



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**HCCRA NO. 32 OF 2017**

**REPUBLIC.....APPELLANT**

**VERSUS**

**RASHID HAMISI MWAKIWIWI.....1<sup>ST</sup> RESPONDENT**

**JANE PETER ODHIAMBO .....2<sup>ND</sup> RESPONDENT**

**ERICK GEKONDE OMARIBA .....3<sup>RD</sup> RESPONDENT**

**JAMES OJODHI ODONGO .....4<sup>TH</sup> RESPONDENT**

**[Being an appeal from the Ruling of Hon. Thomas Obutu delivered on 5<sup>th</sup> May, 2017 in the Original Case EACC Case No. 1 of 2013 Republic Vs Rashid Hamisi Mwakiwiwi & 3 Others]**

**JUDGMENT**

On 5<sup>th</sup> May 2017 the trial Court delivered its ruling on the question as to whether or not the four accused persons had a case to answer.

1. In relation to the 3<sup>rd</sup> accused, **ERICK GEKONDE OMARIBA**, the Court held that there was no evidence that could warrant him being put to his defence.

2. It was the considered view of the trial court that because it had been alleged that the 3<sup>rd</sup> accused had executed a document, the signature of that accused ought to have been subjected to verification. However, the signature of the said 3<sup>rd</sup> accused had not been subjected to verification.

3. The learned trial magistrate further expressed himself thus;

**“His signature was never subjected for verification, and even if it was, the transaction or transfer of the property was between two different parties.**

**Accordingly, the 3<sup>rd</sup> Accused is acquitted under Section 210 Criminal Procedure Code.”**

4. In relation to the other remaining accused persons, namely **RASHID HAMISI MWAKIWIWI, JANE PETER ODHIAMBO** and **JAMES OJODHI ODONGO**, the trial court held that the prosecution had failed to comply with the provisions of **Section 35** of the **Ethics and Anti-Corruption Act**.

5. It was the finding of the trial court that there was no evidence that the Ethics and Anti-Corruption Commission had prepared a Report after it had conducted its investigations, which Report it should then have forwarded to the Director of Public Prosecutions.

6. It was the understanding of the trial court that the Report from the **EACC** ought to have included any recommendation which the Commission might have, concerning whether or not the person(s) who were the subject of the Report should be prosecuted for Corruption or for Economic Crime.

7. The learned trial magistrate expressed the view that the Commission had an obligation to follow the procedure.

8. If the Commission circumvented or failed to follow the procedure, the trial court said that any action undertaken by the Commission, if it decided to prefer charges against any person would be null and void.
9. In this case, the trial court said that as there was no evidence before it, that shows that there had been compliance with **Section 35** of the **Ethics and Anti-Corruption Act**, the case was improperly before the court.
10. When canvassing the appeal, learned State Counsel, Mr. Muia submitted that the trial court had erred when it concluded that **Section 35** had not been complied with.
11. In his considered opinion, the issue about the Report prepared by the Commission and the recommendations contained in that Report, were an internal matter between the Commission and the Director of Public Prosecution.
12. When the **DPP** had made a decision based on the recommendations contained in the Report of the Commission, it is the view of the Appellant that neither the Court nor the public need to be shown that there had been compliance with **Section 35**.
13. Secondly, the Appellant submitted that the ten witnesses who had given evidence on behalf of the prosecution, had provided sufficient evidence to prove a prima facie case against the accused persons.
14. In his opinion, there was evidence which shows that there had been fraudulent transactions on the dealings with the property **L.R. NO. KISUMU MUNICIPALITY/BLOCK 8/148**.
15. As far as the Appellant was concerned, the procedure which ought to have been followed if the property was to have been lawfully transferred from the **MUNICIPAL COUNCIL OF KISUMU**, included a resolution by the Council to have the land transferred, as well as a Consent from the Ministry of Lands.
16. In the absence of those procedures, the Appellant reasoned that a prima facie case had been proved against the accused persons.
17. When responding to the appeal, Mr. Odongo the learned Advocate for the Respondents, submitted that it was mandatory for the prosecution to demonstrate that **Section 35** of the **Ethics and Anti-Corruption Act** had been complied with.
18. The Respondents placed reliance on the Court of Appeal's decision in **ESTHER THEURI WARUIRU & ANOTHER V REPUBLIC CRIMINAL APPEAL NO. 48 OF 2008**.
19. In that case the learned Judges of Appeal said;
- “... non-compliance with Section 35 above is fatal to any prosecution.”**
20. The Court made it clear that the Commission could not ignore the procedure and say that it was a matter between it and the Attorney General.
21. In the event that the Commission did not comply with the provisions of the statute which created it, the Court of Appeal said that the Commission would be acting ultra vires, thus rendering its actions null and void.
22. The learned Judges of Appeal commented that they did not know whether the Attorney General would have undertaken the prosecution or would have taken any other steps in the matter, if the Commission had made its report to him pursuant to **Section 35(1)** of the **Anti-Corruption and Economic Crimes Act**.
23. It is therefore clear that in that case, the Court of Appeal had made an express finding that the Commission had failed to make its report to the Attorney General.
24. The second case cited by the Respondents was that of **NICHOLAS MURIUKI KANGANGI Vs THE HON. ATTORNEY GENERAL, CIVIL APPEAL NO. 331 OF 2010**.
25. In that case, the Court of Appeal made it clear that the Anti-Corruption Commission must report its investigations to the Attorney General, and in the report the Commission may recommend the prosecution of a person for corruption or for economic crime.
26. The Court noted that in the case before it, there is no evidence that the prescribed procedure was followed.
27. In the circumstances, it was held that the actions of the Commission, in asking the Police to prosecute on its behalf were null and void, as the Commission had acted Ultra Vires.
29. Although the courts did not specifically state that the Commission must give a written report, it would appear that best practice demands that the report should be in writing. I so find because it is only when there is a record of the report and of the recommendation contained within it, that it is easy to demonstrate compliance with the provisions of **Section 35** of the **Ethics and Anti-Corruption Act**.
29. In the case before me, the Respondents submitted that because one prosecution witness had testified that consent had been given, that implied that written consent was a requirement.

