



**Republic v Ngwele & 5 others (Anti-Corruption and Economic Crimes Appeal 2 of 2019)
[2022] KEHC 10370 (KLR) (Anti-Corruption and Economic Crimes) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10370 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES APPEAL 2 OF 2019**

EN MAINA, J

MAY 31, 2022

BETWEEN

REPUBLIC APPELLANT

AND

JACOB MUVENGEI NGWELE 1ST RESPONDENT

ADAH AWUOR ONYANGO 2ND RESPONDENT

PHILOMENA KAVINYA NZUKI 3RD RESPONDENT

JAMES KARIUKI KAGUMA 4TH RESPONDENT

RAPHAEL MWINZI MALUKI 5TH RESPONDENT

FREDRICK MACHARIA MWANGI 6TH RESPONDENT

*(Being an Appeal from the Ruling of the Chief Magistrates Court at Nairobi in ACC
No. 36 of 2018 before Hon. Martha Mutuku delivered on 12th February, 2019)*

JUDGMENT

Introduction

1. The respondents herein in their various capacities were charged in ACC. Case No. 36 of 2018 with offences under the *Anti-Corruption and Economic Crimes Act* (ACECA), the Penal Code and the Public Procurement and Disposal of Assets Act (PPDA). The offences cut across unlawful acquisition of public property; conspiracy to defraud; willful failure to comply with applicable procedures and guidelines relating to management of public funds; abuse of office; undue influence, fraudulent accounting and fraudulently making payments from public revenues for goods not supplied.



2. In a nutshell, it was the prosecution's case that the accused persons being suppliers and employees of the Nairobi City County acted in concert to defraud the Nairobi City County Assembly by flouting procurement procedures in the procurement of books meant for the Nairobi City County Assembly Resource Centre, leading to the irregular payment of Kshs. 997,926 to Primara Ventures being payment for goods not delivered. After considering the evidence of 19 prosecution witnesses and the submissions of Learned Counsel for both sides, the trial court acquitted all six accused persons under Section 210 of the Criminal Procedure Code.
3. The State being aggrieved by the acquittal preferred this appeal. The petition of appeal dated 14th February 2019 raises the following grounds: -
 - a) That the learned trial magistrate erred in law and in fact in acquitting the 6 respondents under section 210 of the Criminal Procedure Code while the prosecution had established a prima facie case against the respondents to warrant them being put on their defence.
 - b. That the learned trial magistrate erred in law and in fact by not taking into consideration the principles as to what a prima facie case is, as set out in *Bhatt vs R (1957)EA 332 – 335*.
 - c. That the learned magistrate erred in law and fact in holding that the use of request for quotations for the procurement was regular and justifiable.
 - d. The learned trial magistrate erred in law and fact in finding that there was a legitimate contract.
 - e. That the learned trial magistrate erred in law and fact in finding that the goods in question were delivered.
 - f. That the learned magistrate erred in law and fact in finding that the Inspection and Acceptance committee acted in compliance with the law contrary to the weight of evidence.”
4. The appellant has urged this court to reverse or set aside the trial court's ruling delivered on 12th February 2019 which acquitted the respondents, put them on their defence and/or issued any such orders as it may deem appropriate in the interests of justice.
5. The appeal which is vehemently opposed was canvassed by way of written submissions.

Submissions of the Appellant

6. The appellant's submissions are dated 21st April, 2021 but were filed herein on 7th March, 2022. Learned Counsel for the appellant submitted that the prosecution had established a prima facie case warranting the six accused persons to be put on their defence. That the 2nd, 3rd and 6th respondents improperly conferred a benefit on the 5th respondent as evidenced in the document examiner's report produced as P.Ex 33. He continues that the 1st respondent proceeded to award the subject tender before he was satisfied with the availability of funds resulting in splitting of funds contrary to Section 54(1) of the Public Procurement and Disposal of Assets Act. Counsel averred that the four respondents were involved in signing of the inspection certificate which he deemed an attempt to sanitize the process. Counsel contended that this was demonstrated by PW10's evidence that at the time of the report there was no satisfactory answer as to why the Local Purchase Order and receipts were not attached to payment vouchers as shown by P.Ex 15 and 19.



7. It is the State's case that the prosecution proved the elements of the various offences by way of evidence. That the stores clerk, PW4 did not receive or issue the books in question at any point and that he only saw the books a year after the certificate and payment was done. Further that Moreover, the prosecution demonstrated that the inspection certificate signed by the 2nd, 3rd and 4th Respondents was in fact fraudulent. Counsel cited the cases of Ramanlal Trambaklal Bhatt vs Republic (1957) EA332 and Republic vs Wachira (1975) EA262 wherein what constitutes a prima facie case was defined and where the threshold for proof of material ingredients of an offence by the prosecution as well as its implications was settled.
8. According to Counsel for the appellant, from the evidence tendered by the prosecution witnesses, the main issue was whether or not the books in question were supplied to Nairobi County Assembly's Resource Centre and whether payment was made regularly following the properly laid down procurement regulations. Counsel reiterated that the method of procurement relating to request for quotations was irregular; that through the evidence of PW3, PW11 and PW13 the prosecution tendered proof that the subject books were not delivered; that there was also evidence that payment was made before the books were delivered and that the inspection and completion certificate was a forgery. Counsel urged this court to set aside the order acquitting the respondents and to substitute the same with an order that the respondents be placed on their defence.

1st, 2nd, 3rd and 6th Respondent's Submissions

9. The submissions of the 1st, 2nd, 3rd and 6th Respondents relied on written submissions dated 10th February, 2022 and a list of authorities of even date. Both the submissions and list of authorities were filed on 7th March, 2022. On his part Learned Counsel for the 1st, 2nd, 3rd and 6th respondents submitted that a criminal court is not obliged to put an accused person on his defence at the close of the prosecution's case. That to the contrary, Section 210 of the Criminal Procedure Code obliges a trial court to dismiss a criminal case at the close of the prosecution case if that evidence does not disclose a prima facie case. The respondents contended that the present appeal is an abuse of the criminal justice system; that the complainant (PW1) admitted that the appellant's case before the trial court was based on a draft document hence the complaint was premature to the extent that the audit process was still underway and that the case was motivated by ulterior political motive to hound the 1st Respondent out of office. Counsel pointed out that contrary to the allegations that the respondents paid for books that were not delivered out of the twenty witnesses called by the appellant, eighteen admitted that the vendor delivered the subject books and that the procurement process was regular and above board.
10. Counsel argued that the appellant failed to prove the elements of the offences with which the Respondent were charged and equally failed to meet the strict criteria for a successful appeal against a finding of no case to answer. Counsel called upon this court to re-examine the evidence on record and reach its own independent conclusion making allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses' demeanor as was held in the case of Kiilu & Another vs Republic (2005)1KLR174.
11. Counsel submitted that the burden of proof never leaves the prosecution. That it is only when a court is satisfied that the prosecution has established a prima facie case to warrant the accused persons being put on their defence that it may set aside a finding of no case to answer. To buttress this point Counsel cited Article 50(2) (a) of *the constitution* and the cases of Woolmington vs DPP (1935) AC 462 and Public Prosecutor vs Saimi & Others (1971 2 MLJ 16) cited in the case of Republic vs Robert Zippor Nzilu (2020) eKLR.



