



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, G.B.M.KARIUKI & OTIENO - ODEK, J.J.A.)

CIVIL APPEAL NO. 85 of 2009

BETWEEN

REPUBLICAPPLICANT

AND

KENYA ANTI-CORRUPTION COMMISSION..... 1st RESPONDENT

KIBERA SNR. PRINCIPAL MAGISTRATE'S COURT 2nd RESPONDENT

THE HON. ATTORNEY GENERAL 3rd RESPONDENT

GEORGE WAMBUAEX-PARTE

(Being an appeal from the Judgment of the High Court (Hon. Justice J. G. Nyamu dated at Nairobi on 7th March 2008 in Nairobi Miscellaneous Civil Application No. 569 of 2006)

JUDGMENT OF THE COURT

1. This is an appeal against the Judgment of the High Court declining to grant orders of certiorari and prohibition to stop the criminal prosecution of the appellant, **Mr. George Wambua**. The relevant law in this appeal was the law prior to the promulgation of the 2010 Constitution. At all material times in the suit, Mr. George Wambua was the treasurer of the Mombasa Municipal Council. On 22nd January 2003, he was directed by the Permanent Secretary to the then Ministry of Local Government to proceed to the then City Council of Nairobi to perform the duties of City Treasurer in an acting capacity. In 2004, he was called by officers of the 1st Respondent, the then Kenyan Anti-Corruption Commission and interviewed in relation to payment of per diem allowances made to Councilors of the City Council of Nairobi and council officers for an official study tour made to Egypt and Italy. The study tour was organized and funded by **Jacorrosi Impresse SPA** for purposes of familiarizing the City Council Councilors and officers on its solid waste management operations in both countries. The tour having been fully funded, the Councilors were entitled to ¼ (quarter) per diem. However, Mr. Wambua paid the Councilors and officers full per diem. The 1st respondent contends that payment of the full per diem by the applicant was an abuse of office and the applicant was arraigned and charged with the offence of abuse of office before the Kibera Senior

Principal Magistrate's Court in Criminal Case no. 4271 of 2006.

2. Upon being charged, the applicant filed **Nairobi Miscellaneous Civil Application No. 569 of 2006** dated 4th October 2006 seeking, after obtaining leave, an order of certiorari and prohibition to issue against the respondents to quash the decision of the then Kenya Anti-Corruption Commission dated 1st August 2006 to charge him with the offence of abuse of office contrary to **Section 46 of the Anti-Corruption and Economic Crimes Act**. He also sought an order of prohibition to prohibit the Kibera Senior Principal Resident Magistrate's Court from taking evidence or in any other manner conducting proceedings in the matters the subject of Kibera Criminal Case No. 4271 of 2006.
3. The grounds in support of the application as given in the Statement are that the decision by the Anti-Corruption Commission to charge the applicant was based on an erroneous assumption that the expenses made in respect of the Councilors of the City Council of Nairobi during their trips to Egypt and Italy fell within the scope of **Part 3 of Section J.4. of the Public Service Code of Regulations** which was not true; that the decision was based on the erroneous assumption by the 1st respondent that the applicant was the City-Treasurer to the City Council of Nairobi which fact was not true; that the purported charging of the applicant with the offence of abuse of office was based on a grave error of fact that the applicant was subject to **Personnel Circular Number 4 of 2000** which was untrue; that the conduct of Kibera Senior Principal Magistrate's Court in proceeding with Criminal Case No. 4271 of 2006 is a continuation of the illegality and oppression initiated by the 1st respondent; that **Section 87 of the then Local Government Act** provides immunity to the applicant against criminal prosecution.
4. In opposing the application, the 1st respondent filed grounds of opposition stating that the decision to charge the applicant was not that of the 1st respondent but the decision of the Attorney General; that the applicant had not demonstrated sufficient grounds for the issue of an order of certiorari; that the grounds in support of the application amounted to canvassing the applicant's defence before the wrong court; that the 1st respondent carried out sufficient investigations to sustain the charge against the applicant.
5. The 1st respondent filed a replying affidavit in which it was deposed by **Mr. George Wanjohi Wachira** who states that the application for certiorari and mandamus was incompetent and fatally defective; that the applicant at all material times held a public office and was a public officer within the meaning of **Section 46 of the Anti-Corruption and Economic Crimes Act**; that the applicant was handling the finances of the then City Council of Nairobi; at all material times the applicant was the person who prepared and made out payments of the additional per diem to the Chief Officers and Councilors travelling to Italy and Egypt which included himself; that the applicant's actions were improper and amounted to conferring a benefit to himself and others; that the decision to charge the applicant was reached judiciously by the Attorney General after due investigations and consideration.
6. Upon hearing the parties, Nyamu, J. (as he then was) in a ruling delivered on 7th March 2008 dismissed the application for certiorari and prohibition. In dismissing the application, the judge evaluated the various grounds in support of the application and expressed that since there are ongoing criminal proceedings before the lower court, the applicant could articulate all issues he had raised by invoking the relevant constitutional provisions he alleges were violated. The learned judge held that there was no abuse of office by the respondents and public interest was not violated in charging and prosecution of the applicant.
7. Aggrieved by the judgment, the applicant has lodged the instant appeal citing the following grounds in his memorandum of appeal.

