



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 90 OF 2016

CHARITY KALUKI NGILU.....APPELLANT

AND

ETHICS & ANTI-CORRUPTION COMMISSION..... 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PRODRCTIONS..... 2ND RESPONDENT

THE ATTORNEY GENERAL..... 3RD RESPONDENT

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

THE CHIEF MAGISTRATE, MILIMANI COMMERCIAL COURTS...5TH RESPONDENT

(Appeal from the part of the judgment and decree of the High Court of Kenya (M. Ngugi, Odunga & Onguto, JJ.) dated 9th March 2016

in

Const. Pet. No. 230 of 2015

Consolidated with Const. Pet. Nos. 305, 324and 203 of 2015)

JUDGMENT OF THE COURT

This appeal was heard back-to-back with *Civil Appeal No. 102 of 2016, Eng. Michael Sistu Mwaura Kamau v. Ethics & Anti-Corruption Commission & 4 Others*. The constitutional petitions in the High Court that gave rise to the two appeals were consolidated and heard together. After the appellant in this appeal, *Charity Kaluki Ngilu* and the appellant in Civil Appeal No. 102 of 2016, Eng. Michael Sistu Mwaura Kamau were aggrieved by the judgment of the High Court, they filed separate appeals in this Court. Although arising from closely related set of facts, the two appeals were not consolidated because this appeal was withdrawn by consent pursuant to an order made on 6th March 2017, leaving for hearing and determination only a cross-appeal that was filed by the *1st respondent, the Ethics & Anti-Corruption Commission (the EACC)*. This judgment is therefore confined to that cross-appeal.

By way of brief background, the appellant was at the material time the Cabinet Secretary for Lands, Housing and Urban Development. On 26th March 2015, *His Excellency President Uhuru Kenyatta* gave

the State of the Nation Address to Parliament in line with his constitutional obligation. In the address the President presented a report entitled '**The current status of corruption matters under investigation to the Presidency**' dated 20th March 2015. In that report, allegations of corruption were made against several named personalities, among them the appellant, who were said to be under investigation by the EACC. Allegedly, in his address, the President directed the EACC to complete investigations within 60 days and forward the report without delay to the **2nd respondent, the Director of Public Prosecutions (the DPP)**. He further directed those named in the report to step aside from their public offices, a directive which the appellant duly complied with.

Subsequently, the appellant appeared before the EACC on divers dates and recorded a statement after interrogation. However, between the date when the President issued his directive and the date when the EACC forwarded its report to the DPP, EACC underwent some fundamental changes. The chairperson, the vice chairperson and the commissioners resigned and ceased to hold office in the EACC. Accordingly, when the EACC report was forwarded to the DPP, the EACC had no commissioners in office.

In the media briefing on 24th May 2015, the EACC through its Chief Executive Officer announced that it had completed investigations and had recommended the prosecution of the appellant for the offence of obstructing persons under the **Anti-Corruption and Economic Crimes Act (ACECA)**. On 28th May 2015, the DPP announced that he had concurred with the recommendation of the EACC and made a decision to charge the appellant as aforesaid. Subsequently the appellant was arraigned with 6 others before the Anti-Corruption Court, Milimani, in **Criminal Case No. 13 of 2015**, to answer to the corruption charges. The appellant was charged with a single count of obstructing persons under the **Anti-Corruption & Economic Crimes Act** contrary to **sections 66(1)(a)** as read with **section 66(2)** of the same Act.

Aggrieved by the prosecution, the appellant and her co-accused filed a constitutional petition in the Constitutional & Human Rights Division of the High Court, Nairobi, contending among other things that the actions of the EACC and DPP were an abuse of process and in contravention of their constitutional rights. They also averred that the EACC, by taking directions or directives from the President had violated the provisions of **Article 79** as read with **Article 249(2)** of the Constitution. They also added that at the time the EACC purported to forward the report of its investigations and recommendations for their prosecution, it was not properly constituted in accordance with **Article 250** of the Constitution. Accordingly, they maintained that the purported investigation and recommendation for their prosecution was null and void in law.

As earlier stated, the two petitions was consolidated and heard by **Ngugi, Odunga and Onguto JJ.** who identified three issues for determination, namely whether the EACC was in law properly constituted in the absence of the commissioners; whether the President's State of the Nation address on 26th March 2015 amounted to an unconstitutional directive to EACC; and whether the intended prosecution was in violation of the petitioners' fundamental rights and freedoms.

In their judgment delivered on 9th March 2016, the learned judges held, among others, that the issues raised by the petitioners pertaining to the propriety of the charges against them were for determination by the criminal trial court; that in the absence of commissioners, the EACC could not make recommendations to the DPP regarding the prosecution of the petitioners; that the directive by the President to EACC to complete investigations within 60 days was unconstitutional and amounted to unwarranted interference with the mandate of EACC; and that the DPP's decision to prosecute the petitioners was not unlawful. Save for those declarations, the court declined to prohibit the prosecution of the petitioners.

The appellant was aggrieved and filed this appeal. For its part the EACC was aggrieved by part of the decision of the High Court and filed a notice of cross-appeal on 3rd June 2016. It also filed a notice of grounds for affirming the decision of the High Court pursuant to rule 94 (1) of the Court of Appeal Rules. As we have already stated on 6th March 2017 this appeal was withdrawn by consent and the parties agreed to proceed only with the EACC's cross-appeal. In the cross-appeal the EACC challenged the conclusion by the High Court that the secretariat of the EACC could not undertake investigations and make recommendations to prosecute to the DPP in the absence of the commissioners and that the

President's statement that the EACC should conclude its investigations and forward its report to the DPP within 60 days was unlawful interference with the mandate of an independent commission.

We do not intend to rehash in this judgment the parties' submissions simply because the EACC's submissions in support of the cross-appeal and the grounds for affirming the decision of the High Court were the same submissions that it made in Civil Appeal No. 102 of 2016 to oppose that appeal. As a matter of fact the EACC filed only one set of submissions to oppose Civil Appeal No 102 of 2016 and to support the cross-appeal in this appeal. Similarly, the submissions made by the DPP, the Attorney General, the Inspector General of the National Police Service and the Chief Magistrate's Court, Milimani, to oppose Civil Appeal No 102 of 2016 were the same submissions that they relied upon to support the appellant's cross-appeal and the grounds for affirming the decision of the High Court. Accordingly all the issues raised in the cross-appeal and the grounds for affirming the decision of the High Court have been fully addressed in Civil No 102 of 2016.

We have concluded, as regards that other appeal, that the secretariat of the EACC could not validly conduct investigations and make recommendations to prosecute to the DPP in the absence of commissioners; that the President's directive to the EACC was inconsistent with the constitutional independence of the EACC and that the DPP based his decision to prosecute the appellants on the impugned report and recommendations of the EACC. We have also allowed Civil Appeal No. 102 of 2016, set aside the orders of the High Court dated 9th March 2016 dismissing the petition, and substituted therefor an order allowing the petition. In these circumstances, we have no choice but to dismiss the cross-appeal in this appeal. As in Civil Appeal No. 102 of 2016, because of the public interest issues raised in the cross-appeal, we direct each party to bear its own costs. It is so ordered.

Dated and delivered at Nairobi this 28th day of July, 2017

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR