



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**ACEC APPEAL NO. 17 OF 2018**

**DAN KANG'ARA MBURU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. **Dan Kangara Mburu** the Appellant was charged with two offences under the Anti corruption and Economic Crimes Act namely:

**COUNT 1**

**DEALING WITH SUSPECT PROPERTY CONTRARY TO SECTION 47(2)(a) AS READ WITH SECTION 48(1) OF THE ANTI CORRUPTION AND ECONOMIC CRIMES ACT NO 3 OF 2003**

*The particulars being that the Appellant on the 9<sup>th</sup> day of November, 2017 at Muthurwa area within Nairobi City County, being a person employed by a public body, to wit National Police Service as a Police Corporal, attached to Makongeni Traffic base, traffic department, having reason to believe that a certain property namely Kshs 5,250/- was acquired as a result of corrupt conduct, he held and concealed the said property.*

**COUNT 11**

**ABUSE OF OFFICE CONTRARY TO SECTION 46 AS READ WITH SECTION 48(1) OF THE ANTI CORRUPTION AND ECONOMIC CRIMES ACT NO. 3 OF 2003**

*The particulars being that the Appellant on the 9<sup>th</sup> day of November, 2017 at Muthurwa area within Nairobi City County being a person employed by a public body, to wit National Police Service as a Police Corporal, attached to Makongeni traffic base, Traffic department, used his office to improperly confer to himself a benefit of Kshs 5,250/- from various drivers as an inducement so as not to charge the said drivers with unspecified traffic offences, without following the laid down procedures of section 105,106 and 107 of the Traffic Act Cap 403 Laws of Kenya.*

2 The Appellant denied the charges and the case proceeded to full hearing. He was found guilty and convicted on both counts. He was thereafter fined Kshs 500,000/- in default one(1) year imprisonment on each count with an order that the sentences run concurrently.

3 Being dissatisfied with the judgment the Appellant filed this Appeal citing the following grounds:

*(i) The learned trial magistrate erred in law and fact by convicting and sentencing the Appellant despite the fact that the prosecution did not prove their case against the Appellant to the standard required by law.*

*(ii) The learned trial magistrate erred in law and fact by convicting and sentencing the Appellant despite the fact that all of the respondent's witnesses testified that they did not witness the Appellant receive bribes from motorists.*

*(iii) The learned trial magistrate erred in law and fact by convicting and proceeding to sentence the Appellant when the evidence of the respondent was largely based on speculation and suspicion that the Appellant may have been receiving bribes whenever he boarded public service vehicles.*

*(iv) The learned trial magistrate erred in law and fact by convicting the Appellant when PW2 who conducted surveillance on the*

activities of police officers along Jogoo road and Muthurwa prior to the arrest, stated that he did not see the Appellant receive bribes and that his testimony that the Appellant received bribes inside public service motor vehicle was based on unidentified intelligence reports.

(v) *The learned trial magistrate erred in law and fact by receiving and relying on hearsay evidence to convict the Appellant as the alleged intelligence sources who informed PW2 that the Appellant would receive bribes whenever he boarded public service vehicles were neither revealed nor called to testify.*

(vi) *The learned trial magistrate erred in law and fact in finding that the prosecution had proved its case beyond reasonable doubt when the prosecution called no eye witness to the alleged corrupt conduct on the part of the Appellant. Not even the driver of the public service vehicle which the Appellant had boarded at the time of his arrest was asked to record a statement.*

(vii) *The learned trial magistrate erred in law and fact by holding that the burden of proof shifted to the Appellant under section 111 of the Evidence Act to explain where he got the money(Kshs 5,250/-) yet the prosecution witnesses testified that he had not seen the Appellant receive bribes from motorists thus the prosecution did to discharge its evidentiary burden under section 107 of the said Act.*

(viii) *The learned trial magistrate erred in law and fact by deducing that the Appellant was involved in corruption simply because he was allegedly seen in a clip receiving something from a motorist and moving it from one hand to another when no such clip was supplied to the Appellant among the respondent's list of exhibits nor was the same played out in court.*

