REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC JUDICIAL REVIEW NO. 25 OF 2020

HENRY KIPLAGAT KIPROTICH.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION (DPP).....1ST RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSIONS (EACC).....2ND RESPONDENT

RULING

Introduction

1. By its Notice of Motion dated **16th June 2021** brought under Articles 21, 165 (3)(d) and (4) of the Constitution and Section 10 of the Judicature Act the applicant seeks the orders that: -

"i.) Spent

i.) The Court be pleased to certify that the subject matter of Petition No. 25 of 2020 raises substantial questions of law and matters of public importance requiring that the petition be certified as fit for hearing and determination by an uneven number of judges.

ii.) That upon certification of Petition No. 25 of 2020, the same be referred to the Honourable Chief Justice for empanelment of a bench of an uneven number of judges to hear and determine the petition as the Honourable Chief Justice may determine.

iii.) Any further orders that the court may deem just and fit to grant."

2. The application is based on the grounds on the face thereof and the supporting affidavit of Angela Okallo, Prosecution Counsel in the office of the DPP, sworn on 16th June, 2021. The gist of the application is that the petition filed by the Ex parte Applicant herein raises substantial questions of law that are of public importance.

3. In the supporting Affidavit Miss Okalo deposes that in the Petition filed on 2nd December, 2020 the Petitioner seeks orders of certiorari to quash the charges brought against him in Milimani Chief Magistrates ACC No. 20 of 2019 and prohibition orders against the applicant from bringing similar charges against him. She deposes that the petition raises substantial questions of law necessitating the empaneling of an uneven number of judges due to the potential repercussions of its impending determination; that the prayers sought by the petitioner would have severe implications on the applicant's powers specifically with regard to its

decision to charge and that the applicant is concerned about the possibility of conflicting decisions emanating from judges of equal status and the effect it would have on the administration of justice by dint of Article 157(11) of the Constitution.

4. The purported substantial questions of law cited are:-

"i.) Whether under articles 3, 10, 19, 20, 21, 25, 27, 47, 48, 50, 79, 153(4)(a) and 249 of the constitution of Kenya the Applicant can lawfully fail to commence criminal proceedings against a state officer, that is the Cabinet Secretary National Treasury without violating the provisions of article 157 of the Constitution of Kenya;

ii.) Whether in exercise of powers conferred upon the Applicant under article 157 of the Constitution, criminal proceedings can be initiated against a Cabinet secretary as the one concerned with the overall functions of the Ministry and whether he is accountable individually for the exercise of his powers and the performance of his functions under the law;

iii.) Whether cabinet secretaries are immune to criminal prosecution in respect of any acts and omissions punishable by law occasioned in the course of duty;

iv.) Whether a decision to prosecute a cabinet secretary can be faulted on account of political pronouncements by political leaves that have no nexus to the subject matter of the criminal proceedings and/or the evidence available to the DPP;

v.) Whether Article 23 of the Constitution of Kenya as interpreted vis a vis the settled doctrines on common law on judicial review and administrative action revolutionized the jurisprudence on prerogative orders in Kenya and therefore the test created under the Associated Provincial Picture Houses Ltd v Wednesday Corporation [1948] 1 KB 223 decision still applies;

vi.) Where the DPP, after having observed procedural propriety and applied his mind to constitutional requirements regarding the Decision to Charge and upon reaching a rational conclusion in respect thereof whether the courts can still review that decision and substitute in its place the court's own decision.

vii.) Whether the court may interfere with the decision to charge in the absence of any evidence or establishment of any procedural impropriety or irrationality on the part of the DPP.

viii.) Whether the DPP is required to replicate the trial process including repeating full disclosure and place all its evidence and witnesses before and or turn the High Court into a trial for a and or argue and establish the factual basis and or the validity and or the substance of its charges before the High Court;

ix.) The jurisdictional distinction of the High court and that of the DPP on exercise of prosecutorial discretion and whether the High Court is rendering itself as an appellate forum over the opinion of the DPP

x.) The respect for the hierarchy of courts and jurisdictional deference as espoused under Article 162 & 169 of the Constitution of Kenya are germane to the practice of law generally and should be observed at all times so as to inculcate a culture of respect for the Rule of Law.;

xi.) The interpretation of Article 201 of the Constitution vis a vis the Public Finance Management Act (PFMA) on prudent financial management

xii.) Application of Chapter 6 of the Constitution to Cabinet secretaries where the Constitution confers upon them the power to delegate public authority to a state officer/public officer under the constitution or any other written law; and

xiii.) Whether the High Court is bound by the doctrine of stare decisis and if so in the case of conflicting judicial decisions, a judge of the concurrent jurisdiction or a subordinate court has the discretion to cherry pick on what decision to follow on a similar question."

