



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO.34 OF 2017

JOSEPHAT WAMBUGU GITONGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Anti-Corruption Case No.5 of 2015 of the Chief Magistrate's Court at Nyeri)

J U D G M E N T

1. This appeal is conceded.

2. The appellant herein **Josephat Wambugu Gitonga** was charged with the 2 counts of the offence of corruptly soliciting for a benefit contrary to section 39 (3) (a) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act, No.3 of 2003.

It was alleged that “*on the 14th day of December 2015 at Kiahungu bus stage in Mukurweini town within Nyeri County, being a person employed by a public body to wit, the Judicial Service Commission attached to Mukurweini Law Courts as Senior Support Staff, corruptly solicited for a benefit of Kshs.1,500/- from MONICA WANGARI as an inducement so as to facilitate the release of court proceedings in Criminal Case No.30 of 2015 to enable her file an appeal at the High Court matter relating to the affairs of the said public body*”.

On the second count he was charged with corruptly receiving a benefit contrary to section 39(3) (a) as read with section 48 (1) of the Anti-Corruption and Economic Crimes Act, No.3 of 2003. It was alleged that “*on the 14th day of December ,2015 at Kiahungu bus stage in Mukurweini town within Nyeri County, being a person employed by a public body to wit, the Judicial Service Commission attached to Mukurweini Law Courts corruptly received a benefit of Kshs. 1,500/- from MONICA WANGARI as an inducement so as to facilitate release of her court proceedings on a case Criminal Case No.30 of 2015 a matter relating to the affairs of the said public body*”.

3. On 31st May 2017 the trial Magistrate found him guilty of both counts and convicted him accordingly.

4. On 15th June 2017, following a Probation Officers Report which indicated that he had a history of alcoholism, and cigarette smoking, and was heavily indebted to financial institutions, the trial magistrate on consideration, placed him on probation supervision for 3 years so that the family could assist in his rehabilitation.

5. Aggrieved by that conviction and sentence he filed this appeal. His attack on the judgment was four pronged

i. There was no evidence to support the charges.

ii. The ingredients of the charge were not proved.

iii. There was exculpatory evidence which was ignored.

iv. The judgment was against the weight of the evidence.

6. Ms. Jebet appeared for the state. Mr. C.M King'ori appeared for the appellant.

7. In his submissions Mr. King'ori argued that: -

i. At all material times the EACC had no capacity to conduct the investigations. He relied on the case of **Busia County Government -Vs- EACC (2016) eKLR** that from May 2015 to 2016 the EACC had no chairman, three commissioners had resigned and therefore it had no capacity to recommend the charging of the appellant to the DPP.

ii. The prosecution failed to establish that the appellant “acted corruptly”. There was no evidence of “intention”, intention cannot be imputed. It must be proved with evidence.

8. He submitted that the evidence of PW2 the Executive Officer of Mukurweini Law Courts negated alleged intention on the part of the appellant.

9. The case for the prosecution is that the PW1 had applied for proceedings in a case in which she had been charged, found guilty, convicted and ordered to pay some money in restitution. Upon application for the proceedings, she paid a deposit but it took long for the proceedings to be typed. She went back and forth between the ODPP’s office and the court registry. She then found the appellant whom she testified offered to assist to expedite the typing of the proceedings. He asked for Kshs.800/- which later escalated to Kshs.1500/-. She reported to EACC officers and PW3 arranged for treated money.

She and appellant agreed to meet at the bus stop Mukurweini where she gave him the money. When they met, she had on her body the EACC recording device. They spoke and as soon as the appellant received the money the EACC officers pounced, arrested him and charged him with this offence.

10. In his defence the appellant made a sworn statement.

He testified that at the material time he was a subordinate staff at Mukurweini Law Courts. PW1 has had a case –Criminal Case No.30 of 2014. She found him in the registry when she went looking for proceedings. He was directed by the Executive Officer PW2 to assist her. She applied for proceedings, paid a deposit.

The appellant then proceeded on leave. He was to resume duty in January 2016 but was recalled in December 2015 as the secretary had gone on leave. When he came back, the PW1 had not gotten the typed proceedings. He was directed to obtain copies of the handwritten proceeding, and get them typed elsewhere. This was not the first time for this to happen at the station because they did not have a typist.