(ix) *Further and without prejudice to paragraph 8 above, the learned trial magistrate erred in law and fact by deducing that the Appellant was involved in corruption simply because he was allegedly seen in a clip receiving something from a motorist and moving it from one hand to another when there was no reasonable ground to make such deduction.*

(x) *The learned trial magistrate erred in law and fact by holding that the Appellant was working alone contrary to police procedures and therefore corrupt, despite contrary evidence given both by the Appellant and the respondent's witnesses.*

(xi) *The learned trial magistrate erred in law and fact by proceeding to convict and sentence the Appellant without considering the evidence and submissions made in the Appellant's defence.*

(xii) *The learned trial magistrate erred in law and fact by simply dismissing the Appellant's evidence as an afterthought without giving it much consideration.*

(xiii) *The learned trial magistrate erred in law and fact by holding that the prosecution had placed the Appellant at the scene of crime on the 9<sup>th</sup> November 2017 despite succinct explanation given by the Appellant as to how he spent the morning of the said date.*

(xiv) *The learned trial magistrate erred in law and fact by passing a very harsh sentence on the Appellant despite the Appellants' mitigating circumstances.*

4 A summary of the prosecution case is that PW 1 **Rodger Akaki** an assistant director operations at EACC received several anonymous reports of traffic police officers soliciting and receiving bribes along Muthurwa Market and Jogoo road. This was in the year 2017. After analyzing the reports he instructed PW2 **Ditim Wanyenje Juma Musi** to carry out a surveillance on the same. This was done between 27<sup>th</sup> September 2017 and 9<sup>th</sup> November 2017.

5 PW2 prepared a Sony Digital Video Camera S/No 1365928(EXB1) and proceeded to the scene at Muthurwa with his team on 27<sup>th</sup> September 2017. They found one police officer in uniform working alone which was unusual. PW2 took video clips of this, as the officer performed his duties. He saw the officer stop vehicles, and enter them without doing any inspections. He would even enter onto moving vehicles and come out after a short distance. PW2 went back to the scene on 28<sup>th</sup> September, 10<sup>th</sup> October and 11<sup>th</sup> October 2017 and made similar observations.

6 It was his evidence that the standard police procedure is for officers to work in pairs, but the Appellant just worked alone. The clips he took were observed and a decision made for a sting operation to be conducted, on 9<sup>th</sup> November 2017. PW2 went to Muthurwa on this date while armed with the same Sony Digital Camera (EXB1). He was at the scene at 6.45am, led by PW5 Alex Nyakundi. The Appellant was filmed as he entered and disembarked from the vehicles. The video clips (EXB3) were on 6<sup>th</sup> December 2017 transferred from the camera (EXB1) to the laptop s/No HP2CE0510QGW. He then prepared a report of the operation (EXB2) with two(2) DVDs. He prepared a certificate (EXB4) under section 106(b) Evidence Act.

7 These clips (EXB3) were played in court and the court's observations recorded at pages 33-37 of the record of appeal (R.O.A). In Cross examination he stated that the information they had was that the Appellant used to collect bribes from motorists when he boarded the public service vehicles.

8 PW4 **Erick Mabeta Machogu** an investigator with EACC was in the sting operation in respect to this case, on 9<sup>th</sup> November 2017. The Appellant was said to have been boarding and alighting from different public service vehicles between Muthurwa and the roundabout. He was timed by the officers who then boarded the vehicle. The Appellant had boarded the PSV as it had stopped because of another vehicle which had overlapped. The Appellant co-operated and alighted and they boarded an EACC vehicle which took them to their offices.

9 A search was conducted on the Appellant and the following were recovered from him:

- § Traffic Police Cap
- § Certificate of appointment (EXB7)
- § Traffic Police yellow Reflector Jacket
- § A non-commissioned Officer's cane stick
- § A Samsung phone
- § Kshs 400/- from his wallet
- § Kshs 4,450/- from his pocket
- § A total of Kshs 5,250/- (EXB6) was recovered from the Appellant.

10 PW5 **Alex Nyakundi** who was also in the sting operation testified that the Kshs 5,250/- recovered from the Appellant comprised of denominations of Kshs 50/-, 100/- and 200/- notes. He signed the inventory (EXB9 & 10). PW6 **Amos Yankaso** an officer with EACC gave similar evidence as that of PW4 and PW5.

