REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL NO. 31 OF 2017

BETWEEN

REPUBLIC ……………………..…..………......……………………..……APPELLANT

AND

ALFRED MUREITHI ……...………………………..…………..……1ST RESPONDENT

PERRY WAIRIMU MAINA …..……………………………………2ND RESPONDENT

(Being an appeal from the original Judgment and Acquittal of Hon. T. A. Obutu, PM dated 8th May 2017 in Ethics & Anti-Corruption Criminal Case No. 1 of 2015 at Chief Magistrate's Court at Kisumu)

JUDGMENT

1. The respondents, **ALFRED MUREITHI** (DW 1) and **PERRY WAIRIMU MAINA** (DW 2), are police officers. Before the trial court they faced the following charges;

Count 1

Dealing with suspect property contrary to **section 47(1)** as read with **section 47(2)(a)** and **48(1)** of the ***Anti-Corruption and Economic Crimes Act, Act No. 3 of 2003 ("ACECA")***.

ALFRED MUREITHI *– On 27th March 2015, along the Kisumu-Kakamega Road within Kisumu County, being a person employed by a public body to wit, National Police Service, as Corporal of Police attached to Kondele Traffic base, was found in possession of Kshs. 7,250.00 believed to have been acquired in the cause of corrupt conduct, namely corrupt receipt of benefit from motorists along the said Kisumu-Kakamega Road.*

Count 2

Dealing with suspect property contrary to **section 47(1)** as read with **section 47(2)(a)** and **48(1)** of the ***ACECA***.

PERRY WAIRIMU MAINA *– On 27th March 2015, along the Kisumu-Kakamega Road within Kisumu County, being a person employed by a public body to wit, National Police Service, as a Police Constable attached to Kondele Traffic base, was found in possession of Kshs. 1,800.00 believed to have been acquired in the cause of corrupt conduct, namely corrupt receipt of benefit from motorists along the said Kisumu-Kakamega Road.*

Count 3

Threatening to kill contrary to **section 223(1)** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***.

ALFRED MUREITHI *- On 27th March 2015 at about 10.00am at the Ethics and Anti-Corruption Commission Kisumu Office within Kisumu County, without lawful excuse uttered the words, "I'll look for you, I'm a trained police officer and I will use all possible means, utaona," threatening to kill Raphael Alango Nyina.*

2. In support of its case, the prosecution marshalled 6 witnesses while the respondents gave unsworn statements. The respondents were acquitted under **section 215** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***. The State now appeals against the decision on the following grounds of appeal are set out in the petition of appeal dated 18th May 2017;

1. The Honourable trial Magistrate erred in law by failing to appreciate the evidence presented by the prosecution and arrived at an erroneous ruling.

2. The Honourable trial Magistrate erred in failing to appreciate the law on Anti-Corruption and Ethics and misinterpreted section 35 of the Anti-Corruption and Economic Crimes Act No. 3 of 2004.

3. The Honourable trial Magistrate erred in law by acquitting the accused persons under section 210 of the Criminal Procedure Code.

4. The Honourable trial Magistrate erred in law by finding that the prosecution had not proved a prima facie case against the respondent and should have placed them on their defence.

3. In light of the introduction I have given, it is apparent that grounds 3 and 4 of the petition are erroneous since the respondents were put on their defence and acquitted under **section 215** of the ***Criminal Procedure Code***. This appeal is by the State against an acquittal by the subordinate court governed by **section 348A** of the ***Criminal Procedure Code***. It entitles the Director of Public Prosecutions to appeal to the High Court from the acquittal on a matter of fact and law. Since this is a first appeal, this court is entitled to re-appraise the evidence and reach an independent conclusion as to whether to uphold the decision of the trial court bearing in mind that it neither heard nor saw the witnesses testify (see ***Okeno v Republic*** **[1972] EA 32**).

4. A summary of the prosecution case was as follows. Following complaints by the members of the public about police officers taking bribes from motorists along the Kisumu-Kakamega road, the Ethics and Anti-Corruption Authority (EACC) decided to conduct a surveillance of what was taking place. John Wainaina Muturi (PW 5), an investigator with EACC, embarked on surveillance activities along the Kisumu-Kakamega Road on 17th, 18th, 19th and 20th March 2015. He testified that he was able to observe police officers flagging down vehicles, coming into contact with the drivers and conductors' hands and thereafter releasing the vehicles to proceed without checking them. In some cases, the drivers and conductors would drop money which would be collected by the police officers. After observing this conduct, the EACC decided to mount a sting operation.

5. On the morning of 27th March 2015, Wycliffe Sirengo (PW 1), Inspector Samuel Kingele (PW 2), Police Constable Lilian Simiyu (PW 3), Chief Inspector Francis (PW 4) and Raphael Alango Nyina (PW 6) proceeded to the scene along the Kisumu-Kakamega Road near the Lake Basin Authority Headquarters where they divided themselves into two groups.

6. PW 1, PW 4 and PW 6 approached DW 1, who was at the scene and introduced themselves. PW 1 searched his pockets and recovered Kshs. 7,250/- from the inner pocket of his reflector jacket in denominations of Kshs. 100/ and Kshs. 50/-. PW 2 and PW 3 approached DW 2 and arrested her. When

she tried to resist, her police cap fell off her head and money was scattered. Members of the public helped themselves to some of the money but they managed to recover Kshs. 1,800/- in denominations of Kshs. 100/ and Kshs. 50/-.

7. After arrest, the respondents were taken to the EACC office in Kisumu where an inventory of the money collected was prepared but the respondents refused to sign it. While at the office, PW 6, who was also the investigating officer, testified that DW 1 argued with him and in the course of the argument, he accused him of being a fraudulent police officer who would regret his action. PW 6 reported the threat at Railways Police Station on 30th March 2015.

8. When put on their defence, the respondents elected to make unsworn statements. DW 1. He admitted that he was directing traffic with DW 2 along the Kisumu-Kakamega road when he was arrested by EACC officers who took then to Railways Police Station to record statements. He contended that the charges against them were fabricated. DW 2 stated that she as with DW 1 controlling traffic at Migosi road when she was arrested and taken to the EACC officers. She insisted that nothing was recovered from them and that the offence with which they were charged was not disclosed in the occurrence book.

9. In the judgment, the trial magistrate framed two issues for determination. First, whether the offence was proved and second, whether the state complied with **section 35** of the ***ACECA***. On the first issue the trial magistrate held that the charge was defective to the extent that the respondents were arrested along the Kisumu-Migosi road yet the prosecution case was that the incident took place at the Kisumu-Kakamega road. Second, he concluded that the failure to record the exhibits recovered in the initial report and the Occurrence Book (OB) meant that inclusion of the report of recoveries was an afterthought. Thirdly, the trial magistrate concluded that the clips produced in court did not show any of the respondent receiving any money or benefit. Lastly, the trial magistrate held that there was insufficient evidence to prove that the DW 1 issued threats to PW 6 as alleged in the charge.

10. To support the appeal both parties filed written submissions to support their respective cases. The appellant submitted that the prosecution proved the offence. It argued that it was not in dispute that they were present and arrested along Kisumu-Kakamega road while on duty in possession of assorted currency notes. It relied on the testimony of PW 6 to confirm that that appellants were present at the scene. As regards the application of **section 35** of the ***ACECA***, the appellant submitted that failure to comply with this provisions was not fatal to the prosecution case. It relied on the case of ***Republic v Josphat Koech Sirma & Others*** **NRB HC A&EC Revision No. 3 of 2016 [2017]eKLR**.

11. The respondents submitted that the prosecution failed to meet its burden of proof as the evidence was wanting in several respects and could not have been the basis for a sound conviction. The respondents agreed with the finding of the trial magistrate that failure to comply with **section 35** of ***ACECA*** was fatal to the prosecution case as held by the trial magistrate consistent with the decisions of the Court of Appeal in ***Nicholas M. Kangangi v Attorney General*** **NRB CA Civil Appeal No. 33 of 2010 [2011]eKLR** and ***Esther T. Waruiru & Another v Republic*** **NRB CA Criminal Appeal No. 48 of 2008[2011]eKLR**.

