



**Republic v Agoya & another (Criminal Appeal E20 of 2019) [2023] KEHC 18321 (KLR)
(Anti-Corruption and Economic Crimes) (12 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18321 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES**

CRIMINAL APPEAL E20 OF 2019

PM NYAUNDI, J

MAY 12, 2023

BETWEEN

REPUBLIC APPELLANT

AND

FRANCIS SANYA MUSUMBI AGOYA 1ST RESPONDENT

CHARLES OKELLO MWANDA 2ND RESPONDENT

(Being an Appeal from the Ruling and acquittal of Francis Sanya Musumbi Agoya and Charles Okello Mwanda in Nairobi Anti-Corruption Case No. 4 of 2013 (Republic Versus Francis Sanya Musumbi Agoya and Charles Okello Mwanda) on 10th May 2019 at the Senior Principal Magistrate's Court by Hon. Felix Kombo)

JUDGMENT

Introduction

1. The Appellant aggrieved by the acquittal of the 2 Respondents by the trial court has preferred this appeal vide Petition of Appeal dated 24th May 2019 presented under Sections 348A and 350 of the [Criminal Procedure Code](#). The Appeal is premised on 5 grounds below;
 - a. That the learned trial Magistrate erred in law and in fact in acquitting the Respondents under Section 210 of the [Criminal Procedure Code](#) while the prosecution had proved a *prima facie* case against the Respondents.
 - b. That the learned trial Magistrate erred in law and in fact in acquitting the Respondents under Section 210 of the [Criminal procedure Code](#) while the Prosecution had established a *prima facie* case against the Respondents to warrant them being put on their defence.



- c. That the learned trial magistrate erred in law and in fact by holding that the process of procurement was complied with in accordance with the law, despite the overwhelming evidence indicating otherwise.
 - d. That the learned magistrate erred in acquitting the respondents on all the counts without analysing the overwhelming evidence as against each respondent and the roles they played leading to the commission of the offences charged.
 - e. That the learned magistrate erred in law by failing to consider the weight of the evidence against the Respondents.
2. The Appellant therefore prays that the orders acquitting the Respondents be reversed/ set aside and that the Respondents be put on their defence.
 3. The Appeal is opposed. The Parties agreed to canvass the Appeal by way of written submissions. The Appellants filed submissions dated 2nd December 2022 and the 2nd Respondents are dated 14th December 2022. The 1st Respondent did not file submissions.

Submissions

Appellants Submissions

4. The Appellant collapsed the 5 grounds of Appeal into 1; whether or not the prosecution established a prima facie case as against the Respondents warranting them to be placed on their defence.
5. The Appellant identified the following issues for determination;
 - a. Whether the 1st Respondent wilfully failed to comply with the law relating to procurement of services contrary to Section 45(2)(b) as read with Section 48 of the *Ant Corruption & Economic Crimes Act*, 2003
 - b. Whether the Respondents committed offence(s) of Abuse of office contrary to Section 46 as read with Section 48 of the *Anti-Corruption & Economic Crimes Act*, 2003.
6. It was the Appellants contention that the actions of the Respondents contravened the law. The Respondent submits that the tender Committee did not make any award and that therefore in instructing the 1st Respondent to issue contracts to the 3 Companies subject to Counts 2-4 the 2nd Respondent usurped the mandate of the Tender Committee and the 2nd Respondent acted in violation of Section 27(2) of the *Public Procurement and Disposal Act*, 2005.
7. It is argued further that having acted in excess of their authority, the 1st and 2nd Respondent conferred a benefit upon the 3 companies. Based on the foregoing it is submitted that there was sufficient evidence to place the Respondents on their defence.
8. Reliance was placed on the decisions in *Okeno vs Republic* [972] E. A. 32 and *Ramanlal T. Bhatt Vs. Republic* [1957] E.A. 332

