REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 61 OF 2018

THE REPUBLIC.....APPELLANT

VERSUS

1. MARTHA MUKAMI.....1ST RESPONDENT

2. PAUL TWUMASI.....2ND RESPONDENT

{Being an appeal against the Ruling of Hon. S. Atambo – SPM Kiambu dated and delivered on the 21st day of September 2018 in the original Kiambu Chief Magistrate's Court Criminal Case No. 1184 of 2016}

JUDGEMENT

The respondents herein were charged with **the offence of TRAFFICKING IN NARCOTIC DRUGS CONTRARY TO SECTION 4 (A) OF THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES (CONTROL) ACT NO. 4 OF 1994.**

The particulars of the offence were that **on the 15th day of May 2016 at COAST BUS STAGE within Nairobi County, jointly with others not before court, the respondents trafficked in a narcotic drug namely METHAPHETAMINE to wit 295.4 grams with a street value of Kshs. 23,243,200/= by concealing in a white polythene paper bag in contravention of the said Act.**

They both pleaded not guilty to the charge and there ensued a trial in which the prosecution (now appellant) had so far called six witnesses.

It was after the sixth witness, (a government analyst) finished testifying that the prosecution (appellant) made an application under **Section 214 (1) of the Criminal Procedure Code** to amend the charge. The application was vehemently resisted by the defence and after hearing submissions from both sides the trial Magistrate reserved her ruling. Subsequently by a considered ruling delivered on 21st September 2018 the trial Magistrate rejected the prosecution's application. Being aggrieved by the trial Magistrate's rejection of its application to amend the charge, the appellant preferred this appeal.

The gravamen of the appeal, as can be discerned from the grounds in the petition and the submissions of Learned Prosecution Counsel is that the time with which the prosecution could amend the charge was not closed as the case was ongoing; that it was necessary to amend the charge since the evidence adduced by Pw6 did not support the charges; that failure by the trial Magistrate to allow the amendment could automatically lead to acquittal of the respondents were the case to proceed as it was; that the court should have of its own motion ordered amendment of the charge but not frustrate the appellants effort to do so and that it was the responsibility of the court to ensure the trial proceeded fairly and efficiently in the interest of justice and the public which has an interest in the proper prosecution of offenders and conviction of offenders where culpability is established. Counsel submitted that **Article 165 (6) and (7) of the Constitution** clothes the High Court with supervisory powers over subordinate courts and that therefore this court ought to set aside the ruling of the lower court and allow the appellant to amend the charges. To buttress his submissions, Counsel for the appellant relied on the provisions of **Section 214 (1) of the Criminal Procedure Code, Article 165 (6) and (7) of the Constitution** and two cases: -

- **Yongo v Republic [1983] KLR 319.**
- **Evans Odhiambo Kidero v Director of Public Prosecutions [2020] eKLR.**

The 1st respondent who acts in person in the appeal opposed the appeal mainly on the ground that the application to amend was made five years after the trial begun and only after Pw6 delved into the differences between narcotics and psychotropic substances. She submitted that the trial has been time consuming and this was the second time the charge was to be amended and that recalling the witnesses would delay the trial even further. She informed this court that a certain female officer had approached her with a view of fixing the case but she declined her advances and reported the matter to the investigator in the case who promised to investigate the matter. She also referred to an incident where drugs were planted in her house resulting in her being arrested yet again. She contended that it was unfortunate that when an officer does not get his/her way the officer uses his/her powers to ensure one is imprisoned. She contended that the application to amend the charge

was not made in good faith and implored this court to disallow it. To buttress her submissions, she cited the case of **Republic v Michael Ezra Mulyoowa [2015] eKLR.**

Counsel for the 2nd respondent opposed the appeal on the ground that the amendment sought would result in the violation of the 2nd respondent's right to a fair trial. Counsel submitted that **Section 214 of the Criminal Procedure Code** must be interpreted in line with **Articles 25 (1), 50 (1) (2) (b) (c) (e) (j)** and **(k)** and also **Article 157 (11) of the Constitution**. Counsel contended that the amendment sought by the appellant was not based on a defect on the charge such as is envisaged by **Section 214 of the Criminal Procedure Code** but as a result of evidence adduced by one of the witnesses which brought a realization to the prosecution that it should have charged the respondents with a different offence. Counsel argued that an accused person has a right to challenge evidence and the amendment sought would amount to an unfair trial. Counsel averred that **Section 214 of the Criminal Procedure Code** permitted amendment only where a charge is defective in form or in substance which was not the position in this case. Counsel contended that the right provided under **Section 214 of the Criminal Procedure Code** is not absolute and it cannot apply where the amendment sought results from a challenge by the accused of the evidence adduced. Counsel submitted that it is not the duty of the accused person (respondents) to demonstrate that they would suffer prejudice were the court to allow the application to amend the charge. Counsel further submitted that this case reveals the intention by the appellant to secure a conviction no matter what. He noted that the appellant seeks to invite this court to take into account extraneous matters rather than inviting it to apply its mind to the law and the requirement to do justice to treat all the parties equally. Counsel asserted that were this appeal to be allowed it will change the landscape of fairness in a trial and compromise accused persons' right to the legitimate expectation that they are equal before the law. Counsel urged this court to apply its mind to **Articles 20 (1) (2) (3) (a) (b)** and **(4)** and read them together with **Articles 3, 10** and **159 (1) (a) to (d) of the Constitution.** Counsel further urged this court to uphold, protect and promote constitutionalism and the Rule of Law by dismissing this appeal so as to protect the proper public policy as dictated by the Constitution. Counsel submitted that the cases the appellant relies upon are distinguishable as they do not speak to an amendment motivated by malifides which in his view applies to this case.

