



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**ACEC REVISION NO 32 OF 2019**

**REPUBLIC.....APPLICANT**

**VS**

**HENRY ROTICH & 2 OTHERS.....RESPONDENTS**

(Being an application for revision of a ruling of the Chief Magistrate,

Hon. D. Ogoti, in ACEC No. 18, 19, 20 and 21 of 2019

made on 29<sup>th</sup> July 2019)

**RULING ON REVISION**

1. This application for revision raises the question whether an Advocate, instructed as such to represent a client in a criminal matter, can take the plea to the charges on behalf of his client. It arises out of the ruling of the Chief Magistrate, Hon. D. Ogoti, in ACEC No. 18, 19, 20 and 21 of 2019 made on 29<sup>th</sup> July 2019. In its ruling, the plea court determined that it was in order for Mr. Anami, an Advocate of the High Court of Kenya instructed to represent two companies, CMC Di Ravenna Itinera JV and CMC Di Ravenna Itinera JV Kenya Branch which are charged alongside their co-accused with various offences under the Penal Code and the Antic-corruption and Economic Crimes Act to take plea on the companies' behalf.
2. By his letter dated 31<sup>st</sup> July 2019, the Director of Public Prosecutions (DPP) asks this court to call for the proceedings before the plea court on 29<sup>th</sup> July 2019 and satisfy itself as to the propriety, legality and correctness thereof. The DPP argues that the question that the court needs to address itself to is whether the plea court properly directed its mind in ruling that the accused's counsel takes plea on behalf of the two companies. The court had also, in its ruling on 29<sup>th</sup> July 2019, referred the question of the propriety of the plea to the High Court for consideration. The ruling was that, as noted by the DPP, the file should be placed before the High Court to determine whether, by entering the plea of not guilty against the two corporate accused made by Mr. Anami, the court made an error apparent on the face of the record and give directions pursuant to section 364(1) of the CPC.
3. In his submissions on behalf of the DPP, Learned Counsel Mr. Kinyanjui asked the court to determine the question whether an advocate can represent an accused person in his or her personal capacity and enter a plea on behalf of the accused. That the court had permitted Mr. Anami to enter a plea on behalf of the 9<sup>th</sup> and 10<sup>th</sup> accused; that the prosecution had objected that an advocate cannot enter a plea on behalf of an accused person, but the court had allowed the legal representative to take the plea. Mr. Kinyanjui asked the court to call for the record of the plea court and examine it to confirm whether the proceedings were legal and regular and in accordance with the law.
4. The DPP invoked the jurisdiction of the court in section 362 and 364 of the Criminal Procedure Code and Article 165 of the Constitution. He maintained that an advocate cannot take the place of an accused person and take a plea on his behalf. It was his submission that under Article 50 (2) (f), an accused person has a right to be present when being tried. The only exception is when the conduct of the accused makes it impossible for the trial to proceed. In his view, the status of an advocate representing a party remains that of representation, and the accused person cannot delegate that role to an advocate. Further, that any proceedings in the absence of an accused person outside that exception renders that trial unfair and has the effect of making the trial defective from the start.
5. Mr. Kinyanjui submitted further that plea taking is one of the most important parts of the trial; that it was the first time that the court has an encounter with the accused; that it is when the conduct of the trial is to be determined; and the presence of the accused is mandatory.
6. Counsel referred to section 207 of the CPC with regard to the procedure for taking pleas. He observed that the section is couched in the first person and does not envisage plea taking in the absence of the accused. He submitted that it is the accused who is required to respond to the charge; that the particulars of the charge; that it is the response of the accused that goes on record in the language in which the accused

responds to the charge; that the court should indicate that the entire procedure has been followed; and that the plea of the accused goes to the root of the trial.

7. The DPP referred to the decision in **Adan v Republic (1970) E.A 24** and paragraph 65 of the **Judicial Criminal Procedure Bench Book** which requires that the accused person must be present when the plea is taken. He also cited the case of **Johnstone Kassim Mwandi and Another v Republic (2015) eKLR** to submit that an advocate cannot do certain matters such as taking plea on behalf of a client.

8. Mr. Kinyanjui further contended that the accused may argue that they are corporations. His response was that the questions of pleas by corporations is addressed in paragraph 66 of the **Judicial Criminal Procedure Bench Book** which requires personal attendance of a corporation by its representative and cannot be waived or delegated. The trial court had not ascertained that Mr. Anami was duly authorized to represent the company in its capacity as an accused person; and even if he had been so authorized, there was nothing presented to show that he had the authority.

9. It was his submission further that corporations operate on guidelines and documents and the trial magistrate fell into error in not ascertaining that there were documents giving such authority. The effect of the decision of the trial court was that it taints the entire trial and renders it irregular and illegal. The DPP prayed that the court directs that the accused persons appear before the court and take plea as there is a high risk that if the proceedings go on as they are, then a mistrial will result.

10. Counsel relied in this regard on **Patrick Matemba Jeremiah v Republic (2019) eKLR** and **Republic v Haman Andisi & and 3 others (2017)eKLR**. He asked the court to direct the trial magistrate to require the attendance of the accused person as a way of ensuring that the court will have control of the proceedings as this will be the only way to enable compliance with the law; and that it was in the public interest, given the gravity of the offence and the charges the accused face, that they appear at the trial.

11. In his submissions in response, Learned Counsel, Mr. Monari for the respondents argued that they accepted as a principle of the law that an accused person must appear before a trial court. He also agreed with the principles set out in the authorities relied on by the DPP. He submitted that these authorities were, however, with regard to individuals, not corporations. A corporation, in his view, is required to appear in court and take part in the proceedings by a representative. Such representative, according to Mr. Monari, can be a director or an employee of a representative appointed by the company. Further, that such a representative can be anybody, even a 'mason' or an advocate. It was his case that the documents presented before the lower court showed the person appointed as a representative of the accused persons.

12. Mr. Monari conceded that, as submitted by the DPP, an advocate in active representation of a party may not take plea on behalf of an accused person where that accused person is an individual. But with regard to a corporation in criminal proceedings, an advocate who comes to take plea and will not be representing the accused may take plea on behalf of the corporation. The corporations in this case had appointed the firm of Coulson Harney Advocates and had appointed Mr. Anami to take plea on their behalf and participate on their behalf in the criminal trial, and Mr. Anami would not be involved in representation. He relied on section 33 of the **United Kingdom Criminal Justice Act** and paragraph 66 of the **Judicial Criminal Procedure Bench Book**.

13. In response to the argument by the DPP that the accused has a right under Article 50 to appear for his trial, Mr. Monari submitted that the right to attend a trial is a right retained by the accused person. That it does not become a duty on a corporation, especially one that has appointed a representative, to appear in court; that a right reposed in an individual and a corporation cannot be converted into a duty.

14. To the argument that allowing a plea by a legal representative may lead to a mistrial or the trial be tainted, Mr. Monari's response was that a charge under the Penal Code or any other Act has to be tried under the same circumstances and not with political overtones. In his view, if the DPP has a complaint with regard to the plea, such complaint can be raised before the trial court. He termed the present application premature and a waste of judicial time and urged the court to dismiss it.

15. In submissions in response, Learned Prosecution Counsel, Ms. Mwamburi who appeared with Mr Okeyo for the DPP, argued that on 29<sup>th</sup> July 2019, Mr. Anami represented the accused corporations and also took plea on their behalf; that a corporation is an individual under the law and cannot have separate rights from individuals; that an advocate has duties under Article 50(2)(g) which envisions that an advocate represents an accused person. Her submission was that an advocate has to elect either to be a party in a matter or to be a legal representative as one cannot play both roles. She observed that the trial court had *suo motu* referred this matter to the High Court seeking interpretation of what Mr. Anami had done, and it had even stopped him from collecting documents.

16. With respect to the letter from the corporations presented to this court from the Bar by Mr. Monari, which was said to be on the court file, Counsel noted that it was dated 6<sup>th</sup> August 2019 whereas the resolution was ratified by the Board and is confirmed as correct on 7<sup>th</sup> August 2019. The plea was taken on 29<sup>th</sup> July 2019. Counsel noted that the **Judicial Criminal Procedure Bench Book** at paragraph 66 requires that the court satisfies itself that the person taking plea is authorized to do so by the corporation, a requirement that is couched in mandatory terms. The plea court in this case did not do this, and it was her submission that the plea taken by Mr. Anami was illegal, improper and irregular, should be revised and the parties directed to take a proper plea.

17. Mr. Monari argued in a brief response that the letter dated 6<sup>th</sup> August 2019 is an extract of a resolution made on 25<sup>th</sup> July 2019.

18. I have read and considered the record of proceedings before Hon. D. Ogoti on 29<sup>th</sup> July 2019. I have also considered the submissions made by the parties in this revision. I start from the duty of this court in a revision as encapsulated in section 362 and 364 of the Criminal Procedure Code. Section 362 grants the High Court power to 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 made by the subordinate court, or the regularity of any proceeding before the subordinate court. At section 364, the Criminal Procedure Code provides the powers that the High Court may exercise on revision, which include the power to alter or reverse the orders made by the subordinate court.

19. The state has also drawn attention to the supervisory power of the High Court granted under Article 165(6) and (7) which grant a

constitutional underpinning to the High Court's powers of revision and empower the High Court, in the exercise of its supervisory jurisdiction, to:

***(7)...make any order or give any direction it considers appropriate to ensure the fair administration of justice.***

20. The question before me is fairly straightforward. It is whether an Advocate as a legal representative can stand in the dock and take a plea in a criminal case in the place of an accused person. Mr Monari for the respondents concedes that this cannot be done in the case of an individual. The respondents' case, however, is that a corporation's legal representative can stand in the dock in the place of a corporation and take the plea on its behalf.

