Wafula v Director of Public Prosecutions; Ethics and Anti-Corruption Commission & 2 others (Interested Parties) (Civil Appeal 264 of 2018) [2024] KECA 1677 (KLR) (22 November 2024) (Judgment)

Neutral citation: [2024] KECA 1677 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 264 OF 2018

SG KAIRU, F TUIYOTT & GWN MACHARIA, JJA

NOVEMBER 22, 2024

BETWEEN

BENSON KHWATENGE WAFULA .... APPELLANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS .... RESPONDENT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION .... INTERESTED PARTY

THE BUNGOMA CHIEF MAGISTRATE'S ANTI-CORRUPTION COURT .... INTERESTED PARTY

ATTORNEY GENERAL .... INTERESTED PARTY

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Ong'udi, J.) dated 24th May 2018 in ACEC No. 4 of 2018)

JUDGMENT

1. The appellant, Benson Khwatenge Wafula, has challenged the judgment delivered by the High Court at Nairobi (H. Ong'udi, J.) on 24th May 2018 dismissing with costs, his suit by way of "petition/ judicial review application" in which he had sought orders: to stay his prosecution in Bungoma Chief Magistrate's Anti-Corruption Court Case No. 1 of 2017; to lift his suspension from employment; of certiorari to quash the decision of the Ethics & Anti-Corruption Commission to charge him with an anti-corruption offence; and prohibiting the Director of Public Prosecutions (DPP) from prosecuting him in the stated case.

2. In dismissing the suit, the learned Judge of the High Court found that the appellant had failed to demonstrate that the DPP acted unlawfully, maliciously or contrary to laid down procedures and

written law in recommending that the appellant be charged; that the issue of sufficiency or otherwise of evidence and whether the charge is defective are matters for determination by the trial court; that the suspension of the appellant from employment was within Section 62 of the Anti- Corruption and Economic Crimes Act (ACECA); and that there was no basis for stopping or staying the criminal proceedings before the trial court.

3. The appellant has challenged that judgment on fifteen grounds of appeal set out in his Memorandum of Appeal, which in essence, are that the Judge failed to evaluate the bona fides of the alleged further investigations and evidence that resulted in transposing him from a prosecution witness to an accused person; that the Judge failed to appreciate that there was no basis for charging him with the alleged offence which was an abuse of the process of the court; that he will not have a fair hearing before the Magistrate's Court; and that the Judge failed to appreciate that it is unconstitutional, oppressive, and an abuse of the process of court to charge the appellant with an non-existent offence.

4. We heard the appeal on 30th April 2024. The appellant was represented by learned counsel Mr. Wekesa and Mr. Wesonga. Learned counsel Miss. Murugi appeared for the 1st interested party, the Ethics and Anti-Corruption Commission. Learned counsel Mr. Terrell appeared for the Anti-Corruption Court and the Attorney General, the 2nd and 3rd interested parties respectively. Counsel relied on their respective written submissions which they orally highlighted. The DPP, the 1st respondent, did not appear despite having been served with notice of hearing.

5. Having set out the appellant's employment history and role as Legal Officer and Company Secretary in Nzoia Sugar Company Limited, the company at the heart of the criminal proceedings, counsel for the appellant urged that the respondent made the decision not to charge the appellant but to retain him as a witness and could not renege on that decision without any new evidence implicating him.

6. It was submitted that the Judge erred in her interpretation and application of *the Constitution* which resulted in violation of the appellant's rights and fundamental freedoms in relation to fair trial which ought to have been given the greatest possible respect. The case of Attorney General vs. Kituo Cha Sheria & 7 Others [2017] eKLR was cited.

7. It was submitted, on the strength of decision in Cyrus Shakhalanga Khwa Jirongo vs. Soy Developers Ltd & 9 Others (2021) eKLR in which the Supreme Court laid down the parameters for determining abuse of prosecutorial powers, that the respondent abused its powers in transposing the appellant from a prosecution witness to an accused person. That despite the appellant having been bonded to attend court as a prosecution witness, in a turn of events, the respondent charged the appellant in the same case; that had the Judge evaluated the alleged further investigations and evidence on which that was done, she would have concluded that the decision was based on malice and lacked good faith. The case of Republic vs. NEMA & Another, Ex-parte Philip Kisia & Another [2013] eKLR was cited. It was urged that the alleged new evidence did not meet the evidentiary test under the National Prosecution Policy of the respondent which abused its powers by relying on the opinion of an investigating officer to transpose the appellant from a witness to an accused person.

8. It was submitted further that the learned Judge failed to address the issues raised in the appellant's petition, and therefore arrived at a wrong decision; that the High Court sitting as a constitutional court, ought to have addressed itself on whether there were exceptional circumstances that warranted the transposition of a witness to an accused person; that the court ought to have considered whether the appellant would get a fair trial in the magistrates court, given that he was an accused person in the same court where he initially was a witness; and that there was no evidence against the appellant to warrant his prosecution.

9. The case of Stanley Munga Githunguri vs. R [1986] eKLR was cited in support of the proposition that the decision to charge the appellant in the absence of any fresh evidence, a decision having been made not to charge him, was an abuse of the process of the court; that the appellant is not implicated at all by the material witnesses of fact having been only a bank co- signatory.

10. It was urged that the learned Judge went against her earlier decision in the case of Ronald Leposo Musenga vs. Director of Public Prosecutions & three others [2015] eKLR where she had held that a criminal charge could not be sustained where three years earlier, evidence had been deemed insufficient to sustain the same charge.

11. It was submitted that the learned Judge erred in failing to find that the appellant would not get a fair hearing; that the Judge did not appreciate that the appellant was treated as a witness and as an accused person at the same time and his constitutional right to fair hearing under Article 50 of *the Constitution* which cannot, under Article 25 be limited, would be violated; that moreover, the charges against him in Bungoma Chief Magistrate Court Anti-Corruption and Economic Case No. 1 of 2017 did not reveal any offence known in law as the offence the appellant was charged with did not fall under Section 79(2)(b) of the *Public Finance Management Act* 2012.

12. In opposing the appeal, counsel for Ethics and Anti-Corruption Commission, the 1st interested party submitted that the decision of the learned Judge involved exercise of discretion; that on the strength of the decision in United India Insurance Co. Ltd & 2 others vs. East African Underwriters (Kenya) Ltd [1985] eKLR, the circumstances in which this Court can interfere with that decision are circumscribed and there is no basis for doing so in this case.

13. It was submitted that the Judge arrived at the correct decision in dismissing the appellant's suit as the appellant did not demonstrate that the respondent or the 1st interested party did not act in accordance with their statutory and constitutional mandate; that the further investigations undertaken and the evidence that resulted in the appellant being charged were undertaken in accordance with Section 23(3) and (4) of the ACECA and Section 118 of the Criminal Procedure Code; and that the appellant's rights to fair trial under Article 50 of *the Constitution* are safeguarded.

14. It was submitted that the learned Judge correctly held that the trial court is best equipped to address the quality and sufficiency of the evidence in support of the charge and the function of the trial court should not be usurped; that there is no demonstration by the appellant of abuse or misuse of the court process that would warrant interference with the trial court.

15. Counsel submitted further that the appellant is facing criminal charges over public money lost by Nzoia Sugar Company and it is in public interest that the criminal process runs its course. It was urged that it is within the mandate of the respondent in discharge of its functions to add or substitute witnesses as circumstances demand.

16. Counsel for the 2nd and 3rd interested parties Mr. Terell associated fully with the submissions by Ms. Murugi for the 1st interested party. He submitted that considering that judicial review orders are discretionary, this Court should be slow to interfere with the discretion exercised by the High Court. In that regard, reference was made to the case of Ephantus Mwangi vs. Dancun Mwangi Wambugu [1984] eKLR.

17. It was submitted that the appellant's rights to fair trial under Article 50 of *the Constitution* are guaranteed and the appellant has not demonstrated how he will be prejudiced, and the trial court should, in public interest, be allowed to complete the criminal trial which was said to be on the verge of conclusion.

18. We have considered the appeal and the rival submissions. We are required under Rule 31(1)(a) of the Court of Appeal Rules to re-appraise the material before the High Court and to draw our own conclusions. In doing so, we bear in mind that in dismissing the appellant's suit, the learned Judge of the High Court was exercising judicial discretion. Therefore, the circumstances in which we may interfere with the Judge's decision are limited. Madan, JA. summarised the principles in the case of United India Insurance Co Ltd Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd vs. East African Underwriters (Kenya) Ltd [1985] eKLR as follows:

> "The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case.
>
> The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

19. With that in mind, the facts in brief, are that the 1st interested party, the Ethics and Anti-Corruption Commission, undertook investigations into the affairs of Nzoia Sugar Company Limited, a State Corporation and forwarded its investigation file to the respondent, the DPP, with its recommendations. The appellant, an advocate of the High Court and a Certified Public Secretary, who was at the material time the Company Secretary of Nzoia Sugar Company Limited was initially to be a prosecution witness.

