



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kirui & 2 others v Republic (Criminal Appeal E020 of 2022)  
[2024] KEHC 8223 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8223 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
CRIMINAL APPEAL E020 OF 2022**

**JR KARANJA, J**

**JULY 4, 2024**

**BETWEEN**

**LILIAN CHEPKOECH KIRUI ..... 1<sup>ST</sup> APPELLANT**

**JOHN KIMUTAI ROTICH ..... 2<sup>ND</sup> APPELLANT**

**JAPHETH KIPNGENO YEGON ..... 3<sup>RD</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against a judgement delivered on 2nd June 2022 by Hon. S.M. Mookia, CM and a Sentence delivered on 7th June 2022 by Hon. E.K. Makori CM in KERICHO ANTI-CORRUPTION CASE NO. 1 OF 2020)*

**JUDGMENT**

1. The seven Appellants and another appeared before the Chief Magistrates at Kericho charged with several offences including carrying on the business of a contractor without being registered as a contractor, contrary to Section 15(1) as read with Section 15(3) of the [National Construction Authority Act](#) 2011, in that on diverse date between 4<sup>th</sup> and 11<sup>th</sup> March 2016 in Kericho town, Kericho County the First Appellant, Lilian Chepkoech Kirui, the Second Appellant, John Kimutai Rotich and the Third Appellant, Japheth Kipngeno Yegon, being directors of Jawlink Logistics Limited carried on the business of a contractor in the construction of BAE-KAPSIMOTWET-KIBARAA Road with the knowledge that the said company was not registered to carry on road contractual services.
2. The three Appellants were also charged with fraudulent practice in the procurement proceedings contrary to Section 66(1) as read with Section 177 of the [Public Procurement and Asset Disposal Act](#), in that on diverse dates between 8<sup>th</sup> and 11<sup>th</sup> March 2016, being the directors of Jawlink Logistics Limited, knowingly submitted a falsified National Construction Authority (NCA) Registration Certificate



No. 15061/0915 to officers of the County Government of Kericho in consideration for an award of contract in the construction of the said Bae-Kapsimotwet-Kibaraa Road.

3. The three Appellants were further charged with uttering a false document, Contrary to Section 353 of the Penal Code, in that on or about the 9<sup>th</sup> March 2016 at the County Government of Kericho in Kericho town within Kericho County being directors of Jawlinks Logistics Limited, knowingly and fraudulently altered a National Construction Authority (NCA) Certificate No. 15061(R)0915 to the County Government of Kericho tender committee in respect of contract No. CGK/Q033/RD/2015-2016 purporting it to be a genuine registration certificate issued by National Construction Authority (NCA) in favour of the said company.
4. The charges foregoing were included in the charge sheet dated 11<sup>th</sup> June 2020 as counts number six (6), seven (7) and eight (8) respectively. Count number nine (9) related to the offence of wilful failure to comply with the applicable procedures and guidelines relating to procurement, Contrary to Section 45 (2) (b) as read with Section 48 (1) (a) of the *Anti-Corruption and Economic Crimes Act* 2003.
5. The particulars of the charge were that on the 9<sup>th</sup> March 2016 at Kericho County Government Offices within Kericho County, the Fourth Appellant, Joash Chirchir, the Fifth Appellant, Stanley Ruto Cheruiyot, the Sixth Appellant, Charles Mabwai and the Seventh Appellant, Aaron Njoroge, being employees of the County Government of Kericho and having duly been appointed as members of the ad-hoc evaluation Committee, they willfully failed to comply with the applicable guidelines relating to procurement to wit Regulation 16(4) (a) of the Public Procurement and Disposal (amendment) Regulations by failing to adhere to the compliance and evaluation criteria in recommending for the award of tender No. CGK/Q033/RD/2015-2016 to Jawlink Logistics Limited for the Construction of Bae-Kapsimotwet-Kibaraa Road at a cost of 5,600,512,00 as required by the laid down procedures.
6. The First Appellant faced two additional counts number four (4) and (5). It was alleged in Count Four that on or about the 10<sup>th</sup> April 2016, at the County Government of Kericho Offices in Kericho town within Kericho County, being a roads inspector in the department of public works, Roads and Transport of the County Government of Kericho, the First Appellant willfully failed to disclose her private interest as a director of Jawlink Logistics Limited which was awarded a Contract Number CGK/Q033/RD/2015-2016 of 5,600,000,00/- for the construction of Bae-Kapsimotwet-Kibaraa Road within Kericho County, contrary to Section 42(1) (a) and (b) as read with Section 48(1) of the *Anti-Corruption and Economic Crimes Act* 2003.
7. In count (5), the first Appellant was charged with conflict of interest, contrary to Section 42(3) as read with Section 48(1) of the *Anti-Corruption and Economic Crimes Act*, 2003, in that on the 1<sup>st</sup> September 2016 at Kericho County Government offices in Kericho town within Kericho County, being the road inspector in the department of Public Works, Roads and Transport of the County Government of Kericho and the director of Jawlink Logistics Limited knowingly benefited by receiving Kshs. 3,807,899/90 being the contract sum paid out to her company for the construction of the Bae-Kapsimotwet-Kibaraa road by her employer, the County Government of Kericho.
8. After pleading not guilty to all the counts, the Appellants underwent a full trial which resulted in their conviction on the respective counts.