21. Section 207 of the Criminal Procedure Code provides as follows:

**207. Accused to be called upon to plead**

***(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.***

***(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:***

***Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.***

***(3)...***

22. In **Adan vs Republic**, (supra) the court stated as follows with respect to the taking of a plea:

***“(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.***

***(ii) The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.”***

23. The court goes on in that case to set out the process where the accused pleads guilty to the offence charged, essentially restating the requirements of section 207 of the CPC.

24. The DPP has also referred the court to the decision in **Johnstone Kassim Mwandu & another v Republic [2015] eKLR**. In that case, the court was concerned with the question whether a son of a complainant in a criminal case, who was said to have a power of attorney from his father, could withdraw a criminal complaint on his father's behalf. In finding that the trial court erred in allowing the withdrawal of the complaint on the basis of the power of attorney, the court stated as follows:

***“In most cases the advocate can commit the person he represents. There are however specific issues that are directed at the party and an advocate in my view cannot purport to commit or do on behalf of a client. Such is the case with taking a plea in a criminal case. An advocate cannot plead on behalf of a client.***

***...***

***The Criminal Procedure Code [Cap. 75], and the Penal Code [Cap 63] do not have provisions for powers of attorney. In my view therefore a person cannot through a power of attorney purport to represent or act in the place of any party in a criminal case.”***

25. In this case, the respondents, the 9<sup>th</sup> and 10<sup>th</sup> accused, are corporations. They are charged with the offences, *inter alia*, of fraud contrary to section 317 of the Penal Code and fraudulent acquisition of public property contrary to section 45(1) as read with section 48 of the Anti-corruption and Economic Crimes Act. The *coram* in the court at which the plea was taken indicates that Mr. Anami, with others, was appearing as Counsel on record for the respondents. He then indicated that he had instructions to take plea on behalf of the two companies, a position that the court accepted and allowed the plea to be taken. I note that at the time the court allowed Mr. Anami to take the plea, the letter dated 6<sup>th</sup> August 2019, which Mr. Monari indicated is an extract from a resolution made on 25<sup>th</sup> July 2019, was not before the court.

26. It is instructive also that in its ruling on 29<sup>th</sup> July 2019, the court, of its own motion, referred this matter to this court to determine whether its decision to allow that manner of plea taking was proper.

27. Thus, the document purported to show that the corporations had authorised Mr. Anami to take plea on their behalf was not before the plea court at the time of the plea. It was presented to this court at the hearing of the application for revision, is dated 6<sup>th</sup> August 2019, and so it could not have been before the plea court on 29<sup>th</sup> July 2019.

28. However, the question is whether, even were there proper documentation before the plea court, it is proper for an advocate, acting as a legal representative of a corporation in the trial, as Mr. Anami was in this case, can appear and take plea on behalf of a corporation charged

with a criminal offence under our law. As submitted by the DPP, and as appears in the provisions of section 207 and the authorities cited above, there is no provision in the Criminal Procedure Code that contemplates such a scenario.

29. In an article titled **“The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons”** Kenya Law Review Vol. II : [2008-2010] George O. Otieno Ochich suggests that personal appearance by a corporation to plead to an offence may not always be necessary:

***“Traditionally, the predominant thinking was that a corporation could not be indicted for a crime at all. This was partly attributable to the fact that it was necessary that the accused person makes a personal appearance in the courts, and a corporation, not being a physical person could not appear. Personal appearance is no longer mandatory in all cases as an accused person, including a corporation, may now appear and plead through a representative.”*** (Emphasis added)

30. Mr. Monari referred the court to section 33 of the **United Kingdom Criminal Justice Act**, but did not, unfortunately, indicate of which year as there are several nor did he provide the said section to the court. In the United States, it appears that a corporation may enter a plea through its legal representative. In their article **“Corporations in the Unusual Role of Criminal Defendant”** [2013] **The Legal Intelligencer**

<[https://www.law.com/thelegalintelligencer/almID/1202617256976&Corporations\\_in\\_the\\_Unusual\\_Role\\_of\\_Criminal\\_Defendant/](https://www.law.com/thelegalintelligencer/almID/1202617256976&Corporations_in_the_Unusual_Role_of_Criminal_Defendant/)> accessed 15 September, 2019 Hayes Hunt and Michael P. Zabel observe that:

***“Unlike with a natural person, however, the plea process for a corporate defendant may be done entirely through its legal counsel, so long as he or she has the proper authority. Rule 43(b)(1) of the Federal Rules of Criminal Procedure explains a corporate defendant need not be present at a plea so long as it is represented by counsel who is present.”***

