



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI**

Civil Appeal 228 of 2003

JORAM MWENDA GUANTAI.....APPELLANT

AND

THE CHIEF MAGISTRATE, NAIROBI.....RESPONDENT

*(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Ransley, J.) dated
25th July, 2003, in H.C.MISC. C. NO. 313 OF 2003)*

JUDGMENT OF THE COURT

This is an appeal against the decision of the High Court of Kenya at Nairobi (Ransley J) given on 25th July, 2003 by which the learned Judge refused to grant the appellant a Judicial Review application for an Order of Prohibition directed to the Chief Magistrate, Nairobi, prohibiting him and any other magistrate from hearing or further proceeding with the trial of the appellant on charges brought against him in the Chief Magistrate's Court Criminal Case Number **ACC 9 of 2003** between the Republic and the appellant.

1. Background:

The appellant, **JORAM MWENDA GUANTAI**, is an Advocate of the High Court of Kenya and at the time material to these proceedings he was employed by Kenyatta National Hospital as its Chief Legal Officer. We shall hereinafter refer to Kenyatta National Hospital as "the Hospital". The Hospital is established for the purposes specified under **regulation 5** of the **Kenyatta National Board Order 1987 – Legal Notice No. 109**. These are:-

- (a) to receive patients on referral from other hospitals or institutions within or outside Kenya for specialized health care;
- (b) to provide facilities for medical education for the University of Nairobi and for research either directly or through other co-operating health institutions;
- (c) to provide facilities for education and training in nursing and other health and allied professions;
- (d) to participate, as a national referral hospital, in national health planning.

Under regulation 2 of the above cited Order, there is established a state corporation known as the Kenyatta National Hospital Board, "the Board", which is responsible for matters relating to health, administration, management and development of the Hospital, amongst other powers and functions. The

Board is a body corporate which consists of not more than eleven members and its chief executive and secretary is the Director. The Board, however, is under the control of the Minister.

On or about 9th February, 2001, the Hospital advertised for pre-qualification of bidders and thereafter invited tenders for the supply, delivery, installation and commissioning of Radiology Diagnostic Equipment at the Hospital. The Tender which was assigned Number KNH/T/28/2000-2001 closed on 22nd March, 2001. It is manifest from the schedule of Tenders that many companies, both local and foreign, submitted bids but five of them were short listed for the procurement contract. On 30th July, 2001, the Director of the Hospital appointed a committee to carry out a technical evaluation on bid documents submitted by the bidders. The committee was composed of six members, all of them eminent persons in the fields of medicine, radiology and engineering. Relying on the committee's evaluation and recommendations the Hospital on 30th October, 2001 accepted the bid by **Philips Medical Systems Nederland BV** for **EUR 3,697,180** equivalent of Kshs. 256,471,921/84. However, **Meditec Systems Limited**, one of the unsuccessful bidders lodged an appeal on 19th November 2001 with the Public Procurement Complaints, Review and Appeals Board. In an undated decision, notified to the appellant and the Hospital only, the Appeals Board ordered:-

“The Board declared the procuring entity’s contract with M/s Philips Medical Supplies illegal and directs that:-

- (a) The contract between Kenyatta National Hospital and Philips Medical Supplies be nullified.**
- (b) The contract be awarded to the most cost effective bidder, M/S Meditec system.**
- (c) The Board further recommended to the Minister of Finance to take action against officials involved in the processing of the tender in accordance with regulation 46 of the Public Procurement Regulations.”**

Not surprisingly, the successful bidder **Philips Medical Systems Nederland BV** was dissatisfied with the decision of the Appeals Board and it promptly instituted Judicial Review application for the grant of an order of *certiorari* to quash the said decision.

2. Decision of the superior court:

The learned Judge Hayanga, J in granting the application held, *inter alia*, that:-

“It appears as if the Appeals Board had prejudged the appeal against the applicant. There was no impartiality and no fairness.”