11 When placed on his defence the Appellant elected to make a sworn statement and called three (3) witnesses. In his sworn defence the appellant stated that he is **Cpl Dan Mburu** F/No 75993 and he also does farming. He is attached to D.T.O Makongeni, performing traffic duties. On 9<sup>th</sup> November 2017 4.25am he left his house in Kiserian for work carrying chicken for sale. He delivered 16 chicken to **Peter Jeremiah alias Canaan** (DW2) at Burma. Each chicken was going for Kshs 450/-.

12 He went to the city stadium roundabout where he was working and controlled jam. He picked his cash from DW2 at 9.40a.m. The cash was Kshs 7,200/- in denominations of Kshs 200/-, 100/- and 50/-. He also had Kshs 800/- in his wallet. He bought fuel for his car at Kshs 2,500/- and parked his motor vehicle at the station, went for breakfast at Muthurwa by matatu after controlling traffic. The breakfast cost him 250/-.

13 On his way towards the city stadium and in a matatu they were blocked by EACC officers. He was taken to the EACC offices from where he was interrogated and asked to give out the money he had. He added that prior to this he had prosecuted a traffic case No 4628/17 in respect of a motor vehicle KBC 661G Isuzu minibus over various offences. The driver had run away and a few days later the owner came to the station with C.I Mwangi of EACC who requested for release of the motor vehicle by PW3. The said PW3 did not grant the request.

14 The motor vehicle owner **Dominic Makau** was later bonded to go to court. He remained underground since he had been told he was being looked for. He testified in the traffic case on 7<sup>th</sup> November 2017 and was arrested on 9<sup>th</sup> November 2017. He produced photos of his residence and chicken (DEXB4). It was his evidence that from end of August and September 2017 he had received reports of people looking for him. He wrote a letter of complaint dated 13<sup>th</sup> November 2017 to the EACC and DPP (DEXB1) accusing the EACC officers to their superiors.

15 He further explained that he was usually deployed with 3 to 4 officers to work under his command. He used public vehicles for movement within the city stadium roundabout and within Jogoo road as he inspected vehicles. In cross examination he said he personally knew C.I Mwangi on a work related basis when he worked at Nairobi area traffic base. He confirmed not having had any issues with him.

16 His witness DW2 **Peter Jeremiah Okalo** testified that he did business with the Appellant who used to supply him with chicken. He referred to 9<sup>th</sup> November 2017 5am-5.30 am when the Appellant supplied him with 16 chicken which he bought at Kshs 450 for each. He paid the Appellant Kshs 7200/- later at around 9.00-9.30 am. This money was in small denominations which he got from the Bank for purposes of change.

17 Another witness DW3 **No 231955 CIP Patrick Mwinchi** said he was the DTO Makongeni around September/ November 2017 and he knew the Appellant as one of his officers who was in charge of shifts and supervised officers. He confirmed that the Appellant had detained a vehicle after inspection for being unroadworthy. A Mr. Mwangi of EACC later called him on phone requesting him to release the vehicle, which he did not do. The matter was registered in court as the vehicle owner was charged vide Traffic case no 4628/2017.

18 DW4 **David Cornelius Nyang'au** an Executive Assistant Makadara Law courts confirmed the registration of Traffic case No 4628/17 under the name of Dominic Makau as the accused. He produced a certified copy of the record (DEXB3).

19 When the Appeal came for hearing Mr Juma for the Appellant clustered the grounds of Appeal in his submissions. On grounds 1 and 7 he submitted that the prosecution case was not proved and so section 111 of the Evidence Act could not apply. It was his argument that none of the six(6) witnesses who testified saw the Appellant receive bribes. He referred to the evidence of PW2 and PW3 on this, and on the case of **Paul Mwita Robi v Republic [2010]eKLR** which according to him has no bearing on the same.

20 On grounds 2, and 6 he submitted that the video played did not show the Appellant receiving a bribe. All that PW2, PW5 and PW6 said was that the Appellant's conduct was suspicious and that the suspicion was from the way he entered and alighted from buses. That even though the trial court agreed with them it was erroneous since the Appellant was simply carrying out his duty as a traffic officer.

21 In respect to grounds 3 and 5 he contended that the evidence of PW2 was pure hearsay as he relied on evidence from informers. Counsel

further argued that the Appellant's defence which comprised of his own evidence and that of three(3) witnesses was not considered by the court. Relying on the case of **Thomas Patrick Gilbert Cholmondeley v Republic [2008] eKLR**. He argued that the Appellant had no obligation to disclose his defence in advance.

22 He finally submitted on sentence saying that the offence in the two counts arose from one transaction but the sentence was too harsh. He referred to the case of **Republic vs Mureto Munyoki 20 [1964] KLR** in support of the submission.

23 The State through M/s Nyauncho opposed the Appeal submitting that the evidence was overwhelming on both counts. She referred to the evidence of the witnesses and video evidence and submitted that the Appellant's conduct was suspicious and he was found in possession of Kshs 5,250/- which was in small denominations. It was her submission that section 111 Evidence Act is applicable to this case, and the Appellant had to explain his possession of this money. She referred to the case of **Paul Mwita Robi v Republic** (supra).

24 Counsel argued that the evidence on record showed that the Appellant neither arrested anyone nor escorted any bus to the station. Referring to pg 27 lines 15 and 16 Record of Appeal she said PW2 said he could see the Appellant taking money and putting it in his pockets. On sentence she submitted that the same was lawful and fair, and there was need for a deterrent sentence as the behavior is common among traffic police officers. She submitted that the defence was considered and dismissed.

25 In a rejoinder Mr. Juma submitted that the complaint was against Makongeni police officers and not the Appellant in particular. He wondered what amount of money amounted to suspicious money.

26 This is a first appeal and this court has a duty to reconsider and re evaluate the evidence on record and arrive at its own conclusion. It must also be borne in mind that this court did not see nor hear the witnesses and so give an allowance for that. See **Okeno v Republic 1972 EA 32; Patrick & Another v Republic [2005] 2KLR 162; Muthoko & Another v Republic [2008]KLR 297**.

27 I have duly considered the evidence on record, the grounds of Appeal, submissions by both counsel plus cited authorities. I find the broad issues falling for determination to be as follows:

(i) Whether the prosecution proved its case beyond reasonable doubt as provided by the law?

(a) Is there sufficient evidence of receipt of bribes?

(b) Is there sufficient evidence to prove both counts?

(c) Did the defence raised by the Appellant dislodge the prosecution case?

(ii) Whether the sentence was manifestly excessive.

28 The case of the prosecution is that the arrest of the Appellant was as a result of a surveillance conducted over a period of about two(2) months following reports and complaints against police officers taking bribes along Muthurwa Market and Jogoo road. This was in the year 2017. PW2 **Ditim Wanyenje Juma Musi** was given instructions by his senior PW1 **Rodger Akaki** to conduct the surveillance.

29 The photos from the video clips which were produced together with the report termed, "Report operation Muthurwa" (EXB2) show one traffic police officer boarding and alighting from various PSVs. The said officer is also shown sitting in some of the vehicles in the driver's cabin. He was identified by the witnesses as "the Appellant."

30 It is not disputed that no witness testified as to having seen the Appellant receiving bribes. It is his conduct of boarding and sitting and then alighting from PSVs without conducting any inspection that is said to have been suspicious. This is what led to the sting operation conducted on 9<sup>th</sup> November 2019. Secondly, the prosecution case is that under police operations an officer can never be assigned traffic duties alone. However in the instant case the Appellant appeared to be carrying out these duties alone with no other officer on sight.

31 The charges facing the Appellant are based on the happenings of 9<sup>th</sup> November 2017. PW3 Deputy D.T.O. Makongeni where the Appellant worked testified that on 9<sup>th</sup> November 2017 the Appellant was assigned duties alongside others at the City stadium. They were in total three(3) officers and the Appellant was the one in charge.

32 The sting operation was conducted by PW4 Erick Mabeta Machogu, PW5 Alex Nyakundi and PW6 Amos Yankaso. These officers were on 9<sup>th</sup> November 2017 morning sent to Muthurwa terminal stage while others did surveillance. Clip video photos (3 last photos in EXB2) show the happenings of 9<sup>TH</sup> November 2017. This was not at the City stadium where the Appellant had been assigned.

