



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ANTI-CORRUPTION CRIMINAL APPEAL NO. 12 OF 2016

SAMUEL KIBET CHERUIYOT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from conviction and sentence in Milimani

Chief Magistrate's Anti-Corruption Court in Criminal Case No. 14 of 2015

delivered by Hon. K. Bidali, Chief Magistrate, on 1st November 2016.

JUDGMENT

1. Samuel Kibet Cheruiyot the appellant was charged with three(3) counts of offences under the Anti Corruption & Economic Crimes Act No. 3 of 2003. The 1st and 2nd counts were on soliciting for a benefit contrary to section 39(3) (a) as read with section 48 (1) of the ACECA. He was acquitted of count 1 and convicted on count 2 and fined Kshs. 150,000/- in default one year imprisonment. He was also convicted on count 3 and fined Kshs. 150,000/- in default, one year imprisonment for receiving a benefit of Kshs 10,000/- contrary to section 39(3) as read with section 48(1) of ACECA.

2. Being aggrieved with the Judgment he filed this appeal citing the following grounds:

1. That the learned trial magistrate erred in law and in fact by convicting the appellant without taking into account that there was no written consent from the Director of Public Prosecution to prosecute him and the prosecution was in total violation of the mandatory procedure a provided under seditio 35(1) and (2) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 Cap 65 Laws of Kenya.

2. That the learned trial Magistrate erred in law and in fact in finding that the prosecution had proved the case beyond reasonable doubt. The charges of soliciting for a benefit contrary to section 39(3) (a) as read with section 48(1) and charge of receiving of a benefit contrary to section 39(3) (a) as read with section 48(1) of the Anti Corruption and Economic Crimes Act No. 3 of 2003, when there was no sufficient evidence to sustain the said charges.

3. That the learned trial magistrate erred in law and fact in finding that the evidence of PW1 satisfied the ingredients of the charges above before critically analyzing the said evidence viz a vis the law.

4. That the learned trial magistrate erred in law and fact by not finding that PW1 was not a credible witness as he had recanted his testimony a clear indication that the charge might have been an entrapment that would render PW1's evidence inadmissible hence the case not established beyond reasonable doubt as required by the law.

5. That the trial Magistrate erred in law and in fact by failing to acquit the appellant for want of inconsistency in the ingredients of the charge and the testimony of the prosecute witnesses as to the place where the alleged offence was committed.

6. The learned trial Magistrate erred in law and fact in failing to consider the inconsistencies in the prosecution witnesses including the Complainant who actually recanted his testimony.

7. The learned trial Magistrate erred in law and in fact by acquitting the respondent on count 1 solely because of the inconsistency in the date of the alleged offence but failed to acquit the appellant on count 2 and 3 because of inconsistency in the place of the alleged offence which is equally a legal requirement in a charge.

8. That the learned Magistrate erred in law and fact in failing to analyse the evidence presented before him including calling experts before arriving at a conclusion.

9. That the learned Magistrate erred in law and fact in failing to consider the submissions and authorities cited by the appellant in its defence case.

10. The Appellant shall crave the leave of court to amend, alter add, and/or omit any ground on or before hearing hereof.

3. The case of the prosecution is premised on the evidence of nine (9) witnesses. It was PW1's **Peter Odhiambo** evidence that he used to work with KACA his woes started in April 2015 when someone tampered with his electricity supply which was later disconnected among others. A report was made to Kenya Power & Lighting Company (KPLC). On 3rd April PW2 **Peter Muriithi Njure** and PW3 **Simon Mugambi** came and reconnected for one person only. The rest were instructed to go to KPLC office.

4. When he went to the said offices, PW2 demanded for Kshs. 30,000/- while the appellant demanded for Kshs 20,000/- as a bribe for the power to be reconnected. PW3 had promised to send him a number to which he could send the money. He reported the issue to EACC, and he was given a gadget for purposes of recording the conversation (EXB1). Thereafter he was given Kshs 10,000/- (treated) which he took to the appellant. The treated money was placed in a half cut envelop (EXB2) after photo copies had been taken (EXB4).

5. He met the appellant at "bomb blast" and he gave him the cash as he recorded the conversation. The appellant promised to have the power reconnected but he was immediately arrested. The recording was played in court during the hearing. He produced his July bill as EXB5. In cross examination he said indeed PW3 sent him an mpesa number, to which he was to send not less than Kshs 10,000. He admitted having written a letter seeking to have the case withdrawn because PW2 and PW3 were not charged. He insisted that the cash he gave to the appellant was to go to PW2. He also stated that he had tried to record a conversation with PW2 but the device was disconnected.

