



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

CRIMINAL APPEAL NO 14 OF 2016

GABRIEL MBURU IRUNGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from conviction and sentence in Nairobi Chief Magistrate's Court in Anti Corruption Case No. 29 of 2015 delivered by L.O. Onyina Senior Principal Magistrate on 18th November 2016)

JUDGMENT

1 Gabriel Mburu Irungu, the appellant was charged before the Nairobi Chief Magistrates Anti Corruption Court with the following offences.

COUNT 1

Wilful failure to comply with applicable procedures and guidelines relating to tendering of contracts contrary to section 45(2) (b) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act no. 3 of 2003.

The particulars of the charge being that the appellant on or about 5th March 2012 at Nairobi, within Nairobi City County, being a person employed by a Public body to wit, the then Ministry of Public Works, as the Nairobi City County Works Officer and being the project Manager in respect of Tender No. NBI-DO7/13/2011-2012 for office refurbishment to include acoustic ceiling, gypsum ceiling decoration, air conditioning, improvement and washroom at the first floor Embankment Plaza Phase II, willfully failed to comply with the law relating to procurement to wit section 27(3) of the Public Procurement and Disposal Act by authorizing Mweha Enterprises Limited to commence works in the said Tender without subjecting this Tender to a competitive bidding process.

Count 2

Abuse of Office Contrary to Section 46 As Read With Section 48(1) Of The Anti-Corruption And Economic Crimes Act No. 3 of 2003.

The particulars being that the appellant on or about the 5th day of March 2012, at Nairobi, within Nairobi City County, being a person employed by a Public body to wit, the then Ministry of Public Works, as the Nairobi City County Works Officer, used his office to improperly confer a benefit on Mweha Enterprises Limited by authorizing the said Mweha Enterprises Limited to commence works in tender no. No. NBI-DO7/13/2011-2012 2012 for office refurbishment to include acoustic ceiling, gypsum ceiling decoration, air conditioning, improvement and washroom at the first floor Embankment Plaza Phase II, for Kenya Trade Network Agency without subjecting the tender to a competitive bidding process.

2 He pleaded not guilty to both counts and the case proceeded to full hearing with the prosecution calling a total of thirteen (13) witnesses while the defence called two (2) witnesses. At the end of the trial the court found the appellant guilty and convicted him on both counts. He was fined Kshs 700,000/- in default one year imprisonment on each count.

3 Being aggrieved by the judgment he has appealed against both conviction and sentence, citing the following grounds:

(i) That the prosecution and subsequent conviction of the Appellant was illegal and unlawful in that the Ethics and Anti Corruption Commission (EACC) which investigated the matter and forwarded their report to office of the Director of public prosecution (ODPP) for prosecution was not legally constituted at the time of the said investigation and charging of the Appellant.

(ii) That the learned trial magistrate misdirected himself in law and fact by finding that the prosecution had proved their case on the two counts against the Appellant.

(iii) That the trial magistrate erred in law by not appreciating that the charges under Anti corruption and economic crimes acts are not strict liability offences and the prosecution has to prove willfulness(intention) which was not done.

(iv) That the trial magistrate erred in law by holding that the Appellant was criminally liable for acts of other parties. He failed to appreciate that vicarious liability has no place in criminal jurisprudence.

(v) That the trial court made its judgment against the weight of evidence adduced.

(vi) That the trial magistrate failed to consider and/or appreciate the defence evidence and submissions.

(vii) That the sentence was excessive and punitive considering the facts of the case.

4 A summary of the prosecution is that in 2011/2012, Kentrade began the process of acquiring new offices at Embarkment Plaza Upperhill. **PW1 Isaac Okoth** the then Assistant Director Supply Chain Management did a letter to the secretary, Ministerial Tender Committee (MTC) vide a letter dated 5/9/11 (**EXB1**) and signed on behalf of the acting CEO of Kentrade the late Alex Kabuga. They also sought for permission to do restricted tendering. The estimates were at Kshs 19,503,926/80 for partitioning the hall and Mweha Enterprises Ltd got the tender. The contract was **EXB2**. The work was not complete as there was electrical and mechanical work, some decoration, ceiling, reception desk etc still to be done.

5 The Chief Executive Officer (CEO) the late Alex Kabuga instructed him to start the process for phase 11, and he wrote a letter to the County works officer dated 25/6/12 and he signed for the CEO (**EXB3**). He wrote another letter dated 15/7/12 proposing office refurbishment to include, acoustic ceiling gypsum, decoration and washroom improvement. A response from the Appellant was received with the estimate of Kshs 11,431,510 and names of various firms floated, (**EXB 7 & 8**). The Quantity Surveyor Rose J. Kotut (PW7) revised the estimates to Kshs 10,200,001/80 (**EXB9**). This was in respect of the 2nd phase.

6 **PW2 John Okiro Misiga** confirmed signing a letter dated 22/3/2012 (**EXB15**) on behalf of the acting CEO Mr Kabuga. It was in respect to the proposed ceiling decoration and services installation to the new office at Embarkment Plaza for Kentrade. In brief the 2nd phase was meant to cater for the areas that were not covered during the first phase. This however caused challenges because there had been no proper contracting since it was not part of the 1st phase.

7 The Appellant is accused of having done the approval letter when in fact no contract had been entered into, in accordance with the procurement process. The authorization letter is dated 5/3/12 (**EXB23**) which was received well after bids had been done. In fact according to **PW3 Richard Matu Macharia** he had done 90% of the work in phase two when the letter forwarding the proposal dated 4/9/2014 (**EXB24**) was received. They had not been paid for the works done and a suit Nairobi HCC No 512 of 2013 had been filed.

8 **PW4 Beatrice Kosgei, PW5 Joanne Kweyu, PW6 Kiplangat Simon Cheruiyot, PW8 Jane Njoki Mugambi** were members of the MTC. They all stated that they attended several meetings and even said the authorization letter (**EXB23**) could not make them approve any contract since the works had already been done without any authorization. **PW 7 Rose Jematya Kutut** was the Quantity surveyor with the Ministry of Lands, Housing and Urban Development and Department of Public Works. This witness did not see anything wrong with the happenings at Kentrade. She confirmed that Kentrade and its managing director were aware and participated in the construction of the phase II.

9 **PW9 Stephen Kalomit Yego** and **PW10 Jacob Mugeni Oduor** are both forensic document examiners working with Ethics and Anti-Corruption Commission (**EACC**) and Department of Criminal Investigation (**DCI**) respectively. PW9 examined the questioned signature on **EXB23** and found it to match with the specimen signatures of the appellant. He found them to have been done by the same author (**EXB31**). **Pw10** examined several signatures including that of the appellant. He found the disputed and questioned document to match the appellant's signature. His report was produced as **EXB 32**.

10 **PW11 Eva Waithira Njoroge** the Human Resource officer from Ministry of Lands, Housing and Urban Development gave original copies of employment documents from the Appellant's file to PW13 of EACC. The documents are letters of appointment (**EXB33-36**).

11 **PW12 Francis Wambua Munyizo** and **PW13 Ditim Wanyenje Juma Musi** who are investigators with EACC were on 14th April 2015 assigned to investigate allegations of corruption within Kentrade. PW12 testified that the tender for partitioning of Kentrade office was lawfully awarded to Mweha Enterprises. It initially went for Kshs 19,500,000/- but shot upto Kshs 22 million which exceeded the Kshs 20 million ceiling. It was his evidence that there was nothing wrong with this particular tender.

12 However, during the course of investigations they discovered that phase 1 of the tender was continuing and some work namely acoustic ceilings gypsum ceiling decoration, air conditioning improvement and washroom had not been factored. That a meeting was held on 19/3/12 at 10 a.m. at the site. Those in attendance were Daniel Musembi the project architect (now deceased) and who was representing the County works officer; Zacheus Madonde electrical engineer representing the County works officer; Alex Kabuga the CEO of Kentrade; Evalyne Wamae; Jane Mugami and J.R Kibwana representing Kentrade and Matu Macharia the main contractor.

13 It was agreed during the meeting that there ought to be communication of a formal contract even as the contractor started some of the works. The project manager advised on what needed to be done to formalize the contract which was all reduced into writing. It was signed by Daniel Musembi and Macharia. According to PW12 this is the document that is the basis for the mistake that followed. The document was produced as **EXB 37**. He assured the Court that the works that are the subject of this case were continuing.

14 The appellant had issued the letter of authorization to Mweha enterprises on the basis of **EXB 5&6** and the letter by the late Mr. Kabuga. That there was an elaborate attempt to normalize the works for a fresh tender to start which never happened. The works had continued as the contractor was one and the same. He concluded that Alex Kabuga (deceased) irregularly authorized the Appellant to write to the contractor Mweha enterprises. He further found that Alex Kabuga abused his office by authorizing the contractor to commence works before tenders were awarded PW13 corroborated PW12's testimony on the investigations and findings in respect of Kentrade.

