REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI

ACEC APPEAL NO. 11 OF 2019

EVANS ODHIAMBO KIDERO .....APPLICANT/APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

RULING

1. The applicant herein Evans Odhiambo Kidero together with 10 others were arraigned before Nairobi Chief Magistrate's Court on 9th August 2018 under ACC No. 32/2018 facing various corruption related charges.

2. In particular, the applicant was charged with three counts. In respect of Count I, he was charged with nine others with the offence of conspiracy to commit an offence of corruption contrary to Section 47A (3) as read with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. Particulars state that, on diverse dates between 16th January 2014 and 25th January 2016 within Nairobi City County in the Republic of Kenya, jointly conspired to commit an offence of corruption, namely, fraud leading to loss of public funds in the sum of Kenya Shillings Two Hundred and thirteen million, three hundred and twenty seven thousand three hundred shillings (Kshs.213,327,300/=) for services not rendered.

3. In count 2, he was charged with dealing with suspect property contrary to Section 47(1) as read out with Section 47 (2) (a) and 48 of the Anti-Corruption and Economic Crimes Act No. 3/2003. Particulars are that, on or about 29th day of August 2014, within Nairobi City County in the Republic of Kenya, being the Governor of Nairobi County government and a person whose functions concerned the management and use of revenue received a benefit of Kshs.14,000,000/= from Lodwar Wholesalers Ltd, having reason to believe that the said amount was acquired in the course of corrupt conduct.

4. With regard to count 3, he was charged with dealing with suspect property contrary to Section 47 (1) as read with Sections 47 (2) (a) and 48 of the Anti-Corruption and Economic Crimes Act No. 3/2003. Particulars provide that, on or about 11th day of September 2014 within Nairobi City County in the Republic of Kenya, being the governor of Nairobi City County government and person whose function concerned the management and use of revenue, received a benefit of Kshs.10,000,000/= from Lodwar Wholesalers Ltd, having reason to believe that the said monies were acquired in the course of corrupt conduct.

5. After entering a plea of not guilty, the applicant (accused) was admitted on bail and trial process commenced. However, before the substantive hearing could take off, the applicant herein filed a notice of motion dated 4th March 2019 stating that; count 1 as registered amounts to duplicity in so far it relates to an offence of conspiracy to commit an offence and also corruption under Section 47 of ACECA and fraud under Section 45 of the ACECA; that the charge in respect of count 1 is bad in law for want of particulars in so far as the same does not provide with specificity particulars of the offence; that offences of dealing with suspect property against accused 1 set out in count 2 and 3 be severed and tried separately.

6. Equally, the 8th to 11th accused persons filed a notice of motion dated 5th March 2019 challenging the trial court's jurisdiction in entertaining charges relating to payment and or assessment of taxes which allegedly falls entirely within the tax tribunal; that an order to issue declining to admit counts XXXIV and XXXV of the charge sheet for failing to disclose a reasonable offence

7. On 25th March 2019, the honourable magistrate delivered a detailed ruling dismissing the two applications. Aggrieved by the said ruling, the applicant herein moved to this court on appeal vide petition No. 11/2019 challenging the said ruling citing nine grounds of appeal as follows:

> **(1) The learned magistrate erred in fact and in law by suo moto consolidating the Appellant's application dated 4th March 2019 with that of the 8th to 11th accused persons' thereby completely conflating quite distinct questions of law and ultimately occasioning a miscarriage of justice.**

(2) The learned magistrate erred in law in failing to determine and hold that Count 1 of the charge sheet dated 9th August 2018 as framed did not disclose an offence known in law.

(3) The learned magistrate erred in law in failing to determine and hold that count I of the Charge Sheet dated 9th August 2018 as framed was bad for duplicity, incurably defective and fatal.

(4) The learned magistrate erred in law in holding that Count I in the charge sheet dated 9th August, 2018 could and should be tried together with Counts II and III in the said charge sheet.

(5) The learned magistrate erred in law in determining and holding that Count II in the Charge Sheet dated 9th August 2018 was not deficient for want of particulars of the offence and therefore incurably bad and defective.

(6) The learned magistrate erred in law in holding there was no misjoinder in respect to Counts I and II on one hand and Counts IV to XXXV on the other hand, in the Charge Sheet dated 9th August 2018.

(7) The learned magistrate erred in fact and in law by holding that a challenge to the propriety of the ingredients of a charge, and in this respect, the existence or lack thereof of the *actus reus,* can only be relied upon the close of the prosecution's case.

(8) The learned magistrate erred in fact and in law by determining *per incuriam* that the decision by the DPP to charge the appellant with the offence of conspiracy, alongside 2 other offences, does not prejudice the appellant.

