Republic v Isaak & 5 others (Anti-Corruption Case 9 of 2015) [2016] KEMC 1 (KLR) (Anti-Corruption and Economic Crimes) (9 December 2016) (Ruling)

Republic v Ibrahim Hati Isaak & 5 others [2016] eKLR

Neutral citation: [2016] KEMC 1 (KLR)

REPUBLIC OF KENYA

IN THE ANTI-CORRUPTION MAGISTRATE'S COURT

ANTI-CORRUPTION AND ECONOMIC CRIMES

ANTI-CORRUPTION CASE 9 OF 2015

LN MUGAMBI, CM

DECEMBER 9, 2016

BETWEEN

REPUBLIC .... PROSECUTOR

AND

IBRAHIM HATI ISAAK .... 1ST ACCUSED

PATRICK SAU MUTEMI .... 2ND ACCUSED

ESTHER NJERI NGARI .... 3RD ACCUSED

FRANCIS MUSAU MUTUSE .... 4TH ACCUSED

RUTH MUTHONI MWANGI .... 5TH ACCUSED

EVANS NYAIYO BIKUNDO .... 6TH ACCUSED

RULING

1. This is an application in which the state seeks to proceed with the case not only as against the accused persons physically before the court but also as against the 6th accused who has since absconded after taking plea and being informed about the hearing dates of the case. According to the prosecution, the 6th accused is believed, from investigations conducted to have left the county on 8.7.2015 for Nigeria.

2. It was the state's contention, through M/s Kanyuira – state counsel, that at the time of jumping bail, the 6th accused was duly aware of the charges to which he had answered to, and pleaded not guilty. He was also aware of hearing dated fixed in his presence.

3. The state advanced the argument that under those circumstances the right of the 6th accused to be present has not been violated by anybody, rather, he has by own conduct waived the right to be present and there would thus be nothing wrong with the court continuing with the trial in his absence.

4. M/s Kanyuira referred the court to Sec. 194 and Sec.206 of the Criminal Procedure Code to buttress her submissions and also Article 50[1] [f] of *the Constitution* which I shall consider at length later in this ruling.

5. She also relied on judicial decisions in particular, R vs. Yagnesh Mohanlal Devani & Others Criminal Appeal No. 299 of 2012, where the High Court pronounced itself with regard to the right of the accused to be tried in his or her presence and observed that it is not an absolute right where the conduct of the accused made it impossible for the trial to proceed. She also provided this court with English decision of Regina vs. Jones.

6. The application by the state generated responses from the defence side. In fact, finding that this was a matter which may be of importance to the growth of criminal law jurisprudence, the court asked the counsels to make submissions on the issue.

7. Senior Counsels Gibson Kamau Kuria for 3rd accused, senior counsel Nzamba Kitonga for the 2nd accused and M/s Kamande for the 1st accused made submission on the application by the state. The 6th accused did not, or rather; none was received on his behalf.

8. In his submissions, Senior Counsel, Gilson Kamau Kuria cited article 50[2] [f] of *the Constitution* and argued that proceedings with the trial in absence of 6th accused who is charged with a felony will amount to unfairness for he will have no chance to hear the evidence against him and defend himself. He relied on R. vs Subordinate Court of 1st Class Magistrate at City Hall.

9 He also relied on sec. 206 of Criminal procedure Code and cited the case of Solomon Locham v. R [2015] eKLR, here the court considered the application of section 206 [1] and [2] of the Criminal Procedure Code and held that only where the accused person is charged with an offence which is a misdemeanour can trial magistrate proceed in his/her absence. In this decision, the court observed:-

> " The order the trial Magistrate for issuance of warrant of arrest and proceed in absence of the 2nd accused was made at the first instance the 2nd accused was absent. This was not right as the accused was not allowed time to probably surface and offer an explanation. In other words, at this moment there were no enough grounds to reasonably conclude that the 2nd accused had absconded and was not willing or available on another day to further participate in the trial.
>
> The procedure adopted by the trial Magistrate deprived the 2nd accused of his right to be present throughout his trial as envisaged under section 194 of the Criminal Procedure code and Article 50 [f] of *the Constitution* which states that an accused person should be present when being tried, unless his or her conduct make it impossible for trial to proceed. Proceedings without him amounts to mistrial."

