



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 269 OF 2010

JAPHETH AMBALWA ANGAHYA.....1ST APPELLANT

HASSAN ADAN IBRAHIM.....2ND APPELLANT

PAUL MWANGOMA MACHARIA.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against conviction and sentence in Nyeri Chief Magistrates' Court Anti-Corruption Case No. 14 of 2009 (Hon. Stella Muketi) delivered on 26th October, 2010).

JUDGMENT

The appellants were administration police officers, employed as such in the Government of the Republic of Kenya, at the time material to their trial. Between the 9th day of November, 2006 and the 2nd day of June, 2007, they are alleged to have received diverse sums of money from Equity bank, Kerugoya branch on account of security services rendered to that bank by administration police officers.

The acquisition of this money by the appellants was in the eyes of the state fraudulent and so on 1st December, 2009, the appellants were jointly charged with six counts of fraudulent acquisition of public property contrary to **section 45(1) (a)** as read with **section 48(1)** of the **Anti-Corruption and Economic Crimes Act, 2003**. According to the particulars of offence in the first count, on the 9th November, 2006 in Kerugoya Township within Kirinyaga District of the then Central Province, the appellants jointly and fraudulently acquired public property to wit, Kshs 39,000/= being payment received from Equity Bank, Kerugoya branch for security services rendered by administration police officers to the said bank.

Except for the dates and the amounts alleged to have been received, the particulars in the rest of the counts were similar as those in the first count.

The appellants pleaded not guilty on all the counts and therefore their case proceeded to full trial at the conclusion of which they were convicted on all the six counts; for each of those counts, they were fined the sum of Kshs 60,000/= or twelve months imprisonment; in addition to those fines, the appellants were also fined the equivalent of twice the amount held to have been fraudulently acquired on each of the counts and in default to serve six months imprisonment. The learned magistrate did not, however, specify whether the sentences were to run consecutively or concurrently.

Be that as it may, the appellants appealed against both the conviction and the sentences; they filed separate appeals but which were consolidated since they were tried together. The appeals are based on

similar grounds. The learned magistrate's decision was faulted on the grounds that she erred in law and in fact in failing to appreciate the glaring gaps in the prosecution case; that she also erred in law and in fact in dismissing their evidence which was not challenged by the prosecution at all; and that she erred in law and in fact in relying on the insufficient evidence of the prosecution witnesses which was not conclusive to sustain a conviction. The appellants also impugned the decision of the learned magistrate on the grounds that she erred in law and in fact in finding that the entire amount deposited in the bank account opened by the appellants was generated from security services rendered by administration police officers to Equity Bank and that she also erred in law and in fact in failing to appreciate that the account opened by the appellants was duly authorised by the then District Commissioner of Kirinyaga District.

It is necessary for this court to consider the evidence on record afresh and come to its own conclusions but bear in mind that only the trial court had the advantage of seeing and hearing the witnesses.

Martin Gatheiya Kiragu (PW1) was a branch accountant at the Kerugoya branch of Equity bank when on 8th November, 2006 the appellants opened a savings bank account No. 0100190530676 in the name of administration police at the branch; according to the documents lodged for the opening of the account, either of the two appellants could transact or operate the account at any one time.

From the evidence of this particular witness, there were several transactions by the appellants between the time they opened the bank account in 2006 and 5th October, 2007. Amongst the deposits made to the account were payments by Equity Bank for security services rendered by the administration police officers. The payments were made against the invoices issued by the District Commissioner's office.

The appellants who were signatories to the account made several cash withdrawals from the account; they also requisitioned for bankers cheques in the name of District Commissioner, Kirinyaga District and which were later cleared at the Kenya Commercial Bank at its Kerugoya Branch.

PW2, Peter Mugambi, worked with Co-operative Bank as a branch manager at its Kerugoya branch; he produced a bank statement in respect of a bank account in the name of Administration Police Welfare showing transactions of both deposits and withdrawals. Amongst these deposits were cheque deposits of Kshs 20, 000 Kshs 45,280 deposited by the 3rd and 1st appellants respectively. There were also internal transfers of funds in respect of the same account between the bank's branches at Kerugoya and Nyeri; in particular an amount of Kshs 32, 500 was transferred to the Kerugoya Branch on 27th December, 2007. The sum of Kshs 50,000 was also transferred to the same account on 13th December, 2007.

Ibrahim Kianduga Kubai (PW3) apparently operated a canteen at the Administration Police officer's camp at Kerugoya. He testified that he used to pay rent for the canteen to individual police officers; in the year 2007 he paid the sum of Kshs 24,000/= to the 1st appellant as rent though he was never issued with any receipt.

Amadi Hemed Kamanya (PW4) who was one of the Administration Police Officers at District Commissioner's office at Kirinyaga testified that the officers held a bank account at the Equity Bank, Kerugoya Branch where the police officers used to contribute Kshs 200 of their monthly salary to cater for their welfare. According to his evidence the account was operated by the appellants.

The Kirinyaga District accountant **Francis Kinuthia (PW5)** testified that the Administration Police officers rendered services to institutions for a fee and that he forwarded the payments received to the Office of the President. Several cheques, being payments made for these services were submitted to him at the material time; they were banked in bank account number 210970669 which was the office of the President bank account at the Kenya Commercial Bank, Kerugoya Branch.

The investigations officer **Arthur Opili (PW6)** testified that the payments meant for the district treasury were diverted to bank account No. 0100190530676 at Kerugoya branch of Equity Bank; this account was operated by the appellants. According to this officer, this account was not official and the district commissioner under whose authority the account should have been opened, did not authorise it. The

officer produced a letter showing that the account was opened under the authority of the 1st appellant purporting to act for the district commissioner of the then Kirinyaga District. The District Commissioner then was one Ferdinand Odhiambo who denied having given such authority.

Amongst the transactions on this account were withdrawals by the appellants of different amounts on diverse dates; in particular, so Mr Opili testified, they withdrew Kshs 39,000 on 9th November, 2006; kshs 45,000 on 6th December, 2006 and Kshs 40,000 on 8th February, 2007. They also withdrew Kshs 40,400 on 8th March, 2007 and Kshs 42, 000 on 2nd June 2007. It is these withdrawals that formed the basis of separate counts against the appellants.

The investigations established that once the District Commissioner invoiced the Equity Bank for services rendered, the bank would pay the money to the unauthorised account, the appellants would then requisition banker's cheques from the same account in the name of the District Commissioner but of a lesser sum than the amount invoiced. They would then withdraw the difference.

The document examiner **Emmanuel Kenga (PW7)** established that the appellants signed the application form for opening of what turned out to be unauthorised bank account; they signed to requisition for the bankers cheques from the account and also signed withdrawal slips showing that they withdrew various sums of money from this account.

The appellants opted to give sworn testimony when the court ruled that they had a case to answer. The first appellant testified that he was the Kirinyaga District Administration Police Commander at the material time and amongst his duties were the deployment of officers to institutions such as the Equity Bank, Barclays Bank, Savings and Credit Co-operatives to provide security services in their branches at Ndia, Mwea, Kagio and Kerugoya town. The security services were paid for and the payments were made to the government.

As far as Equity bank was concerned, the 1st appellant testified that the bank used to open earlier than the rest and therefore, special arrangements were made to have his officers transported to the bank in time. The bank provided what the 1st appellant described as the "welfare money" for transportation of these officers; it is this welfare money that was deposited in the "welfare account". The appellant admitted that the welfare account was opened by him together with the 2nd and 3rd appellants but that it was sanctioned by the District Commissioner; he testified that the latter gave him a "verbal consent". According to his testimony, only the welfare money was retained in the account but the money due to the government was forwarded to the district treasury.

Like the 1st appellant, the 2nd appellant testified on oath and stated that he worked as a chief inspector. He denied committing the offences with which he was charged. He asked the court to adopt the evidence of the 1st appellant as his own evidence. Again the 3rd appellant testified on oath and stated that he did not wish to add anything on the testimony of the 1st appellant.

That there was a bank account at Kenya Commercial Bank, Kerugoya Branch, in the name of the office of the President is not doubt. This account, no. 048210970669 was a government account in which government revenue, such as payments by Equity bank for security services rendered by Administration police in the Kirinyaga and Kerugoya regions would ordinarily be deposited. Indeed there was sufficient evidence that the bankers cheques that were requisitioned by the appellants from Equity bank and drawn in favour of the District Commissioner of Kirinyaga District, being payments for services rendered to the bank were deposited in this particular account.

There is also no dispute that the appellants opened a parallel bank account at Equity Bank, Kerugoya Branch being account No. **0100190530676** in which, according to the uncontroverted prosecution evidence, funds due to the Government in settlement of security services rendered by the administration police officers were initially transferred; thereafter bankers cheques would be drawn debiting that account with amounts that were purportedly in settlement of the invoices raised yet they were less than the actual amounts demanded. The effect was that although Equity bank dutifully paid the amount raised in the

invoices, part of that amount was retained in the appellant's parallel account at the bank and the district treasury ended up getting less than the invoiced amounts.

A bank statement from the bank in respect of this account and which was admitted in evidence shows that there were cash withdrawals of the difference that ought to have been remitted to the district treasury. According to the withdrawal slips, the appellants withdrew the amounts from this account from time to time.

As far as I understand the evidence, the appellants never disputed the opening of the parallel account; they never disputed the fact that part of the money paid by the bank in settlement of payments for services rendered by the government was retained in this account. The evidence that that they later withdrew this money from time to time was also not discounted.

In the face of the clear evidence that the appellants opened a parallel bank account in which they had government revenue deposited and that they occasionally made cash withdrawals from the account, all they did in their defence, as far as I can gather, was to attempt to justify their actions.

To begin with, the 1st appellant testified that he was given a verbal communication by District Commissioner to open the account; however, the evidence available shows that the purported authority to open the account was in fact a letter dated 7th November, 2006 addressed to the bank manager and authored by the 1st appellant himself. Contrary to the appellant's testimony the communication to the bank authorising it to open the account was neither oral nor was it from the District Commissioner.

Although the 1st appellant is said to have written the letter on behalf of the District Commissioner, there was no evidence that he had the mandate to perform the functions of the District Commissioner particularly in the matter of opening a bank account to which the appellant himself was a signatory.

To compound the matters even further, the appellant followed the letter of 7th November, 2006 with another one dated 8th November, 2006; in this particular letter in which he advised the bank manager of the mandate to operate the bank account, he described himself as the District Commissioner.

It is obvious even from the 1st appellant's own testimony that he held a specific office and he could not have been the District Commissioner. As noted there is no evidence that his duties as the District Administration Commander included performing duties reserved for the office of the District Commissioner.

It was argued on behalf of the appellants that the state ought to have called the District Commissioner to deny that he ever authorised the opening of the bank account in issue. In my humble view, though the District Commissioner was a relevant witness, failure to call him was not fatal to the prosecution case; I say so because there was enough evidence on record to show that he did not authorise the opening of the bank account in question. In any event, whether the District Commissioner authorised the opening of this account or not was a question of evidence and the moment the state presented evidence that there was no such authority, the evidential burden shifted to the appellants to demonstrate that such authority did exist; this they did not do.

My assessment of the 1st appellant's conduct is that he usurped the functions of the District Commissioner to open unauthorised and what in effect was a clandestine bank account through which he and his officers siphoned government revenue. His defence that they retained "welfare money" in the account and forwarded the rest to the treasury does not appeal to me to be plausible; it is not plausible because the invoices raised by the District treasury did not make any provision for retention of the money due and payable to the government in a separate account as "welfare money". More importantly, the amount paid against the invoices raised by the district treasury for services rendered by Administration police officers was, for all intents and purposes, public property as understood under **section 45(3) of the Anti-Corruption & Economic Crimes Act** and could not be appropriated in any manner other than in accordance with the rules or regulations governing use of such property.

In the same breath the evidence by the 1st appellant that the money was for transportation of his officers or for repair of a government vehicle could not have been viable. The responsibility to service government vehicles or to transport officers to their work stations, where such transport is necessary falls upon the Government which has well established mechanisms to deliver on such responsibilities; it does not befall any particular officer or officers in the government to take it upon themselves and open a bank account in which they divert government revenue for purposes of meeting these responsibilities.

I am satisfied that there was no reason to justify the actions by the appellants; I hold, just like the learned magistrate in the court below, that it was proved beyond reasonable doubt, on all the six counts, that they fraudulently acquired public property contrary to section **45(1) (a)** as read with **section 48(1)** of the **Anti-Corruption & Economic Crimes Act, 2003**.

I am minded that Mr Kaigai for the state conceded to the appeal in his submissions; however, I find the grounds upon which counsel conceded the appeal a bit curious. He submitted that the learned magistrate should have considered the appellants' defence that it was a custom to open a welfare account for administration police officers in Kirinyaga. According to counsel there was nothing wrong in opening such an account.

Counsel may well have been right but what he did not tell the court is whether there was any legal basis for the officers to divert government revenue into this account for their own use.

Counsel also submitted that the money was required for fuelling and servicing of government vehicles. Again, I find this argument rather perplexing because the government always has a vote for such expenditures in its budget and it does not rely on the income derived from services rendered by its officers to maintain and run its vehicles.

Despite the evidence of diversion of government revenue to an unauthorised account, counsel still submitted that there was no evidence that the funds were misappropriated. The appellants were charged with fraudulent acquisition of public property contrary to **section 45(1) (a)** of the **Anti-Corruption and Economic Crimes Act**; in my humble view, the retention of government revenue in a bank account from which they could withdraw money at will fell within the scope of this provision of the law.

Counsel for the state also argued that the appellants' trial was a mistrial because the consent of the Attorney General was not obtained; he did not however cite any provision of the law under which the purported consent should have been obtained before the appellants were charged and tried.

Be that as it may, the record shows that the appellants were arraigned in court by the officer in charge, Kerugoya police station. The prosecution was conducted by a Chief Inspector of Police. These officers were obviously acting at the behest of the Attorney General; in other words the prosecution of the appellants was effectively undertaken by the Attorney General. If counsel's submission is to be taken to its logical conclusion, it would imply that the Attorney General ought to have given himself the consent to prosecute the appellants. Such argument, in my humble view, is unsustainable and it is surprising that this submission could come from the state.

For reasons I have given, I find that the appellants were properly convicted; the sentences meted out against them were also within the premises of **section 48(1) of the Anti-Corruption Act** save to add that in the event they defaulted in payment of the fines their sentences would run concurrently.

Their appeal is accordingly dismissed.

Dated, signed and delivered in open court this day 7th day of October, 2016.

Ngaah Jairus

JUDGE