



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL NO. 12 OF 2016

BETWEEN

REPUBLIC APPELLANT

AND

ANNE ATIENO ADUL.....1ST RESPONDENT

NELCO MASANYA SAGWE 2ND RESPONDENT

SAMWEL ONYANGO ONGOW 3RD RESPONDENT

EDWIN PHILIP ANAYO 4TH RESPONDENT

SAMUEL OTIENO ODERA5TH RESPONDENT

MILDRED MIRIAM OMONDI 6TH RESPONDENT

ELIJAH ADUL7TH RESPONDENT

FACTOR CONNECT LIMITED8TH RESPONDENT

(Being an appeal from the original ruling and order of Hon.T. A. Obutu, PM dated 21st February 2016 in Ethics & Anti-Corruption Criminal Case No. 2 of 2015 at Chief Magistrate's Court at Kisumu)

JUDGMENT

1. This is an appeal by the State from a decision acquitting the respondents under **section 210** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**. The grounds of appeal are set out in the petition of appeal dated 30th March 2016 as follows;

- 1. The Honourable Trial Magistrate erred in law by failing to appreciate the evidence presented by the prosecution and arrived at an erroneous ruling.*
- 2. The Honourable Trial Magistrate erred in law by failing to appreciate the law on procurement.*
- 3. The Honourable Trial Magistrate erred in law by relying on extraneous evidence.*

4. *The Honourable Trial Magistrate erred in law by acquitting the accused persons under section 210 of the Criminal Procedure Code.*

2. The 1st, 2nd, 3rd and 4th respondents were at the time material time to the case members of the Kisumu County Assembly Service Board. The 5th and 6th respondents were the directors of the 8th Respondent (“Factor Connect”), whereas the 7th respondent is a husband to the 1st respondent. They faced three counts.

3. In Count 1, the 1st, 2nd, 3rd and 4th respondents were charged with the willful failure to comply with the applicable law relating to procurement of services contrary to **section 45(2)(b)** as read with **section 48** of the ***Anti-Corruption and Economics Crimes Act (“ACECA”)***. According to this count on or about 15th day of May 2014, the respondents failed to comply with the law relating to procurement to wit **section 29(3)** of the ***Public Procurement and Disposal Act (“PPDA”)*** and **Regulation 10** of the ***Public Procurement and Disposal Regulations*** by single sourcing Factor Connect to facilitate three international trips for members of the Kisumu County Assembly and County Staff at a cost of Kshs. 17.4 million.

4. In Count 2, the 1st, 3rd, 6th, 7th and 8th respondents were charged with conspiracy to defraud contrary to **section 317** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. It was alleged that on diverse dates between April 2014 and July 2015, the respondents jointly conspired to defraud the County Government of Kisumu of Kshs. 17.4 million by arranging three international trips for members of the County Assembly and County staff to Israel, Singapore and China.

5. In Count 3, the 5th, 6th and 8th respondents were charged with the fraudulent acquisition of public property contrary to **section 45(1)(a)** as read with **section 48(1)** of the ***ACECA***. It was alleged that on diverse dates in June 2014, the three respondents fraudulently acquired Kshs. 15.4 million to facilitate three international trips to Israel, Singapore and China for members of the Kisumu County Assembly and County Staff.

6. A summary of the prosecution case was as follows. The County Assembly interim Budget Officer, Kephah Onyango Omoke (PW 1) told the court in June-July 2014, the County Assembly of Kisumu had budgeted about Kshs. 70 million for travel which was factored in the 2013/2014 budget estimates. Subsequently, educational trips were organised for County Assembly members and staff to Singapore, Israel and China. He was among those who travelled to China. PW 1 produced the vote book that showed budget allocation for the trip was Kshs. 58 million and the list of people who travelled. In cross-examination, he stated that the cost of travel was about Kshs. 17 million.

7. Wycliffe Odiwuor Otieno (PW 2), a procurement officer with the County Assembly, testified that he was the custodian of the stores and secretary to the Tender Committee. He further testified that after tender advertisements for services were placed in the Daily Nation and Standard newspapers four firms put in their bids. Thereafter, Factor Connect was pre-qualified by the Tender Committee and its proposal forwarded to the Clerk of the County Assembly as required by the law.

8. Samuel Oyoo Adhiambo (PW 3), an accountant at the County Assembly Finance Department testified that he received several payment vouchers dated 5th June 2014 from PW 9 in favour of Factor connect for Kshs. 4,083,200/-, Kshs. 5,614,400/- and and Kshs. 7,607,600/-. PW 3 further testified he also received two payment vouchers for international per diem, air tickets and information for all the persons who were travelling. PW 3 recalled that after certifying the vouchers and ensuring that all procurement requirements had been complied with, he made payments. In cross-examination PW 3 stated that payments were done after certifying that all procurement requirements were met.

9. Members of the County Assembly who undertook the benchmarking trips also testified. Morris Omondi Ondieki (PW 4), Pamela Akinyi Odhiambo (PW 5), Lydia Achieng Odhiambo (PW 6) and Eunice Atieno Miruka (PW 7) informed the court that they travelled and were satisfied with the services offered by Factor Connect throughout the trip is all destinations and did not have any complaints.

10. The County Finance Officer, Nazarine Amondi Opiyo (PW 8), testified that he authorised the payments to Factor Connect after receiving minutes from the County Assembly Board which was responsible for coming up with the quotations. He stated that he only authorized the payments after confirming that all the procedures had been complied with. An accountant with the County Assembly, Felix Owuor (PW 9), testified that he examined the vouchers prepared for China and Singapore and confirmed that the payments were authorised whereupon he forwarded them to the Finance Department for payment.

11. Rose Caren Githinji (PW10), a forensic Investigator with the EACC, investigated the matter together with her colleagues. She testified that they interviewed members of the County Assembly and the Directors of Factor Connect. That from their investigations they established that Factor Connect had been single sourced to offer travel services to the County and the money paid was not commensurate with the services provided. PW 10 further testified that following further investigations, they discovered that Kshs 7,607,600/- was deposited into the account of Factor Connect by the County Assembly on 26th June 2014 and that on 27th June 2014, Ksh. 1,400,000/- was transferred to the 1st and 7th respondents' joint account and a further Ksh 1,584,000/- was transferred to the 7th respondent's personal account. Following these discoveries, they established a relationship between the 1st respondent and Factor Connect.

12. PW 10 produced minutes of the County Assembly Service Board which showed that the Israel trip would cost more if the County Assembly engaged the services of Pan African Institute (PAI). On cross examination, PW 10 told the court that there was a bid from PAI which had been considered but it was too high. On the issue of the sums transferred to the 7th accused, PW 10 testified that her colleague Rotich interrogated the 7th respondent who stated that the money was for the sale of a car washing machine from China that the 7th respondent was selling to the 5th respondent and there was an email to that effect.

13. PW 10 was of the view that the amount paid out to Factor Connect was too much bearing in mind that the delegates were to pay for their stay using their per diem allowance. On cross examination, she stated as follows:

The money approved was inappropriate. I conclude that some services were rendered and did not establish the value of the market value of the trips. I did not conduct any market value. My conclusions were presumable. I charged them with conspiracy. I do not know where the conspiracy was hatched. The theory was because money moved from Factor Connect to Elijah Adul's account. I also saw the communications. It cannot suggest that they conspired.

14. From the grounds set out in the petition of appeal I have outlined in paragraph 1 above, the important question this court is called upon to answer is whether the magistrate correctly directed himself in acquitting the respondents under **section 210** of the **Criminal Procedure Code**. What amounts to a *prima facie* case has been set out in several cases among them among them **Ramanlal Trambaklal Bhatt v R [1957]EA 332**, **Wibiro alias Musa v R [1960]EA 184** and **Anthony Njue Njeru v Republic NRB CA Crim. App. No. 77 of 2006 [2006]eKLR**. It is that although a court is not required at this stage to establish that the prosecution has proved its case beyond reasonable doubt, it must nonetheless be satisfied that a reasonable tribunal directing its mind to the law and evidence could convict if no explanation is offered by the defence.

15. It is important to recall that this appeal is by the State against an acquittal. It is governed by **section 348A** of the **Criminal Procedure Code** which states as follows;

348A.(1) When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law.

(2) If the appeal under subsection (1) is successful, the High Court or Court of Appeal as the case

may be, may substitute the acquittal with a conviction and may sentence the accused person appropriately.

16. Since this is an appeal on facts and law, this court is entitled to re-appraise the evidence and confirm whether the findings of the trial court are correct. As it has been stated, this court is entitled to independently review the evidence and come to its own conclusion bearing in mind that it neither heard nor saw the witnesses testify (see *Okeno v Republic* [1972] EA 32).

17. Ms Nyamosi, learned counsel for the State, urged the court to review the evidence and find that the prosecution had proved its case. She submitted that the evidence of PW 1 clearly showed that the travel requests were not placed before the tender committee. She submitted that the issue was not the money but the unfair competition as the services were acquired through single sourcing.

18. Counsel for the respondents, submitted that the verdict of the trial court was justified as evidence was led during prosecution that payments were made in compliance with procurement procedures. Counsel was of the view that the respondents could not be placed on their defence when no prima facie case had been made out.

19. On Count 1, the trial magistrate found that the prosecution had failed to prove that there was “single sourcing”. He stated in his judgment that PW 10 admitted that a bid from PAI had been considered and it was therefore impossible to state that there was single sourcing. The learned magistrate concluded that:

At this point I wish to state that I cannot call upon the accused persons to explain how they single sourced if the prosecution witnesses are testifying to the contrary and giving contradictory evidence.

20. Count 1 relates to willful failure to comply with the applicable law relating to procurement of services. **Section 45(2)(b)** of the *ACECA* makes it an offence for an officer or a person whose function concern the administration, custody, management, receipt or use of any part of the public revenue or public property if the person willfully or carelessly fails to comply with the law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures. The prosecution case is that this section was violated by the respondent failing to comply with **section 29** of the *PPDA* and **Regulation 10** of the *Public Procurement and Disposal Rules*.

21. **Section 29** of the *PPDA* titled, “Choice of procurement procedure” states as follows;

29(1) For each procurement, the procuring entity shall use open tendering under Part V or an alternative procurement procedure under Part VI.

(2) A procuring entity may use an alternative procurement procedure only if that procedure is allowed under Part VI.

(3) A procuring entity may use restricted tendering or direct procurement as an alternative procurement procedure only if, before using that procedure, the procuring entity—

(a) obtains the written approval of its tender committee; and

(b) records in writing the reasons for using the alternative procurement procedure.

(4) A procuring entity shall use such standard tender documents as may be prescribed.

22. **Regulation 10** generally make provision for a Tender Committee while **Regulation 10(1)** provides that a procuring entity shall establish a tender committee. **Sub-regulation 2** provides for the functions of a tender committee which include and in particular **2(h)** which states that the tender committee shall, “review the selection of procurement method and where a procurement method, other than open tender,

has been proposed, to ensure that the adoption of the other procurement method is in accordance with the Act, these Regulations and any guidelines stipulated by the Authority”.

23. From the provisions, I have cited, it was incumbent on the prosecution to establish the mode of procurement used and that the mode of procurement violated **section 29** of the **PPDA**. From the testimony of PW 10, the accusation against the respondents in Count 1 was that the provisions of travel services were “single sourced”. The **PPDA** does not use the word “single source” but refers to Open Tendering under **Part V** and Alternative Procedures under **Part VI**. Under **section 29(3)**, the restricted or direct tendering procedures as an alternative mode of procurement can only be used if the procurement entity obtains written approval of the tender committee and records the reasons for use of that alternative procedure.

24. The little that is known of the procedure used to procure travel services emerged for the testimony of the secretary of the tender committee, PW 2, who stated that Factor Connect was a pre-qualified firm in relation to the subject tender a total of 5 firms brought their proposals. In cross-examination, he told the court as follows:

Factor Connect was pre-qualified service provider for the services in question. The pre-qualification was by the Tender Committee. It entailed public advertisement, receipt of competitive bids and the most competitive was pre-qualified.

25. From the testimony of PW 2 the Tender Committee appears to have used Request for Proposals under **section 76** of the **PPDA** which is not prohibited. I have used the word, “appears” as the prosecution did not interrogate the process used to tender for travel services leaving the court to speculate. In order to make out a prima facie case, the prosecution had to establish the procurement procedures used and demonstrate how these procedures were contravened by the respondents. Furthermore, without establishing the procedure that was used, it is difficult to affix criminal liability on the respondents as it is not clear what they did that was contrary to the procurement procedures. Throwing the word, “single sourcing” at the court without more does not an offence make. The respondents cannot be called upon to fill the gaps in the prosecution case. It is for this reason that I agree with the trial magistrate’s conclusion that the respondents could not be called upon to answer if clear breach of the relevant provisions of the **PPDA** had not been established.

26. Regarding Count 2, the trial magistrate held that there was no evidence to show how the respondents conspired to defraud the public of Kshs. 17.4 million as alleged. When cross-examined, PW 10 stated that the case of conspiracy as follows;

I charged them with conspiracy. I do not know where the conspiracy was hatched. The theory was because money moved from Factor to Elija Adul’s account. I also saw communications [to] suggest that they conspired.

27. The contours of the offence of conspiracy were explained in **Archibold: Writing on Criminal Pleadings, Evidence and Practice (1999 3rdEdn)**, pages 2589 and 2590 as follows:

The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons so long as a design rests in intention only, it is not indictable; there must be agreement Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.

28. To prove a conspiracy, the prosecution had to establish that the respondents together with others agreed by common mind to defraud the complainant. The inference must be made both from the actions of the accused and the evidence tendered in court. The Court of Appeal in **Gichanga v Republic [1993] KLR 143** held that:

With respect to the offences of conspiracy the crucial issue is whether the appellant and his fellow

conspirators acted in concert with the intention that the Board be induced to part with its money.

29. Did the respondents act together to induce the County Assembly to part with Kshs. 17.4 million as alleged in the charge? The prosecution did not prove that there was any agreement between the respondents. The only piece of evidence is that money was transferred from Factor Connect to 7th respondent and an explanation was given for the transfer. No evidence was called to show that the met or otherwise agreed to defraud the County Assembly. On the contrary, the evidence shows that tendering was done, Factor Connect applied and was pre-qualified. PW 9 testified that the whole process was above board and that is why he permitted the payments. I therefore find and hold that the evidence was insufficient to establish a prima facie case against the respondents.

30. The trial magistrate also found that the prosecution had not proved Count 3 on fraudulent acquisition of Kshs. 15.4 million paid to Factor Connect to facilitate the international trips. The prosecution witnesses testified how the pre-qualification process took place and payments were authorised after cross checking that the procurement procedures were followed. How then did the respondents fraudulently acquire the money? PW 4, 5, 6 and 7 testified that indeed Factor Connect led through the whole trip and they were satisfied with the services offered.

31. There was a suggestion from the testimony of PW 10 that the amount paid to Factor Connect was too much. This opinion is not supported by evidence as PW 10 admitted that Factor Connect's bid was considered alongside that of PAI and was found competitive. She also admitted in cross-examination she never conducted a market survey to satisfy herself that what the County Assembly was paying for was beyond the value of services rendered.

32. On the whole I find and hold that the case against the respondents was threadbare and the charges a writ in water. Even if the respondents elected to remain silent, a conviction could not be sustained for the reasons I have stated. The trial magistrate's decision was correct and it was supported by the evidence on record.

33. The appeal is dismissed.

DATED and DELIVERED at KISUMU this 6th day of March 2017.

D.S. MAJANJA

JUDGE

Ms Nyamosi, Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the appellants.

Mr Ongoya instructed by Ongoya Wambola and Company Advocates for the 1st and 7th respondents.

Mr Onsongo instructed by Onsongo and Company Advocates for the 2nd, 3rd, 4th, 5th, 6th and 8th respondents.