REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

(CORAM: WARSAME, MAKHANDIA & MURGOR, JJA)

CIVIL APPEAL NO. 2 OF 2017

CONSOLIDATED WITH CIVIL APPEAL NO. 184 OF 2016

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION.....APPELLANT

VERSUS

PRAXIDIS NAMONI SAISI.....1ST RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSION.....2ND RESPONDENT

THE CHIEF MAGISTRATES ANTI-CORRUPTION

COURT AT NAIROBI.....3RD RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (G.V. Odunga J.) dated 19th April 2016,

in

JR Civil Application No. 502 of 2016)

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JUDGMENT OF THE COURT

Following an advertisement for tender No. REF. GDC/HSQ/086/2011-12 by Geothermal Development Company (ADC) for the provision of rig move services which was awarded to Bonafide Clearing and Forwarding Company Ltd for Kshs.42,746,000 per rig move; the 2nd respondent, the **Ethics and Anti-Corruption Commission** (EACC), carried out investigations concerning procurement anomalies in the tender process and found that the contract price for the tender was unjustifiably inflated above the normal market rates, in comparison to the same rig move services undertaken by other government institutions during the same period by the same service provider.

For those reasons, the EACC recommended that the Managing Director of GDC, **Silas Masinde Simiyu**, the General Manager, **Michael Maingi Mbevi** and members of the Tender Committee namely: **Praxidis Namoni Saisi** (1st respondent), **Dr. Peter Omenda**, **Nicholas Weke**, **Caleb Indiatsi**, **Abraham** 1**Saat**, **Godwin Mwawongo** and **Bruno Linyuri**; be charged with various anti-corruption offences which recommendation the appellant, the **Director of Public Prosecutions** (DPP) acceded to upon its own analysis and evaluation of the evidence collected. The various offences, were the subject of Anti-corruption case No. 20 of 2015 before the Chief Magistrate's Court in Milimani. The charges against the 1st respondent were as follows:

> **COUNT I: Willful failure to comply with the law relating to procurement contrary to Section 45 (2) (b) as read with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.**
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> **Particulars**
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> *On or about 29th day of August, 2012, at Geothermal Development Company Headquarters in Taj Towers in Nairobi County within the Republic of Kenya, being members of the Geothermal Development Company Tender Committee and persons whose functions were concerned with the use of public funds in Geothermal Development Company jointly and willfully failed to comply with the law*

relating to procurement to wit Regulation 10(2) (e) of the Public Procurement and Disposal Regulations, 2006 by confirming an Award of Tender No. REF. GDC/HSQ/086/2011-12 which contained a price of Kshs. 42,746,000 per rig move to Bonafide Clearing and Forwarding Company Ltd in respect of Rig Move services.

COUNT III: Willful failure to comply with the law relating to procurement contrary to Section 45 (2) (b) as read with Section 48

1. (a) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

Particulars

On or about 2nd October, 2012, within the Republic of Kenya, being the Company Secretary and an employee of Geothermal Development Company failed to comply with the law relating to procurement to wit Section 27 (3) of the Public Procurement and Disposal Regulations, 2006 by signing a contract of Tender No. REF. GDC/HSQ/086/2011-12 with Bonafide Clearing and Forwarding Company Ltd in respect of Rig Move services, a contract which contained a price of Kshs. 42,746,000 per rig move which was in excess of prevailing market prices.

COUNT IV: Abuse of office contrary to Section 46 as read with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003

Particulars

On or about 2nd October, 2012, within the Republic of Kenya, being the Company Secretary and whose functions concerned corporate governance , legal and regulatory matters of Geothermal Development Company, used your office to improperly confer a benefit to Bonafide Clearing and Forwarding Company Ltd to wit a Contract Agreement for Tender No. REF. GDC/HSQ/086/2011-12 in respect of rig move services, at a cost of Kshs.42,746,000 per Rig Move, a price that was in excess of prevailing market prices.

