



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO.3 OF 2017.

ROBERT CHERUIYOT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from judgment of the Senior Principal Magistrate Hon. Gicheha L. delivered on 13th of January 2017 in NAKURU ACC. 5 of 2015.)

JUDGMENT

1. The Appellant was charged together with another person with various crimes under the Anti-Corruption and Economic Crimes Act No. 3 of 2003 (ACECA). In the first count, the Appellant was charged jointly with the Co-Accused Person with the offence of corruptly soliciting for a benefit contrary to section 39 (3) (a) as read together with section 48 (1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 (ACECA). The particulars were that on the 27th of July 2015 at Kericho Law Courts within Kericho County, being a person employed by a public body to wit Judicial Service Commission, attached to Kericho Law Courts as a Court interpreter corruptly solicited for a benefit of Kshs 20,000 from Wilson Yegon as an inducement so as to facilitate awarding of a favourable penalty in a Kericho Case File Number 3140 of 2014 pending before Kericho Law Courts, where the said Wilson Yegon was an accused person, a matter relating to the affairs of the said public body.
2. The second count related only to the Co-Accused Person.
3. In the third count, the Appellant was charged singly with the offence of corruptly soliciting for a benefit contrary to section 39 (3) (a) as read together with section 48 (1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. The particulars were that on the 19th of August 2015 at Kericho Law Courts within Kericho County, being a person employed by a public body to wit Judicial Service Commission, attached to Kericho Law Courts as a Court interpreter corruptly Solicited for a benefit of Kshs 20,000 from Wilson Yegon as an inducement so as to facilitate awarding of a favourable penalty in a Kericho Case File Number 3140 of 2014 pending before Kericho Law Courts, where the said Wilson Yegon was an accused person, a matter relating to the affairs of the said public body.
4. In the fourth count, the Appellant was charged singly with the offence of corruptly soliciting for a benefit contrary to section 39 (3) (a) as read together with section 48 (1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. The particulars were that on the 20th of August 2015 at Kericho Law Courts within Kericho County, being a person employed by a public body to wit Judicial Service Commission, attached to Kericho Law Courts as a Court interpreter corruptly Solicited for a benefit of Kshs 20,000 from Wilson Yegon as an inducement so as to facilitate awarding of a favourable penalty in a Kericho Case File Number 3140 of 2014 pending before Kericho Law Courts, where the said Wilson Yegon was an accused person, a matter relating to the affairs of the said public body.
5. In the fifth count the Appellant was charged singly with the offence of corruptly receiving a benefit contrary to section 39 (3) (a) as read together with section 48 (1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. The particulars were that on the 20th of August 2015 at Kericho Law Courts within Kericho County, being a person employed by a public body to wit Judicial Service Commission, attached to Kericho Law Courts as a Court interpreter corruptly received a benefit of Kshs 20,000 from Wilson Yegon as an inducement so as to facilitate awarding of a favourable penalty in a Kericho Case File Number 3140 of 2014 pending before Kericho Law Courts, where the said Wilson Yegon was an accused person, a matter relating to the affairs of the said public body.
6. The sixth count was in respect to the Co-Accused Person only.
7. The seventh count charged both the Appellant and his Co-Accused Person with the offence of conspiracy to commit an economic crime contrary to section 47(3)(a) as read together with section 48(1) of ACECA. The particulars were that on the 20th day of August, 2015 at Kericho Law Courts, within Kericho County, being persons employed by public body, to with Judicial Services Commission conspired to commit an offence of corruption by receiving Kshs. 20,000/- from Wilson Yegon to award a favourable penalty in Kericho Case File Number 3140 of 2014 pending before Kericho Law Courts, where the said Wilson Yegon was an Accused Person, a matter relating to the

affairs of the said public body.

8. After a fully fledged trial, the Trial Court convicted the Appellant on count 3 and 5 and sentenced him to pay a fine of Kshs. 100,000/= for each count and in default 1 year imprisonment.

9. The Appellant was dissatisfied by both the conviction and sentence and has appealed on this Court. The grounds of Appeal filed on the 16th of January 2017 are that:

a. The Learned Trial Magistrate erred in law and in fact in convicting the Appellant in both count 3 and 5 of the charge sheet and fining him Kshs 100,000 for each count yet there was no sufficient evidence

b. The Learned Trial Magistrate erred in law and in fact in convicting the Appellant in both count 3 and 5 of the charge sheet and fining him Kshs 100,000 for each count while relying on the contradicting evidence of the prosecution witnesses and more particularly the complainant

c. The Learned Trial Magistrate erred in law and in fact in convicting the Appellant in both count 3 and 5 of the charge sheet and fining him Kshs 100,000 for each count yet there was no independent voice identification of the recorded video evidence

d. The Learned Trial Magistrate erred in law and in fact in convicting the Appellant in both count 3 and 5 of the charge sheet and fining him Kshs 100,000 for each count yet there was no evidence of the Appellant receiving Kshs 20,000

e. The Learned Trial Magistrate erred in law and in fact in convicting the Appellant in both count 3 and 5 of the charge sheet and fining him Kshs 100,000 for each count by shifting the burden of proof on the Appellant which is against the constitution.

