



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL REVISION NO. 12 OF 2017

REPUBLIC.....APPLICANT

VERSUS

OMAR MWINYI MUSIMBA.....RESPONDENT

RULING

1. On the 26.04.2017, by a request for revision dated the same day, the Director of Public Prosecution moved the court and sought that the court revises the decision of the Chief Magistrate, E. Makori, made on the 24/4/2017. In that decision the learned Chief Magistrate in adverting to Preliminary Objection raised by the accused made the following directions and findings.

“Having placed the various definitions of what Elections and Commission, what the prosecution needs to pounder before the suspect takes plea is whether “Election Offences Act” 2016 with definition of elections to mean:-

“presidential, parliamentary or country elections and includes by election”

Whether party primaries offences are included in this Act Or whether

“elections period” which means period between publication of notice by the Commission for Presidential Parliamentary or County elections under section 14, 16,17 & 19 of the Elections Act, 2011 and the gazetted results - include party primaries.

If the prosecution after thoroughly bringing its mind to bear with the same finds it otherwise, then the current charges ought to be dropped altogether and party mechanism as requested by the defence takes cause.

In the event that the prosecution does not address itself to these points, I have raised above on a date which this court will fix today, the parties will address me whether to reject the entire complaints/charges under section 89(5) Criminal Procedure Code.

Those are my directions for today.

Liberty to apply”.

2. As said at the beginning of this ruling, those directions were given pursuant to a request by the defence for deferral of the plea taking for the reasons to:-

- **Enable internal party dispute resolution mechanism.**
- **Avoid subjecting the accused to double jeopardy since Orange Democratic Movement Party was likely to deal with him through internal party mechanisms.**

3. That request was strenuously opposed by the prosecution which cited its independence as being shielded from direction and control by anybody as enshrined in Article 157 of the Constitution urging that the plea be taken forthwith.

4. Now this revision seeks that the court call and peruses the trial court files and satisfies itself, under section 362 and 364, Criminal Procedure Code, of the correctness, propriety and legality of the Orders of, not only the Orders of 24/4/2017, but also of the Orders of the same Magistrate issued in CRIMINAL CASE NO. 677 OF 2017 on the 26/4/2017.

5. By that ruling of 26/4/2017 the trial court said:-

“In giving directions in this matter I must readily admit I was taken aback when I saw the present charges the reason being, the counts levelled against the suspect in the present file are congruent or similar with those in Election Offences 1 of 2017 Count 1 similar to Count I & II, Count II Similar to Count III and IV, Count III similar to Count V and VI, Count IV Similar to Count X, the only new charge seem to be Count V which bring assault of an AP Officer not included in Election Offences No. 1/2017.

The scenario then which arises here is that at this point the accused is facing similar but separate charges under the Election Offences Act 2016 and under the Penal Code. When I gave directions in Elections Offences No. 1 of 2017 this is the question I wanted the ODPP to resolve instead of doing so, and working very hard and not smart the ODPP has entered another unnecessary web and labyrinth bringing up duplex charges against a suspect contrary to rules of framing charges as envisaged Under Section 134-137 of the Criminal Procedure Code. Charges similar arising from similar transaction or events – ODM nomination in Changamwe. The question still remains in this file as Election offences No. 1 of 2017 under what regime does the ODPP intend to charge the accused under the Election Offences Act 2016 or under the Penal Code? What is the effect of the two files running side by side? What as the effect of the present file and the confidence of the public in state organs meant to spur confidence during electioneering period? What is the way forward?

To answer the above questions which are quite pertinent, this matter is then consolidated with Election offences No. 1 of 2017 this will be significant to this court to avoid confusion arising, Election Offences No. 1 of 2017 falls under the purview of special Magistrates appointed under Section 23 of the Election Offences Act, 2016, while the current file falls under the General Provisions under the Criminal Procedure Code and to Penal Code:

- i. This file then is consolidated with Election Offences No. 1 of 2017 for ease of giving directions and case management strategies.
- ii. The current charges after consideration of this file and Election Offences No. 1 of 2017 are duplex and offends the Provision of Section 134 -137 of the Criminal Procedure Code and the accused or defence will be embarrassed of the proceed with the two files separately.
- iii. The directions by this court in Criminal Election Offence Case No.1/2017 issued on 24/4/2017 still remains germane and relevant.
 - a). The prosecution to ponder before the suspect takes plea in this matter and in No. 1/2017 what is the meaning of “Elections” and “Election Period” and decide whether the charges in this file and in Election Offences Case No. 1 should proceed and the manner to proceed and whether Elections include party primaries.

b). In the respect taking of plea in this matter is hereby deferred to 8th of May 2017. The ODPP *must make that decision to avoid total false start in this matters.*

iv. The directions I have given in this matter and which I gave in Criminal Election Offences Case No. 1/2017 are based on Public Interest, the prosecution should not hide under Art. 157 to abuse the due process of the law and abusing and mudding the pure waters and path in a criminal trial, I repeat under the aegis of prosecutorial powers.

v. I also gave directions in the manner I did because Election Offences Case No. 1 of 2017 is a matter of public interest, the law under which the suspect is charged is new and not yet tested. The ODPP must take the lead and chance to guide the Public and Law enforcement agencies here and in the whole County on how to proceed, whether party primaries Offences as are happening now in the whole Republic fall within the Election Offences Act, 2016. When that question is answered we will proceed further. There is nobody who is out to “protect” the suspect because he is a Member of Parliament. The events happening out there have obviously an implication on the National General Election and therefore the lead Agencies must take the que and led the way, the judiciary is prepared to do so – all the Judges and Magistrates having been fully trained to undertake their duties in accordance with the relevant laws.

vi. Therefore the ODPP cannot have the cake and eat it, those directions I have indicated and needed as soon as possible (ASAP) in handling this matters that is why I have not exercised powers conferred to me by the Criminal Procedure Code under Section 89(5) Criminal Procedure Code.

vii. Pleas differed to 8/5/2017 accused’s bond terms extended.”

6. The only question that this court must pose for itself and answer is whether or not the two directions or rulings by the trial court are correct, proper or legal.

Submissions by the parties:

7. I have had the benefit of reading submissions by both parties. In both the written and oral submissions offered to court, Mr. Muteti for the ODPP has submitted at length on 5 broad issues. In doing so I understand Mr. Muteti to have compressed his initial 10 grounds in the application for revision into five grounds.

i) Whether offences committed during party primaries are triable under the Election Offences Act.

ii) Whether the trial court was within the law to direct the DPP on how to exercise its prosecutorial powers in prosecution of election offences.

iii) Whether the deferment of plea and the subsequent consolidation of the two cases was procedurally correct.

iv) Whether a court can properly decline jurisdiction to hear and determine the criminal case on account of definition of the term elections under the Elections Offences Act.

v) Whether party dispute resolution mechanisms can be a substitute for criminal justice system in addressing criminal offences.

8. In urging these broad grounds Mr. Muteti has wholly anchored his submissions on decided cases and employed quite admirable industry in putting the issues in controversy in perspective. In summary, it is the ODPP’s position that all offences that arise during the election as a process, rather than event, are by dint of Article 81 triable under the Election Offences Act and that all actors in the process, like the Court, Parliament, Political Parties and the Independent Election and Boundaries Commission have all taken steps towards preparedness in their respective rules. In his view, therefore, the court was bound to

interpretate the statute defining the term election in a harmonious manner. In his view therefore, even looking it to long title of the Act, party primaries should be seen to be purposes connected to elections even if they be found to be not part of the elections. To him therefore the trial court ran into an error to find that party primaries are not elections and therefore offences committed during such process are not triable under the Election Offences Act.

9. In rebuttal to those arguments the Respondent agree with these directions by the Magistrate and do not agreed that it fell into any error.

10. With utmost and due respect to the counsel, I have not laid my hand on any determination by the Magistrate that the charges do not lie. I read and hear the Magistrate to invite submissions from the counsel, having noted that the *statute is new and yet to be tested* by interpretation by the court on some of its provision. To that extent the very able submissions by the ODPP would be very valuable and of considerable assistance to the court when it receives submissions it has invited and was to take on the 8/5/2017. Unfortunately that opportunity was delayed and not lost by these proceedings.

Whether the magistrate was within the law to direct the DPP on how to exercise his Prosecutorial powers regarding prosecution of Election Offence.

11. It is beyond peradventure to reiterate that as directed under the Constitution, the ODPP is an independent office intended to exercise the specific constitutional obligations and powers in good faith and in consonance with the spirit, values and principles of the constitution.

12. One of the principles is that dictated to be that justice shall be done to all and shall not be delayed, the rule of law shall be upheld and the court process is never abused. Those to this court are the values the ODPP must always focus its sight upon in exercise of its Constitutional powers and so long as it does that it is not subject to any directions or control by anybody. However, the court as the ultimate interpreter of the law reserves the duty to ensure that even the independent bodies exercise their independence within the law.

13. In this revision, the trial court is accused to have acted incorrectly, improperly and illegally by giving the direction it did on the 24/4/2017 and again on 26/4/2017.

14. While the ODPP remain a constitutionally established Public Office with such mandate, it is equally true that the court is equally a state organ with its equally established mandate and obligations. Both act as organs in the administration of justice sector of the state and therefore must always strive to achieve the overall mandate to ensure that justice is not only done but seen to be done, done without delay and to all without regard to status nor undue technicalities. That duty is upon all actors in justice system but the principal duty bearer must remain the court. It is for that reason that the judiciary has embraced and trained its personnel including stakeholders on active case management.

15. A judicial officer is therefore bound from the day the criminal case registered in court to conceive a timetable and chart a route that would enable him expeditiously meet the core and overriding objectives of the court. In setting out to execute active case management the court as the driver gets foresighted and envisages possible pit falls and impediments to its core mandate, to defeat delay and eradicate 'case backlog'. It is therefore critical to set a timetable for surmounting such pitfalls and impediments or just dealing with the them at an appropriate time noting that some of those issues considered pitfalls may have a determinant effect on the case as to be able to conclude it.

16. It is thus within a courts mandate that on the date the charge is registered, the court should prior to taking plea consider basic threshold issues like jurisdictions and propriety or legality of the charge. This position is appreciated by the prosecution who submitted that it was open for the trial court to isolate any threshold issue and invite submission in *limine* as jurisdiction is everything.

17. If that be the accepted position and regard being had to the existence of the Magistrates Powers Under Section 89(5), it must equally be accepted that it would be futile to proceed with a matter by taking the

plea and setting a date and maybe inviting the witness to give evidence before the issues of propriety of the charge is dealt with and determined.

18. To act thus would not only be imprudent but also abdication of the Judicial duty on the court. Having so said, I find nothing incorrect, improper nor illegal with the trial court inviting the prosecution to consider the issues it isolated for the parties and to come to own conclusion on the correctness or propriety of the charges and if convinced that the charges were proper to address the court on its concerns.

19. A con-textual reading of Section 89(5) Criminal Procedure Code passes as permitting a Magistrate to receive the charge and to summarily reject it without inviting submissions by the parties. That has been done and may continue to be done by the magistracy. However in the instant case, the trial court did not come to the opinion nor conclusion that no offence was revealed. Rather he formed the opinion that the charge was capable of being questioned on whether there was an offence committed as an election offence and sought to obviate the prospects of having the objection raised after court resources could have been spent on other preliminary stages of the case. To this court, the trial court was fully within his mandate.

20. Having said that, in making the orders of 24/4/2017, the trial court was within its mandate to actively manage the case, even the subsequent order made on the 26/4/2017 cannot be faulted but must be read as one furthering the same purpose the court had sought to achieve.

21. Even though the court appears to have been exasperated by the conduct of the ODDP in bringing the charges, whose facts and circumstances appeared to him to relate to the same events under the penal code as opposed to Election Offences Act, one understands that every judicial officer is accountable to the People of Kenya for their use of time as a resources and have set target to meet. It thus follows that one walks and works conscious of what the output at the end of period out to be. Active Case Management beyond assisting the court to improve on service delivery is also a tool to enable realization of targets.

22. It is therefore not beyond expectation that a judicial officer would feel that its duty deal with the case justly and expeditiously within the law is being circumvented where a party, in this case the prosecution, exhibits an intention not to comply with the courts direction.

23. Even though the trial court might have said more that was necessary the net effect of the decision of 26/4/2017 was that the directions of the court be complied with and the court receives the address on the framed issues. In doing so, the court merely exercised its case management powers which I find were never inconsistent with any statute nor the purpose for which the Kenyan people created the judiciary and vested on it judicial authority.

24. This being a revision, the foregoing determination is the crux of the matter and it determines all the other complaints by the prosecution. The court is yet to decline jurisdiction at this juncture. It will decide whether to proceed with the charges or framed today or give its own directions on how the two matter or which of them shall proceed in which manner. That will be after it is addressed on the framed issues.

25. At the time the parties address the court on the framed issues, the court will determine whether or not party primaries process is part of **“the elections”** in law and if any alleged offences committed during such processes are elections offences. That is the duty of the trial court and this court must let it perform that duty with interference.

26. I, however, may reiterate that directions given by a court to help it fast track and actively manage a criminal case should not be seen as a control on the ODPP on how to undertake its constitutionally enshrined prosecutorial powers. My understanding of the DPP’s powers under the constitution is that, that power is vested on an independent body intended to be cushioned against undue external controls and directions on when to prosecute, how to prosecute and who should or should not be prosecuted. What the constitution seek to protect against in unwarranted, arbitrary and injudicious interference for purposes ignoble. It, in all honesty, does not deprive the courts power to ensure that the exercise of that office is

done honestly, correctly, properly and for the best interest of criminal justice system bereft of abuse and ulterior purposes. But even then, a court of law would in appropriate cases declared a prosecution improper where purposes that do not inspire public confidence in the office as genuinely geared toward achieving fair and just administration of criminal justice are disclosed.

27. When the magistrate in the ruling of 26/4/2017 said or commented about the strategy by the prosecution in bringing a second set of charges against the accused he was justified to do so as he was expected and mandated under the Constitution to enforce those values the constitution seeks to be presented by the DPP under articles 157 sub-article 11 in particular.

28. In totality, I find the request for revision to have been made in haste, it has failed to endeavor itself as furthering the expeditious disposal of the two criminal matters. Infact it ought not to have been brought at the time and juncture it was. The court time would have been used more efficiently and prudently by allowing the trial court be addressed on the framed issues and only after that should a revision been preferred.

29. For the foregoing reasons, the request for revision fails and it is hereby dismissed. To put the two files back on the track, it is directed that the two files be placed before the Hon. Mr. Makori, Chief Magistrate on 05.07.2017 at 2.30pm with a view to that court giving the parties a date on which they shall address it on the framed issues. For that reason let the two files be taken to the Chief Magistrate's Court Criminal Registry forthwith.

Dated and delivered at **Mombasa** this **7th** day of **June 2017**.

HON. P.J.O. OTIENO

JUDGE