

REPUBLIC OF KENYA

IN THE MILIMANI ANTI- CORRUPTION COURT

CASE NO. 20 OF 2015

REPUBLIC

Versus

NICHOLAS KARUME WEKE.....1ST ACCUSED

ABRAHAM KIPCHIRCHIR SAAT.....2ND ACCUSED

PETER AYODO OMENDA.....3RD ACCUSED

GODWIN MWAGAE MWAWONGO.....4TH ACCUSED

PRAXIDIS NAMONI SAISI.....5TH ACCUSED

CALEB INDIASTSI MBAYI.....6TH ACCUSED

BRUNO MUGAMBI SIMIYU.....7TH ACCUSED

SILAS MASINDE SIMIYU.....8TH ACCUSED

MICHAEL MAINGI MBEVI.....9TH ACCUSED

RULING

The Notice of Motion dated 13th February, 2024 was filed by the Director of Public Prosecution (herein after referred to as the DPP) seeking the withdrawal of the case against the 1st, 3rd and 5th accused persons under **section 87(a)** of the **Criminal Procedure Code, Cap 75**.

The application is made under **Articles 50, 157 (6) & 159** of the **Constitution of Kenya 2010, section 87(a)** of the **Criminal Procedure Code Cap 75** and **Sections 5,6,23 & 25** of the **Office of Director of Public Prosecutions Act No. 2 of 2013**.

The application is premised on the grounds set on its face. In summary, that the office of the DPP received appeals from the 1st accused person seeking a review of the evidence in this case pursuant to Article 157 (6) (c) 7 (11) of the **Constitution** and sections 4 & 5 of the **Office of the Director of Public Prosecutions Act No.2 of 2013**.

The crux of the DPP review rests on the statement contained in **paragraph (vi)** of the grounds:

“That, upon review of the evidence, the DPP found that there was insufficient

evidence to confirm that the Rig Move price was exaggerated, since it was unclear whether Geothermal Development Company conducted market survey to establish the market price for the Rig Moves and whether the same was communicated to the Evaluation Committee.”

The DPP contended that it is in the interest of administration of justice and fair hearing that the present application be allowed as prayed.

The motion is supported by the affidavit of Naomi Isoe, a Prosecution Counsel in the Office of the DPP sworn on 13th February 2024. She reiterated the grounds and at paragraphs 9 and 10 of the supporting affidavit averred that:

“9. THAT upon review of the evidence and the issues raised by the 1st accused person, the following findings were brought to the attention of the Director of Public Prosecution, as follows;

- 1. In respect of the four accused persons to wit; Nicholas Karume (1st accused), Peter Ayodo Omenda (3rd accused), Praxidis Namoni Saisi (5th accused) and Caleb Indiasi Mbayi (6th accused). Out of the five charges captured in the charge sheet, the four accused persons featured in count 1. The same is in respect to willful failure to comply with the Law relating to procurement contrary to section 45(2) (b) as read with section 48 of the *Anti- Corruption and Economic Crime Act* for confirming an award of Tender No. Ref. GCD/HQS/086/2011-12 in respect of rig Moves which was in excess of prevailing market prices of kshs. 42,747,600/= per Rig Move, was excess of the prevailing market price;**
- 2. The procurement process was dully followed except the failure by the evaluation committee to compare market prices before recommending the award to Bonafide Clearing and Forwarding Limited;**
- 3. Investigations were never conducted to confirm the prevailing market price as at the time the contract was awarded;**
- 4. No statement(s) was recorded to confirm if the GCD conducted market survey to establish the market price for the Rig Moves and whether the same was communicated to the evaluation committee;**
- 5. That on record is an opinion by EACC that the price for Rig Move was exaggerated and this does not qualify to be market survey as required;**
- 6. That Bonafide Clearing and Forwarding Limited was the lowest evaluated bidder.**

10. From the foregoing, the Director of Public Prosecutions directed that charges against the three accused persons be withdrawn under section 87(a) of the Criminal Procedure Code, Cap 75.”

This matter was investigated by EACC. The commission strenuously opposed the withdrawal of the case and filed a replying affidavit sworn by Mohamud Hassan on 21st February 2024 and filed on 22nd February 2024. He averred that he was a member of the team that

conducted the investigations in respect of this case and was authorized to swear the affidavit on behalf of the Commission. According to the investigator, the subject of the investigations was the procurement of Rig Move Services at Menengai Site by the Geothermal and Development Company (GCD) from Bonfide Clearing and Forwarding Limited for the Financial Year 2012/2013 at a cost of kshs. 42,746,000/= per Rig Move when compared to the price procured in the previous Financial Year 2010/2011 at a cost of Kshs. 19,550,000/= per Rig Move. It is the contention of the investigator that the price for the Financial Year 2012/2013 was exaggerated. He insisted that the matter ought to proceed for trial as directed by the Supreme Court in **Petition No. 39 & 40 of 2016**. The investigator challenged the reasons advanced by the DPP for withdrawal of the case and denied that no new evidence was disclosed to merit the change of the decision to charge the accused persons. In addition, he averred that the intended withdrawal of the case was not made in the public interest, the interest of the administration of justice or intended to prevent an abuse of the legal process.

The 1st accused, Nicholas Karume Weke on 26th February 2024 filed an undated replying affidavit in response to the EACC investigator's affidavit. He asserted that the investigator misconstrued the constitutional mandate of the DPP under Article 157 of the **Constitution**. He averred that the EACC investigator misled the court with regard to the price of the Rig Moves and maintained that no public money was lost.

The 3rd accused, Peter Ayodo Omenda swore the affidavit deponed on 22nd February 2024 on his behalf and on behalf of the 5th accused, Caleb Indiatsi Mbayi. He reiterated the DPP powers to discontinue criminal prosecution under Article 159 of the Constitution. He complained that the cherry - picking and prosecution of the remaining three accused persons was not in the public interest. He supported the DPP review of the case and the decision to discontinue the proceedings herein. He added that the DPP was representing the Republic who was the complainant and urged the court to find that the DPP application was merited.

Submissions

The parties highlighted their written submissions before the court.

In the written submissions dated 4th May, 2024, learned Senior Prosecution Counsel Mr. Ondimu submitted that the role of EACC was not prescribed in the Constitution and urged the court not to elevate the commission to a level which was not intended by the framers of the Constitution. Mr. Ondimu extensively submitted on the independence and the state prosecutorial powers vested in the DPP as prescribed in **Article 157** of the **Constitution**. He maintained that EACC was an investigative agency and in opposing the application desired to play the role of "a second prosecutor", a role with no place under the law. In that context, prosecution cited the decisions **Thuita Mwangi & 2 others v EACC & 3 OTHERS [2013] eKLR**, **Ali Hassan Joho v Inspector General of Police & 3 others [2017] eKLR** and **Kinoti & 7 others v Chief Magistrate Court Milimani Law Courts & 4 others [2022] KEHC 11622 (KLR)**. EACC filed written submissions dated 26th March, 2024 and submitted that the DPP application to withdraw the charges has in effect impugned on the

quality of the evidence obtained by the Commission and thus the basis for the reply and the right to be heard in opposing the withdrawal of the case. Learned Counsel for EACC submitted at length and cited instances in **JR Misc. Application No. 502 of 2015** and **JR Msc. Application No. 184 of 2016** where the DPP made submissions in agreement with EACC position that there was sufficient evidence to charge the accused persons with the offences preferred in the present case. It was submitted that the Supreme Court Order in **Petition No. 39 7 40 of 2016** that this matter should proceed for hearing on a priority basis was mandatory. Counsel added that the DPP since 2015 to 2024 was consistent and in support of the prosecution of the accused persons and therefore should not be allowed to make a 360 degree turn and now support the accused persons position after 9 years. EACC placed reliance on the decision **Criminal Revision No. E008 OF 2023 Joseph Kipkoech Sirma v DPP** where it was held that the duty to analyze evidence and finally to pronounce the accused guilty or innocent belongs to the court and not the parties. In the end Counsel complained that the DPP change of position to side with the accused persons after protracted litigation up to the Supreme Court for nearly a decade was capricious, irrational and an abuse of office. EACC took the view that the DPP decision to withdraw the case was not made in the public interest and that the matter should commence hearing as per the original charge sheet.

The 1st accused written submissions are dated 8th March 2024. The 3rd and 5th accused persons' submissions are dated 21st March 2024. The submissions proffered by Learned Counsels for the accused persons Mr. Osiemo and Mr. Achiando are similar. Counsels submitted that the DPP under Article 157 of the **Constitution** was under an obligation to independently review the evidence presented and arrive at a decision whether to institute charges and or discontinue a prosecution. It was submitted that the EACC was not clothed with any authority to compel the DPP to continue the prosecution of accused persons where the DPP was of the opinion that the materials placed before him was insufficient to mount a successful prosecution. It was emphasized that not even a court of law can compel the DPP to undertake a prosecution.

Learned counsel Mr. Achiando submitted that the prosecution of this case is an exercise in futility in view of the DPP's review. He further referred to this court's decision in **ACC NO. E005 OF 2021 Republic v Nofatos Ng'ang'a Munyu & 8 others**. In the **Nofatos Ng'ang'a Munyu** Case, the court had the benefit of hearing the evidence of the key prosecution witnesses. The withdrawal of the case was informed by evidence that there was proper prequalification of the tender in question via registration by the National Treasury. The reasons for the withdrawal of the case and the circumstances are at variance with the present case and thus distinguished.