6. PW2 and PW3 are employees of KPLC. PW2 identified the appellant's voice in the recorded conversation. He denied demanding any money from PW1. He produced two letters EXB 6 and 7 showing that the appellant was an employee of KPLC and was in charge of meter reading. He confirmed being aware of PW1's complaint on power disconnection, and having met him severally as he came to his office.

7. PW3 confirmed that there was a power disconnection complaint raised by PW1 whom he sent to the Revenue Protection Unit to sign liability forms. He denied giving PW1 an mpesa number to send money to. He gave 0722887050 as his only telephone number.

8. PW4 **Ditim W.J. Musi** of EACC was asked by the Investigating officer **Mr Mbuvi** to treat some Kshs 10,000/- for an operation in respect of PW1's complaint. An inventory and copies of the notes were made (EXB 3 & 4). Pw5 **Livingston Waihenya** an EACC investigator introduced a digital recording device to PW1 which device was used in recording a conversation between PW1 and an employee of KPLC. He said the report had been in respect of a demand for Kshs 20,000/- but upon negotiation it went down to Kshs 10,000/-.

9. Upon being satisfied that the demand had been made they planned for a trap with PW4 treating the money. Mr Mbuvi (PW8) and Okoth (PW7) accompanied PW1 to the City center. The witness said he followed them from a distance.

10. Later PW8 signaled him and he went to the scene and found the officers struggling with the appellant. They escorted the appellant to their vehicle off Harambee Avenue. Upon search he was only found with Kshs 3,000/- in his pocket. He showed them the person who had the Kshs 10,000/-. The person was asked to enter their vehicle and he removed Kshs 10,000/- in shs 1000/- denomination. It was handed over to PW 7 who confirmed it to be the treated money.

11. An inventory was later prepared (EXB10). The person who had received the money from the appellant was Peter who testified as PW 6 **Peter Chiira**. He testified that in July 2015 he was to meet the appellant who was to assist him do wiring. They met at bomb blast, and proceeded to Agro house. They met some men who surrounded the appellant, and when he inquired he was told by police officer Waihenya that the appellant was under arrest. He followed slowly and some money dropped and he picked it.

12. PW8 stated that Mr. Waihenya took it but he told him the money could be the appellant's. He was later called by the EACC officers through the appellant's line and they met at Equity Bank Harambee Avenue. They wanted the money he had picked and he gave it to them. It was around Kshs 10,000/- and it matched the photo copies the Officers had. He signed the inventory (EXB10) It was his further evidence that the Kshs 10,000/- dropped from one of the five (5) men.

13. PW7 **No. 86058 PC Caleb Okoth** gave similar evidence to that of PW 5. He is the one who prepared a certificate under Section 106(B) Evidence Act, to show the conditions of the recorder (EXB11). It was his evidence that the recorder was in a good working condition at the time it was handed to PW1.

14. PW8 CPL Martin Mbuvi is the investigating officer. He testified that he received the complaint on 1st July 2015 and asked the complainant to come back the next day after he had recorded his statement. All preliminaries were done and a recorded conversation was availed to them by PW1. Upon examining it they were satisfied that a demand of Kshs 10,000/- had been made. That amount was treated with APQ powder by PW4 and handed over to PW1 with instructions.

15. Together with PW1, PW7, Waihenya and himself they left for the town. On the way PW1 called the appellant inquiring where they were to meet and he was told "bomb blast" area. PW1 was dropped around Harambee house and he crossed Moi Avenue. He met the appellant

and another person at Development House. He saw PW1 giving out the envelope containing the money. Further the appellant received the money with his right hand and put it in his trouser pocket.

16. They moved in and arrested the appellant. Upon searching him they discovered that he did not have the treated money. He told them that Peter “Chiira “Gatindi (PW6) had it. The witness (PW6) was searched by PW7 and the money was recovered on him. The appellant’s hands were swabbed for traces of APQ powder. All other exhibits were taken to the Government Chemist for examination and analysis. He did the transcript of the recorded conversation which he produced as (EXB8).

17. **PW9 Catherine Sera Marambi** is a Government Analyst trained as a Forensic Analyzer with G 12. She confirmed receiving exhibits nos 13, 15a-d for analysis from Cpl Mbuvi (PW8) Upon analysis she found the APQ powder to be present in the items. She produced her report as EXB 14.

18. When placed on his defence the appellant gave a sworn defence. He stated that he is an employee of KPLC while PW1 is a client of the said company. He said between March to July 2015 PW1 frequented his office complaining about power disconnection at his residence and the demand money by PW2 and PW3 who are based in Donholm. The appellant was based at Electricity House. Even after being referred to his seniors PW1 was not assisted and he came back to the appellant.

