



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI

ACEC REV. NO. 20 OF 2018

REPUBLIC.....APPLICANT

VERSUS

SOSPETER ODEKE OJAMONG AND 8 OTHERS..... RESPONDENTS

RULING

Introduction

1. This ruling relates to a Notice of Motion dated 14th December 2018 and filed the same day under certificate of urgency pursuant to Article 165 (6) and (7) of the Constitution and Sections 362 and 364 of the Criminal procedure Code(CPC). The Republic through the DPP's office (herein referred to as the applicant) sought orders as hereunder:-

1. Spent.

2. That the honourable court be pleased to order a stay of the proceedings on ACC 23/18 pending the hearing and determination of this application.

3. That this honourable court be pleased to call for and examine the record of proceedings in the Anti-Corruption Chief Magistrate's Court Nairobi at Milimani Anti-Corruption Case No. 23/18 R vs Sospeter Odeke Ojamong for the purpose of satisfying itself and pronouncing the correctness, legality, or propriety of the order issued on 4th December 2018 by Hon. D. Ogoti as well as the regularity of the proceedings giving rise thereto.

4. That the court be pleased to review, vary, reverse and/or alter the orders of Anti –Corruption Chief Magistrate's Court Nairobi at Milimani Anti-Corruption Case No. 23 of 2018 R vs Sospeter Odeke Ojamong.

5. That the court be pleased to allow the applicants to adduce the evidence gathered in respect to the certification of the intended defence exhibits marked for identification during the prosecution case.

6. That the honourable court be pleased to make any other order that it deems fit in the interest of justice.

2. On 17th December 2018, the court certified the application herein urgent and directed for the same together with the supporting affidavit sworn by one MaryAnne Mwangi Senior Principal Prosecution counsel to be served upon the respondents. Consequently, the respondents through a replying affidavit sworn on 18th December 2018 and filed on 19th December 2018 by Samuel Ombui with authority from the co-respondents opposed the application. In response to the said reply, the applicant filed a further affidavit sworn on 21st December 2018 by one Timothy Wahome the investigating officer of the criminal case in question.

3. On 27th December 2018, the matter proceeded for hearing with both counsel making oral submissions. Before I endeavour to determine the application, a brief background of this case will suffice.

Background

4. On 4th July 2018, the 1st respondent herein Sospeter Odeke Ojamong the current governor Busia County jointly with 8 others were arraigned before Milimani Chief Magistrate's Court vide Anti-Corruption Case NO. 23/18 facing various corruption related charges. Among the charges (counts) preferred against the respondents either individually or jointly are; conspiracy to commit an offence of economic crime,

engaging in a project without prior planning, abuse of office, wilful failure to comply with the law relating to management of funds, fraudulently making payments from public revenue for services not rendered, fraudulent acquisition of public property and failure to pay taxes.

5. Upon entering a plea of not guilty, the prosecution lined up a total of twenty witnesses. After conducting a pre-trial conference, the court directed the prosecution to supply to the defence all relevant documents, inventory and exhibits intended to be relied on during the trial. Pursuant to those directions, the prosecution supplied the defence a bundle of documents on 20th July 2018.

6. That upon receipt of the said documents, it dawned upon the defence that the prosecution had concealed crucial and material documents thereby supplying them with what they referred to as draft documents and not the final and adopted copies. Consequently, the defence (respondents) filed a notice to produce dated 3rd September 2018 thus requiring the prosecution to avail and supply the respondents (accused persons) with final and approved copies of the documents sought.

7. Among the documents sought to be produced are:

- 1. Second and last period budget for the financial year 2013/2014.**
- 2. Appropriation and amendment committee report for the second and last supplementary budget for financial year 2013/2014 and appropriation Amendment Bill 2013.**
- 3. Approved appropriation for the second and last budget for the financial year 2013/2014.**
- 4. County of Busia Gazette Supplement No. 22 of the appropriation Amendment Act 2014 dated 29th August 2014.**
- 5. Approved budget estimates of financial year ending 30th June 2016/**
- 6. County of Busia Gazette Supplement No. 22 of the Appropriation Act dated 29th August 2014.**
- 7. Budget and appropriation committee reports on estimates of revenue and expenditure in the year 2014/15 financial year.**
- 8. General account for financial year 2014/2015.**
- 9. Approved county integrated plan.**
- 10. County financial accounting and report manual.**
- 11. The feasibility reports submitted to county government of Busia.**
- 12. The county Treasury delivery book.**
- 13. The Hansard Report indicating the County Assembly of Busia approval of the second and last supplementary budget of financial year 2014/2015 as tabled on 21st June 2014.**