Before the criminal case could be heard and reach its natural conclusion, the 1st respondent, (**Praxidis Namoni Saisi**) filed an ex-parte chamber summons seeking leave to apply for an order of certiorari to quash the decision of the EACC to recommend to the DPP that she be charged with the aforesaid anti-corruption offences and to quash the decision of the DPP to direct her prosecution as contained in the press statement dated 13/11/2015 and in Anti-corruption Case No. 20 of 2015. The 1st respondent also sought leave to apply for an order of prohibition to prohibit DPP from prosecuting and proceeding with the charges in Anti-corruption case No. 20 of 2015 as against her or instituting other charges against her over the award of tender No. REF. GDC/HSQ/086/2011-12 and the contract of the tender between ADC and Bonafide Clearing and Forwarding Ltd.

The 1st respondent was granted leave to apply for the aforementioned orders and filed the substantive application on 22nd December, 2015 wherein she contended inter alia; that the decision by the appellant to prefer charges against her was reached without proper direction or logical connection to the relevant law; that the charges against her did not entitle her to know the case against her or have an opportunity to defend herself, and that the decision to charge her was incomprehensible, irrational and without basis.

The DPP who was the respondent in the High Court, filed a Replying Affidavit dated 9th March, 2016 attested by **Ruby Okoth**, a senior Prosecution Counsel in the office of the DPP where it was contended that the decision to charge the individuals was based on analysis of evidence in the investigation file and was based on the correct interpretation of the law. In her opinion, the challenges raised by the 1st respondent on the decision to charge her vide Anti-Corruption case No. 20 of 2015 constituted a defense for her to raise during prosecution and not by way of judicial review.

The EACC, who was the interested party in the High Court, similarly opposed the motion and filed a Replying Affidavit dated 9th February, 2016 attested by **Salat Abdi,** an investigator with the EACC where it was stated that the issue on whether or not the charges were proper was an issue for the trial court and not a ground for the High Court to stop the prosecution and that the 1st respondent was using the court to determine issues of fact and to subvert the criminal process.

The matter proceeded for hearing and the learned judge (Odunga, J) after hearing the parties rendered his judgment on the 19th April, 2016. In his judgment, the judge agreed with 1st respondent and found that the DPP had acted irrationally in deciding to prefer the charges against her.

With respect to Count I, the Court found that the issue of comparison of past prices was not a criteria in the tender document, and to expect the 1st respondent to have introduced the same in determining the award of the tender would be a violation of the law, that furthermore, to decide to charge a person for not taking an action which would have amounted to a violation of an express provision of the law was irrational.

The court further held that Count III and IV were grounded on the execution of the contract, where, the 1st respondent only witnessed the signature of the chairman of the Board and it could not be said that by merely attesting the said signature conferred a benefit on the entity to which the tender was awarded. The learned Judge stated that the DPP owed a duty to the Court to place before it, material upon which the court would find justification in the mounting of the prosecution and that in exercising their discretion to charge a person both the police and the DPP's office took into account and exercised sound legal principles. The learned Judge further stated as follows:

"***It is clear to the court that based on the factual scenario the charges leveled against the applicant are far-fetched it would not be permissible for the Court to permit the applicant face the charges simply because she will have an opportunity of defending herself. It is therefore clear that the said three counts facing the applicant are untenable. Having considered the material place before me I find merit in this application***".

It is this decision that prompted the DPP and EACC to file separate appeals before this Court; being Civil Appeals No. 2 of 2016 and 184 of 2016 respectively. The DPP also filed a Notice of Cross Appeal in Civil Appeal No. 184 of 2016, dated 28th December 2016 also seeking to quash the decision of the High Court. On 20th September, 2017 and with the consent of the parties, we directed that the appeals be consolidated and heard together as they raised substantially similar issues that arose from the same judgment. The consolidated appeals were also to be heard alongside ***Civil Appeal No. 313 of 2017, Ethics & Anti-Corruption Commission vs. Dr. Peter Ayodo Omenda and 8 Others***, which arose from the same criminal prosecution as the 1st respondent was facing that is the subject of the consolidated appeals.

For the purposes of this judgment and for ease of reference of parties, the DPP and the EACC shall be referred to as the 1st appellant and 2nd appellant respectively while Praxidis Namoni Saisi shall be referred to as the 1st respondent and the Chief Magistrates Anti-Corruption Court at Nairobi as the 2nd respondent.

On 12th March, 2019 the appeals came before us for highlighting of the respective written submissions that had been filed and exchanged earlier. **Mr. Ashimosi**, learned counsel for the 1st appellant and **Mr. Murei**, learned counsel for the 2nd appellant urged the appeal whilst **Mr. Masafu**, learned counsel for the 1st respondent opposed the appeal

In its appeal the 1st appellant contends that the learned Judge erred by interrogating, interfering and quashing its decision to prosecute the 1st respondent. In **Mr. Ashimosi's** opinion, the learned judge delved into the analysis of evidence and the examination of facts. Relying on the authority of ***Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 (2007) 2 EA 170*** and ***Meixner & Another vs. Attorney General (2005) 2 KLR 189*** counsel submitted that the Court ought to have warned itself of the dangers of interrogating the process, and not the merits of the decision.

Counsel for the 2nd appellant submitted that the intended prosecution had a proper factual foundation and cannot be said to be unreasonable. In his opinion, there was no justification for the large sum awarded in the tender; that the absence of a Market Price Index by the Public Procurement Oversight Authority did not discharge the Tender Committee from its duty under **Regulation 10 (2) (e)** of the Public Procurement and Disposal Regulations, 2006 which mandates the tender committee to ensure that the procuring entity does not pay in excess of prevailing market prices. He stated that the Committee could have sought outside advise or directed the procurement unit to carry out a market survey. Counsel further submitted that a prerogative order should only be granted where there is an abuse of the process of the law, which has the effect of stopping the prosecution already commenced and that the 1st respondent had not adduced any evidence of malice or abuse of the court process. Counsel relied on the case of ***Beatrice Nyongo Kamau & 2 Others vs. Commissioner of Police and The Director of Criminal Investigations Department & Another, Petition 251 of 2012 (2013) eKLR*** where it was stated that:

> ***"The DPP must exercise his powers to prosecute on reasonable grounds whereas reasonable grounds cannot amount to the DPP being asked to prove the charge against an accused person at the commencement of trial but show a prima-facie case before mounting a prosecution."***

The 1st respondent's counsel who opposed the appeal invited the court to review the Market Price Index and the contract document which he stated were the most crucial documents in the appeal. He submitted that the High Court did not make any error of law and that the appellants' appeal was predicated on a complete misapprehension of the matters framed and the findings of the High Court. In his view, the High Court decision was arrived at upon a correct interpretation and application of the judicial review principles and law, and that therefore, the finding that the appellant acted illegally, irrationally and with procedural impropriety in reaching its decision to prefer charges against the 1st respondent was sound. Counsel emphasized that in reaching the decision to prefer the charges against the 1st respondent, the 1st appellant misconstrued the law by purporting to elevate **Regulation 10 (2) (e)** of The Public Procurement and Disposal Regulations, 2006 to supersede clear provisions of the Public Procurement and Disposal Act, 2005 (repealed) under **Sections 66 (2), 30 (3) and 52** of the repealed Act.

On our part, we have comprehensively considered the records of appeal, oral and written rival submissions by counsel and the authorities cited therein, as well as the law. The central question for determination is whether or not the learned Judge was entitled to grant the orders sought.

It is worth stating numerous times that the function of the High Court sitting in judicial review proceedings is not to consider the merits of the decision by a public body but rather undertake a consideration of the manner in which the decision was made. In **Uwe Meixner & Another v Attorney General [2005] 2 KLR 189, Civil Appeal No. 131 of 2005**, the Court held, inter alia, that:

> ***"Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power."***

Furthermore, the parameters for interference with this exercise of judicial discretion on appeal have time and again been discussed before this court.

