



REPUBLIC OF KENYA



**KENYA LAW**  
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**Peter Ayodo Omenda, Nicholus Karume Weke, Caleb Indiatsi Mbaye, Abraham Kipchirchir Saat, Michael Maingi Mbevi, Godwin Magae Mwavongo & Bruno Mugambi Linyuri v Ethics & Anti-Corruption Commission, Director of Public Prosecution & Chief Magistrates Anti-Corruption Court (Petition 40 of 2019) [2020] KESC 70 (KLR) (30 April 2020) (Ruling)**

*Peter Ayodo Omenda & 6 others v Ethics & Anti-Corruption Commission & 2 others [2020] eKLR*

Neutral citation: [2020] KESC 70 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
PETITION 40 OF 2019**

**DK MARAGA, CJ & P, PM MWILU, DCJ & VP,  
MK IBRAHIM, SC WANJALA & I LENAOLA, SCJJ**

**APRIL 30, 2020**

**BETWEEN**

**DR. PETER AYODO OMENDA ..... 1<sup>ST</sup> PETITIONER  
NICHOLUS KARUME WEKE ..... 2<sup>ND</sup> PETITIONER  
CALEB INDIATSI MBAYE ..... 3<sup>RD</sup> PETITIONER  
ABRAHAM KIPCHIRCHIR SAAT ..... 4<sup>TH</sup> PETITIONER  
MICHAEL MAINGI MBEVI ..... 5<sup>TH</sup> PETITIONER  
GODWIN MAGAE MWAWONGO ..... 6<sup>TH</sup> PETITIONER  
BRUNO MUGAMBI LINYURI ..... 7<sup>TH</sup> PETITIONER**

**AND**

**ETHICS & ANTI-CORRUPTION COMMISSION ..... 1<sup>ST</sup> RESPONDENT  
DIRECTOR OF PUBLIC PROSECUTION ..... 2<sup>ND</sup> RESPONDENT  
CHIEF MAGISTRATES ANTI-CORRUPTION COURT ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the decision of the Court of Appeal (Warsame, Asike-Makhandia & A.K. Murgor JJ.A) on 20th September 2019 allowing Civil Appeal No.313 of 2017 as well as setting aside the Judgment of the High Court (G.V. Odunga, J) in Judicial Review Misc. Application No.198 of 2016 delivered on 20th December 2016)*



## RULING

### A. Introduction

1. On 20<sup>th</sup> December 2016, the High Court, in judicial review proceedings instigated by the petitioners, granted an order prohibiting the respondents from prosecuting, sustaining, proceeding, hearing, conducting or in any manner dealing with or completing the hearing of the charges laid or proceedings conducted in the Anti-Corruption Case before the Chief Magistrates' Court at Milimani Law Courts, Nairobi in so far as they related to the applicants. This judgment was set aside by the Court of Appeal following a successful appeal by the 1<sup>st</sup> respondent.
2. Aggrieved by the Court of Appeal decision, the petitioners filed an appeal to this Court, as of right, under Article 163(4)(a) of *the Constitution*, against the whole decision of the appellate court raising alleged constitutional grievances. The appeal was filed on 29<sup>th</sup> October 2019.
3. On 3<sup>rd</sup> December 2019, the 1<sup>st</sup> respondent filed a Notice of Preliminary Objection as to the competence of this appeal on the following grounds:
  - a) The matter does not concern the interpretation or application of *the Constitution*;
  - b) No leave was obtained prior to instituting the appeal;
  - c) Consequently, the appeal is incompetent and should be struck out.

This Ruling is on the Preliminary Objection.