2nd Respondent's Submissions

9. The 2nd Respondent opposes the appeal and contends that the trial Magistrate correctly appreciated the facts and applied the law in acquitting the Respondents. The 2nd Respondent identified the following as the issue for determination;



a. Whether the Appellant established a prima facie case against the 2nd Respondent

10. In summary the 2nd Respondent contends that on account of the discrepancy and inconsistencies in the evidence of the prosecution witnesses that went to the root of the charges, the trial magistrate was right in acquitting the 2nd Respondent.
11. The 2nd Respondent relied on the following decisions;
 - a. *Woolmington v DPP* [1935] A.C. 462
 - b. [*Philip Nzaka Watu v Republic*](#) [2006] eKLR
 - c. [*Gordon Omondi Ochieng' v Republic*](#) [2021] eKLR
 - d. *Robert Peter Kazawali v Republic* [2018] eKLR
 - e. *Dickson Ella Nsamba Shapwata & Anor v. The Republic* Cr. App. No. 92 of 2007 (Tanzanian Decision)
 - f. [*Rufus Kangethe Kamau v Grace Njeri Kamau*](#) [2022] eKLR
 - g. [*Mkuba vs Nyamuro*](#) [1983] KLR 403-415

Analysis And Determination

12. Having analysed the record, the Petition of Appeal, and the respective submissions, I frame the issue for determination as

a. Whether the Appellant established a prima facie case against the Respondents as required by the law

13. This being a first appeal and guided by the dicta in *Okeno v R* [1972] EA 32 on the responsibility of the first appellate Court it is the duty of this court to reconsider, re-evaluate and reanalyse the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind, that it didn't see the witnesses as they testified and give due allowance to that.
14. The Prosecution called a total of 15 Witnesses, to support the charges. At the close of the Prosecution case guided by the provisions of Section 210 of the [*Criminal Procedure Code*](#) and relying on the decision of the Court in *Ramanlal Trambaklal Bhatt V Republic* [1957] E. A. 332 the court determined that the Prosecution had not discharged their responsibility to warrant putting the Respondents on their defence.
15. According to PW15- Gideon Mokaya, the matter was triggered by an anonymous report made to the Anti-Corruption Authority alleging irregularities in the procurement of equipment for the Tana Delta Irrigation Project. The project was managed by the Tana and Athi River Development Authority, which was allocated funds by the parent Ministry, Ministry of Regional Development.
16. The 1st Respondent, Francis Sanya Musumba Agoya was the Managing Director of Tana Athi River Development Authority at the material time. While the 2nd Respondent, Charles Okello Mwanda was the Director Regional Development in the Ministry of Regional Development.
17. PW15 who was the investigating officer faulted the conduct of the 1st and 2nd Respondent in relation to the tendering process and therefore recommended that they be charged.



