



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL REVISION NO. 6 OF 2018

ANN WANGECHI MUGO.....1ST APPLICANT

HARAMBEE JOHN GIKINGO.....2ND APPLICANT

ENG. HENRY KATISO KAWINZI.....3RD APPLICANT

SMITH GIKUNDA GITURU..... 4TH APPLICANT

RICHARD NYAIYO ONDIEK.....5TH APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

RULING

A. Introduction

1. The applicants brought separate revision applications under Section 362 and 364 of the Criminal procedure code Nos. 5 and 6 both of 2018 which were consolidated on 9/07/2018 with file No. 6 of 2018 being retained.

2. The main prayer in the two applications is the same and reads as thus:

That the honourable court be pleased to call for examine the record of the criminal proceedings in Runyenjes Senior Principal Magistrates Anti-corruption case No. 1 of 2015 especially in the ruling dated 14/09/2017 on a case to answer and the ruling dated 1st February 2018 on the failure by the prosecution to produce evidence to prove compliance with the mandatory provisions of Section 35 of Anti-corruption and Economic Crimes Act, Cap. 5 Laws of Kenya.

3. The application is supported by the affidavits of **Ann Wangeci Mugo** and that of **Harambee John Gikingo** which contain the following grounds: -

i. That the prosecution closed its case after calling six (6) witnesses in support of the charge without complying with Section 35 of the Anti-corruption and Economics Crimes Act (ACECA) Cap. 65 Laws of Kenya.

ii. That the applicants referred the trial court to the relevant decisions in their submissions for no case to answer but were not considered in the ruling which found that the applicants had a case to answer.

iii. That the trial court disregarded the principles laid down by high courts on the duty of the court to ensure that Section 35 of the Act has been complied with.

B. The Applicant's Submissions

4. The applicant relied on the following authorities in support of their arguments.

i. ESTHER THEURI WARUIRU & ANOTHER VS REPUBLIC [2011] eKLR where the Court of Appeal in acquitting the appellant of charges of soliciting and receiving bribes contrary to **Sections 39(3)(a) and 48(1) of the Anti-corruption and Economic Crimes Act No. 3 of 2003** said the following on **Section 35 of the Act**: -

That power appears to have been retained when the Anti-Corruption and Economic Crimes Act was enacted. The powers of KACC to prosecute any person or group of persons was subject to direction of the Attorney-General, hence the requirement under section 35 of the Act, that a report of any investigation be made to the Attorney General with certain recommendations. Compliance with section 35, above, is not optional. It is obligatory, for reasons which we have endeavoured to give. In exercising his discretion, the Attorney-General is required to act with reason as under section 37 (4) of the Anti-Corruption and Economic Crimes Act, he too is expected to make an annual report to the National Assembly which report must include where applicable, reasons for not accepting recommendations made by KACC to him under section 35, above.

We have dwelt on this issue at considerable length because it is a matter which fundamentally affects the powers of KACC and the way it or its successor is expected to act in matters relating to corruption and economic crimes. What Parliament intended has to be given effect and it is the duty of the courts to enforce the law.

ii. MICHAEL SISTU MWAURA KAMAU VS ETHICS & ANTI-CORRUPTION COMMISSION & 4 OTHERS [2017] eKLR where the court in discussing the provisions of **Section 35** stated as follows: -

To our mind this provision makes it abundantly clear that upon the conclusion of the investigations, even if undertaken by the secretary or the investigator, it is the EACC, meaning the commissioners, who are expected to report to the DPP on the results of the investigations and make appropriate recommendation. We do not see anything in the law that empowers the secretary to bypass the commissioners and report or make recommendations directly to the DPP. Section 16(7) (f)(i) and (iv) of the EACC Act which makes it the responsibility of the secretary to carry out or execute the decisions of the EACC and to perform such other duties as the EACC may assign him is also consistent with the view that we have taken.

iii. TOBIAS MUSYOKI MUTUA HC Criminal Appeal No. 43 of 2011 Nyeri where the court allowed the appeal by quashing the convictions of offences under Sections 39(3)(a) and 48(1) of the Act on grounds of non-compliance with Section 35 of the same Act.

5. The applicants argued that non-compliance with Section 35 of the Act was fatal to the prosecution's case and that the applicants should not have been called upon to make their defence. It was incumbent of the prosecution to produce evidence of compliance failure to which the applicants ought to have been acquitted.

C. The Respondent's Response

6. The application was opposed relying on the affidavit of Leah Mate the prosecution counsel sworn on 10/05/2018.

7. It was deposed that the applicants have not set out the grounds of revision as required by the law. The respondent reiterates the need to comply with Section 35 of the Anti-Corruption Act and states that there was compliance by the Commission for it forwarded its report of the investigation with its recommendations to the Director of Public Prosecutions on 19/11/2013.

8. The respondent attached the letter of the Commission recommending that the applicants and other suspects be charged with offence of conspiracy to commit an offence of corruption under Section 47(3)(a) and 48(1) of the Act.

9. It is the respondent's averment that the trial magistrate acted within the law and the facts in finding that the prosecution had made a *prima facie* case.

D. The Respondent's Submissions

10. The respondent argued that the Director of Public Prosecutions after receiving the report by the Commission charged the applicants. This was followed by taking of the plea on 18/02/2013 and that it was not mandatory to produce the evidence of compliance with Section 35 since it was not an ingredient of the offence.

11. It was argued that in the case of **MICHAEL SISTU MWAAURA KAMAU HC Misc. Criminal Application No. 7 of 2018** the court referred to the Court of Appeal finding that the failure to produce the consent under **Section 35 of the Act** was not an illegality under **Section 362 of the Criminal Procedure Code**.

12. The respondent concluded by stating that the applicants ought to have filed an appeal to give this court a chance to weigh the evidence as a whole. The Director of Public Prosecution had already tested the evidence in its possession in **Petition No. 230 of 2015 Nairobi**.

E. Applicants' Response to the Respondent's Submissions

13. Mr. Wahome Gikonyo for the 1st applicant submitted that **HC Criminal Application No. 7 of 2018 (supra)** is distinguishable from this revision in that the High Court in that application was dealing with a matter where the magistrate had refused to terminate criminal charges. The High Court overturned the magistrate's ruling in that application. The decision has no relevance to this revision.

14. In the 2nd case of **MICHAEL SISTU KAMAU (supra)**, Mr. Wahome referred to it as irrelevant in that the decision of the High Court was overturned by the Court of Appeal. The letter of the respondent showing compliance with Section 35 attached to the submissions was dismissed as non-admissible in evidence.

15. Mr. Kabue for the 2nd applicant expressed similar sentiments on the letter of the DPP as Mr. Wahome and said it is a bit too late in the day to introduce new evidence which would result in denying the applicants the right of cross-examination.

16. The issues arising from this revision are whether the ruling of the trial magistrate that the prosecution had made a prima facie case against the applicants in view of the alleged non-compliance with **Section 35 of the Anti-Corruption and Economic Crimes Act** falls under **Section 362 of the Criminal Procedure Code** to warrant revision.

F. The Law Applicable

17. Section 362 of the Criminal Procedure Code

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.

18. Section 364 of the Criminal Procedure Code

(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence: Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.

19. Section 35 of the Anti-Corruption and Economic Crimes Act 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.

G. Introducing New Evidence

20. The act of the respondent's counsel to include evidence of the letter dated 19/11/2013 showing compliance with Section 35 of the Act by annexing it to the replying affidavit was unprocedural. The document is hereby struck out from the court record for being improperly before the court.

I. The Application of Section 35 of the Act

21. The applicants' argument is that under **Section 35(1) and (2) of the Anti-Corruption and Economic Crimes Act** the Commission is required to make and submit a report of its investigations to the Attorney General with a recommendation to prosecute or not to prosecute the person concerned with corruption offences or with economic crimes.

22. The Court of Appeal in the case of **ESTHER WARUIRU (supra)** accepted this argument and found that any prosecution under the Act where there is no compliance with Section 35 is fatal to the prosecution's case and that such prosecution is null and void.

23. What is the origin of this argument? It is important to look at the provisions of **Section 12 of the repealed Prevention of Corruption Act** so as to capture the repealed and the current law.

24. **Section 12** of the repealed Act provided: -

“A prosecution for an offence under this Act shall not be instituted except by or with the written consent of the Attorney General: Provided that a person charged with such an offence may be arrested, or a warrant for his arrest may be issued and executed, and he may be remanded in custody or on bail, notwithstanding that the consent of the Attorney General to the institution of a prosecution for the offence has not been obtained, but no further or other proceedings shall be taken until that consent has been obtained.”

25. **Section 32** of the ACECA provides: -

Without prejudice to the generality of section 23(3), Director and an investigator shall have power to arrest any person for and charge them with an offence, and to detain them for the purpose of an investigation, to the like extent as a police officer.

26. **Section 23(3)** of the ACECA provides: -

For the purposes of an investigation, the Secretary and an investigator shall have the powers, privileges and immunities of a police officer in addition to any other powers the Secretary or investigator has under this Part.

27. The requirement in corruption and economic crimes was that before instituting any charges under the repealed Act, consent had to be obtained presented to the trial court before taking plea. In the absence of such consent, the court could not proceed to take plea in the case let alone commencing the trial.

28. In the ACECA, there exists no provision similar to Section 12 of the repealed Act. This means that no consent to prosecute is required from the Attorney General as it was in the repealed law.

29. The applicants relied on the **MICHAEL SISTU KAMAU** which cited that of **ESTHER WARUIRU** where the Court of Appeal held:

The powers of KACC to prosecute any person or group of persons was subject to the direction of the Attorney-General, hence the requirement under Section 35 of that Act, which a report of any investigation be made to the Attorney General with certain recommendations.

30. Having said that there is no requirement for consent in the applicable law, I think the court of Appeal may have imported the provisions of Section 12 of the repealed law and enjoined it to Section 35 of the ACECA which does not have similar requirements.

31. It was held in the case of **MICHAEL WAWERU NDEGWA VS REPUBLIC [2016 eKLR]** where Mativo, J. relied on the case of **Stephen Mburu Ndiba (supra)** where it was held: -

*"The legislature was categorical in this provision that a prosecution under the **Prevention of Corruption Act, Chapter 65** must be preceded by a written consent from the Attorney General; its intention is very clear from the outset and there is no doubt that any prosecution without such a written consent would have been fatal. There is no similar provision in the **Anti-Corruption Act, Section 35** of the Act which the Court of Appeal compared with **Section 12** of the **Prevention of Corruption Act** has nothing to do with the consent to prosecute any offence under the **Anti-Corruption & Economic Crimes Act, 2003** but only deals with reports to the Director of Public Prosecutions on the investigations undertaken by the Anti-Corruption Commission. Such reports shall include information on the outcome of the investigations and any action taken upon it, which in my view includes but not limited to arresting and charging suspects pursuant to **Section 32** of the Anti-Corruption Act.*

*It must also be noted that there was no provision in the Prevention of Corruption Act similar to **section 32** of the **Anti-Corruption & Economic Crimes Act, 2003** and I would opine that the existence of that provision in the current anti-corruption legislation is an additional reason against any attempted analogy between **Section 12** of the **Prevention of Corruption Act, Chapter 65** and **Section 35** of the **Anti-Corruption Act**; in the context of the current anti-corruption legal regime there is no comparison between the two either in form, substance or in effect.*

32. In the **STEPHEN MBURU NDIBA (supra)** case the court observed that: -

In my very humble view, it certainly cannot have been the intention of Parliament to clothe the Director of the Anti-Corruption Commission and the Commission's investigators with powers to arrest and charge suspects to the same extent as a police officer acting under the Police Act and in the same breadth require of the Commission to act on its investigations only after a report has been made to the Director of Public Prosecutions.

33. It is imperative to take into account the functions and powers of the Director of Public Prosecution conferred by the Constitution in this application.

34. Article 157 of the Constitution is relevant herein.

35. **Article 157(6)** provides: -

The Director of Public Prosecutions shall exercise State powers of prosecution and may –

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

(c) subject to clauses (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

36. **Article 157(10)** provides: -

The Director of Public Prosecutions shall exercise State powers of prosecution and may –

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

37. With due regard to the principle of *stare decisis*, I find that the decision of **ESTHER WARUIRU** did not take into account Article 157 of the Constitution which gives the Director of Public Prosecution powers to prosecute any person without seeking the consent or authority of any person.

38. I come to the conclusion that **Section 35 of the Constitution** refers to submission of investigation reports to the Attorney General and its compliance or otherwise does not in any way affect the charge and prosecution of cases by the Director of Public Prosecutions.

J. The Ruling of the Trial Court

39. The trial magistrate in exercise of her judicial powers under **Section 21 of the Criminal Procedure Code** considered the evidence on record and found that the prosecution had made up a *prima facie* case. The provisions of **Section 364 of the Criminal Procedure Code** require that the applicants demonstrate that in finding the trial magistrate was correct, based on the illegality or impropriety.

40. In this application, the applicants have failed to show that the ruling of the trial court to the effect that the applicants had a case to answer was incorrect or based on any illegality or impropriety.

41. I find no merit in this application and decline to grant the orders sought.

42. It is hereby dismissed for lack of merit. The case file will be remitted to the trial magistrate for disposal of the case.

43. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH OF NOVEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mate for the Respondent

Mr. Nzioki for Wahome for 1st Applicant

Mr. Kabue for 2nd Applicant

Mr. Nzioka for 3rd, 4th, 5th Applicants