Republic v Chaka (Criminal Case E061, E062, E063 & E064 of 2024 (Consolidated)) [2024] KEMC 6 (KLR) (28 March 2024) (Ruling)

Neutral citation: [2024] KEMC 6 (KLR)

REPUBLIC OF KENYA

IN THE SHANZU LAW COURTS

CRIMINAL CASE E061, E062, E063 & E064 OF 2024 (CONSOLIDATED)

JM OMIDO, SPM

MARCH 28, 2024

BETWEEN

REPUBLIC ..... PROSECUTION

AND

ERICK NDORO CHAKA ..... ACCUSED

RULING

1. For the purposes of this ruling only, I have, sua sponte consolidated this matter with other files that are before me, to wit Shanzu Criminal Cases No. E062 of 2024 *R v Mohamed Said Mohamed*; E063 of 2024 *R v Salim Sleem & 36 others*; and E064 of 2024 *R v Hussein Ali & 8 others*. In total thus, I have 48 accused persons in the four files before me.

2. In the files before me, the respective accused persons are charged with either of the following offences:

   Selling of shisha contrary to Rule 3 of the *Public Health (Control of Shisha Smoking) Rules* as read with Section 164 of the *Public Health Act*.

   Smoking of shisha Contrary to Rule 3 of the *Public Health (Control of Shisha Smoking) Rules* as read with Section 164 of the *Public Health Act*.

3. The respective matters were placed before me and the accused persons presented for plea taking on 15th January, 2024.

4. Being aware of the decision of *Republic v Ministry of Health & 3 others ex parte Kennedy Amdany Langat & 37 others* [2018] eKLR in which the High Court (Aburili, J.) addressed itself on the validity of the Kenya Gazette Notice No. 292 of 27th December, 2017 vide which the *Public Health (Control of Shisha Smoking) Rules*, 2017 were published, I deferred the respective pleas and invited the prosecution and the respective accused persons to address this court as to whether there was legislation or rules in place banning the use, manufacture, sale or offer for sale of shisha.

5. In the High Court authority referred to above, the court, *inter alia*, made the following determination:

> 138. For the above reasons, I hold and find that the shisha ban imposed by the Cabinet Secretary, Ministry of Health vide Legal Notice No. 292 of 28th December, 2017, however irregular, shall remain in force and the Respondents are hereby directed to follow the procedural requirements to the letter in regularizing the ban. The process should be undertaken within Nine months from the date of this judgment. Any party is at liberty to apply. Accordingly, the application is declined. (Emphasis mine).

6. The court directed that the parties address the issue through written submissions, which the parties filed.

7. In response to this court on the position as to whether there is a valid shisha ban in place, Mr. Musyoka, learned Principal Prosecution Counsel, through the filed submissions stated that the shisha ban vide the Kenya Gazette Notice No. 292 of 27th December, 2017 – *The Public Health (Control of Shisha Smoking) Rules*, 2017 is still active pursuant to the High Court's position in paragraph 138 in the above decision as the said judgement has not been set aside on review or appeal and remains undisturbed.

8. Mr. Musyoka further stated that the judgement in the above decision is emphatic that "the ban remains in place and upholds the greater public interest of public health". In his view, the charges in the present cases are therefore legally established and "should be admitted without any condition".

9. The accused persons in the respective matters were represented by Mr. Muliro, learned counsel who took the position that there is no valid ban in place for the use, manufacture, sale or offer for sale of shisha.

10. Mr. Muliro invited the court to consider the observations and findings that the High Court made in the above case and laid emphasis on paragraphs 94, 106, 118 and 138 of the Judgement. I will add paragraphs 83 to 86 as being important. The court expressed itself thus:

> 83. In this case, there was a statutory obligation on the part of the Cabinet Secretary responsible for Health to, within seven (7) sitting days after the publication of the Regulations, ensure that a copy of the Regulations were transmitted to the responsible Clerk for tabling before Parliament and the Clerk was enjoined to register or cause to be registered the Regulations for tabling or laying thereunder. Whether or not the relevant Cabinet Secretary did transmit the Regulations was, in my view, peculiarly within the knowledge of the said Cabinet Secretary and therefore it behooved him to place before the Court material supporting the fact that he had fulfilled the legal obligation placed on him. No evidence was placed before this court to demonstrate that the Cabinet Secretary did comply with the requirement of placing before the Clerk the Regulations for tabling before the relevant House of Parliament.
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> 84. Section 11(4) of the *Statutory Instruments Act* clearly provides for the consequences for the failure to lay the instrument before the House within the stipulated period and the consequences are that "the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void."
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> 85. Therefore, in my view Section 11(4) does not give the Court an option since the section is couched in mandatory terms and the consequences for non-compliance are likewise provided. It follows that the requirement must be read in mandatory terms as opposed to being merely directory.

86. There is however a difficulty in understanding the said provision. Whereas Subsection (1) of Section 11 of the Act provides that the Cabinet Secretary is enjoined within seven (7) sitting days after the publication of a statutory instrument, to ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before Parliament, there is no express period within which the Clerk is to table the Instrument before the House of Parliament. However, subsection (4) thereof provides that "if a copy of a statutory instrument that is required to be laid before Parliament is not so laid in accordance with this Section, the statutory instrument shall cease to have effect immediately after the last day for it to be so laid."

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94. On this limb therefore the applicants have proved their case, that on the whole, the Cabinet Secretary, when issuing the legal notice banning the use, manufacture, sale, offer for sale of shisha did not comply with the procedural requirements under the *Statutory Instruments Act*.

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106. In the instant case, what clearly emerges is that the Cabinet Secretary flouted the procedural requirements for issuance of such legal notices. He did not consult the public on the same. He also did not demonstrate that he ever intended to place the Gazetted Regulations before Parliament for approval before implementation.

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118. In this case, I have indeed found that the Cabinet Secretary flouted the procedural requirements for issuing the legal notice. However, I have not delved into the merits of how shisha smoking is useful or harmful to health. This is so because judicial review looks at the process and not the merits of the decision.

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138. For the above reasons, I hold and find that the Shisha ban imposed by the Cabinet Secretary, Ministry of Health vide Legal Notice No. 292 of 28th December, 2017, however irregular, shall remain in force and the respondents are hereby directed to follow the procedural requirements to the letter in regularizing the ban. The process should be undertaken within Nine months from the date of this judgment. Any party is at liberty to apply. Accordingly, the application is declined.

11. The learned defence counsel stated that despite the learned judge declaring the rules irregular, she proceeded to order that the shisha ban remains in force for a period of nine (9) months to allow the Cabinet Secretary, Ministry of Health to regularize the rules. That despite the respite of nine (9) months to address the irregularities that were pointed out in the judgement, the Cabinet Secretary never initiated the process of regularizing the rules and/or shisha ban.

12. In Mr. Muliro's view, the failure by the Cabinet Secretary to regularize the rules within the period of nine (9) months as directed by the High Court had the effect or rendering the Kenya Gazette Notice No. 292 of 27th December, 2017 *vide* which the *Public Health (Control of Shisha Smoking) Rules*, 2017 were introduced to automatically cease. Counsel urged that it cannot in the circumstances be stated that the High Court extended the gazette notice and/or the rules indefinitely and/or infinitely.

13. In conclusion, Mr. Muliro submitted that by virtue of Section 11 of the *Statutory Instruments Act* and Aburili J.'s findings in the above decision, Legal Notice No. 292 of 27th December, 2017 is "void and the rules cannot be the basis of any criminal charge".

14. I have considered the submissions by the two sides and the records before me. The issues for determination as discernible from the record are as follows:

15. The first issue for determination is whether the *Public Health (Control of Shisha Smoking) Rules* 2017 are in force, in light of the judgement of the High Court in *Republic v Ministry of Health & 3 others ex parte Kennedy Amdany Langat & 37 others* [2018] eKLR. In other words, I am required to determine whether there is a valid shisha ban in force pursuant to which criminal charges can be brought against a person who uses, manufactures, sells or offers for sale shisha.