“a)The learned judge erred in law in failing to give effect to the plain and unambiguous

*provisions of **Section 87 of the Local Government Act** and find that the said section indemnifies the appellant from criminal prosecution for the acts complained of.*

b). The judge erred in fact and law in failing to find that the appellant had been charged in court by the Kenya Anti-Corruption Commission a body that had no power in law to prefer such charges.

c. The judge erred in law and fact in failing to find that the appellant was by nature of his office not bound by the Directorate of Personnel Management Circular of 31st August 2000.

d. The judge erred in law in failing to find that the prosecution of the appellant was against public policy and public interest.

e. The judge erred in law in failing to find that the prosecution of the appellant was a violation of the appellant's constitutional rights."

8. At the hearing of this appeal, the appellant was represented by learned counsel Mr. Elisha Ongoya while learned counsel Mr. Ruto appeared for the 1st respondent and the Senior Principal State Counsel Mr. Kepha Onyiso appeared for the 2nd and 3rd respondents.
9. Learned counsel Mr. Ongayo submitted that the appellant is challenging a criminal prosecution started in 2006 which was a decade ago; that the instant appeal calls upon this Court to foster the legacy of the decision in **Githunguri -vs-R**. Counsel collapsed all the grounds of appeal and urged them as one global ground of appeal. He submitted that the legal question was whether there was sufficient justification before the trial court to warrant the quashing of the decision by the respondents to charge and prosecute the appellant. It was submitted that there is on record sufficient evidence and justification and the learned judge erred in law in not quashing the decision to prosecute the appellant; that there was material before the judge to show that the decision to prosecute the appellant was made by the then Kenya Anti-Corruption Authority in excess of their powers; that the power matrix under the **Economic and Anti-Corruption Act** was that the **Kenya Anti-Corruption Authority (KACA)** was the investigator and the Attorney General the prosecutor; that the 1st respondent expressly admitted that the decision to charge the appellant was made by KACA and not the Attorney General; that because the decision to charge the appellant was not made by the Attorney General, the prosecution of the applicant in the **Kibera Criminal Case No. 4271 of 2006** is neither proper nor valid and should not be allowed to stand in law.
10. In support of the appellant's submission, we were referred to the Charge Sheet dated 1/8/2006 wherein it is indicated that the complainant is the Republic through the Kenya Anti-Corruption Commission. We were also referred to a letter dated 5th October 2006 from the Kenya Anti-Corruption Commission addressed to the then Permanent Secretary in the Ministry of Local Government which letter at paragraph 1 thereof explicitly states that the appellant was arrested and charged by the Kenya Anti-Corruption Commission on 1st August 2006 before the Anti-Corruption Court at Kibera. Counsel urged us to find this letter is an express admission by the 1st respondent that the decision to arrest and charge the appellant was made by the 1st respondent and not the Attorney General as was then required by law.
11. Counsel submitted that the appellant was charged in relation to per diem payments to Councilors; that the entire transaction was governed by the then **Section 87 of Local Government Act**; that under the said **Section 87** of the Act, the appellant had immunity from criminal prosecution; that the trial court erred in holding that the issue of immunity under **Section 87** was a matter for the trial court to consider and determine. It was submitted that this was misdirection on the part of the trial judge who ought to have determined the question of immunity; that immunity as a question of law should have been determined by learned judge. It was further submitted that the appellant is alleged to have violated the **Civil Service Code of Regulations**; that the legal issue is whether the

