



**Matsanza v Republic (Criminal Appeal 003 of 2021)  
[2024] KEHC 10555 (KLR) (26 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10555 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL 003 OF 2021  
SC CHIRCHIR, J  
AUGUST 26, 2024**

**BETWEEN**

**JOHN JUMA MATSANZA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellant was charged in the Chief Magistrate's court at Kakamega , with 7 others, of a number of offences under the Anti- corruption and Economic crimes Act , 2003. The Appellant herein was charged with three counts.
2. On count 1 , he was charged with wilful failure to comply with the law relating to management of funds and incurring of expenditure contrary to section 45(2) (b) as read with section 48(1) of the Anti- corruption and Economic crimes Act, 2003. On count 2 he was charged with wilful failure to comply with the law relating to the management of funds and incurring of expenditures contrary to section 45(2) (b) as read with section 48(1) of the Anti- corruption and Economic crimes Act , 2003; and on count 3 he was charged with wilful failure to comply with the Applicable procedures and guidelines relating to procurement and tendering of contracts contrary to section 45(9) (2) (b) as read with section 48(1) of the Anti- corruption and Economic crimes Act , 2003.
3. He was convicted of the first two counts and fined ksh. 400,000 on each count or 2 years imprisonment in default.

**Memorandum of Appeal**

4. Aggrieved by the judgment , he proffered this Appeal and set out the following grounds.



1. That the trial magistrate erred in law and in fact in not considering that at the time the case was brought against the appellant the ethics and Anti-corruption commission was not properly constituted.
2. The trial magistrate erred in law and in fact in not considering the fact that the report and recommendations of the DPP were forwarded when the Ethics and Anti-Corruption Commission was not properly constituted.
3. The judgment passed by the trial court is against the law, incorrect and inconsistent.
4. The learned trial magistrate erred in law and in fact in ignoring the contradictions of the prosecution witnesses and in particular on whether or not members of the inspection and acceptance committee conducted a market survey.
5. The learned trial magistrate erred in law and in fact in basing his decision to convict the appellant on the pronouncement of a valuation report prepared and uttered by unqualified persons and hence gave force to as documentary evidence, a document that is of no evidentiary value.
6. The learned trial magistrate erred in law and in fact in arriving at his verdict based on facts that were not part to the charges read to the appellant and which facts to the charges read to the appellant and which facts therefore he could not be called upon to answer to.
7. The learned magistrate erred by giving weightage to the procedures of direct procurement while the charges the appellants were called upon to answer to had no relation to direct procurement.
8. The learned trial magistrate erred in failing to read and consider the law as a whole and erred in holding that the findings of the evaluation committee was legally and absolutely binding and without room for discretion on the part of the appellants and particularly the procurement unit.
9. The learned trial magistrate erred in law at failing completely to address the constitutionality of the arrest and prosecution of the appellant by failing to appreciate the fact that the investigations having been conducted during the absence of a duly constituted commission were in breach of the constitutional provisions which rendered both the investigations as well as the resultant recommendations to prosecute a nullity.
10. The learned trial magistrate grossly misdirected himself in holding that the items or equipment were ordinarily available in the market thereby contradicting his own finding that the equipment had been prefabricated.
11. The learned magistrate erred in failing to appreciate that in the entire hearing no evidence was adduced of criminal intent as imported by the word wilfully in the charges and hence imputed without proof.
12. The learned magistrate erred in law and in fact in placing reliance while convicting the appellant on case law that were civil in nature thereby in effect convicting on standard of proof to a balance of probability rather than beyond reasonable doubt.
13. The learned magistrate failed to take into account the evidence in totality mitigating circumstances and elimination of extraneous considerations and pressure while passing the sentence.