The learned Judge further strongly condemned the Appeals Board for “*fabricating evidence*” by pretending that it had a certain letter and other documents before it and yet it did not have any when the appeal came up for hearing. He held that the Appeals Board had acted unfairly against the applicant and had not given it a right to be heard and thus breached the cardinal principles of Natural Justice. The ruling of the learned Judge was dated 17th September, 2002.

3. The Contract:

The Hospital did eventually execute the contract with the successful bidder to which it has made payment and it is common ground that the contract was duly performed by the parties thereto and it is no longer a live issue in these proceedings. We were also informed from the Bar that the project was duly commissioned and completed as designed.

4. Criminal Charges:

On 5th February, 2003 the appellant and Dr. Hosea Waweru, an interested party in this appeal, were

arraigned before the Chief Magistrate, Nairobi, on various charges of abuse of office contrary to **section 101 (1)** of the **Penal Code**. In Count V the appellant is alleged that on 2nd November, 2001 being an officer employed in the Public Service to wit Chief Legal Officer of the Hospital in abuse of authority of the said office arbitrarily and without regard to Exchequer and Audit (Public Procurement) Regulations facilitated the signing of the contract between the Hospital and **Philips Medical Systems Netherlands BV** for supply and commissioning of radiology diagnostic equipment before the mandatory expiry of 21 days after notification of the tender an act which was prejudicial to the Hospital Board. Counts VI and VII relate to an alleged abuse of office by the appellant by directing the immediate implementation of the contract thereby leading to an advance payment of some money which acts are alleged to be prejudicial to the Hospital Board.

5. Application for an Order of Prohibition:

On 27th March, 2003, the appellant moved the superior court under **Order 53 Rules 1 and 2** of the **Civil Procedure Rules** for an Order of Prohibition directed to the Chief Magistrate, prohibiting her/him and any other Magistrate's Court of similar jurisdiction from hearing or further hearing and determining the Chief Magistrate's Court, Criminal Case Number ACC 9 of 2003 between **THE REPUBLIC versus HOSEA N. WAWERU** and **JORAM MWENDA GUANTAI**; and that the grant of leave to apply for an Order of Prohibition aforesaid do operate as a stay of the Chief Magistrate's Court Nairobi Criminal Case Number ACC 9 of 2003 between **THE REPUBLIC versus HOSEA N. WAWERU and JORAM MWENDA GUANTAI** until the determination of the application for prohibition.

The application was grounded upon the averments, *inter alia*, that the appellant's prosecution was in derogation of the appellant's constitutional rights and was actuated by malice and abuse of process and that it has been brought with the predominant and improper intent of harassing and exerting pressure on the appellant. It is also stated that the intended prosecution will demean the authority of the Court of Appeal and the High Court of Kenya before which a civil appeal touching on the substance of the intended prosecution and an application for Review, respectively, are pending.

The appellant filed the requisite statutory statement together with an affidavit. His co-accused, an interested party in this appeal, **Dr. Hosea Waweru** also swore an affidavit on 28th May, 2003. During the hearing of the application the appellant through his counsel, Mr Lubulellah, submitted that the criminal charges preferred against him did not disclose any offence since what he did was what was required of him by his job. He contended, as he has done before us in the appeal, that the Tender Board of the Hospital which had approved the contract the subject matter of the criminal charges, had a total number of 13 members and as such his prosecution appeared selective and malicious as other members of the Board should also have been charged. He averred that he never breached any Regulations as he was acting all the time under complete instructions and direction of the Board and the Hospital.

6. Ruling:

The learned Judge in a ruling devoid of framed issues and reasons for the decisions held:-

“In my view it is not a matter for this court to determine whether there has been a breach of the Regulation or not or if there has been (sic) whether the same amounts to an abuse of office by the applicant or not. That is purely a matter for the trial magistrate to determine after hearing the evidence and arguments in the case.”

The learned Judge also held:

“One has sympathy with the Applicant brought as he has been into criminal proceedings for what is alleged are an abuse of his office when he may well think he was just doing his job.”

And later in the ruling that: -

“However it is not for this court to say that the prosecution does not have a right to pursue such

proceedings if it thinks in the evidence it has that an offence has been committed.”

