Case Number:	Revision E002 of 2021
Date Delivered:	19 May 2021
Case Class:	Criminal
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	Mumbi Ngugi
Citation:	Joram Opala Otieno t/a Mactebac Contractors & 3 others v Director of Public Prosecutions [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	Hon. L.N. Mugambi (CM)
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

ACEC REVISION NO E002 OF 2021

JORAM OPALA OTIENO T/A MACTEBAC CONTRACTORS............1ST APPLICANT

DELTRACK ICT SERVICES AND SELTRACK CONSULTANT..........2ND APPLICANT

CAROLYNE ANYANGO OCHOLA..3RD APPLICANT

PATROBA OCHANDA T/A DOPLHUS SOFTWARES, JOYUSH SOFTWARE

7 & SWYFCON ENGINEERING...4TH APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS ....RESPONDENT

(Being an application for revision of the ruling in Milimani Chief Magistrate Case No. E 018 (Hon. L.N. Mugambi (CM) dated 21st December 2021)

RULING ON REVISION

1. The applicants are amongst 11 individuals and 5 limited liability companies charged in **Chief Magistrates Court Anti-Corruption Case No. E018 of 2020** with various offences *inter alia:*

a. Conspiracy to commit an economic crime contrary to section 47A (3) as read with section 48 of the Anti-Corruption and Economic Crimes Act No.3 of 2003;

b. Conflict of interest contrary to section 42(3) as read with section 48 of the Anti-Corruption and Economic Crimes Act of (2003); and

c. Money laundering contrary to sections 3(a) (i) as read with section 16 of the Proceeds of Crime and Money Laundering Act and unlawful acquisition of public property contrary to section 45(1) as read with section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

2. The applicants state that they took plea on 27th August 2020 but upon inspecting the charge sheet thereafter, they realized that it contained a plethora of duplex charges. They contend that the counts preferred in the charge sheet are 22 which they allege is manifestly prejudicial to them. They further state that on 21st October 2020, Zachariah Okoth Obado, the 1st accused before the trial court (but who is not an applicant in the present application) filed an application seeking orders *inter alia* that the trial court directs the respondent to elect not more than 12 counts out of the 22 counts preferred to proceed with at the trial of the applicants. The application was, however, dismissed by the trial court in its ruling dated 21st December 2020.

3. The applicants have now filed the present application brought by way of Notice of Motion under Certificate of Urgency dated 22nd February 2021. The application is expressed to be brought under Articles 10, 12(1), 19(2), 20, 24, 25(b), 27, 28, 31, 47, 49, 50, and 156 of the Constitution, section 134, 137, 362 and 364 of the Criminal Procedure Code (CPC), Articles 5 and 7 of the African Charter on Human and Peoples' Rights and Article 14 of the International Convention on Civil and Political Rights. They ask the court to grant the following orders:

a. Spent

b. Spent

c. That this Honourable Court be pleased to review and set aside the ruling issued by the Honourable Chief Magistrate L. N. Mugambi (Mr.) delivered on 21st December 2021(sic) in Milimani Chief Magistrates Court Anti-Corruption Case No. E018 of 2020.

d. That this Honourable Court do issue an order finding that the Charge Sheet in Milimani Anti-Corruption Case E018/2020: R v Okoth Obado & 15 others is overloaded;

e. That this Honourable Court do issue an order finding that the Charge Sheet in Milimani Anti-Corruption Case E018/2020: R v Okoth Obado & 15 others is duplex;

f. That upon granting orders to prayer 4 and 5. This Honorable Court do issue the substitution of the impugned charge sheet by the prosecution to reflect no more than 12 charges.

g. That this Honourable Court do issue other directions and/or orders as the court may deem fit.

h. That costs of this application be in the cause.

4. The application is based on the grounds set out in the application and is supported by an affidavit sworn by the 1st applicant, Joram Opala Otieno, on 22nd February 2020.

5. The respondent opposed the application and filed Grounds of Opposition dated 9th March, 2021 and a replying affidavit sworn by Evah Kanyuira on 25th February 2021.

6. Pursuant to directions issued on 14th April 2021, the application was canvassed by way of written submissions.

The Applicant's Case

7. In their written submissions dated 6th April 2021, the applicants identify three issues for determination. The first is whether the trial court erred in law and fact in failing to find that the charge sheet is overloaded and therefore undermining a fair trial and fundamental rights and freedoms. The second issue is whether the trial court erred in fact and law in failing to find that the charge sheet is defective for duplicity and 'numerosity' (sic) of counts. Thirdly, they ask the court to determine whether their application merits the condition for grant of the orders sought.

