



REPUBLIC OF KENYA



**Republic v Gachagua & 9 others (Anti-Corruption Case E015 of 2021)  
[2022] KEMC 8 (KLR) (Civ) (10 November 2022) (Ruling)**

Neutral citation: [2022] KEMC 8 (KLR)

**REPUBLIC OF KENYA  
IN THE ANTI-CORRUPTION MAGISTRATE'S COURT  
CIVIL  
ANTI-CORRUPTION CASE E015 OF 2021  
VN WAKUMILE, SPM  
NOVEMBER 10, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**RIGATHI GACHAGUA ..... 1<sup>ST</sup> ACCUSED  
WILLIAM WAHOME MWANGI ..... 2<sup>ND</sup> ACCUSED  
ANNE NDUTA RUO ..... 3<sup>RD</sup> ACCUSED  
JULIANNE JAHENDA MAKAA ..... 4<sup>TH</sup> ACCUSED  
SAMUEL MURIMI IRERI ..... 5<sup>TH</sup> ACCUSED  
GRACE WAMBUI KARIUKI ..... 6<sup>TH</sup> ACCUSED  
LAWRENCE KIMARU ..... 7<sup>TH</sup> ACCUSED  
IRENE WAMBUI NDIGIRIRI ..... 8<sup>TH</sup> ACCUSED  
DAVID REUBEN NYANGI NGURU ..... 9<sup>TH</sup> ACCUSED  
M/S RAPID MEDICAL SUPPLIES LTD ..... 10<sup>TH</sup> ACCUSED**

**RULING**

- 1 Through a letter dated November 3, 2022, by the principal prosecution counsel, Mrs Vera Amolo Hamisi, the director of public prosecution seeks to have the present criminal case withdrawn against all the accused persons under section 87 [A] of the *Criminal Procedure Code*. The learned counsel relies on the basis of an affidavit of support deponed by number 231XXX Kuria Obadia, senior



superintendent of police and leading investigator in this matter. The affidavit in support of the application is dated, October 15, 2022 and it was filed in court on November 2, 2022.

- 2 In the subject affidavit, the investigating officer essentially relies on two grounds which are well articulated in paragraphs 5 and 6 of the document being;
  - (i) That the investigation team was given very strict and fixed timelines to come up with findings promptly, which made it very difficult to conduct thorough and comprehensive investigations into the allegations raised by the complainant.
  - (ii) That while investigations were still in progress, the Director of Criminal Investigations Mr George Kinoti, CBS directed the investigating team to make recommendations that will enable the accused persons to face charges, and based on immense pressure team made the recommendations
- 3 Mrs Muriungi the director of public prosecution argued the application. She complained that despite the office writing several letters to the investigating team seeking evidence covering specific areas, they received no response.
- 4 All the accused persons through their respective counsel supported the prosecution's application to have the matter withdrawn under section 87( A) of the *criminal procedure code*.
- 5 On cross-examination, by senior counsel Kioko Kilukumi for the 1st accused, the investigating officer, largely alluded to the contents of his affidavit dated November 2, 2022. However, he indicated that the investigating team acted based on a complaint from the Financial Reporting Center and that the matter wasn't politically instigated to harass and portray his client the Hon Rigathi Gachagua AKA Riggy G to the electorate as not being electable. It is common knowledge, that " Riggy G" is the deputy president of the republic of Kenya whereas, it came to my attention yesterday that the 2nd Accused Hon William Wahome Mwangi is the current senator for Nyeri county. I believe this is why the issue of political harassment has been taunted by the defense as being the sole motivation behind the arrest of the accused persons.
- 6 It would be repetitive, for the court to delve into the submissions of each counsel concerning the instant application since they all associated themselves with the submissions by senior counsel Kilukumi for A1.
- 7 Essentially, they are of the considered view, that the 1st Accused was the principal target in this matter and the rest of the accused persons are merely collateral damage hence the entire proceedings amount to an abuse of due process. Mr Makoha for the third accused took the argument a notch higher, by suggesting that the office of the DPP and the DCI abdicated from their constitutional roles and urged the court to make recommendations to the effect, that no charges should ever be preferred against anyone before investigations are concluded, and there should be full disclosure of evidence before the commencement of a criminal trial.
- 8 In response, Mrs Muriungi for the state told the court that the office of the ODPP relies on their policy guidelines before the decision to charge is taken. Their policy guidelines provide for three tests to be applied:
  - (i) Evidential test
  - (ii) Public interest test.
  - (iii) The threshold test.



