



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OUKO, PCA, WARSAME & M'INOTI, JJA.

CIVIL APPEAL (APPLICATION) NO. 102 OF 2016

BETWEEN

MICHEAL SISTU MWAURA KAMAU.....APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

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

ATTORNEY GENERAL..... 3RD RESPONDENT

INSPECTOR GENERAL, NATIONAL POLICE SERVICE.....4TH RESPONDENT

CHIEF MAGISTRATES COURT, MILIMANI.....5TH RESPONDENT

(Application to cite the 1st, 2nd, and 4th respondents for contempt of court for disobeying the judgment of the Court of Appeal dated 14th July 2017

RULING OF THE COURT

The applicant, Michael Sistu Mwaura Kamau, seeks an order to cite some nine persons for contempt of court for their alleged deliberate disobedience of the judgment of this Court dated 14th July 2017. The subjects that the applicant seeks to cite are:

- i. Noordin Haji;
- ii. Archbishop (Rtd.) Dr. Eliud Wabukala,
- iii. Sophia Lepuchirit;
- iv. Dr. Dadar Abdi Maalim;
- v. Paul Mwaniki;
- vi. Rose Mghoi Mtambo Macharia;
- vii. Halakhe Dida Waqo;
- viii. Michael Mubea; and
- ix. Joseph Boinnet.

Subject No. (i) is the *Director of Public Prosecutions (DPP)*, No. (ii) is the *Chairperson of the Ethics & Anti-Corruption Commission (EACC)*, Nos. (iii) to (viii) are employees of the EACC, while No. (ix) is the *Inspector General of the National Police*. The applicant also

seeks a further order to summon the said persons to appear before the Court and show cause why they should not be punished for contempt of court.

The background to the application is fairly straightforward. In June 2015, the appellant, a former Cabinet Secretary for Transport and Infrastructure, was charged before the Chief Magistrate's Court, Nairobi, with offences under the **Anti-Corruption and Economic Crimes Act**, following recommendations made to the DPP by the EACC. As it turned out, at the time the EACC made the said recommendations, it did not have commissioners, all the three commissioners having resigned from office. The applicant challenged his prosecution in the High Court, contending that it was null and void because the EACC was not properly constituted and that the DPP was acting at the behest of the President of the Republic, who during the **State of the Nation Address** in the Parliament on 26th March 2015, had directed the EACC to complete its investigations into allegations of corruption by specified individuals, including the applicant, and forward its report to the DPP within 90 days. By a judgment dated 9th March 2016, the High Court dismissed the applicant's petition, after which he filed Civil Appeal No. 102 of 2016, in this Court. That appeal was allowed by a judgment dated 14th July 2017, after the Court found that the EACC was not properly constituted at the time it made its recommendations to the DPP and that the President's directive to the EACC could reasonably be interpreted or perceived as interference with its independence. The Court concluded its judgment with the following words:

“This appeal succeeds on the technical ground that the EACC was not properly constituted at the time it completed the investigations and forwarded its report and recommendations to the DPP. From the foregoing anti-corruption constitutional edicts, the parties are at liberty to proceed as they deem necessary on the basis of a properly constituted EACC and within the dictates of the Constitution and the law.”

While the appellant understood the judgment to have permanently foreclosed his prosecution now and in the future, the respondents understood it to mean that a properly constituted EACC was not barred, acting within the Constitution and the law, from charging the appellant afresh. Those are the two contending positions that subsequently played out in Chief Magistrate's Court and the High Court, culminating in this application.

After the judgment, the Chief Magistrates' Court discharged the applicant vide a ruling dated 28th July 2017 and terminated the proceedings. The applicant was however subsequently charged in **Anti-Corruption Case No. 7 of 2018**.

Contending that the judgment of this Court entitled him to an acquittal rather than a discharge, the applicant applied to the High Court for revision of the orders of the Chief Magistrate that discharged rather than acquitted him. On 11th April 2018 the High Court dismissed the application for revision and the applicant filed a notice of appeal, evincing intention to challenge the decision of the High Court in this Court. He also filed before this Court **Criminal Application No. Nai. 7 of 2018**, seeking an injunction to stop his fresh prosecution.

Thereafter, he filed the application now before us for committal of the respondents for willful disobedience of the judgment of this Court, by charging him in **Anti-Corruption Case No. 7 of 2018**.

Pressing the application, **Mr. Havi**, learned counsel for the applicant relied on an affidavit sworn by the applicant on 24th May 2018 and submitted that the respondents should be cited for contempt of court for bringing charges against the applicant in violation of the judgment of this Court. In counsel's view, the part of the judgment that stated that the parties were free to proceed under a properly constituted EACC was *obiter dicta*, which is not binding and should not have been the basis for preferring fresh charges against the applicant. He added that the respondents were aware of the judgment because it was delivered in their presence, yet they chose not to comply with it. He further contended that the notice required under **section 30** of the **Contempt of Court Act** was not applicable in this case because it is limited to cases of undertakings.

The applicant cited from ***Arlidge, Eady & Smith on Contempt, 4th edition; Paula Corbin Jones v. William Jefferson Clinton & Another, 36 F. Supp. 2d, 1118, 1999, U.S. Dist.***; and ***Dr. Fred Matiang'i v. Miguna Miguna 4 Others, Crim. App. No. Nai. 1 of 2018 (UR)*** and submitted that the court's contempt jurisdiction is intended to protect the administration of justice and the rule of law, including from state officers, which the respondents were undermining. He also relied on ***Simmers Plaza Ltd v. National Bank of Kenya [2015] eKLR*** in support of the proposition that in contempt of court proceedings, personal service of an order is not necessary where it is made in the presence of the respondent's advocate, or where the respondent is aware of the order. He urged us to find that the respondents had deliberately violated the judgment of this court and to summon them, as prayed, to appear in Court and show cause why they should not be punished for their acts of contempt.

