



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

REVISION NO. 2 OF 2016

SAMMY KIP'NGETICH KIRUIAPPLICANTS

VERSUS

REPUBLICRESPONDENT

R U L I N G

1. The record indicates that the court was moved under **Section 362 and 364** of the **Criminal Procedure Code, Cap 175 Laws of Kenya** by way of a letter dated 24th March 2016, from Mr. Rugo Advocate learned Counsel for one Sammy Kirui, the 1st Accused/Applicant (hereinafter the 1st Applicant). The Applicant was charged with 13 others in the lower court and although the 1st Applicant moved the High Court for Revision, oral submissions were made on behalf of 10 other Accused Persons who were all in support of the Revision.

2. In the grounds for Revision learned counsel Mr. Rugo for the 1st Applicant alleged that the learned magistrate:

i. Shied away from and failed to directly address his mind to the totality of the objections raised on behalf of the 1st Accused/Applicant.

ii. Failed to make an unequivocal finding on whether or not the Prosecution was justified in joining the conspiracy charges with charges for specific offences to the prejudice of the 1st Accused/Applicant.

iii. Cursorily brushed aside the several weighty legal grounds and objections raised on behalf of 1st Accused/Applicant by stating that caution would be taken in considering admissibility of evidence, without addressing the weighty issues at all.

3. Counsels made brief oral submissions on behalf of each of the 10 Applicants. Mr. Rugo for the 1st Applicant raised various issues with the Charge sheet as presented in the trial court, and specifically the joinder of count 1 being a charge of conspiracy. Mr. Rugo argued that the 1st Applicant was not charged with other offences, and that the prejudice he would suffer in mounting his defence far outweighs other considerations. He gave as an example the particulars of Count III and Count I which he said were similar, that is, “fraudulent acquisition of property.”

4. Mr. Rugo contended that the witnesses in Count III will testify on matters that the 1st Applicant does

not know. Further that if charged alone other Accused persons can testify on his behalf, but with the joinder the other Accused persons will not testify on his behalf because they will run the risk of making statements that can be used against them in the same file.

5. Mr. Rugo submitted that it is not enough that the trial court stated that caution would be taken to protect the rights of the Accused persons during trial. Counsel asserted that the trial will be rendered impracticable because the Applicants will raise numerous challenges to the admissibility of evidence. Counsel urged the court to order the prosecutions to make an election under section 135(3) of the Criminal Procedure Code, to choose to separate the charges, or for the court to do so. It is counsel's view that Count 1 can be tried on its own since it is against all Accused persons.

6. Mr. Nderitu learned counsel for the 2nd Applicant submitted that there was duplicity in connection with Count 1 on conspiracy. He agreed with the submissions of Mr. Rugo and argued that it would be double jeopardy for the 2nd Applicant to be charged with acquisition of some of the money and also with the acquisition of all of the money. He urged the court to put the prosecution to election.

7. Mr. Mbaabu learned counsel for the 3rd Applicant supported the application and the submissions made on behalf of the 1st Applicant. He urged the court to call up the lower court record and examine it to establish the illegality or incorrectness of the lower court's decision. He also urged the court to use the substantive submissions and authority provided in the lower court, to reach a decision herein.

8. Mr. Opiyo learned counsel for the 6th and 9th Applicants urged the court to call for the lower court file, read the submissions and revise the lower court decision.

9. Mr. Omogen learned counsel for the 7th Applicant associated himself with the application for revision, which he said affected the 7th Applicant on issues of duplicity and multiplicity. He urged the court to order for election by the prosecution under **Section 135(3)**, of the **Criminal Procedure Code** and that the court do call for the lower court record to examine it and revise the decision.

10. Mr. Amolo learned counsel for the 8th Applicant associated himself wholly with the application and submission of the 1st and 2nd Applicants. He urged the court to invoke its supervisory powers under the Constitution. Counsel submitted that the trial court looked at the issue from an extremely narrow perspective and accepted the prosecution's submissions that it was necessary for the charges of conspiracy to remain in place to present an "overall picture".