16. Article 50(2)(n) of *the Constitution* of Kenya provides that every accused person has the right to a fair trial, which includes the right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya; or a crime under international law. This provision, is in my view plain clear and does not require further explanation.

17. Also relevant to this matter is Section 134 of the *Criminal Procedure Code*, Cap 75 Law of Kenya which provides that every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of offence charged.

18. The rival argument between the two sides is that, while the prosecution takes the view that the ban on the use, manufacture, sale and offer for sale of shisha as provided for under the *Public Health (Control of Shisha Smoking) Rules*, 2017 that were published *vide* Kenya Gazette Notice Number 292 of 27th December, 2017 is still in force, the accused persons in the respective matters are of the view that the said rules ceased to remain in force upon expiry of nine (9) months following the judgement of the court and the failure by the Cabinet Secretary to regularize the ban.

19. Both sides have relied on the same judgement with the prosecution stating that the shisha ban remains in force pursuant to the order of the court in paragraph 138 of the judgement (reproduced above), with the defence taking a contrary view.

20. I have carefully considered the contents of the charge sheets in respect of all the consolidated matters and the rival arguments presented by the two sides in their filed submissions. It is not in dispute that the High Court reached a finding that the Cabinet Secretary, upon issuing the legal notice banning the use, manufacture, sale and/or offer for sale of shisha did not comply with and/or flouted the procedural requirements under the *Statutory Instruments Act* (see paragraphs 94, 106 and 118 of the judgement).

21. It is also clear to me that despite the court's findings in the paragraphs that I have pointed out above, that the legal notice and the rules were irregular, the court proceeded to direct that the ban would remain in force and ordered that the process of regularizing the same be undertaken within nine months from the date of the judgement, i.e. 26th July, 2018, in the words that I have reproduced above.

22. The point of departure between the two sides is that while the prosecution argues that the court did not state or give a limited period for which the ban would remain in force, the defence argues that the judgement provided that there be compliance within nine (9) months in terms of regularizing the ban to the letter. To the defence, it then meant that the legal notice would in its state (before being regularized) remain in force for only nine months, and that the period of nine months was for purposes of regularizing the same.

23. What comes out of the prosecution's submissions is that the Cabinet Secretary did not comply with the order by the High Court to regularize to the letter the shisha ban within the nine months that the High

Court ordered. In fact, there has not been placed before the court anything to show that the process of regularizing the ban was ever commenced or even attempted during the nine (9) month respite.

24. This then is what I hear the prosecution to be saying in its submissions: That the High Court found the shisha ban irregular but all the same ordered that the same remains in force and directed the Cabinet Secretary to regularize the ban within nine (9) months. The Cabinet Secretary did not do so. The inaction by the Cabinet Secretary notwithstanding, the ban remains in force.

25. With profound respect, I drastically disagree with the prosecution, particularly on the view Mr. Musyoka takes that the shisha ban remains in force even after non-compliance by the Cabinet Secretary. The reasons are in the three rhetorical questions that I will ask.

26. The first one is, having declared, as did the High Court, that Legal Notice No. 292 of 28th December, 2017 that gave rise to the shisha ban, was irregular, could the High Court have intended that it would not matter that the same rules would remain in force even after the Cabinet Secretary fails to regularize the same within the period given, just because the court did not specify that in the event of non-compliance they would cease being in force?

27. The second question is, what then was the purpose of the nine-month respite, if the said period meant nothing as to the validity of the rules and the requirement directed at the Cabinet Secretary to regularize the same to the letter?

28. The third question is, considering that the rules ought to have been placed before parliament for approval before implementation, does the High Court judgement amount to an order for such implementation without approval by parliament, as urges the prosecution?

29. Having considered the position as above, I am on the same page with Mr. Muliro that the High Court directed that the *Public Health (Control of Shisha Smoking) Rules*, 2017, which it found to be irregular, would remain in force to allow their regularization within a period of nine months.

30. I understand the High Court to be saying that in the event the irregular rules are not regularized by the Cabinet Secretary within nine (9) months, then they would stand rendered as irregular and their force would immediately cease.

31. I have read the High Court decision alongside Section 11(4) of the *Statutory Instruments Act* which provides that "if a copy of a statutory instrument that is required to be laid before Parliament is not so laid in accordance with this section, the statutory instrument shall cease to have effect immediately after the last day for it to be so laid."

32. Such that then, there is no way the High Court, in my understanding could give life indefinitely to the rules when the statute itself requires mandatorily that there be compliance. Doing so would in my view mean bypassing Parliament, which is the body mandated to legislate. It is for that reason that I find that the extension was not indefinite or infinite but was limited to the period of nine (9) months.

33. In the result, guided by the decision of the High Court and pursuant to the doctrine of stare decisis, I reach the finding that there is no valid and/or lawful ban for the use, manufacture, sale, offer for sale of shisha under the *Public Health (Control of Shisha Smoking) Rules*, 2017 for the reason that the said rules were not regularized by the Cabinet Secretary within nine (9) months as ordered and/or directed by the High Court and therefore ceased to have effect upon the expiry of nine months from the date of the decision of the High Court.

34. That then brings me to the second and third issues for determination, which are whether there are valid charges before this court in the respective consolidated matters and the fate of the matters before me, in either event.

35. Having already reached the finding that there is no valid and/or lawful ban for the use, manufacture, sale, offer for sale of shisha under the *Public Health (Control of Shisha Smoking) Rules*, 2017 for the reason that the said rules were not regularized by the Cabinet Secretary within nine (9) months as ordered and/or directed by the High Court, it follows that there are no valid charges in any of the consolidated files before me.

36. I have stated above that Article 50(2)(n) of *the Constitution* of Kenya provides that every accused person has the right to a fair trial, which includes the right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya; or a crime under international law.

37. The accused persons in the consolidated matters were charged with offences under the *Public Health (Control of Shisha Smoking) Rules*, 2017 purportedly committed on 14th January, 2024. There was no valid shisha ban under the said rules at the time and as per the dictates of *the Constitution* in the Article I have cited above, the respective offences that they were charged with did not exist and no conviction can arise therefrom.

38. Further, the contents of the respective charge sheets defy the provisions of Section 134 of the *Criminal Procedure Code* which provides that a charge shall contain a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of offence charged. There is no specific offence in the cases before me as the offences did not exist at the time the accused persons are alleged to have flouted the law.

39. Under Section 89(5) of the *Criminal Procedure Code*, where the court is of the opinion that a complaint or formal charge made or presented does not disclose an offence, the court is required to make an order refusing to admit the complaint or formal charge and shall record its reasons for the order.I am persuaded to such opinion.

40. In the result, in line with the said provision of statute and for the reasons that I have stated above, I hereby refuse to admit the charges in all the consolidated matters before me. I proceed to discharge all the accused persons in all the respective consolidated matters, under Section 89(5) of the *Criminal Procedure Code*.

41. Each of the 48 accused persons in the four (4) consolidated files shall be set at liberty forthwith unless otherwise lawfully detained.

42. The cash bail that was deposited by each of the accused persons in the respective consolidated matters shall be released to the depositors. The order for refund of cash bail will not apply to the accused persons whose cash bail has already been forfeited to the state.

43. A copy of this ruling to be placed in each of the files.

DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 28TH DAY OF MARCH, 2024.

OMIDO, JOE MKUTU.

SENIOR PRINCIPAL MAGISTRATE

Accused Persons: (Appearances as separately recorded in each of the consolidated files).

Defence Counsel: Mr. Muliro.

Prosecution Counsel: Ms. Maina.

Court Assistant: Ms. Osundwa & Ms. Chepkurui.