33 The first of the 3 clips shows the Appellant jumping onto a vehicle with another overlapping it. The second one shows him seated in the co-driver's seat of a different PSV and same to the 3rd photo. The evidence is that, the Appellant was arrested after boarding a PSV and while another PSV was overlapping. Upon arrest he was searched and Kshs 5250/- found on him.

34 The Appellant does not dispute this arrest and recovery of Kshs 5250/-(in denominations of 200/-, 100/= and 50/-(EXB10) on his person. In his defence he testified that his arrest was as a result of a witch hunt following the charge of one Dominic Makau, the owner of motor vehicle KBC 661G with a traffic offence. That C.I. Mwangi of EACC had tried to interfere with the due process in the said case, and when he was unsuccessful he turned his anger on him.

35 Secondly, he explains that the Kshs 5,250/- money found on him was not bribe money since it was part of the money paid to him by DW2

for sale of his 16 chicken to him, plus his own Kshs 800/-. Out of this money he said he had bought fuel for his car for Kshs 2,500/- and paid Kshs 250/- for breakfast, leaving him with Kshs 5,250/-.

36 The charge sheet (DEXB3) in respect to Traffic case No 4628/17 shows that Dominic Makau committed the offence he was accused of on 16<sup>th</sup> August 2017 and was arrested on the same date. Plea was taken on 15<sup>th</sup> September 2017 while the Appellant testified as PW1 on 7<sup>th</sup> November 2017. It's the argument by the defence that the Appellant was only arrested on 9<sup>th</sup> November 2017 after he testified which to him was evidence of witch-hunt. A letter dated 13<sup>th</sup> November 2017 and written by the Appellant's counsel was served on the DPP on 14<sup>th</sup> November 2017. In the letter he complained of harassment by C.I. Mwangi (EACC) and one Dominic Makau the accused in the traffic case.

37 In the letter (DEXB2) the Appellant alleges that prior to the inspection of the motor vehicle one Dominic Makau (motor vehicle owner) and a Mr. Mwangi of EACC went to Makongeni Police Station and demanded for the immediate release of the motor vehicle. The deputy D.T.O Makongei declined their demand and it was at that point that Mr Dominic Makau and Mr Mwangi of EACC warned the deputy D.T.O of dire consequences against the Appellant who had impounded the said motor vehicle unless it was released forthwith.

38 The deputy D.T.O Makongeni testified herein as PW3. She clearly indicated that it is only a Mr Mwangi of EACC who came and inquired about the said motor vehicle registration no KBC 661G, and asked for its release which was declined. He then requested to be shown the motor vehicle which was done and he confirmed that it was unroad worthy. She denied Mr Mwangi having mentioned Mr Makau or issuing any threats against her or the Appellant. Even DW3 No 231955 C.I Patrick Mwinchi the D.T.O Makongeni never mentioned any threats from C.I Mwangi or anybody else.

39 If the issue of threats was real PW3 is the person who could have answered all the questions on it because she is the one who was approached by Mr Mwangi. She was also categorical that Mr. Mwangi was alone when he came to the station and he never issued any threats nor mentioned the name of Mr Makau the motor vehicle owner. Secondly, if any threats were issued as alleged there was nothing that stopped PW3 or the Appellant from reporting to their seniors immediately it was done.

40 On the date of plea on 29<sup>th</sup> November 2017, the Appellant was represented by the same counsel who had done a letter to the DPP (DEXB2). No report was made to the Court about any threats by Mr. Mwangi or any other. Further in his sworn defence the Appellant told the court that he had no differences with Mr. Mwangi whom he had worked with. I find that there were no threats issued to the Appellant or anybody else in respect to the motor vehicle KBC 661G.

41 My finding is that the case facing the Appellant was a result of surveillance conducted by the EACC under the directorship of PW1. The surveillance conducted was as a result of several complaints received from anonymous persons in respect of traffic police operations along Muthurwa bus terminus along Jogoo road. The Makadara Law courts traffic case No 4628/17 (DEXB3) had nothing to do with it as the Appellant had sought to have the court believe.