20. The record shows that upon further investigations, the DPP, charged him, alongside other officials Nzoia Sugar Company Limited, with the offence of wilful failure to comply with the applicable laws relating to management of public funds contrary to Section 45(2)(b) as read with Section 48(1) of ACECA. He was arrested and arraigned before the Magistrate's Court where, we were informed from the bar, that the trial was on the verge of conclusion. It was on that basis that he moved the High Court seeking the reliefs to which we have already referred.

21. In dismissing the appellant's suit, the learned Judge of the High Court stated that in as far as the appellant claimed that there was bias and malice against him with regard to the investigations and the decision to charge him, he had failed to demonstrate the same; that although the appellant had all along been treated as a prosecution witness, it was within the mandate of the DPP to charge him after further investigations unearthed new evidence; that the appellant did not demonstrate that the DPP acted unlawfully, maliciously or contrary to procedure and the law, and the court could not therefore interfere.

22. In relation to the contention that the charge was defective and that there was insufficient evidence to sustain the charge, the learned Judge expressed that those are matters to be raised before the trial court which has the competence to address the same. In the end, the Judge concluded that there was no basis for quashing the decision of the DPP to charge the appellant or staying the proceedings before the Magistrate's Court.

23. The issue before us therefore is whether the appellant has made out a case, within the parameters set out in United India Insurance Co. Ltd. Kenindia Insurance Co. Ltd & Oriental Fire & General Insurance Co. Ltd vs. East African Underwriters (Kenya) Ltd above, for this Court to interfere with the decision of the learned Judge.

24. In that regard, the Supreme Court of Kenya, in the case of Jirongo vs. Soy Developers Ltd & 9 Others (Petition 38 of 2019) [2021] KESC 32 (KLR) stated that the DPP is not bound by any directions, control or recommendations made by any institution; that however, under Article165(3)(d)(ii) of *the Constitution*, where it is shown that the expectations of Article 157(11) of *the Constitution* are not met, the High Court can properly interrogate any question arising therefrom and make appropriate orders. The Supreme Court went on to state as follows:

> " The guidelines to be considered on when the High Court could review prosecutorial powers were as follows:
>
> 1. where institution/continuance of criminal proceedings against an accused could amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice; or
> 2. where it manifestly appeared that there was a legal bar against the institution or continuance of the said proceeding, for example want of sanction; or
> 3. where the allegations in the first information report or the complaint taken at their face value and accepted in their entirety, did not constitute the offence alleged; or
> 4. where the allegations constituted an offence alleged but there was either no legal evidence adduced, or evidence adduced clearly or manifestly failed to prove the charge."

25. We are not persuaded that the circumstances in the present case fall within the ambit of interfering with prosecution powers of the DPP or that the learned Judge erred in declining the invitation by the appellant to do so. The appellant did not demonstrate that the transposition from a prosecution witness to an accused person was malicious or that it violated his rights to fair trial or was an abuse of power by the DPP.

26. The circumstances in this are distinguishable from those in the case of Stanley Munga Githunguri vs. Republic, Criminal Application No. 271 of 1985 [1986] KEHC 44 (KLR) to which counsel for the appellant referred. where the High Court said:

> " We are of the opinion that two indefeasible reasons make it imperative that this application must succeed. First as a consequence of what has transpired and also being led to believe that there would be no prosecution the applicant may well have destroyed or lost the evidence in his favour. Secondly, in the absence of any fresh evidence, the right to change the decision to prosecute has been lost in this case, the applicant having been publicly informed that he will not be prosecuted and property restored to him. It is for these reasons that the applicant will not receive a square deal as explained and envisaged in section 77(1) of *the Constitution*. This prosecution will therefore be an abuse of the process of the Court, oppressive and vexatious."

27. There was no evidence that the DPP, with the sole mandate to prosecute, represented to the appellant that he would not be prosecuted. Furthermore, the learned Judge found that the evidence gathered upon further investigations informed the decision to charge the appellant, and as the learned Judge correctly stated, the sufficiency of evidence or defects in the charge sheet are matters within the province and competence of the magistrate's court in the criminal proceedings.

28. In conclusion, we do not have a basis for interfering with the decision of the High Court. The appeal fails and is dismissed with costs to the 1st and 3rd interested parties.

DATED AND DELIVERED AT NAIROBI THIS 22ND OF NOVEMBER, 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR