



**Republic v Kiriago (Anti-Corruption Case 15 of 2016) [2018] KEMC 95 (KLR)
(Anti-Corruption and Economic Crimes) (22 January 2018) (Ruling)**

Republic v Robert Kiriago [2018] eKLR

Neutral citation: [2018] KEMC 95 (KLR)

**REPUBLIC OF KENYA
IN THE ANTI-CORRUPTION MAGISTRATE'S COURT
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION CASE 15 OF 2016**

JO MAGORI, SPM

JANUARY 22, 2018

BETWEEN

REPUBLIC PROSECUTOR

AND

ROBERT KIRIAGO ACCUSED

RULING

1. The accused Robert Kiriago is charged with four counts under the [Anti-Corruption and Economic Crimes Act](#) No 3 of 2003(ACECA)
2. In the first, second and third counts the accused is charged with the offence of corruptly soliciting for 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.
3. In the fourth count accused is charged with the offence of corruptly 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](#).

The particulars of the offence in Count 1 are that;

4. On the 10th day of October 2016, at Helena Restaurant in Nairobi within Nairobi County, being a person employed by a public body, to wit, the Nairobi City County Government as the Head of Environmental Operations, the accused corruptly solicited for a benefit of Kshs.140,000/= from Clifford Mwimi Kimanzi, as an inducement so as to allow him to continue with excavation work at Karen without approval letter and also to facilitate the withdrawal of a Case Number 12132/2016 that is pending before City Court Nairobi.



The particulars of the offence in Count 2 are that:-

5. On the 28th day of September 2016, at unknown place in Nairobi within Nairobi County, being a person employed by a public body, to wit, the Nairobi City County Government as the Head of Environmental Operations, the accused corruptly solicited for a benefit of Kshs.100,000/= from Paul Mwai Nguru, as an inducement so as to allow him to continue with excavation work at Karen without approval letter.

The particulars of the offence in Count 3 are that:-

6. On 28th day of September 2016, at unknown place in Nairobi within Nairobi County, being a person employed by a public body, to wit, the Nairobi City County Government as the Head of Environmental Operations, the accused corruptly solicited for a benefit of Kshs.70,000/= from Paul Mwai Nguru, as an inducement so as to allow him to continue with excavation work at Karen without approval letter.

The particulars of the offence in Count 4 are that:-

7. On 11th day of October 2016, at City Hall Annex in Nairobi within Nairobi County, being a person employed by a public body, to wit, the Nairobi City County Government as the Head of Environmental Operations, the accused corruptly received a benefit of Kshs.90,000/= from Clifford Mwimi Kimanzi, as an inducement so as to allow him to continue with excavation work at Karen without approval letter and also to facilitate the withdrawal of a Case Number 12132/2016 that is pending before City Court Nairobi.

8. The accused denied the offences in all the four counts and the case proceeded to hearing. 11 (eleven) witnesses testified in support of the prosecution case and 28 (twenty eight) Exhibits were produced.

9. The issue for determination at this stage is whether the prosecution has established a prima facie case against the accused in the four counts to enable me place the accused on his defence.

10. Sir Newham Worley P. in the case of Ramanlal T. Bhatt .vs. R. (1957) E.A. 332 held that;

“...the court is not required at this stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a “prima facie case” but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

11. In Mosley and Whiteley’s Law Dictionary 5th Edition a prima case is defined as follows;

“A litigating party is said to have a prima facie case when the evidence in his favor is sufficiently strong for his opponent to be called to answer it. A prima facie case then, is one which established by sufficient evidence, and can be overthrown by rebutting evidence adduced by the other side.”

12. In R. v. Wachira, (1975) EA 262, Trevelyan, J. paired with Hancox, J. (as he then was) held that:-

“It has been settled for many years that the sufficiency or otherwise of the evidence at close of prosecution case, so as to require an accused to make his defence thereto, is a matter of law. A court is only entitled to acquit at that stage if there is no evidence of a material ingredient of the offence or if the prosecution has been so discredited and the evidence



of their witnesses so incredible and untrustworthy that no reasonable tribunal, properly directing itself, could safely convict....Apart from these two situations, a tribunal should not in general be called upon to reach a decision to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it.If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit, but on whether the evidence is such that a reasonable tribunal might convict.If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer.”

COUNTS 1 AND 4

13. Considering the evidence presented by the prosecution in the two counts, it is my finding that the prosecution has established a prima facie case against the accused in the first and fourth counts.

