



**Republic v Opondo & another (Anti-Corruption Case
10 of 2019) [2020] KEMC 6 (KLR) (27 January 2020) (Judgment)**

Republic v Antony Juma Opondo & another [2021] eKLR

Neutral citation: [2020] KEMC 6 (KLR)

**REPUBLIC OF KENYA
IN THE ANTI-CORRUPTION MAGISTRATE'S COURT
ANTI-CORRUPTION CASE 10 OF 2019
EN JUMA, CM
JANUARY 27, 2020**

BETWEEN

REPUBLIC PROSECUTOR

AND

ANTONY JUMA OPONDO 1ST ACCUSED

PAUL MARTIN SAO 2ND ACCUSED

JUDGMENT

1. The two accused were arraigned in court faced with four counts. They were jointly charged in counts 1 and 2 and separately charged in counts 3 and 4. The charges are as here below: -
2. Count 1: Receiving a bribe contrary to section 6 (1) (a) of the *bribery Act*, as read with section 18 (1) and (2) thereof.

The particulars of the offence are stated that both accused on the 27/4/2017 at Uganda house in Nairobi City County within the Republic of Kenya, being persons employed by the Ethics and anti-corruption commission as Legal Officer 11 and operation assistant 11 respectively, requested for a financial advantage amounting to kshs 15 million from Dennis Mombo of Mwananchi Credit Limited through his lawyer Albert Kuloba with intent that, in consequence, they would compromise a purported tax evasion investigation involving the said Mwananchi Credit Ltd.

3. Count 2: Conspiracy to commit a corruption offence contrary to section 47 A (3) as read with section 48 (1) and the Anti-corruption and Economic Crime *Act No. 3 of 2003*.

The particulars of the offence are outlined that the two accused on the 27/4/2017 at Uganda house in Nairobi City County within the Republic of Kenya, being persons employed by



the Ethics and anti-corruption commission as Legal Officer 11 and operation assistant 11 respectively, conspired to commit a corruption offence namely bribery by requesting for a bribe from Dennis Mombo of Mwananchi Credit Limited through one Albert Kuloba to compromise a purported investigation on tax evasion against the said Mwananchi Credit Ltd.

4. Count 3: Abuse of office contrary to section 46 as read with section 48 (1) of the ACECA No. 3 of 2003.

The particulars of the offence being that the first accused Antony Juma Opondo on the 27/4/2017 at Uganda house in Nairobi City County within the Republic of Kenya, being a person employed by the public body to wit the Ethics and anti-corruption commission as Legal Officer 11, used his office with intent to improperly confer to himself a benefit of kshs 15 million from Dennis Mombo of Mwananchi Credit Limited through one Albert Kuloba so as to compromise a purported investigation on tax evasion against the said Mwananchi Credit Ltd.

5. Count 4: Abuse of office contrary to section 46 as read with section 48 (1) and the ACECA [Act No. 3 of 2003](#).

The particulars being that the second accused Paul Martin Sao on the 27/4/2017 at Uganda house in Nairobi City County within the Republic of Kenya, being a person employed by the public body to wit the Ethics and anti-corruption commission as operation assistant 11, used his office with intent to improperly confer to himself a benefit of kshs 15 million from Dennis Mombo of Mwananchi Credit Limited through one Albert Kuloba so as to compromise a purported investigation on tax evasion against the said Mwananchi Credit Ltd. A matter related to the affairs and the said body.

6. The prosecution called a total of 16 (sixteen) witnesses in support of its case, when both accused were placed on their defence, they each gave evidence on oath, they did not call witnesses.
7. The prosecution's case was opened by the complainant Mr. Dennis Mumbo a director of Mwananchi Credit, a company which is a private money lender, he testified that on a 20/4/2017 he received a call from his lawyer Mr. Albert Kuloba PW 10 informing him that he had been informed by a police friend Mr. Peter Orwa PW5 that Mwananchi credit was being investigated for tax evasion.
8. That on the same day Mr. Kuloba (PW 10) called him (PW1) informing him that he had received a call from an EACC investigator Mr. Sao (the 2nd accused) seeking to have a meeting, that PW 10 called PW1 to seek for instruction whether he can meet the 2nd accused or not.
9. The evidence by PW1 is that he instructed PW 10 to meet the 2nd accused at EACC premises. That the meeting took place on 27/4/17 subsequently PW 10 updated PW1 on the meeting that he was shown the file touching on Mwananchi credit but not the contents and that he was informed that further details to be discussed outside EACC offices and that made PW 1 and 10 suspicious.
10. That on the same day the suspects called PW 10 requesting for a meeting on the same day at Uganda house, where Pw 10 was told of the allegation that PW1 had charges of tax evasion up to 280 million and that he was asked for kshs 15,000,000 bribe for them to drop the charges.
11. That PW1 was surprised and decided to call a police friend Mr. Munga Nyale who was working at the Anti-Terrorist Police Unit who referred PW1 to see Mr. Pascal at EACC.



12. Further that on 22/4/17 another officer by the name Gikonyo called his (PW1's) secretary and asked for Mr. Kuloba or for PW1 but PW1 was not at the office and Mr. Kiloba was not based at PW1's office and that the caller left a message for PW1 to go to EACC offices to record his statement.
13. PW1's evidence is that he visited EACC offices on 2/5/17 and spoke with Mr. Pascal Mweu, PW7 and met the investigating team. On cross examination PW1 told this honorable court that the demand for the bribe was made to his lawyer PW10.
14. PW 2 Mr. Victor Omondi Odera a security officer 11 at EACC testified that he receives visitors to the premises by registering all visitors to EACC.
15. His evidence is that on 17/5/17 he was called to the office of Mr. Rodgers Akaki PW 16 to record statement about the visitors who had gone to see the 2nd accused, he identified the two visitors as Mr. Orwa, PW5 and Mr. Albert Simiyu, PW10 who were issued visitors card numbers 2007 and 2001 respectively. He produced a photocopy and the relevant page of the visit by PW 5 and PW 10 as Pex1.
16. PW 3, Mr. Jacob Luta Matayo, the office assistant at EACC testified that on 27/4/17 the 2nd accused asked him to open for him the office and Mr. Waihenya (PW 15) which PW3 did, and that 2nd accused told PW3 that he needed the office to record statement. That PW 3 went on with his work and passed by later and found the office which he had opened vacant and locked it.
17. That the 2nd accused had asked him to open the office for the 1st accused to record statement from a client, that it was normal for interviews to be conducted at the offices.
18. Mr. Lucas Kipkemoi Chepngeno Chepnagar (PW4) testified that he is the section manager in charge and corporate compliance at KRA.
19. His evidence is that they did not have any query about the tax-return of Mwananchi Credit limited which he said were proper according to the records at KRA. His evidence is that KRA has an investigative arm in event of any question on returns and that there was inter agency collaboration with other investigators from the police and EACC, he testified that they had not received any request for investigation by EACC on the Mwananchi credit Limited other than the investigation relating to this case. He produced the documents on the tax status of Mwananchi as Pex 3.
20. PW 5 police constable Peter Orwa testified that on 20/4/17 he was with PW 10 over different issues when PW 10 informed him that his client Mwananchi Credit Ltd had issues with EACC and that PW 10 asked PW 5 to accompany him to EACC offices which he did on 27/4/17 where PW 10 met the 1st and 2nd accused where they discussed legal issues for about 30 minutes then left for PW 10's office in town where they stayed for some time then proceeded to a restaurant at Uganda house.
21. PW 5 testified that he exchanged telephone number with the 1st accused while at EACC office so that PW 5 could help the 1st accused to trace his lost mobile phone.
22. He (PW5) testified that on 2/6/17 he was called by Mr. Rodgers Akaki to record his statement which he did.
23. PW5's evidence is that he did not listen to the conversation between the two accused and PW 10 during the meeting on 27/4/17.
24. On cross- examination PW5 said that PW 10 later informed him that both accused had demanded kshs 15 m at the meeting at EACC offices.



25. PW 6 police officer Stephen Oduor Manyala testified that on 22/4/19 he met PW 1 who is his friend at Savannah restaurant. That it was a coincidental meeting and that PW1 told him about being investigated by EACC for tax- evasion.
26. That he called 2nd accused through his telephone number 0711489880 and placed the telephone on speaker mode and that the 2nd accused confirmed that he was investigating PW1 on allegations of tax- evasion and that the investigations were on course and that the 2nd accused requested PW6 not to interfere.
27. That the 2nd accused met PW 6 at Savannah restaurant and that PW 6 informed the 2nd accused that PW1 was seeking a clearance certificate from KRA and that the 2nd accused confirmed that the investigation were on going.
28. PW 7 Mr. Pascal Mweu the acting deputy director investigations testified that he was in charge of the division of forensic investigations, which oversaw all the investigations at EACC.
29. His evidence is that on 28/4/17 he was out of the office at Nakuru when he received a call from Mr Munga Nyale of ATPU Nairobi informing him of encounter with EACC officers who were demanding for a bribe, on allegations and tax evasion and gave the name of the investigator as the 2nd accused.
30. That PW7 called his deputy Mr. Livingstone Waihenya (PW 15) who was not aware of any investigations touching on the complainant.
31. That PW 15 called PW 7 later and told him that the 1st accused was investigating the matter. That PW 7 called Mr. Edwin Wangwe Waudu PW 8 the in charge litigation under whom the 2nd accused worked and confirm the investigations and PW8 was not aware of such investigations. That PW 7 told Mr. Munga Nyale to ask PW1 to see him on 2/5/19 to lodge a formal complaint.
32. That on 2/5/17 PW1 went to PW 7's office and PW 7 referred him to Abdi Mohammed who listened to PW 1 and advised PW1 to lodge a formal complaint at the data Centre and PW 7 gave instructions to PW 16 to investigate the matter.
33. PW 7's evidence is that the investigations by the two accused were being done outside the operational on frame work work, set out by the commission.
34. The evidence is that there was a channel a case would take before being signed to particular officers for investigations.
35. PW 8 Mr. Edwin Wangwe Waudu the then in charge investigation under who the 1st accused was denied having assigned the 1st accused to investigate the matter involving the complainant.
36. PW 9 Mr. Joseph Wachira an investigator with EACC testified that he and the 2nd accused had been sent on an assignment at city hall on 27/4/17 but the 2nd accused excused pw9 from the mission, the 2nd accused told him (PW9) that he will be accompanied the 1st accused, hence PW9 went back to his office.
37. PW 10 Mr. Albert Simiyu Kuloba herein testified that the complainant was his client and that the complainant was his client and that on 20/4/17 PW 5 called him and told him that the complainant was being investigated by EACC for tax-evasion, that he called PW1 and notified him and the allegation and that on 27/4/14 he went to EACC offices where he met the two accused who ushered him in an offence where they discussed the investigations on allegation of tax evasion against the complainant.



38. That the complainant had tax arrears of kshs 280,000,000 and that he can pay ksh 15,000,000 to regularize the status. On cross-examination PW 10's evidence is that they were to pay the kshs 15 million to KRA to regulate the tax status.
39. PW 11 an officer for Safaricom produced a data for some data correspondences the two accused and also a call data for PW5 and 10. PW 12 Mr. Mbiti Wanyenje Juma Musa who is deputy PW 15 testified that on 27/4/17 both PW 16 and PW 15 were not in the office hence he was in acting in charge on the absence of both PW 15 and PW 16.
40. He testified that on that day PW 9 and the 2nd accused sought for permission to proceed to CBD for assignment given to both by PW 15 but later PW 9 informed him that the 2nd accused proceeded for the assignment with an officer from the legal department.
41. That at 4.00 p.m. the second accused returned to PW 12's office for a de-brief on what happened which was that PW 9 was left behind for lack of transport and that the legal officer was going the same way hence they used it same transport. The de-brief was that he did not get the documents from city hall and he was to get them later.
42. That the 2nd accused did not disclose to PW 12 the identity of the legal officer.
43. Pw 13, M/s Elizabeth Mumosi Ngeresa testified that she was at EACC data centre where all complaints are made. Her evidence on the complaints touching the matter were reported on 2/5/17 first by the 1st accused and after 30 minutes by PW1. That she forwarded both to reports for assessment and investigation to the matters.
44. PW 14 Mr. Tom Amolo the assistant director in charge for report and data centre testified to mode of reporting and the channel which the complaint takes before the investigation commence.
45. PW 15 Mr. Livingstone Waiyanya the deputy in charge investigation testified that on 25/4/17, PW 16 took 3 days off duty and PW 15 was left in the office and that on 26/4/17 he (Pw 15) left Nairobi for Nakuru on 27/4/12, before he left he sent Pw 9 and the 2nd accused to collect documents from city hall. He left PW 12 as the officer in charge, at the office.
46. That he later learnt on the allegation of tax evasion investigation being conducted against the complainant but he was not aware of the complaint, that the 2nd accused also denied knowledge of the KRA Mwananchi credit tax- evasion.
47. The evidence by PW 14, PW 15 and PW 16 Mr. Rodgers Akaki is that they were not aware of the complaint which both accused were pursuing and that the complaint was reported on 2/5/17, some days after the two accused had contacted PW 10, PW 5, PW6 and had confirm that investigations were on going.
In their evidence on oath both accused denied committing the offence.
48. The 1st accused testified that he received a tip of by an informer on tax-evasion by Mwananchi credit and that he commenced investigation and informed his co accused. That they were in the process of gathering evidence on the case and on 2/5/17. The 1st accused lodged a complaint at the data centre for investigation.
49. The 2nd accused also denied having demanded for a bribe, on not going with PW 9 on the assignment given by PW 15, the second accused explained that there was lack of transport and that the 1st accused had agreed to give him a lift since he was also going to CBD.