11. Counsel contended that the phenomenon referred to as the "overall picture" is unknown in law, unlike fair trial which is a known principle. Counsel argued that the 8th Applicant who faces only the charge of conspiracy will have to sit through the evidence of all the witnesses, yet if the charges are separated the 8th Applicant will only be in count I.

12. Counsel pointed out that Counts 1, 3 and 9 are duplications, and asserted that the offence against the 8th Applicant must be able to stand on its own and that the 8th Applicant ought to face the charges which concern him separately. Counsel urged that the trial court rendered the law correctly, but made a fundamental error when it made a finding that Count I was not duplicitous for describing two offences.

13. M/s. Lipo Learned counsel for the 10th Applicant supported the application and associated herself with the submissions of the 1st Applicant since the 10th Applicant is also charged with only Count I. She was of the view that the charges ought to be separated as they are duplicitous.

14. Mr. Oduk learned counsel for the 11th Applicant associated himself with the application and submission of the 1st Applicant on all points. Counsel urged that the court failed to appreciate that the 11th Applicant would be prejudiced if charges were allowed to stand as they are. He recognized that the lower court and the prosecution had appreciated the earlier submissions since it led to the dropping of

alternative charges. He urged the court to make an order for election.

15. Mr. Musyoka learned counsel for the 12th Applicant associated himself fully with submissions made on behalf of 1st and 2nd Applicant and prayed for the revision to be allowed.

16. Mr. Mwenesi learned counsel for the 13th Applicant submitted that he was challenging the prosecution on the charge of conspiracy, but also prayed for the trial to be concluded expeditiously. Counsel pointed out that the case had been in court since the year 2010. That the 13th Applicant is a civil servant whose service had been extended for three years on account of good service. He urged the court to call for the lower court record and examine it to determine whether the principles laid down in **John Mburu Kinyanjui**, which is a good law were properly applied.

17. Mr. Maluku learned State Counsel submitted that this is an application for Revision under **Section 362** of the **Criminal Procedure Code** and nowhere in the ruling of the lower court had an illegality been pointed out, nor this court shown any incorrectness in the ruling dated 18th March 2016.

18. The State Counsel contended that the argument that the 1st Applicant, who faces only one count, would be required to listen to the evidence adduced in respect of the other Applicants in count No. 2 to No. 10 missed the point. He stated that although it was true that the 1st and 10th Applicants were not facing any other count other than count I for conspiracy, an impression should not be created that there is a set of witnesses for count I and another set for count No. 2 to Count No. 10, so that the trial could be separated to proceed in respect of each count in different courts and in separate files.

19. The State Counsel argued that it would cause more confusion and defeat fair trial if each Applicant should have a separate trial as it was prayed in the submissions. He stated that there were only three sets of offences generally, which were committed during this incident, being conspiracy in count I, fraudulent acquisition of public property in count 2 to count 9 (with varying amounts acquired) fraudulent disposal of public property in count No. 10 and count 11 which is under the Procurement law.

20. Secondly, the State counsel asserted that all the counts are distinct and the offences committed and particulars relating to each count are stated. That it is the duty of the prosecution to prove each and every element of each offence beyond reasonable doubt and it is misleading to argue that by proving either of the charges and especially count III, he would be proving count I. He contended that count I is inseparable from the other counts,

21. The State Counsel further submitted that it was not true that the lower court introduced the issue of the “overall picture” attributed to it by Mr. Amolo. He referred the court to the authority in **John Mburu Kinyanjui** which set the general rule that conspiracy should not be charged with substantive offences, but gave three exceptions when this can be done. That in the ruling of the lower court this case lies within those exceptions. That it is therefore the Court of Appeal in the above case and not the trial court which referred to the “overall picture”.

22. The State Counsel contended that the 8th Applicant is facing the 1st 3rd and 9th counts and cannot therefore be tried separately in the conspiracy count and at the same time be tried with others in the other two counts.

