



THE SUPREME COURT OF KENYA

**BENSON KHWATENGE WAFULA VS. DIRECTOR OF PUBLIC PROSECUTION & 3
OTHERS**

SC PETITION NO. E045 OF 2024

DATE OF JUDGMENT: 11th JULY 2025

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.

Order: Appeal Dismissed

Background

The appellant was at all material times the Company Secretary of Nzoia Sugar Company Limited. Following complaints of misappropriation of funds by some of its employees, the 1st interested party (EACC) undertook investigations into the alleged fraudulent use of the company's funds, amounting to Kshs. 11,212,711/-. The appellant recorded a statement with the said 1st interested party on 15th June 2016. EACC thereafter forwarded its investigation file with recommendations to the respondent, the Director of Public Prosecution (DPP), who proceeded to charge seven suspects with various offences in Bungoma Chief Magistrate's Anti-Corruption Case No. 1 of 2017, **Republic Vs Godfrey Sifuna Wanyonyi & 6 Others**. The appellant was at the time listed as a prosecution witness, his statement was shared with the accused persons at the time, and he was bonded severally to attend court as a witness. However, on 10th January 2018, the appellant was arrested by officers attached to the EACC and was subsequently arraigned in court on 17th January 2018 in Bungoma Chief Magistrate's Anti-Corruption Case No. 1 of 2017, **Republic Vs Godfrey Sifuna Wanyonyi & 6 Others** where he was charged with the offence of wilful failure to comply with the law relating to management of public funds contrary to Section 48(1) of Anti-Corruption and Economic Crimes Act (ACECA).

Aggrieved by the decision of the DPP to transpose him from a prosecution witness to an accused person, the appellant filed **Miscellaneous Application No. 4 of 2018** seeking orders *inter alia* restraining his prosecution in Bungoma Chief Magistrate's Anti-Corruption Case No. 1 of 2017 **Republic Vs Godfrey Sifuna Wanyonyi & 7 Others**, the lifting of his suspension from employment arising therefrom and for the court to issue an order of *certiorari* quashing the decision of the EACC recommending to the Office of Director of Public Prosecution (ODPP) that the appellant be charged with an anti-corruption offence. The appellant also sought an order of *prohibition* prohibiting the ODPP and the trial court from prosecuting, sustaining, proceeding with, hearing, conducting, or in any manner dealing with or completing the trial insofar as it relates to Count XII and the appellant; and, instituting or commencing any other criminal

proceedings against him concerning the alleged loss of public funds amounting to Kshs. 7,793,366/-.

The High Court (*Ongudi, J*) in a judgement delivered on 24th May 2018 held that, despite procedural flaws and the failure to seek leave under Order 53 of the Civil Procedure Rules, the matter would be treated as a constitutional petition and determined on its merits in the interests of justice. On the *insufficiency of evidence*, the court determined that, while the appellant had all along been treated as a prosecution witness, the investigating officer explained how he later obtained evidence incriminating the appellant in the offence that he was later charged with, and that the appellant had failed to prove any evidence of malice or bias on the part of the investigating officer or even the ODPP. She, in addition, concluded that questions surrounding the sufficiency or otherwise of evidence were, in any event, best left to the trial court. On the alleged *defective charge*, the court held that the appellant had not shown the inability of the trial court to deal with the issue. As for his *suspension*, the court affirmed that it was lawful under Section 62 of ACECA, noting that the suspension was not permanent and any employment-related issues would be addressed after the conclusion of the criminal proceedings. Regarding the *stay of proceedings before the Bungoma Chief Magistrate's Court*, the court found no basis to stay the proceedings, the matter having already been fixed for hearing. In the end, the court found no merit in the petition before it and dismissed it with costs.

Aggrieved by the decision of the High Court, the appellant moved the Court of Appeal vide **Civil Appeal No. 264 of 2018**, premised on 15 grounds. The Court of Appeal (*Gatembu, Tuiyott & Ngenye, JJA*) in a judgment delivered on 22nd November 2024 held that the appellant did not demonstrate that the transposition from a prosecution witness to an accused person was malicious or that it violated his rights to a fair trial or was an abuse of power by the DPP. The appellate court also determined that there was no evidence that the DPP, with the sole mandate to prosecute, represented to the appellant that he would not be prosecuted. Furthermore, the appellate court found that the evidence gathered, upon further investigations, informed the decision to charge the appellant, and concluded that the learned Judge of the High Court correctly held that the sufficiency of evidence or defects in the charge sheet fell within the province and competence of the trial court in the criminal proceedings. Ultimately, the appellate court found no basis to interfere with the decision of the High Court and dismissed the appeal with costs to the 1st and 3rd interested parties.

Undeterred, the appellant filed the instant appeal challenging the decision of the Court of Appeal on seven grounds. The Court delineated the following four (4) issues for its determination:

- i. *Whether the court has Jurisdiction to hear and determine the Appeal **and** if so;*
- ii. *Whether the 1st Respondent has the mandate to review its decision, and in particular to transpose a prosecution witness to an accused person;*
- iii. *Whether the Appellants' Rights were violated;*
- iv. *Whether the Appellant is entitled to the relief sought.*

Upon consideration, the Supreme Court determined the appeal as follows:

1. **Issue 1:** The Court noted that the High Court expressly considered the proceedings as a Constitutional Petition. Articles 157, 50 and 25 of the Constitution were actively canvassed and adjudicated upon in the superior courts and therefore, the court found that the appeal raised substantive questions involving the interpretation and application of the

Constitution and falls within the ambit of Article 163 (4)(a) of the Constitution granting this court the jurisdiction to hear and determine the matter.

2. **Issue 2:** The Court found that the 1st Interested Party, EACC, was entitled to conduct additional investigations in accordance with the Office of the Director of Public Prosecution Act and the Decision to Charge Guidelines. However, the court emphasized that the discretion granted to the ODPP must be exercised in good faith, based on credible and admissible evidence, and is subject to Judicial Review under Article 47 of the Constitution. The Court also considered the specific circumstances of the case and agreed with both the High Court and the Court of Appeal that it was the discovery of new evidence by the EACC that influenced the ODPP's decision to convert the appellant from a prosecution witness into an accused person.

3. **Issue 3:** The court held that the appellant is now occupying the position of an accused person in the trial court, and as such, his rights under Article 50 (2) of the Constitution accrue and that he has sufficient opportunity to prepare his defence and present his case at the said court. The appellant's claim of a dual role is therefore unsubstantiated. Regarding whether any prior statements he made while under consideration as a witness might prejudice his trial, the Court found no procedural unfairness, malice, or arbitrariness on the part of the ODPP when making the reclassification. The timing was also not prejudicial to the appellant's case since the main trial had not yet commenced. The Court also concurred with the findings of the lower courts: that this is a matter best evaluated and decided by the trial court, which is suitably positioned to assess the evidentiary and procedural implications of the appellant's reclassification, and whether the charges against him are defective for being based on non-existent laws.

Consequently, the final orders issued by the Court were as follows:

- (a) The Petition of Appeal dated 20th December 2024 and filed on 23rd December 2024 is hereby dismissed.***
 - (b) Each party shall bear their costs of the appeal.***
 - (c) The security for costs deposited in the appeal be refunded to the Appellant.***
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