In count five (5), the First Appellant was convicted and sentenced to pay a fine of Kshs. 500,000/- or three (3) years imprisonment and a further find of Kshs. 7,615,799/80cts or three (3) years imprisonment.

In count six (6), the First, Second and Third Appellants were convicted and sentenced to pay a fine of Kshs. 300,000/- each or one (1) year imprisonment.



9. In count seven (7), the First, Second and Third Appellants were convicted and sentenced to pay a fine of Kshs. 2,000,000/- each or two years imprisonment.
- In count eight (8), the First, Second and Third Appellants were convicted and sentenced to pay a fine Kshs. 100,000/- each or one (1) year imprisonment.
- In count nine(9), the Fourth, Fifth, Sixth and Seventh Appellants were convicted and sentenced to pay a fine of Kshs. 300,000/- each or two (2) years imprisonment.
- The First Appellant was however, found not guilty on count four and acquitted in accordance with Section 215 of the Criminal Procedure Code.
10. Being dissatisfied with the convictions and sentences, the Seven Appellants preferred separate appeals on the basis of the grounds specified in their respective petitions of appeal.
- The appeals were herein consolidated and argued as a single appeal in a hearing which proceeded by way of written submissions which were filed on behalf of the First, Second, Fourth, Sixth and Seventh Appellants by E. M. Orina & Company Advocates.
11. The Third and Fifth Appellants did not file any submissions.
- The State/ Respondent opposed the appeal and filed its written submissions in respect thereof through the Learned Prosecution Counsel, Mr. S.O. Ogutu, on behalf of the Office of the Director of Public Prosecution (ODPP).
- After due consideration of the appeal on the basis of the supporting grounds and the rival submissions the duty of this court as the First Appellate Court was to reconsider the evidence, re-evaluate it and draw its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing the witnesses (See, Okeno Vs. Republic(1972) EA 32 and Achira Vs. Republic (2003) KLR 707
12. In that regard, the prosecution evidence against the Accused/ Appellants adduced through the sixteen prosecution witnesses (PW1 to PW16) was duly considered as against the evidence led by the defence through the nine defence witnesses inclusive of the Appellants (i.e. DW1 to DW9).
- As it were, the burden of establishing and proving the case against Appellants lay squarely on the prosecution upon a standard of proof which is beyond reasonable doubt.
13. This being a criminal case, the Accused/Appellants had no duty whatsoever to establish and prove their innocence (See, Kioko Vs. Republic (1983) KLR 289)
- The burden of proving the guilt of an accused persons always rests with the prosecution throughout the trial and does not shift to the defence except in exceptional circumstances as provided by the Law (See, Republic Vs. Safari Katana Lugo (2021) eKLR).
14. In counts four and five affecting the First Appellant, the trial court concluded that whereas the prosecution failed to prove the fourth count to the required standard, the fifth count was proved beyond any reasonable doubt.
- In count four, the charge was failing to disclose a private interest. The interest in question was the alleged directorship of the First Appellant with the entity known as Jawlink Logistics Limited which was awarded the suspicious contract by the Kericho County Government for which the First Appellant worked as a Roads Inspector.
15. Section 42 of the Anti Corruption and Economic Crimes Act, under which counts four and five were brought, provides for conflicts of interest.