15 The Appellant in his sworn defence testified that he was a qualified architect designated as a senior superintendent architect. He held the rank of County works officer Nairobi County in the department of public works in the larger Ministry of Infrastructure and Transport. He gave a detailed structure of the County works office and how they operate. In this case he explained that his office did not procure as it was Kentrade to do that. His office is not represented in the tender committees he said. Once he received the request from Kentrade his office marked it to the County Architect and copied it to the other county heads.

16 The County Architect assigned the project to the late Architect Musembi. Also assigned were Quantity Surveyor Mr. Nyakiogora; Electrical Engineer Mr. Madonde (late) and Mr. Akoko as Project Mechanical Engineer. The Appellant said he was not involved in the appointments since it is the County heads who appoint the officers who in turn report to them. After all documentation was done the works were tendered and procured. He did not attend any of the site meetings. However as the works of phase 1 were on going he confirmed that there were some works that needed to be done though not captured in the documentation. They had been put in phase 1 and some even completed, and were referred to as phase 11.

17 Those incorporated were 15% of the work in phase 1 which is allowed in Law. He admitted that Mweha Enterprises did not have a formal contract. He explained that the accounting officer was the CEO of Kentrade while the County office was the Project Manager and Mweha Enterprises was the contractor. He admitted having signed the letter (**EXB23**) though he did not write it. The late Musembi the Project Architect was its author. He said he believed that the Project Architect had instructions from the client to do the letter.

18 In reference to phase 11 he said there was no money that was paid to contractor and the office could not have prepared any payment without a contract. He added that there was no complaint of overpayment of any nature or of inducement, bribery or confirmation of benefit to anybody. He however admitted that under normal circumstances, documentation precedes authorization.

19 **DW2 Kariuki Moses Kimani** who is the Appellant's witness is the County Surveyor and works as the Chief Superintendent Quantity Surveyor. He corroborated DW1's evidence on the functions of the county works office and its administrative structure. He stated that the county works office does not do any procurement and only gives technical advice in matters relating to construction works but the final decision on the award is done by the client. In regard to **EXB23** he said the contents obviously emanated from the Project Architect as that is the procedure.

20 The appeal was disposed off by way of written submissions which were highlighted by both counsels. Mr Mutinda for the Appellant submitted that the Appellant was convicted on two counts under the ACECA and the particulars in both counts were that he failed to comply with the Public Procurement and Disposal of Assets Rules. (PPADA), which names those to be prosecuted.

21 He argued that the Appellant was the county works officer and not an employee who was involved in the day to day works. His office was more of a consultancy. He was therefore not in the list of those to be prosecuted. In reference to the evidence of PW1 and PW2 who were procurement and finance officers respectively, he submitted that the Appellant never did anything in respect of this case as he relied on officers on the ground. He went further to submit that PW12 and PW14 who were investigators recommended that the **CEO** Alex Kabuga (deceased) be charged but he passed on before that was done. Musembi also died and that's when the Director of Public Prosecution (DPP) relying on **EXB23** decided to charge the Appellant.

22 Counsel further submitted that the Appellant had several staff under him whom he relied upon and that criminal liability is personal and not vicarious. That section 45 of the ACECA is not a strict liability section and the Appellant's signature was over relied on. He contended that from the evidence adduced no money was lost, and neither did any money change hands. That there was no evidence of overcharging. It was his contention that the Appellant was only charged because he declined to approve payment as he demanded for certain documents to be availed. He further argued that the Appellant and his witness testified but their evidence was never considered.

23 Counsel finally submitted that when the Appellant was being investigated and prosecuted the EACC was not properly constituted. He relied on the case of **Michael Sistu Kamau v EACC & 4 Others [2017] eKLR** in urging the court to allow the appeal.

24 M/s Sigei for the Respondent in response to the above submission, contended that the evidence of PW5-PW8 and PW10 all pointed out to the fact that it was the Appellant who gave the go ahead for the project to be undertaken. Further that there was no documentation to show that indeed the Appellant had been given mandate by the CEO to give the authority. In the written submissions the Respondent argued that what was provided were minutes of a meeting that indicated there was need to undertake fresh procurement by the client in order to proceed with the second phase of the project.

25 She went further to state that the works in the second phase were already done by the time the tender committee was sitting to award the tender and that was why the committee declined to award it as doing so would amount to sanitizing it. She argued that the Appellant conferred a benefit and an advantage to Mweha enterprises within the meaning of section 2(1) of the **ACECA**. This she said was unlawful, unprocedural, irregular, and wilful as there had been no recommendation from the team for the contractor to start the works.