In regard to the submissions of counsels on EACC participation in the proceedings, I agree that the Commission was not a Victim but an investigating agency. See the decision **Republic v EACC & 2 others Ex parte Stephen Sanga Barawa [2017] eKLR**.

It was contented that the role of EACC as an investigative agency ends at the submission of the investigations report under section 35 of ACECA leaving the prosecution of the case subject to the DPP decision. In ending, counsels for the accused persons urged the court to

disregard the EACC submissions and to allow the DPP application to withdraw the case.

Determination

The history and protracted litigation in this case across the hierarchy of the courts for the last 9 years is a matter of interest in the determination of the present application.

The accused persons after plea taking challenged their prosecution in **High Court Judicial Review Msc Application No. 502 of 2015 Republic v Praxidis Namoni Saisi** and **High Court Judicial Review Msc Applications No. 198 of 2016**. On 19th April, 2016 in **High Court Judicial Review Application No. 502 of 2015**, Odunga G.V. J (as he then was now JJ) prohibited the prosecution of the 5th accused, Praxidis Namono Saisi. On 20th December, 2016 in **High Court Judicial Review Misc. Applications No. 198 of 2016 Peter Ayodo Omenda & 6 others v DPP & 2 others**, Odunga G.V. J (as he then was now JJ) also prohibited the prosecution of the 1st, 2nd, 3rd, 4th, 6th, 7th and 9th accused persons.

On 15th July 2016, following the two (2) High Court decisions in the Judicial Review Proceedings, the prosecution with leave of the court amended the charge sheet.

On 21st October 2016, the prosecution with leave of the previous trial court amended the charge sheet for a second time. This is the current amended charge sheet in force before the court.

On 20th April, 2017 counsel for the 4th accused person, Godwin Mwangae Mwavongo informed the previous trial court that the accused passed on. The date of death was stated as 29th March, 2017. However, the matter was not pursued to verify the alleged death of the 4th accused person or to make orders suitable to the change in circumstances.

On 18th July 2017, the previous trial court allowed the prosecution oral application to withdraw the charges against the 2nd, 6th, 7th and 8th accused persons under section 87 (a) of the **Criminal Procedure Code** following the Court of Appeal decision in **Civil Appeal no. 102 of 2016 Eng Michael Sistu Kamau v EACC, DPP & 3 OTHERS**. The rationale by the Court of Appeal was that, EACC was not properly constituted without a Chairman and commissioners as at the time the matter was investigated and a decision to charge Eng. Kamau was made. The Court of Appeal held:

“This appeal succeeds on the technical ground that the EACC was not properly constituted at the time it completed the investigations and forwarded its report and recommendations to the DPP. From the foregoing anti-corruption constitutional edicts, the parties are at liberty to proceed as they deem necessary on the basis of a properly constituted EACC and within the dictates of the Constitution and the law.”

In my opinion, the arguments by the parties based on the **Eng. Kamau** case is a matter that cannot be mixed and determined with the present application for the reason that it attracts separate and specific factual arguments.

On 20th September 2019, the Court of Appeal in **Civil Appeal no. 2 of 2017** consolidated

with **Civil Appeal no. 184 of 2016 DPP v Praxidis Namoni Saisi, EACC & The Chief Magistrate Anti-Corruption Court at Nairobi** set aside the High Court Judgement in **High Court Judicial Review MSC. Civil Application No. 502 of 2015 Republic v Praxidis Namoni Saisi** and **High Court Judicial Review Misc. Applications No. 198 of 2016 Peter Ayodo Omenda & 6 others v DPP & 2 others**.

The accused persons being dissatisfied with the Court of Appeal Judgement rendered in **Civil Appeal no. 2 of 2017** consolidated with **Civil Appeal no. 184 of 2016 DPP v Praxidis Namoni Saisi, EACC & The Chief Magistrate Anti-Corruption Court at Nairobi** moved the Supreme Court in **Consolidated Petition no. 39 of 2019 and no. 40 of 2019 Praxidis Namoni Saisi & 7 others v DPP & 2 others**. The Supreme Court in a unanimous Judgement rendered on 27th January 2023 dismissed the Appellants petitions and ordered that this case be heard on a priority basis.

Turning to the DPP application, **section 87 (a)** of the **Criminal Procedure Code, Cap 75** relevant to this case provides that the public prosecutor may with the consent of the court at any time before judgement withdraw from the prosecution of any person and upon withdrawal discharge the accused person. The critical question for the trial court called to apply this provision is how to exercise the discretion under **section 87 (a)** of the **Criminal Procedure Code, Cap 75**. In **Republic v Leonard Date Sekento [2019] eKLR**, Nyakundi, J observed that the Provisions of **section 87 (a) (b)** of the **Criminal Procedure Code, Cap 75** are meant to advance the administration of justice and not to frustrate it. The learned judge further observed that a trial court was under a duty to consider the application under **section 87(a)** of the **Criminal Procedure Code Cap 75** subject to Article 157 (6), (7), (8) and (10) of the **Constitution** which vests power upon the DPP to institute, continue or discontinue any criminal proceedings pending before the court.

It is settled law that although Article 157 of the **Constitution** establishes the DPP as an independent office with state prosecutorial powers, the exercise of such power is subject to Article 157 (11) of the **Constitution** which imposes a duty on the DPP to exercise this power with due regard to the public interest, the interest of the administration of justice and the need to prevent abuse of the legal process. This legal position is well articulated in the decisions; **Republic v EACC & 2 others Ex parte Stephen Sanga Barawa (supra)**, **Okiya Omtata Okoiti & 2 others v Attorney General & 4 others [2018] eKLR**, **Republic v Leonard Date Sekento (supra)**, **Republic v Simon Okoth [2017] eKLR**, **Republic v Peter Kinoti Nyamu [2021] eKLR**, **Republic v Faith Wangoi [2015] eKLR**, **Geoffrey K. Sang v Director of Public Prosecution & 4 others [2020] eKLR**, **Ahmed Rashid Jabril & another v DPP [2020] eKLR** and **Kinoti & 7 others v Chief Magistrates Court Milimani Law Courts & 4 others; Sang & 2 others (supra)**. Similarly, the Supreme Court of Kenya affirmed this position in **Petition No. 39 of 2019 (as consolidated with Petition No. 40 of 2019) Praxidis Namoni Saisi & 7 others vs Director of Public Prosecution & 2 others**.

The present application was brought after the Supreme Court decision in **Petition No. 39 of 2019 (as consolidated with Petition No. 40 of 2019) Praxidis Namoni Saisi & 7 others vs Director of Public Prosecution & 2 others**. The Supreme Court at paragraph

98 observed that there was nothing untoward in relation to the charges levelled against the accused persons in the present case and instructed that the case should proceed and be heard on a priority basis. On the express orders of the Supreme Court binding on this Court under Article 163(7) of the **Constitution**, this Court is duty bound to proceed and determine this case on its merits.

The rare contest, by the DPP and EACC now played before this court runs against the Judgement of the Supreme Court. The DPP sudden change of position is an unjustified deviation from his previous submissions on record before the superior courts which supported the charges. On this account, the superficial averments of Naomi Isoe contained in paragraph 9 of the supporting affidavit to the DPP application on the contested facts are without merit. The public interest and the interest of administration of justice in this case lie in hearing of this case on its merits as ordered by the Supreme Court.

In **Director of Public Prosecutions (DPP) v Nairobi Chief Magistrate Court & another [2016] eKLR**, Isaac Leneola, J (as he then was now SCJ) observed that the DPP's powers to discontinue criminal charges are not absolute but are subject to the court's permission. See Article 157(8) of the **Constitution** and section 5 as read with section 25 of the **Director of Public Prosecution Act, No. 2 of 2013**. In the words of the Learned Judge, the application to withdraw or oppose withdrawal would fail if it is rooted in illegality, irrationality and impropriety.

It is my considered opinion that the DPP application to withdraw the charges against the accused persons under section 87(a) of the **Criminal Procedure Code** is not founded on any sound reasoning and is intended to defeat the Supreme Court Judgement.

For the foregoing reasons, in the light of the Supreme Court decision and in the absence of any merited reasons in support of the withdrawal of this case, the DPP application is hereby dismissed.

Accordingly, I order as follows;

1. The matter is fixed for a pre-trial conference on 25th June 2024.
2. The prosecution shall confirm the alleged demise of the 4th accused during the pre-trial conference.
3. There shall be no orders as to the costs of this application.

Dated, signed and delivered this 22nd day of May, 2024

THOMAS T. NZYOKI

CHIEF MAGISTRATE

In the presence of:

Court Assistants: Sankok & Fardhosa

Prosecution Counsel: Mr. Ondimu

1st accused: Present

3rd accused: Present

5th accused: Present

Ms. Nganga Advocates watching brief for EACC

Advocates for the accused persons: Mr. Osiemo Advocate for

the 1st accused

Mr. Achiando Advocate for the 3rd and 5th accused

Thomas T. Nzyoki

Chief Magistrate

22/5/2024