31. While we do not have similar provisions in our law, the **Judicial Criminal Procedure Bench Book** provides at paragraph 66 that a corporate entity can be charged with a criminal offence, and that in taking a plea, the court must satisfy itself that the person taking the plea is authorised to do so by the corporate entity. Reference is made in the Bench Book to the decision of Ojwang J (as he then was) in **Manager, Nanak Crankshaft Ltd. v Republic, through City Council of Nairobi [2008] eKLR**. In his decision, the Learned Judge cited the decision of Farrell J in **Stephen Obiro v. R. [1962] E.A. 61** in which the High Court was concerned with the question of who should take a plea on behalf of a company. Ojwang J cited the words of Farrell J as follows:

***“Even if some means can be found of bringing an unincorporated body before the Court, a further difficulty arises in deciding how it is to plead to the charge. In the instant case, a person named in the charge as the chairman of the union appeared and pleaded on behalf of the union. There is nothing in the record to show that the learned resident Magistrate made any inquiry to ascertain whether he was in fact authorized by the union to plead on its behalf, and in any case there is no provision in law enabling a representative to appear and plead on behalf of an unincorporated body. Under s.207 of the Criminal Procedure Code it is the accused person who must plead to the charge, and even an advocate is not ordinarily permitted to plead on his behalf: R v. Hussein Mohamed Moti (1953), 20 EACA 161. The same difficulty was considered in relation to the taking of plea from a corporate body in M. S. Sondhi Ltd. v. R. (1950) 17 EACA 143, where after referring to the provisions of s.96 of the Criminal Procedure Code the judgment proceeded (at p. 144):***

***‘There would appear to be no provision in the Criminal Procedure Code governing the reception of a plea from a company in a criminal proceeding and in its absence Mr. Kelly suggests that a Court should follow the provisions of S. 33 of the U.K. Criminal Justice Act, 1925. We agree with Mr. Kelly to this extent that where a company is charged before any Court with a criminal offence the Court should satisfy itself before taking any plea from any person that he is a representative of the company for the purpose of answering the charge.’***

[.....]”

(Emphasis added)

32. It seems to me that the principles that can be garnered from the above authorities is that the court may, if satisfied that the person before it is authorised to take plea on behalf of a corporate entity, allow him or her to do so, This, in my view, requires an inquiry by the court with respect to the position of the person, within the corporate entity, who presents himself as having the authority to take the plea. In the present case, it appears to me that the court did not make this inquiry before allowing the plea by Mr. Anami.

33. Secondly, the position seems to be that a corporation may be represented by a legal representative, provided that such representative is duly authorised and the court considers and satisfies itself in this regard. However, the nature and seriousness of the offence should be taken into consideration in determining whether a corporation can plead through its legal representative.

34. However, I can find no situation or circumstances in which the same legal representative who is representing a corporation in defending a criminal charge also appears and takes a plea on behalf of the corporation, or, in the words used in the Obiro case, is ***“a representative of the company for the purpose of answering the charge”*** even with authorisation, as the respondents in this case allege.

35. In my view, the person who can properly represent a corporation in our courts is an officer of the corporation, properly authorised. Such person would ordinarily be a Director of the corporation. It cannot be just ‘anybody’, even a ‘mason,’ as Mr. Monari suggested in his submissions. To hold otherwise may well result in the rather unedifying spectacle of a parade of legal representatives from the Kenyan Bar engaging in the gymnastics of moving from the Counsel table to the dock while simultaneously standing in for and representing their corporate clients as the accused in the dock and also conducting their defence.

36. There is another reason in my view, related to public interest that would require that the particular, and peculiar, circumstances of the country should be taken into consideration in determining whether to permit an advocate, even where duly authorised, to take plea on behalf of a corporation. As I observed above, even in other jurisdictions, a corporation may be permitted to take plea by its legal representative. In our circumstances, particularly taking into account the need to effectively deal with corruption matters and hopefully deter corruption, it is necessary to have corporations appear and plead by their Directors. The commission of alleged economic crimes has impoverished the country and left many citizens in poverty. It cannot be in the interests of fighting corruption that the alleged corporate accomplices of individual perpetrators of economic crimes remain in the shadows and hide behind legal representatives when such matters come to trial.

37. In the result, I find that the plea recorded by the subordinate court with respect to the respondents on the basis of a plea by their defence Counsel was irregular and improper. I accordingly set aside the said plea and direct that the respondents shall appear before the court to take plea by a Director or Directors of the corporations.

**Dated and Signed at Nairobi this 17<sup>th</sup> day of September 2019**

**MUMBI NGUGI**

**JUDGE**

**Dated Delivered and Signed at Nairobi this 18<sup>th</sup> day of September 2019**

**JOHN ONYIEGO**

**JUDGE**