- 9 In this matter, the director of public prosecutions allegedly relied on the threshold test based on available evidence with the expectation that further evidence would be availed before the hearing date. Counsel further added that under section 5(4)(e) of the director of public prosecution Act, the director of public prosecution has the power to review any criminal case. She was of the view that if the third accused felt that his constitutional rights had been violated, he ought to have moved the High court for the appropriate remedy since, in her opinion, this court lacks the jurisdiction to entertain such issues. However, I am of the contrary view.
- 10 There being no objection to the substantive application by the prosecution to have the matter withdrawn under section 87(A) of the criminal procedure code, the application is hereby granted as prayed. The accused persons are hereby informed that they may be re-arrested in the future and the same or similar charges be preferred against them. However, as suggested by counsel for the third accused, I believe that it is important for courts of law to make recommendations that might improve the criminal justice system based on real-time observations. Courts of law are no longer passive arbiters of everything that is presented before them for adjudication. Never should a judicial system be used as a stop-gap measure, holding cell in contemplation of cogent evidence, or as a doormat. There is a need to embrace institutional interdependency while at the same time recognizing the existence of institutional sanctity.
- 11 Recommendations are necessary and they can be made at any level moreso, when a criminal process seems to overtly offend Article 50(2) of the constitution of Kenya which provides that "every accused person has her right to a fair trial".
- 12 I have read and reread the provisions of section 157 of the constitution of Kenya which establishes the office of the director of public prosecutions. It is a very powerful constitutional office and it is subordinate to none when it comes to institutions taking over and discontinuation of criminal proceedings in the republic of Kenya. The DPP is in charge of the conduct of criminal proceedings in the republic.
- Under Article 157(4) of the constitution of Kenya, the director of public prosecution has been granted powers to direct the inspector general of the police service to investigate any information or allegation of criminal conduct and the inspector general shall comply with any such directions.
- 13 It is common knowledge, that the DCI is the investigative arm of the Kenya police service which is led by the inspector general of the police. The question that begs for an answer at this juncture is how come in this matter, the director of public prosecutions seems to have acted under pressure and approved charges based on inconclusive investigations. One can not be faulted to infer that he acted under pressure from his junior and contrary to the expectation of his office. The issue of adherence to some internal policy guidelines can never be the basis to deny a citizen his liberty. There is only one logical threshold which in my view is that the evidentiary value of the evidence presented should be able to prove a particular case beyond reasonable doubt
- 14 Under Article 157(11) of the constitution of Kenya 2010, while exercising the powers of his office, the director of public prosecution is expected to have regard for the public interest, the interest of the administration of justice, and the need to prevent and abuse of the legal process. These proceedings are testimony to the fact the DCI and the DPP acted unprocedurally . One cannot prefer charges in anticipation of evidence, since plea taking marks the commencement of a criminal trial and the event ordinarily leads to serious repercussions which may include but are not limited to denial of liberty, public ridicule, and many a time stress which may lead to unnecessary loss of life. The decision



to charge must be exercised judicially, sapiently, impartially, and independently. Millions of shillings were deposited as cash bail and the money has been lying idle in court ever since when the accused persons took the plea, instead of being pumped into our ailing economy. whereas some Title Deeds are being held as security yet they could be used as collateral to secure loans. Any right-thinking member of society would be justified to seek answers from the arresting, investigating, and prosecuting authorities, as to why the decision to charge was based on extraneous factors such as hope and not the requisite evidentiary value threshold. such conduct is what rightly makes some Kenyans argue that, the office of the director of public prosecutions and that of the director of the directorate of criminal investigations have been weaponized in the fight against corruption, or that they have been operating under state capture. Honestly, they cannot be faulted for expressing their displeasure in such a manner because the *National Police Service Act*, donates wide-ranging powers to police officers when it comes to preliminary investigations. Section 53 of the *Act* provides as follows:

- (1) A police officer investigating an alleged offense (not being an offense against discipline) may require any person to execute the bond in a such sum in such form as may be required, subject to the condition that the person shall duly attend court if and when required to do so.
- (2) A person who refuses or fails to comply with a requirement lawfully made under subsection (1) commits an offense'
- (3) Notwithstanding the foregoing provisions, the powers conferred under this section shall be exercised in strict accordance with the *criminal procedure code* (cap 75)

15 Parliament did not enact the subject provisions of the law in vain.

16 It remains the only legal and logical avenue through which this case ought to have been handled, given the explanation tendered by the state in response to the submissions by the defense. The director of public prosecution ought to have brought these provisions to the attention of the investigators th who were allegedly acting under pressure from their boss, but it never happened. sadly, the public is likely to lose money, since the defense insinuated that they are likely to sue the state for compensation on account of malicious prosecution. I do preside over a subordinate but as mentioned at the onset of my ruling, counsel for the third accused (Mr Makoha), fervently pleaded with the court to make recommendations that may forestall replication of the events witnessed through these proceedings in the future.

17 The learned counsel sounded a bitter man. Thus, I elect to take up the challenge in consideration of the confidence he has bestowed upon this court, with the hope and prayer that the powers that be shall consider taking the appropriate action.

18 The court proposes the following changes which are likely to have far-reaching consequences if adopted:

### **Establishment of the office of the Pre-Trial judge**

19 Parliament should consider passing the necessary legislation to establish the independent office of the Pre-Trial judge, akin to the francophone judicial system.