COUNTS 2 AND 3

14. The evidence relating to counts two and three was presented by pw1,pw2 and pw10. Paul Mwai Nguru (pw10) is the complainant in count 2 and 3 and is the key witness in the two counts. He is the owner of the property where there was an on going construction but there was no approval letter to do excavations at this construction site in Karen.
15. He testified that he was informed by his foremen (pw1) Clifford Mwimi Kimanzi who was at his construction site, that Nairobi county officers had gone to the site at Karen and arrested him together with the driver pw2 and two other employees. He stated that he asked pw1 to give him the number of the incharge of the county officers who had gone to the site.
16. He was given the number by pw2 but did not call. Pw2 Peter Njau Maina informed him that one of the county officers wanted to talk to him. He said the person did not identify himself but told him to pay Kshs.100,000/= for the 4 to be released and that the boss had accepted and reduced the amount to Ksh. 70,000/=
17. He followed them to Central police station and paid their cash bail of Kshs.20,000/= each making a total of Kshs.80,000/=, the four were released and advised to appear in court at City court the following day on 29/9/2016.
18. The four appeared in court on 29/9/2016 and were charged vide City court C. No. 12132/2016 and were released on cash bail of Kshs.20,000/= each.
19. Pw10 in his evidence further stated that he had never met the accused before and only saw him in court for the first time on 20/11/2017 when he testified in this case.
20. The charges in counts 2 and 3 relate to solicitation which took place on 28th September 2016 at an unknown place in Nairobi.
21. It is not indicated where or which area of Nairobi the alleged solicitation took place. The particulars of offence in the second count indicate that the accused corruptly solicited for a benefit of Kshs.100,000/= from the complainant Paul Mwau Nguru (pw10) on 28th September 2016.
22. The third count indicates that the accused corruptly solicited for a benefit of Kshs.70,000/= from Paul Mwai Nguru (pw10) on the same date 28th September 2016.



23. It is not clear why the prosecution decided to charge the accused in two different counts with the same offence but with different amounts and yet the alleged solicitation took place on the same day at the same unknown place.
24. In my view considering that there is no indication that the solicitation took place at different times on the same day then the accused ought to have been charged in one count for soliciting one of the amounts in either of the two counts since it was a single transaction. The charges in count 2 and 3 are therefore a replica of each other apart from the amount.
25. The accused allegedly solicited the money in counts 2 and 3 from the complainant Paul Mwai Nguru (pw10).
26. On cross examination Pw10 said he did not get to know the county officers who visited the site, their ranks and numbers. He further stated that he did not talk to any of the officers on their phone numbers though he spoke to someone using the phone number of Peter Njau Maina (pw2) but he did not know who it was.
27. He denied that the accused demanded Kshs.100,000/= and Kshs.70,000/= from him on 28/9/2016. He said that he does not know the person whom he talked to using Pw2's phone and that the person demanded for Kshs.100,000/= which was reduced to Kshs.70,000/=. The money was for the four to be released from custody at Central police station after they had been arrested.
28. Pw2 in his evidence said that he gave his phone to a kikuyu officer whose name he did not know and the officer talked to his boss pw10.
29. On cross examination he stated that he did not hear the accused asking for Ksh.100,000/= or Ksh.70,000/= from pw10.
30. Pw1 on cross examination stated that he did not hear the accused calling his boss pw10 and asking for any money after they had been arrested on 28/9/16.
31. Considering the evidence presented by the prosecution in the second and third counts, it is clear that the accused did not demand for Kshs.100,000/= or Kshs.70,000/= from the complainant pw10.
32. The complainant in the said counts had never met the accused and did not engage the accused on phone on 28/9/2016 when the solicitation allegedly took place.
33. The charges in count 2 and 3 are similar apart from the amount of money alleged to have been solicited and there is no indication that the two offences were committed at different times. This is duplicity of charges and hence the charges are defective.
34. The prosecution has therefore failed to establish a prima facie case against the accused to enable me place him on his defence in counts two and three.
35. In conclusion it is my finding that the prosecution has established a prima facie case against the accused in count 1 and 4 and accused is placed on his defence.
36. However in counts 2 and 3 the prosecution has failed to establish a primafacie case against the accused to require him to defend himself. I therefore acquit the accused under Section 210 of the Criminal Procedure Code in counts 2 and 3.

J.O. MAGORI – SPM

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 22ND DAY OF JANUARY 2018 IN THE PRESENCE OF ACCUSED,



Pros. Counsel

c.clerk

J.O MAGORI - SPM