18. The sequencing of the facts is that having failed to secure the sought machinery from the Ministry of Works, the TARDA placed tender advertisements in 2 newspapers on 14th August 2009. However, this decision was revised in view of the short time available for implementation and the Tender Committee met on 19th August 2009 and approved direct procurement. The Authority was required to have planted maize by September.
19. In response to the invitation 26 forms were returned by bidders and subsequently analysed by the procurement unit which prepared a report that was tabled at the meeting of the Tender Committee of 21st August 2009. At that meeting the Tender Committee recommended that
 - a. The rates be harmonised.
 - b. Tenders be awarded to those who would accept the harmonised rates.
 - c. Mr. Theuri & Mr. Kahindi were to inspect machines and give a detailed report.
20. The minutes of the Tender Committee were then forwarded to the 1st Respondent by the Secretary of the tender Committee (PW2) and he approved the minutes.
21. In relation to count 1, The fundamental issue for determination was whether the prosecution established a prima facie case that 1st Respondent wilfully failed to comply with Section 27(2) as read with Section 74 of the *Public Procurement and Disposal Act 2005* by procuring machinery and equipment without ensuring that the Tana and Athi River Development Authority tender committee had complied with the procurement laws and regulations.
22. The import of the evidence of PW1 and PW2 in relation to this charge is that the tender committee having determined that the time was limited the only viable option was to proceed by way of direct procurement. This decision-making process is well documented. Section 74 (1) of the PPDA, 2003 provides for the instances when a procuring entity may use direct procurement as allowed under subsection (2) or (3) as long as the purpose is not to avoid competition.
23. Sub section (3) provides A procuring entity may use direct procurement if the following are satisfied-
 - a. there is an urgent need for the goods, works or services being procured.
 - b. because of the urgency the other available methods of procurement are impractical; and
 - c. the circumstances that gave rise to the urgency were not foreseeable and were not the result of dilatory conduct on the part of the procuring entity.
24. None of the witnesses called by the prosecution challenged the decision of the Tender Committee to proceed by way of direct procurement. It is safe to conclude therefore, that on the evidence the tender committee acted in accordance to Section 74 and regulation 62 of the PPDA Rules, 2006. For this reason, I would agree with the trial court that the prosecution had not established a prima facie case to require the 1st Respondent to be put on his defence.
25. With regards to Counts 2,3 and 4, The Prosecution case was hinged on the evidence of PW1 (chair of the Tender Committee), PW3 (Secretary to the Committee) and PW15 (the Investigating officer).
26. The Trial Magistrate observed inconsistencies and discrepancies that in his view went to the root of the charge. The issue for determination was whether the tender committee actually finalised the process of procuring to enable the 1st Respondent to enter into contracts and whether the 2nd Respondent overreached his authority and usurped the role of the Tender Committee *vide* his letters dated 24th and 27th August 2019.



27. The *Public Procurement and Disposal Regulations*, 2006 set out the roles of the Accounting officer (regulation 7) and the Tender Committee (Regulation 10) and also the process of procurement. In the delineation of roles, the Tender Committee is required to (inter alia)
- a. Review, verify and ascertain that all procurement and disposal has been undertaken in accordance with the Act, these Regulations and the terms set out in the tender documents;
 - b. Approve the selection of the successful tender or proposal;
 - c. Award procurement contracts in accordance with the thresholds prescribes in the First schedule;
28. With regard to the accounting officer the roles include signing contracts for the procurement and disposal activities on behalf of the procuring entity for contracts entered to in accordance with the Act and these regulations.
29. PW 15 stated that the genesis of the matter was an anonymous report that made reference to a Kenya National Audit Office (KENAO) report. The KENAO report was however not part of the prosecution evidence. PW 15 testimony was therefore to the effect that the Tender Committee had not awarded the tender and therefore the 1st Respondent abused his office in issuing contracts to the 3 companies subject of counts 2, 3 and 4 as he prepared these contracts under the instruction of the 2nd Respondent. The 2nd respondent was also faulted for attending the meeting on the 21st August 2019.
30. PW 1 was the Chair of the Tender Committee whilst PW2 was the Secretary. Whereas in examination in Chief he laid the basis of the charge on cross examination he fell apart and inflicted several punctures into the prosecution case. Some of the statements that go to the root of the charge include;
- ‘The procurement unit advised the Tender Committee to award the tender to the bidders who would accept the flat rate they had computed. The tender committee then decided to award the contracts to those who would accept the harmonised rates’
- ‘Kahindi and Theuri were required to inspect the machinery and give a report. These reports were however not placed before the tender Committee.’
- ‘The conditions for Mr. Mwanda to sign a certificate were not discussed by our Tender Committee’
- ‘According to our tender Committee we had harmonised the rates hence completed our work. The terms left was Eng. Kahindi and Theuri to inspect the machinery then advise the Managing Director.’
- ‘It’s not indicated who was to receive the report. In the minutes it’s clear that the report was not to be given to the tender committee...the procedure of inspection of machinery was clearly not clear from the minutes’
- ‘The irregularity I had spoken about is contracts awarded before inspection. I note such inspection was not agreed upon in the minutes. Those minutes are only reference points.’
- ‘The minutes by the Tender Committee did not talk of such certification. 2nd Accused’s decision to certify was thus for the better interest of TARDA. We have had problems of contractors just storing spoilt machinery at site. The letter addressed that problem.’
- ‘About 26 companies were given contracts. I do not recall any inspection report for any of the 26 companies.’
31. The same fate seems to have befallen PW2 here are some of her statements on cross examination.