(9) That the learned magistrate erred in fact and in law by determining the case for misjoinder of counts as merely a case management issue rather than a question of the substantive right to a fair hearing as encapsulated under Article 50 (2) (e) of the Constitution.

8. Contemporaneously filed with the petition of appeal is a notice of motion dated 16th April 2016 brought pursuant to Articles 165 (6 & 7), 159 and 259 of the Constitution. The applicant sought orders particularized as hereunder:

(a) This honourable court be pleased to certify this application as urgent and to dispense with service thereof in the first instance.

(b) Pending the interpartes hearing and determination of this application, the proceedings in Anti-Corruption Cr. Case No. 32/2018, Republic vs Evans Kidero and 10 others be stayed.

(c) Pending the hearing and determination of Anti-Corruption Cr. Appeal No. 11/19 Evans Odhiambo Kidero vs Republic the proceedings in Anti-Corruption Case No. 32/2018 be stayed.

(d) Costs of this application be provided for.

9. On 23rd April 2019 the duty court directed for service of the application upon the DPP who in response filed 17 grounds of opposition on 30th April 2019 as follows:

(1) That the proceedings in Chief Magistrate Anti-Corruption Criminal Case No. 32 of 2018 Republic vs Evans Odhiambo Kidero & 10 Others are correct, legal, regular, proper and orders recorded and directions given by Honourable Ogoti are correct, legal, regular and appropriate.

(2) That the learned Magistrate was correct that as against the applicant herein, there is no prejudice that has been occasioned on the applicant in the charges drawn against him.

(3) That the charge of conspiracy drawn against the applicant and other accused persons is within the law and there is no duplicity in the particulars as stated in the charge sheet.

(4) That the applicant purports to abdicate himself the powers of the DPP to draw charges and purports to dictate the manner in which the said charges are to be drawn and framed.

(5) That the DPP has powers under Article 157 of the Constitution to institute and undertake criminal proceedings and in so doing, has powers to draw charges within the law.

(6) That the charges of conspiracy drawn against the applicant are within the law and the particulars thereto are clearly stated and do not amount to fraud as purported by the applicants herein.

(7) That the charges as drawn in count II and III clearly are within the law having clear statement of the offence and clear particulars of the offence which can aid the applicant in the proceedings in terms of preparing for his defence.

(8) That there is no ambiguity in the charges as drawn.

(9) That the applicant has to be patient to await the evidence to be adduced in court as required in law by the prosecution and if according to him the evidence has not proved the charges can raise that as a ground of defence if and when called upon.

(10) That the said line of thought by the applicant to question the charges at this stage implies that the defence wants to be the prosecutor who draws the charges, wants to direct which charge to be drawn and how to be drawn and wants to be the defendant at the same time.

(11) That the law is very clear on separation of powers and roles in the criminal justice system thus providing for the prosecutor, the defence and the impartial arbiter who is the court.

(12) That the law is also very clear on the stage at which one is given the position to prove or disprove an allegation. At this particular stage where the DPP has drawn charges against the applicant, the law has given the DPP powers to prove or disapprove the said allegations. Hence, the applicant has to follow the law as it is.

(13) That the application by the applicants herein is made in bad faith and to waste the court's time in regard to the pending trial.

(14) That there is no issue that necessitates the staying of proceedings in the lower court. The applicant can proceed to appeal on the decision of the trial court as the trial proceeds accordingly. The stay of proceedings is a waste of court's time and a move to defeat justice to Kenyans.

(15) That the court should take judicial notice of how many times that the applicant has been dodging taking plea with the various applications he has been making and this is a move to delay the trial process.

(16) That the ultimate goal of the applicant attacking the charges drawn against him is to state that he does not want to face any trial as the charges drawn against him are in regard to Count I, Count II and Count III. This in essence is challenging the powers of the DPP under Article 157 of the Constitution. He has an opportunity under the law to attack the prosecution case when called upon to cross examine the witnesses and the evidence adduced in court and when called upon to make a defence if at all he will be placed on his defence.

(17) That this application lacks merit and is done in bad faith.

10. When parties appeared before court on 2nd May 2019 they opted to argue the application orally. The applicant however filed a list of authorities on the same day.

Applicant's Case

11. In his submissions, Mr. Orengo Senior counsel together with Mr. Havi and J. Soweto appearing for the applicant reiterated the averments contained in the affidavit in support of the application and grounds on the face of it. Learned counsel urged the court to find that the learned trial magistrate erred in finding that the charges as drawn are not duplicitous, defective, bad in law by virtue of misjoinder and overloaded charge sheet with 35 counts against 11 accused persons.