Finally, the learned judge dismissed the allegations that the criminal charges had been instituted selectively or maliciously and firmly concluded:

“Also, it is for the prosecution to charge such persons as it perceives to have committed an offence and that it has acted selectively has not been proved before me.”

7. The Appeal:

The applicant was aggrieved by the decision of the learned Judge and has preferred this appeal. The first ground of appeal taken up by Mr. Lubulellah is that the learned Judge erred in holding that an Order of Prohibition could not issue in the circumstances of the case. Our perusal of the record shows that counsel vigorously contended before the superior court that the facts of the case necessitated the granting of the Order of prohibition. He made copious submissions backed up with a lot of relevant decisions and authorities both local and foreign but surprisingly, the learned Judge did not make any finding on them. We think, with respect, that it was wrong for him to merely hold that:

“that is purely a matter for the trial magistrate to determine after hearing the evidence and arguments in the case.”

It is trite that an Order of Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings. See **Kenya National Examinations Council vs Republic Ex-parte G.G. Njoroge & 9 Others** 1996 LLR 483 (CAK. See also **HALSBURY’S LAWS OF ENGLAND 4th Edition Vol. 1 p 37 para. 128.**

Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. It was succinctly put in **Stanley Munga Githunguri vs Republic [1985] KLR 91** that if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious the Judge has the power to intervene and that the High Court has an inherent power and a duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court. This **dictum** is now an everyday edict in our courts and we are indeed surprised that the learned Judge was shy to so declare.

The question that we must of necessity answer is whether the facts and circumstances of the case did justify the granting of the order of prohibition. Would the trial of the appellant have amounted to an abuse of the process of the court? What are the factors to be considered by a court of law before arriving at this conclusion? This court in **KNEC’s** case said, if **Githuguri** had allowed the Chief magistrate to try him and a conviction had been recorded, an order of prohibition would be ineffectual against the conviction because such an order would not quash the conviction. Prohibition looks to the future in order to prevent the making of a flawed decision. In our view, therefore, the appellant cannot be faulted for walking on the well-trodden path pioneered by Githunguri. He was perfectly entitled to mount the application for a prerogative order and the learned trial Judge was wrong not to consider the matter raised before him. It was plainly a misdirection to avoid the issue placed before him for deliberation.

The appellant was charged with abuse of office for allegedly breaching the **Exchequer and Audit (Public Procurement) Regulations 2001** which act in effect brought immediate implementation of the contract to install medical equipment at the Hospital. It is true that the Tender Board of the Hospital, of which the appellant is not a member, awarded the contract. In this regard, therefore, the appellant not being a member of the procuring entity (The Hospital), cannot be guilty of any offence under **regulation 46(1)** of the Regulations which provides that a member of a procuring entity who breaches the provisions of the Regulations commits an offence and shall be liable to a fine. As he was incapable of committing

any offence under the Regulations he cannot in the circumstances be charged under **section 101(1)** of the Penal Code for breaching the Regulations. If there was a breach of the regulations the blame must lie squarely with the Tender Board or the Hospital which implemented the contract and is a procuring entity under the said regulation.

Moreover, it has not been suggested that the contract or the Tender award was procured or caused by the undue influence of the appellant or that he was in a position to dominate the will of the Hospital. It is correct that in awarding of the tender the Board and the Hospital are legal persons and since in every corporation there are certain persons who control and direct its activities, and those persons, when acting in the corporation's business, are considered to be the corporation for this purpose. Their acts and states of mind are the corporation's acts and states of mind and it is held liable, not for acts of its servants, but for what are deemed to be its own acts. See **Gardner v Akeroyd [1952] 2 Q.B. 743** and **The Criminal Liability of Corporations [1946], 62 L.Q.R. 345**. In this regard, therefore, if there was any breach of the Regulations the blame should have been directed towards the Board and the Hospital and not the appellant, an obscure entity within these two bodies.

