



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, NAMBUYE & MAKHANDIA, JJA)

CIVIL APPEAL NO. 332 OF 2017

BETWEEN

MIKE GIDEON MBUVI SONKO.....APPELLANT

AND

GEORGE WAINAINA NJOGU.....1<sup>ST</sup> RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> RESPONDENT

THE ETHICS & ANTI-CORRUPTION COMMISSION...3<sup>RD</sup> RESPONDENT

*(Being an Appeal from the Judgment of the High Court of Kenya at Nairobi,*

*(J.L. Onguto, J) dated 18<sup>th</sup> July, 2017*

in

**H.C. CONSTITUTIONAL PETITION NO. 17 OF 2016)**

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**JUDGMENT OF THE COURT**

George Wainaina Njogu “the 1<sup>st</sup> respondent” was charged alongside Roselyne Oluoch in Nairobi Chief Magistrate’s Court Criminal Case No. 1 of 2016; with the offence of corruptly offering a benefit contrary to section 39 (3) as read together with section 48 (1) of the Anti-Corruption and Economic Crimes Act. The charge contained five counts and more particularly that the 1st respondent and the co-accused had offered the benefit to the appellant on 5th and 6th January, 2016 respectively and an inducement for the appellant to stop pursuing a story on how some senior officials employed by the Nairobi County Government were acquiring and developing property using public funds. The 1st respondent was the Chief of Staff, Nairobi County Government and had been arraigned in court on 9th January 2016 alongside co-accused, a secretary in his office on those counts. To stem the prosecution, the complainant in the criminal case was said to be the appellant. The 1st respondent instituted the petition from which this Appeal emanates mainly challenging the investigatory process leading to his prosecution as unconstitutional and illegal. The respondent further sought to have the criminal proceedings instituted against him quashed and compensation in damages for violations of his rights and freedoms.

The allegations against the 1st respondent were that he got wind of a scheduled press conference by the appellant to reveal to the public of how the 1st respondent together with other county officials had been purportedly misusing public funds. On 4th January 2016, the appellant invited all media houses of a scheduled press conference the following day. The press was to cover the appellant as he led a team of

investigators to building sites allegedly being put up by the corrupt officials of the Nairobi County Government, the 1st respondent included. The 1st respondent got in touch with the appellant seeking further particulars of the scheduled press release. They agreed to meet the following day to discuss the matter since according to the 1st respondent the matter fell within his docket and as the Governor was away from the office. The following day, they met as scheduled in the company of another county official. That upon exchange of pleasantries, the appellant remarked to the 1st respondent in jest that “*nyinyi Christmas mliniwachanjaa*” ostensibly to remind the 1st respondent that he closed the office for the Christmas break without giving him a Christmas gift as had been the case over the years. The 1st respondent then informed the appellant that he had left the said gift with Roselyn Aluoch the co-accused. Indeed, the 1st respondent had left the co-accused with Kshs. 1,000,000/- with instructions that Kshs. 500,000/- be given to the appellant, while the rest of the amount was to be deposited into his own Mpesa business.

On the same day, whilst having lunch, the 1st respondent was informed that officers from the **Ethics & Anti-Corruption Commission** “*the 3<sup>rd</sup> respondent*” had invaded his office as the co-accused was handing over the Kshs. 500,000/- to the appellant’s agent and she had been arrested. The 1st respondent was arrested later that evening as he attended a funeral service at All Saints Cathedral by officers of the 3rd respondent on allegations of bribing the appellant with Journalists in tow. Even then, officers from the 2nd respondent also present claimed that they had strict instructions from above to lock up the 1st respondent. In his Petition, the 1st respondent claimed that the appellant sent his agents to broker and resolve the matter between them. He alleged that the said agents, floated a figure of Kshs. 7 million to facilitate the withdrawal of the case against him which he refused to part with. Concisely, the 1st respondent’s case was that the appellant was simply out to extort money from him hence the trumped up charges. The 1st respondent denied any criminal culpability on his part and alleged that the only reason the 2nd and 3rd respondents were pursuing his prosecution was because the appellant had manipulated and influenced the process. In effect, the 1st respondent contended that the 2nd and 3rd respondents had abused their investigatory and prosecutorial powers under the law by allegedly allowing themselves to be directed and controlled by the appellant or a third party for that matter.