5. The application proceeded by way of written submissions.

6. Counsel for the applicant summarised its arguments as follows: -

"a) The Applicant/1st Respondent meets the threshold to merit empanelment of an uneven number of judges as per Article 165(4) of the Constitution.

b) The application raises substantial questions of law of great public importance to merit recommendation for hearing and determination by a bench of an uneven number of judges.

c) The applicant/1st Respondent has presented material particulars so as to demonstrate real prejudice that may be occasioned to him if the orders sought are no granted."

7. Counsel submitted that the issue for determination in this Notice of Motion is whether the JR Application filed by the exparte applicant raises a substantial question of law. She cited three cases where the phrase "substantial question of law" was defined. The said cases are:- **SIR CHUNILAL MEHTA & SONS LTD v CENTURY SPINNING AND MANUFACTURING CO. LTD AIR 1962 SC 1314** where the Supreme Court of India stated:-

"a substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial."

· **PHILOMENA MBETE MWILU v DIRECTOR OF PUBLIC PROSECUTION & 4 OTHERS [2018] eKLR** where Mwita J stated:-

"…… that a question of law would be a substantial question of law if it directly or indirectly affects the rights of parties; there is some doubt or difference of opinion on the issues raised and that the issue is capable of generating different interpretations. If however the question has been well settled by the highest court or the general principles to be applied in determining the question before court have been well-settled, the mere application of those principles to a new set of facts presented in a case before the court would not on their own constitute a substantial question of law. There must be the possibility of the matter attracting different interpretations or opinion in its interpretation or application of the principles espoused in the matter to make it a substantial question of law. All this notwithstanding, it is up to the individual judge to decide whether the matter raises a substantial question of law for purposes of reference."

· **OKIYA OMTATAH OKOITI & ANOTHER VS ANNE WAIGURU –CABINET SECRETARY, DEVOLUTION AND PLANNING AND 3 OTHERS (2017) eKLR** where the Court of Appeal held:-

"42. There is therefore wisdom to be gained from the pronouncements of the Supreme Court of Kenya respecting interpretation of Article 163(4)(b). In Hermanus Phillipus Steyn v Giovanni Gnechi- Ruscone [2013] eKLR the Supreme Court of Kenya pronounced governing principles for purposes of certification under Article 163(4)(b) some of which are relevant in the context of certification under Article 165(4). Drawing therefrom, we adopt, with modification, the following principles:

"(i) For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the Court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;

(ii) The applicant must show that there is a state of uncertainty in the law;

(iii) The matter to be certified must fall within the terms of Article 165 (3)(b) or (d) of the Constitution;

(vi) The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought."

43. It is our judgment therefore, that whether a matter raises a substantial point of law for purposes of Article 165(4) of the Constitution is a matter for determination on a case-by-case basis. The categories of factors that should be taken into account in arriving at that decision cannot be closed."

8. Counsel submitted that the mandate of the 1st Applicant is clear and in support of this submission she cited the decision of Majanja J in the case of **THUITA MWANGI & 2 OTHERS v ETHICS & ANTI-CORRUPTION COMMISSION & 3 OTHERS [2013] eKLR** that:-

"39. The State's prosecutorial powers are vested in the DPP under Article 157 of the Constitution, the pertinent part which provides as follows;

(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—

institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.

40. The decision to institute criminal proceedings by the DPP is discretionary. Such exercise of power is not subject to the direction or control by any authority as Article 157(10) stipulates that;

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority."