The abuse of office charges, though having been in the Penal Code for decades, only started being filed in the courts after the year 2002. The charges create a new crop of hitherto uncommon offences and there are very few past decided cases on them and hence a dearth of authority. The purpose of the **Regulations** is to promote economy and efficiency in public procurements and to ensure that public procurement procedures are conducted in fair, transparent and non-discriminatory manner thereby contributing towards the creation of a sound business climate in Kenya – **regulation 4**. Though well meaning, the **Regulations** are badly drafted, sketchy, not well-thought out and do not appear to be likely to solve the perceived problems. For example, the penal regulations make no sense and are lamentably limited in scope and they lack clarity. Moreover, it is wrong jurisprudence to attempt to rescind lawfully executed contracts by criminally prosecuting the officials of a State Corporation who are deemed “to have breached” the Regulations. In the instant case, the contract in issue cannot now be voided though the State is unhappy with its execution. To charge the appellant, therefore, with a criminal offence would in our view, appear to be improper and indeed malicious.

Again, we do not agree with the assertion by Mr. Oriri-Onyango, for the Attorney General, that every breach of the regulations amounts to an abuse of office punishable under the Penal Code. Each case depends on its own particular facts and circumstances.

It is common knowledge that the Hospital is not complaining over the breach of any **Regulations**. In fact it was urging for an immediate implementation of the Tender award. Moreover, it facilitated the execution of the contract and the payments for the intended works. It is understandable therefore why the Hospital did not file any documents or statements implicating the appellant in any wrong doing. In our opinion, therefore, grounds 4 and 5 of the grounds of appeal cannot be resisted. That is to say the entire affidavit evidence of the appellant had not been controverted and thus there is no evidence that the Hospital was in any manner prejudiced. As it is not in actual fact the real complainant cited in the charge sheet, counts V, VI and VII of the charge are not capable of being sustained. We would in the result agree with Mr. Lubulellah that there was absolutely no basis for charging the appellant with abuse of office offences.

The appellant further avers that the learned judge failed to decide whether the criminal charges preferred against him were oppressive and an abuse of the process of the court. We have in the early part of this judgment observed that the learned judge did not resolve the issue; and yet, this was the crux of the application before him. His failure to do so was indeed improper and could be said to offend the decision in **Metropolitan Bank Ltd v Pooley (1885) 10 APP Cases 210 at 220, 221** wherein Lord Blackburn:-

“But from early times.... the court had inherently its power the right to see that its process was not abused by proceeding without reasonable grounds, so as to be vexatious and harassing – the Court had the right to protect itself against such an abuse.”

This passage was cited with approval in the **Githunguri** case.

We have carefully looked at the particulars of the charges preferred against the appellant and also examined the ingredients of an offence of abuse of office as contained in **section 101(1)** of the **Penal Code**. We have also considered all these together with the **Regulations**. We observe that criminal charges underpinned on alleged breach of the **Regulations** as in the instant case would make the cases the fountain of unceasing ambiguity in that no clear distinction exists nor can be drawn between acts done in abuse of office and acts in excess of it. Any perceived criminal charges based on the **Regulations** would in most cases be ill-advised.

8. Conclusion:

In the result we hold a firm view that in the particular circumstance of this case the prosecution of the appellant and his co-accused, **DR. HOSEA N. WAWERU**, the interested party in the appeal, would be oppressive and vexatious and would amount to an abuse of the process of the Court and that the criminal charges against them have been wrongly brought. The learned trial Judge had inherent power and duty to intervene but he did not take the appropriate judicial action. In failing to do so he greatly erred and had failed to secure the appellant and the interested party a fair treatment before the subordinate court.

In the result, we allow the appeal and make the following orders: -

- 1. The ruling or decision of the superior court made on 25th July, 2003 is hereby set aside and vacated.**
- 2. An Order of Prohibition shall issue against the Chief Magistrate, Nairobi and or any other Magistrate, prohibiting him or them from hearing or further proceeding with the trial of the appellant and the co-accused on the charges brought against them in the Chief Magistrate's Court Criminal Case Number ACC 9 of 2003 between The Republic vs Hosea N. Waweru and Joram Mwenda Guantai.**
- 3. We make no order as to cost.**

Dated and delivered at Nairobi this 2nd day of February, 2007.

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR