



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ACC. APPEAL NO. 27 OF 2017

SHADRACK NGATIA.....APPELLANT

VERUS

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment of Hon. Kennedy Bidali Chief Magistrate delivered on 1st September 2017 in Nairobi ACC Criminal case No. 4 of 2017)

JUDGMENT

1. **Shadrack Kioni Ngatia** the appellant was convicted and sentenced to pay Ksh 1,028,600/= or in default to serve 18 months imprisonment. He was charged with 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 of the offence were that the appellant and another on the 28th day of January 2017 at Mukeu area along Thika- Kenol road, within Murang'a county, being persons employed by a public body, to wit National Police Service as Police Constable respectively and attached to Makuyu Police Station Traffic duties, jointly used their office to improperly confer to themselves a benefit of kshs.14,300/= from various drivers, as an inducement not to charge the said drivers with unspecified traffic offences, a matter relating to the affairs of the said Public body.

2. The appellant being aggrieved by the judgment appealed on the following grounds:

(i) That the learned trial Magistrate erred in law and fact in convicting the appellant to pay a fine of Kshs.1,028,600/= or in default serve 18 months imprisonment yet the prosecution did not prove its case beyond reasonable doubt.

(ii) That the learned trial magistrate erred in law and fact in convicting the appellant to pay a fine of Kshs.1,028, 600/=or in default serve 18 months imprisonment and failed to consider the strong evidence of the defence.

(iii) That the learned trial magistrate erred in law and in fact in convicting the appellant to pay a fine of Kshs.1,028,600/=or in default serve 18 months imprisonment by relying on circumstantial evidence, suspicion and unclarified evidence on who put the money where it was found.

(iv) That the learned trial magistrate erred in law and fact in convicting the appellant to pay a fine of Kshs.1,028,600/= or in default serve 18 months imprisonment yet the prosecution failed to prove whether the appellant solicited and received the money which fact the trial magistrate failed to address.

(v) That the learned trial Magistrate erred in law and fact by overlooking the fact that the evidence relied on was not watertight to justify a conviction.

(vi) That the learned trial magistrate erred in law and fact by shifting the burden of proof to the appellant

(vii) That the learned trial magistrate erred in law and fact in convicting the appellant to pay a fine of Ksh.1,028,600/=or in default serve 18 months imprisonment on the evidence which evidence was not "collaborated" by the documentary evidence (sketch map)

(viii) That the learned trial magistrate erred in law and fact in sentencing the appellant to pay a fine of Ksh.1,028,600/= or in default serve 18 months imprisonment by failing to consider the strong defence and submission by the appellant.

(ix) That the learned trial magistrate erred in law and fact by relying on the insufficient evidence of the prosecution.

3. Counsel for the appellant also filed a supplementary memorandum of appeal with the following further grounds:

(i) The learned trial magistrate erred in law and fact by failing to find that the particulars of the offence were not proved in evidence and particularly that the appellant obtained a benefit from drivers as an inducement not to charge them with traffic offences.

(ii) The learned trial magistrate erred in law and in fact by misapplying the doctrine of constructive possession and thus arriving at a wrong decision.

(iii) The learned trial magistrate erred in law and in fact by finding the appellant guilty yet no evidence presented; being witness testimony, video evidence and the money recovered linked the appellant to the offence.

(iv) The learned trial magistrate erred in law and fact by convicting the appellant yet the drivers who purportedly offered the bribes were never called to testify as prosecution witnesses.

(v) The learned trial magistrate erred in law and in fact by convicting the appellant despite the contradicting evidence of PW1 and other prosecution witnesses.

(vi) The learned trial magistrate erred in law and in fact by failing to find that no link was established between the appellant and the money recovered and particularly that no forensic report was presented in evidence.

(vii) The learned trial magistrate erred in law and in fact by finding the appellant guilty yet it could not be established in evidence that the police officers were actually obtaining money from drivers.

(viii) The learned trial magistrate erred in law and in fact by not taking into account that the inventory was never signed at the scene especially that there is contradictory testimony on the amount of money recovered.

The Prosecution Case.

4. The Prosecution set out to establish its case by calling nine (9) witnesses. PW1 **Rogers Akaki** is the assistant director operations at the ethics and anti-corruption commission (EACC). He testified that his office received a letter dated 27th October 2016 from the Independent Policing Oversight Authority (IPOA) (EXB 1). The letter raised complaints about police officers soliciting and receiving bribes from public service vehicles. The letter was entered into their data system. He then asked the surveillance unit to undertake surveillance between Thika and Makuyu towns which was done between 23rd– 25th January 2017. The report and recording by PW1 confirmed the complaints by IPOA.