19. He dispatched two technicians to PW1’s house whose report showed that the wiring was poor. He gave PW1 a “defective installation” note dated **24th April 2015** to enable him get a qualified fundi to deal. He came back three days later saying he could not get a contractor. He referred him to Gilbert Rotich (DW2) who gave him a quotation, (DEXB6) which was very high. Being his friend he told him to avail Kshs 10,000/- as down payment and he would pay the balance later.

20. PW1 called him on 2nd July 2015 midday and informed him that he had the money. They met and talked briefly and he gave him the money. That is when some people he later learnt were police officers arrested him. He further stated that PW2 and PW3 disconnected the power for PW1, Dan Kamau and Steve Okari. That the power for the last two was reconnected and he suspected they had bribed PW2 and PW3.

21. He denied soliciting for any benefit, and insisted that the money he was given was for buying materials for wiring by Gilbert Rotich (DW2). He does not deny receiving the Kshs 10,000/- from PW1 but to him it was for a totally different assignment.

22. His witness Gilbert Rotich testified as DW2 and he said he worked for Mekib General Contractors. He showed the court, his company profile, certificate of incorporation, staff members inventory none of which was produced as an exhibit. That on 2nd July 2015 he had been given some work by the appellant who he had spoken to. He went to River Road to buy materials for one Peter whose quotation he had. Peter could not raise the money but offered to pay Kshs 10,000/-, labour was Kshs 4,000/-, while Kshs 1500/- was for the completion certificate.

23. He later learnt that the appellant had been arrested, so he never got the money. It was his evidence that the appellant had given his company many contracts. He later did Peter’s wiring in July 2015.

24. When the appeal came for hearing the counsels appearing highlighted the submissions already filed. Mr Makori holding brief for Mr Ntabo submitted that section 35(1) ACECA was not complied with by EACC. That they filed no report as required since EACC has no prosecutorial powers. He submitted that since there was no compliance the trial was a nullity. He referred to several authorities among them **Nicholas Kangangi v Republic Cr. Appeal No. 331 of 2010; Esther Theuri Waruiru & Anor v Republic 2011 ektr.**

25. He further submitted that there wasn’t sufficient evidence to sustain a conviction. That the scene is unknown since two places are mentioned i.e Electricity House and Bomb blast. He submitted that the appellant did not commit any offence at Electricity House.

26. Ms/ Sigei for the respondent relying on the submissions filed by Ms Aluda opposed the appeal submitting that the presence of a prosecution counsel signified consent by the DPP, who institutes and conducts criminal proceedings. She further submitted that the prosecution discharged its burden of proof by establishing that:

-The appellant was a public officer under KPLC see PW2 EXB 6 & 7.

- PW2 knew the appellant.

-There was proof of receipt of a benefit. That the voice was identified see evidence of PW1 PW4 PW7 –PW9.

-That the defect in the charge sheet is curable under section 382 Criminal Procedure Code.

27. She finally submitted that the sentence was legal and proper.

28. This is a first appeal and this Court has a duty bestowed upon it to re-evaluate and re-consider the evidence that was adduced and come to its own conclusion. It should also bear in mind that unlike the trial court it did not hear nor see the witnesses. An allowance should be given for that. See **Okeno v R 1972 E.A. 32;**

29. In the case of **Patrick & Anor v Republic [2005] 2 KLR 162** the Court of Appeal held:

3. 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 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.

30. I have considered the evidence on record the grounds of appeal, the written and oral submissions and authorities filed herein by both the parties. I find the following to be the issues falling for determination;

- (i) Whether the charge sheet was defective.
- (ii) Whether there was compliance with section 35(1) (2) of ACECA and the consequences of non compliance
- (iii) Whether there was sufficient evidence to sustain a conviction.

Issue NO. (i) Whether the charge sheet was defective.

31. The charge sheet shows that both the soliciting and receiving took place at

“Electricity House.” The evidence adduced clearly shows that the receiving (C3) took place at “bomb blast” place. Does that make the charge sheet defective?

Section 382 Criminal Procedure Code provides:

382. Finding or sentence when reversible by reason of error or omission in charge or other proceedings. *Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice: Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings. **(Emphasis mine).***

32. All the witnesses who testified on the receipt of the money mentioned the scene as Bomb Blast place. There was no issue raised in cross examination about Electricity House and the Bomb Blast place. What clearly came out was that the recording of the demand was done elsewhere, and the parties only met at Bomb Blast place to complete the deal. i.e. giving and receiving of the money.