I have considered the rival submissions carefully. **Section 214 of the Criminal Procedure Code** states: -

> **"214(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:**
>
> **Provided that—**
>
> **(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;**
>
> **(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.**
>
> **(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.**
>
> **(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary."**

It is evident from the wording of the section that the discretion given to a court in regard to amendment of charges is very wide. However, such discretion must as always be exercised judiciously and the courts are now in agreement that in considering such an application the court must also consider the accused person's right to a fair trial enshrined in **Article 50 of the Constitution.** In the case of **Republic v Perezi Wangechi Marungo [2016] eKLR** Joel Ngugi J, stated: -

> ***"20. There is a second limit to this right to amend the charge sheet: it must meet the constitutional test of fairness. Like all other procedures in the Criminal Procedure Code, the Prosecution cannot wield the right to amend charges like a secret weapon to ensure that the Defence is kept guessing about the case it is facing or otherwise make a mockery of the right to fair trial. The right to amend must be exercised in a way that it does not offend the outer limits of the right to a fair trial."***

In the case of **Republic v Michael Ezra Mulyoowa [2015] eKLR** where a similar issue arose Kimaru J took into consideration the accused's right to a fair trial and held: -

> ***"If the prosecution was to be allowed to amend or substitute the charge, then it would mean that the trial of the respondent would take a longer period if he chose to exercise his right to – recall the 17 witnesses who had testified for cross examination. The right of the accused person to be accorded expeditious trial will obviously be infringed if the application for revision is allowed."***

Similarly, in the case of **Directorate of Public Prosecution (DPP) v Chief Magistrates Court – Nyahururu [2019] eKLR** Wendo J stated: -

> ***"……...At the time of the application to amend the charge, the prosecution had not closed its case and under Section 214***

Criminal Procedure Code, the prosecution had a right to apply for an amendment of the charge. The question that the court should have addressed its mind to is whether the said amendment would be prejudicial to the accused."

In the case of **Republic v Catherine Mutheu Ndung'a & another [2019] eKLR** the court held: -

"15. In my understanding, what Trial Magistrate found wanting in Mr. Masila's explanation as to why he needed to amend the charge, is his failure to express himself in the words used under the provisions of Section 214 of the Criminal Procedure Code (CPC). However, this court's interpretation of what Mr. Masila told the Trial Court was that the evidence adduced could not support the charge in count 1 and he therefore sought the court's approval to amend the charge to be in tandem with the evidence adduced. It was as straightforward as that. Obviously, the Prosecutor could only rely on the evidence that had been adduced by its witnesses and as for whether the evidence would reach the threshold of being beyond reasonable doubt, that was within the purview of the Trial Court.

16. Article 157(6) of the Constitution provides that the Director of Public Prosecutions (DPP) is empowered to institute and undertake criminal proceedings against any person before any court other than a court martial in respect of any offence alleged to have been committed. It is therefore upon the DPP to file charges in court, be present during plea taking and at all pre-trial proceedings, attend court when a case is being mentioned and to attend the main trial to prosecute the case. Put another way, it is the prosecution that sets the agenda as to the charges to prefer against an accused person, when to amend the charge or when to withdraw it. The Prosecution Counsel gauges how the case is progressing and if the evidence tendered is likely to support the charge. If not, the DPP is at liberty to amend the charge to an appropriate one, if the evidence tendered discloses a different offence, other than the one an accused person has been charged with or if there is an error in the manner in which the charge was drafted. The court's duty is to consider the application to amend and if it allows an amendment to be done, it reads out the amended charge to the accused person and records the plea made by the accused person. A court can however decline to allow an amendment of a charge if it apparent that it is being done in bad faith.

17. The prosecution is therefore in charge of how it will conduct its case and the Trial Court is in charge of the judicial process of recording of proceedings, considering applications made and determining the case. As an arbiter, the Trial Court should not be seen to be curtailing the prosecutorial powers of the DPP by unreasonably denying a Prosecution Counsel the opportunity to amend the charges brought to court. After all, when all is said and done, the prosecution would still be obligated to prove the amended charge beyond reasonable doubt. Even in the worst case scenario where an application for amendment is made after the accused person has been put on his defence, the Trial Court is empowered to acquit the accused person. Moreover, at the end of the trial, the Magistrate presiding over the case will have the duty of determining if the amended charge was proved beyond reasonable doubt. In this matter, I am of the considered view that the action of the Trial Court of denying the prosecution an opportunity to amend the charge with respect to Count 1 was both unjustifiable and unreasonable.

