IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, BOSIRE & NYAMU, JJ.A)

CIVIL APPEAL NO. 331 OF 2010

BETWEEN

NICHOLAS MURIUKI KANGANGI ……. APPLICANT

AND

THE HON. ATTORNEY GENERAL ……..…….. RESPONDENT

(Appeal from a judgment and decree of the High Court of Kenya at Nairobi (Wendoh, J) dated 14th October, 2010

In

H.C. JUDICIAL REVIEW MISC. APPLN. NO. 642 OF 2008)
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JUDGMENT OF THE COURT

Around ***11th*** or ***12th September, 2006***, Nicholas Kangangi Muriuki, hereinafter the Appellant "appeared before the court of the Chief Magistrate at Makadara, charged with various offences under the Anti-Corruption and Economic Crimes Act, hereinafter the Act." At the time he so appeared in court, the appellant was a serving Police Constable and by a letter dated 16th October, 2006, he was interdicted by his superior officers in the Criminal Investigations Department to which he was attached. According to the appellant in the performance of his duties as a police officer, he arrested and charged one Vipul Dharji or Darji with offence of stealing and that Vipul thereafter conspired with one Rose Githinji, a police officer then in the service of Kenya Anti-Corruption Commission, KACC, and had the appellant in turn charged with the offences under the Act. On the very first day that he appeared before the Magistrate, the appellant raised various issues under the repealed Constitution and under the Act itself and he requested the trial Magistrate to frame a constitutional question for interpretation by the High Court. The Magistrate (Miss Lilian Mutende) was of the view that there was no valid constitutional issue which she could refer to the High Court for interpretation. The appellant was dissatisfied with the Magistrate's order and through his present counsel, Mr. Kelvin Mogeni, he moved to the High Court and asked that court to exercise its revisionary powers under ***section 362*** of the Criminal Procedure Code and reverse the order of the Magistrate. Ojwang, J, as he then was, duly obliged but directed the appellant to:-

"------- forthwith – and in any case, within 14 days of the date hereof – lodge an application in the High Court on the relevant constitutional question."

Pursuant to that order the appellant did, on the 21st October, 2008, file a petition in the High Court and the petition was so filed under sections ***70 (a)*** , ***72 (1) (3)***, ***71 (2) (a)*** of the then Constitution. In the petition, the appellant had sought:-

"(a) ----------

(b) ----------

(c) A declaration that Criminal Case No. 3 of 2007 against the Petitioner and any other case pursuant to the arrest and detention of the Petitioner is an abuse of the criminal process and that it is null and void.

(d) A declaration that the detention of the Petitioner pursuant to the Criminal complaint on 8th to 12th September, 2006 was a gross violation of the Petitioner's right to personal liberty as protected by section 12 (1) and (3) of the Constitution of Kenya.

(e) ----------

(f) ----------

(g) A declaration that the Respondents are liable to pay costs of this petition."

The petition was supported by the affidavit of the appellant which contained a total of twenty-four paragraphs. In summary, the appellant alleged that Vipul had stolen something from one Divyesh Patel and Patel complained to the appellant . The appellant arrested and charged Vipul before the Magistrate at Makadara in criminal case No. 3644 of 2006. Vipul was convicted and duly sentenced but that during the pendency of the case Vipul threatened the appellant and Patel with death. The appellant and Patel complained to the police about the threat of death and Vipul was again charged in the same court in criminal case No. 1867 of 2007. Finding himself in that position, Vipul sought the help of Rose Githinji, who was a police officer attached to KACC. Vipul alleged to Rose that a Mrs. Patel had threatened Vipul with death. With the assistance of Rose, VIpul called the appellant and the two offered a bribe to the appellant. The appellant rejected the offer. Thereafter the appellant was arrested on 8th September, 2006 and was detained by the police at Kileleshwa Police Station until the 12th September, 2006 when he was produced in court, charged on two counts under ***section 39 (3) (a)*** as read with ***section 48 (1)*** of the Act and one count of receiving a benefit contrary to the same sections. The complainant in all the three counts was Vipul. The appellant further alleged that during the trial of Vipul on the charge of theft, Rose was one of his witnesses and as a result, Rose was dismissed by KACC. So, according to the appellant the charges of soliciting and receiving a benefit which are still outstanding against him were as a result of a conspiracy between Vipul and Rose and are a frame-up to get their revenge against him. Luckily for us, we are not called upon to determine the validity or otherwise of those claims. If the trial of the appellant were to proceed before the Magistrate, the claims would be determined there.

