



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI

ACEC CR. APPEAL NO. 9 OF 2018 AS CONSOLIDATED WITH ACEC CR. APPEALS NOS. 10/2018, 11/2018 AND 12/2018

JOHN GAKUO.....1ST APPELLANT

ALEXANDER MUSANGA MUSEE.....2ND APPELLANT

SAMMY KIPNGETICH KIRUI.....3RD APPELLANT

MARY NGECHI NGETHE.....4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The first appellant herein was charged with the offense of wilful failure to comply with the law relating to procurement contrary to section 45(2)(b) as read with section 48 of the Anti-corruption and economic crimes Act No.3 of 2003. He was subsequently convicted and sentenced to serve three years imprisonment and in addition pay a fine of one million shillings in default serves one year imprisonment.
2. On 31st October 2018 when this case was scheduled for hearing of the appeal, Mr. Nyakundi counsel for the 1st appellant informed the court that his client had died on 30th October 2018 while serving sentence in prison. A signal from the prisons department dated 30th October 2018 confirmed that the 1st appellant had indeed died at Mbagathi District Hospital immediately after admission.
3. With the concurrence of all counsel, Mr. Nyakundi requested for more time to consult the family of the deceased (1st appellant) and avail a post mortem report to confirm the said death. Consequently, the court fixed the matter for mention on 8th November 2018 for further directions.
4. On that day, Mr. Nyakundi did not produce a copy of the post-mortem report as earlier indicated. Instead, he urged the court to rely on the prison's department's signal as sufficient proof that the appellant had died. However, Mr. Nyakundi urged the court to allow the 1st appellant's appeal proceed to full hearing his death notwithstanding. In the alternative, he requested the court to refer the matter to the High Court Constitutional Division for interpretation of the constitutionality of Section 360 of the Criminal Procedure code regarding the 'right' of a deceased person having his appeal being heard and determined posthumous instead of abating.
5. However, Counsel for the 2nd, 3rd and 4th appellants insisted on proceeding with their clients' appeals separately to safe on time in determining the appeals. They asserted that should the 1st appellant's appeal be referred to the High Court Constitutional Division, their clients' appeal should not be affected.
6. M/s Aluda for the state confirmed the death of the first 1st appellant but opposed the application seeking to refer the matter to the constitutional division for interpretation of section 360 Of the CPC. Learned counsel urged the Court to mark the 1st appellant's appeal as having abated.
7. There is no dispute that the 1st appellant died while serving sentence of a fine of Kshs 1,000,000 and in default serve one year imprisonment and in addition three years imprisonment. At the time of his death, no amount of fine had been paid. Under Section 360 of the Criminal Procedure code, the appeal is automatically deemed to have abated.
8. The prayer to have this case referred to the High Court Constitutional Division to determine the constitutionality of Section 360 is not for this court to determine in this appeal. Mr. Nyakundi should file a constitutional reference before the constitutional court for interpretation on

the 'deceased's rights' against abatement of the appeal pursuant to Section 360 of the Criminal Procedure code.

9. Although the application provokes a thoughtful jurisprudential question, the same is improperly before me for determination at this stage. Besides, an order referring this matter to the Constitutional Court for interpretation will further delay this case.

10. Accordingly, the appeal in respect to the 1st appellant is hereby marked as having abated pursuant to Section 360 of the Criminal Procedure Code Hearing shall therefore proceed with the 2nd, 3rd and 4th appellants' appeal on priority basis.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER 2018

J.N ONYIEGO

JUDGE