



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL DIVISION

REVISION CAUSE NO. 172 OF 2019

ETHICS AND ANTI-CORRUPTION COMMISSION.....APPLICANT

VERSUS

MIRIAM RIUNGU & 7 OTHERSRESPONDENTS

DIRECTOR OF PUBLIC PROSECUTION.....INTERESTED PARTY

R U L I N G

1. The Respondents were on 24/4/2019 charged with various counts under the **Anti-Corruption and Economic Crimes Act (AECA) in ACC No. 2 of 2019**. They all pleaded not guilty and were released on reasonable bail terms. Pre-trial directions was accordingly undertaken.
2. On 30/5/2019, Learned Counsels for the respondents applied that the investigation report made under **section 35 of the Anti-Corruption and Economic Crimes Act, 2003 (“ACECA”)** be supplied to them. The prosecution did not object and the court made an order that the same be supplied to the respondents.
3. On 4/9/2019, the prosecution informed the court that the report would be supplied within 14 days. On 17/9/2019, Counsel for the 1st to 3rd accused served one Anastacia Rono, the investigations officer with a Notice to Produce under **section 69 of the Evidence Act** requiring to produce in court the report for purpose of serving the defence with a copy.
4. On 18/9/2019, the prosecution prayed for time to be allowed to submit against the production of the said report. This was strongly opposed by counsels for the respondents who argued that the document is a public and statutory document which they have a right to be supplied with. The trial court ordered that the report be supplied. The court also issued summons to the Regional Manager, Ethics and Anticorruption Commission (the commission) to attend Court on 30/9/2019 and show cause why the document should not be supplied. The trial court made findings that the failure to supply the respondents with the said report amounted to a violation of the respondent’s right to fair trial under **Article 50 (2)(j) of the Constitution**.
5. Aggrieved by that decision, the **EACC (“the applicant”)** moved this Court vide a letter dated 19/9/2019 for the revision of the said orders. The applicant alleged that; when the matter came on 18/9/2019, it applied for a review of the Order made on 30/5/2019 on the grounds that; the prosecutor who was handling the matter was not aware of the Commission’s position and there was no counsel watching brief for the applicant then, that what was being requested was an internal report and did not form part of the prosecution evidence. That the same was an administrative document between the applicant and the interested party. That the prosecution will be highly prejudiced if the orders were complied with.
6. The applicant contended that the trial Court acted irregularly in making the orders it made on 18/9/2019 as the prosecution and fully discharged its disclosure in terms of the Constitution having complied with **Article 50 (2) (j)** by supplying the defence with all documents that it intends to rely on in the trial.
7. The application was opposed by the respondents through the replying affidavit of the 3rd respondent, **Sharon Chepkorir Koskei**. She contended that; the application was incompetent as it had been instituted by the commission who have no prosecutorial powers and lack standing to approach this Court under **section 364 and 365 of the Criminal Procedure Code Cap 75 Laws of Kenya**. That **Article 50 (2) (c) of the Constitution** provide for the right to a fair trial, which includes the right to have adequate facilities to prepare a defence. That the report under **section 35 of ACECA**, bearing recommendations made on their prosecution was an important facility in preparing for their trial and being a statutory document should be available and be supplied to them whenever requested for.

8. From the letter applying for revision, the Replying affidavit and the Submissions of learned counsel; three issues arise for determination; these are. Whether the trial court had jurisdiction to make the orders it made, and finally whether the orders made on 18/9/19 were properly so made.

8. The applicant and the interested party filed joint submissions. They submitted that; the provisions of **Article 50 (9) of the Constitution and section 4 (2) of the Victims Protections Act** grants it the jurisdiction to institute the application for revision. The case of **Joseph Lendrix Waswa v Republic [2019] eKLR** was relied on in support of the submission that the applicant was entitled to make the present application.