The constitutional issues raised by the appellant in his petition were two, namely:-

(i) his detention at Kileleshwa Police Station between the 8th and 12th September, 2006 which according to the appellant exceeded the twenty-four hours permitted under ***section 72(3)*** of the repealed Constitution; and

(ii) that under section ***35 (1)*** and ***(2)*** of the Act, KACC was mandatorily required to make and submit a report of its investigations to the Attorney-General with a recommendation as to whether the appellant should or should not be prosecuted for corruption or economic crime. The appellant contended KACC did not so report to the Attorney-General and that his purported prosecution by KACC through Kilimani Police Station was null and void.

These were the issues which came for determination before Wendoh, J whose judgment is the subject of

the appeal before us. For some unclear reason, the learned Judge dealt only with the first issue regarding the unlawful detention of the appellant at Kileleshwa Police Station. The Judge said absolutely nothing about the second issue under ***section 35*** of the Act.

On the issue of the alleged unlawful detention, the learned Judge found as a fact that the appellant was arrested on 8th September, 2006 which was a Friday and was produced in court on 11th September, 2006 which was a Monday. The appellant himself had alleged that he was produced in court on 12th September, 2006, but the Judge said the charge-sheet produced by the appellant himself showed that he was produced in court on 11th September, 2006. There was no other evidence to show that he was not produced in court on 11th September, 2006 as the charge-sheet showed. This was really not correct because the charge sheet showed under the heading "*Date Apprehension Report to Court*" the date "*12/9/2006*." In our view, nothing really turns on this point. The important point is that the 8th September, 2006 when the appellant was arrested was a Friday. The appellant did not allege that was not correct. Courts do not work over the week-ends and he could not have been produced in court until Monday the 11th. He was produced in court on 12th which would be a Tuesday. The important thing is that the learned Judge specifically directed her mind to the delay and came to the conclusion that in the circumstances of the case, the delay was reasonable and she ignored it. Mr. Mogeni did not tell us that on that issue the Judge exercised her discretion wrongly or that she misapprehended the bearing the facts had on the applicable law. Listen to what the Judge said in her conclusion:-

"----------. As explained above, the present scenario is different, the arrest having been on a Friday. Further each case must be considered on its own special circumstances taking into account the fact that in a criminal case, there is a complainant whose rights have also been violated, and the court has to balance each parties rights. Acquitting a person just because the police violated his rights even if found guilty, it would in itself be a violation of the rights of a complainant in the criminal case and I believe that is why section 72 (6) of the Constitution was enacted. It provides that anybody who is illegally detained is entitled to compensation from the person who detained him. In this case I find there was no unlawful arrest or detention and I find that the petitioner has not proved that there was any violation of his rights as pleaded. ------."

There can be no basis in law upon which we can, on an appeal, interfere with the learned Judge's conclusion on that point. We must accordingly reject grounds one and two in the appellant's memorandum of appeal where he complains:-

"1. That the superior court in its judgment misdirected itself in finding that there was no unlawful arrest or detention and that the applicant (sic) did not prove that there was any violation of his rights.

2. The superior court failed to make a finding that the Applicant (sic) was unlawfully held in custody for a period between 8th September to 12th September, 2006 and not 11th September, 2006."

In our view, those grounds must fail. Grounds 3 to 9 deal with the second question of whether the prosecution of the appellant was being conducted in violation of the provisions of the Act. The charge-sheet upon which the appellant was being tried was, of course, signed by Kilimani Police Station, but there was evidence from the appellant himself which was not controverted, that it was the officers of KACC who arrested the appellant and took him to Kilimani Police Station. The charge-sheet itself shows the complainant, as "REPUBLIC OF KENYA THRO' KACC." So the true prosecutor was really KACC . Under Part IV of the Act which is headed "INVESTGATIONS" the Director of KACC or a person authorized by him may conduct investigations on behalf of KACC and the provisions of that Part are consistent with those in ***section 7*** in ***Part III*** which sets out the functions of KACC. ***Section 7 (1) (a)*** and ***(b)*** states the first function of KACC,

"to investigate any matter that in the Commission's opinion, raises suspicion that any of the following have occurred or are about to occur –

(i) Conduct constituting corruption or economic crime;

(ii) Conduct liable to allow, encourage or cause conduct constituting corruption or economic crime.

(b) to investigate the conduct of any person that in the opinion of the Commission, is conducive to corruption or economic crime."

There are other functions listed under ***section 7 (c)*** to ***(h)*** but none of them include prosecution either by itself or through the Kenya Police. What happens after the investigations are completed is then set out in ***section 35*** in ***Part IV***:-

"35 (1) Following an investigation the Commission shall report to the Attorney-General on the results of the investigation.

(2) The Commission's report shall include any recommendation the Commission may have that a person be prosecuted for corruption or economic crime."

So the Commission must report the results of any investigations to the Attorney-General and its report may include a recommendation that a person be prosecuted for corruption or economic crime. The provisions of ***sections 36*** and ***37*** throw further light on what is to happen after a report is made to the Attorney-General.

