



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI

ACEC REVISION CASE NO. 24 OF 2019

BRAMWEL JUMA WANYALIKHA.....APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

AND

CHARLES KIPROTICH TANUI.....1ST INTERESTED PARTY

PHILLIP KIMEU.....2ND INTERESTED PARTY

BRAMWEL JUMA WANYALIKHA.....3RD INTERESTED PARTY

FRANCIS GITHAIGA MURAYA.....4TH INTERESTED PARTY

SAMWEL ODOYO MIKWA.....5TH INTERESTED PARTY

NICHOLAS GITOBU.....6TH INTERESTED PARTY

PETER GAITHO MACHUA.....7TH INTERESTED PARTY

JANE JESANAI NAKODONY.....8TH INTERESTED PARTY

CHARLES NDIRITU MAITAL.....9TH INTERESTED PARTY

CHARLES OCHIENG OUKO.....10TH INTERESTED PARTY

FREDRICK KAGOSH OGENGA.....11TH INTERESTED PARTY

EMILIO MWAI NDERITU.....12TH INTERESTED PARTY

AERO DISPENSER VALVES LIMITED.....13TH INTERESTED PARTY

JOHN HUBA WAKA.....14TH INTERESTED PARTY

FRANCIS OMONDI OBURE.....15TH INTERESTED PARTY

BERYL ALUOCH KHASINAH.....16TH INTERESTED PARTY

JIM YUKES.....17TH INTERESTED PARTY

RULING

1. Vide a letter dated 31st May 2019 addressed to the court through the Deputy Registrar, the firm of Nyandieka and company advocates acting for one Bramwel Juma Wanyalikha the 3rd accused in Chief Magistrate ACC No. 50/2018, sought this court's directions by way of revision in calling for the said file from the trial court to satisfy itself as to the correctness, legality or propriety of the finding and order in the ruling passed by the Chief Magistrate Mrs. E.M. Juma on 27th May 2019 and as to the regularity of the proceedings in the said proceedings.
2. The applicant herein together with 17 others were charged before the CM's court facing various counts relating to corruption and economic crimes. In respect to count one the subject of this application, all accused persons were charged jointly for the offence of conspiracy to defraud contrary to Section 317 of the penal code. Particulars are that, between the months of October, 2014 and July, 2015 within Nairobi City County in the Republic of Kenya being employees of Kenya Pipeline Company Limited, private persons and limited liability companies the 18 accused persons conspired to defraud Kenya Pipeline Company Limited of USD 6,441,700.40 in respect of Tender No. SU/QT/3264F/14 for the supply of Cla Val Model 352GF Hydrant Pit Valves Complete with Under Hydrant Valves and Two Years Maintenance Spares.
3. However, during plea taking, the 17th and 18th accused persons both Canadians were absent. It later emerged that the non-attendance of the two was as a result of lack of issuance of summons to appear and that their appearance in court could not be secured as they were beyond this court's jurisdiction. However, the court proceeded to take plea and entered a plea of not guilty against them in absentia.
4. When the hearing commenced on 27th March 2019, Mr. Nyandieka together with a team of other lawyers appearing for the rest of the accused persons (interested parties), raised an objection against the case proceeding in the absence of the two accused persons. He sought their names to be removed from the proceedings by way of amendment to allow the case proceed against the rest of the accused persons.
5. It was the applicant's contention that proceeding with the hearing of the case with names of the 17th and 18th accused persons on the charge sheet while absent and having not taken plea may lead to a mistrial should they resurface. He further argued that, the other accused person's rights will greatly be prejudiced and in particular, the right to a fair hearing under Article 50 of the Constitution.
6. It was further stated that the 17th and 18th accused persons being foreigners, the process of compelling their attendance had not been followed and therefore the trial commencing in their absence with their names on the charge sheet would be illegal and un-procedural as neither the procedure for service of summons outside local limits of jurisdiction or service of warrants of arrest as envisaged had been invoked.
7. In their response, the state opposed the application stating that the prosecution has powers to decide on when to charge a person and when not and with what offence. They submitted that there was no prejudice suffered by the accused by proceeding with the case as it is.
8. Having considered the parties' submissions, the trial court overruled the application/objection holding that: the absence of the 17th and 18th accused persons does not affect the evidence that may be adduced by the prosecution in support of the charge; the DPP has the mandate to conduct its case; it is within the DPP's discretion to decide when to charge or not and determine on the evidence to present to court; the 18th accused a juristic person cannot be extradited unless its directors are; the defence are at liberty to call the 17th and 18th accused persons as witnesses if they so wish; the absence of the 17th and 18th accused should not delay the trial; the absence of the two accused persons implies that they have forgone their right to participate in the trial and lastly, the removal of their names would amount to encouraging impunity.

