



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 193 OF 2011

DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

JOSEPH PETER MBUVI.....1ST RESPONDENT

JOHN BOSCO NYAMA.....2ND RESPONDENT

(An appeal from the Ruling of the Chief Magistrate, Embu in Anti-Corruption Case No. 5 of 2011 dated 28/10/2011)

J U D G M E N T

1. This is an appeal against the ruling of Hon. M. W. Wachira delivered on the 28th of October, 2011 in Embu Anti- Corruption Criminal Case No. 5 of 2011 whereby the 1st & 2nd respondents were acquitted under Section 210 of the Criminal Procedure Code. In its Amended Petition of Appeal dated the 7th Day of November 2016, the Director of Public Prosecutions (DPP) relied on four main grounds.
2. The first ground is that consent to prosecute was not sought or given to the DPP as required under Section 35 of the Anti-Corruption and Economics Crimes Act (ACEC) and that the submissions of the appellant were ignored.
3. Secondly, it was contended that the court erred in holding that there was no legitimate complaint and limiting the definition of the word complaint.
4. Thirdly, it was argued that the court failed to evaluate the entire evidence tendered by the prosecution.
5. Fourthly, that the submissions of the appellant were ignored in regard to the issues arising in the case.
6. The appeal was argued by way of written submissions filed by both parties. Ms. Nadwa appeared for the appellant while Mr. Njeru Ithiga represented the respondents.
7. The facts of the case are that the 1st accused in Embu CM Anti-Corruption case No. 5 of 2011 was working as the Chief Executive of Tana Athi Water Services Board based in Kitui while the respondents were said to be the District Water Officer for Kibwezi and for Kathiani respectively. The prosecution called thirteen witnesses to testify. PW2 the Document Manager of Tana Athi told the court that he was an accountant by profession and he was in-charge of procurement. He said that in procurement an advertisement is supposed to be done in the local dairies inviting the applicants to bid and supply various services.
8. A deadline is given for the applications. On closing bidders are invited to open the bids. An evaluation team on bid documents is constituted to check if the criteria has been met. The criteria includes tax compliance, certificate of compliance, certificate to operate license, the history of indication and the list of directions of personnel in the organization. In open tendering the process is supposed to be open, accessible to all interested parties and involves the sum of Kenya shillings five million and above.
9. Restricted tendering involves the sum of Kenya shillings five million and below. As for this particular case PW2 said that he was not able to trace any tendering documents in respect of the contract complained of. He told the court that he joined the institution in October 2009. He was not aware of any contract awarded in respect of this case.
10. The evidence of PW3 was the head of Finance Department and the overseer of all finances, accounts, revenue and expenditure. He testified that officers from Kenya Anti-Corruption Commission (KACC) went to his office and requested for documents relating to payments made in respect of this case. He provided them with the documents which consisted of local purchase orders, letters, invoices and delivery notes made in favor of Taru General Engineering Company.
11. The documents were produced in evidence. He confirmed that all the payments were made after the necessary procedures were

followed. He added that before payments are processed it must be confirmed that the goods have been delivered. According to him the payments were done in good faith and in line with the accounting procedures.

12. PW4 was in charge of operations and maintenance undertaking inspections and verification of delivery of goods in his department of Kitui Water and Sanitation. He testified that the 360 UPUC pipes purportedly supplied by Taru Engineering Company were never delivered. He signed the documents based on the honest belief that the goods were to be delivered to the Masinga station as he had been told.

13. PW1 was the Chief Manager in charge of Infrastructure and Development in the Ministry of Water and Irrigation. He testified that he was not aware of the contract valued at Kshs.10,982,250/- and neither was he aware of any payments in respect thereof. He was also not aware of any goods delivered by Taru Engineering until he saw the documents with KACC.

14. PW5 was a storekeeper and testified that she was aware of the contracts No. KITWASCO 19/09/2010, 21/09/2010 and 22/09/2010. The delivery note was brought to her by her boss one Christine Githunga and she was instructed to receive the pipes which she did and documented the issue to Mr. Martin Wambua. She further stated that she did not receive the pipes because she was told that the goods were to be delivered to the site. Her explanation was that she made the entries because her boss instructed her to do so in the ledger and in the store records.

15. The evidence of PW6 a storeman was that his duties included doing purchases, registering them in store, registering receipt vouchers and post them to S3 Card- a ledger Card that shows goods in the store or out of the store. He testified that he did not raise the ledger because the 2nd respondent went to him with a piece of paper and told him to write the information regarding Order No.0121 for UPUC pipes for Kshs.9,867,300/- on S13-9 counter receipt voucher. She did not sign the document because she did not see the goods. When she was shown the document later on she noted that the stamp on it did not belong to the office and that the signature on the document was not his.

16. PW7 a procurement assistant testified that on instructions of the Transport Manager, she raised the LPO in respect of Kshs.23,234,900/- issued to Nakala Ventures dated 8th of December 2009. It was in respect of Epoxy coated pipes 7930, 8 inches in diameter.

17. PW8 was a store assistant whose duties were to receive goods, write LPOs and perform any other duties assigned to her by the procurement manager. She recalls raising the LPO0394 for Kshs.10,982,250/- in favor of Taru Engineering Ltd for supply of 750 pipes and 50 pieces GI pipes on the instructions of the Procurement Manager. The documents were taken for processing to another officer.

18. PW9 testified that it was shown in documents regarding several deliveries of pipes by KACC. In the year 2009 he was sent by the Mr. Joseph Nzesya the co-accused, to go and verify if the materials were delivered to the 2nd respondent who was the District Water Engineer at Kathiani. He told the court that he was not able to verify whether the goods were delivered or not for the simple reason that the instructions were verbal. The goods were to be supplied in Machakos, and then to Non Timesh water service provider. He also visited the sites and was not able to verify anything.

19. The evidence of PW10 based in Kenya Commercial Bank (KCB) Forensic Service Department testified that he received two warrants to investigate two bank accounts in their bank for the period commencing December 2007 to 28th February 2011. He learnt that account No.11011990509 in the name of General Engineering Ltd, Kipande House had been transferred to Machakos on instructions of the account holder Joseph Nzesya. The account had substantial deposits and withdrawals amounting to millions of shillings.

20. Account No.1106061950 Kitui branch in the name of Tana Athi Company was being operated by an agent appointed by the board namely Catherine Kasembi Munyao. Mr. Nzesya had given another one Mr. Mwameti written authority to sign the account. There were substantial deposits that corresponded with the Taru Engineering account of colossal sums of money.

21. The appellants and their co-accused Joseph M. Nzesia faced ten counts. Nzesia was charged in his capacity as the Chief Executive of Tana Athi Water Services board with four counts of abuse of office contrary to Section 46 as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act, 2003(counts1-4).

22. He also faced four counts of conflict of interest contrary to Section 42(3) as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act (counts 5-8).

23. The respondents faced separate charges of deceiving principal contrary to Section 41(2) as read with Section 48(1) of the same Act in counts 9 and 10.

24. The trial magistrate evaluated the evidence against the respondents and the co-accused and found that the prosecution had not made up a *prima facie* case for them to be called upon to make their defence. The three were therefore acquitted under Section 210 of the Criminal Procedure Code. The DPP was aggrieved by the judgment of the learned magistrate and lodged this appeal.

25. The duty of the 1st appellate court was explained in the case of ***Mwangi Vs Republic [2004] eKLR*** where it was held as follows:-

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 to have the appellate Court's own decision on the evidence.

The first appellate Court must itself weigh the 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 evidence and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide

whether the Magistrate's findings should be supported. In doing so, it should make allowances for the fact that the trial Court had the advantage of hearing and seeing the witness.

The manner in which the Appellants' appeal was dealt with by the first Appellate Court fell short of its duty in re-evaluating the evidence. It is not enough for a first appellate Court to merely state that it has analyzed the evidence adduced. That analysis of evidence must be seen to have been undertaken than simply stated.

26. Mr. Ithiga for the respondents submitted that no evidence was adduced as to the effect that the respondents were employees of the District Water Office Kibwezi and Kathiani respectively. There was no witness from the Ministry of Water to explain what designations the respondents held in the Ministry which was confirmed by PW12. The respondents were charged in their capacities as the agents of Tana Athi Water Service Board. There was no evidence regarding their agent-principal relationship as required by Section 38 of the Act.

27. It was further submitted that there was no complainant in the case and that KACC acted as the complainant, the arresting officer and the prosecutor. The functions of KACC is to investigate economic crimes as stipulated under Section 35(1) of the Act.

28. The respondents challenged the appeal in that there was no consent to prosecute the case that was given by the Attorney General as required by the law. KACC is under obligation to report their investigations to the Attorney General to facilitate the granting of consent to prosecute or specify the charges to be preferred. The DPP argued that the consent was in the court file but was never produced in evidence thus rendering the prosecution null and void.

29. It was further contended that their delivery notes were not addressed to Kibwezi but to Machakos/ Makindu/ Kibwezi Water Service Boards. The 2nd respondent was absolved from responsibility by the evidence of PW10 who said that the impression did not come from Kibwezi District Water Service Board. In relation to count 10 the delivery notes were addressed to Machakos/Nutresh District Water Service Board. It was further argued that there was no basis for delivery notes for Kathiani based on the fact that the requisition was not made by that station.

30. The respondents submitted that their acquittal was based on evidence and the law and should not be disturbed.

31. The issues arising from this appeal are as follows:-

(a) Whether the consent to prosecute was obtained by KACC or whether it was a requirement by the law.

(b) Whether there was a complainant in this case.

(c) Whether the magistrate erred in acquitting the respondents and their co-accused.

32. The respondents argued that consent under Section 35 of the Act was not obtained and that failure to do so was fatal to the prosecution's case. Section 35 of the Act is in respect of the investigation report and provides as follows:-

Following an investigation the Commission shall report to the Director of Public Prosecutions on the results of the investigation.

The Commission's report shall include any recommendation the Commission may have that a person be prosecuted for corruption or economic crime.

33. The appellant in its submissions relied on the case of **Michael Waweru Ndegwa Vs Republic [2016]eKLR** cited in the case of **Stephen Mburu Ndiba Vs Ethics & Anti-Corruption Commission & Another** where Section 35 of the Act was interpreted as follows:-

There is no similar provision in the Anti-Corruption Act. Section 35 of the Act which the Court of Appeal compared with Section 12 of the Prevention of Corruption Act has nothing to do with the consent to prosecute any offence under the Anti-Corruption & Economic Crimes Act, 2003 but only deals with reports to the Director of Public Prosecutions on the investigations undertaken by the Anti-Corruption Commission. Such reports shall include information on the outcome of the investigations and any action taken upon it, which in my view includes but not limited to arresting and charging suspects pursuant to Section 32 of the Anti-Corruption Act. It must also be noted that there was no provision in the Prevention of Corruption Act similar to Section 32 of the Anti-Corruption & Economic Crimes Act, 2003 and I would opine that the existence of that provision in the current anti-corruption legislation is an additional reason against any attempted analogy between Section 12 of the Prevention of Corruption Act, Chapter 65 and Section 35 of the Anti-Corruption Act; in the context of the current anti-corruption legal regime there is no comparison between the two either in form, substance or in effect.

34. The plain and ordinary meaning of Section 35 is that no consent to prosecute is required to be obtained. The requirement to obtain consent was contained in Section 12 of the repealed Prevention of Corruption Act, Chapter 65.

35. Section 32 of the Act grants powers *to the investigator to arrest any person and charge them with an offence, and to detain them for the purpose of an investigation to the like extent of a police officer.*

36. The interpretation of Section 35 of the ACEA Act given in the case of *Michael Ndegwa* & that of *Stephen Mburu* was correct and addressed the mystery of the requirement of consent. The powers granted to KACC by virtue of Section 32 of the Act are not in conformity with obtaining consent to prosecute. The provisions of Section 32 as read with Section 35 are quite clear that there was no need for a consent to be produced before the court to show that the Attorney General had given approval for the respondents to be charged.

37. This argument is supported by the decision of Susan Mboo Ng'ang'a Vs Attorney General [2015]eKLR where the court held in a case with similar facts that:

“A legitimate question that would flow from this argument is, why the KACC would require a consent from either the Attorney-General or the Director of Public Prosecutions when it is clear from the record that it neither filed the criminal charge against the petitioner nor prosecuted her. Of what value would that consent be to the Commission whose only role was limited to investigation of the offences against the petitioner and whose officers could only testify as prosecution witnesses.

These questions are not far-fetched more so considering that there is no legal provision either in the constitution or in any statutory instrument for a “consent” either from the Director of Public Prosecutions or the Attorney-General before him and, in my very humble view, the obsession with the so-called “consent” is, to say the least, baseless in law.”

38. It was therefore a misdirection in law by the trial magistrate to find that there was a legal requirement for obtaining consent.

39. The respondents argued that there was no complainant in the case thus rendering the proceedings null and void. The respondent faulted for finding that there was no named complainant in the case. The magistrate relied on Section 3(1) and Section 89 of the Criminal Procedure Code. Section 3(1) *requires all offences under the Penal Code to be inquired into, tried and dealt with in accordance with the law.* Section 89 provides that *a person who believes from a reasonable and probable cause that an offence has been committed by another person may make a complaint thereof to a magistrate having jurisdiction.*

40. The Section further provides that a complaint may be made orally or in writing.

41. Although the person who first complained was not named, the actual complainant in this case was Tana Athi Water Service Board who proceeded to avail witnesses to record statements. The witnesses testified in court as to what had transpired in respect of the charges against the respondents. The magistrate erred in reaching a conclusion that there was no complainant in the case whereas a report had been made and followed through.

42. In evaluating the evidence in this appeal, the court will restrict itself to the evidence relating to the respondents in counts 9 & 10. The co-accused Joseph Nzesia absconded the appeal and the DPP later withdrew the appeal after unsuccessful efforts to trace him. It was submitted by the respondents that there was no sufficient evidence to put them on their defence.

43. On perusal of evidence adduced by the prosecution, I find a missing link in that there was no evidence to prove that the respondents were employees of either the Ministry of Water or the Tana Athi Water Service Board. The court believes that this evidence was available but the investigator conducted shoddy investigations in omitting very crucial evidence. The respondents were charged in their capacities as employees/agents of Tana Athi Water Services Board. It was alleged that they had deceived the principal being Tana Athi Water Service Board in the course of preparation of delivery notes numbers 052, 053, 030 & 031 dated 30th of June and 31st of July 2009 respectively. However, there was no tangible evidence to prove the agent-principal relationship.

44. The investigating officer conceded that there were clerical errors and deliberate wrong entries in the delivery notes made by some of the prosecution witnesses which led to the arrest and charging of the respondents.

45. I have evaluated the evidence against the respondents. The burden of proof in criminal cases is beyond any reasonable doubt and the prosecution have a duty to discharge that burden which it failed to do. It is my considered opinion that it is not sufficient to make a *prima facie* case as required by the law. In this regard I find that the magistrate was correct in finding that the prosecution's case had no merit.

46. The ruling of the magistrate made on 28th of October 2011 acquitting the respondents of counts 9 & 10 is hereby upheld.

47. I find no merit in this appeal and it is hereby dismissed.

48. The respondents are hereby set at liberty unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF JULY, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

1) Both respondents

2) Ms. Manyal for Appellant

3) Ms. Muriuki for Ithiga for respondents