Civil Service Code of Regulations is applicable and binding upon the employees of the then Local Government; it was submitted that it was not open to the respondents to charge the appellant and be arraigned before a magistrate court when he was not a civil servant. Based on the foregoing submissions, we were urged to allow the appeal.

12. Learned counsel Mr. Ruto for the 1st respondent urged this Court to dismiss the appeal; he submitted that the issue in the appeal revolves around **Section 87** of the **Local Government Act** and who made the decision to charge the appellant; that it is not in dispute that the per diem rate payable was quarter per diem; that the appellant admitted that quarter per diem was the applicable and proper rate to be paid and that full per diem was paid without authorization. The 1st respondent submitted that the appellant had abused his authority; that the 1st respondent conducted investigations and submitted the investigation file to the Attorney General with a recommendation that the appellant be charged and arraigned in court; that the decision to charge the appellant was made by the Attorney General; that the issue whether any immunity is conferred by **Section 87** of the **Local Government Act** is an issue to be determined by the trial magistrate; that immunity is a defence raised by the appellant and this can Page 6be canvassed before the trial magistrate; that the Directorate of Personnel Management Circular dated 31st August 2000 was addressed to all Permanent Secretaries and Heads of Department and the same applies to the appellant.
13. The Principal State Counsel Mr. Onyiso urged us to dismiss the instant appeal and uphold the findings of the trial judge; that there is nothing illegal in the prosecution of the appellant; that there is no doubt the appellant made full per diem payments in contravention of law and applicable circulars; that the appellant attempted to obtain after the event authorization to regularize the unlawful payment but his attempt did not succeed; that in this appeal, the appellant is raising issues on merits of his defence which issues should be raised and canvassed before the trial magistrate; that whether or not the appellant was a civil servant is an issue to be determined by the trial magistrate; that the learned judge did not err in making his findings and determinations; that the appellant has not raised any issue on procedural impropriety of his arraignment and prosecution before the trial magistrate.
14. In reply to the respondents' submissions, counsel for the appellant urged that immunity is a bar to action and not a defence on the merits.
15. We have evaluated the rival submissions by learned counsel and examined the record of appeal. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in **Selle -vs- Associated Motor Boat Co. [1968] EA 123**, thus:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appear either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. 270).”
16. The gist of this appeal is that the learned judge erred in law in failing to find that **Section 87** of the **Local Government Act** conferred immunity from prosecution to the appellant; that the appellant was not a civil servant and that the decision to prosecute the appellant was made by the 1st respondent and not the Attorney General. The appellant also contend that his prosecution is a violation of his fundamental rights and freedoms.