"36 (1) The Commission shall prepare quarterly reports setting out the number of reports made to the Attorney-General under section 35 and such other statistical information relating to those reports as the Commission considers appropriate.

(2) A quarterly report shall indicate if a recommendation of the Commission to prosecute a person for corruption or economic crime was not accepted.

(3) The Commission shall give a copy of each quarterly report to the Attorney-General.

4. The Attorney-General shall lay a copy of each quarterly report before the National Assembly.

(5) The Commission shall cause each quarterly report to be published in the Gazette."

It is clear from the provisions of this section that under ***section 36 (2)***, the Attorney-General can reject a recommendation by the Commission that a person be prosecuted for corruption or economic crime. This is made even clearer under the provisions of ***section 37*** which obliges the Attorney-General to prepare an annual report on prosecutions for corruption or economic crimes. ***Section 37 (1)*** and ***section 37 (6)*** obliges the Attorney-General to lay each annual report before the National Assembly within a specified period. ***Section 37 (4)*** specifically provides:-

"The annual report shall also indicate if a recommendation of the Commission to prosecute a person for corruption or economic crime was not accepted and shall set out succinctly the reasons for not accepting the recommendation."

What clearly emerges from these provisions is that KACC must report its investigations to the Attorney-General and in the report it may recommend the prosecution of a person for corruption or economic crime. The Attorney-General may, in turn, either accept or reject the recommendation to prosecute and the only check on the power of the Attorney-General to accept or reject KACC's recommendation to prosecute lies in the National Assembly. Where the Attorney General rejects the recommendation to prosecute his report to the National Assembly:-

"shall set out succinctly the reasons for not accepting the recommendation."

The Act sets out the procedure to be followed. That procedure cannot be circumvented by KACC asking the Kenya Police to prosecute on its behalf. There is no such provision in the Act. In the case before us

there is no evidence that this procedure was followed. Mr. Obiri, the State Counsel who represented the Republic before us submitted that whether a report was made or not made to the Attorney-General was as it were, a matter between the Attorney-General and KACC. That cannot be right. The procedure is set down in the statute which creates KACC; KACC cannot ignore that procedure and say it is a matter between it and the Attorney-General. As a creature of statute, it must comply with the provisions of its creator. If it fails to do so, it is acting ultra vires and any such action is null and void. That is what the appellant contended before us. We accept that contention by the appellant.

In view of that position, we do not think it is necessary for us to consider whether police officers can prosecute cases arising under the Act before the anti-corruption courts. Perhaps it may be safer for the Attorney-General to specifically appoint officers to be prosecutors for the purposes of the Act. The Attorney-General has power to do so under ***section 85*** of the Criminal Procedure Code. But we take no concluded view on that issue.

What orders should we make in the appeal ? In his memorandum of appeal the appellant asks us for four orders, namely:-

"(a) THAT this Appeal be allowed and the superior court's Ruling/Order given on 14th October, 2010 be set aside and substituted with an order allowing the petition as prayed.

(b) THAT the appellant be acquitted of the charges facing him in Act 3 of 2007.

(c) THAT the costs of this appeal and costs in the superior court be awarded to the appellant.

(d) Any other order or relief this Honourable Court may deem fit to grant."

We can straight-away say that we cannot acquit the appellant on the charges he is facing in the Magistrate's court. The merits of those charges have never been a matter before this Court or the courts below. What we have agreed with the appellant is that the process which was used to bring the charges before the Magistrate was faulty as not being in conformity with the provisions of the Act. Accordingly under prayer (d) in the memorandum of appeal, we order that the three charges before the Magistrate's court be forthwith terminated, the charges not having been brought to court in accordance with the Act. The termination, however, does not prevent KACC from complying with the provisions of the Act and reinstituting the charges should it be deemed necessary. We repeat that we have rejected the appellant's prayer that he be acquitted on the charges.

The appellant has failed on one part of his appeal before us but has succeeded on the other half. We accordingly order that he shall be paid half of his costs both in the High Court and in this Court. Accordingly the orders of the Court shall be that the criminal charges pending against the appellant be and are hereby terminated forthwith but that the said termination does not bar the prosecution from reinstituting the said charges if the prosecution complies with the provisions of the Act. The appellant's prayer that he be acquitted is rejected and he is awarded half his costs in the High Court and half his costs of the appeal.

Dated and delivered at Nairobi this 29th day of July, 2011.

R.S.C. OMOLO
…….
JUDGE OF APPEAL

S.E.O. BOSIRE
…….
JUDGE OF APPEAL

J.G. NYAMU
……..
JUDGE OF APPEAL

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

DEPUTY REGISTRAR.