Another complaint was that at the time of the investigations and recommendations to prosecute the 1st respondent, the 3rd respondent was not properly constituted in law to legally make the decision to prosecute him. As a result, the 1st respondent contended that his constitutional rights and freedoms under Articles 28, 29, 31, 40, 47, 49, 50 and 51 of the Constitution had been violated and or threatened with violation. As per the 1st respondent, the 2nd and 3rd respondents were obliged by law to act lawfully, fairly and reasonably in the exercise of their statutory and constitutional mandate. He alleged that the case filed with the 2nd respondent- allegedly at the instigation of the appellant was unlawful and contrary to public policy and interest. In the 1st respondent’s view, the case was unlawful in that it was not based on open legal and proper investigations. That the case was only aimed at aiding and abetting an extortion exercise to cover up the illegal actions of the appellant. According to the 1st respondent, the charge sheet indicated that he had been arrested and charged with corruptly conferring a benefit to the appellant to induce the latter not to pursue the matter over some plots of land in Ngumba and Donholm. That however, a press release by the 3rd respondent indicated that he had been arrested for allegedly bribing the appellant to induce the latter to drop a suit he had filed over a plot situate in Loresho. To the 1st respondent, such inconsistencies pointed to the fact that his prosecution was tainted with *mala fides* and was being used as conduit for illegalities.

In response to the 1st respondent’s Petition, the 2nd respondent stated that in prosecuting the 1st respondent it was simply exercising its statutory and constitutional mandate having reviewed documents availed to it by the 3rd respondent. On its part, the 3rd respondent in similar fashion contended that it was simply exercising its discretion in investigating and recommending the 1st respondent’s prosecution following an attempted bribery complaint by the appellant. In doing so, it asserted that it had acted in accordance with the Constitution and relevant statutory laws. In the light of an admission by the 1st respondent that he had intended to pay Kshs. 500,000/- to the appellant as a Christmas gift, the 3rd respondent was of the view that there was culpability on the part of the 1st respondent. The appellant’s case in the High Court was that the 1st respondent had offered to pay him Kshs. 1,000,000/- to induce him to tread slowly and not to expose alleged corrupt and fraudulent activities within the

County Government. The appellant denied soliciting any monies from the 1st respondent and contended that it was the 1st respondent who sought him out.

Based on those facts, the High Court declared that the initiation, maintenance and prosecution of the Chief Magistrate's Court Criminal Case No. 1 of 2016 against the 1st respondent in the manner intended was an abuse of the criminal justice system and court process. The Judge then issued a prohibitory order barring the continuance of the criminal case against the 1st respondent in the manner intended, as well as an order of certiorari to remove into the court for purposes of being quashed the entire proceedings and criminal charges against the 1st respondent.

Aggrieved and dissatisfied, the appellant instituted the present appeal. In his memorandum of appeal, the appellant accused the Judge of wrong exercise of discretion in finding in favour of the 1st respondent and especially since according to him, the Judge had been satisfied that the 1st respondent presented no evidence to prove violations of his constitutional rights under Articles 42, 43, 46 and 49 of the Constitution. He complains further that the Judge misdirected himself by holding that the purported prosecution of the 1st respondent was an abuse of the criminal justice system yet finding that the charges preferred against him were proper. He further complained that it was not open for the Judge to quash the entire criminal process against the 1st respondent after finding that the 1st respondent's constitutional rights had not been violated and that the process was lawful. He challenged the findings of the Judge for holding that the question of culpability or innocence of the 1st respondent was a matter to be decided by the trial court but then turn around and quash the criminal prosecution and in the process depriving the appellant an opportunity to prove the criminal charges. He argued that the Judge also failed to consider their submissions that the 1st respondent stood to suffer no prejudice by standing trial where his culpability or innocence would have been determined. The Judge is further accused of taking into account extraneous matters and therefore arriving at a wrong decision.

The 3rd respondent lodged a cross-appeal with its core complaint stemming from the Judge's decision to quash and prohibit criminal proceedings against the 1st respondent despite having been satisfied that the 1st respondent's Petition lacked merit on alleged violations of the Constitution. The 3rd respondent further accused the High Court for failing to appreciate its independence to investigate and make recommendations to the 2nd respondent to prosecute. It faulted the High Court of quashing the entire criminal proceedings against the 1st respondent despite the fact that the trial court was the best equipped court to deal with the quality and sufficiency of the evidence gathered in support of any charge.