17. This court in **Michael Sistu Mwaura Kamau -v- Ethics & Anti-Corruption Commission & 3 others (2015) eKLR**, held that proceedings before a court of law should not be stopped on the basis of speculation or apprehension. In arriving at our decision, we are guided by dicta in the case of **Peter O. Ngoge vs Francis Ole Kaparo and others, SC Petition No. 2 of 2012**, where the Supreme Court observed that in the interpretation of any law, the guiding principle is that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law.
18. The appellant apprehends that his continued prosecution will violate his fundamental constitutional rights and freedoms. There is a dispute as to who made the decision to charge and prosecute the appellant. The appellant asserts that the decision was made by the 1st respondent while the 1st respondent contend that consent to charge and prosecute the appellant was obtained from the Attorney General. In our view, this is a disputed fact that must be determined by the trial of facts which is the trial magistrate's court. Further, the trial magistrate is best placed to determine in the first instance whether consent of the Attorney General to prosecute is a material ingredient to prosecution of an offence under the **Ant-Corruption and Economic Crimes Act**. Further, the magistrate's court is best placed to determine in the first instance the legal effect and inferences to be drawn from the letter dated 5th October 2006 from the Kenya Anti-Corruption Commission to the Permanent Secretary of the then Ministry of Local Government.
19. We are cognizant that the appellant is urging this Court to stop his prosecution. The Constitution is replete with the provisions on separation of roles, powers and functions. In principle, it is not the work of courts to interfere with other State organs unless it can be shown that they have violated the constitution; each State Organ must be allowed to function without interference. (See also **Judicial Service Commission v. Speaker of the National Assembly and 8 Others, Nairobi HC Petition No.518 of 2013**). It is the duty of this Court to protect not only the functional, administrative and operational independence of the Office of the Attorney General and the office of the then Anti-Corruption Commission but also to protect the applicant and ensure that in exercise of their functions, the AG and the then KACA must have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process. In this context, functional, administrative and operational independence entails that the respondents in exercising their autonomy and carrying out their functions they do so without receiving any instructions or orders from other State organs or bodies and have regard to *inter alia* public interest and not to abuse the legal process.
20. It was submitted that the learned judge erred in failing to note that it is in the public interest not to prosecute the appellant. In considering public interest as a criterion for determining whether or not a person should be prosecuted, we have asked ourselves whether as a general rule it is in public interest to stop the Attorney General or the then KACA from investigating and prosecuting any criminal offence on the basis that such investigation or prosecution is a violation fundamental rights and freedoms because it may lead to arrest and prosecution of an individual. The *raison detre* for the existence of the then KACA and the prosecution powers bestowed then upon the Attorney General was investigation and prosecution of any and all alleged criminal offence. If we are to allow this appeal, this Court would be imposing a restriction on the then constitutional prosecutorial powers of the Office of Attorney General and the then KACA.
21. In our considered view, the grounds of appeal identify defenses that may be raised by the appellant before the trial magistrate's court. We are of the view that the trial magistrate's court is the best forum to hear and evaluate the evidence tendered and the merits of any defence raised. In this regard, we adopt the statement by this Court in **Uwe Meixner & Another -v- The Attorney General, Civil Appeal No. 131 of 2005** where it was stated that it is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. The Senior Principal Magistrate's Court at Kibera has the professional competence to consider and evaluate any constitutional issues and any applicable defence raised by the appellant. As observed by the Supreme Court in **Peter O. Ngoge vs Francis Ole Kaparo and others, SC Petition No. 2 of**

2012, the chain of courts in Kenya and for that matter the Kibera Magistrate's court has competent office holders with requisite training and skills to hear and determine any defence that the appellant may proffer. This Court is not a trial court to determine the factual merits and cogency of defenses available to the appellant; the proper forum to raise and urge any defence is the trial court. In our view, public interest dictates that the rights of the appellant cannot be violated if he is given an opportunity to raise and urge his defence before the trial magistrate.

22. On the issue that the appellant's constitutional rights is violated if his prosecution continues, we adopt the dicta by this Court in **Helmuth Rame -v- R Criminal Application No. 1 of 2015** where it was stated that should it be found after trial that the appellant's rights will have been violated, then he has a remedy in damages. In totality, we find that this appeal has no merit and is hereby dismissed with costs.

Dated and delivered at Nairobi this 1st day of July, 2016.

M. K. KOOME

JUDGE OF APPEAL

G.B.M. KARIUKI

JUDGE OF APPEAL

J. OTIENO-ODEK

JUDGE OF APPEAL

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

DEPUTY REGISTRAR