20 The office shall subject the activities of the director of public prosecution, the director of criminal investigation, and any other investigative authorities as relates to the intended charges to scrutiny, determine the number of witnesses to be bonded based on the quality of their testimony, and set timeline for the case. Once, such issues are determined the defense should be invited and full disclosure is done before the matter is forwarded to a court of law for plea taking and commencement of the trial. I state so because at times the nature of the witnesses that are brought to court suggests that



the prosecution is not prepared to proceed probably because investigations are yet to be concluded. It is usually, embarrassing to prosecute such cases and not only distressful to the judicial officer who is made to record volumes of unnecessary evidence but a waste of public resources. Unfortunately, sometimes when we comment on the nature of the evidence being served, we are asked to recuse ourselves. Once the office of pre-trial judge is established, grain shall be separated from the chaff at the point of disclosure and there is a real likelihood, that instead of plea taking, plea bargain shall be the norm as is the case in countries with strong judicial systems. It's unfair to subject judicial officers to taking lengthy notes and hearings of ridiculous witnesses when the prosecution is aware that the DCI is still fishing for evidence. They may as well have been duped as it seems to have been the case in this matter, but the blame would unfortunately fall on the prosecution. The decision to charge Policy guidelines must be deployed in line with the provisions of Article 50 of the [constitution](#) at all times.

- 21 The office of the Pre-Trial judge will surely exorcise the ghost of backlog from the judiciary and lighten the director of public prosecutions baggage since the decision to charge shall have to be taken after tripartite discussions between three independent state entities and after full disclosure.

### **Introduction of personal prosecutorial and investigative liability**

- 22 Investigators and prosecution counsel have played a blame game in this matter. The court has heard and understood them clearly, they are simply saying in different tones and words, that they were instructed by their superiors to proceed at whatever cost. Administrative action would follow if they acted contrary to such instructions. However, with the introduction of personal, investigative, and prosecutorial liability, they would be in a position to stand firm, unshaken, and resist the devil at all times, since they can always argue that they have a career and personal reputation to protect. Employees should be allowed to carry out their duties professionally and arrive at informed decision. Investigators should not cause charges to be preferred through mischief whereas the prosecution should always insist on proper evidence at all times.
- 23 Lord Action once said “ power tends to corrupt and absolute power corrupts absolutely” It is high time, that all leaders in our criminal justice system uphold their respective oath of office and the tenets of chapter six of our constitution which provides for leadership and integrity of all public officers, for the good governance of our beloved nation. The law should never be applied selectively but equally to all Kenyans. We are all children of the same God. As investigators, prosecutors, judicial officers, etc, we are not immune from being processed through the same system through which, we conduct state business for the good of our people. Therefore, it is our noble responsibility to sanitize the same whenever an opportunity presents itself, rather than compound the malpractices that have been laid bare courtesy of this case.
- 24 It is worth noting,that parliamentarians, namely Hon Rigathi Gachagua aka Riggy G who is now the deputy vice President of the Republic of Kenya ( Formerly accused number 1) and Hon Wahome (Formerly accused number 2) have been part and parcel of this labyrinthine trial, since its commencement with their dramatic arrests, publicized arraignment before a court, and in course of the zealously demonstrated by the state in its willingness to prosecute the matter almost instantly, so much, such that when the former trial court took the plea and set the trial date some months away in tandem with the court diary, the state wrote a letter of protest claiming that the dates were too far away, yet they were ready for the trial. In other words, the judiciary was being blamed for delaying the trial yet the proceedings confirm otherwise. The court has nothing personal against the two institutions ,they are crucial and indispensable in the administration of justice Sector.However, it is important that all stake holders work together and avoid buck passing. It is now clear that they are the causa causans of the tribulations faced by the The parliamentarians should take the initiative to



support the proposed changes through legislation, so that no one residing within our nation shall ever be subjected to whatever they went through regardless of but not limited to one's political inclination.

25 As we go about our official duties, it is always advisable to seek solace in our holy scriptures whenever one is overwhelmed. In Mathew 7:2 the bible says “ For in the same way you judge others, you will be judged and with the same measure you use, it will be measured to you”.

**RULING DATED AND DELIVERED ON THIS 10<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**V. WAKUMILE [MR]**

**SENIOR PRINCIPAL MAGISTRATE**

**10. 11.2022**

In the presence of :-

Mrs. Hamisi & Mrs Muriungi for the State

Mr. Kilukumi for 1<sup>st</sup> accused

Mr. Nyabuto for 2<sup>nd</sup> accused

Mr. Makoha for 3<sup>rd</sup> accused

Mr. Kisilu for 4<sup>th</sup> and holding brief for Mr. Wandugi for 9<sup>th</sup> and 10<sup>th</sup> Accused

Mr. Sendeyo for 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> accused

Court Assistant – Miriam and Daniel.

