



**Republic v Kamau & 2 others (Anti-Corruption Case
7 of 2018) [2019] KEMC 5 (KLR) (10 May 2019) (Ruling)**

Republic v Michael Sistu M. Kamau & 2 others [2019] eKLR

Neutral citation: [2019] KEMC 5 (KLR)

**REPUBLIC OF KENYA
IN THE ANTI-CORRUPTION MAGISTRATE'S COURT
ANTI-CORRUPTION CASE 7 OF 2018
DN OGOTI, CM
MAY 10, 2019**

BETWEEN

REPUBLIC PROSECUTOR

AND

MICHAEL SISTU M KAMAU 1ST ACCUSED

MWANGI MAINGI 2ND ACCUSED

NICHOLAS NDUNGU NG'ANG'A 3RD ACCUSED

RULING

1. On 30th October 2018 the prosecution filed a Notice of motion under Article 157 of *the Constitution* of Kenya, 2010 and section 135 and 136 of Criminal Procedure Code, Cap 75 Laws of Kenya and any other provisions of the law seeking for the following orders:-
 1. That Milimani Chief Magistrate's court Anti-corruption (ACC) case No. 7 of 2018 and Milimani Chief Magistrate's Court ACC No. 44 of 2018 be consolidated and heard together.
 2. That the Honourable court be placed to make any other and or further order as may be necessary to meet the ends of justice.
2. The application was based on the following four grounds and the affidavit of Terry Kahoro:
 1. That the offences which form the basis of the two criminal cases are founded on the same facts and arose from the same transaction.
 2. That sufficient nexus exists in relation to the offences preferred, witnesses and documentary evidence hence it would save judicial time and resources to have the two matters heard together.



3. That it is fair and in the interest of justice that this Honourable court allows this application. That both cases are yet to commence hence no prejudice would be occasioned to any party if the cases are consolidated.
3. The genesis of the above application was based on the above two mentioned cases. In ACC 7 of 2018 the 8th Respondent was charged with the following offences;-

Count I: Wilful failure to comply with Applicable Procedures and Guidelines relating to the Management of Public Funds contrary to section 45(2)(b) as read with Section 48(1) of the *Anti-corruption and Economic Crimes Act, 2003 (ACECA)*.

4. The facts were that Michael Sistu Mwaura Kamau on the 15th day of March 2008 in Nairobi area within Nairobi county, being the Permanent Secretary, Ministry of Roads and being a person whose functions concerned the management of public revenue willfully failed to comply with chapter 5 of the Government financial regulations and procedure by ignoring the design of the road which had been done by Engiconsult consulting Engineers limited at the cost of Kshs.33,303,600 and entering into a memorandum of understanding under which the Resident Engineer redesigned the same road.

Count 2: Abuse of office contrary to section 101 as read with section 102A of the Penal Code.

5. Michael Mwaura Kamau between 15th day of October 2007 and 15th day of March 2008 in Nairobi county, being the Permanent Secretary, Ministry of roads, in abuse of the authority of the said office arbitrary authorized the redesigning of Kamukuywa-Kaptama-Kapsokwony-Sirisia road which had been designed by Engiconsult consulting Engineers Ltd at the cost of Kshs.33,302,600 without involving the said M/s Engiconsult consulting Engineers Ltd, an act that resulted to the loss of public funds.

Count 3: Abuse of office contrary to section 101 as read with section 102A of the Penal code.

6. The facts were that Mwangi Maingi, on the 5th day of July 2007, and 15th day of March 2008 in Nairobi county being the Chief Engineer road, in abuse of the authority of the said office arbitrary authorized the redesigning of Kamukuywa-Kaptama-Kapsokwony-Sirisia road which had been designed by Engiconsult Consulting Engineers Ltd at the cost of Kshs.33,302,600 without involving the said M/s Engiconsult consulting Engineers Ltd, an act that resulted to the loss of public funds.

Count 4: Abuse of office contrary to section 101 as read with section 102A of the Penal Code.

7. Particulars of the case were that Nicholas Ndungu Ng'ang'a between 15th day of July 2007 and 15th day of March 2008 in Nairobi county, being the Resident Engineer Kamukuywa-Kaptama-Kapsokwony-Sirisia road in abuse of the authority of the said office, arbitrary authorized the redesigning of Kamukuywa-Kaptama-Kapsokwony-Sirisia road which had been designed by Engiconsult consulting Engineers Ltd at the cost of Kshs.33,302,600 without involving the said M/s Engiconsult consulting Engineers Ltd, an act that resulted to the loss of public funds.

Count 5: Giving a misleading document to principal contrary to section 41 as read with section 48(1) of ACECA

8. The facts are that Mwangi Maingi on the 6th day of November 2007 in Nairobi county, being the chief Engineer Roads, gave a document to wit, a memo dated 6th November 2007 to the Secretary Ministerial Tendering committee, ministry of Roads stating that the implementation of a memorandum of understanding between the ministry of roads and Kundan Singh construction limited had no cost implications, a fact he knew to be misleading in material respect.



9. M/s Kahoro while arguing her application besieged the court to consider the history of the matter as enumerated in paragraphs 2, 3, 4 and 5 of her supporting affidavit. That the matter had been re-investigated pursuant to a Ruling by the Court of Appeal in Appeal Decision No. 102/16. She submitted that the 1st to the 8th respondents were the persons in the earlier matter. She urged the court to consolidate the two matters because;-
 - (i) The facts that from the basis of the two cases a rise from a series of the same transaction which was the re-designing of the Kamukuywa-Kaptama-Kapsokwony-Sirisia road and that the actions of all accused have a nexus.
 - (ii) The witnesses to be called are the same.
10. That respondents did not contest the material evidence and nexus and that their complaint was the delay occasioned by the 8th respondent. Further that no prejudice will be caused to the respondent by such consolidation.
11. Several counsels appeared for the respondents. Mrs. Wambugu and M/s Soweto appeared for the 8th respondent. On her part Mrs. Wambugu argued that the DPP was all along aware of the investigations and chose to charge separately. That consolidation will make the parties fatigued and also make the trial cumbersome. That each of the accused handled the transaction separately. The only purpose of the DPP when seeking for the consolidation was to cure defect by using the court to sanitize the matter. M/s Soweto on her part urged the court to look at the merits and whether the charges are related as argued so that it does not prejudice the right to a fair trial. She attacked the validity of count 1 in ACC 7/2018. She argued that the particulars of the charges as brought under ACECA in ACC 7/2018 were different from the particulars of the charges brought under ACECA in ACC 44/2018. That the application for consolidation was intended to cause confusion before the court by mismatching the charges and that such consolidation will embarrass both the court and the accused. She submitted that the offences were brought under different regimes and wondered why the same offence would give rise to different suits. That the charges were not similar in both case files. She urged the court to await for a Ruling pending in the High Court before delivering its ruling. This court has since learnt of the ruling in *the constitution* and Human Rights Division Milimani Petition No. 22 of 2018.
12. Mr. Ranta argued that the prosecution had not come out clearly but only wanted to join the accused persons. He explained the import of section 135 of the CPC that the persons to be enjoined must be the same or same group of person, be of the same character and proximate in time and space. That dates are different. The places were different and that section 135 does not join divergent offences and that the offences were not founded on the same facts. He further argued that though the courts had jurisdiction to consolidate the cases, such jurisdiction is ousted of prejudice would be caused to the accused persons. That accused must have acted in concert.
13. I listened to all parties in their presentation, considered all the pleadings and appraised myself on all the authorities supplied to the court to consider. According to the Black's Law Dictionary and in particular and relevance to the case consolidation is defined as a judicial order that combines charges in two or more separate accusatory instruments into a single accusatory instrument. It is a cardinal rule of law by precedent that the threshold for consolidation, requires that the parties must be the same, the law applicable must be the same, the subject must be the same i.e. the evidence must be the same.
14. There was only one issue to determine in this case and that is whether the application for the DPP meets the necessary threshold in order that this court exercises its judicial discretion and order for a consolidation.



15. From the notice of motion dated 30th October 2018, there are 8 respondents included in the application or cited in the application. The 1st accused in ACC 7 of 2018 was listed as the 8th Respondent. All the accused in ACC 44 of 2018 were listed as the 1st to the 7th respondents. Unless there was another application, the names of Mwangi Maingi and Nicholas Ndungu Nganga did not feature in the application. It was not argued as to what that would happen to them.
16. On the law applicable, in ACC 7 of 2018, the 8th respondent was charged with willful failure to comply with applicable procedures and guidelines relating to the management of public funds contrary to section 45(2)(b) as read with section 48(1) of ACECA. The other two accused persons were charged with abuse of office both under ACECA and the penal code. In ACC 44/2018, the accused face two counts:-
- (i) Engaging in a project without prior planning contrary to section 45(2)(c) as read with section 48(1) of ACECA. And
 - (ii) Wilful failure to comply with the law relating to procurement contrary to section 45(2)(b) as read with section 48(1) of ACECA.
17. First the accused in ACC 7/2018 are not named in ACC 44/2018 as accused. Secondly it is worthwhile to note that both ACECA and the penal code create individual and definite offences that have specific penalties. It is on this basis that consolidation will follow. A consolidation will not follow where there are different sections of the law violated as much as the penal section may at times be the same. The dates are different. The only semblance of dates is only in ACC 7/2018 where the two accused persons who are not part of this application were charged with abuse of office singularly under the different laws which facts indicate the same dates. However this was also an error as ACECA is the later law that should have been applicable and on the face of the charges the accused should have been charged jointly.
18. Further count I in ACC 7/2018 was quashed by the High Court by its order at paragraph 112 (a) which found and held as follows:
- (a) That an order of certiorari do and is hereby issued calling for the charge sheet dated 23rd May 2018 in respect of ACC No. 7/2018 pending before the magistrates court and the same be and is hereby quashed only in respect of count 1. This in effect plus my earlier observation means there is nothing to consolidate between ACC 7 of 2018 and ACC 44 of 2018 and the two accused in ACC 7/2018 are not party to the proceedings in the prosecution notice of motion.
19. It was pleaded and argued by the prosecution that the charges form part of the same transaction. This argument is based on section 6 of the Evidence Act on facts forming part of the same transaction. It reads as follows:-
- “Section 6 Facts which though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant whether they occurred at the same time and place or at different times and places.”
20. Each offence stands on its own depending on when and where it was committed. A road project is a project on its own. It cannot be argued that since offences were committed during the pendency of a road project they form part of the same transaction. Part of the same transaction must be envisaged from the aspect of a crime. In order to invoke section 6 of the Evidence Act, there must be an offence committed which then creates facts in issue to be investigated. It is this fact in issue that form part of the same transaction that are relevant.



21. Be that as it may what that also captured my attention is count 5 in ACC No. 7 of 2018. The court which was reproduced above to my mind absolves all the members of the ministerial tendering committee as it evident from the face of the charges that all accused in ACC 44 of 2018 were misled by the accused in count 5 in ACC 4 of 2018.
22. The above being the scenario, I find that the prosecutions Notice of motion dated 30th October 2018 failed to meet the threshold of a consolidation in order to cloth me with the judicial discretion to order for a consolidation. I hence find and hold that the said Notice of motion failed in its entirety.

D.N. OGOTI

CM

10/5/2019