23. On the election, the State Counsel pointed out that the state was not called upon to drop the conspiracy charge, and that that would only be where there was misjoinder. He maintained that the State had fully complied with **section 135(1)** of the **Criminal Procedure Code**.

24. The State Counsel urged that there was absolutely nothing wrong with the charges facing the Applicants, nor was there error on the face of the record which this court can rectify. That the lower court specifically made a determination on each of those issues, and there is no irregularity that the court occasioned.

25. Having set out the grounds of the application for revision and a summary of the submissions of the counsels on record, I find that the issue for determination is whether, in a case where accused persons face ten counts alleging specific offences of fraudulent acquisition of public property, fraudulent disposal of public property and fraudulent practice in procurement it is proper for the charges to be tried together with a count of conspiracy.

26. It was submitted that the original charge sheet had an alternative count which formed the basis of the application of the 8th Applicant in the trial court on the issue of duplicity. A new charge sheet was filed on 5th April 2016 removing the count that was said to be duplicitous and a fresh plea was taken. A plea of not guilty was recorded.

27. According to Mr. Mutuku no objection was raised against the new charge, and to date there has been no attempt to amend it. According to Mr. Rugo however, he made an application for the plea taking to be deferred till this revision had been determined but he was overruled.

28. Going by the decisions in **Musinga v Republic (1951) 18 EACA 211** and **John Mburu Kinyanjui vs Republic [1988] eKLR**, there is no illegality per se to frame a substantive charge of conspiracy together with substantive charges for specific offences. The Court of Appeal recognized that dealing with counts of conspiracy raises problems which require discretion and complete understanding of the particular case in hand.

29. It is a question which cannot therefore, be determined by the application of any rigid rules. The governing principle was restated in **John Mburu Kinyanjui** (supra) to which all counsels for both the Applicants and for the state referred this court. It stated that:

“1. As a general rule where there is an effective and sufficient charge of a substantive offence, the addition of a charge of conspiracy is undesirable. It is not desirable to include a charge of conspiracy which adds nothing to an effective charge of a substantive offence. The conspiracy indeed may merge with the offence.”

To this general rule there are, however some exceptions.

30. In the case of John Mburu Kinyanjui the Court of Appeal set out the exceptions to the above general rule as follows:-

“a) Where it is in the interest of justice to present an overall picture, which a series of relatively small substantive offences cannot do; sometimes a charge of conspiracy may be the simpler way of presenting the case;

b) Where there is clear evidence of conspiracy but little evidence that the conspirators committed any of the overt acts; or where some of the conspirators but not all, committed a few but not all, of the overt acts, a count for conspiracy is justified;

c) Where charges of substantive offences do not adequately represent the overall criminality disclosed by the evidence, it may be right and proper to include a charge of conspiracy.”

The Court of Appeal did not therefore declare the joinder illegal, but decried it and gave guidelines.

31. Dealing with counts of conspiracy requires discretion as stated earlier. Where for instance the evidence discloses more than one conspiracy, it is undesirable to charge all the conspiracies in one count, but it may not be bad in law as **Musinga’s case** shows. Other factors in cases of conspiracy concern the number and type of conspirators, for instance, the possibility of two being husband and wife, or of two conspirators the possibility that one may be acquitted, may need to be safeguarded. See **Mulama v Rep [1976] KLR**, pg. 24.

32. As a general rule, it is desirable that the court admits only evidence which is admissible in law. What

is however, admissible in a substantive offence and what is admissible in a charge of conspiracy may cause confusion. In *Musinga's case* the court explained itself as follows at p 216 :-

“A person who joins a conspiracy is responsible in law for all the acts of his fellow-conspirators, done in furtherance of the conspiracy, whether done before, during or after his participation. In our view therefore, as continuing unlawful possession of the wolfram, even if it originated with the second appellant, attached itself in law to the other conspirators.”

This state of affairs appears to have been Mr. Rugo's fear.