8. The applicants argue that continuation of their trial without alteration of the charge sheet goes against their right to fair trial protected under Article 25(c) and 50 of the Constitution. They contend that the right to a fair trial commences from the moment a person becomes a suspect or is arraigned in court, support for this submission being placed on the decision of the Supreme Court of India in **Rattiram v State of M.P. [12]** which was cited by the court in **Joseph Ndungu Kagiri v Republic (2016) eKLR** where the court held that:

"Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracize injustice,

prejudice and favoritism…" "Decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be occasioned to the accused."

9. The applicants also rely on, among others, the decisions in **Stephen Njue Nyaga v Director of Public Prosecutions [2016] eKLR** which had been cited in **Richard Leguro Ramacha & 2 others v Republic [2012] eKLR**; **Ochieng v Republic [1985] KLR 252** and **Eliphaz Riungu v Republic [1977] eKLR** in support of their argument that it was undesirable to charge an accused person with so many counts in one charge sheet as that may occasion prejudice. It is their argument that an accused person should be charged with not more than 12 counts.

10. According to the applicants, the plethora of charges may cause embarrassment to them and difficulty in the prosecution of the case. In their view, the charge sheet was overloaded and goes against the law governing the drawing of charge sheets under sections 89 to 90 of the CPC. Further, that the Learned Magistrate has a duty to draw the charge sheet or cause it to be drawn as provided under section 90 of the CPC, which he had not done. Should they be convicted on the basis of the charges as drawn, they would be deprived of their rights to freedom and security of the person under Article 29(a) of the Constitution.

11. In support of their contention that the charges against them were duplex, the applicants contend that the trial court erred in fact and law in failing to find that the charge sheet is defective for duplicity. It is their contention that the charge sheet does not conform to the requirements of section 134 of the CPC, which sets out the manner in which charges should be drawn.

12. It is the applicants' submission, finally, that this court is vested with supervisory jurisdiction under Article 165(6) and (7) of the Constitution as well as sections 362 and 364 of the CPC. They ask the court to issue an order quashing the decision of the trial court made on 21st December 2020 as it infringes on their right to fair trial.

The Response

13. In the Grounds of Opposition dated 9th March 2021, the DPP argues, first, that the application is not merited and should be dismissed *sua sponte* as there is no factual or legal basis for grant of stay orders. Secondly, that the impugned orders by the Learned Magistrate did not touch on the applicants' case but were in respect to the 1st accused who is not an applicant. Thirdly, that the application is so weak and feeble since none of the applicants have been charged with more than 12 counts and that the application is based on a clear misreading of section 135 of the CPC and gross misapprehension and misunderstanding of the term duplex charge as no factual or legal basis has been demonstrated for issuance of the stay orders. Further, that the trial court had issued pre-trial directions and the matter was set for mention on 12th March 2021 for purposes of fixing hearing dates and finally, that grave prejudice will be occasioned on the other accused persons should the stay orders be granted.

14. In its written submissions dated 1st April, 2021, the respondent identifies five issues as arising for determination. These are first, who is the appropriate party to apply for revision where there are joint offenders; whether the court can direct the respondent on the number of counts to charge; whether the charge sheet is overloaded; whether the applicants' rights have been violated and what remedies are available to the applicants. It argues that the charges preferred against the applicants arise from facts which are part of a series of similar transactions and therefore are properly charged together in one trial in accordance with sections 134, 135 and 137 of the CPC.

15. It is its case further that the applicants have failed to demonstrate how their rights to a fair trial have been limited, constrained or threatened since the prosecution intends to line up all witnesses within reasonable time and the applicants will have all the opportunity to cross-examine them under Article 50. The respondent further submits that the applicants have been charged with not more than 12 counts and they have not demonstrated that they will face any hardships in presenting their defence. According to the respondent, it is only the 1st accused, who is not a party to this application, who has been charged with a total of 22 counts.

16. The respondent submits further that there is no statute, rule or guideline that stipulates that the prosecution cannot prefer more than 12 counts against an accused person. It submits that the Court of Appeal decision in **Ochieng v Republic** (supra) did not bar the charging of an accused person with more than 12 counts but merely expressed a desire that an accused person ought not to be charged with more than 12 counts. Further, that it is in any event undesirable to try separately offences arising from related transactions.

17. The respondent makes further detailed submissions on each of the issues it has identified. However, as will be evident from the following analysis, I need not enter into a consideration of these submissions.

Analysis and Determination

18. I have read and considered the pleadings and submissions of the parties in this matter. I have also noted the issues that the parties have identified in their submissions as arising for determination. In my view, however, the sole issue for determination is whether the applicants have placed before the court such material as would bring their application within the revisionary jurisdiction of the High Court under the Constitution and the CPC.

19. The applicant asks the court to exercise supervisory powers under Article 165 of the Constitution and section 362 of the CPC in respect of the ruling of the trial court dated 21st December 2020. Article 165 (6) and (7) which are relevant for present purposes provide as follows:

165 (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

20. At section 362, the CPC provides that:

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself <u>as to the correctness, legality or propriety</u> of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

21. The ruling which the applicants seek revision of was in respect of a Notice of Motion application dated 21st October 2020. It was filed by the 1st accused before the trial court, Governor Okoth Obado. The respondent has argued that the applicants seek revision of an order by the trial court that did not touch on their case but instead was in respect of the 1st accused who is not an applicant in the instant application.

22. The question that, in my view, this court should address itself to is whether the applicants have satisfied the requirements of the Constitution and the CPC with regard to the exercise of the Court’s supervisory powers over subordinate courts and the powers of revision as provided under the CPC. Under section 362 of the CPC, the court may, on its own motion or on the application of a party, call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

23. The issues that the applicants have placed before the court relate to the question whether the charge sheet before the trial court is overloaded or defective for duplicity. The trial court before which the application was made by Governor Okoth Obado considered the charge sheet and came to the conclusion that the charge sheet before it was proper. The applicant before the trial court, Okoth Obado, had been charged with 22 counts. From the documents before me, the present applicants have been charged with 12 counts. The application before the trial court related to the charges against the 1st accused. The decision of the trial court also related specifically to the charges against the 1st accused.

24. It seems to me then that the respondent is correct in its submissions that the applicants cannot properly seek revision of a decision that has no bearing whatsoever upon them. In any event, the present applicants have been charged with 12 counts, the number of charges that they submit is proper, and which they ask the court to direct the respondent to prefer against them.

25. More crucial, however, is the question whether the application meets the test for revision under section 362 of the CPC. It is trite that in a revision application, the court is required to satisfy itself as to the “***<u>legality, correctness or propriety</u>*”** of any ***‘finding,***

sentence or order' of the trial court.

26. Indeed, the applicants recognize this in their submissions on the second issue that they have identified, their submission being that the court should determine whether there was incorrectness, illegality or impropriety in the court finding that the charge sheet is not defective for duplicity. From the constitutional and statutory provisions set out above, however, the revisionary jurisdiction of the High Court is to be invoked only where the subordinate court has made a decision whose correctness, legality or propriety is in contention. An application for revision should not be a substitute for an appeal.

27. In its decision in **George Aladwa Omwera v R [2016] eKLR**, the court cited with approval the decision of the Supreme Court of India in **Veerappa Pillai vs Raman & Raman Ltd and Others 1952 AIR 192** in which it was held that:

"The supervisory powers are obviously intended to enable the High court use them in grave cases where the subordinate tribunal or bodies or officer acts wholly without jurisdiction or excess of it or in violation of the principles of natural justice or refuses to exercise jurisdiction vested in them or there is an apparent error on the face the record and such action, omission, error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide and large as to enable the High Court to convert itself into a Court of Appeal and examine for itself the correctness of the decision impugned and decide what the proper view on the order be made…."

28. In dismissing the application for revision, the court in **George Aladwa Omwera v R** (supra) concluded that the revisionary jurisdiction: ***"…is only exercised to correct the manifest error in the order of the subordinate courts."*** The powers of revision vested in the High Court should not be exercised in a manner that turns the court exercising the powers of revision into an appellate court, nor should it be exercised mainly because the lower court has taken a wrong view of the law or misapprehended the evidence tendered.

29. A perusal of the application before me and the applicants' submissions reveals that the applicants are challenging the merits of the decision made by the trial court on the application by the 1st accused in the trial before it. They want the court to find that the trial court 'misdirected itself in law and fact' in the findings it made on whether the charges facing the accused were overloaded for containing more than 12 counts, and in finding that the charges were not duplex.

30. These questions, however, are matters of appeal, not revision. The applicants have not demonstrated that the decision of the trial court was incorrect, illegal or improper in any manner so as to warrant an order of revision under section 362 of the CPC and Article 165 of the Constitution. As the decisions cited above illustrate, on an application for revision, the court cannot convert itself into an appellate court to inquire into the merits of a decision of the subordinate court.

31. In the circumstances, it is my finding that the present application is without merit, and it is hereby dismissed.

DATED SIGNED AND DELIVERED ELECTRONICALLY THIS 19TH DAY OF MAY 2021

MUMBI NGUGI

JUDGE