26 Counsel submitted that the chairman of the **EACC** resigned on 12th March 2015, while investigations commenced on 14th April 2015. The Appellant was charged on 29th December 2015 on the recommendation of the DPP as the investigators had not recommended that he be charged. That the Appellant had already been convicted when the **Engineer Kamau case** was determined by the Court of Appeal. She argued that he could not therefore cling on the said decision as the same does not negate the evidence on record. Further that he did not raise the said issue before the trial court. She asked for dismissal of the appeal or a retrial should the court find that the file submitted to the DPP was not procedurally done.

27 In a rejoinder Mr. Mutinda submitted that the issue was not about whether procedures were followed but who should have followed them.

28 This is a first appeal and this court has a duty to re-evaluate and reconsider the evidence adduced and arrive at its own conclusion. It has also to bear in mind that it did not see nor hear the witnesses and give an allowance for that. This was the holding in the case of **Okeno vs Republic 1972 EA 32**

“ An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandaya v R, [1957] E.A 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v R, [1957] E.A 570). It is not the function of a 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. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post, [1958] E.A 424.”

29 The Court of Appeal further in the case of **Patrick & Anor v Republic [2005] 2 KLR 162** held as follows:

“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 submissions by both counsels and the cited authorities. The appellant has raised seven (7) grounds of appeal. Upon considering all I have stated above I find the issues falling for determination to be 3 namely:

(i) Whether the EACC was properly constituted at the time it made its report and recommendations to the DPP in respect of the Appellant.

(ii) Whether the prosecution proved its case on the two counts against the Appellant beyond reasonable doubt.

(iii) Whether the trial court considered the appellant’s defence

Issue No. (i)

Whether the EACC was properly constituted at the time it made its report and recommendations to the DPP to prosecution the Appellant.

31 This is covered by ground no. 1 of the grounds of appeal. It is not disputed that the EACC chairman Mumo Matemu and Commissioners Jane Onsongo, and Irene Keino resigned on 12th May 2015, 31st March 2015 and 30th April 2015 respectively. The new Commissioners were sworn into office on 23rd January 2016. **PW12 Francis Wambua Munyizo** an investigating officer told the court that they were instructed to investigate the case on 14th April 2015. **PW13 Ditim Wanyenje Juma Musi** also an investigating officer stated that the instructions were given in March 2015.

32 After completion of the investigations the **EACC** forwarded its report and recommendations to the **DPP**. The Appellant was finally arrested and arraigned in court on 29th December 2015. It is therefore not disputed that the **EACC** was not properly constituted at the time it made the report and recommendations to the **DPP** in respect of the Appellant in this case.

33 The Court of Appeal in the case of **Michael Sistu Mwaura Kamau** (supra) had made similar findings and concluded 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. The scenario prevailing in this matter is no different. I do find that the prosecution of the Appellant was **founded** on the report and recommendation of an improperly constituted EACC.

34 The Respondent had argued that the issue of the proper constitution of the EACC came too late in the day and was never an issue before the trial court. M/s Sigei therefore argued that the appellant could not cling on it. When proceedings are a nullity that position remains notwithstanding the fact that the issue has been raised too late in the day. In the case of **Mwangi v Republic [2006] 2 KLR 94** the Court of Appeal stated thus:

“6 The trial of the appellant was a nullity because the Court was unable to exclude the probability of his having been convicted on unsworn evidence.

7 It did not matter that the issue was being raised for the first time in this appeal. If the trial was a nullity then it did not matter at what stage that issue was raised.”

I do find that the prosecution of the appellant was a nullity based on the technicality stated hereinabove and it did not matter at what stage the issue was raised.

35 The Respondent submitted that should the court find that there was any irregularity then a retrial should be ordered. When can a retrial be

ordered? The Court of Appeal in the case of **Bernard Lolimo Ekimat v Republic Criminal Appeal No 151 of 2004 [2005] eKLR** stated the following of a retrial:

“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.”

36 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.”

37 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**.

38 The circumstances of this case are a bit unique because the case was investigated when EACC was not properly constituted. The report and recommendations to the DPP were also forwarded during the same period. Ordering a retrial would take the Appellant back to the same scenario that the court has found to have been a nullity. I therefore decline to order for a retrial. Further since issue no (i) has determined the Appeal, I will not consider the rest of the issues as it will be an exercise in futility.

39 The result is that the appeal is allowed on the basis of the above mentioned technicality. The conviction and sentence are set aside. This is not however a bar to any action being taken against the Appellant within the confines of the Constitution and the law.

40 Any money paid as a fine by the Appellant should be refunded to him forthwith.

Orders accordingly.

Dated, signed and delivered this 31st day of July 2018 in open court at Nairobi.

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HEDWIG I. ONG’UDI

JUDGE