



**Prosecutions v Kitavi (Criminal Appeal E023 of 2024)
[2024] KEHC 13626 (KLR) (6 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13626 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E023 OF 2024
LM NJUGUNA, J
NOVEMBER 6, 2024**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT

AND

ANASTACIA KITAVI RESPONDENT

(Appeal arising from the decision of Hon. R.G. Mundia (PM) in Embu Chief Magistrate's Court Anti-Corruption Case No. 4 of 2023 delivered on 15 th February 2024)

JUDGMENT

1. The appellant has filed a petition of appeal dated 29th February 2024 seeking that the appeal be allowed and the acquittal be quashed. The appeal is premised on grounds that:
 - a. The learned trial magistrate erred in both law and fact in acquitting the respondent under section 210 of the *Criminal procedure Code* when all the ingredients of the offence of abuse of office had been proved to the required standard;
 - b. The learned trial magistrate erred in both law and fact in finding that the respondent had not committed the offence when there was overwhelming evidence establishing that the respondent had committed the offence;
 - c. The learned trial magistrate erred in both law and fact in finding that the respondent had not conferred a benefit on herself when the evidence revealed that due process was not followed and revealed the nature of benefit conferred on the respondent;
 - d. The learned trial magistrate misdirected himself in law and fact by failing to properly analyse the evidence before him; and
 - e. The acquittal of the respondent was against the weight of the evidence.



2. The respondent 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* (hereinafter referred to as “ACECA”). Particulars of the offence are that between 14th and 15th July 2021 at Itabua Police Station in Embu County, the respondent, being a person employed by a public body to wit National Police Service as Chief Inspector of Police and attached to Embu Regional Criminal Investigations Office as an investigator, used her office to improperly confer a benefit on herself from exhibits namely cash Kshs.23,200/= and 2kgs of cannabis sativa (bhang) which she recovered in the course of duty in contravention of the said Act.
3. The appellant pleaded not guilty and a plea of not guilty was duly entered. The prosecution called witnesses in support of its case.
4. PW1 was CI Munyinyi Musau the OCS Itabua Police Station who stated that he was informed that a female suspect had been arrested in possession of cannabis sativa but she could not be placed in the cells because she had a small child. That since she was out, she called IP Kamathi and instructed him to go to the station and resolve the issue. That IP Kamathi told her that the respondent had taken the suspect away, saying that she was going to interview her. When she returned to the station, she found that the suspect had been booked for being in possession of 2kg of cannabis sativa and about Kshs.30,000/= but had been released by the respondent. That the exhibits were handed over to him by the respondent. On cross-examination, she stated that the exhibits were irregularly conferred by the respondent for her benefit although she was not sure if the respondent benefited from them.
5. PW2 was PC. Benjamin Kiprono of Itabua Police Station who stated that he was at the report office while PC. Barasa was the cells sentry. That a female suspect was brought in and it was reported that she had cannabis sativa but they could not place her in the cells without PW1’s authority. That since PW1 was away at the time, PC. Barasa called him and he instructed his deputy, I.P. Kamathi who spoke to the DCI personnel.
6. He testified that he checked out at 10PM but the suspect had not yet been placed in the cells. That the suspect was booked for the offence of being in possession of cannabis sativa but he did not see it. On cross-examination, he denied having seen any cannabis sativa. That the DCI offices and Itabua Police station are in the same building and they use the same exhibit store. That he was not aware that the cannabis sativa and Kshs.23,200/= were handed over but the OB extract indicates that the OCS is in possession of the same.
7. PW3 was PC. David Barasa formerly of Itabua Police Station. He stated that he was on cell sentry duty when officers from DCI being the respondent and PC. Munyua, brought a female suspect who had a 9-month-old baby. That the respondent started booking the suspect indicating that she was in possession of 2kgs of cannabis sativa and Kshs.23,200/=. That he asked her to call PW1 before the suspect could be placed in the cells and she called her but PW1 sent her deputy to ascertain the arrest. That by the time he was handing over duties to the next person, the suspect was not in the cell register. On cross-examination, he stated that his duties as cell sentry do not include taking evidence in the OB. That the respondent outranks PW1 who is also in charge of the evidence room. That there is no error if a DCI officer makes an entry in the OB or placing suspects in the cells. That the suspect did not appear in the cells register since IP Kamathi instructed that the suspect could not be placed in the cells when she had a baby. That he did not see the money or the cannabis sativa.
8. PW4 was IP John Otieno, formerly Deputy regional Officer in charge at Embu. He testified that he was in his office when some officers from Internal Affairs Unit informed him that they were investigating a complaint regarding a suspect who had been arrested and then released before being arraigned. That he told them that he did not issue any instructions for the suspect to be released and that he was away



