



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL REVISION NO.68 OF 2014

REPUBLIC.....APPLICANT

VERSUS

RUTH WANJIKU MURAYA)

JOAB OOKO)

BORU GUYO)

BENJAMIN NZIOKA)

HENRY ACHOKI).....RESPONDENTS

FREDRICK TSOFA MWENI)

DUNCAN OTIENO)

BENEDICT OMOLO)

RULING

The Director of Public Prosecutions was aggrieved by the decision rendered by the trial court that denied him an opportunity to consolidate three (3) different criminal cases that were filed at separate times against the Respondents. The particular cases are **Criminal Case Nos.1447 of 2013, 1457 of 2013 and 2052 of 2013**. The Director of Public Prosecutions has therefore, pursuant to **Section 362 and 364** of the **Criminal Procedure Code**, applied to this court for the order issued by the trial court in denying him a chance to consolidate the criminal cases to be revised and instead this court issues an order consolidating the three criminal cases. The basis upon which the Director of Public Prosecutions is predicating his application is as follows:

That the offences charged are founded on the same facts; that the three criminal cases filed are still fresh; that the offences that the Respondents have been charged with form part of a series of offences of the same character; the same witnesses will be called in each case, and if a contrary order is issued, it will mean that the same witnesses will be required to testify in three different courts at different times; the exhibits relied on by the prosecution are the same; that it will be prudent for one judicial officer to hear the case to avoid a situation where three different courts may arrive at different decisions; there may be a possibility of confusion if the same exhibits will be required to be produced in different courts at the same time; that inordinately may be occasioned if the same witnesses are called to testify in three different

cases; that there was possibility that there may be miscarriage of justice; that the consolidation will not prejudice any of the Respondents; that the charges brought against the Respondents, taken in totality will be less than ten (10) counts thus below the legal threshold of twelve (12) counts; that each of the Respondents has been charged with the 1st count of conspiracy and therefore it is only fair and convenient that they be charged in one trial; that the prosecution will be grossly inconvenienced if it is forced to conduct three trials in three different courts; and finally, the Director of Public Prosecutions asserts that the Respondents would not be inconvenienced at all because they have all been supplied with witness statements and documentary evidence that the prosecution will rely on during trial. Attached to the application were the Rulings that the Director of Public Prosecutions seeks to have revised and the proposed charge sheet if consolidation is allowed by this court.

Mr. Mutuku for the State reiterated the above arguments when he made his oral submission before court. The application is opposed. Mr. Kangahi, Mr. Kago, Mr. Munene, Mr. Okumu, Mr. Ambala for the Respondents opposed the application. Their argument in opposition to the application can be summarized thus:

That this court has no jurisdiction to entertain the application before it because to do so would amount to this court interfering with the smooth trial of the criminal cases facing the Respondents; that the Respondents will be prejudiced by the proposed consolidation because some of the Respondents face only one or two of the counts in the proposed consolidated charge sheet – in that regard, they will be forced to sit through trial when evidence is adduced against other Respondents when they will not be party to such evidence; that to allow the consolidation would be infringing on the Respondents' constitutional rights under **Article 50(2)(e)** of the **Constitution** that entitles the Respondents to have their trial heard and concluded without unreasonable delay; the Respondents were concerned that the multiplicity of applications brought by the Director of Public Prosecutions in the subordinate court has had the effect of causing undue delay in the hearing and determination of the respective cases facing the Respondents; that the court should not accept the invitation made by the prosecution to interfere with interlocutory decisions made during the course of a criminal trial, because to do so would amount to this court micromanaging the affairs of the trial court; that the prosecution has not been ready to proceed with the prosecution of the case in the trial court and therefore the present application was yet another delaying tactic by the Director of Public Prosecutions; the Respondents were concerned that their right to fair trial as guaranteed by **Article 50** of the **Constitution** would be infringed if the order of consolidation is issued by the court; that the orders issued by the trial court denying the Director of Public Prosecutions to consolidate the charge sheet was final, and if aggrieved, the Director of Public Prosecutions should have appealed instead of filing the present application. In essence, the Respondents are saying that they will be highly prejudiced if this court allows the application by the prosecution to consolidate the charges facing the Respondents.

This court has carefully considered the rival arguments made by the parties to this application. The court has also benefited from the decisions of court of concurrent jurisdiction relied on by counsel in their submission. The first issue for determination by this court is whether it has jurisdiction to entertain the application. **Article 165(6)** of the **Constitution** provides thus:

“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.”