12. Mr. Orengo stated that, to charge the applicant with 3 counts with 10 other accused persons will amount to misjoinder of charges thus subjecting the applicant to undue harassment, oppression, unnecessary inconvenience and .a waste of his time as the overloaded charge sheet will take a very long time to be concluded. He urged the court to find that the applicant should have been charged separately for expeditious delivery of justice and that the charge as currently drafted is bad in law and amounts to a misjoinder. On the same issue, counsel submitted that the charges preferred referred to offences committed over a period of 10 years hence should be separated.

13. Further, Mr. Orengo took issue with the trial court's lack of jurisdiction as some of the charges touches on non-payment of tax hence a matter of assessment of the same hence a dispute which falls squarely under the ambit of the tax tribunal.

14. Regarding defective charge sheet, Mr. Orengo stated that the charges as drawn do not have specific detail hence lack of specificity. He urged that the charge of corruption and leading to loss of public funds are two distinct charges which cannot be collapsed into one charge.

15. To support his submission on stay of proceedings, counsel relied on the decision in the case of **Christopher Ndarathi Murungaru vs Kenya Anti-Corruption Commission and Another (2006) eKLR** where the court stayed criminal proceedings on the basis that matters involving penal consequences must be of necessity be treated differently. Mr. Orengo argued that the appeal raises arguable grounds of appeal which needs to be determined first before any hearing proceeds. He opined that, if the proceedings slated for hearing on 6th – 10th May 2019 and then 20th to 30th May 2019 are not stayed, the appeal will be rendered nugatory. To bolster this proposition, counsel further referred the court to the above cited case of murungaru and **R vs Kenya Anti-Corruption Commission and 2 Others (2009) eKLR** where similar position was held.

16. In response, M/s Aluda appearing for the state opposed the application relying on their grounds of opposition aforesaid. Counsel basically opposed the application terming it as a waste of precious judicial time thus causing unnecessary inconvenience to the trial court's calendar in trying to forestall the trial which allegedly the applicant has been reluctant to participate in. M/s Aluda submitted that to prove conspiracy, one need to look at the entire evidence before the trial court.

17. She argued that the charges as drawn do not amount to duplicity nor are they defective as there is a nexus for the offences preferred.

Counsel stated that, it is will amount to double work and tedious to severe and try the charges separately considering that the witnesses are the same. Commenting on the authorities quoted by the applicant, M/s Aluda stated that the facts are totally different. She urged the court to allow the hearing before the lower court scheduled from 6th to 10th May 2019 to continue as the applicant persues the appeal at the same time.

Determination

18. I have considered the application herein, affidavit in support, grounds of opposition and oral submissions by both counsel. Issues that emerge for determination are:

(a) Whether disallowing the application for stay will render the appeal nugatory.

(b) Whether the appeal raises triable issues.

19. From onset, it would appear that the applicant has already argued the appeal. However, I will as much as possible avoid delving onto the merits of the entire appeal and confine myself into the application for stay .

20. The application herein was brought under Articles 165 (6) and (7) 159 and 259 of the Constitution. Article 165 (6) provides:

"The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising aquasi judicial function, but not over a superior court".

Sub-Article 7 – **"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 give any direction it considers appropriate to ensure the fair administration of justice".**

21. Unlike Section 356 (1) of the criminal Procedure Code (CPC) which provides for stay of execution on a sentence and in cases touching on Constitutional reference or Judicial Review proceedings, there is no express provision for stay of proceedings in a subordinate court under the CPC pending an appeal against an order made by such subordinate court. Equally, there is no saving clause in the CPC the equivalent of Section 3A of the Civil Procedure Act which steps in by conferring the court with inherent powers to entertain any proceedings and make necessary orders even when there is no express provision in law.

22. In this case, the appeal seeks a stay order to issue stopping continuing proceedings before the lower court pending determination of the appeal. However, Article 165 (3) gives the high court unlimited jurisdiction over civil and criminal matters. This provision when read together with Article 165 (6) and (7) confers the high court with inherent powers to make necessary orders for the ends of justice to be met. That is not to say that I am not alive to the fact that jurisdiction must be conferred on the high court either by the Constitution or by any other written law (**See Thomas Patrick Gilbert Cholmondeley vs R (2008) eKLR**. In this particular case, I will be exercising jurisdiction derived from the Constitution as stated above.

23. What is the rationale in applying for stay of proceedings in ACC NO 32/18 pending the hearing of the appeal? According to the applicant, unless the order for stay is granted, the appeal will be rendered nugatory as the hearing of the lower court criminal proceedings is due to commence on 6th running up to 10th May 2019 and thereafter 20th May 2019 onwards.

24. Appeals from the lower court to the high court are governed under Section 347(1) (a) and 354 (3) of the CPC. Section 347 provides-

(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.

(2) An appeal to the high court may be on a matter of fact as well as on a matter of law.