10. Senior counsel Kamau Kuria further submitted that the prosecution did not demonstrate efforts made to secure attendance of the 6th accused since all what it had succeeded in showing was that there is a warrant of arrest in force and that he is believed to be working in Nigeria.

11. In summing up his submissions, Senior Counsel further cited two decisions of the superior court namely:-

> Salim Said & 2 Others Vs. Republic -2012] eKLR where the court expressed the view that it was wrong to proceed with the trial in absence of an accused. The court stated:-
>
> > " How on earth can the 2nd appellant be deemed to be answerable on the basis of evidence he never heard. This is surely the height of injustice. The fact that 2nd accused absconded during the trial does not in any way mean he is to be denied his right to a fair trial. This action in absconding could be dealt with by way of appropriate sanctions. Indeed this was done by trial magistrate revoking his right to bail".

12. The court further went on;

> " The trial court ought to have directed that since the prosecution had closed its case, a retrial be conducted [preferably by another court] of the 2nd appellant alone. Putting him on his defence was fallacious erroneous and had no legal basis at all ..... The 2nd appellant was clearly denied a fair trial and this court will not compound that injustice by confirming his flawed conviction".

13. In the case of R Vs. N. M. G. [2014] eKLR it was held that the importance of accused attending trial during the pendency of the case cannot be over emphasized because where there is no accused person there is no case because a case cannot proceed in absence of the accused.

14. Nzamba Kitonga, Senior counsel, observed that the procedure that the state was urging this court to adopt could not apply in Common Law Legal systems or Modern Constitutions such as that of Kenya. He argued that this was possible in Civil Law jurisdictions such as Egypt and France.

15. Counsel posed and wondered what would happen if the 6th accused was to be convicted and sentenced using this procedure. He asked if this would mean if arrested, he would go to prison without being tried. He equated this to detention without trial and said it was horrifying to even countenance.

16. Referring to Article 50 [2] [f] of *the Constitution*, Senior Counsel Nzamba Kitonga submitted that it speaks to the misbehaviors on the face of the court such as commotion or aggression in court and does extend to absence from court by reasons of absconding.

17. He argued that jurisdiction in Criminal trials is physical presence of the accused since that is the only way constitutional safeguard to fair trial can be obtained such the right to cross-examine, right to mitigate etc.

18. Counsel further pointed that evidence may be led against the absence 6th accused which might impact on other accused persons and it would be impossible to rebut such evidence without the evidence of the 6th accused.

19. Further, such rebuttal could require cross-examination of the 6th accused which would not be possible.

20. Senior Counsel impugned the decision of Mbogholi- Msagha J. in Criminal Revision No.299/2012 stating:-

> " Justice Mbohgholi Msagha did not properly direct his mind to the potential dangers of adopting a procedure which does not exist in our law books. He did not address himself

to the question of jurisdiction and constitutional concepts of fairness and prejudice. Our system of law is silent precisely because such procedure is not contemplated and does not exist..... it is not a simple question of stretching the interpretation of the law and *the constitution*".

21. On the issue of submission by the state that the charge against the 6th accused cannot be withdrawn because it will frustrate the intended extradition proceedings against the 6th accused; Senior Counsel Nzamba Kitonga response was that the state cannot undertake illegal proceedings in the name of extradition proceedings and in fact, he was of the view that this even endangers the extradition proceedings because they would be premised upon a trial which is a nullity.

22. Counsel observed that failure to withdraw the charge against the 6th accused so that the trial against the other accused can continue was occasioning grave injustice to the remaining accused as their right to an expeditious trial was being infringed upon by the prosecution.

23. On her part, counsel for the 1st accused M/s Kamande submitted that proceeding with the trial when the charges against the accused have not been terminated or withdrawn would render the trial fatally defective amounting to a mistrial.

24. She submitted that under sec.99 [1] of the Criminal Procedure Code, the court can only proceed in absence of accused when it has dispensed with his presence and this would only apply when the accused is charged with an offence punishable with a fine only or imprisonment not exceeding three months and accused has pleaded guilty in writing or appears by an advocate.