9. Counsel decried the various interpretations by the courts as to the extent to which the applicants **"decision to charge"** can be reviewed. She submitted that some courts have based their decisions on **"proof of violation of constitutional powers"** and others on **"lack of sufficient"** evidence issues which in her view should be determined by trial courts. She cited as an example the case of **RICHARD MALEBE v DIRECTOR OF PUBLIC PROSECUTIONS & 2 OTHERS [2020] eKLR** where she submitted the court took a liberal approach and held that:-

"On the contrary, a substantive review of the exercise of the DPP's decision must necessarily involve an assessment of the merit of the decision in the context of the threshold set for the DPP by the Constitution..... It cannot be disputed therefore that the position of our law is that in certain, albeit limited, circumstances, the court may properly inquire into the propriety of the exercise of the discretion of the DPP to prosecute. Such an inquiry, as the cases above illustrate, must be undertaken in the clearest of cases. The question then, is whether the present case falls into that bracket. It would do so, as emerges from the cases set out above, if the facts and circumstances demonstrate a violation of the constitutional rights of the petitioner, or an improper exercise of the DPP's prosecutorial discretion conferred under the Constitution."

10. Counsel also cited the case of **UWE MEIXNER & ANOTHER VS ATTORNEY GENERAL [2005] eKLR and** the case of **MUMO MATEMU v TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS [2013] eKLR** where the court stated:-

"(56) The question then becomes, what is the standard or the test of the review" It was the contention of the appellant that the standard of review must be deferential given that appointments are committed to the other organs of government. In view of our constitutional design and the institutional competences attendant to it, it seems to us that this view cannot and has not been seriously contended in principle by any of the respondents. Deference is multi-directional, and we are prepared to hold that in the same way the other branches are to defer to the jurisdiction of the courts, the courts must also defer to the other branches where the constitutional design so ordains. We hold that the standard of judicial review of appointments to State or Public Office should therefore be generally deferential, although courts will not hesitate to be searching, where the circumstances of the case demand a heightened scrutiny provided that the courts do not purport to sit in appeal over the opinion of the other branches."

11. Counsel contended that the decisions by various courts on the question of review of the Applicant's **"decision to charge"** based on lack of sufficient evidence "have opened a floodgate of litigation such as the petition in this case and it is due to this trend that the applicant raises the substantial questions of law which it seeks to have heard by an expanded bench.

12. Counsel further submitted that noting the grave effects that decisions of the High Court would have on the DPP's mandate under Article 157 of the Constitution and ultimately the public interest which the DPP is under a duty to protect the applicant is convinced that the issues raised are substantial as they directly affect the rights of the applicant, the public interest and the results transcend the circumstances of this case and because such decisions have ripple effects in criminal matters. Counsel contended that the substantial questions of law raised have not been determined by the highest court and the general principles are vague leaving parties to select the principles that best suit them. Counsel contended that the failure by the High Court to pronounce itself with finality on the issue could easily cripple criminal proceedings in all subordinate courts.

13. On what constitutes general public importance Counsel cited the cases of: - **HERMANUS PHILLIPUS STEYN v GIOVANNI GNECHI – RUSCONE [2013] eKLR, DELMONTE KENYA LIMITED v COUNTY GOVERNMENT OF MURANGA & 2 OTHERS [2016] eKLR** and submitted that in executing his mandate the 1st Applicant works at safeguarding the best interest of the public through prosecution of criminal cases including corruption and economic crimes and as such the issues are of great importance not just to the applicant but to the public. She implored this court therefore to exercise its discretion in the applicant's favour and hence refer this petition for empanelment. Counsel however submitted that while the 1st Applicant is alive to the principle that the decision of a single judge has the same jurisprudential value as that of an expanded bench in these kind of applications each case must be considered on its own merit.

14. The Respondent opposed the application through a replying affidavit sworn on 14th July, 2021. In summary it is the respondent's case that the application is bad in law for being brought too late in the day hence in violation of Article 159 (2) (b) & (e) of the Constitution the same having been filed after the close of pleadings; that the application is an afterthought and brought to delay resolution of the Judicial Review Petition brought by the respondent; that the request for empanelment is in violation of the tenets of Article 165 (4) of the Constitution and further that the issues raised by the applicant are not novel and neither do they raise substantial questions of law.