8. In response to the said notice, the investigating officer one Timothy Wahome swore an affidavit on 10TH September 2018. The officer acknowledged receipt of the notice and intimated that out of the 14 listed and sought documents, he was intending to produce only seven as per the attached inventory. He stated that the remaining documents were not within his custody as they were with relevant institutions to which the respondents were advised to obtain them directly. The officer put the respondents to strict proof to show that the commission (EACC) had those documents.

9. In obedience to the investigating officer's contentment and advice, the first respondent obtained all those documents mentioned in the notice to produce and used the same to cross examine a total of 18 prosecution witnesses. In the process, the said documents were identified by various prosecution witnesses and marked for identification as defence exhibits intended to be produced.

10. The documents marked for identification for the defence were listed as hereunder:

- a. Revised Budget Estimates for the financial year 2013 – 2014 marked (DMFI.1).**
- b. Revised Budget Estimate for the financial year 2013/2014 marked as DMF.2 (a).**
- c. Last supplementary budget for the financial year 2013/2014 marked as DMFI.2(b).**
- d. Busia Count supplementary appropriation Amendment Act 2014 marked as DMFI.4.**
- e. Approved last revised budget and appropriation committee report on the last supplementary budget 2013/2014 marked as**

DMFI.5.

f. Proceedings of the budget and appropriation committee report on the last supplementary budget 2013/2014 marked as DMFI.6 (a).

g. Appropriation Amendment Bill of 2013 marked DMFI.6 (b).

h. Budget estimates for the county government of Busia for the year ending 30th June 2015 marked DMFI.8.

i. The budget and appropriation committee report on the estimates of revenue and expenditure for the financial year 2014/2015 marked as DMFI.7.

11. While proceedings were ongoing, the anti-corruption commission issued a letter dated 12th November 2018 addressed to the clerk Busia County Assembly requiring him to supply and avail original budget for the year 2013/14 and 2014/15 as well as the supplementary budgets for the same period. Again, in their letter dated 14th December 2018 addressed to the County secretary Busia County Government, EACC sought for the supply of handing over notes between the former county secretary and the chief officer in the governor's office, county executive minutes handed over to the former county secretary and the chief officer, and access and carry away computers in the budget.

12. Aggrieved by this move, the first respondent filed before the trial court a notice of motion dated 14th November 2018 and filed the same day seeking orders stopping the EACC from conducting any investigation or interfering on matters pertaining the subject pending under Cr. Case No. 23/2018, and that the court to summon the chair person of EACC to explain their reasons for interfering with a matter pending before court. In the said application supported by an affidavit sworn by Mr. Ligunya counsel for the 1st respondent, the accused questioned the rationale behind conducting investigations over a matter that was at its final stage with the investigating officer as the only remaining witness towards the closure of the prosecution case. Mr. Ligunya termed the further investigations as illegal, unlawful and improper with the sole purpose of reopening the entire prosecution case.

13. In response to the said application, the republic through the DPP filed a replying affidavit sworn by Timothy Wahome on 15th November 2018 challenging the application arguing that the documents being investigated were produced and marked for identification by the defence which documents were introduced during the hearing (cross examination) hence EACC and the DPP had no opportunity to question the prosecution witnesses to ascertain their veracity. Mr. Wahome stated that the documents supplied to the defence were not drafts but originals and that the purpose of the letter dated 12th November 2018 addressed to the clerk Busia county assembly and county secretary was to ascertain the origin of the documents introduced and marked for identification by the defence during cross examination since they were not supplied with the same during the initial investigations.

14. That the request by the prosecution to verify the authenticity of the defence documents was necessary to remove any doubt on their legality and in the interest of justice hence not unlawful nor prejudicial or subjudice to the on-going proceedings.