5. Two teams were thereafter formed to undertake a sting operation on 28th January 2017 between 10 am – 10:30at at Mukeru area. When he left Thika town at 10am he spotted two officers on either side of the road. He informed **PW2 John Wanaina Muturi** to strike as he proceeded on to Kenol town. On being alerted by **PW5 PC Lenjo Kililo** of the end of the operation he went to the scene where he witnessed three officers being placed in the vehicle. The two teams converged at the scene and one searched around the scene while the other searched the police vehicle.

6. While at Kenol Thika road he saw a black paper bag and informed his supervisor. After the search the two teams converged and the team leader informed him that he had videotaped the entire recovery where money had been recovered. Further that an officer had been brought from the thicket. The case was allocated to **PW9 Francis Mwitii Kamwara** for investigation. The surveillance clips were produced as EXB2a & b and they showed officers receiving money. A police vehicle GKB 432E was searched and money was recovered from therein, in denominations of Ksh.50 and Ksh.1000/= stamp, books and a black paper bag full of currency. A 4th officer escaped arrest.

7. He confirmed that the exchange in the video clips did not show any money being received save for the officers touching the door. None of the drivers recorded statements for fear of repercussions. No money was recovered on the officers, but in the thicket. Recovered was ksh.14,300/= belonging to both officers who were charged.

8. **PW2 John Wainaina Muturi** was part of the surveillance team of 23rd January – 25th January 2017. They covered areas along Thika – Sagana road and they saw officers take bribes from drivers of public vehicles. On 28th January 2017 they organized for a sting operation. At Makuyu area the taking of benefits involved six (6) police officers and they informed PW1 after capturing it on video. PW1 arrested the 4 traffic officers involved. He testified that money was recovered in different places including a bottle at the back of the car as well as a black polythene bag.

9. He identified the appellant as one of those arrested. He produced the recorded video recordings (EXB2) Sony camera (EXB3) and the certificate under section 106B of the Evidence Act (EXB4); video clips Exb3(b), (c) and (d). The recording and the pictures were clear and could clearly be read. **PW3 Bitim Wanyenche Juma Musi** gave similar evidence to that of PW2. He added that the amount of cash recovered was Ksh.30,000/= though the inventory was not done at the scene.

10. **PW4 No. 234601 IP Harrison Kiambuthi** was the officer in charge of Ngoliba sub-base in Thika but had been at the Makuyu traffic base

as the deputy base commander at the time of incident. His evidence is that on 3rd March 2017 he was summoned to EACC to view some clips related to work involving officers from Makuyu traffic base. He identified them as IP Said Barasa, PC Evans Mureithi and Abdi Khalif. He did not observe any misconduct on the clips. He confirmed having worked with the appellant.

11. **PW5 Lenje Kililo** and **PW6 Samuel Mukundi Njiru** were also in the team of the sting operation. They confirmed that the appellant was among the four (4) officers arrested. Though they did not witness the recovery of the money they still signed the inventories. **PW7 232934 CIP Abdullahi Tote** was the Traffic base commander Makuyu. He produced the duty roaster for the week running from the 21st January – 28th January 2017. It showed that the appellant had been on duty on 22nd, 24th, 25th, 26th, 27th and 28th January 2017. The duty roaster did not indicate when the shift began and ended. The known times were 6am – 11:30 am and 11:30am to 6pm and the one on duty would sign.

12. **PW8 James Wachira** was involved in this operation. Just before Kenol they found two traffic police officer on duty and they stopped and identified themselves. They did a quick search on them but recovered no money. They however recovered money by the roadside in a black polythene bag and in water bottles. Money was also found under the mat in the driver's cabin, and at the back of the vehicle. PW9 was the one recovering it. He confirmed that 4 officers including the appellant were arrested. The inventory was prepared at Integrity Centre.

13. **PW9 Francis Mwit Kamwara** was the investigating officer in this matter. He testified that he arrested four (4) officers at Kenol and conducted a search on them but recovered no money. He searched the vehicle driven by the 1st accused (in the lower court) and recovered Ksh.5500/= under the seat and Ksh.8800/= in the rear seat (EXB8b). He then prepared inventories but the appellant and others refused to sign them. He confirmed that the appellant had been at the scene, but he was not present at the time of the recovery. The money recovered was in various denominations. He also confirmed that **PW5 Lenje Kililo** and **PW6 Samuel Mukundi Njiru** were not at the scene but they signed the inventory. An agent of the police officers was arrested at the scene.