33. It is necessary for the court to be quite sure that no evidence is given which is inadmissible. Mr. Mugambi the learned trial magistrate did give an assurance that great care would be taken in approaching the evidence to keep all the issues clear at the trial. Where an indictment contains substantive counts and a related conspiracy count, the court should require the prosecution to justify the joinder, or failing justification, to elect whether to proceed on the substantive or on the conspiracy counts.

34. A joinder is justified if the court considers that the interests of justice demand it. Election or severance stems from the Court's inherent powers to see that its process is not abused, in the sense that the accused is guarded against oppression or prejudice. It is for this purpose that as a general rule the objection must be taken at the earliest opportunity.

35. **Section 362 and 364 of the Criminal Procedure Code** under which this application has been brought together with **Article 165(6) of the Constitution**, grant the High Court supervisory powers over the lower Court. Under **Section 362 CPC** the court has 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 recorded or passed, and as to the regularity of any proceedings of any such subordinate court’***. **Section 364** provides for the powers of the High Court on revision.

36. This power is echoed under **Article 165 of the Constitution** as follows:

“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of administration.”

37. I have called for and examined the lower court record as demanded of me by the law under which the Applicants approached the High Court. In particular I have read the well-reasoned ruling of the learned trial Magistrate. Mr. Mugambi gave good summary of the rival arguments that were made before him, isolated seven issues for determination, and addressed and rendered himself on each of these issues.

38. On the particular issue of the joinder of a count of conspiracy I have quoted Mr. Mugambi *in extenso* as follows:

“Hence, the question becomes, has the prosecution through its submissions justified the present joinder? Basically Mr. Mutuku sought refuge in the exceptions laid down in this case, in particular he came out very clearly on two of them, namely:-

Where it is in the interest of justice to present an overall picture.

Where there is clear evidence of conspiracy ... but where some conspirator but not all, committed a few but not all overt acts.

His submissions on these two points came powerfully where he painted picture of offences with the said scheme as a foundation from which other offences sprang. He tried to show the inter-connected nature between the other offences and the conspiracy as the base. He argued that should the conspiracy charge be dropped, this overall picture will be lost and in fact some actors might not even be prosecuted. He said, and quote:-

“For the prosecution, count 1 is cast on stone ... if we are not allowed to demonstrate how the scheme was hatched and how the benefits flowed to some of these accused, then some will never fact trial.”

He then went on to explain that count 1 captured and put all the actors in one basket while the rest of the counts identified and charged the beneficiaries with distinct offences that they benefited due to the illegal scheme. I must weight this justification against the fears expressed by Mr. Rugo with regard to 1st accused who is only charged in count 1 i.e. the conspiracy charge.

He cited the fact that 1st accused will experience practical challenges due to the nature of a conspiracy charge since being conspirators, what one of them says in furtherance of conspiracy could be admissible evidence even though said or done in his absence and wondered how 1st accused would confront such evidence. The court would wish to observe that in its evaluation of evidence, care will necessarily be taken to ensure that only relevant and admissible evidence in respect of each count will be taken into account.”

39. The burden was on the Applicants to satisfy the court of the incorrectness, illegality, or impropriety of the orders which this court is being called upon to review, or as to the irregularity of the proceedings leading thereto. The acts in the count on conspiracy are said to form part of a whole scheme in which the doctrine of res gestae may apply.

40. The doctrine of res gestae embraces not only the actual facts of the transaction and the circumstances surrounding it, but the matters immediately antecedent to and having a direct casual connection with it, as well as acts immediately following it and so closely connected with it as to form in reality a part of the occurrence.

41. I have called for and reviewed the proceedings and the events which led to the application that birthed the orders complained of and I am unable to find anything which could justify the invocation of the powers of **Section 362** of the **Criminal Procedure Code** in this case.

42. For the foregoing reasons I find that the application is lacking in merit and decline to issue the orders sought. The application is dismissed accordingly.

SIGNED, DATED this 2nd day of November, 2016.

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L. A. ACHODE

JUDGE