9. When the matter came up for revision, this court directed service upon the DPP who duly appeared for the hearing. In his submissions, Mr. Nyandieka adopted the contents contained in his letter seeking revision. Counsel submitted that the Kenyan legal system does not allow prosecution of an accused in his absence especially when he has not appeared for plea except where charged with a misdemeanour pursuant to Section 206 of the CPC. To fortify his submission, counsel relied on the decision in the case of **Solomon Locham vs R (2015) eKLR** where the court held that only where an accused is charged with an offence which is a misdemeanour can the trial magistrate proceed in his or her absence.

10. According to Nyandieka, the offence of conspiracy is a felony which then requires attendance of an accused person in court pursuant to Section 99 (2) of the CPC. That under the aforementioned provision, the court has powers to cause attendance of an accused person or dispense with the same but it cannot start a trial without taking a plea first.

11. Counsel urged the court to find that it is only under Article 50 (2) of the Constitution where the court can prosecute in the absence of an accused if the conduct of such person makes it impossible for the trial to proceed.

12. Learned counsel stated that trial of a case cannot commence before an accused person is arraigned before court. In support of this proposition, counsel placed reliance on the decision in the case of **Kimani vs Kihara (1983) eKLR** where the court held that:

“in the context of Section 88, however, “trying” we think must include taking a plea. It is we think clear that the trial of a case cannot start before the accused person is before the court. As soon as an accused person is before him in court for the purpose of pleading to a formal charge, duly signed charge a magistrate can properly be described as “trying the case”. It is at this stage that an application may be made for permission to prosecute. If in the absence of the accused person permission is purportedly granted to a private prosecutor to conduct a prosecution the power to grant permission cannot be taken to have been exercised by a magistrate trying the case. Such permission is premature and as Mr. Chunga and Mr. Georgiadis submitted, it is null and void”.

13. Counsel submitted that in exercise of his constitutional mandate under Article 157 (11) the DPP must not abuse his office.

14. In response, M/s Owiti appearing for the state submitted that the court properly directed itself in dismissing the application and that nothing prohibits the court from entering a plea of not guilty against a person who fails to attend court.

15. Further, counsel submitted that there was nothing irregular in proceeding in the 17th and 18th accused’s absence. She referred to the decision in the case of **R vs Galma Abagaro Shano vR (2017) eKLR** where the court proceeded in the absence of an accused who absconded trial after the close of the prosecution case.

16. Counsel relied on Article 50 (2) (f) contending that where an accused person’s conduct makes it impossible for the trial to proceed, then the case can continue in his absence. She further submitted that there will be no mistrial in the proceedings in the event the two accused persons appear.

Determination

17. I have considered the application herein and the oral submissions by both counsel. The only issue for determination is whether the applicant has satisfied the requirements for revision under Section 36 2 CPC.

18. The revision application is brought pursuant to Article 165 (6) and (7) of the Constitution and Sections 362 and 364 of the CPC.

19. Article 165 (6) confers the High Court with supervisory jurisdiction over subordinate courts and over

any person, body or authority exercising a judicial or quasi judicial jurisdiction but not over a superior court. Sub-Article 7 goes further to provide that ,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.

20. The above provision is further operationalised under Section 362 of the CPC which 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”.

21. It is trite that exercise of revisionary powers by the High Court is purely a matter of judicial discretion which must be exercised judicially within the confines of the relevant provisions and not a substitute to an appeal (**See Abraham Wafula vs R (2013) eKLR**).

22. The gist of the application herein is that the trial court entered a plea of not guilty against the 17th and 18th accused persons even before being summoned to appear before the court and formally take plea. That to proceed with the proceedings in their current form will amount to impropriety, illegality and irregularity in proceedings.

23. It is common ground that the 17th and 18th accused persons were never summoned to attend court for plea because they are not Kenyans and therefore reside outside the jurisdiction of the Kenyan courts. Further, that it was impossible for the prosecution to secure their attendance by virtue of the fact that they are Canadians to whom Kenya has no mutual legal assistance agreement or extradition treaty.

24. Can proceedings in a criminal trial commence in the absence of an accused person? The Kenyan criminal justice system does not provide for prosecution of an accused in absentia except under legally recognised exceptions. Such situations include; where an accused person is charged of a misdemeanour but not a felony pursuant to Section 206 of the CPC which provides at Sub Section (1) that; if at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court which made the order of adjournment, the court may, unless the accused person is charged with felony, proceed with the hearing or further hearing as if the accused were present, and if the complainant does not appear the court may dismiss the charge with or without costs.