9. On the second issue, the applicant relied on the provisions of **section 8 (2) of the Magistrate Act** which limits the jurisdiction of the Magistrate Court to deal with constitutional issues arising under **Article 25 (a) and (b) of the Constitution** and submitted that the trial court had no jurisdiction to interpret the Constitution. The case of **Director of Public Prosecutions vs Samuel Obudo Otieno & 6 Others (2017) eKLR** was cited in support thereof.

10. As regards **section 35 of the Aceca**, it was submitted for the applicant that the Director of Public Prosecution has the mandate to independently review evidence and does not require the consent of any person or authority in the exercise of its powers and functions. That in the premises, the trial Court erred in ordering the supply a report that will not be relied on in the prosecution case against the respondents.

11. On their part, the respondents submitted through written submissions of the 3rd and 8th respondents. It was submitted that the applicant cannot bypass and interested party and institute the revision proceedings directly. That this would make him the investigator, complainant and the prosecutor at the same time. The of **Roy Richard Elimma & Anor vs Republic Cr. Appeal No. 67 of 2002** as cited in **Republic v Faith Wangoi [2015] eKLR** was cited for the proposition that all the criminal prosecutions are to be brought and ably represented by the DPP. There was no evidence that the DPP had delegated powers to the applicant to bring the present application.

12. On whether the application for revision is merited, it was submitted that an investigator should not be heard casting doubt to the competence of the prosecutor. That the prosecutor had not disagreed with the consent orders. That by dint of **section 35 of the ACECA**, the report is not merely an administrative document between the applicant and the applicant but a creature of statute which should satisfy the respondents that there were no legal lapses in the investigation and recommendation of their prosecution by the applicant. The cases of **Nicholas M. Kanganagi v Attorney General [2011] eKLR**, **Esther T. Waruri & Another v Republic [2011] eKLR** and **Micheal Sistu Mwaura Kamau v Ethics & Anti-Corruption Commission & 4 others [2017] eKLR** were relied on in support of those submissions.

13. This is an application for revision under **section 362 of the Criminal Procedure Code**. The provisions of **Article 165(6) and (7) of the Constitution** were also relied on. The revisionary power of this Court under **section 362** enables this Court 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 recorded or passed, and as to the regularity of any such proceedings.

14. On the other hand under **Article 165(6) and (7)**, the Constitution vests in this Court supervisory jurisdiction over subordinate courts, persons and other bodies exercising judicial or quasi-judicial functions.

15. This court called for and examined the trial court's record.

16. The first issue for consideration is *whether the applicant has capacity to institute the present application*. **Article 157 of the Constitution** grants the Interested Party the authority to commence and/or discontinue a prosecution and shall not be under the direction or control of any person or authority.

17. On the other hand, **Article 50(9) of the Constitution** directed Parliament to enact legislation providing for the protection, rights and welfare of victims of crime. In pursuance thereto, the **Victims Protections Act, 2014 (VPA)** was enacted. **Section 4 (2)(b)** provides that every victim is given an opportunity of being heard before a decision affecting him is made while **section 9** thereof provides for the rights of the victims during the trial process. **Sub-paragraph (d)**, provides that the victim of an offence is entitled to have any dispute that can be resolved by the application of law decided in a fair hearing before a competent authority or, where appropriate, another independent and impartial tribunal or body established by law.

18. In the case cited by the applicant of **Joseph Lendrix Waswa v Republic [2019] eKLR**, the Court of Appeal held of the rights of victims: -

“In the absence of a definition of complainant in section 13 of the VPA, the word, in our view, bears the meaning which nearly corresponds to the meaning of complainant in the Criminal Procedure Code to include a family victim who initiates the prosecution of a suspected offender by lodging a formal complaint with the police that a certain person known or unknown has murdered a person to whom he is related.

