



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 279 OF 2011

ANTHONY MKALA CHITAVI APPELLANT

VERSUS

REPUBLICRESPONDENT

(FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 27 OF 2009 OF THE
CHIEF MAGISTRATE'S COURT AT MOMBASA – **HON. MUTENDE - CM**)

JUDGMENT

The Appellant herein was Convicted and Sentenced to a fine of Ksh. 800,000/= in default three years imprisonment for each of the two counts which faced him.

In the first count he was charged with Abuse of office contrary to section 46 as read with section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

In the second count he had been charged with willful failure to comply with the law applicable to tendering of contracts contrary to section 45 (2) (b) as read with section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2013.

Counsel for the Appellant Mr. Kithi submits that the trial magistrate erred in law by holding that the appellant had conferred a benefit contrary to the anti-corruption Act as the evidence before the court was that a cheque was issued to Africa Merchant Insurance and there is no evidence as to whether the cheque issued was actually paid. He further submits that the issuance of a cheque in itself is not tantamount to payment. That there was no evidence to the effect that the cheque was banked.

It is also contended by the appellants counsel Mr. Kithi that several prosecution witnesses were cosignatories together with the appellant and no explanation is given why in particular PW 4 was not charged.

Further that the prosecution had produced various documents in an attempt to prove that the cheque in question was irregularly issued and the reliance by the learned trial magistrate on exhibits No. 20 and 21 was in error.

Counsel also submitted the trial magistrate did not take into consideration that certain documents alluded to by PW 3 John Karisa were not formally marked for identification and or produced as exhibits and that this ought to have been weighed in favour of the Appellant.

The prosecution case, it is argued rests on PW 1's evidence that on 25th February, 2008 she informed the appellant of the decision of the tender committee and in defiance to the decision of the Tender Committee the Appellant decided to award the tender to another company. Its the contention by the appellant that no single documents was produced as an exhibit in court containing the alleged information.

Further that the cheque which was allegedly issued was dispatched before the date of 25th February, 2008 when PW 1 was said to have passed to the appellant information on their decision. Further that the learned trial magistrate failed to appreciate that the appellant took the step to pay the lowest bidder and the only one that was an insurance company.

That the tender was for insurance services and could not have been awarded to an Insurance Broker.

It is also the case for the appellant that the representative from the oversight procurement authority did testify that exhibits Nos. 3, 3c, 4a and 5(a) (b) were defective and these were from the winning bidder.

It is further submitted that it was not proved that the company the Appellant was working for was a public body as required by law.

On the last issue as to whether National Water Conservation and Pipeline Corporation was a public body, the learned trial magistrate at page 72 line (1) did observe,

“N.W.P.C is a Corporation hence a public body as defined by section 2 of the anti-corruption and Economic Crimes Act No. 3 of 2003”.

It is evident therefore that the trial magistrate did appreciate that it had to be proved that the company the Accused was working for was a public body. I find that there is no evidence to the contrary.

It is the contention by the appellant that there is no proof to the effect that the appellant had conferred a benefit contrary to the anti-corruption Act. That the evidence before the Court was that a cheque had been issued to Africa Merchant Insurance Company but there is no evidence that it was actually paid. At page 77 line 16 of the judgment the magistrate observes,

“There is no evidence that he benefited from the award but there is evidence as stated by PW 10 that Amaco was paid 50% of the sum, Ksh. 1,170,136.50”.

PW 3 John Karisa is shown to have prepared a voucher for payment of the insurance policy of Ksh. 1,170,156.50 . It was signed by the Accused and Engineer Stephen Ndegwa.

At page 47 line 13 PW 10 told the court,

“In April, passed by the offices of the company – Mombasa Water and I was paid Ksh. 1,170,136.50 by way of cheque. I received the cheque. I signed for it in this dispatch register. We then gave services. I was expecting the other 50% after 2 months but to date has not received any”.

It would therefore be not correct for the appellant to state that there was no evidence of payment when the Managing Director of Amaco himself concedes such payment and this ground cannot stand.

The appellant in his defence concedes that he was the Managing Director of N.W.P.C and that it is he who had appointed members of the evaluation and tender committees.

He faulted both the tender and evaluation committees for flouting the procurement process and decided to award the tender to Amaco and hence saved Ksh. 600,000/=. He sent out an internal memo notifying the procurement office that he had resolved to award the tender to Amaco. As the managing Director the appellant was entrusted with the duty to ensure that the Procurement and Disposal Act 2005

was complied with.

The tender committee had advised him to award the tender to Eagle Africa. He ignored the advise and awarded it to Amaco

During the evaluation of tender documents there were mandatory requirements which were to be complied with Amaco did not comply. The Director General of Public Procurement (PW 9) did an analysis so as to establish whether the procurement act was followed and did find that the Appellant did breach the public procurement and disposal act when he awarded the tender to Amaco which firm had been found non responsive by the Tender Committee and that notification of the award breached section 67 (a) of the Act.

I am satisfied that the Appellant did use his office improperly to confer a benefit on Africa Merchant Assurance company as found by the trial magistrate.

The Conviction was safe and as regards the 1st count there is no reason to interfere with it.

However, the appellant was charged with one substantive count with an alternative one.

He should not have been convicted and Sentenced on the alternative count after he was found guilty and convicted on the substantive one.

Consequently, therefore, the Conviction and Sentence on the alternative count is quashed and set aside respectively.

Judgment delivered dated and signed this **1st day of November, 2013.**

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M. MUYA

JUDGE

1ST NOVEMBER, 2013

In the presence of:-

Learned Counsel for the appellant Mr. Gatundu holding brief for Mr. Kithi

Learned state counsel Mr. Tanui

The appellant present

Court clerk Musundi

M. MUYA

JUDGE

Gatundu: The Accused had paid the fine of Ksh. 1.6 million.

Court: The fine paid in respect of the alternative count of Ksh. 800,000/= to be refunded to the depositor.

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M. MUYA

JUDGE

1ST NOVEMBER, 2013