



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO.37 OF 2014

ALBERT YAWA KATSENGAAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

1. At all material times the Appellant, **ALBERT YAWA KATSENGA**, was an Assistant Commissioner of Customs at Kenya Revenue Authority Offices in Kisumu. On 5th November, 2012, he was charged before the Chief Magistrate's Court at Kisumu with three counts of soliciting and 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.

2. The particulars of the offence as laid in Count 1 were that on 5th October 2010 at KRA Kisumu Office within Kisumu town of Nyanza Province being a person employed by a public body to wit, the KRA as an Assistant Commissioner of Customs corruptly solicited a benefit of Kshs. 30,000/- from **DANIEL IVAGALE IDAGIZA** as an inducement to release Motor Vehicle registration No. T453 ADS make Toyota Caldina which was being detained at customs warehouse in Kisumu, a matter in which the said public body was concerned. The particulars of the offence in Count 2 and 3 were the same, save that in count 2 the amount alleged to have been solicited was 20,000/- and the offence is alleged to have been committed on 5th October 2010. In Count 3, the offence is receiving and the amount alleged to have been received was Kshs. 20,200/- on 8th October 2010.

3. The appellant pleaded not guilty to all the counts and the matter proceeded to full trial. After full trial the trial Magistrate found him not guilty in Counts 1 and 2 but convicted him for Count 3 and sentenced him to a fine of Kshs. 300,000/- or 1 year custodial sentence or one year in default. The appellant was fined a mandatory fine of Kshs. 40,000/- or six months imprisonment in default. Aggrieved by the conviction and sentence, the appellant has lodged an appeal to this court.

EVIDENCE

4. This being a first appeal, it is the duty of this court to re-consider and to re-evaluate the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. See. **NJOROGE –VS- REPUBLIC [1987] KLR 19** at page 22.

5. The prosecution called a total of seven witness. **DANIEL IDAGIZA (PW1)** told the court that on 2nd October, 2010, he was driving motor vehicle registration number T 453 ADS towards Kisumu. On reaching Nyamasaria he was stopped by **MR. ONDITI (PW4)**, a Customs Officer, who asked him to produce temporary importation permit as the vehicle bore a Tanzanian registration number. He did not have the original documents and as such he was informed that the vehicle would be detained pending

production of the original documents. The vehicle was driven to the KRA customs warehouse. In the meantime, **DANIEL** was able to obtain the original importation permit which he took to the KRA Offices and he presented the same to PW4 who in turn inspected the documents and after confirming that they were original he asked him to pay Kshs. 2850/- being warehouse storage fees.

6. The vehicle was released to Daniel after payment of Kshs. 2850/- and he set off. On reaching the warehouse gate he was stopped and informed that he could leave the vehicle as the appellant had instructed that the same be detained further. Daniel decided to call **MOSES KIDALI (PW2)**, a clearing agent who had cleared the vehicle at the Kenya Tanzania border at Isebania. He informed him what had transpired. Moses in turn called **FRANCIS MUKORO (PW3)** and requested him to find out why the vehicle was being detained yet it had all the clearance documents. Mukoro referred Moses to the Appellant as he is the one who had ordered that the vehicle be detained. Moses travelled to Kisumu and went to the Appellant to find out what was happening. The appellant informed him that the vehicle was involved in activities for which it was not permitted.

7. Moses then requested Mukoro to follow up the matter on his behalf for he had to go back to Isebania. Later on Moses received a call from Mukoro who informed him that the appellant had requested for Kshs. 30,000/- so as to release the vehicle. Moses argued that Kshs. 30,000/- was on the higher side and asked Mukoro to request the appellant if he could accept 20,000/- . The appellant agreed to take the Kshs. 20,000/- and Moses informed Daniel and Odhiambo (PW5) who was the owner of the vehicle. Odhiambo decided to report the matter to the KACC(as it then was known) for assistance. At the KACC offices in Kisumu he met one **MR. NYANGARA (PW7)** who gave them treated money to hand over to the appellant. The appellant then told Daniel to send the money via M-Pesa to Mukoro who would then send it to him. Daniel sent the money in the presence of Mr. Nyangara and Odhiambo. Mukoro then forwarded the money to the Appellant. It is upon receipt of such money via M-pesa from Mukoro that the appellant released the motor vehicle and was later arrested by the KACC officers and arraigned in court.

8. When the appellant was put on his defence he gave sworn statements and denied having committed any offence. He stated that he followed the customs law to the letter and the money sent to him by Mukoro was for payment of a debt.

ANALYSIS AND DETERMINATION

9. The appellant raised ten grounds of appeal but when the matter came up for hearing, Mr. Onsongo, Counsel for the appellant decided to abandon all the other grounds and only addressed the Court on ground number one which states as follows: **The charges as drawn and preferred against the Appellant were incurably defective and could not have been the basis of a sound conviction.**

10. Counsel argued that the charge as preferred were fatally defective for reasons that first, the charge sheet was signed by the Office in charge of Police Station yet the matter fell under the Anti-Corruption and Economic Crimes Act. He argued further that there is a requirement under section 35 of the Act that any prosecution under the Act to be sanctioned by the Attorney General, which was not done in the appellant's case. Counsel further submitted that there was no evidence on record to indicate that the Attorney General had sanctioned the appellant's prosecution and to that extent therefore, the appellant's prosecution was a nullity. The decision of **PATRICK OMIKUNDA OMUNG'ALA VS.- REPUBLIC CA CRIMINAL APPEAL NO. 195 OF 2012.** was relied on in support of the submission that a prosecution under the Anti-corruption and Economic Crimes Act undertaken without the sanction of the Attorney General is a nullity.

For the respondent, Mr. Keto, learned State Counsel, readily conceded the appeal.

11. Whereas the respondent reserves the right to oppose or concede a criminal appeal, that in itself does not bind the Court. The decision of the Court is based the court's analysis of the evidence adduced at trial. The respondent's opposition of an appeal does not lead to a dismissal of the appeal; conversely respondent's concession of an appeal cannot lead to its automatic success. See. **NORMAN AMBICH MERO& ANOR VS.- REPUBLIC NYERI CR APP NO. 279 OF 2005.** This court therefore has a

duty to determine this appeal on its merits.

12. The question raised by the appellant is technical and of great importance. Was the prosecution of the appellant a nullity for lack of requisite sanction from the Attorney General?

13. The Anti-corruption and Economics Crimes Act does not confer prosecutorial powers on the Ethics and Anti-corruption Commission 'EACC' formerly KACC. The Act having been enacted before promulgation of the Current Constitution, conferred such powers upon the Attorney General and after amendment to comply with the current Constitution, such powers are now vested upon the Director of Public Prosecution by virtue of section 35 which provides as follows:

“Sec 35. (1) Following an investigation the Commission shall report to the Director of Public Prosecutions on the results of the investigation.

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

14. The Court of Appeal in **NICHOLAS MURIUKI KANGANGI-VS- ATTORNEY GENERAL [2011] eKLR** dealt with this issue extensively and stated as follows:

“What clearly emerges from these provisions is that KACC must report its investigations to the Attorney General and in the report may recommend the prosecution of a person for corruption or economic crime. The Attorney General may, in turn, either accept or reject the recommendation to prosecute and only check on the power of the Attorney General to accept or reject KACC's recommendation to prosecute lies in the national Assembly....The Act sets out the procedure to be followed. That procedure cannot be circumvented by KACC asking the Kenya Police to prosecute on its behalf. There is no such provision in the Act. In the case before us there is no evidence that this procedure was followed. Mr. Obiri, the State Counsel who represented the Republic before us submitted that whether a report was made or not made to the Attorney-General was as it were, a matter between the Attorney-General and KACC. That cannot be right. The procedure is set down in the statute which creates KACC; KACC cannot ignore that procedure and say it is a matter between it and the Attorney-General. As a creature of statute, it must comply with the provisions of its creator. If it fails to do so, it is acting ultra vires and any such action is null and void.”

15. The court reiterated its position in **PATRICK OMIKUNDA OMUNG'ALA -VS- REPUBLIC (Supra)** where the same issue was raised. I am guided by the reasoning in these two opinions.

16. In the present case, there is no evidence that the Attorney General was ever consulted before the charges were brought. As was stated by Mr. Onsongo, the charge sheet was signed by the Officer in charge of station. The KACC was wrong in asking the Kenya Police to prosecute the matter on its behalf. Procedure had to be followed as laid out in the Act.

17. For the above reasons the appeal is allowed and any fine paid by the appellant be refunded.

Orders accordingly.

Dated, signed and delivered this 2nd November, 2015

H. K. CHEMITEI

J U D G E