42 The evidence is clear that the Appellant was arrested at the scene at Muthurwa bus terminus. He was found in possession of Kshs 5,250/ which was suspected to be money received as bribes. There is no evidence that he ever gave any explanation for the possession of the money. It did not come out even in the cross examination of PW1-PW6 by the defence what the money was for. See the case of **Paul Mwita Robi v Republic [2010] eKLR**. He had a duty to explain the possession under section 111 Evidence Act.

43 However, in his defence he gave an explanation on the source of the Kshs 5,250/- and even called a witness (DW2) to support this. He also produced a photo (DEXB4) showing that he keeps poultry. It was the Appellant's evidence that he delivered the chicken to DW2 in the wee hours of the morning of 9<sup>th</sup> November 2017 and went about his work. He was later paid for the chicken between 9.00am-9.30 am by DW2. DW2 explained that the Kshs 7,200/- he paid the Appellant was in such loose denominations as he had obtained it from the Bank for purposes of change.

44 It is the evidence of PW2 Ditim Wanyenje Juma Musi that he was at Muthurwa as early as 6.45 am on 9<sup>th</sup> November 2017. He found the Appellant there and he filmed him as he entered and disembarked from the PSVs. He took these clips upto around 10 am and thereafter reported to PW5 his findings. The video clips were produced as exhibits and the Appellant was clearly seen in them and what he was doing. He cannot therefore be believed when he said he was away selling chicken, fuelling his car, controlling jam, taking tea and picking the chicken proceeds upto around 9.50 am when he went to Muthurwa.

45 He was in Muthurwa very early in the morning. By the time PW2 arrived there armed with his Sony digital video camera (EXB1) ready for the assignment the Appellant was there moving from one PSV to another and literally carrying out no inspection. Its curious to note that his so called "inspection" was limited to the co-drivers seat in the cabin. He never produced any fuel receipt to show that he bought fuel worth Kshs 2,500/- for his car.

46 My finding is that the prosecution through its witnesses and exhibits (photos) explained their suspicion of the source of the loose money (kshs 5,250/-) found with the Appellant. DW2 tried to state that he got the loose money from the bank for purposes of change. If indeed DW2 bought the chicken why would he go to the bank to look for loose money to pay the Appellant? The Appellant did not at that point require loose money if his story is anything to go by. All he would have required was payment for the chicken. The Appellant's and DW2's story does not add up.

47 I am satisfied that after considering all the evidence and circumstances under which the Appellant was found with the Kshs 5,250/- in his pockets, that the said money was obtained as a result of corrupt conduct as set out under section 47(2)(a) of the ACECA. His defence was properly rejected by the trial court. He abused his office by collecting money from the PSV drivers instead of inspecting the PSVs to ensure that there was compliance with the law.

48 I find no reason to make me interfere with the finding by the trial court in convicting him on both counts.

49 I do note that the Appellant was fined Ksh 500,000/- in default one year imprisonment on each of the two counts. The learned trial magistrate went ahead to order that the sentences run concurrently which was wrong. The law and practice is clear that where there is a default sentence, the sentences are to run consecutively. That should have been the case here.

50 In passing sentence the court must take into account several factors including but not limited to the nature of the offence; the seriousness of the offence; any antecedents and mitigation. In this case the Appellant had no previous records and so was treated as a 1<sup>st</sup> offender. His mitigation was also considered and in spite of the Appellant's wayward behavior, the court should have considered the value of the bribe which has to be proportionate to the deterrent sentence being passed. I find the fine of Kshs 500,000/- for the sum of Kshs 5,250/- to have been too harsh and out of proportion.

51 I therefore set aside the fines imposed by the trial court plus the order that the sentences run concurrently. I substitute it with the following sentences:

(i) The Appellant is sentenced to a fine of Kshs 200,000/- in default six (6) months imprisonment on each count from the date of conviction.

(ii) Sentences to run consecutively.

(iii) Any excess fine paid to be refunded to the Appellant.

52 The final orders are that the appeal against conviction is dismissed. The appeal against sentence is allowed to the extent stated at para 51 of this judgment.

Orders accordingly.

**Delivered, dated and signed this 22<sup>nd</sup> day of January 2019 in open court at Nairobi**

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**HEDWIG I. ONG'UDI**

**JUDGE**