From the foregoing, it is clear that the Constitution and the VPA gives a victim of an offence a right to access justice and a right to fair trial which rights, as Article 20(2) provides, should be enjoyed to the greatest extent consistent with the nature of the right. The right to a fair trial as Article 25 provides is an absolute right. The fact that the rights of an accused person to fair trial are enumerated and the rights of victims of offences are recognized by Article 50(9) but to be stipulated in a legislation indicates that the Constitution intends, as a principle, that the constitutional rights of an accused person to a fair trial should be balanced with the statutory rights of the victim of the offence as stipulated in VPA and further that the rights of the victim of crime should be exercised without prejudice to enumerated rights of an accused person to a fair trial.....”.

19. In the present case, the applicant is a creature of the **Ethics and Anti-Corruption Act, 2011 (EACA)** pursuant to **Article 79 of the Constitution**. Under both **Article 252(1)(a) of the Constitution** and **section 11(1)(d) of EACA**, the applicant is empowered to carry out

investigations and make recommendations to the interested party for prosecution of economic crimes.

20. It would seem that, in pursuance of its functions both under the Constitution and EACA, the applicant investigated the respondents and made a report to the interested party upon which they were charged before the trial Court. To that extent, the applicant can be taken to have been the complainant in the said case.

21. In view of the foregoing, in terms of the **Joseph Lendrix Waswa Case (supra)**, a complainant includes a victim who initiates a prosecution. **Section 9 of the VPA** does not limit the rights of a victim to the trial court but equally gives him/her the alternative of seeking redress in an independent tribunal or body established by law.

22. In this regard, in instituting the revision proceedings before this Court, the applicant was but seeking redress before an independent body established by law. As a victim who had been aggrieved by the orders of 18/9/2019, the applicant was entitled to approach this Court for redress.

23. In any event, the revisionary powers of this Court under **section 362 of the CPC** are not restricted by the doctrine of *locus standi*. This Court can act even *suo motto*, once this court learns by any means whatsoever that some proceedings under its jurisdiction have been undertaken in an irregular or illegal manner, it is empowered to call for the lower court records and examine the same.

24. The second issue is *whether the trial Court, as a magistrate's court, had the power to interpret the constitution*. The applicant relied on **section 8 of the Magistrate's Act** and submitted that the same limits the jurisdiction of the Magistrate's Court to human rights contained in **Article 25 (a) and (b) of the Constitution**. The respondents did not submit on this issue.

25. I do not think that the trial Court had been called upon to interpret any provisions of the **Constitution**. The record shows that, what came before the trial court was the issue of compliance of a lawful Court order. All that the trial Court was doing was to enforce an order that had been made which the interested party was not opposed to at the time.

26. In **Samuel Otieno Obudo & 6 others v Republic [2019] eKLR**, the Court of Appeal held that the provisions of **section 8(2) of the Magistrate Courts Act** does not bar a magistrate's court from determining issues concerning a fair trial that may arise before it in the course of the proceedings. The right to fair trial is one of the rights that cannot be derogated from. In this regard, the trial Court was within its mandate to interrogate the matter before it and given appropriate directions.

27. The last issue is whether **section 35 of the AECA** falls under **Article 50 (2) (c)**. **Article 50 (2) (c) of the Constitution** provides as follows: -

“(2) Every accused person has the right to a fair trial, which includes the right—

(a) to be presumed innocent until the contrary is proved;

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

(c) to have adequate time and facilities to prepare a defence;

(d) to a public trial before a court established under this Constitution;

...

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

28. On the other hand, **section 35 of the ACECA** provides: -

“(1) Following an investigation the Commission shall report to the Director of Public Prosecutions on the results of the investigation.

(2) The Commission's report shall include any recommendation the Commission may have that a person be prosecuted for corruption or economic crime.”

29. The applicant relied on the decision in **Republic v Josephat Koech Stima & 5 others [2017] eKLR** where the Court held that the investigation report under **section 35** aforesaid is an assessment report which the applicant never seeks to rely on hence it does not form part of the evidence referred in **Article 50(2)(j)**.