12. The first issue in this appeal deals with proof of the offence. **Section 47** of ***ACECA*** creates an offence known as dealing with suspect property and it provides as follows;

> *47(1) A person who deals with property that he believes or has reason to believe was acquired in the course of or as a result of corrupt conduct is guilty of an offence.*
>
> *(2) For the purposes of this section, a person deals with property if the person—*
>
> > *(a) holds, receives, conceals or uses the property or causes the property to be used; or*
> >
> > *(b) enters into a transaction in relation to the property or causes such a transaction to be entered into.*
>
> *(3) In this section,* ***"corrupt conduct"*** *means—*

(a) conduct constituting corruption or economic crime; or

(b) conduct that took place before this Act came into operation and which—

(i) at the time, constituted an offence; and

(ii) if it had taken place after this Act came into operation, would have constituted corruption or economic crime.

13. In order to prove the offence under **section 47** of ***ACECA***, the prosecution must establish, *"the dealing"* as provided in **section 47(2)** thereof and the belief by the accused that the property was acquired in the course of or as a result of corrupt conduct. The first element is not difficult to prove but the second requires that the, *"corrupt conduct"* as defined under **section 47(3)(a)** of the ***Act*** be proved.

14. In order to prove, *"belief that the property was acquired in the course of or as a result of corrupt conduct",* the prosecution must establish the underlying conduct that constituting corruption or economic crime which can be imputed to the accused. A similar provision is to be found in the definition of the offence of handling stolen goods in **section 322** of the ***Penal Code*** which makes it an offence for a person to handle stolen goods knowing or having reason to believe them to be stolen goods. In ***Khaleft Haret v Republic*** **NBI HCCRA No. 1 of 1979 [1979]eKLR**, the court held that the conviction for handling stolen goods could not be upheld unless the goods in question were proved to have been stolen. The Court stated as follows;

The first ground of appeal was, however, purely on a point of law. Mr Omondi submitted that it is an essential ingredient in any charge of handling stolen property that the property has in fact been stolen. It is not enough for the accused person to be shown to have had reason to believe the property was stolen (under the second branch of the ingredient requiring guilty knowledge) if there is no evidence (or, as in this case, no admissible evidence: the contention being that such evidence as there was constituted hearsay) that it was stolen. He cited a passage from Lord Reid's judgment in the English case ***Haughton v Smith (1974) 2 WLR 1, 11,*** *as follows:*

It is clear from the terms of that section and of section 24(3), that the goods must be goods which have been stolen but have not been restored to lawful custody before the commission of the offence. It has been admitted, though perhaps wrongly, that the goods to which the charge relates had been restored to lawful custody before the alleged offence was committed. So there could be no offence under section 22 with regard to them. There is a reference in the section to the accused believing the goods to be stolen goods. But that does not widen the ambit or scope of the section: it merely makes the E section apply to a case where the goods are, in fact, stolen goods but the accused does not know that but only believes them to be so ... with which we respectfully agree.

15. By parity of reasoning, the prosecution in this case ought to have proved the essential element of bribery before the grounds of belief or the guilty knowledge is established. In this case, the testimony of PW 1, PW 2, PW 3, PW 4 and PW 6 established that the respondents were in possession of the currency notes and an inventory of the recovered items prepared so soon after their arrest. The conduct fell within the definition of *"dealing"* under **section 47(2)** of ***ACECA***.

