REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 120 OF 2011

JOHN FAUSTIN KINYUA ….……1ST APPELLANT

CHARLES KINUTHIA GACHANE…….2ND APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

From original conviction and sentence in ACC Case No.31 of 2008 in the Chief Magistrate's court at Nairobi – Ms. L. Nyambura (PM)

JUDGMENT

Introduction

1. On 3rd of September 2008 the two appellants herein were charged jointly for offences under the **Anti-Corruption** and **Economic Crimes Act No. 3** of **2003** as follows:

   In **Count I** John Faustin Kinyua was charged with the offence of abuse of office contrary to **Section 46** as read with **Section 48** of the **Anti-Corruption** and **Economic Crimes Act No. 3** of **2003,** and fraudulent disposal of public property contrary to **Section 45 (1)(b)** as read with **Section 48** of the same act.

   In **Count II** Charles Kinuthia Gichane was charged with the offence of fraudulent acquisition of public property contrary to **Section 45(1)(a)** as read with **section 48** of the **Anti-Corruption** and **Economic Crimes Act, No. 3 of 2003.**

   In **Count III** the two appellants were jointly charged with the offence of obtaining registration by false pretence contrary to **Section 320** of the **Penal Code, Cap 63** of the Laws of Kenya.

Facts of the Case

2. The brief facts in **count I** were that on diverse dates between 19th August 2003 and 27th October 2003 at Reinsurance Plaza, within Nairobi Area in the Republic of Kenya, John Faustin Kinyua being the Director (Finance and Corporate Services), Kenya Reinsurance Corporation Ltd, used his office to improperly confer a benefit on Charles Kinuthia Gichane by allocating and causing to be transferred to his name, House No. 70, Villa Franca Estate, Nairobi belonging to the said Kenya Reinsurance Corporation Limited without any consideration. In the alternative count he

faced a charge of fraudulently disposing of public property, to wit, House No. 70, situated in the parcel of land known as L.R. No. 209/10611/106, Villa Franca Estate, Nairobi.

3. The facts in count II were that on diverse dates between 4th July 2003 and 17th August 2004, at Nairobi area Charles Kinuthia Gichane fraudulently acquired a public property, to wit, House No. 70 situated in the parcel of land known as LR No. 209/10611/106, Villa Franca Estate, Nairobi.

4. In **count No. III** it was alleged that on 20th April 2004 at Nairobi John Faustin Kinyua wilfully procured registration of Charles Kinuthia Gichane as the title holder for all that parcel of land known as L.R. No. 209/10611/106 situated in Villa Franca Estate, Nairobi by falsely pretending that the said Charles Kinuthia Gichane had paid the sum of Kshs.3,201,530.00 to Kenya Reinsurance Corporation Limited in purchase thereof.

5. The first appellant was convicted in **count No. I** while the second appellant was convicted in **count No. II**. Each appellant was fined Kshs.1,000,000/= in default to serve three years in jail. In addition the learned trial magistrate ordered that house No. 70 Villa Franca situated on parcel of land L.R. No. 209/10611/106 which was in issue, should revert to its rightful owner, Kenya Re-insurance Corporation in accordance with the provisions of **Section 54(1)(b)** of the then **Anti-Corruption** and **Economic Crimes Act**. Both appellants were acquitted in **count No. III.**

Grounds of Appeal

6. Both appellants filed grounds of appeal. The first Appellant's grounds were that:

i. **The conclusion that the appellant conferred a benefit to the second appellant was in error.**

ii. **The evidence was not properly and carefully analysed.**

iii. **The appellant's actions were within the powers vested in his office.**

iv. **The cheque issued for the purchase of the house was meant for settling of premiums.**

v. **The impact of the striking out of count II was not appreciated.**

vi. **The appellant's evidence was not considered.**

The second Appellant's grounds were that:

i. **The defence was not considered or given any weight.**

ii. **The second appellant was tried and convicted on a charge in which he had been discharged.**

iii. **Material evidence was not availed to the court.**

Respondent's Reply

7. In response the learned State Counsel opposed the appeal on grounds that the order for repossession of the property was legal and within the mandate of the court. Secondly, that this court should re-evaluate the evidence on record, including the evidence on **count No. III** with a view of confirming the conviction and sustaining the sentence.

Analysis

8. The main thrust of the second appellant's appeal is that he was tried and convicted on a charge in which he had been discharged and that material evidence was not availed to the court. From the record it is not in dispute that **count no. II** was struck out under **Section 89 (5)** of the **Criminal**

Procedure Code on 16th June 2009. The prosecution did not frame a fresh charge in **count no. II**.

9. It was necessary for the failure of the prosecution to reintroduce the charge properly framed, and for the court to take the second appellant's plea afresh on the said charge. The consequence of this omission is that the only remaining charges which were properly before the court during the trial were those in **count no. I** and **count no. III**. Any subsequent proceedings pertaining to **count no. II** were a nullity and of no consequence after the order of discharge under **Section 89(5)** of the **Criminal Code**. The court was therefore in error in finding the second appellant guilty and convicting him on **count no. II**.

