



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**CRIMINAL APPEAL NO 23 OF 2017**

**EZEKIEL KIPKOECH CHIRCHIR.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from the original conviction and sentence in Kericho Anti-corruption Case No. 1 of 2015 (Hon. J Ndururi (PM) dated 16<sup>th</sup> June 2017)**

**JUDGMENT**

1. The appellant, Ezekiel Kipkoech Chirchir was an employee of the county government of Bomet as the head of procurement. He was serving in this capacity when the county government leased from the Kenya Red Cross Society / Emergency Plus Medical Services Limited (EPMS) six ambulances by way of a contract dated 7<sup>th</sup> January 2014. The procurement process leading up to this contract is what gave rise to the charges, conviction and sentence of the appellant before the trial court. The conviction and sentence are the subject of the present appeal.

2. The appellant and his co-accused were charged with the following offences:

1. Fraudulent practice in procurement proceeding contrary to section 41(4) as read with section 137 of the Public Procurement and Disposal Act No. 3 of 2005. The particulars of the offence were that on diverse dates between the 7<sup>th</sup> December 2013 and 13<sup>th</sup> December 2013 at Bomet County Government offices in Bomet Town, within Bomet County in the Republic of Kenya, being employees of the Bomet County government and members of the County Tender Committee fraudulent misrepresented facts in order to influence the procurement of ambulance services for the county government of Bomet TO Emergency plus Medical Services Co. Ltd.

2. Abuse of office contrary to Section 46 as read with Section 48(1) (a) of The Anti-Corruption and Economic Crimes Act No. 3 of 2003. On 16<sup>th</sup> December 2013 in Bomet County Government Office in Bomet Town, within Bomet County in the Republic of Kenya, being employees of the Bomet County Government and members of the County Tender Committee jointly and willfully used their offices to improperly confer a benefit of awarding tendering contract for leasing of ambulance services to Emergency plus Medical Services Co. Ltd without following the laid down procedures.

3. The appellant had been charged with 13 other persons, including the County Secretary, one Jonathan K. Soi. The County Secretary was found to have no case to answer at the close of the prosecution case and he was acquitted on all the charges. At the close of the trial, the trial court acquitted accused 1-10, 12 and 13 under section 215 of the CPC.

4. The appellant was found guilty of the offences charged and was sentenced to 5 years imprisonment on each count, the sentences to run concurrently.

5. Aggrieved by both his conviction and sentence, the appellant has filed the present appeal in which he raises several grounds of appeal in his petition of appeal dated 27<sup>th</sup> June 2017. One of the grounds of appeal is that by the time the Ethics and Anti-corruption Commission (EACC) made its report and recommended his prosecution to the DPP, it was not fully constituted.

6. This was the only ground which was raised at the hearing of the appeal. It was also conceded by Counsel for the State Mr. Ayodo. Mr. Ayodo conceded on this technical ground on the basis that the prosecution had established that at the time the case against the appellant was investigated in the period between 4<sup>th</sup> April 2015 and 28<sup>th</sup> October 2015, the EACC was not fully constituted.

7. Mr. Ayodo noted that the matter was affected by the case of **Michael Sistu Mwaura Kamau v Ethics & Anti-Corruption Commission & 4 others [2017] eKLR** in which the Court of Appeal held that the EACC can only carry out its investigative functions when the full number of Commissioners is in office. It was the state's position, however, that the court should order a retrial.

8. While Ms. Chelimo appearing for the appellant had initially indicated that the court should make a decision on the technical ground conceded by Mr. Ayodo, she subsequently asked the court to vacate the judgment date and give a date for arguing the appeal on other grounds on their merits. This was done. However, when the matter came up before me in the presence of Mr. Ayodo and Mr. Orina, Mr. Ayodo reiterated the grounds on which the state was conceding the appeal and asked the court to order a re-trial. Mr. Orina asked the court to render a ruling on the appeal, noting that once the concession on the technical ground was made, the issue of a re-trial should not arise.

9. Accordingly, the only two issues to consider in this appeal are whether the EACC was properly constituted at the time of the appellant's trial. The second is whether, if it was not properly constituted, the court should set aside the appellant's conviction and sentence and order a re-trial.

10. On the first issue which is set out in ground 12 of the appellant's petition of appeal, there is no dispute that the EACC Chairman, Mumo Matemu, and Commissioners Jane Onsongo, and Irene Keino resigned on 12<sup>th</sup> May 2015, 31<sup>st</sup> March 2015 and 30<sup>th</sup> April 2015 respectively. The new Commissioners were sworn into office on 23<sup>rd</sup> January 2016. **PW17, Augusta Meka**, an investigating officer, told the trial court that they were instructed to investigate the case on 27<sup>th</sup> March 2015.

11. After completion of the investigations, EACC forwarded its report and recommendations to the DPP. The appellant was arrested and charged in court on 27<sup>th</sup> November 2015. EACC was therefore not fully constituted at the time it made the report and recommendations to the DPP in respect of the appellant in this case.