(2) If the court commits the accused person in his absence, it may set aside the conviction upon being satisfied that his absence was from causes over which he had no control and that he had a probable defence on the merits.

25. Besides the above provision, Article 50 (2) provides that; every accused person has the right to a fair trial which includes the right –

(a) ...

(b) to be informed of the charge, with sufficient detail to answer it.

(c)

(d)

(e)

(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed.

26. Does Article 50 (2) (f) envisage a scenario where an accused person has not entered or taken plea in a criminal trial? Does failure to appear in court for plea taking and commencement of a trial where no notice has been furnished to a suspect to appear amount to a conduct making it impossible for proceedings or a trial to proceed? In my view, this provision is geared towards; insulating a criminal trial which has already commenced; to cure any mischief where accused persons who are bent to frustrate their trial abscond thus leaving the victims of their actions or omissions and courts helpless and, to restore sanity in the criminal justice system so as to achieve substantive justice against a person who has duly been given an opportunity to state his case but deliberately forfeits it by skipping due process.

27. It does not envisage a situation where an accused person is charged but has not taken plea and more especially on a felony which is exempted under Section 206 (1) & (2) of the CPC. Our criminal justice system does not provide for trial in absentia. In the words of Article 50 of the Constitution, a fair hearing embodies public hearing in an open court and in the presence of an accused person.

28. For this court to allow prosecution of an accused person who has no idea nor notice of the pending charges and trial will amount to a procedural legal absurdity and uncertainty. It is not about curtailing impunity but rather respect to the rule of law and maintaining certainty in our legal system. This court in my view will be charged harshly if it sanctions a process which will undermine due process and the rule of law. To allow this style of prosecution will set a bad precedent of generally charging anybody deemed to have committed an offence but resides outside jurisdiction of the court without following the laid down procedures.

29. In arriving at that conclusion, several questions are bound to arise; why do we have legal mutual assistance agreements? Why do we have extradition treaties? They are intended to facilitate surrender of culprits suspected of committing various crimes to the countries where required for prosecution. There is no cut. If we were to allow prosecution in the manner now being agitated by the prosecution, then we are moving towards a wrong direction where even extradition proceedings will not be necessary as people will be charged in absentia without any struggle in securing their attendance.

30. What orders will be made against the two upon closure of prosecution case or trial? Assuming the accused persons turn up after judgment has been delivered and they have been found guilty, will it not be prejudicial to a subsequent trial if the court is convinced that they had sufficient cause for their non-attendance in the first place. Such a scenario will embarrass the court system.

31. It is my conviction that it was improper and that there was an error committed by admitting the charge and commencing trial and conducting the hearing with the two accused persons' names on the charge sheet. That was an error and a gross misdirection in law on the part of the honourable magistrate. I am in agreement with the decision in the case of **Kimani vs Kihara (Supra)** that trial of a case cannot start before an accused person is before court. The best the prosecution would have done was to withdraw count one under Section 87 (a) of the CPC, amend the same and charge the 16 accused persons with others not before court and then proceed.

32. The prosecution will not suffer any prejudice in proceeding in the absence of the two as they will have an opportunity when appropriate to charge them. Equally, they will not gain anything by proceeding with the charges as they are. Instead, the proceedings will be untidy and irregular procedurally. Criminal justice system has no time limitation. They will try other means legally possible to apprehend the 17th

accused person and then charge him together with the 18th accused juristic person.

33. The argument that the 18th accused a juristic person can be charged even without notification or summons being served will not serve the interest of justice in a criminal trial. It is not about who has powers to charge who or prefers which charges but rather the procedure or route followed in realising those powers. Whereas the DPP has those powers which is not in dispute, the same must be exercised within the confines of the law.

34. Accordingly, I am satisfied that the application for revision is merited and the same is allowed with

orders as follows:

(a) That the order of the trial court and the entire ruling delivered on 27th May 2019 by Hon. E.M. JUMA is hereby set aside.

(b) That the prosecution shall withdraw the charge in respect of count one under Section 87(a) of CPC and amend the same by removing the names of the 17th and 18th accused persons.

(c) That the new charge of conspiracy in respect of count one can read with others not before the court.

(d) That after amendment, proceedings shall continue normally by the accused taking plea afresh as in the normal way with the option of either party recalling for further evidence in chief or cross examination of the witness who has already testified and thereafter hearing continues.

(e) That the original file be returned to the trial court for further proceedings

Order accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF JULY, 2019.

J.N. ONYIEGO

JUDGE