In ***Mbogo versus Shah [1968] EA 93*** the Court stated: -

> ***"It is well settled that this Court will not interfere with the exercise of 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."***

Similarly, in ***United India Insurance Co. Ltd Versus East African Underwriters (Kenya) Ltd [1985] EA 898*** the court stated that:

> ***"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 as at first instance, would or might have given different weight to that given by the Judge to the varies 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 consideration of which he should have taken account of; or fifthly, that his decision albeit a discretionary one is plainly wrong."***

And as was also observed by this Court in ***Captain (Rtd) Charles Masinde vs. Augustine Juma & 8 Others [2016] eKLR***, ***Civil Appeal No. 1 of 2014*** that:

> ***"It is therefore important to remember in every case that the purpose of judicial review remedies are to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question".***

It follows therefore that the golden thread running through the aforementioned authorities is that judicial review is concerned with the decision-making process and not with the merits of the decision itself.

Before dealing with the merits of the appeal we also find it is necessary to state that the High Court can exercise its power of judicial review in criminal matters, either to prevent abuse of the process of any court or otherwise to secure the ends of justice. The High Court has inherent powers to quash, stay or prohibit criminal proceedings at any stage of the case where a person has been subjected to harassment of an illegal prosecution, where there is manifest injustice or where the proceedings are laced with malice. This inherent jurisdiction must however be delicately balanced with the High Court's duty to allow proceedings in the subordinate Courts to proceed and take their natural course and must only be exercised where there are exceptional circumstances that call for the Court's interference.

If this rule is not limited in this way, there would be a flood of applications before the High Court by every person accused of an offence seeking to put a stop to further proceedings as often as they desire in the cause of trial. This would not only impede the speedy administration of justice but result in an interference of the principles of separation of power. Therefore, in considering whether or not to grant judicial review orders, the court must take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought (see ***Republic vs. Attorney General & Another Ex parte Samuel Kazungu Kambi; Kenya Railways Corporation (Interested Party) [2019] eKLR***).

In the Indian Supreme Court case of ***State of Maharashtra & Others vs. Arun Gulab & Others***, ***Criminal Appeal No. 590 of 2007*** the court in acknowledging the fragility of the parameters of interference stated:

> ***"The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion.*** *(Emphasis ours).* ***The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled-for stage nor it can `soft-pedal the course of justice' at a crucial stage of investigation/ proceedings."***

In the matter before us, the High Court granted the following reliefs to the applicant/1st Respondent:

> ***1) An order of Certiorari removing into this Court for the purposes of quashing the decision of the 1st interested party to recommend to the Respondent that the Ex parte Applicant be charged with various anti-corruption offences and the decision of the Respondent to direct prosecution of the Ex parte Applicant Praxidis Namoni Saisi contained in the press statement from the office of the Director of the Public Prosecutions dated 13th November, 2015 and in the charge sheet in the Anti-corruption Case No. 20 of 2015 Republic of Kenya vs Nicholas Karume & 8 others before the Chief Magistrate's Court (Milimani Law Courts) Nairobi, which decision is hereby quashed.***
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> ***2) An order of Prohibition prohibiting the Respondent from prosecuting Republic vs. Nicholas Karume Weke & 8 Others before the Chief Magistrate's Court (Milimani Law Courts) Nairobi so far as it touches on or relates to or concerns the 5th Accused (the Ex parte applicant herein) Praxidis Namoni Saisi in Counts I, III and IV or instituting any other charges based on the same facts.***

It is a known fact that only an order of Certiorari can quash a decision already made. Though it is an exercise of discretion, this power is subjected to certain standards. It will only issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or where a body acts illegally, irrationally or improperly. (See ***Kenya National Examination Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & 9 Others, Civil Appeal 266 of 1996).***

Whereas certiorari is concerned with decisions in the past, prohibition is concerned with those in the future. Certiorari is sought to quash the decision and prohibition to restrain its consequent execution. This is why the 1st respondent is seeking to quash the decision to prosecute her and prohibit the court in Anti-corruption Case No. 20 of 2015 from proceeding with the prosecution hearing and making a final determination. This is the scope and the effect of the orders sought in the superior court.

In the case before us, the appellant's contention is that the Judge misdirected himself in law and exceeded the court's mandate by interrogating the correctness of provisions laid out in the charge and concerning itself with merits and the question of 'right or wrong', whereas its mandate was to concern itself with whether the action was lawful or unlawful, and whether it was within the limits of the powers granted. The 1st respondent however insists that the appellants made errors of law, that were irrational and labored under procedural

improprieties in reaching the decision to charge her.