- when the suspect was released. On cross-examination, he stated that even though the OB indicated that he was the one who issued instructions for release of the suspect, he had nothing to do with it.
9. PW5 was IP Charles Kimathi, deputy OCS of Itabua Police Station who stated that he received a call from PW1 requesting him to go to the station to ascertain reports of a suspect who had been arrested since the others who were at the station did not know the officers who had brought the suspect. That he went to the station and found 5 officers including the respondent and PC Munyua and a female suspect with a child. That the OB indicated that the suspect had been found with cannabis sativa and Kshs.23,000/= and PC Munyua told him that the respondent had the exhibits. That he asked him to tell the respondent to surrender the exhibits before the suspect could be booked into the cells register.
 10. That he told the officers not to book the suspect into the cell register and called PW1 and told her he could not see the exhibits; the child was not entered into the OB and there was no juvenile cell at Itabua Police Station. That he then left and returned home. On cross-examination, he stated that the OCS cautioned him against placing the suspect in the cells because of the minor. That PC Munyua is the one who had entered the OB and it was his duty to also fill the exhibit register. That the command structure in the DCI is different from that of the regular police and that the respondent is more senior than him. That the exhibit memo can be prepared at any time to forward exhibits to the government chemist or to DCI headquarters and the exhibits are kept in the same place. That there is a memo showing that the exhibits were handed over to the OCS.
 11. PW6 was IP Johnson Mutua of DCI Eastern Region who stated that he was informed that PC Munyua had intelligence that there was a person selling cannabis sativa. That he accompanied the respondent and PC Munyua to the suspects home and the respondent identified herself to the suspect. That they conducted a search and they recovered cannabis sativa in polythene bags together with some money which they suspected was proceeds from selling the cannabis sativa. That the suspect was arrested and the cannabis together with the money were taken as exhibits but he couldn't recall whether they were handed over to the OCS after the suspect was booked. That the following day, he was informed that PC Munyua had released the suspect.
 12. He stated that he was approached by the Internal Affairs Unit to answer whether money had changed hands in that matter and he denied but and suspected ill will. On cross-examination, he stated that he was not aware if the exhibits were booked and the DCI exhibit room is different and separate from the police exhibit room. That it is not necessary for the DCI to hand over investigations to the regular police and there were no hand-over notes. That the respondent did everything above board and that she was good at her job but after that operation, she was transferred. He suspected ill will from the Internal Affairs unit who were coercing him to implicate the respondent, who is a person of integrity, having known her since the year 2001.
 13. PW7 was SP Joseph Nzuda former Regional head DCI Embu. He testified that PC Munyua, PW6 and the respondent acted without his instructions on the operation. That commander Otieno asked him to record a statement but he refused to do so because he was not aware of the circumstances surrounding arrest of the suspect. That an investigation can be initiated when an officer seeks permission to investigate or when a complainant reports a matter. In this case, the officers did not seek permission before investigating neither did they report back after they returned. He stated that exhibits are recorded in the OB, the exhibit register and the exhibit memo for onward transmission. On cross-examination, he stated that the respondent ought to have taken instructions from him since the investigations were intelligence based. That he did not issue instructions to the respondent and her colleagues to pursue investigations, that is why he refused to record a statement on the matter.