12. Relying on the case of *Kacem vs Bashir* (2010) NZSC112 cited with approval in *Republic vs Nathif Jama Adan & 6 Others* (2020) eKLR Counsel for the respondents submitted that for an appellate court to set aside a finding of no case to answer, the appellant must demonstrate that there was an error of law and principle; consideration of irrelevant factors; failing to consider relevant factors or that the decision of the trial court is plainly wrong.
13. Counsel stated that the appellant has neither established any of the above conditions; that the trial court carefully considered the evidence tendered before it and applied the relevant principles to determine whether the State had made out its case based on the following:-
 - a. The books were indeed delivered as per the testimonies of PW2, PW3, PW4, PW6, PW7, PW8, PW11, PW12 and PW13.
 - b. PW4 physically verified the delivery of the books and confirmed that they were delivered at the County store and received by his boss who later gave him the Inspection and Acceptance Report.
 - c. The original inspection certificate was produced. That at page 145 of the ruling the trial court observed that the prosecution had a duty to prove that the inspection certificate was falsified and observed that its authenticity was unchallenged.
 - d. The complainant and other prosecution witnesses testified that the books were in the County stores and not the Resource Centre which was under renovation at the material time as confirmed by PW2 and PW3.
 - e. PW2 confirmed that Form S11 (DMFI5) was used to requisition books from the County Store demonstrating that the Assembly's staff knew that the books were in the store and not the Resource Centre.
 - f. The appellant neither demonstrated how the procurement process was flouted nor was evidence led to prove there was breach of procurement laws and regulations during procurement of the books in question. Counsel averred that the Request for Quotation is also a method allowed under Section 105 of the Public Procurement and Disposal of Assets Act.
 - g. No evidence was adduced to establish the respondents conferring an illegal benefit to Primara Ventures. That the court correctly observed that the 5th respondent was entitled to payment pursuant to fulfilment of his contractual obligations being delivery of the subject books.
 - h. The appellant's case was hinged on a draft audit/contract management report whose contents were at variance with the final report as confirmed by PW4.
 - i. From PW1 and PW10's evidence, the complaint and resultant prosecution was a ploy by the complainant to hound the 1st respondent out of office
 - j. The appellant dishonestly attempted to conceal evidence for instance by swearing a false affidavit denying the taking of photographs of the books which action was exposed through the testimonies of PW4, PW10 and PW18.
 - k. The investigating officers, PW18 and PW19 contradicted each other thereby exonerating the respondents.
 - l. PW10 testified that he was satisfied with the responses to the audit queries raised on the draft audit/contract management report and had no doubt that the respondents complied with all applicable laws and regulations.



- m. PW19 and PW20 were aware of the status of the Final Audit report on delivery of the books before institution of the proceedings but still went ahead to charge the respondents resulting in an abuse of court process.
 - n. PW19 conceded that the 1st respondent was charged under the wrong provisions of the law as Section 68 of the [Public Finance Management Act](#) does not apply to County Governments.
 - o. No evidence, direct or circumstantial linked the respondents to the offences with which they were charged warranting their discharge.
14. In light of the foregoing, Counsel for the respondents concluded that the trial court correctly invoked the principle as to what constitutes a prima facie case as set out in the case of Ramanlal Trambaklal Bhatt vs R (supra) and urged this court to uphold the trial court's ruling of 12th February 2019 and to dismiss the appeal with costs.

Submissions of the 4th Respondent

15. In his written submission dated 3rd of March 2022 filed herein on 7th March 2022 learned Counsel for the 4th Respondent associated himself with the submissions of the 1st, 3rd, 6th Respondents. Counsel also relied heavily on the case of Ramanlal Trambaklal Bhatt v Republic [1957] EA 332 where the court held:-

“It may not be easy to define what is meant by a prima facie case but at least it must be one which a reasonable tribunal properly directing its mind to the law and the evidence would convict if no explanation is offered by the defence.”

16. Counsel argued each of the grounds of appeal separately and submitted that it was the duty of the prosecution to prove that the inspection certificate upon which it relied heavily, was falsified but it miserably failed to do so and therefore the court did not err for acquitting the 4th Respondent. Counsel asserted that PW7 and PW12 who were officers attached to the Procurement Department confirmed that the procurement method used was that of Request for Quotation and affirmed during cross examination that that is supported by the law. Counsel stated that of all the witnesses only one (PW19) alleged that the procurement process was flawed. Counsel described this witness as one who showed semblance of confusion to the extent that in examination-in-chief he stated that the method used was open tender only to retract during cross examination and say it was direct tender only to change and say it was Request for Quotation. Counsel pointed out that the 4th Respondent was the head of procurement and that he oversaw the procurement process and it was approved by PW7 and PW12. Counsel urged that the prosecution did not prove its case against the 4th Respondent beyond reasonable doubt. Counsel relied on the case of Republic v Attorney General & another Ex parte Ng'eny where the Court stated:-

“Where a criminal prosecution amounts to nothing more than an abuse of the process of the court, the court will employ its inherent power and common law to stop it.....”