They would usually arrange with an external typist who would be paid to type the proceedings and the applicant would not be charged for typing. He did not deny receiving the money but that the arrangement was for the money to be paid to the external typist to type the proceedings. It was not for his own use/ benefit.

11. In his submissions Mr. King’ori pointed out that the appellant’s statement of defence was supported by the evidence of his supervisor PW2 who confirmed he had recalled him from leave, and that sometimes typing would be arranged outside the station. In this event parties would arrange for the same. He was the one who authorized the release of copies of handwritten proceedings for the purpose of ‘external typing’.

12. Further that the only evidence of “acting corruptly” was the evidence gathered in the entrapment of the appellant whereby the complainant was instructed by EACC investigators on what to do to entice the appellant whereas the appellant was at all times acting in the course of his duty.

13. In conceding the appeal Ms. Jebet for the state submitted that the evidence of PW2 that, it was normal for proceedings to be typed from outside the court premises raised doubt in the case for the prosecution. That therefore it was not conclusive that the appellant was taking the money for his own benefit.

14. She submitted that the circumstances subsisting at the material time at Mukurweini Law Courts where the only secretary/typist was on leave and there was a backlog of untyped proceedings, were sufficient grounds to create doubt in case for the prosecution.

15. On the issue relating to the capacity of EACC investigators she left it to court.

16. I have carefully considered the evidence on record, the submissions by both the state and counsel for the appellant, and the authority cited by Mr. King’ori for the appellant.

17. The only issue for determination is whether the appeal is conceded on sound grounds.

18. I begin with the issue of the composition of the EACC at the material time and its impact on the appellant’s case. In the authority cited above the issue of the composition of the EACC arose, as it arose in the case of **Michael Sistu Mwaura Kamau & 12 others -Vs- EACC & 4 others (2016) eKLR**. The courts held that of the Commissioners of the EACC were not in office, it would follow that the business of the commission as contemplated under paragraph 5 of the 2nd schedule of the Anti- Corruption and Economic Crimes Act as read with Section 11 (1) (d) of the same Act could not be undertaken, hence any steps of the Commission including investigations and recommendations ought to be under the hand of the chair for the time being of the commission.

“We agree with the petitioners that any decision purportedly transmitted to the DPP recommending the prosecution of the petitioners without the sanction of the commissioners would not be in compliance with the law”.

19. Justice Onguto in the **Busia County case** agreed with the above holding that

“in the absence of the commissioners the secretariat on its own motion could not and cannot purport to execute and perform the core functions of EACC. It would be contrary to the law. The functions include investigating and recommending the prosecution of offenders”.

20. The state did not respond to this submission.

21. The appellant's case arose at a time three commissioners of the EACC were not in office. The complainant PW1 reported to EACC officers on 15th December 2015. The commissioners had all resigned by 12th May 2015.

The appellant was arrested on 15th December 2015 and charged in court on 22nd December 2015. As at that time there were no commissioners hence the actions of the EACC officials of investigations and prosecution of the appellant were not in compliance with the law.

22. In the **Busia County case** the Judge found that in the circumstances of the case

“The EACC at the time of the impugned investigations was not properly constituted and could not undertake the investigations. The investigations including the scene and seizure must therefore be declared null and void”.

23. The appellant's case falls squarely into similar circumstances. The whole investigations and the process of charge and prosecuting the appellant were in contravention of the law and must be declared null and void.

24. On the 2nd ground for conceding the appeal it is common ground, and from the record that there existed exculpatory facts that did not support the charge, and which in any event created gaps in the case for the prosecution.

I find therefore that: -

- i. The appeal is conceded on sound grounds.
- ii. The charges were brought in contravention of the law.
- iii. The appeal is allowed.
- iv. The conviction is quashed.
- v. The sentence is set aside
- vi. The Probation Order is and is hereby discharged.

Dated, delivered and signed in open court at Nyeri this 4th April, 2018.

Mumbua T. Matheka

Judge

In the presence of: -

Court Assistant A. Atelu

Ms. Jebet for state

Appellant present