30. On their part as held by the trial Court, the respondent's right to fair trial under **Article 50** would be violated if the report is not supplied as ordered. They relied on the cases of **Nicholas M. Kangangi v. Attorney General [2011] eKLR** and **Esther T. Waruiru & Another v. Republic [2011]** where the Court of Appeal held that failure to submit the report under **section 35 of ACECA** was fatal. That it was important to ascertain whether the provisions of that section had been complied with.

31. Firstly, the order of 30/5/2019 was not a consent order as contended by the respondents. What happened on that date was that, when the

respondents applied for the supply of that report, the prosecution did not oppose the same. That did not make the order a consent order but an order by the court for reason that the application for the same is not opposed.

32. Secondly, the applicant alleged that the failure by the prosecution to oppose the application for the supply of the subject report was because the concerned prosecutor was unaware of the position of the applicant in respect of the application. I note that on 18/9/19, the interested party requested for time to explain to the court why the report could not be supplied. The trial court did not rule on that application. It proceeded to hold that failure to supply the subject report was a violation of the respondent's rights to a fair trial.

33. In this regard, the trial court erred in failing to give an opportunity to explain why the order of 30/5/2019 could not be complied with.

34. The question is whether the failure to supply the report is a violation of **Article 50 (2)(j) of the Constitution**. The **Sub-paragraphs that are applicable are sub-article 2(c) and (j) The operative words in sub-article 2 (c) are "adequate time and facilities"**. Facilities will include for an accused person. The opportunity to reach his relatives if in custody, get an advocate, writing materials. A room to consult with his advocate etc.

35. On the other hand, the operative words in **Article 50 (2) (j) of the Constitution** are; "to be informed" and "to have access" to "the evidence the prosecution intends to rely on".

36. There was an averment that the prosecution does not intend to use that report. The view this Court takes is that; the respondents are entitled to a fair trial, that includes the supply of all the materials necessary to prepare their defence; the reason. The view this Court takes is that; the respondents are entitled to a fair trial, that includes the supply of all the materials necessary to prepare their defence; the respondents have already been supplied with all the relevant witness statements of the witnesses that will be paraded by the prosecution and other documentary evidence. The prosecution does not intend to rely on the report prepared pursuant to **section 35 of ACECA**.

37. The respondent's submitted that the report prepared under **section 35 of ACECA**, was a public document and therefore amenable to be supplied to them. The applicant and interested party submitted that the same is an internal document between the applicant and the interested party.

38. The report is a document that culminates from the applicant's investigatory role. It is a communication from an investigator to the Public Prosecutor. It is based on investigations carried out by the applicant on the strength of, *inter alia*, witness statements, intelligence reports, expressions of opinion of the investigator amongst others. Most of the material may be pure hearsay. Strictly speaking, most of this cannot pass the test of admissibility.

39. In the view of this Court, the report is not one of the documents or matters under **Article 50 (2)(j) of the Constitution**. The interested party has expressly stated that it will not be relying on it at the trial. It is therefore not a document under the Article on fair trial relied on by the trial Court to order for its supply.

40. The respondents will have the opportunity to cross-examine the investigator on her/ his statement as well as the investigation diary. It is not denied that all the evidence that will be relied on by the prosecution has been supplied. It has been confirmed by none other than the interested party himself that it does not intend to rely on it. To that extent, there is nothing like a breach of the respondent's right to fair trial under **Article 50 (2)(j)**, if the report is not released. Its attempt will greatly prejudice the victim or complainant.

41. The trial Court did not allow the interested party and the victim sufficient time or opportunity to explain why it was desirable to re-visit the order of 30/5/2019. I find that the reasons proffered by the applicant are justifiable and that the trial court erred in not considering the application by the interested party to make the relevant submission.

42. In this regard, I hold that the element of disclosure in **Article 50 of the Constitution** has been met. The upshot is that the application dated 19th September 2019 has merit. The trial Court's Orders dated 18th September ,2019 are hereby set aside.

The trial to proceed with the material already supplied.

DATED and DELIVERED at Meru this 7th day of November, 2019.

A. MABEYA

JUDGE