17. Counsel also placed reliance on the case of SM Githunguri v Republic HC Criminal Appeal No. 271 of 1985 where he cited the Court as stating:-

“Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will



achieve nothing more than embarrass the individual and put him to unnecessary expense and agony.....”

18. Counsel urged this court to review the evidence of PW7 and PW12 and to ultimately dismiss this appeal with costs.

Analysis and Determination

19. Having carefully considered the grounds of appeal, the rival submissions, the record of the lower court and the applicable law, I find the issues that arise for determination to be as follows:

- i. Whether the respondents defrauded Nairobi City County by paying for books that were subsequently not delivered
- ii. Whether the appellant proved its case to warrant the respondents to be put on their defence.

20. As correctly argued by the Learned Counsel for the parties, it behoves this court to submit the evidence before the trial court to a fresh and exhaustive evaluation so as to draw its own conclusions as was held in the case of *Kiilu v Republic (supra)*.

21. Section 210 of the Criminal Procedure Code provides:-

“210. If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.”

22. What would constitute a prima facie case was settled in the case of *R. T. Bhatt v Republic (supra)* where the court stated:-

“It may not be easy to define what is meant by prima facie case but at least it must mean one on which a reasonable tribunal properly directing its mind to the Law and the evidence could convict if no explanation is offered by the defence.”

23. However in the case of *Republic Vs Galbraith [1981] 1WLR 1039* cited in the case of *Republic v Daniel Kazungu Karisa [2020] eKLR Lord Lane C.J* stated:

“How then should the Judge approach a submission of no case?”

- (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The Judge will of course stop the case.
- (2) The difficulty arises where there is some evidence but it is a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.
 - (a) Where the Judge comes to the conclusion that the prosecution evidence taken at its highest, is such that a jury properly directed could not properly convince upon it, it is his duty upon a submission being made, to stop the case.
 - (b) Where however, the prosecution evidence is such that its strength or weakness depends on the view taken of a witness reliability or



other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the Judge should allow the matter to be tried by the jury. There will of course as always in this branch of the Law be borderline cases. They can safely be left to the discretion of the judge.”

24. In this case, the complainant, PW1, Dr. Beatrice Elachi testified that at the time material to this case she was the Speaker of the County Assembly of Nairobi. She narrated that the case involved a matter that was brought to her by a Member of County Assembly, one Hon. Kabiru that he had wished to get a book at the Assembly’s Resource Centre but there were none. She stated that the clerk said that the books had not been supplied and that the tender was cancelled. However, the following day she was informed that the books had in fact been supplied and paid for on 5th July 2017. PW1 stated that she followed up the issue and that she subsequently called the Directorate of Criminal Investigations (DCI) and the Ethics and Anti-Corruption Commission (EACC) to assist in investigations whereupon after being furnished with an internal audit and management report, the DCI concluded that money was paid but deliveries were not made. She stated that it is that report that culminated in the criminal proceedings against the Respondents. In cross examination, PW1 was referred to the Final Audit Report of Nairobi City County Assembly dated 5th July 2018 (DMFI2). She stated that she had made her complaint in June, a month before the Final Audit Report was rendered. When referred to column 5 thereof on management response and action which stated that “The books were delivered on 24th June 2017” her response was that the books were reported a year before her complaint. With regard to item 2 on renovations at the Resource Centre she admitted that she had not seen the Final Audit Report before making a complaint to the DCI and that the report given to the DCI was an internal draft document. Further, as noted by the trial court, PW1 stated that when she reported to the DCI she was not aware of the existence of books worth Kshs 11,280,558 at the store. Moreover, in her understanding, Law Reports were not books. During examination-in-chief PW1 maintained that she had no knowledge if the books worth Kshs.11,280558/= had been supplied.
25. The narrative presented by PW2, Pauline Akuku is that she chaired the team that requisitioned books for the Resource Centre which they were setting up and that the bid by the 5th respondent, Primara Ventures was the lowest. She confirmed that her role ended at the evaluation of bids. She was not aware if there was an inspection committee. PW2 was however aware that there were renovations at the Resource Centre where her department was located but confirmed that the bookshelves had not been stocked. She was also not aware of any stock taking exercise.
26. Cyrus Muchemi, PW4 was the Procurement and Stores Clerk at the material time. He stated that the modalities of receiving such goods is that goods were supplied to the store by delivery note, invoice and a copy of the LPO and that upon delivery, an Inspection Committee was appointed to inspect the goods. She stated that members of the inspection committee would go to the store, verify the goods and issue an inspection certificate. He testified that he participated in the quotation opening in relation to this case. PW4 was categorical that the books were delivered to the stores. He stated that he learnt about the books in May 2018 when his boss one Mr. James Kagumo went to his office and told him that there were books that were required to be put in the store. He stated that his boss gave him the inspection certificate in relation to the books. He testified that he verified the inspection certificate dated 29th June 2017 in respect to the same with the supplier named as Primara Ventures. That the items were accepted and approved to pay. On cross-examination, PW4 testified that the tendering process was above board. That deliveries of the books were accurate as per the inspection certificate