In his written submissions, the appellant contended that the Judge found that no evidence had been adduced by the 1st respondent to show that his constitutional rights stood in danger of being violated in the event the criminal process was to proceed. He points out that, other than blanket allegations of violations of his constitutional rights and freedoms, the 1st respondent failed to particularize how his rights stood in imminent violation and hence the Petition ought to have been dismissed. Furthermore, that having found that the Petition had not met the competency threshold and thus warranting it to be summarily dismissed, it was not open for the Judge to proceed further to justify the Petition or even seek to salvage it. The appellant submitted that the 1st respondent failed to demonstrate how the safeguards provided in Article 50 (2) of the Constitution stood to be abridged or be compromised.

The case of **Daniel Munyambu v Director of Public Prosecutions & Others (2014) eKLR** was cited to support the contention that a petitioner ought to demonstrate violations of his rights under Article 50 (2) which contains specific guarantees with respect to accused persons facing a criminal trial.

The appellant contended that the 1st respondent failed to prove on all counts how his personal rights and freedoms had been violated in the process of his arrest and arraignment. According to the appellant, the Judge only granted or found violations by the 2nd and 3rd respondent of their powers under the law. The appellant contended that the learned Judge ought to have allowed the trial court to determine whether there was a case to answer or not. The appellant urged that the Constitution had provided sufficient safeguards to the 1st respondent as an accused person. He has relied on the case of **Ronald Leposo Musengi v DPP & 3 Others (2015) eKLR** where it was held that unless there was material before court upon which court could find that the petitioner was unlikely to receive a fair trial, the court ought not to

interfere simply because the petitioner may at the end be found to be innocent. The appellant further contended that it was not for the court to inquire into the evidence and the facts that gave rise to the charges where the authorities charged with the investigation and prosecution had found that offences under the penal code had been established. The appellant denied directing the 2nd respondent to charge the 1st respondent. According to him, the 1st respondent was rightly charged and the appellant only lodged a complaint with the 3rd respondent as it was entitled to do. The appellant also points out that the 1st respondent failed to demonstrate as to how he stood to be prejudiced by his prosecution.

The 1st respondent on his part supported the High court's findings. He supported the finding that the 2nd and 3rd respondents acted under the direction, influence or control of the appellant in instituting criminal charges against him rather than make such decisions independently. That the 2nd respondent is enjoined under Article 157 of the Constitution to act independently when discharging its mandate. He pointed out that the appellant had in his press conference on 4th January 2016 intimated that he would lead a team of investigators to three building sites being put up by corrupt officials of the County government. The respondent submitted that the role and statutory mandate of the appellant, who was the senator for Nairobi County at the material time, did not include leading investigators into crimes or to determine who is corrupt or not. That by him purporting to do so, it amounted to usurping and arrogating himself constitutional and statutory powers of investigation of alleged economic crimes vested in the 2nd and 3rd respondents. The appellant faulted the 2nd and 3rd respondents of failing to undertake any independent investigations in relation to the press release of 4th January 2016 to verify whether there was any truth in the press release. The respondent cited the case of **Kenneth Kanyarati & 2 Others v Inspector General of Police Director of Criminal Investigations Department & 2 others (2015) eKLR** where the High Court observed that a court would intervene where the powers conferred upon the 2nd and 3rd respondents is abused or performed contrary to constitutional or statutory provisions.

The case by the 3rd respondent is that it is mandated under section **11 (1) (d)** of the Ethics & Anti-Corruption Act to investigate and recommend to the 2nd respondent the prosecution of any acts of corruption and other matters as stipulated in law. Under Article **249 (2)** and section 28, Ethics & Anti-Corruption Commission Act the 3rd respondent is endowed with independence in the exercise of its powers and functions and it is not under the control of any person or authority. It contends that the criminal prosecution of the 1st respondent had a proper factual foundation or basis and could not be described as an abuse of the court process. In the 3rd respondent's perspective, it was not open for the learned Judge to quash the criminal proceedings because he disagreed with the objectivity of the recommendation to charge the 1st respondent made by the 3rd respondent due to the alleged role of the appellant in the investigations. It maintained that the role of the appellant was limited to that of a complainant. The 3rd respondent contended that the 1st respondent relied heavily on the press conference of 4th January 2016 as well as the speedy manner of his arrest and prosecution to support its allegations. It was the 3rd respondent's submission that the press conference by the appellant could not be used as an inference or evidence of control of the 3rd respondent's investigations and subsequent prosecution of the 1st respondent. The respondent cited the case of **Kuria & 3 Others v Attorney General (2002) 2 KLR 69** where it was held that prohibition of a criminal prosecution cannot be secured without evidence that there is manipulation, abuse or misuse of the court process or that there is a danger to the right of the accused person to have a fair trial.