4. The 1<sup>st</sup> respondent filed its submissions in support of the objection. It submits that the judicial review proceedings instituted by the petitioners were grounded on the argument that the decision to prosecute them is based on illegality, irrationality and procedural impropriety. Accordingly, it is the first time that the constitutional questions are being raised in a ploy to mislead the Court into assuming jurisdiction. That this being a second appeal, the Court should not assume jurisdiction. The 1<sup>st</sup> respondent relies on the principles espoused in *Wavinya Ndeti v Independent Electoral & Boundaries Commission & 4 others* [2015] eKLR and *Boniface Katana Kilaveri v Ethics & Anti – Corruption Commission & Commissioner of Land* [2018] eKLR. To the 1<sup>st</sup> respondents, the appeal is incompetent and should be struck out with costs.
5. In response, the petitioners through their submissions submit that the preliminary objection should be dismissed as this appeal is as of right as it involves the interpretation and application of *the Constitution*. As such, no prior leave is required from this Court or from the Court of Appeal. They rely on this Court's Ruling in *Cyrus Shakhalaga Khwa Jirongo v Soy Developers Limited & 9 others* [2019] eKLR. The respondents further submit that the original matter in the High Court was brought under express provisions of *the Constitution* being Articles 10, 22, 23, 27, 28, 29, 50, 157 and 165. That the matter is therefore ripe for determination by this Court in accordance with the principles laid out in *Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd & Another* [2012] eKLR.

### B. Analysis

6. Do we then have jurisdiction to hear and determine this appeal? We have time and again delineated the contours of our jurisdiction under Article 163(4) of *the Constitution*. There is common ground from the submissions alluded to that our exercise of jurisdiction is based on certain principles. For an appeal to be as of right, the constitutional questions must have transcended from the courts below



and not raised for the first time before us. In the same breadth, this jurisdiction can be exercised if it can be demonstrated that the Court's determination of the issue took a trajectory of the constitutional application or interpretation. The guiding principles are well summarized in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 others* Sup. Ct Petition No.2B of 2014 [2014] eKLR.

7. Suffice to note that the path a litigant takes is determined on the basis of the subject matter and in particular, the character of the issues involved in the subject matter. Once the Court of Appeal renders its decision, the litigant is able to elect, in advance, whether to seek certification first or proceed straight as of right (see *Fahim Yasin Twaha v. Timamy Issa Abdalla & 2 Others* [2015] eKLR at paragraph 41). In our ruling in *Synergy Industrial Credit Limited v Cape Holdings Limited* [2018] eKLR we noted that though a similar matter had been certified as involving general public importance, the petitioner was not precluded from pursuing the same issue as of right. This inevitably means that it is not for the respondent to insist on its preference but rather the petitioner to exercise the choice.
8. The petitioners have therefore chosen to pursue their appeal as of right under Article 163(4)(a) of *the Constitution*. It therefore behoves us to evaluate whether indeed they meet the threshold.
9. A perusal of the Statutory Statement dated 29<sup>th</sup> April 2019, Notice of Motion Application dated 13<sup>th</sup> May 2019 and the face of the pleadings, it is evident that while the petitioners filed judicial review proceedings, several constitutional provisions were invoked. Indeed, the notice of Motion was stated to be brought under Articles 10, 22, 23, 27, 28, 29, 41, 47, 50, 157, 159(9)(2)(a) & (b) and 259. The face of the application on the other hand listed Articles 10, 22, 23, 27, 28, 29, 50, 157 and 165. In the grounds, the petitioners allude to instances of violation of the constitutional rights ranging from abuse of criminal law and trial process, evidence in their support being ignored, excess of jurisdiction by the respondents and abuse of discretion. All these issues are tenets of a constitutional process available to a litigant particularly in a criminal trial context.
10. Even if we were to consider the 1<sup>st</sup> respondent's position that the petitioners' grounds before the High Court related to illegality, irrationality and procedural impropriety, these grounds do not exclude *the Constitution*. An example is where the petitioners challenged the exercise of the powers of the Director of Public Prosecution under Article 157 or fair trial which stems from Article 50 of *the Constitution*.
11. In our view, nothing precludes a litigant from invoking *the Constitution* in whatever proceedings pending before the High Court. The fact that the proceedings related to judicial review, the High Court nevertheless had powers to address any constitutional questions that arise. Without going to the merits of the High Court judgment, we take note of the following:
  26. It was therefore averred [by the Respondents] that the decision to charge the Applicants in this case alongside other suspects named in the said charge sheet . . . was based on correct interpretation of the law relating to procurement and other applicable laws and regulations in tandem with *the constitution* and therefore there was no violation of *the constitution* . . .”The learned Judge at paragraph 42 of the Judgment went ahead to address the provisions of Article 157(10) of *the Constitution* relating to the office of the Director of Public Prosecution.
12. At the Court of Appeal, the 1<sup>st</sup> respondent's grounds of appeal included failure by the judge to appreciate that any public tendering process conducted in this country must aim at achieving the purpose and objects of Article 227 of *the Constitution*. At this juncture, it is worth noting that the constitutional questions decided in favour of the petitioners were not appealed by any of the respondents and to that extent, it was not incumbent upon the petitioners to pursue their constitutional arguments at the appellate stage. The situation would have been different if the appeal before the Court of Appeal was filed by the petitioners.



13. We also considered the position in *Cyrus Shakhalaga Khwa Jirongo v Soy Developers Limited & 9 others* [2019] eKLR in the following regard:

(12) This Court’s jurisdiction is not sharply defined in certain cases — especially as regards claims of constitutional entitlements, the content of which stands to be ascertained individually, from one case to another. So we must consider whether the circumstances in which the criminal case against the applicant was initiated, in any way stands to compromise rights as delineated in *the Constitution*. Does the applicant have certain constitutional rights, which can only be safeguarded through a proper hearing of his appeal before the Supreme Court?”

14. In purely civil cases, it is easy to address the constitutionality of the questions before court and whether they meet our jurisdictional threshold. The fact that the initial proceedings before the High Court or a court of equal status are couched as constitutional petitions may not necessarily warrant an appeal as of right. For instance, in *Rutongot Farm Ltd v Kenya Forest Service & 3 others* [2018] eKLR we stated:

“Even though the Appellant thus alludes to infringement of its constitutional rights, the issue for the Superior Court’s determination was, who is the rightful owner of the suit land? This would entail examination of the facts on record and based on the governing laws, deciding on who between the 1<sup>st</sup> Respondent and the Appellant was entitled to the suit land. No question of constitutional interpretation or application was therefore before those Courts or this Court. And as already stated, neither was such an issue canvassed at the superior Courts.”

15. However, criminal cases or a mixture of criminal and civil, such as judicial review proceedings invite a more careful approach, as we have done. There however remain no fast and hard rules and each case must be considered on its merits. We reiterate our position in *Hussein Khalid and 16 Others v The Attorney General & 2 Others* Sup Ct. Petition No.21 of 2017 (unreported) where we stated:

121. . . .As we have stated above, such claims may be legitimately pursued and addressed outside the criminal justice system for the criminal justice system is not meant for addressing constitutional petitions and/or allegations of its breach thereof.”

### **C. Determination**

16. The summation of the above position is that we are persuaded, without going to the merits of the case, that the appeal raises constitutional issues that were originated from the High Court at the first instance. We therefore affirm that we have jurisdiction to entertain the appeal as filed and that the same should be heard on merit. Consequently, the preliminary objection dated 3<sup>rd</sup> December 2019 lacks merit and is disallowed. The costs of the objection will abide the outcome of the appeal.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF APRIL, 2020.**

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**D. K. MARAGA**

**CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT**

.....

**P. M. MWILU**

**DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT**



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**M.K. IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

.....

**S. C. WANJALA**

**JUSTICE OF THE SUPREME COURT**

.....

**I. LENAOLA**

**JUSTICE OF THE SUPREME COURT**

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

Registrar Supreme Court of Kenya