The DPP opposed the application vide an affidavit sworn by **Emily Kamau, Senior Assistant Director of Public Prosecutions** on 6th June 2018. He contended that the Chief Magistrate's Court properly terminated the applicant's prosecution and discharged him under section 87(a) of the Criminal Procedure Code, which was in accordance with the judgment of this Court because the Court only stopped specific charges arising from recommendations by an EACC that was not properly constituted. He added that after receiving a report and recommendations for the prosecution of the applicant from a properly constituted EACC, and upon satisfying himself that there was sufficient evidence to prosecute, he directed the applicant to be charged with offences under the Anti-Corruption and Economic Crimes Act. He concluded that in his view, the judgment of this Court did not prohibit the prosecution of the applicant on recommendations of a properly constituted EACC and accordingly he was not in contempt of court. He relied on the decisions in ***Amos Mathenge Kabuthu v. Simon Peter Mwangi [2015] eKLR; Jihan Freighters Ltd v. Hardware & General Stores Ltd [2015] eKLR; and Wang'ondu v. Nairobi City Commission, CA No. 95 of 1988*** and submitted that to form the basis of committal for contempt of court, an order must be clear and unambiguous. Lastly, he cited the ruling of the Supreme Court in ***Republic v. Ahmad Abolfathi Mohammed & Another, Cr. App. No. 2 of 2018*** in support of the proposition that to commit for contempt of court, it must be proved that a person has willfully and deliberately violated a court order.

The EACC, represented by **Mr. Kimani**, learned counsel, also opposed the application, relying on an affidavit sworn by its Secretary and Chief Executive Officer, **Halakhe D. Waqo**. Like the DPP, the EACC submitted that the judgment of this Court prohibited only the prosecution of the applicant based on charges arising from the recommendations of the improperly constituted EACC. Counsel argued that

the new charges against the applicant were based on independent investigations, evaluation of the evidence, and recommendations to the DPP by a differently constituted EACC. He also contended that the Chief Magistrate's Court and the High Court also shared the view that this Court did not stop prosecution of the appellant based on recommendations by a properly constituted EACC.

The EACC relied on a number of authorities, among them Republic v. County Chief Officer, Finance & Economic Planning, Nairobi County ex parte Stanley Muturi [2017] eKLR and Republic v. University of Nairobi & Another ex parte Nabiswa Wakenya Moses [2017] eKLR in support of the proposition that it is mandatory to serve the notice required under Section 30 of the Contempt of Court Act; Woburn Estate Ltd v. Margaret Bashforth [2016] eKLR and In the Matter of the Estate of Kipkoech Kirui (Deceased) [2016] eKLR in support of the submission that since contempt proceedings are quasi- criminal, the prescribed procedure must be scrupulously followed; Katsuri Ltd v. Kapurchand Devar Shah [2016] eKLR on the elements that must be proved in an application for contempt of court; Tribe Hotel Ltd v. Josphat Cosman Onyango [2018] eKLR and Republic v. City Council of Nairobi & 2 Others ex parte Kaka Travellers Co-operative Savings & Credit Ltd [2012] eKLR for the view that to commit for contempt, there must be deliberate and willful disobedience of a court order; Mutitika v. Baharini Farm Ltd [1985] eKLR on the standard of proof in contempt of court; and Republic v. Cabinet Secretary, Ministry of Education & Another ex parte Thadayo Obando [2018] eKLR in support of the submission that to sustain committal for contempt of court, an order must be clear and unambiguous.

Lastly to take the podium was **Mr. Moimbo**, learned counsel for the

Inspector General of Police, the Attorney General and the Chief Magistrate's Court. He adopted the submissions by the DPP and the EACC and urged us to dismiss the application for lack of merit.

We have considered the application, the submissions by learned counsel, the authorities they cited and the law. It is trite that to commit a person for contempt of court, the court must be satisfied that he has willfully and deliberately disobeyed a court order that he was aware of. That is made absolutely clear by section 4 of the Contempt of Court Act and the ruling of the Supreme Court in Republic v. Ahmad Abolfathi Mohammed & Another (supra). Secondly, as this Court emphasized in Jihan Freighters Ltd v. Hardware & General Stores Ltd and in A.B. & Another v. R. B. [2016] eKLR, to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt. (See Mutitika v. Baharini Farm (supra) and Republic v. Ahmad Abolfathi Mohammed & Another (supra).

It is obvious to us that there is no agreement between the parties on the interpretation of the judgment of this Court. The Chief Magistrate's Court and the High Court have concluded that the judgment did not stop the respondents bringing charges against the applicant on the basis of recommendations by a properly constituted EACC. For now the applicant has filed a notice of appeal and the issue is live before this Court. Prudence demands that we should not pre-empt the issue which is pending for determination by the Court. It would be remiss, if for example, after hearing the appeal this Court finds that the judgment did not stop prosecution of the applicant, and yet in the meantime the respondents had been committed for contempt of court.

On account of the foregoing, we find that there is no proof to the required standard that the respondents have willfully and deliberately violated the judgment of this Court dated 14th July 2017. Accordingly this application is dismissed with costs. It is so ordered.

Dated and delivered at Nairobi this 17th day of August, 2018

W. OUKO, PCA

JUDGE OF APPEAL

M. WARSAME

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR