



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION
ACEC NO. 9 OF 2016 (Formerly HCCC NO. 300 OF 2006)

ETHICS AND ANTI CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

PETER MWAI NDEGWA T/A BON MARCHIE CONTRACTS SPIRAL POWERS

TOOLS & EQUIPMENT AND EMEDIA PROMOTIONS.....1ST DEFENDANT

DAVID MUROKI NDEGWA T/A KAMBITI GENERAL MERCHANTS...2ND DEFENDANT

DAVID KAGAKA GACHURU.....3RD DEFENDANT

GEORGE WAHOME NJOROGE.....4TH DEFENDANT

JOSEPH NDUNGU KIARIE T/A PLOVER PACKAGING.....5TH DEFENDANT

TOM ODHIAMBO MWONYA.....6TH DEFENDANT

ANGELINE MARY MUGUONGO.....7TH DEFENDANT

ERASTUS MAINA GIKUNU.....8TH DEFENDANT

CHARLES KINYUA KAGIO T/A KINCH

ENTERPRISES AND SEKIL ONTRACTORS.....9TH DEFENDANT

DANIEL MWAURA KIMANI.....10TH DEFENDANT

RULING

This is an ongoing matter and the witness on the witness stand is PW 9 Antony Kahiga. He has testified that he is an investigator with EACC which took over for KACC the Plaintiff herein. He testified that in the course of investigations the 1st and 9th defendants herein recorded statements which he sought to produce as exhibits herein. Copies of these statements were served on the defence counsel on 31st October 2018 morning in court just before the case proceeded. The counsel for the defendants objected to their production saying the statements were recorded when PW9 was investigating a criminal case of theft by a person employed in the public service contrary to section 280 Penal Code. They sought to have the authors of the statements to appear in court for cross examination. It was argued that the statements should not be admitted in these proceedings since this is a civil case and the statements were taken in respect to a criminal case which was never prosecuted. Mr Munyororo for the 10th defendant added that discoveries in this case were done in 2007 and if the statements were crucial they should have been included.

Mrs Shamalla for the plaintiff submitted that the statements were taken voluntarily and procedurally and were signed by the authors. She further submitted that the defendants will have an opportunity to cross examine the witness on the same and they can also produce evidence in rebuttal. She said there was nothing prohibiting the admission of the said statements.

I have considered the submissions made by counsel alongside the record herein which dates back to the year 2006. Section 25 A(1) and

section 29 of the Evidence Act provides for the procedure of recording confessions. There is no allegation that the statements sought to be admitted were taken in breach of the said provisions of the law.

All that the defence is saying is that they should have been notified of the presence of the statements in good time and they would wish to have the makers cross examined. In the witness statement of PW9 at paragraph 14 he refers to a statement made by the 9th defendant. It is therefore not anything new PW9 is introducing despite the plaintiff's failure to avail the statements in good time. The Evidence Act under sections 5, 17, 35, 36 lays down the procedure for admission of statements such as the ones being contested. Section 36 of the Evidence Act provides:

“(1) In estimating the weight, if any, to be attached to a statement rendered admissible by section 35 of this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts.

(2) For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible by section 35 of this Act shall not be treated as corroboration of evidence given by the maker of the statement”.

Such admitted statements by themselves are not proof of any fact. They must be considered alongside the other evidence and circumstances. Justice Odunga had occasion to deal with an issue such as the one before this court in the case of **Central Bank of Kenya V Giro Commercial Bank & 2 Others [2014]**. He stated thus:

15. Therefore whereas a statement may be admissible in evidence due to the fact that it is relevant, it may not ipso facto be taken as proof of the matters contained therein. In other words admissibility ought not to be equated with proof. In civil matters a fact is said to be proved when its existence is established by a preponderance of probability and not merely by the fact of existence of admissible evidence. It is worth emphasizing that whether the admissible evidence will prove the facts in issue must at the end of the day depend on all the circumstances including in my view, the circumstances under which the same was given and its accuracy.

17. Having considered the relevant provisions of the Evidence Act it is my view and I so find that since a confession is meant to establish criminal guilt as opposed to civil liability the amendment introduced by section 25A of the Act did not necessarily render a statement improperly obtained inadmissible in civil proceedings. It is therefore my view that the introduction of the said amendment did not affect civil proceedings in so far as admissibility is concerned. The issue of what weight to attach to it, if any, will however be determined based on the totality of the evidence. The issue of improperly obtained evidence was dealt with by the Court of Appeal in Kenya Breweries Ltd vs. Godfrey Odoyo Civil Appeal No. 127 of 2007, where Onyango-Otieno, JA held that even if it had been proved that the report by the Bureau of Standards on the contamination of the beer, manufactured by the appellant was improperly obtained, that alone would have probably only affected its value and not its admissibility. It is noteworthy that this decision was rendered on 16th April, 2010 after the amendment in question.

I agree with the Hon. Judge on this.

In the instant case the plaintiff has not yet closed its case. The defendants will have an opportunity to cross examine the witness as well as adduce and call their own evidence in rebuttal. The court will then weigh all the evidence and decide whether the case has been proved or not. The defendants will therefore not suffer any prejudice. I therefore find no merit in the objections raised by the defence, and the same are disallowed. The hearing to continue.

Costs shall be in the cause.

Dated, signed and delivered this 2nd day of November 2018 in open court at Nairobi.

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HEDWIG I. ONG'UDI

JUDGE