5. The Appeal was canvassed by way of written submissions .

### **Appellant's submissions**

6. The Appellant presented the following issues for consideration:

- a). Whether the ethics and anti-corruption commission was properly constituted at the time investigations were conducted by the EACC and whether the resultant recommendation to prosecute the appellants was a nullity.
  - b). Whether the prosecution met its burden and proved its case against the appellant beyond reasonable doubt.
  - c). Whether the elements of the crime as set out under section 45 (2) of the Anti-Corruption and Economic *Act No. 3 of 2003* were established.
  - d). Whether the sentence imposed was too harsh and excessive.
7. On whether the Ethics and Anti-corruption Commission ( EACC) was properly constituted, the appellant submits that EACC did not have commissioners between the month of May 2015 and January 2016. That the last commissioner to leave office resigned on may 2015 , while the new ones were sworn into office on 23<sup>rd</sup> January 2016.
8. It is pointed out that according to the investigations officer who testified during trial, the recording of statements, the collection of exhibits and the commencement of the prosecution, took place when there were no commissioners in the office.
9. The Appellant further argues that , it follows that the evidence collected during that period were null and void , rendering the entire trial a nullity. In this regard the Appellant has relied on the court of Appeal decision in the case of Michael Sistu Mwaura vs EACC& 4 others ( 2017) e KLR where the court of Appeal held that investigations and recommendations to Director of public prosecutions(DPP) must be authorized and sanctioned by the EACC commissioners.
10. It is further submitted that looking at the core mandate of EACC the work of sanctioning investigation and making recommendations to DPP belongs to EACC as a corporate entity , who are required to exercise oversight over the secretariat and that there is nothing in the EACC Act that allows the EACC secretariat to pass by the commissioners in their recommendations.
11. According to the appellant, upon the completion of an investigation, the commissioners are the ones responsible for reporting to the ODPP the reports of the investigations and making appropriate recommendation.
12. The Appellant has further relied on the high court decision in Kakamega Criminal Appeal No. 90 of 2018 Ayub Tuvaka China and 4 others versus Republic where Justice Njagi pronounced himself on the commencement of investigation where the EACC commissioners were not constituted at the time the investigation began. In the said decision the Appellants were charged together with the Appellant herein at the chief magistrates court and the Appeal was against the same decision.
13. The Appellant has finally relied on another high court decision in *Busia County Government versus Ethics and Anti-Corruption Commission Milimani Constitutional petition No. 382 of 2015* (d2016) eKLR where the Justice Onguto held that though the absence of the commission did not render the EACC extinct, the EACC had no powers in the absence of the commissioners, to initiate investigations on its own motion.



14. The decisions in the cases of *Robert Cheruiyot vs. Republic Nakuru HCCRA No.3 of 2017* and John Mwangi Maina & 2 others versus Republic (2018) and Gabriel Mburu Irungu vs. Republic were also relied on.

### **Respondent submissions.**

15. The Respondent filed its submissions on 16<sup>th</sup> January 2023, in which it confined itself to the issue of the late filing of the Appeal. The respondent further submitted that save for the issue of the time bar, they are not opposed to the Appeal.

### **Determination**

16. This is a first Appeal and the mandate of this court is well settled. In the case of *Odhiambo =versus= Republic (2005) eKLR* the court of Appeal held “On a first appeal the court is mandated to look at the evidence adduced before trial afresh, re-evaluate and re-asses it and reach its own independent conclusions. However it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their direction (see *Pandya =Vs= Pandya (1957) E A 336*)”
17. I have considered the memorandum of Appeal the lower court record and the parties submissions. I have identified the following issues for determination:
- a. Whether the Appeal herein was time- barred
  - b. Whether the investigation, recommendation for prosecution and the prosecution of the Appellant in the lower court was illegal
  - c. Whether prosecution proved its case beyond reasonable doubt.

### **Whether the Appeal was time- barred.**

18. Let me first dispense with the only issue raised by the Respondent, namely the issue of whether the Appeal was filed late and whether if any leave was sought for any late filing.
19. The record shows that the issue of whether or not the Appeal was filed out of time was dealt with by my brother Justice J. A Wananda. Through the Ruling delivered on 25<sup>th</sup> January 2023. He admitted the Appeal and deemed it to have been filed within the time. This issue is therefore moot.

### **Whether the investigations, recommendation for prosecution and the prosecution of the Appellant was illegal**

20. The testimony of PW15, the investigation officer, attached to EACC, is relevant in this regard. He told the court that on 18/ 9/ 2015 he received instructions to carry out investigations regarding acquisition of wheel barrows by Bungoma county. He proceeded to procure several documents for that purpose. He further stated that he forwarded his findings to ODPP and the accused persons before court were eventually charged. I notice that the witness was not taken to task on the legality of his actions at the time or on whether there was a commissioner(s) in the office to give him Authority to conduct the investigation. Equally in his defence, the Appellant herein did not question the legality of the prosecution process as well as his prosecution. The issue of the legality of the prosecution therefore is being raised for the first time in this Appeal.
21. The next question then is whether the Appellant should be allowed to raise this issue on an Appeal yet he acquiesced on it during trial. In *Mwangi v. Republic (2006) 2 KLR 94* the Appellate court was



determining the legality of a lower trial based on unsworn evidence of prosecution witnesses, which issue had not been raised during trial . The court held interalia: It does not matter that the issue is being raised for the first time in this appeal. If a trial was a nullity then it does not matter at what stage that issue is raised.”

22. The main issue in this Appeal is the legality of the investigations and trial of the Appellant. Though the nature of the illegality was different in Mwangi’s case(supra), the issue to be determined is the same;- , namely whether the trial was a nullity due to its illegality. The principle set out in Mwangi’s case is therefore applicable to this case. Am duly guided . This court will therefore proceed to consider this issue notwithstanding the fact that it is being raise for the first time in this Appeal.
23. The Appellant’s case is that , there were no commissioners in office at the time he was investigated and at the commencement of his prosecution, and therefore, the EACC was not properly constituted. That was the period between May 2015 and 23<sup>rd</sup> January 2016, according to the Appellant. This submission has not been contested by the Respondent and therefore I will treat it as an admitted fact.
24. It is further submitted that in the absence of the commissioners there was no one to sanction his investigation and recommendation for prosecution.
25. To address this issue effectively it is imperative to look at the structure of EACC, its functions as an entity, the role of commissioners, and or against that of the secretariat. What central role do the commissioners play in the commission? In their absence, the commission ceases to function?
26. The EACC is established pursuant to the provisions of Article 79 of *the Constitution*. The *Ethics and Anti-Corruption Commission Act*, No. 22 of 2011 was later enacted by the parliament to operationalize Article 79.
27. Pursuant to Article 253 of *the constitution*, EACC , like other independent commissions established by *the constitution*, is a corporate entity with a legal personality of its own, capable of suing and being sued and independent of the commissioners and/or its employees in any event.
28. The functions of EACC is set out under section 11 of the EACC Act . Under section 11(1) (d) one of the functions , relevant to this case ,is to “ investigate and to recommend to the director of public prosecutions of any acts of corruption , bribery or economic crimes or violations of codes of ethics or other matter prescribed under this Act , the Anti- corruption and Economic crimes Act or any other law enacted pursuant to chapter six of *the constitution*.”
29. The functions of the commissioners are found in section 11(6). The functions are:
  - “ a). assist the commission in policy formulation and ensure that the commission and its staff including the secretary perform their duties to the highest standards possible in accordance with this Act
  - b). give strategic direction to the commission in the performance of its functions as stipulated in this Act
  - c). establish and maintain strategic linkages and partnerships with other stakeholders in the rule of law and other governance sector
  - d). deal with reports, complains of abuse of power; impropriety and other forms of misconduct on the part of the commission or its staff and;



- e). deal with reports of conduct amounting to maladministration including, but not limited to delay in the conduct of investigations and unreasonable invasion of privacy by the commission or its staff.”
30. The responsibilities of the secretary of the commission is set out under section 16(8)(c) and it includes to : (i) carry out the decisions of the commission , (ii) day to day Administration and management of the affairs of the commission (iii) supervision of Employees of the commission , (iv) the performance of such other duties as may be assigned by the commission”
31. The imperative , and indeed a preliminary question that needs to be answered is whether the commission, through its secretary, as head of the secretariat could carry out its legal mandate in the absence of commissioners.
32. In *Ephantus M. Kagomo & 6 others vs Industrial and commercial Development corporation (2012)* e KLR justice Odunga had this to say about the central role of directors in a Corporate entity: “A corporation is an artificial legal entity. Accordingly it must of necessity act through agents, usually the Board of Directors. In other words the corporation’s brain is the Board of Directors who make decisions on behalf of the company. A company may in many ways be likened to a human body; it also has hands which hold the tools and act in accordance with the directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by law as such. The day to day management of the company may, however, be handled by specific officers tasked to do so on behalf of the Board. However, the ultimate responsibility rests with the directors. It therefore follows that the management of the corporation must be deemed to be carried by or on behalf of the Board save in cases where the ultra vires principle applies” ( Emphasis added).
33. Am of the view that the above central role of the board directors apply to any legal entity having a legal personality of its own. Depending on the structure of such legal entity the “ the brain of the company” in the words of Justice Odunga( supra) goes by the name : “Board of Directors,” “Board of trustees” “ Commissioners “ as in the case of EACC , or by whatever other name called.
34. I entirely associate myself with the findings of justice Odunga in the above stated case, that is to say , ultimately it is the Board , or commissioners who are accountable of what happens in an organization, They must answer to the stakeholders and third parties.
35. Further , with specific reference to EACC, the court of Appeal had this to say in mwaura kamau’s case ( supra), about the mandate of the Board of EACC: “It is the core mandate of EACC under section 11(1) (d) of the EACC Act to: ‘ investigate and recommend to the director of public prosecution of any acts of corruption , bribery of economic crimes or violation of codes goes by the name of ethics or other matter prescribed under this Act, the Anti- corruption and Economic crimes Act or any other law enacted pursuant to chapter six of *the constitution*: From that provision it is crystal clear to us that the functions of investigating and making recommendations to the DPP belong corporately to EACC and not to the secretary or secretariat alone. The investigations and the recommendations to the DPP must be authorised and sanctioned by the commissioners who are required to exercise oversight over the secretariat and overall, to give strategic direction to EACC in the performance of its function under the Act. That is the position notwithstanding section 3 of the Anti- corruption and Economic crimes Act which empowers the secretary or the person authorized by the secretary to conduct investigations on behalf on behalf of EACC.A proper reading of ACECA together with EACC Act ca not justify



the conclusion that that officers to whom specific powers of EACC have been delegated can purport to bypass the EACC Commissioners who are ultimately responsible to the Kenyan people for the proper discharge of EACC’s constitutional and statutory duty” ( Emphasis added)

36. On whether the secretary/ secretariat could act on its own , in the same Mwaura’s case ( supra), the court went on to state: Whereas we appreciate that the staff may, based on their areas of specialization, perform the duties for which they are appointed, to contend that they have a free hand to make binding recommendations arising from their duties without reference to the Commission, in our view would be absurd. The outcome of the tasks undertaken by the Commission’s staff must be ratified by the Commissioners if they are to be deemed as the decisions of the Commission otherwise unilateral actions taken by the staff may well be deemed to be insubordination”.
37. Looking at the functions of the EACC Secretariat as set out in section 16(8) (c) (supra), apart from carrying out the decisions of the commission, it is evident that the other functions are purely the Administrative and management functions. In this regard , I find support again in the mwaura case where the court held that the investigations and recommendation of prosecution are key functions of the commission which the secretariat cannot carry out while bypassing the Commissioners .
38. Am bound by the decision of the court of Appeal as set out in mwaura’s case. In the absence of the commissioners , the secretariat could not investigate and recommend to the DPP the prosecution of the Appellant herein. The entire process was a nullity.
39. The investigation and the prosecution of the Appellant was therefore a nullity from the start. It can not be allowed to stand. The conviction and sentence is hereby quashed.
40. The next question is whether a retrial should be ordered.
41. The test as to whether a retrial should be considered was set out in the case of Opicho v. R [2009] KLR 369, 375 where the court of Appeal stated as follows:“In many other decisions of this Court it has been held that although some factors may be considered, such as illegalities or defects in the original trial; the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution’s making or not; whether on a proper consideration of the admissible evidence or potentially admissible evidence, a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for retrial should only be made where the interests of justice require it. ( Emphasis added).
42. In the present case , the circumstances were that it was not just the trial that was illegal but the entire investigation was tainted with illegalities. It can not be said therefore that the admissible or potentially admissible evidence on record will secure a conviction if a retrial was to be ordered. Ordering for a retrial on the basis of such evidence will mean that the trial will suffer the same outcome. In the circumstances of this case therefore a retrial can not be the next course of action.
43. I hasten to add that this conclusion does not bar the EACC from taking any further action against the Appellant as long as there is compliance with the EACC Act , *the Constitution* and other applicable laws .
44. In the end this Appeal succeeds. The trial of the Appellant in Kakamega Chief Magistrate’s court EACC No.1 of 2017 is hereby quashed and sentence set aside.

**DATED, SIGNED AND DELIVERED AT NAIROBI, VIA MICROSOFT TEAMS THIS 26<sup>TH</sup> DAY OF AUGUST 2024.**

**S. CHIRCHIR**



## **JUDGE**

In the presence of :

Godwin- Court Assistant

John Juma – The Appellant.