18. If amendment of the charge would have been allowed, the CPC gives the right to the accused person to request for the recall of prosecution witnesses to testify on the charge as amended and for them to be cross-examined. No prejudice would therefore have been occasioned to the respondents if an amendment of the charge in count 1would have been allowed."

It is clear from the decisions cited above that in considering an application to amend a charge the court's approach must not be simplistic but must, as was submitted by the respondents herein apply its mind to the application vis avis the accused person's right to a fair trial. In my understanding in the instant case the amendment was sought to change the description of the substance allegedly found in the possession of the respondents from a **"narcotic"** to a **"psychotropic substance."** It was indeed an application made upon the government analyst's evidence that the substance was a psychotropic substance and the prosecution then realizing that the evidence adduced by the government analyst **"could not support the charge facing the respondents".** The **issue for determination by this court therefore is whether the amendment on that ground would amount to a violation of the accused's right to a fair trial hence a travesty of justice.**

Section 214 of the Criminal Procedure Code provides for amendment where the charge is defective either in substance or in form and one would want first to ask, **was the charge before the court below defective either in "substance or in form" as to warrant an amendment?** The phrase **"substance of the charge"** was defined in the case of **Adan v Republic [1973] EA 445** to mean the charge and all essential ingredients of the offence. Going by the above definition the charge before the trial court was clearly defective in substance in so far as it mistakenly described the material allegedly found in the possession of the respondents, which was a key ingredient of the offence, as a narcotic rather than a psychotropic substance.

Having found that the charge was defective in substance the **next issue for determination is whether to allow the amendment would limit the respondent's right to a fair trial as enshrined in the Constitution.**

On this I am in agreement with what Mumbi J stated in the case of **Evans Odhiambo Kidero v Director of Public Prosecutions [2020] eKLR** that the right to a fair trial applies both to the accused and to the prosecution. In her own words: -

"As I see it, it is the responsibility of the court to ensure that the trial before it proceeds fairly and efficiently, with a view to ensuring the fair administration of justice, not just for an accused person but in the interests of the public which has an interest in proper prosecution of offenders and where culpability is established conviction of the offenders."

The court cannot in considering the question of fairness read **Article 50 of the Constitution** restrictively. The court must also consider the duty bestowed upon the Director of Public Prosecutions under **Article 157 (11) of the Constitution** which states: -

"(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process."

In the case of **Paul Ng'ang'a Nyaga and 2 others v Attorney General & 3 others (Petition No. 518 of 2012) [2013] eKLR**, the court stated: -

> ***"38 From the foregoing there is a clear public interest in ensuring that crime is prosecuted and that a wrongdoer is convicted and punished. It also follows from this that it will generally be in public interest to prosecute a crime where there is sufficient evidence to justify the contrary e.g unless there is some countervailing reason not to prosecute.....".***

Clearly the office of the Director of Public Prosecutions does not prosecute offenders for private or personal interest but in the public interest and that office must be accorded a level and fair playing field too. It is my finding that an amendment of the charge would accord the Director of Public Prosecutions an opportunity to correct a defect in the charge and hence create a fair playing ground. I am not persuaded that it would limit the respondents' right to a fair trial. I say so because in the end the trial court will not judge the respondents merely on the precision by which the charge is drafted but rather on the sufficiency of the evidence adduced by the prosecution and whatever defence or evidence that may be put forth by the respondents. In other words, the Director of Public Prosecutions' duty to prove the charge against the respondents beyond reasonable doubt is still intact and it must be discharged in order for the respondents to be found guilty and convicted. I am also not persuaded that the amendment shall in any way compromise the ability of the defence to make an answer to the charge. **Section 214 (1) (i) of the Criminal Procedure Code** requires that once the charge is amended the trial court shall call the respondents to plead to it. Moreover, as at the time the application to amend was made the trial court had taken the evidence of six witnesses and four were remaining and the respondents shall have a right to recall the six witnesses and shall have a right to cross examine the four who were yet to be called and after that to present their own evidence. I do not agree that the delay that may be occasioned by recalling those witnesses outweighs the public interest present in the prosecution of criminal cases. Further, I have found nothing on the record to suggest that the application was motivated by anything other than the public interest and the interests of the administration of justice. The 1st respondent who claims to have been approached by officers with a view to fix the case clearly stated that those officers are not witnesses in this case. It was also her submission that the two officers who she alleged planted drugs in her house are also not witnesses in the case. It is my finding therefore that no evidence of bad faith has been demonstrated. In the premises I find this appeal has merit. The same is allowed and the ruling of the trial court dated 21st September 2018 is set aside and the same is substituted with an order granting leave to the Director Public Prosecutions to amend the charge. It is so ordered.

Signed and dated this 28th day of October 2020.

E. N. MAINA

JUDGE

Judgement dated and delivered Electronically via Microsoft Teams on this 9th day of November 2020.

MARY KASANGO

JUDGE