Section 362 of the **Criminal Procedure Code** provides that:

“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 so as to the regularity of any proceedings of any such subordinate court.”

It has been contended on behalf of the Respondents that this court lacks jurisdiction to entertain the application brought by the Director of Public Prosecutions because the order made by the trial court is not amenable to revision under **Section 362** of the **Criminal Procedure Code** but rather ought to have been

subjected to an appeal. The Director of Public Prosecutions is of the contrary view. He argued that this court had jurisdiction to consider and determine the application brought before it on account of the fact that miscarriage of justice may likely occur if the orders issued by the trial court are not revised. This court is of the opinion that it has jurisdiction to entertain the application because the subject matter of the application is within the purview of this court to issue an order of revision. The law has not delineated the limit within which this court can exercise its supervisory powers under **Article 165(6)** of the **Constitution** and **Section 362** of the **Criminal Procedure Code**. The only qualification is that the issue that prompts the application must touch on either *“the correctness, the legality or propriety of any finding, sentence or order recorded.”* The argument advanced by the Respondents that this court lacks jurisdiction, in exercise of its supervisory jurisdiction, to consider an application seeking to impeach and interlocutory ruling does not therefore hold. Any interlocutory ruling made by a subordinate court is amenable to revision by this court when exercising its supervisory jurisdiction, the only caveat being that the issue presented in the application serves the overarching interests of justice.

As regard the merits of the application, the starting point is that under **Article 157** of the **Constitution**, the Director of Public Prosecutions has exclusive power of prosecution and shall exercise such powers without supervision of any person or authority. The only limit to such exercise of prosecutorial powers is under **Article 157(7)** and **(8)** of the **Constitution**. This relates to where a criminal case is being discontinued by Director of Public Prosecutions. In the present application, what the Director of Public Prosecutions sought from the trial court was an order seeking to consolidate the three criminal cases brought against the Respondents. From the explanation given by the Director of Public Prosecutions and from my perusal of the charge sheets in the respective cases and the proposed consolidated charge sheet, it was clear that the events that led to the Respondents being charged arose from the same series of transactions. The Respondents were brought to court at different times but the charges brought against them arose from the same series of transactions. Under **Section 135(1)** of the **Criminal Procedure Code**:

“Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are found on the same facts, or form or are part of a series of offences of the same or similar character.”

The Director of Public Prosecutions in exercise of his powers under **Article 157** of the **Constitution** has authority to determine what charges may be brought against any accused persons provided that where many counts are brought against an accused person, it shall not exceed twelve counts (**See Ochieng –Vs- Republic [1985] KLR 252**). More than one charge may not be brought against an accused person if the presentation of more charges may embarrass the accused in his defence (**See Section 135(3) of the Criminal Procedure Code**).

In the present application, it was clear that the trial court erred when it failed, firstly, to acknowledge the Director of Public Prosecutions Constitutional authority under **Article 157** of the **Constitution** to prosecute criminal cases in Kenya, and secondly, to determine how such prosecutions shall be conducted. The facts of the present application disclose that the request made by the Director of Public Prosecutions to consolidate the charges brought against the Respondents was not in the circumstances unreasonable. The trials in the three criminal cases have not commenced. The Respondents have been charged in relation to the same or a series of transactions that arose from the same facts. The witnesses who will testify are the same. The exhibits that will be relied on are the same. While it is conceded that some of the Respondents face more charges than others, the interest of justice demands that a criminal case arising from the same facts or the same series of facts or transactions should be heard and determined by one court. This court is unable to agree with the submission made on behalf of the Respondents that their Constitutional right to fair trial and right to have the criminal case facing them expeditiously disposed of will be infringed if this court orders consolidation of charges. To the contrary, having the criminal case facing the Respondents ventilated in one forum will expedite their trial. The Respondents will not be prejudiced by the consolidation.

In the premises therefore, this court will issue order of revision pursuant to **Section 362** of the **Criminal Procedure Code** and call to this court the decisions made by the trial court in the three criminal cases *i.e.* **Criminal Case Nos.1447 of 2013, 1457 of 2013 and 2052 of 2013** denying the Director of Public

Prosecutions' application to consolidate the charges in the three cases for the purposes of determining its legality. Those decisions are hereby set aside and substituted by an order consolidating the three (3) criminal cases under **Criminal Case No.1457 of 2013**. The Respondents shall take fresh plea in the proposed consolidated charge sheet presented in that case. The charges facing the Respondents shall be heard by one trial court. It is so ordered.

DATED AT NAIROBI THIS 2ND SEPTEMBER 2015

L. KIMARU

JUDGE