16. As regards the element of bribery, the prosecution relied mainly on the evidence of PW 5 who had conducted surveillance of police officers along the Kisumu-Kakamega road. PW 5 told the court that he conducted surveillance on 17th, 18th, 19th and 20th March 2015. There was no evidence that the respondents were at the scene of surveillance on the days that surveillance was done hence knowledge and belief of the corrupt conduct on those days could not be attributed to them. Further, on the day of the sting operation none of the witnesses' present testified that the respondents were collecting money from drivers and conductors and forbearing to inspect or check the vehicles. Thus the second element of the offence was not proved. I would add that had the prosecution proved that the respondents had been taking money in circumstances that implied bribery and corruption, then the evidential burden, under

section 111 of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, would have shifted to the respondents to explain how they received the small denomination currency notes in those circumstances.

17. As regards the charge against the 1st respondent, threatening to kill contrary to **section 223(1)** of the ***Penal Code***, I find that the prosecution did not establish the offence. PW 6 did not even testify that the 2nd appellant told him that, *"I'll look for you, I'm a trained police officer and I will use all possible means, utaona."* The evidence is that PW 6 and the 1st respondent argued but the words uttered could not amount to a threat to kill.

18. Having reached the conclusion, I hold that the prosecution failed to prove its case. For the sake of completeness and clarity, I propose to deal with the reasons advanced by the trial magistrate. First, the fact that the charge referred to the place of the incident as Kakamega-Kisumu Road and not Kisumu-Migosi Road was, in my view, a misdescription which was not prejudicial. The respondents were arrested at the scene where they were found with money and even DW 2 stated that she was with DW 1 at Migosi Road controlling traffic when they were arrested. This error was clearly curable under **section 382** of the ***Criminal Procedure Code***.

19. The second issue concerns the finding that the extract of the OB did not mention the exhibits recovered or the nature of the charge the accused were likely to face. The records that an officer-in-charge of a police station is required to keep are specified in **Appendix 41A** of ***The Kenya Police Standing Orders*** and **paragraph XIII(2)** of the appendix which deals with Occurrence Books provides:

> *Section 18(1) of the Police Ordinance 1960 requires "all complaints and charges preferred, the names of all persons arrested and the offences with which they are charged" shall be entered in the occurrence book. These are legal requirements. In addition entries will show clearly the entire days work performed by all ranks attached to police stations.*
>
> *(3) Entries to be concise – ALL entries should be as concise as possible.*

20. Thus the only statutory requirement is that the OB should contain a record of all complaints and charges preferred, the names of all persons arrested and the offence with which they are charged. There is no requirement that the inventory should be included in the OB. In this case, the inventory made so soon after the arrest and in the respondents' presence together with all the evidence of the witnesses was sufficient evidence of possession and recovery. Further, the fact that the specific charge against the respondents was not stated in the OB cannot, of itself, invalidate the charges facing them in court. It is sufficient that the OB set out the facts constituting the offence as it is no longer the responsibility of the police to prefer and prosecute offenders particularly for offences under ***ACECA*** which are investigated by EACC. In view of the findings that I have made, the acquittal is upheld.

21. Following the decision I have reached, it is not necessary to deal with the effect of **section 35** of ***ACECA*** save to state that the Court of Appeal in both ***Nicholas M. Kangangi v Attorney General (Supra)*** and ***Esther T. Waruiru & Another v Republic*** **(Supra),** held that failure to comply with the **section 35** of ***ACECA*** rendered the prosecution a nullity. However, the High Court in ***Stephen Mburu Ndiba v Ethics & Anti-Corruption Commission & Another*** **NYR Misc. Crim. Application No. 20 of 2014 [2015]eKLR** (Ngaah J.) and ***Michael Waweru Ndegwa v Republic*** **NYR Criminal Appeal No. 290A of 2010[2016] eKLR** (Mativo J.) cast doubt on those decisions and departed from them. The Court of Appeal may, in due course, have the opportunity to review its decisions but as I have stated, it not necessary for me to deal with the issue.

22. The appeal is dismissed.

DATED and DELIVERED at KISUMU this 16th day of January 2018.

D.S. MAJANJA

JUDGE

Mr Muia, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the appellant.

Mr Onsongo instructed by Onsongo and Company Advocates for the respondents.