15. In his ruling delivered on 4th December 2018, Honourable Ogoti allowed the investigation initiated by the EACC and prosecution to continue with a caveat that the said investigation and disclosure envisaged will not be used in the ongoing criminal proceedings. The court directed parties to restrict themselves to the facts of the case before it and that 18 witnesses having testified, it would be prejudicial and dangerous precedent setting to allow evidence gathered during investigations when the trial is ongoing to be introduced at the end of the trial. The learned magistrate held that there can never be investigations conducted touching on a matter pending before court unless with express permission of the court upon application for leave to do so.

16. The court concluded by saying that EACC was bent to interfere with the process of the trial and the integrity of the trial process. The court allowed the 1st accused's (1st respondent in this case) application barring the EACC or any other officer acting under its instructions from conducting any investigations pertaining to the subject matter pending before the court.

17. Aggrieved by this finding, the applicant filed the instant application seeking to revise the trial court's orders under Article 165(6) of the Constitution and Sections 362 and 364 of the CPC.

Applicant's Case

18. The applicant's case is anchored on the grounds on the face of it and averments contained in the affidavit in support deposed by MaryAnne Mwangi Senior Principal Prosecution counsel. The facts are basically as analysed in the background above. It is the applicant's case that during the pre-trial conference held before the trial court, directions were made that all documents intended to be used as exhibits be supplied to the defence. Further it was directed that any party wishing to adduce further evidence could do so upon filing a notice of motion within 7 days prior to the hearing of the case.

19. It is the applicant's contention that they complied with the orders. That when the defence introduced some exhibits and had them marked for identification, they opted to direct EACC to investigate the authenticity of those documents which the court allowed but with a caveat that the outcome of those investigations should not be used in the ongoing trial.

20. M/s MaryAnne stated that the evidence gathered during the verification process should be admitted as prosecution's evidence through the investigating Officer who is yet to testify.

21. During the hearing, M/S Murungi prosecution counsel appearing for the applicant adopted the averments contained in the affidavit in

support of the application and a further affidavit. She submitted that the prosecution is under duty to disclose material information to the court at all material times and that it is a continuous process. To buttress her argument, learned counsel referred the court to the case of **Ahamad Abolfathi Mohamed and Another vs R (2018) e KLR.**

Respondent's Case

22. Relying on the replying affidavit of Samuel Ombui sworn on the 18th December 2018, the respondents opposed the application arguing that the defence exhibits marked for identification through the prosecution witnesses were concealed from the court and the defence by the prosecution during the pre-trial conference. That the prosecution having denied their existence after being served with notice to produce, they have no business claiming that the documents are not genuine.

23. It is the respondent's case that the holding of the trial court was proper as there cannot be continuous investigations during the pendency of the trial. In their submissions, Mr. Orengo Senior Counsel assisted by Mr. Ligunya and Gichamba appearing for the respondents entirely adopted the averments contained in the replying affidavit aforesaid.

24. Mr. Orengo submitted that the application was misconceived as it was inviting the high court to micro manage the trial court's proceedings. Learned counsel argued that the documents in question are public documents which are printed and gazetted hence do not need verification. Counsel further submitted that the only recourse available was for the prosecution to invite the court to allow additional evidence.

25. On the other hand, Mr. Ligunya submitted that the prosecution is hell bent to ambush the defence with new evidence hence unfair practice. Learned counsel opined that the prosecution is intending to reopen the case through the backdoor to cover up their inadequacies. Mr. Gichamba associated himself with the submissions of his colleagues.

Analysis and Determination

26. I have critically examined the application herein, grounds on the face of it, supporting affidavit and further affidavit, replying affidavit and oral submissions by counsel. I have also perused the original record of the lower court. The application is seeking to have the orders of the lower court made on the 4th December 2018 reviewed, revised and or set aside pursuant to this court's powers conferred under Article 165 (6) and (7) of the Constitution and Sections 362 and 364 of the CPC. The issues that crystallize for determination are; whether this court is seized of the revisionary powers sought and; whether the impugned directions or orders made by the trial court are incorrect, improper or illegal.

