliance by the prosecution on five exhibits marked as MF12,MF13(a) and (b), MF114 and MFI25. He dismissed the objection of Counsel for the appellant and allowed the production of the exhibits in evidence. Dissatisfied with this ruling, the appellant has filed the present appeal in which he raises six grounds of appeal which, for reasons that will become obvious later in this judgment, I need not set out.

3. The parties filed written submissions on their respective positions on the appeal which were highlighted by Mr. Ligunya for the appellant and Ms. Nyauncho for the 1st respondent. Mr. Eshuchi appeared and made oral submissions for the 2nd accused in the criminal trial who is named in this appeal as the 2ndrespondent.

4. In his submissions, Mr. Ligunya argued that the appellant was objecting to the production of the exhibits by the Investigating Officer, Abraham Kemboi (PW19), on the basis that the appellant had his own set of the same documents which were different in content from the

documents that the 1st respondent was relying on. The 1st respondent had supplied the appellant and his co-accused with the documents on 20th July 2018 and upon looking at the documents, the appellant raised questions about their authenticity. This was because a number of them were draft budgets and not the actual budgets of the county.

5. According to Mr. Ligunya, the appellant had served notice on the 1st respondent to produce certain documents set out in the notice to produced, but the 1st respondent indicated in its response that it did not have the said documents. It asked the defence to request for them from the relevant departments of the county. The appellant asserts that he requested and obtained the documents, and that the set of documents he obtained, which he has placed before this court, is different from what the prosecution had produced in court.

6. The appellant submits that the trial against him therefore proceeded with different documents purporting to be the same documents, and that the documents are different in form and content. Mr. Ligunya submitted that the documents that the prosecution produced were certified copies of the original while the defence had the actual documents.

7. Mr. Ligunya further submitted that the issue before the trial court was whether the court could rely on copies while there was a whole new set of documents alleged to be the original documents. His submission was that in allowing production of the documents by the prosecution, the trial court had acted contrary to the Evidence Act. Counsel relied on section 65-68 of the Evidence Act with regard to production of documentary evidence, and the circumstances in which certified copies of documents may be relied on.

8. Counsel noted that section 68(1)(e) allows reliance on secondary evidence where thedocument is a public document. He conceded that the documents in this case were public document, but submitted that the section gives the court the discretion to rely on certified copies of public documents and does not make it mandatory to do so. In his view, the trial court erred in allowing the production of certified copies as the defence had the original documents while the prosecution had copies.

9. In response to submissions by the 1st respondent that the appeal is void as there is no judgment from the trial court and that the order at issue is an interlocutory ruling not subject to appeal, Mr. Ligunya argued that the prosecution's contention was not supported by any authority. Counsel relied on section 354 (3) (d) of the Criminal Procedure Code (CPC) which he submitted gives the High Court power in an appeal from *'any other order'* to reverse that order and make any other order. It was the appellant's submission that the section envisions an appeal from any other order beyond an appeal on conviction. He urged the court to find that the interpretation of section 354 of the CPC that it should adopt should be one that upholds the right of appeal.

10. In response to submissions by the prosecution that the appeal has been overtaken by events, the appellant's submission was that this was not the case as the court was still proceeding with the prosecution case and the court was yet to make a decision on whether or not the appellant had a case to answer.

11. In response to a question from the court on what orders he would expect from the court, Mr. Ligunya submitted that the court should find that the documents failed the legal threshold for admissibility in secondary form and remit it to the trial court with directions that the prosecution should produce the primary documents and in the alternative, the court should call for certified documents.

12. In submissions in support of the appeal, Mr. Eshuchi submitted that allowing the orders of the trial court to stand would prejudice the case of the 2nd respondent. In his view, it would be prudent and in the interests of justice to revise and set aside the orders in the manner sought by the appellant. Allowing interlocutory appeals on admissibility of evidence would, in his view, ensure that the law is followed. This is because the High Court would direct the lower court to follow the law and ensure that prejudice is not suffered by the accused.

13. In submissions in response, Ms. Nyauncho urged the court to dismiss the appeal on the basis that it is incompetent and premature. Her submission was that at this stage, the appellant does not have a right of appeal as the trial court has not delivered the judgment in the case.In her view, the CPCdoes not envisage an appeal against an order that is not final, and in the present case, what the trial court delivered was an interlocutory ruling from which an appeal cannot lie.