14. When placed on his defence the appellant gave an unsworn testimony. He stated that on 28th January 2017 he reported to work at Makuyu Traffic base at 7:30am. They proceeded to Mukeu along Kenol-Sagana road for duty. They came across an accident scene involving a canter. They left the 1st accused (lower court – case) attending to it as they went to Kenol. The 1st accused picked them at 9am and they went back to the accident scene. He was on the Thika-Nyeri side of the highway inspecting a lorry when he was surrounded by officers and he was warned against running or he would be shot.

15. He was arrested and searched and his notebook taken but nothing was recovered from him. Arrested with him were 1st accused, PC Mureithi and IP Baraza Khalif. They were all taken to integrity centre, and placed in an office where money was poured on the floor. He refused to sign any inventory as he did not know its contents.

16. When the appeal came for hearing both counsels made oral submissions. **Mr. Mombo** for the appellant submitted that the main issue in this case was that of the appellant conferring on himself a benefit of ksh.14000/=. He opined that the learned trial magistrate ought to have addressed himself on the ingredients of the said offence. He listed the ingredients as:

- (i) A link between the appellant and the property. In this case it is the money in the bottle, in the bush and in land cruiser.
- (ii) The property was proceeds of crime and that the appellant was aware of this.

17. He pointed out that the drivers were never called to testify. Further that from the video recording of 23rd January 2017, 25th January 2017 and 28th January the appellant was not mentioned anywhere. A motor vehicle at the scene had also been removed which to him was interference with the scene of crime. The notebook recovered from the appellant was not produced.

18. Counsel submitted that there was no money recovered from the appellant and the one found in the vehicle was recovered in the appellant's absence. Further that no forensic examination was done on the vehicle which had been used by several people. He also raised issue with the place from where the inventory was taken, especially considering the evidence by PW5, PW8 and PW9.

19. Counsel submitted that there was no dusting done on the recovered money nor any linkage between the appellant and the money shown. He contended that the amount of the money recovered was contradictory from the evidence of the witnesses. It was not therefore clear how the learned trial magistrate convicted on constructive possession in the face of all these loopholes.

20. In response Mrs. Aluda for the state opposed the appeal. She said their evidence was based on visual technology video and documentary evidence. She explained the report received by EACC of an illegal barrier along Makuyu-Thika highway and the surveillance done on 23rd to 25th January 2017. That the raid on 28th January 2017 was conducted after watching the appellant and another on video for two (2) hours. She submitted that PW2 conducted the surveillance, PW3 prepared the inventory and there was no contradiction in this. Further that PW1 confirmed to the court that the appellant was on duty while PW7 produced a duty roaster showing that the appellant was on duty and was at the scene.

21. She also submitted that the appellant gave someone a paper bag and the person ran and threw it. She contended that there was sufficient material including circumstantial evidence to support the charge and the video evidence was watertight.

22. In a rejoinder Mr. Mombo for the appellant submitted that the issue of illegal roadblock was never raised and that the appellant was not identified on the video. On the issue of circumstantial evidence he referred to the authorities he submitted to the court.

23. This being a first appeal this court is called upon to re-analyze the evidence and reach an independent conclusion as to whether to uphold the decision of the trial court or not bearing in mind that it neither heard nor saw the witnesses testify. This was the decision in **Okeno –vs- Republic (1972 E.A 32)**. In the case of **Patrick and Another –vs-Republic [2005]2 KLR 162**, the court of appeal had this to say;

***“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions.*”**

24. I have carefully considered the evidence on record, grounds of appeal, and the submissions by both counsels as is required of a first appeal court.

Upon considering the grounds raised in this appeal I find the issue falling for determination to be whether there is sufficient evidence to support a conviction and whether the constructive possession doctrine was misapplied.

25. The charge the appellant faced alongside another is under sections 47(2a) and 48(1) of the ACECA.

Section 47 of the ACECA provides:

(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 cause 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.

26. From the section above, the offence that the appellant was charged with is narrowed down to:

“Holds, receives, conceals or uses the property or causes the property to be used”

The particulars in the charge sheet are that:

“The appellant and another jointly used their office to improperly confer to themselves a benefit of Kshs.14300/= from various drivers, as an inducement not to charge them with unspecified traffic offences, a matter relating to the affairs of the said body”

27. The EACC officers set out on a sting operation to nab traffic police officers who were involved in collecting bribes from drivers operating along Thika-Kenol road within Murang’a county. It was clear in their mind that whatever money that would be found on the officers would be money received as a benefit. This explains why they were not keen on getting any driver nabbed. None of the PSV drivers testified in this case.

Section 47(1) clearly states that the person commits the offence when:

“He believes or has reason to believe the property was acquired in the course of or as a result of corrupt conduct.”