‘The tender Committee decided to award the contract to bidders who would accept the harmonised rates.’

‘We harmonised the process because they were from different bidders. Contracts should be given to whoever accepted the rates subject to the report of the inspection.’

‘Absence of the report is a problem. I cannot point out any other problem. I expected a report to me. This is in minute 3 of PEX11. The minute does not say that I should be given report. It is silent that as to who should be given the report.....There is no decision indicated on this minute..I cannot extract any resolution under minute.’

32. Both Raymond Kahindi Mwanyamba and Boniface Karanja Theuri were called as Prosecution witnesses 4 and 8 respectively. It was their evidence that everything moved very fast. They did inspect 3 firms on the list of 26 before they proceeded to Garsen and while at Garsen they ensured that all the equipment was inspected, and a report provided to the Managing Director.
33. From the evidence of these key witnesses it is evident that at the meeting of 21st August 2019, the Tender Committee did award the tender to the firms on the list of 26 subject to their approving the harmonised rates. The Tender Committee did not make a final decision on where the inspection report would go to.
34. The 3 firms subject of count 2,3 and 4 are on the list of 26 firms. The contracts signed with the 3 firms were on the basis of the harmonised rates. The secretary to the tender committee forwarded ‘a decision’ to the accounting officer on the basis of which contracts were prepared.
35. There is nothing to suggest that the letters originating from the 2nd Respondent to the 1st Respondent in any way altered the decision of the Tender Committee. In any event PW1 who was the Chair of the Tender Committee indicated that the direction by the 2nd respondent in his letter to the 1st Respondent were infact designed to safeguard the interests of TARDA. Infact all the witnesses who were part of the implementation of the project stated that the project was a success.
36. PW15- appeared to read a sinister intention by the 2nd Respondent in attending the Tender Committee meeting. The Regulations allow for the attendance of independent advisers (Regulation 12(7) and (8). Members of the Tender Committee confirmed that he did not influence the decision of the tender Committee.
37. Section 2 of the *Public Procurement and Disposal Act*, 2003 provides that the purpose of the Act is to ensure that any procurement process undertaken by a procurement entity is among other objectives intended to promote competition and ensure that competitors are treated fairly; to promote the integrity and fairness of these procedures, to increase transparency and accountability in those procedures; to increase public confidence in those procedures.
38. In other words, the intention of the Act is to ensure that the taxpayer gets value for money. It is not intended as a box ticking exercise rather a process that places primacy on achieving the government’s goal and not tying oneself in knots in bureaucratic processes.
39. In this instance TARDA took on an ambitious project to undertake major works in time for the planting season and they succeeded in doing this.
40. As was stated in *Bhatt vs R* [1957] EA 332

“A mere scintilla of evidence can never be enough; nor can any amount of worthless, discredited evidence. It is true...that the Court is not required at that stage to decide finally



whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively; that final determination can only be properly made when the case for the defence has been heard.

It may not be easy to define what is “meant by a prima facie case”, but at the least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence”

41. From the foregoing it follows that the prosecution failed to prove the case to the required standard and consequently I am compelled to uphold the decision of the trial court.

Conclusion

42. The upshot of the foregoing is that the appeal fails in its entirety.
43. The Acquittal of the 1st and 2nd Respondent on Counts 1,2,3 and 4 under Section 210 CPC is upheld.
44. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF MAY, 2023.

P M NYAUNDI

JUDGE

In The Presence Of: -

Court Assistant Doreen Karani

Mr. for Appellant

.....for Respondent

