



**Republic v Oywer & another (Criminal Case 11 of 2016) [2019] KEMC 11 (KLR)
(Anti-Corruption and Economic Crimes) (2 October 2019) (Ruling)**

Republic v Elizabeth Oywer & another [2019] eKLR

Neutral citation: [2019] KEMC 11 (KLR)

**REPUBLIC OF KENYA
IN THE ANTI-CORRUPTION MAGISTRATE'S COURT
ANTI-CORRUPTION AND ECONOMIC CRIMES
CRIMINAL CASE 11 OF 2016
F KOMBO, SPM
OCTOBER 2, 2019**

BETWEEN

REPUBLIC PROSECUTOR

AND

ELIZABETH OYWER 1ST ACCUSED

DUNCAN MUISYO DAVID KIVUITU 2ND ACCUSED

RULING

1. I have carefully considered the evidence adduced herein by 23 prosecution witnesses alongside submissions by counsel for the State and the accused.
2. I find that a case is sufficiently made out against both accused persons in Count 1, the 1st Accused in Count 2, and the 2nd Accused in Counts 3 and 4.
3. I do not find that Count 4 is sufficiently established against the 2nd Accused.
4. From the evidence adduced, EACC investigators served the 2nd Accused with a document entitled "Notice to Produce Information and Documents". The document does not show on its face, the provision under which it is served but it is contended that the 2nd Accused failed to furnish the said investigators with a list of documents itemized therein and that are alleged to have been in his possession.
5. As a result, a charge (Count 4) indicated to be brought under Section 28 (9) of the *Anti-Corruption and Economic Crimes Act* (ACECA) was additionally preferred against him.

Section 28 of the ACECA provides as follows;



28. Production of records and property

- (1) The Commission may apply, with notice to affected parties, to the court for an order to—
 - (a) require a person, whether or not suspected of corruption or economic crime, to produce specified records in his possession that may be required for an investigation; and
 - (b) require that person or any other to provide explanations or information within his knowledge with respect to such records, whether the records were produced by the person or not.
- (2) A requirement under subsection (1)(b) may include a requirement to attend personally to provide explanations and information.
- (3) A requirement under subsection (1) may require a person to produce records or provide explanations and information on an ongoing basis over a period of time, not exceeding six months.
- (4) The six month limitation in subsection (3) does not prevent the Commission from making further requirements for further periods of time as long as the period of time in respect of which each requirement is made does not exceed six months.
- (5) Without affecting the operation of section 30, the Commission may make copies of or take extracts from any record produced pursuant to a requirement under this section.
- (6) A requirement under this section to produce a record stored in electronic form is a requirement—
 - (a) to reduce the record to hard copy and produce it; and
 - (b) if specifically required, to produce a copy of the record in electronic form.
- (7) In this section, “records” includes books, returns, bank accounts or other accounts, reports, legal or business documents and correspondence other than correspondence of a strictly personal nature.
- (8) The Commission may by notice in writing require a person to produce for inspection, within a reasonable time specified in the notice, any property in the person’s possession, being property of a person reasonably suspected of corruption or economic crime.
- (9) A person who neglects or fails to comply with a requirement under this section is guilty of an offence and is liable on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three years, or to both.

6. From the contents of Pros Exh 52, which is the document served, the information that the 2nd Accused was required to produce comprises specified accounting records that were deemed necessary for the



investigation-a matter that would clearly fall under Section 28 (1) paragraph (a) and/or (b) of the ACECA.

7. To obtain information from a suspect under these two paragraphs would in the clear terms of the section have required the investigators to make an application to court with prior notice of the same served on all the parties that may be affected thereof.
8. There was therefore no room to directly serve a notice in the circumstances to the 2nd Accused and as such, the charge under section 28 (9) is wholly misconceived against him.
9. I so find and dismiss Count 4 forthwith and acquit him thereof under section 210 CPC.
10. In conclusion, I therefore call the 1st and 2nd accused to their defence in Count 1, the 1st accused to her defence in count 2 and the 2nd accused to his defence in counts 3 and 4.

FELIX KOMBO

SENIOR PRINCIPAL MAGISTRATE

DELIVERED IN OPEN COURT THIS 2ND DAY OF OCTOBER 2019