Failing to disclose a private interest in a decision to be made by anybody or body of persons for which a party who may be directly or indirectly affected by the decision is involved would amount to an offence under Section 42 (1) (a) or (b) of the aforementioned Anti-Corruption Act.

Under Section 42(3) of the Act; an agent of a public body who knowingly acquires or holds, directly or indirectly, a private interest in any contract, agreement or instrument emanating from or connected with the public body would be guilty of an offence.

16. The Trial Court, with regard to count four stated as follows:-

“The evidence adduced herein clearly demonstrates that the 2<sup>nd</sup> Accused was an employee of the County Government of Kericho. She was at the time in issue the Roads Officer Belgut Sub County. Her appointment letter was dated 16<sup>th</sup> April 2014. The tender No. CGK/1Q033/RD/2015-2016 was awarded to Jawlink Logistics Limited on 10<sup>th</sup> March 2016, as per P. Exhibit 49. The evidence tendered herein indicate that on 8.12.2016 the 2<sup>nd</sup> Accused was still one of the directors in the company which was awarded the tender. The letter from the registrar of Companies confirming this was produced as P. Exhibit 76.

The foregoing required the 2<sup>nd</sup> Accused to declare her private interest in the tender. To confirm that position, the investigating agency call for the conflict of interest and gifts registers. The County Government of Kericho was required to avail a certified copy as per the request letter from Ethics and Anti Corruption Commission dated 29<sup>th</sup> January 2018. Further, the letter forwarding the two registers was not produced herein.....

The two registers produced herein as P. Exhibits 64 and 65 have no indication as to where they originated from. It is unclear as to whether the two exhibits are from Kericho County. Therefore, the 4<sup>th</sup> count herein is not proved to the required standard. It has to collapse.”

17. Clearly, the fourth count collapsed, hence stood disproved on account of the non-production of the conflict interest and gifts register which would have shown whether or not necessary disclosure of interest was made by the First Appellant. The finding of the trial court in that regard was proper and so was the finding in relation to count five which was informed by the credible evidence that First Appellant was at the material time an employee of the County Government of Kericho within its department of Public Works, Road and Transport which was directly involved in the process leading to the award of the suspicious contract for the construction of the Bae-Kapsimotwet-Kibaraa Road.

18. Although the First Appellant indicated that she was no longer a director of the impugned Company at the material time, the fact was disproved by a letter from the companies registrar dated 8<sup>th</sup> December 2016 which showed that she was still a director of the Company and no lawful changes in that regard were made.

Further, documents availed from Kenya Commercial Bank Kericho Branch indicated that the company operated an account with the bank from the 11<sup>th</sup> May 2016 and that the First Appellant was listed as one of the directors of the company.

19. There was sufficient and credible evidence from the prosecution which established and proved that the First Appellant was a director of the impugned company when it was awarded the suspicious contract of constructing the aforementioned road in a process in which she was involved as an employee of the Kericho County Government in complete disregard of her conflict of interest in the matter. In actual sense, the first Appellant directly benefitted from the payment of over Kshs. Three (3) million which was paid to the company by the Kericho County Government on account of the suspicious contract. Her conviction by the trial court on count five (5) was sound and proper.



