



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 113 of 2010

JOSEPH NALLOS..... APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence by LUCY MUTAI Principal Magistrate at Embu in Criminal Case No. 1586 of 2004 on 28th July 2010)

J U D G M E N T

The Appellant was the Officer Commanding Police Division (OCPD) of Meru North District of the Eastern Province when he was convicted and sentenced by the Principal Magistrate, Embu on 28th July 2010. He was aggrieved and preferred this appeal which was prosecuted on his behalf by Mr. Mogusu. The State was represented by Mr. Wohoro who conceded the appeal.

The Appellant was convicted on counts 1 and 3 and jointly with the 3rd Accused Kiluu Muchiri M'muchamura on count 5. In count 1 he was charged with abuse of office contrary to Section 101(2) of the Penal Code whose particulars were that on the 17th of May 2001 at Meru North Police Divisional Headquarters in Meru North District of the Eastern Province, being a person employed in the public service as Superintendent of Police (OCPD Meru North), in abuse of the authority of his office, arbitrarily awarded to Kiluu M'uchamura a contract when such person had no contract with the Government an act that was prejudicial to the Government of Kenya. In count 3, he was charged with false claim by person employed in the public service contrary to Section 100 of the Penal Code, that on 3rd of September 2001, at the same place, he certified a false payment voucher No.000266 for the sum of KShs.82,350/= being payment for meals purportedly supplied to prisoners from Kangeta GK Prison and payable to Kiluu M'muchamura. In count 5 they were jointly charged with conspiracy to defraud contrary to Section 317 of the Penal Code, that on 3rd of September 2001 they jointly, with others not before the court, and with intent to defraud conspired to defraud the Government of Kenya of KShs.82,350/= by falsely pretending that the said amount was payable for meals to prisoners from Kangeta GK Prison.

The prosecution evidence on which the Appellant was convicted was that there were construction works at Maua, Nchiru and Tigania police stations which fell under his charge. The contractor was Laban Kairira Munoru (who was the 2nd Accused in this case). Prisoners from Kangeta Prison were used to provide labour at the sites. The 3rd Accused made a claim of KShs.82,350/= whose payment the Appellant authorized and the District Treasury paid. The Appellant had Authority to Incur

Expenditure. The claim was for food that the 3rd Accused had allegedly provided to feed the prisoners. The prosecution case was that the prisoners did not eat any food at the police stations as they had had breakfast at the Prison and that lunch was carried for them from the Prison.

The Appellant and the 3rd Accused each gave a sworn defence to say that the prisoners were fed on food supplied by the 3rd Accused; that the 3rd Accused had been contracted by the District Commissioner's office to provide the food.

The trial court accepted the evidence of the prosecution witnesses and disbelieved the defence. On conviction, the Appellant was ordered to pay a fine of KShs.20,000/= in default one year jail on each of counts 1 and 3 and KShs.5,000/= in default 6 months in jail on count 5. In the Petition of Appeal, the Appellant complained that the evidence called by the prosecution was insufficient to support the conviction.

This is the first appellate court and it is its duty to look afresh at the evidence adduced before the trial court, to re-evaluate and re-assess it to be able to reach its own conclusion, while remembering that it did not have the benefit of seeing the witnesses as they testified (*NJOROGE VS REPUBLIC [1987] KLR 19*). Even where the State has conceded the appeal, the court cannot surrender this responsibility. (*ODHIAMBO VS REPUBLIC [2005] 1KLR 564*).

The fact that the 3rd Accused was paid KShs.82,350/= by the District Treasury on authority of the Appellant was not in dispute. In count 1 it was alleged that the Appellant had illegally and in abuse of office awarded the contract to the 3rd Accused as a result of which the payment was raised. The Appellant testified on oath that the order for the 3rd Accused to supply the food came from the District Commissioner's office. The 3rd Accused testified, also on oath, that he was called by the District Supplies Officer and asked to supply the food which was urgently required. A Local Service Order was then raised by the Appellant. There was no evidence called to show who was supposed to award such a contract, or whether the Appellant had no authority to award it. PW3 ACP Julius Rutere and PW8 CI Simon Mwangela were the ones who investigated this case and the ones on whom duty fell to find out and tell the court who had the authority to award this contract. They were silent on this. This payment was sanctioned by an Internal Auditor Joseph Njeru Mbogo (PW2) of the District Commissioner's office. He found this payment to be in order. The District Accountant Collins Oganga (PW4) gave evidence, but he was not asked about this payment, or whether it was in order. The result is that the allegation that the Appellant had illegally, or at all, contracted the 3rd Accused to supply food was not supported by the prosecution evidence.

The next issue was whether the food was indeed supplied and consumed by the prisoners. PW8 casually stated as follows:

"At Kangeta Prisons I established that prisoners therein had not been supplied with meals by the 1st Accused as claimed."

He did not say how, or from whom, he established this. PW1 Chief Officer (1) Patrick Nzika was the apparent in charge of Kangeta Prison as he was the one from whom the Appellant requested prisoners to work at the three police stations. His evidence was that the prisoners would carry uncooked food from prison to the police stations where they would cook it for lunch. He arranged for 10 prisoners to be ferried daily to the stations and this was between May and August 2001. They would be taken at 7.30 a.m. and returned at 4.30 p.m., and were accompanied by 3 escorts. He did not himself visit any of the police stations but said there was no arrangement for the Appellant to feed the prisoners. He did not know how the food carried was prepared. When asked by Mr. Okwaro for the 3rd Accused he replied:

"I can't tell if the prisoners were offered food either at Tigania, Nchiru or Maua police station."

PW1 further testified that all the food given to the prisoners as they left for the stations was reflected in a book kept at the prison. He did not avail that book. It was therefore not possible to verify his

testimony that food left the prison. Sgt. Samson Githinji (PW6) testified that he was the officer who escorted prisoners to the police stations. He stated that all the times he took uncooked food along with the prisoners and that they prepared and ate it, and there was no time they ate food prepared by the Appellant. The value of this witness was, however, limited. He testified that:

“I escorted prisoners to the sites thrice in 4 months.”

He cannot therefore say what happened on the other occasions when he did not escort the prisoners. This is because he said:

“The prisoners used to be escorted by other officers on different dates.”

These other officers were not called to say the prisoners were not fed by the Appellant. Even on the three occasions the officer escorted the prisoners, he could not have been at the three stations at the same time. The officer said that he would escort 8 to 9 prisoners at a time. He said there was a daily record of how many prisoners he took every day. He did not produce that record. It was therefore not proved how many prisoners left for the work on each day, or that they were not fed by the Appellant.

In short, my own evaluation of the recorded word shows that the prosecution was hopelessly unable to prove its case against the Appellant. There was insufficient basis for the conviction that was returned by the trial court. The consequence is that, I allow the appeal, quash the conviction and set aside the sentence. Any fine paid by the Appellant shall be returned to him.

DATED, DELIVERED AND SIGNED AT EMBU THIS 20TH DAY OF JULY 2011.

**A. O. MUCHELULE
JUDGE**