28. My view is that the wording in section 47 (1) and (2) must be read together. The corrupt conduct that the prosecution relied on is bribery. The learned trial magistrate found that the appellant was not found with any of the recovered money but he relied on constructive possession to convict.

29. The evidence is clear that there were four (4) police officers who were arrested by the EACC officers at the scene. Only two (2) were charged vide ACC case No. 4 of 2017. What happened to the other two and in particular

(i) P.C Evans Mureithi

(ii) IP Said Barasa?

It is obvious that they were never charged but why? These two have been clearly identified in the video clips as having been actively involved with the drivers. So where they were not charged?

30. What is it that the appellant did that amounted to constructive possession? What then is constructive possession? Constructive possession is a legal term used to describe a situation where an individual has actual control over chattels or real property without actually having physical control of the same assets. At law the person who has constructive possession stands in the same legal position as a person with actual possession.

31. It was therefore the duty of the prosecution to adduce evidence to show how through his conduct the appellant was in constructive possession of the suspect property. In the case of **Republic –vs- Alfred Mureithi & Another [2018] eKLR Majanja J.** stated thus:

“in order to prove, belief that 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? In Khalif Haret –vs- Republic Nairobi 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.”

32. The charge sheet shows that the appellant and another improperly conferred a benefit of kshs.14,300/= on themselves. Inasmuch as PW1, PW5, and PW9 testified that the money recovered was a total of Kshs.14,300/=. PW6 said it was Kshs.14,200/=. while PW3 was categorical that the total amount of money recovered from the scene was ksh.30,000/=.

33. It has also come out in the evidence that the inventory was not prepared at the scene but elsewhere, and the arrested persons refused to sign it. The witnesses pointed out there were three points of recovery.

(i) The front of the motor vehicle under the mat kshs.5500/=

(ii) The rear of the motor vehicle in a black polythene bag ksh.8800/=

(iii) Black polythene bags in the bush – amount not stated.

34. The investigating officer (PW9) only mentions the amounts recovered from the two spots in the vehicle and that’s what adds up to Ksh.14300/=. He is silent on what was allegedly recovered in the bush. Where did this money go to? PW3 who was at the scene was clear that ksh.30,000/= was recovered. Other officers save for PW1 and PW5 decided to say nothing about the recoveries.

35. From the judgment it is clear that the conviction was based on the video clips as well as constructive possession. **PW2 John Wanaina Muturi** testified that the appellant is not seen in the video clip. According to **PW3 Bitim Wanyenche Juma Musi** the appellant was not at the scene at the time of arrest, as he had been taken to the other side. PW4 only identified three (3) officers in the video clip and the appellant was not one of them.

36. None of the witnesses testified that the appellant was seen receiving bribes and from their testimonies he was not seen in the video clips exchanging handshakes with the drivers though he was at the scene. No one has stated that the appellant was the driver of the motor vehicle GK B432E in which some of the money was recovered under the mat and at the back of the vehicle. Mrs. Aluda submitted that the appellant was seen giving a paper bag to someone who ran and threw it away. I have not been able to trace any such testimony from the record before me.

37. There is evidence by PW9 that an “agent” was seen talking to police officers and he ran away upon their arrest. In cross examination, he said he did not see the alleged agent talking to the appellant or his co-accused.

38. I have evaluated the evidence on record and do appreciate the work done by the EACC officers in this particular case. A lot more needs to be done for anyone to appreciate the sacrifices they make.

39. PW2 was doing the video covering of the events of 28th January 2017. He was not able to cover how the money was taken to the Land cruiser GK B432E (both to the driver’s cabin and rear part of the vehicle). He did not also cover how the money was taken to the bushes and who did it. Finally the appellant is nowhere seen in the clip either collecting money or taking to any of those three (3) points. He was not captured in any of the video clips, yet he was at the scene, how come? These are omissions which strictly speaking ought to have been covered.

40. I do observe that the prosecution had a duty of not just showing that the appellant was at the scene but that he was also involved in the illegal activities that were taking place there. I find that the prosecution failed to link the appellant to the bribe taking and could not therefore link him to the constructive possession. A lot more needs to be done by the EACC officers in the sting operations for this vice called bribery and corruption to be rooted out of our society.

41. In conclusion I find that the appeal has merit and I allow it. I quash the conviction and set aside the sentence.

42. The appellant shall be released forthwith unless lawfully held under a separate warrant.

43. If any fine has been paid it shall be refunded to the appellant.

Orders Accordingly.

Dated, signed and delivered this 20th day of **March 2018** in open court at Nairobi.

HEDWIG I. ONG'UDI

HIGH COURT JUDGE