In analyzing the sustainability of Count I, the learned judge reviewed the charge and its particulars vis-à-vis **Section 30 (3) and Section 66(2)** of the Public Procurement and Disposal Act (repealed) and stated:

> ***"The Respondent has not contended that the issue of comparison in past prices was one of the criteria in the tender document. If it was not and there is no evidence to the contrary, then to expect the applicant to have introduced the same in determining the award of the tender would clearly have been a violation of the law. To decide to charge a person for not taking an action which would have amounted to an express violation of the law, in my view clearly irrational".***

In analyzing the legality of Count III and IV, the Court stated:

> ***"In this case it is clear that Counts III and IV are grounded on the execution of the contract. It was however contended by the applicant which contention was not disputed that the applicant only witnessed the signature of the board. In those circumstances, can it be said that the applicant by merely attesting the said signature conferred a benefit on the entity to which the tender was awarded?"*** **In conclusion the court stated:** ***"where it is clear to the court that based on the admitted factual scenario the charges leveled against the applicant are far-fetched it would not be permissible for the Court to permit the applicant face the charges simply because she will have an opportunity of defending herself. It is therefore clear that the said three counts are untenable".***

From the Court's analysis above, it is clear that in the learned judge delved into the sufficiency and quality of the evidence gathered by the EACC and the office of the DPP by concerning himself with issues such as whether or not the appellants had provided evidence that the comparison of past prices was one of the criteria in the tender document, undertaking an analysis of which procurement laws ought to have taken precedence in the case against the 1st respondent and categorically limiting the charge of abuse of office contrary to **Section 46** of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 to the signing of the contract in question by the 1st respondent.

In our view, the question of whether the evidence provided adequately supported the charges levelled against the 1st respondent falls squarely on the shoulders of the trial court and not in a judicial review proceedings. Ideally, for a criminal matter to warrant interference by the High Court, a bare reading of the statement of the facts of the case and the charge sheet without any elaborate argument should be sufficient to convince the Court that it is a fit case for its interference at an intermediate stage due to apparent glaring injustice (see **Uwe Meixner case).**

In the present instance, a detailed examination of evidence is clearly required. The trial Court must be accorded an opportunity to thoroughly interrogate the material before it through *viva voce* evidence and through cross examination of witnesses so as to determine issues such as which procurement laws, as argued by the parties, supersede the other; the interpretation and consequence of the phrase 'market price' where the Market Price Index does not provide for specific goods or services, on the general and specific obligations of the tendering committee but in relation to Tender No. REF. GDC/HSQ/086/2011-12. We therefore agree with this court's sentiments in the **Uwe Mexiner (supra)** that:

> ***"It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge."***

Again, even if the charges against the 1st respondent are taken at their face value and accepted in their entirety, we cannot find any manifest or patent injustice apparent upon the face of the proceedings which calls for prompt redress and inter reference by the High Court. Given the crucial role of the 1st respondent as a member of the tender committee, it cannot be said that the allegations made by the appellants and in the charge sheet are so absurd and inherently improbable so that no prudent person or authority could ever reach such a conclusion.

Without preempting the case and without pronouncing any opinion upon its merits, we must say that the application did not merit the exercise of the court's discretion and it was not necessary for the learned judge to delve into such elaborate analysis at that stage.

All in all, based on the material that was placed before us, we are satisfied that the appellants demonstrated that the learned Judge misdirected himself in arriving at the decision to issue the orders of certiorari and prohibition. Consequently, we are inclined to interfere with the exercise of his discretion and hereby allow both appeals and set aside the High Court judgment. Let each party bear their costs.

DATED and DELIVERED at NAIROBI this 20th day of September, 2019.

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M. WARSAME

JUDGE OF APPEAL

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ASIKE-MAKHANDIA

JUDGE OF APPEAL

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A. K. MURGOR

JUDGE OF APPEAL

I *certify that this is a*

true copy of the original.

DEPUTY REGISTRAR