14. It was also the 1st respondent's submission that the appeal had been overtaken by events and has been rendered nugatory. This was on the basis that the proceedings are at an advanced stage as there was no stay of proceedings granted, and the prosecution was about to close its case, more than 20 witnesses having testified.

15. In the course of hearing this appeal, I inquired of the appellants whether they had considered judicial precedents on the question of interlocutory appeals. Both Mr. Ligunya and Mr. Eshuchi stated they had not come across any, and Ms. Nyauncho did not place any before the court either.

16. The position, however, is that the question of whether or not an interlocutory appeal lies from a ruling of the trial court has been considered and pronounced upon by both the High Court and the Court of Appeal. A few illustrations will suffice.

17. In his decision in **Henry Nyachio Ondara v Republic [2019] eKLR** Majanja Jset out the provisions of section 347 of the Criminal Procedure Code andobserved, in striking out the appeal before him, that:

> **"4. It is clear from the forgoing that the right of appeal under section 347(1) of the Criminal Procedure Code is only given to a person who has been convicted and sentenced. There is no right of appeal conferred against an interlocutory ruling."**

18. In **John Njenga Kamau v Republic [2014] eKLR** the court cited the provisions of section 347 of the Criminal Procedure Code, as well as section 354(3) of the said Code which contains the powers of the High Court on hearing of an appeal, which is to the following effect:

(3)The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may—

(a) in an appeal from a conviction—

> **(i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or**
>
> **(ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or**
>
> **(iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;**

(b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence;

19. The court then went on to state as follows:

> **"…It is clear from the foregoing provisions of the Criminal Procedure Code that only a party who is convicted can file an appeal to this court. <u>The Criminal Procedure Code does not envisage a situation where an accused or the prosecution may appeal to this court from an interlocutory ruling made by the trial court in the course of the trial</u>. This court's considered view is that the reason why such appeals are not allowed is deliberate and is not a lacunae in the law. If parties to a criminal trial were allowed to appeal against any interlocutory ruling made during trial, there is a possibility that parties to such trials, especially accused persons, may use the appeal process to frustrate the hearing and conclusion of the criminal case."**(Emphasis added)

20. In my decision in **ACEC Appeal No. 24 of 2019- James Ambuso Omondiv Republic**, I observed as follows:

> **18. I note further that under section 347 of the Criminal Procedure Code, an appeal lies to the High Court by the accused on a conviction. It provides as follows:**
>
> **347. Appeal to High Court**
>
> **(1) Save as is in this Part provided—**
>
> **(a) a person convicted on a trial held by a subordinate court of the first or second class may appeal to the High Court; and**
>
> **(2) An appeal to the High Court may be on a matter of fact as well as on a matter of law.**
>
> **….**
>
> **20. It appears to me, then, that there is no provision in the Criminal Procedure Code for appeals from orders of the trial court in the course of proceedings. In particular, there is no provision for interlocutory appeals against orders of the trial court admitting or failing to admit any evidence into the record."**

21. The above decisions find support in the decision of the Court of Appeal in **Thomas Patrick Gilbert Cholmondeley –vs- Republic [2008] eKLR.** Though the Court of Appeal in the Cholmondeley case was dealing with section 379(1) of the Criminal Procedure Code which deals with appeals from the High Court to the Court of Appeal, its observations are applicable with equal force to appeals from subordinate courts to the High court. The Court of Appeal observed as follows:

> **"In ordinary criminal trials, there is generally no interlocutory appeals allowed for section 379 (1) of the Criminal Procedure Code allows only appeals by persons who have been convicted of some offence. The Appellant has not been convicted of any offence. As far as we understand the position the basis of an appeal cannot be that an order made in the course of a trial is highly prejudicial to an accused person;…..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."**

22. In the circumstances, it is my view and I so hold that the present appeal is improperly before me. The appellant has no right of appeal to this court on an interlocutory appeal relating to the admissibility or otherwise of documents in a trial before the Magistrate's Court. The appeal is accordingly struck out.

Dated and Signed at Nairobi this 15th day of April 2020

MUMBI NGUGI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent and pursuant to a notice issued on 8th April 2020. The parties have waived compliance with Order 21 rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court.

MUMBI NGUGI

JUDGE