27. The exercise of supervisory authority by the high court over a subordinate court and over any person, body or authority exercising judicial or quasi judicial function is anchored under Article 165 (6) of the Constitution. Article 165 (7) goes further to provide:

“for 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 give any direction it considers appropriate to ensure the fair administration of justice”.

28. The above constitutional provision is operationalised by Sections 362 and 364 of the Criminal Procedure Court. For clarity purposes, I wish to reproduce the wording of the two provisions.

Section 362 provides-

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.

Section 364 (1) -

In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the high court may:

a. in the case of a conviction exercise any of the powers conferred on it as a court of appeal by Sections 354, 357 and 358 and may enhance the sentence.

b. In the case of any other order other than an order of acquittal, alter or reverse the order.

(2)...

(3)...

(4) Nothing in this section shall be deemed to authorize the high court to convert a finding of acquittal into one of a conviction.

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.

29. The objective of revisionary powers vested upon the high court is to correct any injustice that may arise as a result of the orders or decision made by a subordinate court or person or body exercising quasi judicial function. It is not meant to substitute any appeal process envisaged and or accruing from such orders or decisions as outlined under Sections 354, 357 and 358 of the CPC.

30. It then follows that the exercise of supervisory powers of the high court under the stated provisions is wide and is not limited to situations where there is an error on the face of the record or new issues having emerged. It covers or extends to incorrect, illegal, improper order or finding or irregular proceedings of the trial court (**R vs Jared Wakhule Tubei and Another (2013) eKLR**). It is therefore crucial to ascertain whether this court has the jurisdiction to entertain this application. In the case of **John Kipng'eno Koech and 2 others vs Nakuru County Assembly and two others (2013) eKLR** the court held that:

“Jurisdiction is the practical authority granted to a formally constituted 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 provide or adjudicate upon a matter”.

31. The nature of the orders sought to be revised or reviewed herein is not among those decisions that will call upon the aggrieved party to appeal. This court is therefore properly seized of the jurisdiction to adjudicate over the same.

32. The next issue is, whether the impugned orders are incorrect, improper or illegal. The facts of this application are not in dispute. It is admitted that during the pre-trial conference, the trial magistrate directed the prosecution to supply all material documents mentioned and or exhibits to the defence which was done. However, in the course of the trial, the defence issued a notice for the prosecution to produce certain documents which in their opinion and wisdom were material and crucial to meet the ends of justice.

33. Through their notice to produce filed in court on 3rd September 2018 which is annexed to the respondent's replying affidavit and marked annexure SOO-1, the prosecution denied having in their custody or possession seven of the sought documents. In fact, in answer to the notice, Timothy Wahome swore an affidavit attached to the respondent's replying affidavit marked annexure SOO-2 denying having knowledge of the existence of those documents. Mr. Wahome urged the defence to access them from other county government offices or state agencies. True to their word, the documents in question were subsequently obtained and introduced by the defence during cross examination of various prosecution witnesses who identified them accordingly.

34. It is worth noting that those documents were only identified by the prosecution witnesses who are not bound to acknowledge them if they are not genuine or forged. At the end of the day, it is the author or maker of the said documents who will have the opportunity to acknowledge them and produce them as defence exhibits. If the prosecution witnesses do not recognise them as authentic documents then, there will be nobody to produce them hence they will not be of any evidential value.

35. The marking of the documents for identification is not prejudicial to the prosecution. They shall have an opportunity to cross examine on the genuineness of the documents and probably object to their production if there is no maker to own them for purposes of production. Having denied their existence, the only recourse the prosecution have is to re-examine the witnesses and cross examine them on the exhibits and oppose production subject to the rules of evidence governing admissibility of documents. At that stage, the court will interrogate the objection and decide on whether to admit or not to admit those documents as exhibits. What if the defence opts not to produce the documents in question as exhibits? Fair practice demands that the prosecution should independently submit and adduce all material evidence in its possession without withholding what they may consider as secret and adverse evidence against them.

36. On the other hand, a court on its own motion under Section 150 of the CPC at any stage of the trial can summon or call any person as witness or examine any person in attendance though not summoned as a witness or re-examine a person already examined if his evidence appears to be essential to the just decision of the case.