f. The Learned Trial Magistrate erred in law and in fact in convicting the Appellant in both count 3 and 5 of the charge sheet and fining him Kshs 100,000 for each count and making a finding that the APQ Chemical was found on the Appellants hands yet the Appellant in his defense explained how the complainant greeted him

g. The Learned Trial Magistrate erred in law and in fact in convicting the Appellant in both count 3 and 5 of the charge sheet and fining him Kshs 100,000 for each count in failing to consider the strong defence and submission of the defence

h. The Learned Trial Magistrate erred in law and in fact in convicting the Appellant in both count 3 and 5 of the charge sheet and fining him Kshs 100,000 for each count in failing to find that the government analyst report comprise of different dates contrary to the dates in the charge sheet.

i. The Learned Trial Magistrate erred in law and in fact in convicting the Appellant in both count 3 and 5 of the charge sheet and fining him Kshs 100,000 for each count by being speculative and imaginative yet no such evidence was tendered by the witness.

j. The Learned Trial Magistrate erred in law and in fact by overlooking the fact that the evidence relied on was not watertight to justify a conviction

k. The Learned Trial Magistrate erred in law and in fact by shifting the burden of proof to the Appellant

l. The Learned Trial Magistrate erred in law and in fact by failing to consider the strong defence and submission by the Appellant

m. The Learned Trial Magistrate erred in law and in fact by relying in the insufficient evidence of the prosecution.

10. The appeal was opposed by the State. With the concurrence of the parties, the appeal was argued by way of written submissions. Neither parties highlighted their submissions.

11. I have perused the submissions filed by both parties; scrutinized the entire Trial Court record; and re-evaluated the evidence presented during the trial as I am required to do as a first appellate Court. It turned out that the main issue urged on appeal was a technical point: whether the trial was a nullity because the Ethics and Anti-Corruption Commission (EACC) was not properly constituted when the investigations, recommendations to prosecute and prosecution of the Appellant was undertaken in 2015.

12. It is uncontested that in 2015, the EACC was not fully constituted as it did not have Commissioners on board at the time. The Court of Appeal addressed this question in *Michael Simitu Mwaura Kamau v EACC & Others (Nairobi Civil Appeal No. 102 of 2016)*. It held as follows:

Having found that the EACC was not properly constituted at the time it made a report and recommendations to the DPP to prosecute the Appellant and having further found that indeed the DPP formed his decision to prosecute the Appellant on the basis of the impugned report and recommendations, it is inevitable to conclude that the Appellant's prosecution was tainted with illegalities and that the High Court ought to have issued a declaration to that effect and prohibited his prosecution founded on the report and recommendations of the improperly constituted EACC.....

This appeal succeeds on the technical ground that the EACC was not properly constituted at the time it completed the investigations and forwarded its report and recommendations to the DPP. From the foregoing anti-corruption constitutional edicts, the parties are at liberty to proceed as they deem necessary on the basis of a properly constituted EACC and within the dictates of

the Constitution and the law.

13. The holding in this binding decision is dispositive: the conviction of the Appellant based on investigations and recommendations of an improperly-constituted EACC cannot stand. It must be quashed. It follows that the sentence must equally fall by the wayside.

14. As the Court of Appeal pointed out in its decision, this outcome is based on an important but technical ground. The question that remains is what should happen next. I have looked at the other grounds of appeal proffered by the Appellant. Due to the orders I have given in this appeal, I will not delve into the other grounds of appeal. The lesser I say, the better.

15. Having set aside the conviction and sentence, I must now consider whether this is a fit case for re-trial. The principles governing whether or not a retrial should be ordered are now well settled. The East Africa Court of Appeal captured the principles succinctly in **Fatehali Manji v Republic [1966] EA 343** as follows:

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 purposes 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 particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.

16. The Court of Appeal added an important consideration in **Mwangi v Republic [1983] KLR 522**:

We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant.

17. The main question here, then, is whether on a proper consideration of the admissible or potentially admissible evidence a conviction might result from a retrial. Given the nature of the offence; the public interests involved; the availability of witnesses; and the reason for setting aside the conviction and sentence, after perusing the Trial Court record as part of this appeal, I have come to the conclusion that this is a fit case for re-trial.

18. Consequently, the orders and directions of the Court are as follows:

a. **The conviction entered in Nakuru Chief Magistrate's ACC Case No. 5 of 2015 is hereby set aside.**

b. **The sentenced imposed on the Appellant is hereby consequently set aside.**

c. **The Appellant shall be presented before the Chief Magistrate's Court, Nakuru on Friday, 29th November, 2019 to take plea.**

19. The Deputy Registrar is directed to send back the Trial Court file in **Nakuru Chief Magistrate's ACC Case No. 5 of 2015** and a copy of this ruling to the Chief Magistrate's Court, Nakuru for compliance. It should be re-assigned to any magistrate with competent jurisdiction other than the Learned L. Gicheha.

Dated at Nairobi this 22nd day of November, 2019.

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JOEL NGUGI

JUDGE

Delivered at Nakuru this 11th day of November, 2019

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MUMBUA T. MATHEKA

JUDGE