



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

HIGH COURT CRIMINAL CASE NO. 77 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

RAPHAEL MUOKI KALUNGU.....ACCUSED

RULING

BACKGROUND

1. This trial commenced before me on 14/12/2015 with Mr. Peter Mwenda prosecuting wherein a total of twenty two (22) witnesses have since testified with **PW22 INSPECTOR CLEMENT MWANGI** the Investigating Officer taking the witness stand in chief. On 27/6/2018 Miss Kilonzo for the accused applied for adjournment to enable her obtain full instructions on the content of an affidavit which was filed at the Children's Court by her client which was part of **PW22's** evidence for purposes of cross-examination which adjournment was granted.
2. On 11/11/2018 Mr. Mwenda informed the court that he had left the services of the Office of the Director of Public Prosecutions (ODPP) for Kenya Revenue Authority (KRA) but had been appointed and gazetted on 3rd August 2018 as a special prosecutor for purposes of concluding this trial to which the court directed Mr. Mwenda to supply the court with a copy of the Gazette Notice for record purposes.
3. On 23rd October 2018 Ms. Kilonzo on behalf of the accused indicated that she will be objecting to the appointment of Mr. Mwenda as a special prosecutor and was directed to file a formal objection upon being supplied with information on when Mr. Mwenda left the services of the ODPP.

NOTICE OF OBJECTION

4. On 16/11/2018 the accused filed a Notice of Objection to the Gazette Notice dated 3rd August 2018 appointing Mr. Peter Mwenda as special prosecutor under Section 85 of Criminal Procedure Code on the following grounds:-

1. **Article 260** of the **Constitution** defines state officer to include Director of Public Prosecution and since **Article 157 (9)** provides that the powers of ODPP can be delegated to person's designated by him or subordinate officers, such officers are deemed to be State Officers.

2. **Article 77 (1)** of the **Constitution** provides that full time state officers should not participate in any other gainful employment and therefore appointment of a full time official of the KRA to simultaneously exercise the powers of state officer as a special prosecutor is in violation of Article 77 of the Constitution.

3. No reasons are given for the appointment of a special prosecutor and therefore the Gazette Notice violates the rights of the accused to fair administrative action under Article 47 of the Constitution and Fair Administrative Action Act and Articles 25 and 50 of the Constitution; right to a fair trial and hearing.

4. Appointment having been made at the end of the prosecution case, the participation of the accused was necessary in order to protect his right to a fair hearing and trial under Articles 25 and 50 the of the Constitution.

5. In response to the objection the DPP filed a replying affidavit sworn by Mr. Charles Okeyo in which it was deponed that the ODPP is created under Article 157 of the Constitution with powers of appointing officers subordinate with general or special instructions in the

conduct of criminal matters and Article 157 (1) provides that the DPP shall not require the consent of any person or authority in the exercise of the powers or functions thereon and shall not be under the direction or control of any person or authority.

6. It was deponed that the appointment was done with due regard to the advanced stage of the case where over twenty (20) prosecution witnesses had testified with the last witness yet to be cross-examined and therefore it was deemed proper and expedient to retain the same prosecutor so as to avoid further delays.

7. It was further stated that Mr. Mwenda is a public servant and not state officer and no prejudice to be suffered by the accused by the appointment of Mr. Mwenda advocate was demonstrated.

SUBMISSION

8. It was submitted by Ms. Kilonzo for the Objector that Section 85 of the Criminal Procedure Code must be read together with Article 260 of the Constitution where DPP is identified as state officer who is prohibited under Article 77 of the Constitution from any other full time engagement. It was submitted further that **Article 156 (9)** gives the DPP powers to delegate his duties. He can only do so to subordinate officers. She distinguished the authorities supplied by the DPP and stated that in **REGINE BHUTT vs HARRON BHUTT & ANOTHER, HIGH COURT at MOMBASA, CIVIL SUIT NO. 8 OF 2014 (OS)** the question was whether a Member of Parliament could engage in civil proceedings and was allowed to do so if he did not receive payment.

9. She further distinguished **DPP vs SAMUEL KIMUCHU GICHURU & ANOTHER, HIGH COURT at MILIMANI CRIMINAL REVISION NO. 926 Of 2011** on the ground that the court allowed the prosecutor to continue since he was dormant from his law firm and had been hired by the Public Service Commission as a special prosecutor and his full attention was dedicated to the service of DPP.

10. It was submitted that the terms of Mr. Mwenda with KRA were not disclosed and neither was it disclosed whether he was offering his services *pro bono*. It was submitted that the state's case was near completion so it cannot be said that they will suffer if another officer was engaged. It was submitted that it will be unfair to the defence if the proceedings are tinted with the question as to whether the prosecutor has constitutional authority. It was submitted that both the court and the accused do not know the process through which the decision to allow Mr. Mwenda to continue with the prosecution was made.

11. It was contended that the accused should have been involved in the decision to gazette Mr. Mwenda and be given reasons under Section 6 of the Fair Administrative Action Act.

12. Mr. Imbali submitted that **Section 85** of the **Criminal Procedure Code** gives powers to the DPP to give notice and appoint a person to perform either general or specific functions as a prosecutor and that the DPP has complied with the law to gazette Mr. Mwenda to continue prosecuting the case. It was submitted that Mr. Mwenda stopped being a state officer when he left the services of the ODPP for KRA which is not mentioned in Article 77 as a full time state officer. It was submitted that the appointment was in realization of **Article 25** and **50** of the **Constitution** right to fair trial without unreasonable delay.

13. It was submitted that the accused should not have a say on who to prosecute him whereas the **ODPP Act Number 2 of 2013** gives the powers to the DPP to appoint prosecutors under Section 30 stating that he/she can appoint a private practitioner to be a public prosecutor. He relied upon the two authorities herein.

ANALYSIS AND DETERMINATION

14. From the submissions herein it is clear that the powers of the DPP to appoint a special prosecutor is not disputed. From the tone of the objection one gets the feeling that Ms. Kilonzo's objection is on the procedure under which Mr. Mwenda was appointed and not the powers of DPP to appoint him as a special prosecutor.

15. For avoidance of doubt the ODPP is constitutionally established in Article 157 of the Constitution with Article 157 (9) providing that the powers of the DPP may be exercised in person or by officers acting in accordance with general or special instructions. Section 10 thereof states that DPP shall not require the consent of any person or authority for the commencement of criminal proceedings and **in exercise of his/her powers or function shall not be under the direction or control of any person or authority.** (emphasis added).

16. The only constitutional limitation to the powers of DPP is given under Article 157 (11) that in exercise of the powers, the DPP shall have regard to public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.

17. In the case of **JOHN SWAKA vs THE DPP & ANOTHER [2013] eKLR** the court cited with approval **FRANCIS ANYANGO JUMA vs THE DPP & ANOTHER, PETITION NO. 160 of 2012 [2012] eKLR** thus:-

“Clearly, the intention under the Constitution was to enable the Director of Public Prosecution to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the Director of Public Prosecution of his power under the Constitution or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a party's rights under the Constitution or violation of the Constitution itself.”

18. With that in mind the issue for the court to answer is whether Mr. Mwenda is qualified to be appointed as a special prosecutor by the DPP in exercise of his powers under the Constitution and Section 85 of the Criminal Procedure Code? The only objection raised by the defence is that he is a state officer and that the terms of his engagement were not disclosed and neither did the accused take part in the decision of his appointment as such hereby breaching Fair Administrative Action Acts and Article 47 of the Constitution.

19. From a reading of the Constitution and the law I find no basis for the submission that the accused should have been involved in the decision to appoint Mr. Mwenda as a special prosecutor. The Constitution states that in exercise of his powers the DPP should be under no direction of anybody or authority and should exercise those powers with minimal interference or superintendence, the accused has no right to determine the person to prosecute him unless it is proved to the satisfaction of the court that there is conflict of interest. The DPP is better equipped than the court to deal with variables involved in deciding who prosecutes its cases and the court as it were can only interfere on the grounds of legality or rationality.

20. I am unable to see logics in the submission that the accused should have been given the reason for the appointment of Mr. Mwenda and further that the same should have been involved in the decision thereon. It is for the DPP to apply his mind and arrive at a conclusion that the concerned case has special significance which require the appointment of a special prosecutor and in this case the reason given that Mr. Mwenda has prosecuted the matter since 2014 and the same is at the tail end and therefore his continued prosecution is for the benefit of the accused, the prosecution and the court so as to realize the constitutional obligation of fair hearing cannot be wished away.

21. The issue before the court is not whether Mr. Mwenda is a state officer but whether he is qualified to be appointed by DPP. Even if Mr. Mwenda was a state officer it has not been shown that his appointment is inherently incompatible with the responsibilities of a state officer or whether it will result in the impairment of his judgement. The issue of his terms of engagement is better left to the office of the DPP and KRA. This court is not the best forum to litigate the process and the reason leading to the appointment of a special prosecutor.

22. I therefore find no merit in the objection herein as I see no prejudice which the accused shall suffer by the appointment of Mr. Mwenda who has been prosecuting this case all along and his continued prosecution is in the best interest of the cause of justice. The objection is hereby dismissed.

Dated, Signed and Delivered at Nairobi this 14th day of February, 2019.

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Okeyo for Imbali for the State

Ms. Kilonzo for the accused person

Mr. Karigi for the family

Accused present

Court Assistant: Karwitha