37. Besides, the prosecution still has another chance in the event the respondents are put on their defence. Under Section 212 of the CPC, if an accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter.

38. My reading and understanding of the application before court is that, the prosecution is geared towards pre-empting production of exhibits by the defence which have just been identified by the prosecution witnesses. They are seeking to discredit and forestall production of exhibits by the defence before even production is attempted. Although disclosure of evidence by prosecution is a continuous process, it should be used only where justice demands and that there was due diligence exercised in adducing the same in advance before commencement of the trial as envisaged under Article 50 (1)&(2) (j) of the Constitution but due to circumstances beyond the control of the prosecution it could not be possible.

39. That does not mean that the prosecution shall have an open ended cheque to introduce new evidence as they wish at any stage of the proceedings without leave of the court which shall then weigh the application and the implication or necessity of the evidence sought to be introduced against the interest of justice. Giving an omnibus widow to introduce evidence at any time in the course of the proceedings without any justifiable reason would open a Pandora box to endless litigation which eventually will delay the expeditious delivery of justice. It will also encourage unfair practices thus underscoring practice by ambush (**see Juma and others vs AG (2003) AHRLR 179**). It is not the duty of the defence to assist the prosecution to fill in the gaps or inadequacies in the course of the trial. The duty to prove a case beyond reasonable doubt squarely lies with the prosecution (**See Stephen Mburu Kinyua vs R (2016) eKLR**).

40. The trial court dismissed the accused's (respondent's) application of 14th November 2018 attempting to bar investigation or authentication of the documents marked for identification by the defence. The magistrate went further to direct that the outcome of such investigation would form the basis of a separate case whether forgery or not (emphasis mine). The magistrate went further to direct that the evidence gathered shall not be used in the ongoing case. He also observed that such evidence could not be adduced without leave of the

court.

41. Did the magistrate's directions amount to an illegality or impropriety? Was the directive correct? Hon. Ogoti at the 3rd last page of his undated ruling stated as follows:

“the prosecution seems to be in a dilemma on how it was obtained. The court's view and or opinion which a court is always entitled to give is that no party to a proceeding in court is allowed to go behind the back of the court in this case EACC which is an investigating agency to investigate a matter pending before court without the knowledge of the court. The proper procedure would have been to move the court with the proceedings to seek to investigate their concerns for proper necessary action to be taken in case their concerns bear fruit. There cannot be an investigation on a subject before the court without the express permission of the court. The court has not been moved”.

42. Obviously, it is common practice that before an accused is arraigned in court, the prosecution must have at least a prima facie case to stand the test of a sound criminal process with the possibility of a conviction. A trial court has wide powers to admit or not to admit certain evidence subject to the rules of evidence on admissibility of documents.

43. It is not the duty of the high court to micro manage the court proceedings before a subordinate court. The court cannot for instance keep directing the lower court on which evidence to admit or not to admit. A criminal trial is self contained in terms of procedure regarding admission of evidence. Where the final verdict is not satisfactory to either party then, the aggrieved party shall have a right of appeal. At this stage, the trial court found that any additional evidence shall be adduced through making a relevant application to the court for consideration. In the instant case, no application has been made before the trial court seeking to call for additional evidence. The trial court has stated as such.

44. As stated earlier, the prosecution is laying the cart before the horse. The trial court was correct in holding that, the prosecution's investigations in the alleged forgery of documents would form a basis of a separate case. That does not mean that the prosecution application where necessary for additional evidence subject to the court's consideration cannot be made. The court reserves the right to admit additional evidence at any stage of the trial if convinced that it was essential so to admit.

45. I do not find anything illegal, incorrect or improper in the trial court's holding and finding. There will be no prejudice suffered upon the prosecution as it is their witnesses who will determine production of the defence exhibits and where appropriate oppose the production and admission as exhibits and lastly, exercise the right to rebuttal under Section 212 of the CPC where necessary.

46. Accordingly, it is my finding that the application herein is not merited and the same is disallowed. The original file be returned to the trial court for proceedings to continue as scheduled.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF JANUARY, 2019.

J.N. ONYIEGO

JUDGE