50. The two accused denied committing the offence and alleged that they were in their normal course of duty assigned to them at EACC.
51. To determine whether the prosecution has managed to prove its case against the two accused this Honourable court will consider the following five (5) issues.
1. Whether both accuseds had powers to conduct investigations.
 2. Whether there was a report to warrant investigation.
 3. Whether there was demand for a bribe or not.
 4. Whether there was abuse of office or not.
 5. The defence raised by both accused.
52. This matter was initiated by PW10 and PW5 or rather either PW5 or PW 10, from the evidence of PW 5 he was informed of the matter by PW 10 while PW 10 has also counter alleged that he got the information from PW 5. Nevertheless, both converge at a point that they visited EACC offices at the invitation by the 2nd accused and that while at EACC they met both accused who discussed the allegation of tax evasion against the company.
53. There is no dispute that the two PW5 and PW 10 went to EACC offices, there is also no doubt that they met both accused, this evidence was corroborated by the security record showing their identity and registration as visitors and confirmed by the office assistant who opened the office for the meeting.
54. On the first issue both accused had letters appointing them as investigators as such this honorable court is certain that the two accused had the requisite powers to conduct investigations for and on behalf of EACC.
55. On the second issue whether there was a report to warrant investigations. The defence by the 1st accused corroborates the evidence by PW 13 and PW 14 that the 1st accused lodged the complaint report on 2/5/17 yet the meeting with PW 5 and PW 10 took place on 27/4/17 which meant that as at that time no report had been lodged for investigations or to warrant the meeting.
56. The evidence that the accused persons had demanded for a bribe of kshs 15 million was allegedly made to PW 10, the evidence by all other witnesses touching on the bribe demand was as such hearsay. This honourable court has evaluated the evidence of PW10 and he did not state that a bribe was demanded from his client.
57. In cross examination PW 10 clearly stated that the client was to pay kshs 15,000,000 to KRA to regulate the complainant's the tax status.
58. This honorable court has had the benefit of looking at the complainant's tax returns, although the case is not touching directly on amount of tax returned. It appears to raise some eye brows on a company of such business of giving credit or rather in money lending business could return such an amount of tax and still remain in business, however the issue has been fully raised to the investigative authorities who must have internally confirmed and satisfied themselves that the tax returns reflect the actual business status of the complainant. If not then the same needs to be relooked by the investigative authorities to avert any oversight in the investigation process.
59. Back to the case at hand the evidence given by PW 10 and PW 5 both who are the key witnesses allegations contested by the two accused there is no mention of a demand for a bribe and there was no evidence that any money was paid to either of the two accused as such and the evidence on record does



not support the charge. This honourable court finds that both accused be are entitled to the benefit of doubt in respect of counts 1.

60. On count 11 in respect of conspiracy the evidence on record failed to support the particulars of charge as drawn in count 11. There was no evidence that either of the accused requested for a bribe from PW 10, the evidence by PW10 did not support this charge as well equally accused are accorded for the benefit of doubt.
61. On the offences of abuse of office, in counts III and IV, section 46 of ACECA provides.

A person who uses his office to improperly confer a benefit, on himself or against else is guilty of an offence.
62. For an offence under section 46 of ACECA to be established it must be shown that.
 1. The person accused is a state officer
 2. The person accused must have used his/her office,
63. PW14, PW15 AND PW 16 established the procedure through which a complaint is channeled up to the same being assigned an officer to investigate.
64. The procedure must have been set to avoid any abuse of office by any officer and also to streamline operations at that office.
65. Although both accused were authorized to conduct investigations on behalf of EACC, proper structures had been put in place from inception of the complaint to the finalization of the investigation and in this case both accused commenced investigation outside the laid structures. The 2nd accused confirmed to PW6 that investigations were on going and that he was handling the investigation yet he appeared to have retracted when he talked to PW 15 that he was not aware of the investigation.
66. The conduct by the 1st accused in purporting to lodge the complaint i.e. the morning of 2/5/17 after PW1 had visited their offices is a pure cover up.
67. Both accused in abuse of authority given to them by their employer EACC. Unprocedurally commenced parallel investigation without authority, notification or knowledge of their superiors, they held an investigative meeting with PW10 and PW5 days before the 1st accused lodged complaint, this was clearly and presumably to further personal interest.
68. The two accused are entrusted with powers by EACC to work within the laid down reporting lines and procedures, there was no valid explanation given by the defence why they did not inform or alert their superior of such investigations they were undertaking. The reasons for keeping the investigations a secret was not explained by the defence.
69. Both accused may have demanded ksh 15m as a bribe but since the key witness Pw10 who had set PW1 on motion retracted evidence that the payment was to KRA. Pw10 absolved both accused on count 1 and 2.
70. There is no doubt and this honourable court is certain that both accused were in furtherance of personal interest and made it apparent by conducting secretive out of the system investigation and made effort to exclude PW9 from their company on the 27/4/14, they committed act which amounted to abuse of office and the court makes the following findings;



Count 1:

71. Both accused are found not guilty and acquitted under section 215 Criminal Procedure Code.

Count 2:

72. Both accused are found not guilty and are hereby acquitted under section 215 criminal procedure code.

Count 3:

The 1st accused found guilty and hereby convicted as charged herein.

Count 4:

73. The 2nd accused is found guilty and accordingly convicted as charged herein.

14 days right of appeal- explained.

CHIEF MAGISTRATE

27/01/2020

Judgment read and delivered in open court in the presence of

Mr. Muthama advocate for both accused.

Both accused – present

Miss Kivali state counsel present for the state.

This 27/01/2020.

E. JUMA

CHIEF MAGISTRATE

27/01/2020

Miss Kivali:

74. There are no previous conviction against the 1st and 2nd accused let them be treated as first offenders.

E. JUMA

CHIEF MAGISTRATE

27/01/2020

Mr. Muthama advocate for both accused in Mitigation.

75. We thank the court for the Judgment both accused are young men who have served the country for a long time. Both of them are parents. They are both the single bread winners for their families.

76. They have also never been found guilty before this case or have committed any offence as confirmed by my colleagues.

77. That might have been an oversight on their part but unfortunately it shows from the record that they tried to do the right thing.

Both of the accused are still employees of the state.



78. The 2nd accused is on his leave working in a very volatile part of this country where he dedicated his life to protect the great republic of Kenya against foreign insurgency.
79. The 1st accused being a lawyer has served in various offices including the office of the AG where he performed exceptionally well. He is currently still working for the government at the KRA. Where he continues to render services for this great republic we therefore urge this honorable court to find that a non-custodial sentence will suffice. It is clear from the record that there was no benefit which was conferred to them.
80. We urge this honorable court to impose the fine at most so that this will serve as a deterrence to other officers of the state in the importance of following laid down procedures.
81. Lastly the two accused persons have fully co-operated with the honourable court in terms of bail terms and never skipped any attendance when they were required to.
82. They also cooperated with the prosecution. This honorable court had the benefit of looking at my client's demeanor and they are most remorseful.
83. We therefore leave it in the hands of this honourable court to mete out justice. We so pray.

E. JUMA

CHIEF MAGISTRATE

27/01/2020

Sentence:

84. The two accused are said to be first offenders. This honorable court has considered the plea in mitigation as brought forward by Mr. Muthama advocate. This court has duly considered the fact that no money was paid out to the two accused which is also mitigating factor.
85. But the conduct on both accused duly brought disrepute to the office entrusted to fight crime to have its officers bend to infringe the same law they are enforcing.

The court now sentences both accused as follows.

Count 3:

86. The 1st accused is fined kshs 1 million (1,000,000) in default to serve 10 years' imprisonment.

Count 4:

87. The 2nd accused is fined kshs 1 Million (1,000,000) in default to serve 10 years imprisonment.

14 days right of appeal.

E. JUMA

CHIEF MAGISTRATE

27/01/2020

Mr. Muthama:

88. I pray that we be supplied with certified copy of the judgment and proceedings and pray the cash bail deposited in court by the 1st accused of kshs 500,000 be utilized as part of the fine. That is all.

E. JUMA

CHIEF MAGISTRATE



27/01/2020

Court:

89. The defence to be supplied with certified of the proceedings and judgment at their cost.
90. The cash bail of kshs 500,000/= deposited by the 1st accused to be treated as part of the fine upon the surrender of the original receipt.

E. JUMA

CHIEF MAGISTRATE

27/01/2020

14 DAYS RIGHT OF APPEAL EXPLAINED.

E. JUMA

CHIEF MAGISTRATE

27/01/2020