25. Counsel further faulted the prosecution attempt to rely on sec.206[1] and section 194 of the Criminal procedure Code saying that provisions of sec.206 of Criminal Procedure Code were inapplicable in this case as at no time has the accused appeared at the hearing or further hearing following an adjournment. Secondly, the charges herein are not misdemeanours.

26. Concerning the applicability of sec. 194 of the Criminal Procedure Code to the present situation, she argued that it was inapplicable for the following reasons:-

    (i) That there is no express provision in the code that dispenses with presence of accused at the trial.

    (ii) Sec. 194 make presence of the accused mandatory

    (iii) The court has not at any time dispensed with personal attendance of the 6th accused

    (iv) And where the court does dispense with attendance, accused advocate must be present

27. From my reading of statutory provisions in particular our Criminal procedure Code; it is clear that the presence of the accused can be dispensed with in certain instances.

28. Under sec. 99[1] of the Criminal Procedure Code, where an accused pleads guilty in writing or appears by counsel, the court is required to dispense with his appearance if the offence is one which is punishable with fine only or imprisonment for not more than 3 months.

29. It is imperative to note here that the court is required to give effect to the accused right not to be present or to appear when the condition of pleading guilty in writing or appearing by an advocate is met.

30. The second instance that the Criminal procedure code recognizes that a trial can take place in absence of accused is under sec. 206 [1] and [2] of the Criminal Procedure Code. Here the court is empowered to proceed with the trial if the accused does not appear at the hearing or further hearing in a case where he is not charged with a felony. In fact, the law says the court may proceed as if the accused was present.

31. In essence, sec. 99[1] and section 206 [1] & [2] of the Criminal Procedure Code permit the court to conduct trials in absentia where the accused is charged with offences attracting minor sanctions. One would thus comfortably say that under these provisions, there are express provisions that we can easily resort to.

32. The questions that we should then ask is whether there are other situations not expressly covered by the statute that could arise but necessitate a trial in absentia.

33. In my humble view, Article 50 [2] [f] of *the Constitution* allows the court to deal with those other circumstances. This article read together with sect.194 of the Criminal Procedure Code is the one that would cover such situations.

34. Section 194 of the Criminal Procedure provides:-

> " Except as otherwise expressly provided, all evidence in a trial under this code shall be taken in presence of the accused or when his personal attendance has been dispensed with, in presence of his advocate [if any]".

35. As already pointed out, the express situations where the law Criminal Procedure Code has provided evidence may be taken in absence of accused and in sec. 99[1] and sec. 206 [1] and [2] and this is where accused is charged with misdemeanor attracting minor sanctions.

36. However, sec. 194 of the CPC is not limiting when it says

> " Or when his personal attendance has been dispensed with"

37. It means therefore that are other situations which might arise and necessitate dispensing with presence of accused and this can be dealt with in this section notwithstanding whether offences charged are felonies or misdemeanours.

38. Sec. 194 of Criminal Procedure Code should thus be read in context of Article 50[2] [f] of *the Constitution*.

39. This position resonates with the reasoning of Justice Mbogholi Msagha in Criminal Revision No.299 of 2012 where he held that depending on circumstances of the case, a court can consider dispensing with attendance of the accused and continue with the trial. It is definitely in contrast with the views expressed by the Judge in Salim Said vs. [2012] eKLR where it was stated that:-

> " There is no provision of law allowing the court to proceed as if accused was present."

40. Taking into account the provisions of sections 99[1], 206 (1) and (2), 194 of the Criminal Procedure Code and Article 50 [2] [f] of *the Constitution*, this court finds the jurisprudential approach adopted by Mbogholi-Msagha Judge more tenable and will thus be guided.

41. According to Mbogholi-Msagha Judge, the attendance of the accused is not an absolute right. He said:-

> " The attendance of the accused persons is not an absolute right. The condition laid down by *the Constitution* to warrant violation of right to be present during trial, is when the conduct of an accused person impedes on progress of the trial. Other provisions of law are to be read in this context."

42. The Judge then expounded:-

> " The trial court had powers by law to determine, if circumstances allowed, that trial could go on in absence of 1st and 10th respondent".