issued. At the time of recording the statement with DCI, he was aware that the books were at the store. PW4's evidence was corroborated by PW6, Alphonse Owuor Ouma who was a member of the inspection committee. He too testified that the books were delivered. PW5, Gladys Kanyaa Mwendwa, a Procurement officer testified that to the extent of her participation in the tender process, it was above board.

27. The above testimony was in line with those of the internal auditors, Polycarp Abuor Okeyo (PW10) an auditor at Nairobi County Assembly on secondment from National Treasury who testified that during their audit they noted that the books were delivered to the store but were not issued to the Resource Centre due to ongoing renovations. He stated that he saw the books when they were put outside the store to be photographed by officers from the Directorate of Criminal Investigations. In relation to this case, PW11 stated that he was a member of the Internal Audit Committee that conducted an audit with respect to the subject books. It was his evidence that he did not formally physically verify the existence of the subject books and there was a possibility they were not delivered. PW12 on the other hand stated that to the best of her knowledge, no books had been delivered in July 2018. She took issue with the absence of the inspection certificate. In her view, in the cycle of procurement, the law was followed up to the point of award.
28. Finally, the investigating officer, PC John Munjama testified that he received the complaint from Hon. Beatrice Elachi (PW1) concerning illegal misappropriation of funds and that the 1st Respondent had given tenders to close family members. He echoed the testimony of the previous witnesses on Primara ventures being the lowest bidder for supply of the subject books at Kshs. 946,000 though payment was Kshs. 997,926, a figure below Kshs. 1 million. He confirmed that he visited the store and resource centre and that they took photographs of the books in the presence of a Mr. Muchemi.
29. From the evidence tendered before the trial court as reproduced above it is clear that the books requisitioned for the benefit of the Nairobi County Assembly were received, are in existence and were duly paid for. All the witnesses including PW10 testified that the procurement process was above board save for the documentation which had some inconsistencies. Evidence shows that by the time PW1 lodged the complaint with the Directorate of Criminal Investigations the books were already in the store the same having been delivered in May, 2018. As stated in paragraph 80 of the trial magistrate's judgment:-
 - “ 80. The final conclusion as per the final Audit report was that the books were delivered as ordered, only that they were not delivered to the Resource Centre. There was nothing to show that the accused persons including the 5th, breached any procurement laws. Another observation is that even the prosecution witnesses were consistent in their testimonies that the procurement process was near-flawless and that procurement laws were followed to the letter.”
30. Accordingly, I find that the trial court did not misdirect itself in acquitting the Respondents. The Learned Trial Magistrate properly evaluated the evidence against each Count and concluded that the prosecution had not made a case warranting the accused persons to be put on their defence in line with the principle in *Ramanlal Trambaklal Bhatt v R (supra)* that a prima facie case is one where a reasonable tribunal properly directing itself to the law and evidence would convict if the accused person elected to remain silent.



Conclusion

31. In the upshot I find no merit in this appeal and it is dismissed. The order of the trial court acquitting the Respondents is upheld.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 31ST DAY OF MAY, 2022

E N MAINA

JUDGE