10. The record also shows that upon the conclusion of the trial, the learned trial magistrate acquitted both appellants on the charge in **count no. III**, for reasons that it was not the appellants who obtained the registration of the document in question. The prosecution had failed to prove their case beyond reasonable doubt against any of the two appellants in this count. The prosecution did not appeal against the findings of the trial court, on this count and it will therefore be left to lie.

11. The first appellant's grounds of appeal boil down to the question as to whether the prosecution evidence, considered together with his defence was sufficient to form the basis of a conviction against him in **count no. I**.

12. The first appellant in his defence told the court that the second appellant had been outsourced to collect bad debts for Kenya Re-insurance Corporation, and was owed money by Kenya Re-insurance Corporation. Further that the first appellant did not allocate him the house in issue. **PW13** Margaret Abok Otega told the court that there was no Board meeting which had authorised that the second appellant was to be paid for his services by allocation of a house and that such a decision needed the approval of the Board. There was also no formal letter of engagement between the second appellant and Kenya Re-insurance Corporation which stipulated that such payments were to be made by allocation of a house to him.

13. There is no doubt however, that the second appellant was allocated House No. 70 Villa Franca after the first appellant triggered a request for his letter of offer. The said house was paid for by cheque No. 026937 for Kshs.3,196,896/= which was meant to defray outstanding premiums to Kenya Re-insurance Corporation by Heritage Insurance. The said cheque was forwarded vide a letter dated 22nd August 2003 written by the second appellant to the first appellant.

14. The second appellant who was allocated the house No. 70 did not therefore pay for the house using his own money. To that extent he was conferred a benefit. This benefit was conferred to him through the full knowledge and participation of the first appellant herein, who was a public officer. The first appellant abused his office by allowing the cheque which was meant to settle an outstanding account to be used to pay for the purchase of the house in question.

15. Having considered the entire evidence from the prosecution and the defence in **count no. I**, the court finds that the prosecution did prove its case against the first appellant, John Faustin Kinyua. The learned trial magistrate acted properly in dismissing his defence and convicting him for the offence of abuse of office contrary to **Section 46** as read with **Section 48** of the **Anti-Corruption** and **Economic Crimes Act no. 3 of 2003.**

16. A perusal of the record shows that **Section 35** of the **Anti-Corruption** and **Economic Crimes Act No. 3 of 2003** was not complied with, before the charges were instituted in court. The said **Section 35**, set out the procedure to be followed in investigation and prosecution of offences under the act, in mandatory terms as hereunder:

> **"(1) Following an investigation the commission shall report to the Attorney-General 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".

17. The vexing question is whether or not to order the immediate release of the appellants in these circumstances. This is mainly because the quashing of the conviction herein would not be based on a patent weakness of the prosecution case. As sufficiently demonstrated above, there were procedural errors committed by the court in both **count no. I** and **count no. II.** It is not therefore failure on the part of the prosecution to produce sufficient evidence, which has led to the quashing of the convictions.
18. Rutakangwa, Mbarouk and Bwana, JJA agonised over the question of setting an appellant free on the basis of a procedural technicality thus, in **Rashid v Rep [2011] 2 EA page 354**:

"We take it to be our unavoidable duty to do justice to all parties in any case. Should the prosecution, indeed the public, be punished because of the trial magistrate and the public prosecutor being remiss in their duty? We think not. If there is a right, the law should always provide a remedy. The remedy here, in our considered view, would be an order for a retrial, if the interests of justice so required."

I therefore addressed my mind to the question as to whether the interests of justice in the case before me would require a retrial.

19. Although none of the parties submitted on the issue of re-trial, it does lend itself to these circumstances. It is acutely important for the court to exercise its discretion with wise circumspection by evaluating the public interest involved, and weighing it against the rights of the appellants under the Constitution so as to give effect to the objects of the Constitution on dispensation of public justice in the criminal sphere.

20. The principles upon which a court should order a re-trial were restated in the case of **Fatehali Manji v Rep [1966] EA pg. 343**. The Judges of Appeal Sir Clement de Lestang, Ag. P., spry, Ag V-P and Law, J.A. had this to say:

> **"in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it;"**

These principles were reiterated in the more recent case of **Muiruri v Republic [2003] KLR, pg 552**, by Kwach, Githinji & Waki JJA.

21. Generally therefore, whether a re-trial should be ordered or not must depend on the circumstances of the case. An order for retrial will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial and whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the court's.

22. The offences herein involved a government corporation and the court has not been told that it would be difficult to trace the records relied upon during the trial, or the main witnesses for a re-trial. Although the trial was defective, there was overwhelming evidence on the part of the prosecution and the mistakes leading to the quashing of the convictions were of a technical nature only. Taking into account the circumstances of this case, and the principles set out above, the order which commends itself to the court and which I now make, is that there shall be a re-trial.

I therefore quash the conviction in **count no. I** and **count no. II**. I set aside the sentences and order a re-trial.

SIGNED DATED and **DELIVERED** in open court this **29th day** of **January 2014.**

L. A. ACHODE

JUDGE