30. I would not entirely agree that just because the Appellant's witness had said that consent had been given, that that implied that the said consent had to be in writing.
31. More significantly, if the prosecution had asserted that the Director of Public Prosecution had given a nod to the prosecution of the Respondents, that implies that the Appellant had complied with the provisions of **Section 35**.
32. I have carefully perused the record of the proceedings, and I have paid particular attention to the cross-examination of the witnesses who testified for the prosecution.
33. None of the witnesses was asked whether or not the Commission had given a recommendation in its report to the **DPP**, concerning the prosecution of the Respondents.
34. Therefore, at this stage, it may well be premature for the court to have concluded that the Director of Public Prosecution had not given his go-ahead for the prosecution of the Respondents.
35. I find that the Director of Public Prosecution must make a conscious decision on the question as to whether or not a suspect ought to be charged for corruption or an economic crime.
36. In other words, the **Ethics and Anti-Corruption Commission** cannot lawfully prefer charges for either corruption or economic crimes before the Director of Public Prosecution has accepted the Commission's recommendation on the issue.
37. When the recommendation to prosecute a person was not accepted, the Director of Public Prosecution is required to succinctly set out his reasons for not accepting the recommendation.
38. The said reasons are supposed to be set out in the Annual Report of the Director of Public Prosecution, as stipulated in **Section 37(4)** of the **Ethics and Anti-Corruption Act**.
39. That therefore implies that the issue concerning the acceptance or the rejection of the Commission's recommendation to the Director of Public Prosecution cannot remain a matter between those two offices.
40. But there is no express requirement that the Acceptance of the recommendation to prosecute a person must be made public, before the prosecution can commence.
41. Perhaps, it might be prudent to make it mandatory that the Director of Public Prosecution provides both the Court and the accused with a copy of the Acceptance of the Commission's recommendation.
42. I have in mind a provision similar to that of **Section 50** of the **Traffic Act**, which provides that no conviction can result if either the person was not warned at the time the offence was committed, or if he was not served with summons within 14 days from the date the offence was committed, or if the person was not served with a Notice of Intended Prosecution within 14 days from the date the offence was committed.
43. In the absence of such express requirements in the **Ethics and Anti-Corruption Act**, it would be wrong to insist that the Director of Public Prosecution had to publicly display his acceptance of the Commission's recommendation for prosecution either prior to the commencement of the case or even prior to the close of the prosecution case.
44. In my view, if the prosecution is challenged on the issue, but fails to prove that the Director of Public Prosecution did accept the Commission's recommendation for prosecution, then only would the trial be deemed a nullity.
45. As the matter is supposed to be a part of the Annual Reports of the Director of Public Prosecution, I find that there is absolutely no possibility of the evidence being fabricated in this case.
46. It is a matter about which the court need not make any presumption.
47. This is an issue of a historical fact, whether or not the Director of Public Prosecution had, in his Report for 2013, accepted the Commission's recommendation to prefer charges of the nature facing the Respondents.
48. For that reason, I find merit in the appeal. I therefore set aside the findings that the provisions of **Section 35** of the **Ethics and Anti-Corruption Act** had not been complied with.
49. That is a matter that the court ought to have only determined based on evidence; and the Appellant had not yet been required to put forward the requisite evidence.
50. I direct that the acquittal of the Respondents be set aside, and be substituted with an order requiring the Appellant to place before the trial court, the Annual Report for 2013. A perusal of the Report will then enable the Court make an informed decision on whether or not **Section 35** had been complied with.
51. It is so ordered.

52. As regards the rest of the issues raised by the Respondents, I decline to express any view on;

**a. Whether or not the charge sheet was defective;**

*and*

**b. Whether or not the evidence adduced was sufficient to prove a prima facie case with a probability of success against the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Accused Persons.**

53. My said decision is pegged upon the fact that the trial court's decision, in relation to those 3 accused persons was based only on the court's interpretation of **Section 35**. The trial court did not make any findings on the alleged defective charge sheet or on the alleged lack of sufficient evidence against those 3 persons.

54. It is only as against the 3<sup>rd</sup> accused that the trial court made a finding based on the insufficiency of evidence.

55. The Appellant did not take issue with the trial court's finding, in respect to the 3<sup>rd</sup> accused.

56. And because that said finding is not pegged on the interpretation of **Section 35** of the **Ethics and Anti-Corruption Act**, I find that it cannot be affected by this decision.

57. Accordingly, the appeal against the 3<sup>rd</sup> Accused is rejected.

**DATED, SIGNED and DELIVERED at KISUMU This 27<sup>th</sup> day of March 2019**

**FRED A. OCHIENG**

**JUDGE**