14. PW8 was John Kariuki Nyaga who stated that the suspect was working at his home as a househelp. That he was informed that the suspect had been arrested for selling cannabis and had been taken to the police cells. That he did not know the suspect's whereabouts to date. On cross-examination, he stated that he does not know the respondent and had never seen her before that day. That police officers went to his house and made him to record a statement involuntarily but he was not compelled to do so.
15. PW9 was ASP Hoseah Kipkoech of Internal Affairs Unit who testified that they received an anonymous call from a member of the public at Nembure village reporting that a DCI officer has been harassing them by planting exhibits in their homes with the intention of obtaining money. That he investigated the matter at Nembure village at the home of PW8 where the suspect was living before her arrest. That he went to Itabua Police Station and found that there was an OB entered by the respondent indicating that the suspect had been booked and another OB for release of the suspect. That the respondent was interviewed in Nairobi since she had already been transferred and there were no hand over notes.
16. That PW1 said that she had seen some exhibits at the report office without any handover or entry in the exhibit register. That the exhibits were dropped by the respondent and she did not know what to do with them. He stated that from his investigations, in considering whether or not to charge the respondent, he noted that the suspect who was released was never traced; the suspect was only a caretaker and the exhibits seemed to have been planted and the respondent failed to place the suspect into gazetted police cells which infringed on the suspect's rights.
17. He stated that the respondent received Kshs.23,200/= and 2kgs of cannabis sativa from the suspect and yet there was no inventory for the same as is the norm. That the respondent was supposed to hand over the exhibits to the OCS and then record the suspect's statement and she had the option of releasing the suspect on cash bail or free bond. That the respondent was the senior most of the 3 officers who executed the operation, which is why she was charged.
18. He stated that the OCS handed over the money-Kshs.23,200/= and cannabis sativa valued at Kshs.30,000/= as exhibits, and the same were produced as evidence. He also produced the OB extracts for the booking and release of the suspect as well as the cell register. On cross-examination, he stated that the copies of OB extracts were true copies of the original and that he is the one who photocopied them from the police station. That the copies were certified by the OCS in his presence.
19. PW10 was PC Makau Munyua, formerly of DCI Regional offices Eastern Region. He testified that he received a call from his informer about a home where cannabis sativa was being sold. That he immediately informed the respondent who was his immediate boss and together with PW6, they booked an OB and went to the informer's home where they gave him Kshs.1,500/= to make the purchase to verify the information. That the informer was able to buy the product and that is when they went in and asked the suspect, who was a housekeeper to contact her employer. That the employer failed to come and after 2 hours, they asked the suspect to show them around the compound. That she resisted to open the chicken coup but when she eventually opened it, they found cannabis sativa packaged ready to sell. That the suspect attempted to run away and that is when the respondent caught up with her, searched her in a separate room and recovered Kshs.23,200/= which she brought to them.
20. He stated that they returned to the police station with the suspect and the exhibits which the suspect who had a baby, had, and she told them that the product belonged to the owner of the house. That he left the respondent with the suspect and her child but the homeowner had not reported at the station. That the suspect complained that her baby was not feeling well and there was no reason to continue holding her there since form P52 had been filled. That the suspect said that she was new in the area