33. It was very clear what the witnesses were talking about as the venue for the receipt of the money. I do find that this is one of the instances covered by section 382 Criminal Procedure Code. The appellant was not prejudiced at all by the charge showing Electricity House and instead of Bomb Blast place.

Issue No. (ii) Whether there was compliance with section 35(1) (2) of ACECA and the consequences of non compliance

34. Mr. Ntabo in his written submissions states that there was no written consent from the DPP allowing the prosecution of the appellant section 35 (1) (2) of the ACECA provides.

(1) Investigation report (1) Following an investigation the Commission shall report to the Director of Public Prosecutions on the results of the investigation.

(2) The Commission's report shall include any recommendation the Commission may have that a person be prosecuted for corruption or economic crime.

35. I have considered the authorities cited by the Appellant's counsel. It is true the EACC does not have prosecutorial powers hence the provisions of section 32 of the ACECA. Section 35(1) and (2) of ACECA does not however call for a written consent from the DPP as has been submitted. Had Parliament intended that to be the position it would have stated so. Under the repealed Prevention of Corruption Act section 12 provided clearly for a written consent of the A.G. We do not have such a provision in the ACECA section 35(1) (2) of ECECA only talks of a report and recommendations.

36. These recommendations are not binding on the DPP who makes his own determination upon considering the material before him. It is the DPP who institutes and conducts criminal proceedings and he is represented in court by the prosecuting counsels. Article 157 (9) (10) of the Constitution provides:

“(9) The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”

37. The record shows that the Prosecution was a prosecuting counsel and not police prosecutor. The prosecuting Counsel was there by virtue of article 157(9) of the Constitution and was clearly representing the DPP. The Counsel would not have been there without the knowledge and green light from the DPP. I therefore find that the argument could only hold water if the prosecution was by a police prosecutor who had to be given written consent by the Attorney General to prosecute under the Prevention of Corruption Act.

38. On this I am persuaded by the finding by Jairus Ngaah J in the case of **Stephen Mburu Ndiba v EACC & Anor Nyeri Misc Cr. Application No. 20 of 2014** where he stated;

“ I am convinced that S 32 read together with s23(3) of the Anti Corruption & Economic Crimes Act, 2003, are tools available to the commission to arrest and charge where, in the circumstance of the case, it is appropriate to do so. These provisions of the law would be rendered superfluous and bear no meaning at all if it was to be argued that before any arrest and charge is preferred against any suspect, a report has to be made to the Director of Public Prosecutions. If that was the intention of the Legislature it would have expressly stated so.”

39. My finding is that there is no requirement for the DPP’s **written consent** under section 35(1)(2) ACECA when he is the one charging and conducting the prosecution.

Issue NO. (iii) Whether there was sufficient evidence to sustain a conviction

40. There is no dispute that the appellant received Kshs 10,000 from PW1. The issue is what the money was for. PW1 testified that it was to facilitate reconnection of his disconnected power. The appellant says it was down payment for purchase of re-wiring materials to be used by Gilbert Rotich (DW2) in PW1’s house.

41. DW2 stated that he had been to PW1’s residence to inspect the house in order to do a quotation for rewiring. This was very crucial evidence which should have been put to PW1 in cross examination for him to deny or admit. It was never put to him, which confirms that there was nothing like that.

42. The transcript (EXB8) is so clear on what the money was for. At pg 11 bottom it goes like this.

Samuel: Leta elfu ishirini (20,000/-Kshs.)

Peter Odhiambo: Elfu Ishirini (20,000/- Kshs)

Samuel: Leta elfu ishrini alafu nitamuongelesha mimi mwenyewe, na uniwachie hii vitu by ten utakuwa na stima.

43. The purpose of the money being given was for reconnection of electricity not doing rewiring. There was no element of entrapment in this as was the case in **Mohamed Noor vs A.G. Petition no. 181 of 2010 (NAIROBI)**. PW1 reported this matter to EACC after going through a lot of frustrations in trying to have his power reconnected. The recorded conversation confirms the demand and there is overwhelming evidence of receipt of the money. PW1 cannot be said to be unreliable. His concern was that whereas PW2, PW3 and the appellant had asked for money it is only the appellant who was charged.

44. My finding is that the learned trial Magistrate analyzed the evidence well and arrived at the right decision and the sentence is lawful.

45. I find no reason to make me interfere with the decision. The result is that the appeal lacks merit and is dismissed. The conviction and sentence are upheld.

Signed, dated and delivered this 31st May 2018 in Open Court at NAIROBI

.....

HEDWIG. I. ONG’UDI

JUDGE