



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 50 OF 2015

REPUBLIC.....APPELLANT

-V/S-

GABRIEL MBITHI MULEI.....RESPONDENT

(Being an appeal against the decision by Hon. R. Odenyo, Senior Principal Magistrate on 16th March 2015 in Anti-Corruption Case No. 16 of 2012, *Republic v Gabriel Mbithi Mulei*).

JUDGMENT

Background

1. Gabriel Mbithi Mulei was charged with the offence of submitting misleading information contrary to Section 29 as read with Section 32 of the Public Officers Ethics Act No. 4 of 2003. The particulars are that Gabriel Mbithi Mulei on the 26th day of November 2009 at Malindi within Kilifi County, being a public officer to wit a Chief Inspector of Police working as the Traffic Base Commander in Malindi, knowingly submitted misleading information in the Wealth Declaration Form by not declaring Kshs. 629,947.75 he held in his bank Account No. xxxx held at Equity Bank, Ukunda branch.
2. In Count Two, Gabriel Mbithi Mulei was charged with the offence of submitting misleading information contrary to Section 29 as read with Section 32 of the Public Officers Ethics Act No. 4 of 2003. The particulars are that Gabriel Mbithi Mulei on the 26th day of November 2009 at Malindi within Kilifi County, being a public officer to wit a Chief Inspector of Police working as the Traffic Base Commander in Malindi, knowingly submitted misleading information in the Wealth Declaration Form by not declaring Kshs. 804,478.35 he held in his bank Account No. xxxx held at Barclays Bank, Haile Selassie branch.
3. In Count Three, Gabriel Mbithi Mulei was charged with the offence of submitting misleading information contrary to Section 29 as read with Section 32 of the Public Officers Ethics Act No. 4 of 2003. The particulars are that Gabriel Mbithi Mulei on the 26th day of November 2009 at Malindi within Kilifi County, being a public officer to wit a Chief Inspector of Police working as the Traffic Base Commander in Malindi, knowingly submitted misleading information in the Wealth Declaration Form by not declaring Kshs. 111,776.35 he held in his bank Account No. xxxx held at Cooperative Bank, Malindi branch.
4. In Count Four, Gabriel Mbithi Mulei was charged with the offence of submitting misleading information contrary to Section 29 as read with Section 32 of the Public Officers Ethics Act No. 4 of 2003. The particulars are that Gabriel Mbithi Mulei on the 26th day of November 2009 at Malindi within Kilifi County, being a public officer to wit a Chief Inspector of Police working as the Traffic Base Commander in Malindi, knowingly submitted misleading information in the Wealth Declaration Form by not declaring Motor Vehicle Registration No. KBF 685E, which he owned.
5. In Count Five, Gabriel Mbithi Mulei was charged with the offence of submitting misleading information contrary to Section 29 as read with Section 32 of the Public Officers Ethics Act No. 4 of 2003. The particulars are that Gabriel Mbithi Mulei on the 26th day of November 2009 at Malindi within Kilifi County, being a public officer to wit a Chief Inspector of Police working as the Traffic Base Commander in Malindi, knowingly submitted misleading information in the Wealth Declaration Form by not declaring Motor Vehicle Reg. No. KBD 176G, which he owned.
6. The trial magistrate considered the evidence of eight prosecution witnesses and found that the accused had no case to answer. The accused was then acquitted under Section 210 of the CPC.
7. The appellant aggrieved and dissatisfied by the entire ruling and decision by the trial court preferred the appeal herein on the following grounds:-

1) The learned trial magistrate erred in law by failing to uphold the constitution authority by the Director of Public Prosecution to prosecute either by himself or officer subordinate to him thereby rendering a decision that is manifestly unconstitutional, illegal and a travesty of justice.

2) The state powers of prosecution are vested in the office of the Director of Public Prosecution and that no consent is required by the Director of Public Prosecution to prosecute anyone for any offence.

3) The Honourable magistrate erred in law by giving a narrow interpretation of the Ethics and Anti-corruption Act and or Anti-corruption and Economic Crimes Act failing to appreciate that under Article 157 (9) as read together with clause 7 of the 6th schedule in the transitional clauses of the Constitution that all laws shall be read and interpreted with necessary modifications, alterations and/or amendments to bring them into conformity with the Constitution.

4) The trial magistrate erred in law in dismissing the charges on a technicality in total disregard of Article 159 (d) of the Constitution and denying the state substantive justice. The technicality cited by the magistrate can only benefit the accused person to subvert and circumvent the law thereby avoiding sanctions for his criminal act.

5) The ruling is a clear violation of Section 169 of the CPC since the Honourable magistrate failed to analyse the evidence and give reasons for the finding that he reached thus his decision lies on the face of the law and a great travesty of justice.

8. The appellant prayed that the appeal be allowed, conviction quashed and sentence set aside. This appeal was canvassed by way of written submissions.

Appellant's Case

9. PW1, Antony Kimbi, an Accountant for Al Honah Motors, produced a document said that it was a sale agreement between Gabriel Mbiti Mule and Al Honah Motor Ltd dated 12.2.2009 in respect of Sale of Motor Vehicle KBF 685E, Toyota Corolla Premio. The chassis number 80211/0141391 registration number 7A/JU7208. The model was 2001 and white colour. Rating is 1760CC. PW1 said the car was sold at Kshs. 750,000/-. Deposit cash was Kshs. 500,000. The balance of Kshs. 250,000 was payable within one month. PW1 said he was not a party to the agreement and the signature on behalf of the company belonged to the director, Mr. Mohamed Afzaal. PW1 produced the sale agreement as MFI 1.

10. PW2, Westery Kipngetich, the Deputy Director in charge of Ethics and Governance at the Public Service Commission said he received a declaration form filled by one Gabriel Mbiti Mulei which lists assets of the declarant as motor vehicle registration number KBG 776A valued at Kshs. 800,000, land at Kangundo valued at Kshs. 200,500. The entry relating to incomes was gross pay for 2 years, sales dividends for 2 years Kshs. 56,000, Shamba for 2 years Kshs. 300,000. Under liabilities on rent for 2 years Kshs. 240,000, sacco loan Kshs. 192,000, school fees Kshs. 10,600, and entry number 9 had no comment. The first page showed personal details of the declarant. PW2 produced the document as exhibit MFI 2. PW2 said that he received a query form from the Ethics and Anti-Corruption Commission (EACC) asking for the form through a letter dated 25.2.11, MFI 3, saying that it is investigating unexplained assets. PW2 said that they wrote to Mr. Mbiti on 4.3.11 asking him if he can make any representation to the commission before the form is released to EACC. PW2 produced the letter as exhibit 4. They received a response to exhibit 4 from Mr. Mbiti saying he had no objection and it is date 29.3.2011. PW2 produced it as exhibit 5. PW2 then said that they forwarded certified copies of the declaration form for 2008 and 2009 vide a letter dated 5.4.2011 and the letter was collected on the same day by an officer called Lena who signed the delivery book. PW2 produced the letter dated 5.4.2011 as exhibit 6 and the extract from the delivery book as MFI 11.

11. PW3, Karimi Janerose Njue from the Barclays Bank of Kenya in the Financial Crime Unit, said they received a Misc. Criminal 30/2011 order for investigation of account No. xxxx upon which she provided statement and account opening details from the system. The account opening documents shows that it is account No. xxxx for one Gabriel Mbiti Mulei. PW3 also provided the statement for account No. xxxx held at the Haile Selasie Avenue branch in Nairobi. The statement is for period 6.2.2008 to 22.2.2011. PW3 said that on 26.10.2009, the account closing balance was a credit of Kshs. 804,478.35. PW3 produced the account details form as Exhibit 8, bank statement as Exhibit 9 and the order from court as Exhibit 10.

12. PW4, Susan Kathomi Miriti, working as an Account Services Officer at Cooperative Bank of Kenya said she received a court order in Misc. 33/2011 which was investigating an account. As ordered, they supplied EACC with the account opening documents and the statement of account. The account opening documents certified by the manager MFI 11. The account name is Gabriel Mbiti Mulei No. xxxx opened on 28.5.2009. PW4 also had a statement and as at 30.10.2011, the bank balance was Kshs. 111,776.35. The statement was an original and signed by the Operations Manager Malindi branch which was produced as Exhibit 12. Pw4 said that she had MFI 11. She also had copies from the bank, upon opening an account, the forms are taken to Nairobi where they are archived. PW4 said she had a certified copy which is an extract from their system, produced as Exhibit 11.

13. PW6, James Peter Mburu, a Revenue Officer at K.R.A in charge of Motor Vehicle Registration Unit, said that KRA asked for information of motor vehicle KBD 176G and he provided the details as follows: Make- Nissan Minibus Matatu, Colour- white, Chasis No. KRRGE24-036947, Engine No.- TD 27-622036, Owner- Gabriel Mulei. PW6 said the copy of records is dated 10.6.11 which also indicates when the vehicle was transferred to the registered owner. PW6 said that a log book was issued to Gabriel Mulei on 9.6.2009, when the vehicle was registered to his name. PW6 produced the two documents as Exhibit 14a and 14b. PW6 said that the EACC also asked for a copy of records for motor vehicle KBF 685E with the following details: Make- Toyota Corolla Saloon, Chassis No. AJ 211-0141391, Engine number- 7A J217206, Owner- Al Hussein Motors Ltd but it has since changed ownership. Pw6 said that the history of the vehicle is that it changed ownership to Peris Mugo on 28.3.2012. The motor vehicle had been registered on 8.1.2009 to Al Hussein Motors. PW6 produced copies of the records as Exhibit 15a.

14. PW7, Shadrack Mutua, worked for Equity Bank Ukunda branch as an Acquiring Supervisor, said that the branch received a warrant under Misc. 32 of 2011 which was to investigate the account of Gabriel Mbiti Mulei. PW7 said that the bank then issued certified copies of

account opening forms for EACC with the following details: Name of Account – Gabriel Mbiti Mulei, ID card number – xxxx, Account No. xxxx, Telephone number – xxxx. The account was opened on 1.4.2008. PW7 produced the document talked of as Exhibit 11. He also had a certified copy of the original of the statement of the account. The last transaction of owner 2009 was on 27.10.2009. The balance as at that date was Kshs. 629,947.75. Produced the statement as Exhibit 12, duly signed by the operations manager.

15. PW8, Mutembei Nyaga, an investigator with EACC, employed in the year 2000 by the predecessor of EACC which was then KACC. PW8 said that he was assigned by his then boss to conduct a preliminary investigation. He had received information that the base commander of Malindi had received illegal wealth by extortion of matatu operators. PW8 was then tasked to verify the allegations. PW8 said that as part of his investigations, he went to Malindi Law courts through Misc. No. 7/11 and obtained warrants on 11.2.2011. He then proceeded to the house of Gabriel Mulei where a search was conducted. Several documents were recovered including bank statements of Equity Bank, Cooperative Bank, Standard Chartered Bank, and Barclays Bank of Kenya. Also, insurance stickers for various motor vehicles as well as utility bills were recovered. An inventory was then written. A certificate was also done which was signed by PW8, the DCIO and Mr. Gabriel Mulei. PW8 produced the certificate and the inventory as Exhibit 13a and b. On 25.2.2011, a letter was done to the Public Service Commission and requested for the Wealth Declaration Form of Gabriel Mulei. The form was received. From the preliminary investigations, PW8 said he formed the opinion that the allegations had merit. He then gave the report to his boss Mr. Abdullahi who was then in charge of Coast Region.

16. PW9, Abdulhamid Farooque Low, the investigator with EACC said that a preliminary investigation of wealth and assets of Gabriel Mulei had been done by his colleague (PW8). He was handed over various documents including the Wealth Declaration Form that had been filled by Gabriel Mbiti Mulei. PW9 said he examined the Declaration Form vis-à-vis the documents which had been presented to him including bank statements and copies of records from KRA. As per the form dated 26.11.2009, filled by Gabriel Mulei, he had declared as assets a motor vehicle KBG 776A and land at Kangundo. PW9 said that when he analysed the documents, he realised that Mr. Mulei had three bank accounts which had various balances as at 31.10.2009. As at that date, the balance he had at Equity Bank was Kshs. 629,947.75. At Cooperative Bank, the balance was Kshs. 111,776.36. At Barclays Bank of Kenya, the balance was Kshs. 804,478.35. All the bank balances were not declared in the Wealth Declaration Form. PW9 also obtained copy of records for two motor vehicles i.e. KBD 176G which belongs to Gabriel Mulei and KBF which belonged to Al-Hussein Motors Ltd. PW9 said he followed up the matter to Al-Hussein Motors who confirmed the same.

Appellant's Submissions

17. The Appellant submits that the Respondent was charged under the Public Officer Ethics Act No. 4 of 2003 on each of the 5 counts. He was not charged under any law that expressly required the written consent of the DPP. In fact the trial court did not quote which particular law the Republic failed to follow on the issue of obtaining DPP consent. The Appellant submits by reproducing the relevant sections under the Anti-Corruption and Economic Crimes Act (ACECA) and Public Officer Ethics Act: Section 35 of ACECA states, *'following an investigation the Commission shall report to the DPP on the results of the investigation... The Commission's report shall include any recommendation the commission may have that a person be prosecuted for corruption or economic crime.'* Similarly, Section 38 of the Public Officer Ethics Act provides:- *'If as a result of an investigations under this Part, the Commission is of the view that civil or criminal proceedings ought to be considered, the Commission shall refer the matter to the Attorney General or other appropriate authority.'*

18. The Appellant submits that as can be expressly read from the law, there is no direct unequivocal mandate to get the written consent of the DPP either in anti-corruption cases or even specifically, in offences relating to the Public Officers Ethics Act. The Appellant submits that the trial court was wrong to infer this and proceed to reach the conclusion it did.

19. The Appellant submits that the Court of Appeal in Nyeri has recently made its ruling on the issue of requirement of consent. In *EACC v James Makura M'abira* [2020] eKLR the learned judges pronounced themselves that, *'We have found that the holding by the learned judge that the AG needed to give written consent to the prosecution who laid the charges against the respondent was an erroneous interpretation of section 35, as read with sections 36 and 37 of the ACECA... Put another way, did the procedural misstep amounted to a violation of the respondent's equal treatment before the law? We did not think so, because the AG/DPP did not decline to charge the respondent... The respondent did not adduce any evidence to support the allegations of differential treatment or how that procedural mistrial amounted to unequal treatment before the law. There are no allegations that the prosecution was biased, irrelevant or malicious.'* The Respondent submits that in paragraph 34 of the judgment, the learned judges of appeal continued: *'In conclusion we find and hold that the learned judge erred by interpreting the ratio in the Kangangi's case to mean that failure to give written consent to prosecute economic crimes... renders the charges null and void.'*

20. The Appellant submits that the learned trial magistrate was wrong to conclude that failure to avail a written consent voided the charges. The state called 9 witnesses and produced exhibits in the lower court matter before closing the case. However, no ruling was made on the state's case as presented before the court. The court failed to make any finding on the evidence of these witnesses or on the exhibits produced. The Appellant submits that from the proceedings, it is evident that the state made out a prima facie case against the respondent. The Appellant submits by praying that the matter be retried.

Respondent's Submissions

21. The Respondent submits that the court majorly relied on the Appellant's failure to follow the law particularly Section 35 of the Anti-Corruption and Economic Crimes Act. The court also relied on precedents then existing which had clearly given and interpretation on that subject. In the cases of *Christopher Kamau Mwangi alias Numbas v Republic* [2014], the court stated as follows: *'In my view the language of these provisions make it mandatory for the commission to present its investigations and recommendations thereto, the Attorney before instituting prosecution. This interpretation found expression in Cr. App No. 331 of 2020 Nicholas Muriuki Kangangi v Attorney General. In which the Court of Appeal interpreted the said Section 35 (1) (2) to mean that prosecution was a nullity if it was done without the opinion or consent of the Attorney General, and that the proceedings and judgment thereto cannot be left to stand.'*

22. The Respondent submits this was a decision made on the 16th May 2014 by Lady Justice Achode, a decision that was and is binding on the Magistrate's Court. Similarly in the case of *Tobias Musyoki Mutua v Republic* [2018] eKLR the court had this to say: *'This court is*

guided by the Court of Appeal case of *Nicholas Muriuki Kangangi v Attorney General Civil Appeal No. 331 of 2010* and the more recent case of *Esther Theuri Waruiru & Anor v R. Cr. App. No. 48 of 2008* where it was held that compliance with the section is fatal to any prosecutions' case.'

23. The Respondent submits that the Appellant's Appeal and Submissions seem to be grounded on a decision by the Court of Appeal in 2020 which is five years since the acquittal of the Respondent. Even assuming that the submissions by the Appellant represent the new legal position, should it be applied to affect decisions made before it existed? The Respondent submit that the answer is no. The investigating officer, Mr. Abdulhamid Farouque Low (PW9) stated on page 75 that, '*I am aware that the consent of the D.P.P was required in this case before charging the accused.*' The Respondent submits that it should be remembered that this was the position taken by the court of Appeal. The same Court seems to have taken another position in the case referred to before the Appellant. None is superior to the other.

24. The Respondent submits that this is a first appeal and the court is expected to look at the evidence adduced before the magistrate. The charges the Respondent faced were all grounded on a wealth declaration form said to have been submitted by the Respondent who held a position in the Public Service namely a Police Officer. The Respondent further submits that what the prosecution relied on was simply the form and the existence of bank accounts and motor vehicles said to belong to the accused. There was no attempt to establish if the form was truly the one submitted by the Respondent. Notably: a) No evidence was led to show when and where the form was submitted; b) No evidence was led to show how it was received and by who; c) No expert evidence was led to show that the form was the Respondent's handwriting or signed by him; and d) No attempt was made to overrule the possibility of the Respondent failing to fill the form.

25. The Respondent submits that the dismissal of the charge was based on good law and good interpretation of the law then and now. The Appellant further submits that even if that aspect is disregarded, the prosecution case is still weak and an acquittal would have been inevitable. The Respondent therefore urged the appeal to be dismissed.

Analysis and Determination

26. This being the first appellate court, I am guided by the principles in *David Njuguna Wairimu v Republic [2010] eKLR* where the court of appeal held:-

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

27. After considering the grounds of appeal, Records of the trial court, Ruling of no case to answer and submissions, the issue for determination is as follows:-

i. Whether the trial Magistrate properly found that the Respondent should not have been prosecuted without the (written) consent of the DPP.

Whether the trial Magistrate properly found that the Respondent should not have been prosecuted without the written consent of the DPP

28. Upon the prosecution closing their case against the Respondent, the defence counsel Mr. Magolo submitted that the prosecution had not made out a case to answer for reasons that consent of the DPP to prosecute had not been obtained. Although there were other submissions for no case to answer, the trial magistrate determined that failure to obtain written consent of the DPP rendered the submissions null ab initio and rendered the acquittal under Section 210 of the Criminal Procedure Code Cap 75 Laws of Kenya.

29. The Respondent was charged under Section 29 as read with Section 32 of the Public Officer Ethics Act No. 4 of 2003 in five counts. The offences against the Respondent were investigated by the Ethics and Anti-Corruption Commission pursuant to Sections 35, 36 and 37 pursuant to the Anti-Corruption and Economic Crimes Act as well as Section 38 of the Public Officer Ethics Act.

30. **Section 35 of the Anti-Corruption and Economic Crimes Act** provides as follows:-

1) Following an investigation the commission shall report to the Director of Public Prosecutions on the results of the investigation.

2) The Commission's Report shall include any recommendation the commission may have that a person be prosecuted for corruption or economic crime.

31. Further, **Section 38 of the Public Officer Ethics Act** provide as follows:-

If, as a result of an investigation under this Part, the Commission is of the view that civil or criminal proceedings ought to be considered, the Commission shall refer the matter to the Attorney-General or other appropriate authority.

32. In consideration of the provisions of the above sections in the two statutes, this court finds that the trial magistrate erroneously concluded that consent of the DPP is required to prosecute offenders under the Public Officer Ethics Act and Anti-Corruption and Economic Crimes Act. The authorities relied on by the Respondent are distinguishable from the current case in that they relate to the Constitutional and legal

regimes that subsisted before the advent of the 2010 Constitution when the AG was vested with authority to give consent before prosecution. This is no longer the case as the Director of Public Prosecution is conferred with the authority to prosecute all cases under **Article 157(10) & (11) of the Constitution of Kenya, 2010** and **Section 6 of the Office of the Director of Public Prosecutions Act, 2013. Article 157(10) & (11)** which provides as follows:-

“(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”

“(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”

Section 6 of the **Office of the Director of Public Prosecutions Act, 2013** provides:-

Pursuant to **Article 157(10) of the Constitution**, the Director shall:-

- a) not require the consent of any person or authority for the commencement of criminal proceedings;
- b) not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law; and
- c) be subject only to the Constitution and the law.

33. The Respondent was charged in court on 21.11.2012 for offences committed on 26.11.2009. By the time that he was being charged, the authority and mandate to prosecute was being discharged solely by the DPP under **Article 157 (10) & (11) of the Constitution of Kenya, 2010** and there is no requirement for consent whether written or otherwise from the DPP to prosecute. The mandatory provision that the Commission shall report to the DPP cannot be construed to mean that a written consent is required from the DPP. The Court of Appeal holding in **EACC v James Makura M’abira [2020] eKLR** is appropriate in the circumstances as there is no provision under Section 35, 36 and 37 of ACECA requiring written consent.

34. The Respondent relied on the holding in **Esther Theuri Waruiru & another v Republic [2011] eKLR**, to support the position that written consent is required to prosecute. The court stated as follows:-

“...The Anti-Corruption and Economic Crimes Act, (Act No. 3 of 2003) mandated KACC to investigate the commission of crimes under the Act. Its officers did not have any prosecutorial powers, and therefore, by section 35 (1) of the Act it was required to report to the Attorney- General on the results of its investigations.”

“The law as it stood on 12th October, 2005, reposed power on the Attorney-General to direct and control all prosecutions. The need to make reports to the Attorney-General meant that it was his duty to authorize prosecutions on corruption cases if the interest of the country and the interests of justice so demanded.”

“Under the Prevention of Corruption Act, Cap 65 of the Laws of Kenya, since repealed, the consent of the Attorney-General was required for all prosecutions under the Act. The consent was not cosmetic; nor was it as a matter of course. It was a matter of policy.”

“Section 12 of the Prevention of Corruption Act, provided as follows:

12. A prosecution for an offence under this Act shall not be instituted except by or with the written consent of the Attorney-General.”

35. It is clear from the holding that the Prevention of Corruption Act (Cap. 65) which was in operation from August 1956 had since been repealed and the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 became operational in May 2003.

36. The same situation above applies to the holdings in **Tobias Musyoki Mutua v Republic [2018] eKLR** and **Civil Appeal No. 331 of 2010, Nicholas Muriuki Kangangi v Attorney General** that were relied upon by the Respondent.

37. In consideration of this court’s finding, the appeal is allowed. The trial court’s file is hereby referred back to the Chief Magistrate Mombasa Court for directions and determination. Mention on 17th February 2022 at the Chief Magistrate’s Court. Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,

THIS 27TH DAY OF JANUARY 2022

HON. LADY JUSTICE A. ONG’INJO

JUDGE

In the presence of:-

Ogwel- Court Assistant

Mr. Mulamula for the Appellant

Mr. Magolo for the Respondent

HON. LADY JUSTICE A. ONG'INJO

JUDGE