The 3rd respondent maintained that the decision to charge the 1st respondent was based on material facts obtained from its investigations and the decision to charge was justified by the evidence gathered. It contended that the decision to charge the 1st respondent was reached independently and without undue influence. It pointed out that the 1st respondent's fundamental rights are safeguarded by the Constitution at trial. It contended that the absence of some of its Commissioners in its composition did not affect its capacity to make the decision to prosecute the 1st appellant. The 3rd respondent's case was that there were no concrete grounds adduced by the 1st respondent to demonstrate influence or control by the appellant of the 2nd and 3rd respondents in their decision to charge the 1st respondent.

The core issue for determination in this appeal is whether the learned Judge exercised his discretion judicially in arriving at his conclusions and findings. In the petition the 1st respondent had sought various declarations and Judicial Review orders of Prohibition and Certiorari. No doubt orders of Judicial Review

are both equitable and discretionary. The onus was on the appellant to prove that the Judge exercised his discretion wrongfully so as to invite this Court's mandate to intervene and correct such unjudicial exercise of discretion, if any. The complaints by the appellant in this Appeal and the 3rd respondent's in its cross-appeal stem from the Judge's finding that the 1st respondent presented no evidence to prove violations of his constitutional rights under Articles 42, 43, 46 and 49 of the Constitution. The Judge in his determination found that the 1st respondent's Petition failed to identify with reasonable precision, the Articles of the Constitution which had been allegedly violated and the manner and extent of the violation as observed in the cases of **Annerita Karimi Njeru v Republic (1979) KLR 154** and followed in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR**. After review of the evidence before him, the Judge found that the 1st respondent did not adduce evidence to support alleged violations of his rights and freedoms.

So on what basis did the Judge allow the Petition? The Judge remarked as follows,

**"I have reviewed the evidence placed before me. I have already previously in this judgment pointed out that the staggering nature of the 3rd Respondent's conduct. The 3rd Respondent's role may not be simply gainsaid. Besides being the complainant, the 3rd Respondent struck me as having been overbearing in the circumstances. He overarched. He lodged the complaint but then opted not to go mute and wait the result of the investigations. He appeared on top of what was happening. He knew who was going to be arrested and who would be arraigned in court and when. The press conference held by the 3rd Respondent, in my view, may not be simply dismissed as having been of little consequence as far as the investigations and ultimate prosecution of the Petitioner was concerned...."**

**"The Petitioner has failed to show how his constitutional rights have been violated. The Petitioner has also failed to show that the 1st Respondent acted in abuse of his offices when he approved the prosecution of the Petitioner. The Petitioner has however shown that the role of the 3<sup>rd</sup> Respondent was more than that of a complainant. The Petitioner has also done enough to show that in the absence of the Commissioners of the 2<sup>nd</sup> Respondent Commission, the 2<sup>nd</sup> Respondent in the circumstances of this case was not objective enough and could not recommend to the 1st Respondent the prosecution of the Petitioner as the veil of independence appeared to have been pierced." (Emphasis)**

As can be seen therefore, though the 1st respondent failed to satisfy the Judge that his constitutional rights and freedoms had been violated the Judge was satisfied of the presence of other factors warranting the orders he granted. The Judge was firstly persuaded that the role of the appellant was not solely limited to that of being a complainant. The Judge duly recorded his reasons for the holding. From the evidence adduced, the Judge found that the investigations that led to the arraignment of the 1st respondent in court happened so fast by local standards. There was evidence, however, to suggest that the appellant had played more role than just a complainant or whistle blower and was involved and called shots in the investigations, on the false premise though that he was assisting with the investigations. The Judge was convinced that the appellant acted in a pre-emptory manner. The appellant failed in this appeal to challenge or even address those findings. They remain uncontroverted. On the authority of **Mbogo v Shah (1968) EA 93**, it was settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. Instead of the appellant providing reasons to challenge the findings by the Judge that he influenced the investigations and criminal prosecution of the 1st respondent, the appellant has in canvassing the appeal concentrated on showing how the 1st respondent failed to prove how his constitutional rights had been violated, a conclusion already found and conceded to by the learned Judge. The appellant's onus before this Court was to persuade us that the reasons relied on by the learned Judge for arriving at the conclusions he did were erroneous or were plainly wrong.