Section 354 (3) also provides that- 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.

25. A clear reading of the above provisions reveals that the criminal procedure does not envisage an appeal to the high court arising from an

interlocutory ruling made by a trial court in the course of the trial **(See John Njenga Kamau vs R (2014) eKLR)**.

26. In the case of **Thomas Patrick Gilbert Cholmondeley vs R (Supra)** the court of appeal had this to say:

> **"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 atrial 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 rights, falls by the wayside and causes no harm to such an accused person".**

Section 379 (1) which refers to appeals from the high court to the court of appeal is the equivalent of Section 347 (1) (a) of the CPC regarding appeals from lower courts to the high court**.**

27. Relying on the above court of appeal decision, Justice Kimaru dismissed an application for stay of criminal proceedings pending appeal under similar circumstances in the case of **John Njenga Kamau vs R (Supra)** where he held:

> **"it is clear from the foregoing that the order of stay of proceedings sought by the applicant cannot be allowed. There is no legal basis upon which this court can stay proceedings before the trial court because the appellant has neither been "convicted" nor "acquitted" as envisaged under Section 347 and 354 of the CPC".**

28. While faced with a similar scenario, Justice Majanja pronounced himself in the case of **Henry Nyachio Ondara vs R (2019) eKLR** as follows:

> **"it is clear from the foregoing that the right of appeal under Section 347 (1) of the CPC is only given to a person who has been convicted and sentenced. There is no right of appeal conferred against an interlocutory ruling such as the one made by the trial magistrate rejecting the applicant's counsel's application to start the case denovo."**

29. While referring to an application filed under judicial review to stay criminal proceedings, the court of appeal in **R vs Kenya Anti-Corruption Commission and 2 others (2009) eKLR** held as follows:

> **"Further, the grounds on which the application for Judicial review was based can be raised as defences at the trial as the superior court found. Therefore, if the trial proceeds, the applicant will be afforded an opportunity of advancing the matters he intends to raise in the appeal. Lastly, there is no certainty that if criminal trial proceeds, the applicant would be convicted. If however he is ultimately convicted he can resort to appeal mechanism to ensure that justice is done".**

30. From the above quoted authorities, it is apparent that superior courts are reluctant to entertain stay of criminal trial based on interlocutory appeals as much as possible to avoid clogging trial courts with numerous unnecessary delays arising out of appeals from nearly every ruling pronounced by a subordinate court touching on every slight objection raised including admissibility or non admissibility of exhibits. It is saver then for the aggrieved party to raise all those issues at once upon conclusion of the trial in the event of a conviction. This will also give the appellate court hearing the main appeal after conclusion of the trial an opportunity to make an independent and informed mind or decision without being influenced by the decision of an appellate court of concurrent jurisdiction having determined an interlocutory appeal arising from the same subject in the course of the trial.

31. The authorities quoted by the applicant herein arose out of either a constitutional reference or judicial review proceedings whose principles and threshold is different hence not so much relevant in so far as interlocutory appeals are concerned.

32. The issues regarding misjoinder of charge sheet, defective charge sheet, duplicity can be built and addressed as the trial progresses and finally at the stage of the main appeal should there be a conviction. I do not wish to delve into the evidence that is likely to be adduced at the trial to make a conclusive determination. That is why section 382 of the CPC provides for such safety measures in case of any irregularity, error or omission and whether such an error, omission or irregularity would have occasioned a miscarriage of justice. To arrive at such conclusion, the appellate court handling the main appeal would be guided by the nature of the evidence adduced which is not available at the moment hence not determinable at this stage.

33. For the above stated reasons, I do not find any sufficient or convincing reasons to justify stay of proceedings pending before the lower court on account of misjoinder, duplicity or defective charge sheet as there is no prejudice likely to be suffered even if the trial proceeded before the appeal is heard.

34. However, the issue of overloaded charge sheet with over 35 counts is indeed an arguable ground of appeal which needs to be fully ventilated and addressed at a later stage in the course of the hearing of the appeal which should be fixed for hearing as soon as the appeal is admitted. This ground alone cannot stop the entire hearing process which is due to start. I do not find anything herein capable of rendering the appeal nugatory as the appeal will be heard and determined within the shortest time possible. Regarding offences touching on tax evasion, the applicant is not a victim of the same hence can not purport to represent the interest of the other accused persons.

35. Accordingly, the application for stay is hereby dismissed and orders of stay issued on 2nd May 2019 lifted .The original file be forwarded to the trial court for hearing to proceed as scheduled. Parties to fast track hearing of the appeal so as to determine the outstanding issues.

DATED, DELIVERED AND SIGNED AT NAIROBI ON THIS 7TH DAY OF MAY, 2019.

J.N. ONYIEGO

JUDGE