15. In their submissions Counsel for the Respondents contended that most of the issues raised are moot and are not so complex or difficult to warrant setting up of a three judge bench. Counsel submitted that empanelment should be an exception rather than the rule and cited the case of **WYCLIFFE AMBETSA OPARANYA & 2 OTHERS v DIRECTOR OF PUBLIC PROSECUTIONS AND ANOTHER [2016] eKLR** where the court held that:-

"25. …..Whereas the constitution permits certain matters to be heard by numerically enlarged bench, that is an exception to the general legal and constitutional position and it is in my view an option that ought not to be exercised lightly."

16. Counsel contended that in any event the decision of the expanded bench is no more superior to that of a single judge. To support this submission counsel cited the case of **PETER NGANGA MUIRURI v CREDIT BANK LIMITED & ANOTHER CIVIL APPEAL NO. 203 OF 2006** and the cases of **HARRISON KINYANJUI v ATTORNEY GENERAL & ANOTHER [2012] eKLR and VADAG ESTABLISHMENT v SHRETTA & ANOTHER NAIROBI HC Misc CC No. 559 of 2011.** Counsel also relied on the case of **SOSPETER OJAAMONG & OTHERS v DIRECTOR OF PUBLIC PROSECUTION & ANOTHER [2021] eKLR.**

DETERMINATION

17. The issue that arises in this application is whether the Applicant has made out a case to warrant this court to refer this petition to the Chief Justice for empanelment of a bench of an uneven number of Judges as provided in Article 165 (4) of the Constitution.

18. The principles governing applications of this nature are now settled. In the case of **OKIYA OMTATA OKOITI & ANOTHER v ANNE WAIGURU & OTHERS (supra)** the Court of Appeal adopted with modification the principles for certification of appeals under Article 163(4)(b) of the Constitution laid down by the Supreme Court in the case of **HERMANN PHILLIPUS STEYN v GIOVANNI GNECHI RUSCONE [2013] eKLR** and imported them into applications for certification under Article 165 (4) of the Constitution. I have cited those principles at length at paragraph 9 of this ruling and I see no need reproduce them again.

19. Applying those principles to this application it is my finding that this application does not meet the threshold for certification under Article 165(4) of the Constitution in that firstly, the applicant has not demonstrated to this court that the issue or question of the extent to which a court can review the Applicant's **"decision to charge"** is novel or that it raises a substantial issue of law. That question has been litigated and adjudicated by several judges of the High Court and it is not new, a fact which was admitted by

Counsel for the Applicant by raising concern regarding what she refers to as varying decisions of the courts. I am not however persuaded that empanelment will cure the varying decisions that arise from the courts on that issue given that it is trite and it has been so held in various cases that the decision of an enlarged bench of the High Court holds the same jurisprudential value as that of a single High Court Judge (see the cases of **SIR CHUNILAL MEHTA & SONS LTD v CENTURY SPINNING AND MANUFACTURING CO. LTD (SUPRA)** and the case of **HARRISON KINYANJUI v ATTORNEY GENERAL & ANOTHER [2012] eKLR.**

It is therefore not clear to me how empanelment will settle or cure that question when the decision of the expanded bench of the High Court will not bind the other judges of the High Court. In my view what would settle the question would be subjecting the varying decisions to an appellate process. That ground must therefore fail.

20. Secondly it is my finding that the Applicant has not demonstrated that the question raised will transcend the circumstances of this case and that it will have a significant bearing on the public interest in the war against corruption and have the effect of crippling criminal cases in the trial courts. He who asserts must prove; a mere assertion such as is being made by Counsel for the Applicant is not sufficient. It is trite that each case is determined on its own facts and or merits and it is unlikely that the merits of this case can be imported into another case in a blanket manner without the party therein bringing him/herself to the circumstances of this case. Besides the submission that it will transcend other cases, that it will affect the public interest in the war against corruption and that it will cripple criminal cases in the lower courts is in my view merely speculative and cannot be the basis upon which this court can exercise its discretion in favour of the applicant.

21. Further, this court is not convinced that the Applicant will suffer any prejudice if this application is not granted. This is because it will have an equal opportunity as the Respondent to present its case in the Judicial Review proceedings.

22. For the aforegoing reasons, I find that the application has no merit and it is dismissed.

Dated, signed and delivered electronically this 3rd day of November, 2021.

E. MAINA

JUDGE