12. In its decision in **Michael Sistu Mwaura Kamau v Ethics & Anti-Corruption Commission & 4 others (supra)**, the Court of Appeal held that the appellant's prosecution was tainted with illegalities and that the High Court ought to have issued a declaration to that effect and prohibited his prosecution as it was founded on the report and recommendations of the improperly constituted EACC. It expressed these sentiments as follows:

*“Having found that the EACC was not properly constituted at the time it made a report and recommendations to the DPP to prosecute the appellant and having further found that indeed the DPP formed his decision to prosecute the appellant on the basis of the impugned report and recommendations, it is inevitable to conclude that the appellant's prosecution was tainted with illegalities and that the High Court ought to have issued a declaration to that effect and prohibited his prosecution founded on the report and recommendations of the improperly constituted EACC.”*

13. This is the situation that prevails in the present case. On the authority of the above decision therefore which is binding on this court, I am constrained to find that the prosecution of the appellant on the basis of a report and recommendations of the EACC while it was improperly constituted cannot stand.

14. The second issue to consider is whether this court should order a retrial of the appellant. The state asked the court to find that there was a mistrial of the appellant and order a re-trial as its concession was on the technicality regarding the composition of the EACC, but not on the evidence against the appellant. The appellant and the state did not address this court on the substance of the appeal, confining themselves to the technical issue regarding the composition of the EACC, which was conceded by the state. The question then that I must address is when a retrial can be ordered.

15. In **Bernard Lolimo Ekimat v Republic Criminal Appeal No 151 of 2004 [2005] eKLR**, the Court of Appeal stated as follows with respect to a re-trial:

*“There are many decisions on the question of what appropriate case would attract an order of retrial but in the main, the principle that has been acceptable to court is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it.”*

16. In **Njenga & Another v Republic [2006] 1 KLR 17** the same court held that:

*“Where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not follow that a retrial should be ordered. Each case depends on its own facts and circumstances but an order for retrial should only be made where the interests of justice require it.”*

17. Further, in **M' Obici & Anor v Republic [2006] 2 KLR 166** the Court of Appeal held:

*“A retrial should not be ordered unless the appellate court was of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result. In this case, the Court having carefully considered the evidence on record assessed that the evidence was unlikely to lead to a conviction for the offence charged even if a retrial was held.”*

See also **Opicho v Republic [2009] KLR 369**.

18. The principles then are that a retrial should be ordered where, taking into consideration the facts and circumstances of the case, the interests of justice demand that a retrial be ordered. Further, that a retrial must not be ordered unless the appellate court is of the opinion, on a proper consideration of the admissible or potentially admissible evidence, a conviction against the appellant might result.

19. In this case, however, I note that the state asked the court to order a retrial as its concession was on the technicality regarding the composition of the EACC, but not on the evidence against the appellant. Neither the appellant nor the state addressed this court on the

substance of the appeal, confining themselves to the technical issue regarding the composition of the EACC. I find therefore that in the circumstances, it would not be proper for this court to enter into a consideration of the merits of the case. In my view, the proper course of action is to be guided by the decision of the Court of Appeal in **Michael Sistu Mwaura Kamau v Ethics & Anti-Corruption Commission**. While allowing the appeal on the technical ground regarding the composition of the EACC, the Court of Appeal observed as follows:

*“We have already adverted to the great emphasis that the Constitution lays on integrity of State and public officers and the strong and consistent anti-corruption theme that runs through the Constitution. Article 79 of the Constitution expressly enjoins Parliament to enact legislation to establish an independent ethics and anti-corruption commission with the status and powers of a constitutional commission, for the purposes of ensuring compliance with and enforcement of the provisions of Chapter six of the Constitution on leadership and integrity. The EACC was established pursuant to the provisions of Article 79. In Ethics & Anti-Corruption Commission v. The Chief Magistrates? Court Milimani & 4 Others (supra) this Court observed as follows:*

*“...the current Constitution is heavy-laden with anti-corruption principles and values, such as good governance, integrity, transparency and accountability, to the extent that it has dedicated a separate and distinct chapter, being Chapter Six, to issues of leadership and integrity. Among the functions of EACC is to investigate and recommend to the DPP the prosecution of any acts of corruption or violation of codes of ethics or any other matter prescribed by the Act or any other enactment pursuant to Chapter Six of the Constitution and to recommend appropriate action to be taken against State officers or public officers alleged to have engaged in unethical conduct.”*

*This appeal succeeds on the technical ground that the EACC was not properly constituted at the time it completed the investigations and forwarded its report and recommendations to the DPP. From the foregoing anti-corruption constitutional edicts, the parties are at liberty to proceed as they deem necessary on the basis of a properly constituted EACC and within the dictates of the Constitution and the law.”*

20. To my understanding, this requires that the EACC, which I believe is now properly constituted, and the office of the DPP, take the necessary steps *“to proceed as they deem necessary on the basis of a properly constituted EACC and within the dictates of the Constitution and the law.”*

21. Given the fact that this is a matter alleging corruption against a public officer, and given the importance that the Constitution places on combating corruption as recognised in the **Michael Sistu Mwaura Kamau** case. I believe that the interests of justice demand that the prosecution should be at liberty to bring charges against the appellant should there be sufficient evidence to do so.

22. I accordingly allow the appeal and set aside the conviction and sentence. In view of the fact that the appeal succeeds on a technicality, the state is at liberty to institute fresh proceedings against the appellant should there be sufficient basis to do so.

**Dated and Signed this 12<sup>th</sup> day of July 2019**

**MUMBI NGUGI**

**JUDGE**

**Dated Delivered and Signed at Kericho this 24<sup>th</sup> day of July, 2019**

**GEORGE DULU**

**JUDGE**