Wanja v Republic (Anti-Corruption and Economic Crimes Appeal 4 of 2023) [2024] KEHC 13561 (KLR) (Anti-Corruption and Economic Crimes) (31 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13561 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

ANTI-CORRUPTION AND ECONOMIC CRIMES

ANTI-CORRUPTION AND ECONOMIC CRIMES APPEAL 4 OF 2023

PJO OTIENO, J

OCTOBER 31, 2024

BETWEEN

GRACE WANGARI WANJA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was aggrieved with the judgment of the trial court conviction and sentence in the original Nairobi Milimani Chief Magistrate's Court ACEC Case No. E007 of 2022. She lodged the current appeal and set out 11 grounds of appeal.

2. The court upon perusal of the record and the petition of appeal considers that the eleven grounds are collapsible into the following three grounds.

    a. The trial court failed in its analysis of the evidence which did not disclose proof of the case beyond reasonable doubt.

    b. The Appellant was entrapped by the complainant and EACC officers.

    c. The evidence relied on was illegally obtained and thus inadmissible.

3. The charge sheet filed against the appellant preferred three offences against the appellant. First count was the charge of conspiracy to commit an offence of corruption while the second and third were for receiving a bribe.

4. By the judgment of the trial court dated 26/6/2023, the appellant was convicted of all the charges and sentenced to pay a fine of Kshs.200,000 each for counts 1 and 2 or serve a jail term of two years and for count 3, to pay a fine of Kshs.250,000 or suffer a jail term of three years.

5. At the trial, the prosecution called a total of 11 witnesses while the accused persons when put on their defence opted to give sworn testimonies without calling any other witness.

6. The evidence taken is indeed voluminous and the court has elected not to regurgitate that evidence afresh in the judgment. The court has however executed its duty on a first appeal by reading the entire record so as to be able to reassess, re-examine and re-evaluate the day with a view to coming to its own independent conclusions while being acutely appreciative that it enjoys not the benefit enjoyed by the trial court who saw and heard the witnesses testify.

7. Having read the proceedings, the exhibits and the judgment of the trial court it comes out clearly that the trial court place lots of reliance on the document said to have been the recording by PW1 of his conversation with the two accused persons.

8. On count I, the appellant was alleged to have conspired with one John Karuma Thomas, the c0-accused, to commit the offence of corruption contrary to section 47A (3) as read with section 48(1), the facts being alleged to be that on the 23/1/2019 at Kamukuji police station, being persons employed by National Police Service, as corporal and constable, respectively jointly conspired to commit an offence of corruption, namely receiving a benefit of Kshs.5,000/= from George Chege Kiarii, so as to aid him recover his civil debt of Kshs.25,000/= from a motor vehicle spare part broker, a matter related to the affairs of the said public body.

9. The evidence led to support that charge was by the complainant PW1. The gist of evidence by PW1 was that he went to the police station to get assistance in tracing a person who had refused to refund him some Kshs.25,000/= and he was asked for a facilitation fee of Kshs.5,000/=.

10. He asked to go away and promised come later. On leaving the police station he went to seek assistance from EACC who gave him the bait money and two recording devices; a video and audio recorders.

11. When so armed with the money and recording devices, PW1 went back to the station, handed over the money in a khaki envelope to the appellant in her office. The appellant kept the money in a shelf inside the office.

12. The witness and the Appellant then went out of the office to look for one Karuma, the co-accused, and the witness heard the Appellant tell the said Karuma that the witness had done his part and it was now for Karuma to trace the subject of the complaint. The said Karuma then asked the witness for the number of the subject which he gave.

13. All the while the witness was taking both video and audio recording. The recordings were played in court and the trial court observed that he could see both the Appellant and her co accused on the video.

14. The witness concluded his evidence by stating that the EACC officers, who were within proximity, were tipped and they came and had the two accused persons arrested. The money, the devices, the recordings and their transcriptions were then marked for identification as; MFI3(i), (i),(iii),(iv) and (v), MF11 and 2 and 9 .

15. Upon being cross-examined, the witness told the court that there was no OB for his report to the police and that he met the two accused persons in the office at the station when the two demanded the sum of Kshs.5000.00 to enable him be assisted in the recovery of his money for which reason he sought the assistance of EACC leading to the arrest. He clarified that the conversation and request for money was

made on the 22/1/2019 and that there was no record from the accused asking for money. He added that after handing over the money to the appellant, both went down stairs and he made it clear that he was not present when the money was recovered by EACC. He denied the possibilities of the EACC officers sneaking into the office and placing the money. He was however adamant that he was not bribing the appellant who had asked him to have his report recorded at the police station.

16. With such evidence, the trial court in its analysis zeroed in on the transcription of the audio recording, exhibit 9(b), to pick what was captured as a conversation between the two accused persons and the complainant, PW1. The document is at pages 196 t0 203 of the record of appeal.

17. It remains the law that the standard of proof upon the prosecution is that beyond reasonable doubt. The exhibit P9(b) as said by PW2 and 3 was recorded in English, Kiswahili and Kikuyu.

18. The Law in Kenya, under *the Constitution* and *Civil Procedure Act* section 86, is that the language of the court is English and Kiswahili. Where a document is in a language other than the language of the court, the court is deemed not to be able to comprehend its contents. When a document produced as an exhibit is illegible, incoherent or just incapable of being comprehended, it confers no evidentiary value and cannot be the basis of a finding of conviction. In Raphael Lukale v Elizabeth Mayabi & another [2018] eKLR, the Court of Appeal when faced with that question had this to say:

> " The official languages of the Republic of Kenya according to Article 7 are Kiswahili and English. Although Section 86 of the *Civil Procedure Act* provides that the official language of the High Court and Court of Appeal is English we think that by the aforesaid Article 44 this has changed, at least in so far as oral testimony in the High Court is concerned. We are of the considered view that today the relevance of that provision remains in the requirement that documents used in the proceedings in the High Court must be translated into English. Translation or certificate of translation of the words does not arise in view of the 1st respondent's own confirmation in both her statement and testimony before the trial court that the translation of the Luhya words

19. That position was shared by the court in Pasatificio Lucio Garofalo SPA v Security & Fire Equipment Co & Another (2001) eKLR where Justice A.G. Ringera (as he then was) said that as there was no translation of the same into English-which is the official language of the High Court-this Court cannot and will not know the position.

20. For this matter, the court has strived to read the document with a view to comprehending what it says to no avail. The court is unable to know what was the conversation captured by the document. The court is thus placed in a position where it cannot execute its mandate as a first Appellate court, to review, reexamine and reappraise the evidence afresh.

21. To this court, it matters not that the trial court was able to comprehend the document in a language that is not a language of the court. That court was bound to ensure that the document was in the language of the court before its admission. In admitting the documents in a language other than of the court.

22. A reading of the judgment shows unerringly that the transcription was the basis upon which the judgment was made. When it had no probative value, the court had no reason to so ground its judgment on the document. It did so in error and the error is fatal to the conviction reached.

23. For the reasons set out above, the court find that the conviction was grounded on no evidence. The conviction is therefore quashed and the sentence which it stands on set aside. Let the appellant, if in custody, be released forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 31ST DAY OF OCTOBER, 2024

PATRICK J O OTIENO

JUDGE