The appellant fell short of persuading this Court that he did not influence the investigations and prosecution of the 1st respondent on a balance of probabilities and the appellant has not demonstrated

why this Court should interfere with the Judge's factual findings.

Secondly, the learned judge made a finding of fact that in the whole saga, the complainant appeared to play more role than a mere complaint. He was all over the place during the investigations. He was acting as though he was a lead investigator.

The trial court stated that the appellant over-asserted himself in a manner as to leave any reasonable bystander to conclude that he dictated the process being findings of fact by the trial judge, we have an obligation to respect and pay homage to the same. Nothing has been brought to our attention as would warrant us to interfere with the finding of facts.

The other reason advanced by the Judge for reaching his conclusion is that in the absence of the Commissioners and a substantive chairman, the 3rd respondent was not properly constituted and could not therefore objectively recommend to the 2nd respondent the prosecution of the appellant since its veil of independence appeared to have been pierced.

It is not in dispute that when the 3rd respondent took the decision to recommend the prosecution of the 1st respondent it was not properly constituted. In the case of **Eng. Michael Sistu Kamau & 12 Others v The EACC & 4 Others (2016) eKLR** the court grappled with a similar question and held that the resignation or dismissal of commissioners did not render the 3rd respondent non-existent but only disabled it from performing some of its core functions. The court further found and held that in the absence of the commissioners, the 3rd respondent could not perform one of its core functions of recommending to the 2nd respondent the prosecution of any acts of corruption or economic crimes or violation of Codes of Ethics or any other matter prescribed under the Ethics and Anti-Corruption Commission Act, the Anti-Corruption & Economic Crimes Act or any other law. In his determination the Judge expressed himself as follows:-,

**“My view is that, unlike in the case of Eng. Michael Sistu Mwaura Kamau & 12 Others v The EACC & 4 others [2016] eKLR, the circumstances of this case would point to a situation where in the absence of the commissioners, it may not be safely stated that the 2nd Respondent commission independently executed its mandate in investigating and recommending the prosecution of the Petitioner.”**

The 3rd respondent has cited the case of **Thuita Mwangi v 2 Others v Ethics & Anti-Corruption Commission & 3 Others (2013) eKLR** where the High Court considered that even though there was an alleged defect in the composition of the 3rd respondent, there was an independent decision made by the 2nd respondent to prosecute the 1st respondent. However, in the circumstances of this case, the 1st respondent has refuted that the 2nd respondent took the decision to prosecute him independently or without control or direction from any person. The 1st respondent has contended that from the 2nd respondent's reply to the Petition, the 2nd respondent made the decision to charge the appellant before reviewing the physical inquiry file. In its reply, the 2nd respondent deponed as follows,

**“I direct the prosecution to ensue as recommended by EACC.**

**However, this decision is subject to review upon receipt of the physical inquiry file.”**

According to the 1<sup>st</sup> respondent, in so far as the 2<sup>nd</sup> respondent gave consent to charge him without having the full benefit of the complete physical file, then the same amounted to control or direction from the appellant and shows that it had a pre-determined mind regarding his prosecution. The Judge found that everything from the complaint by the appellant to the investigations and to the arraignment of the 1st respondent in court happened so fast by local standards. The Judge bore in mind that such expediency of process alone should not invite adverse inferences. He however considered the appellant's conduct of being always in the thick of things as a possible explanation of the expedited nature of the process. The Judge on a balance of probabilities and based on the evidence, ruled in favour of the 1st respondent. We are satisfied with the stand taken by the learned judge and there is nothing that warrants our interference with the learned Judge's findings. The upshot is that both the cross appeal and this appeal lack merit and are accordingly dismissed with no order as to costs.

Dated and delivered at Nairobi this 21<sup>st</sup> day of June, 2019.

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**R. NAMBUYE**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**