43. Although Senior Counsel Nzamba Kitonga faulted the position taken by Justice Mbogholi and claimed the procedure is inapplicable in common law jurisdictions, I am unable to agree with him in the light of House of Lords decision in Regina vs. Jones [2003] I A.C.I

44. In this case, on 18.8.1997, a robbery took place; Jones [The appellant] was arrested and charged. Subsequently, his co-defendant Mr. Roberts was also charged. Both were admitted to bail. On the date of trial, they did not show up. A warrant of arrest was issued.

45. Their advocates withdrew from acting citing failure to attend. The Judge was urged to proceed with the trial because the defendants were deliberately frustrating the trial and the delay was unfair to a large body of witnesses.

46. The trial went on and both the appellant and co-defendant were convicted for conspiracy to rob and sentenced to 13 years imprisonment each. 14 months later, at the end of December, 1999, the appellant was arrested.

47. He was taken to court and sentenced to serve 12 months imprisonment for his failure to surrender to custody concurrently with sentence already imposed for conspiracy to rob.

48. In his appeal to the Court of Appeal, it was not suggested that the had been unaware of his obligation to appear at the trial. His appeal was dismissed. Following that dismissal, he moved to the House of Lords.

49. In the House of Lords, it was held that the Judge had a discretion to start or continue a trial in defendant's absence, though it was to be exercised with great caution and with close regard to the overall fairness of proceedings.

50. The House of Lords revisited the checklist of matters that should be taken into account in exercising the discretion, which the Court of Appeal had come up with as a useful guide. Before exercising the discretion, it was imperative to consider:-

    (i) The nature and circumstances of Criminal Defendant's behaviour on absenting himself from trial or disrupting it, and in particular, whether the behaviour was voluntary and so plainly waived the right to be present.

    (ii) Whether adjournment would rescue the matter.

    (iii) The likely length of such adjournment.

    (iv) Whether the defendant, though absent, wished to be represented or had waived his right to representation.

    (v) Whether Criminal Defendant's representatives were able to receive instructions from him and the extent to which they could present his defence.

    (vi) The extent of disadvantage to the defendant in not being able to present his account of events.

    (vii) The risk of jury reaching an improper conclusion about absence of Criminal defendant

    (viii) The general Public interest that trial should take place within reasonable time.

    (ix) The effect of delay on memories of witnesses

(x) Where there was more than one Criminal defendant, not all had absconded, the undesirability of having separate trials.

51. Lord Bingham of Cornhill while acknowledging the importance of a criminal defendant to attend trial stated:-

> " For many years, the law of England and Wales has recognized the right of the defendant to attend his trial and, in trial on indictment, has imposed an obligation on him to do so. The presence of the defendant has been treated as a very important feature of an effective jury trial. But for many years problems have arisen on cases whether although the defendant is present at the beginning of the trial, it cannot [or cannot conveniently or respectably] be continued to the end in his presence. This may because of genuine but intermittent illness of the defendant or misbehaviours or because the defendant voluntarily absconded."

52. He later went on to state;-

> " If a Criminal Defendant with full knowledge of forthcoming trial, voluntarily absents himself, there is no reason in principle why his decision to violate his obligation to appear and not to exercise his right to appear should have automatic effect of suspending criminal proceedings against him until such time, if ever, as he chooses to surrender himself or is appended".

53. Regarding the concern as was argued by Senior Counsel Nzamba Kitonga that such an accused would have been denied the rights to a fair trial such the right to cross-examine, re-examine, offer evidence in defence or submit on the evidence and law, Lord Bingham said:-

> " Counsel for defendant laid great stress on what he submitted was inevitable unfairness to the defendant if a trial were to begin in his absence after he had absconded, his legal representatives would be likely to regard their retainer as terminated by his conduct in absconding, as happened in this case...... The answer to the contention is in my opinion, is that one who voluntarily chooses not to exercise a right cannot be heard to complain that he has lost the benefits which he might have expected to enjoy had he exercised it".

54. To demonstrate the necessity of this discretion, he explained his views using a scenario such as the one this court is presently facing. He said:-

> " Considerations of practical Justice in my opinion support existence of discretion which the Court of Appeal held to exist. To appreciate this, it is only necessary to consider the hypothesis of multi- defendant prosecution in which return just verdict in relation to any and all defendants is depended on their being jointly tried. On the eve of commencement of trial, one defendant absconds. If the court has no discretion to begin the trial against that defendant in his absence, it faces an acute dilemma: either the whole trial must be delayed until the absent defendant is apprehended, an event which may cause real anguish to witnesses and victims; or trial must be commenced against the defendants who appear and not the defendant who absconded. This may confer a wholly unjustified advantage on that defendant ..... A system of criminal Law should not be open to manipulation in such a way".

55. This decision of House of Lords to a big extent amplifies the decision and reasoning of Msagha Mbogholi, Judge.

56. It emphasizes that the decision to try an accused in his absence can only be made by the Court in exceptional circumstances, which the court must evaluate or asses with extreme care and caution.

57. In submissions made by the defence, particularly on when such action can be taken under Article 50 [2] [f] of *the Constitution*, the defence counsels argued unanimously that such conduct as would render the accused to be excluded from his own trial is limited to disrupting behaviour such as commotion or aggression exhibited by the accused before a court or court room.

58. The state on the other hand contended that such conduct goes beyond the court room and extends to accused conduct even outside court if its effect is to impede the trial.

59. *The Constitution* has not set out or defined the scope or extent of the conduct. However, looking at the decision of Msgaha Mbogholi Judge in Criminal Revision No.299 of 2012; it is clear the Judge took the broader view when he determined that the conduct of 1st and 10th respondent in not appearing in court justified the trial going on in their absence.

60. Taking cue from Mbogholi Msagha Judge therefore, this court finds that the conduct contemplated by Article 50 [2] [f] is wider than merely disruptive behaviour inside the court. It covers situations where:-

    (i) Accused is tried in his absence due to disruptive behaviour and also;

    (ii) Where he absconds deliberately or in case of fugitive accused.

61. In the present case, the 6th accused took plea in this case on 24.6.2015 where he was charged alongside 1st – 5th accused with conspiracy to commit an Economic Crime contrary to sec. 47 [A] as read with section 48 [1] of anti-Corruption & Economic Crime Act, 2003. On the same day, the court fixed the matter for hearing on 21st and 22nd September, 2015. He was then represented in court by Mr. Nyachoti.

62. On the date of the hearing, 21.9.2015, the 6th accused did not appear and his lawyer Mr. K.A. Nyachoti withdrew from acting for him. The state applied for warrant of arrest and ever since, accused has never come to court.

63. In my view, the conduct of the 6th accused in the present case is in excusable. He took plea and was granted bail. He was informed of hearing date.

64. In breach of bail conditions, he has been away and has not bothered to communicate with this court at all regarding his whereabouts.

65. Of importance to consider also, is that 6th accused is facing a conspiracy charge with 5 – co-accused who are present in court.

66. Should the court not exercise the discretion which it has perfectly found can be exercised under Article 50 [2] [f] of *the Constitution*, it means either the whole trial shall be delayed awaiting arrest of 6th accused which is indefinite for now, and this would be at the risk delaying the trial of the co-accused and possible loss of evidence. Alternatively, the trial of the accused persons present can commence without the 6th accused but as was observed by Lord Bingham in R. Vs. Jones [supra] that would amount to conferring an unjustified advantage to the absent accused and a criminal law system should not be open to such manipulation.

67. The question would be, if 6th accused is not tried together with the rest who are all charged for an offence of conspiracy, would he be prosecuted alone when he is eventually arrested or shows up? The answer is No. It is therefore necessary that this case proceeds in his absence together with the rest.

68. At the end of it all, the court will consider the law and evidence, and in line with the reasoning in R vs. Jones, make such decision as is appropriate upon due consideration of the evidence. The application by the state to proceed with the case notwithstanding the absence of 6th accused therefore succeeds.

RULING READ IN OPEN COURT IN PRESENCE OF SENIOR COUNSEL G. KAMAU FOR 3RD ACCUSED.

M/s Kamande for 1st accused

Mr. Mutemi holding brief for Nzamba Kitonga for 2nd accused

M/s Kanyuira for state

Accused persons present

Court Clerk – Isaac

L.N. MUGAMBI [MR]

CHIEF MAGISTRATE

9.12.2016

Mr. G. Kamau – We now apply to take a hearing date.

Court – Hearing now 6th, 10th and 11th April, 2017.

Bond extended.

L.N. MUGAMBI [MR]

CHIEF MAGISTRATE

9.12.2016