- and couldn't trace her way back home at night and so she was left with the respondent at the report office where she was booked.
21. That the following day, the suspect's employer had not reported at the station and the suspect was still being held and so the respondent took her to her office and gave her the form P52 and told her to return after 3 days. That the suspect never returned and she and her employer have been at large since. That the exhibits remained with the respondent. On cross-examination, he stated that the respondent did not abuse her office in any way since the exhibits were recorded in the OB and the inventory. That the respondent was diligent and beyond reproach. That according to the report, the exhibits were handed over to PW1.
 22. At the end of the prosecution's case, the trial court acquitted the respondent noting that if the matter had been properly investigated, there would have been no need for these criminal proceedings. The trial magistrate gathered from the evidence that the respondent followed the laid down procedures. He took issue with the fact that PW1 testified that the exhibits were not handed over to her yet she had told the court that she was not at the police station on the night of the incident. He noted that some of the prosecution witnesses exonerated the respondent, thus creating reasonable doubt.
 23. This appeal was canvassed by way of written submissions.
 24. The appellant, in its submissions, relied on the provisions of sections 2 and 46 of the ACECA and the case of *Ann Wangechi Mugo & 6 others v. Republic* [2022] eKLR. That there was sufficient proof that the respondent was a public officer who was also identified by PW1, PW2 and PW3 as their work colleague. That the respondent knowingly withheld exhibits that were recovered from an arrest, for her own benefit. It relied on the case of *John Simiyu Khaemba & Pamela Maluti v. Republic* [2020] KECA 470 (KLR) where the court held that non-adherence to procedure amounts to improper use of office.
 25. It submitted that the fact that the respondent availed the exhibits upon arraignment does not absolve her of liability for the offence and it relied on clauses 33, 4(b)&(d) of the *Police Standing Orders* which stipulate how evidence recovered is to be handled. That it would have been understandable if the evidence was held for a reasonable period but 2 years is not reasonable in the eyes of a reasonable man. That the respondent ought to have been placed on her defense to explain the whereabouts of the exhibits for that period of 2 years.
 26. It argued that the respondent searched the suspect and recovered Kshs.23,200/= and she informed her colleagues about this. That the deputy OCS declined to admit the suspect into the cells because he did not see any exhibits. That the respondent was obligated to hand over the exhibits to the deputy OCS in the absence of the OCS. Further reliance was placed on section 306 of the *Criminal Procedure Code* and the cases of *Ramanlal Bhat v. Republic* [1957] EA 332 and *Ronald Nyaga Kiura v. Republic* [2018] eKLR. It urged the court to allow the appeal.
 27. On her part, the respondent relied on the provisions of sections 2 and 46 of the *ACECA* and the case of *John Simiyu Khaemba & Pamela Maluti v. Republic* [2020] KECA 470 (KLR) and submitted that the testimonies of PW9 and PW10 go to show that the respondent followed the laid down procedures. That in as much as the OCS was not present at the station, the deputy OCS instructed that the suspect should not be held in the cells with the child.
 28. That the respondent adhered to all the regulations and that she booked the exhibits in the OB in the presence of PW10. That upon arraignment, the respondent availed the exhibits to court thus she did not benefit from them. She relied on the case of *Ronald Nyaga Kiura v. Republic* [2018] eKLR, *Republic v Prazad* [1979] 2A Crim R 45, King CJ, *May v. O'Sullivan*. [1955] 92 CLR 654 and *R v Galbraith* [1981] 1 WLR 1039 where the general sentiment is that a court may acquit an accused



person after the close of the prosecution case if the prosecution fails to establish a prima facie case. She urged the court to analyse the prosecution's evidence and uphold the findings of the trial court.

29. The issue for determination here is whether the trial court erred in acquitting the respondent at the point of determining 'case to answer'.
30. It is the role of the first appellate court to review the evidence at trial and reach its own conclusion. These were the sentiments of the Court of Appeal in the case of *Okeno v Republic* [1972] EA 32 I agree with the court when it held:

“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 the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding 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.”

31. At the close of the prosecution's case, the trial court found that the prosecution had not established a prima facie case, thus acquitted the respondent at that stage. PW1 was the OCS who testified that she was away from the station when the respondent brought in a suspect on allegations of possession of cannabis sativa and Kshs.23,200/=. When the respondent called her, she instructed PW5, her deputy, to go to the station and ascertain the arrest before the suspect could be detained. PW5 stated that when he went to the station, he found the respondent with PW10 and PW6.
32. PW10 told him that the exhibits were being held by the respondent and PW5 said that without the exhibits being present, the suspect will not be booked into the cell register. The cell sentry was being manned by PW3 that night. PW3 said that by the time he was leaving for the day, the suspect had not been booked into the cells. PW5 testified that he declined to have the suspect (who had a child) detained in the cells because he had not seen the exhibits, the child was not booked as the police station did not have juvenile cells. After making his decision, he left and went home.
33. PW2 was at the report office that night and he stated that the respondent together with PW6 and PW10 brought the suspect alleged to have been in possession of cannabis sativa and some cash. He said that he did not see the exhibits and he advised that they call PW1, the OCS, before detaining the suspect. This is when PW5 arrived and spoke to the respondent and her colleagues and at this point, the suspect had already been booked in the OB.
34. PW7 was the respondent's senior who denied having assigned any duties to her. He declined to record a statement when the Internal Affairs Unit asked him about the occurrence because he had nothing to do with it. PW9 works with Internal Affairs Unit and he testified that on 13th March 2021, his office was anonymously tipped off about police officers who were harassing members of the public by planting evidence and extorting them. He stated that he investigated the matter and his findings led to the home of PW8 where the suspect arrested by the respondent was living and working.
35. He testified that he found the respondent's conduct to be suspicious because the suspect was released and was never traced afterwards, the evidence seemed to have been planted at the scene and the suspect was not held in a police cell. According to the evidence, the suspect in question was arrested on 14th July 2021 with exhibits that were not handed over to the OCS until 11th July 2023. The respondent herein was arraigned on 11th July 2023 when she took plea and according to OB no.27/11/7/2023,



the respondent handed over the exhibits which had been misplaced and had now been recovered. The document contains a stamp titled 'Officer-in-charge Itabua Police Station' and it is endorsed with a signature.