20. In count six, the charge was carrying on the business of a contractor without being registered as such by the National Construction Authority (NCA). The impugned company in which the First, Second and Third Appellants were directors undertook the said business when it was awarded the suspicious contract to construct a road.
21. The *National Construction Authority Act*, requires that a person or person who undertake the business of construction be duly registered. There was sufficient evidence from the prosecution through PW12 and PW13 to disprove the contention by the company through its directors that it was duly registered by the National Construction Authority to carry on the business of road construction. Although it was indicated that the company had applied for registration and was issued with registration letter, the purported registration was not in accordance with the law, hence amounted to no registration or unlawful registration.
22. The seventh and eight counts did also affect the First, Second and Third Appellants as directors of the impugned company. They were charged in count seven with fraudulent practice in the procurement proceedings relating to the impugned contract. Section 66(1) of the *Public Procurement and Asset Disposal Act*, provides that a person shall not be involved in any corrupt, coercive, obstructive, collusive or fraudulent practice or conflicts of interest in any procurement or asset disposal proceeding.
23. In finding the First, Second and Third Appellants guilty of fraudulent practice in relation to the suspicious contract, the trial court observed that: -

“On count 7, this court is required to ascertain on whether the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Accused Persons were involved in fraudulent practice. This is in relation to National Construction Authority NCA registration certificate NO. 1561/0915 to officers of County Government of Kericho which informed the award of the contract for the road in issue herein. Foremost, PW13 denied that he had signed the aforesaid certificate. He alluded to the fact that the signature appended on it wasn't his. The document examiner had a chance of comparing the known signatures of PW13 and the one on A3 in P. Exhibit 41 as part of his analysis he said:

“Signatures on A3 indicated by the arrow in green and specimen signatures marked B17-B19 are generally similar, however document marked A3 is basically product of electronic manipulation.”

The certificate A3 was not signed by PW13 and as such it was not a genuine one. Registration certificate is a mandatory requirement in award of a contract. The Accused made the officers at the County Government of Kericho to believe that it was genuine and as such was awarded the contract.”

24. The Trial Court went on to observe that: -

“The conduct of the accused person was out to deceive the procuring entity and indeed it did and was awarded the contract on the strength of the falsehood. The registration certificate was not from National Construction Authority (NCA) as it wasn't signed by PW3. The offence under this court is fully proved beyond reasonable doubt.”

As borne by the evidence adduced by the prosecution in relation thereto, this court cannot agree more with the aforementioned observation and findings of the trial court. the conviction of the First, Second and Third Appellants on count seven was therefore sound and safe and so was the conviction on count eight of uttering a false document, contrary to Section 353 of the Penal Code.

25. The trial court was correct in finding and holding that the National Construction Authority (NCA) registration certificate No. 15061/R/0915 which was used to influence the award of the suspicious



contract was a forged one as confirmed by the document examiner. That, the First, Second and Third Appellants knew that the document was not genuine.

And, as regards count nine, the Fourth, Fifth, Sixth and Seventh Appellants faced a charge under Section 45 (2) (b) of the Anti Corruption Act, being willful failure to comply with the applicable procedures and guidelines relating to procurement in their capacity as members of the ad-hoc evaluation committee of the County Government of Kericho vis-à-vis the suspect contract.

26. Section 45 of the Anti Corruption Act provides for protection of public property and revenue and under Sub-Section (2)(b) of the provision, an officer or person whose function concern the administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of any offence if the person willfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures.
27. There was sufficient and credible evidence from the prosecution which showed that the Fourth, Fifth, Sixth and Seventh Appellants being member of the ad-hoc committee which carried out the necessary valuation did actually fail to comply with procurement procedures and instead flouted them by the non-involvement of the relevant procurement department in the Kericho County Government thereby resulting in the tender No. CGK/Q033/RD/2015-2016 being awarded to Jawlink Logistics Limited for the construction of the Bae-Kapsimotwet-Kibaraa Road at a cost of 5,600,512/-.
28. In sum, the Appellants' convictions by the trial court on the respective counts five, six, seven, eight and nine were sound, proper, lawful and safe and are hereby affirmed. This therefore means that all the grounds in support of the appeals as consolidated together with the submissions in support thereof are hereby overruled and dismissed for want of merit.

Ultimately, the appeal is disallowed and dismissed in its entirety. The sentences imposed by the trial court were lawful and reasonable and are hereby upheld.

Ordered accordingly.

**DELIVERED AND DATED THIS 4<sup>TH</sup> DAY OF JULY 2024**

**J. R. KARANJAH,**

**JUDGE**