36. According to PW10, the suspect had a baby whom she said was unwell. The respondent had already filled out form P52 (free bond) for the suspect but when she asked her to leave, the suspect refused and said that she was unfamiliar with the way home since it was dark. That PW10 left the suspect with the respondent at the report office and the next morning, the suspect was let go on the understanding that she would return after 3 days but she disappeared into thin air.
37. PW10 testified that he was with the respondent when she booked the suspect and the exhibits into the occurrence book as item 33 on that day. The entry indicates that the exhibits were being kept as exhibits. Through item 14 of the occurrence book on 15th July 2021, the suspect was released on condition that she returns on the specified date. PW6 was also present when the exhibits were booked in the occurrence book but he did not know whether the same were handed over to the OCS.
38. At the point of determining whether an accused person has a case to answer, the trial court must look at the prosecution's case to ascertain whether a prima facie case has been established. The court in the case of *Republic v. Abdi Ibrahim Owi* (2013) eKLR, defined a prima facie case as follows:
- “Prima facie’ is a latin word defined by *Black’s Law Dictionary* 8th Edition as, “sufficient to establish a fact or raise presumption unless disapproved or rebutted”. ‘Prima facie’ is defined by the same dictionary as “the establishment of a legally required rebuttable presumption.””
39. In other words, a prima facie case is a rebuttable presumption that the accused person is guilty of the offence. This is the position held at Section 211 of the *Criminal Procedure Code*. Further, in the case of *Ramanlal Trambaklal Bhatt v. R* (1957) E.A 332 at 335, the court stated as follows:
- “Remembering that the legal onus is always on the Prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution’s case, the case is merely one in ‘which on full consideration might possible be thought sufficient to sustain a conviction’. This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather, hopes the defence will fill the gaps in the Prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is ‘some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence’. A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence. It may not be easy to define what is meant by a, “prima facie case”, but at least it must mean one on which a reasonable man, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence”.
40. From re-examination of the evidence placed before the trial court, this court, standing in the shoes of reasonable man, thinks that there is basis for convicting whether or not the respondent is placed on her defense. The East Africa Court of Appeal in the case of *Ramanlal Trambaklal Bhatt v. R* (1957) E.A 332 at 335 was faced with facts similar to this one in a corruption case. That court found it perilous to uphold an acquittal at the point of determining whether the prosecution has established a prima facie case where the weight of the evidence speaks of a different scenario.



41. In the case of *Ronald Nyaga Kiura v Republic* [2018] KEHC 5030 (KLR), the court overturned a finding of ‘no case to answer’ after considering the trial court’s reasons for its finding. It held thus:

“It is important to note that at the close of prosecution, what is required in law at stage is for the trial court to satisfy itself that a prima facie has been made out against the accused person sufficient enough to put him on his defence pursuant to the provisions of Section 211 of the *Criminal Procedure Code*. A prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person. This is well illustrated in the cited Court of Appeal case of *Ramanlal Bhat v. Republic* [1957] EA 332. At that stage of the proceedings the trial court does not concern itself to the standard of proof required to convict which is normally beyond reasonable doubt. The weight of the evidence however must be such that it is sufficient for the trial court to place the accused to his defence.”

42. The weight of the prosecution’s evidence in this case demands that the respondent be placed on her defense before the trial court after which, it can consider the evidence wholly in its final judgment.

43. Therefore, the appeal herein has merit and the same is hereby with orders thus:

- a. The order of the trial court acquitting the respondent is hereby set aside;
- b. The respondent is hereby found to have a case to answer; and
- c. Embu Chief Magistrate’s Court Anti-Corruption Case No.4 of 2023 to be placed before the Chief Magistrate for the defense hearing and final determination.

44. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 6TH DAY OF NOVEMBER, 2024.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent

