



**Republic v Mugo & another (Anti-Corruption Case 24 of 2016) [2018] KEMC 99 (KLR)
(Anti-Corruption and Economic Crimes) (15 May 2018) (Ruling)**

Republic v Davis Mugo & another [2018] eKLR

Neutral citation: [2018] KEMC 99 (KLR)

**REPUBLIC OF KENYA
IN THE ANTI-CORRUPTION MAGISTRATE'S COURT
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION CASE 24 OF 2016**

K BIDALI, CM

MAY 15, 2018

BETWEEN

REPUBLIC COMPLAINANT

AND

DAVIS MUGO 1ST ACCUSED

MARGARET MWENDE MBULU 2ND ACCUSED

RULING

1. The first accused Davis Mugo and the second accused Margret Mwendu are jointly charged with the offense of dealing with suspect property contrary to section 47 (1) (a) as read with section 48 (1) of the [Anti-Corruption and Economic Crimes Act](#) (ACECA); that on 22.11.2016 at about 0915 hours along Magadi Kiserian Road in Kajiado North within Kajiado sub county being persons employed as police constables attached to Kiserian traffic department were each found in possession of suspect property namely cash Kshs.6,250/= and Kshs.10,300/= respectively that was reasonably believed to have been acquired in the course of corrupt conduct, namely corrupt receipt of benefits from motorists along the said Magadi-Kiserian Road.

Prosecutions Case

2. PW1 Job Kioko is stationed at police headquarters performing special duties. On 22.11.2016 together with his colleagues and acting on information that police officers had been soliciting for bribes along the Kiserian Magadi road saw the two accused police officers at a road block. In his evidence he stated that the first accused was receiving money from a motorist. Immediately they approached him he attempted to run away but they managed to arrest him and conducted a quick search where they



recovered Kshs.6,250/=. He stated that the accused was told to remove money from his pocket. The second was also instructed to remove money from her pocket and she removed kshs.10,300/=. The driver of the white probox whom he had seen giving money was also arrested. Immediately the team of officers prepared an inventory produced as exhibit 3. Immediately they took the two accused persons to Ngong police station and the matter was handed over to officers based at the station.

3. Under cross examination, PW1 stated that he had never been involved in such an operation before and that the corrupt actions of the police officers was captured on digital recording but that the recording was left behind at police headquarters. He stated that he could not identify the specific Kshs.100 note that he saw being handed over to the accused. He also stated that the second accused was not searched as she voluntarily removed money from her pocket.
4. PW2 accompanied PW1 at the time of the operation on 22.11.2016. Upon receiving a signal from his colleagues they proceeded to arrest the two officers where the first and second accused voluntarily removed money from their pockets. He also stated that there was a vehicle parked on the roadside from where some money was recovered. His evidence was similar to that of PW1 in all material aspects. Under cross examination, he stated that the vehicle his team used was parked about 500 metres from where the police officers were and that one of his colleagues recorded the incident on a mobile phone. He also stated the first accused was searched but the second accused was not searched as she voluntarily removed money from her jacket.
5. PW3 Inspector Martin Fwamba is the officer in-charge crime office Ngong Police Station. Once the accused persons were presented at the station he opened a file and nominated Sgt. Nyongesa as the investigating officer.
6. PW4 accompanied PW1 and PW2 on 22.11.2016. PW4 stated that on reaching the area where the accused person had placed a road block they drove past the accused towards Magadi, turned around then drove past the accused the second time. They then followed a Toyota probox PSV which was flagged down by the accused person. They too stopped next to the police officers who then started running away. They gave chase and arrested the officers after a few metres. Under cross examination, he stated that, when the Toyota probox PSV was stopped he did not see any money changing hands but his in charge informed him that the Toyota probox driver had given money to the police officers.
7. PW6 Jared Nyongesa is attached to Ngong Police Station. On 22.11.2016 at 1400 hours he was called by his in charge and informed that the two accused persons had been arrested for soliciting and receiving bribes from motorists. He also produced the inventories and cash handed over to him. Under cross examination, he stated the allegation against the two accused persons had been soliciting for bribes from motorists and that some money was recovered from the accused persons. He also stated that the recovered money had not been treated or marked. Under reexamination, he stated that denominations of the currency recovered from the accused persons raised “eyebrows”.
8. In their submissions, the accused persons urged the court to make a finding that all matters falling under the *anti-corruption and economic crimes act* have special processes and channeling by the courts and that the court hearing this matter has a special jurisdiction. And therefore there was a mandatory obligation on the part of the prosecution to ensure compliance with Section 35(1) and (2) of the Act which in a nutshell obligated the Ethics and Anti-Corruption Commission to seek authority and approval of the DPP before commencing cases under the Act. They further submitted that authority must be in writing and must form part of the proceedings. It is further submitted, that from the evidence on record it was clear that the prosecution had failed to establish a prima facie case against the accused person. The prosecution countered these submissions. In their submission filed on 7.2.2018, the prosecution urged the court that a prima facie case had been established as contemplated in the



leading cases of Ramanlal Trambakial Bhatt –vs- Republic (1975) E.A 332 and 335, Republic –vs- Abdi Ibrahim High Court of Kenya Criminal case No.6 of 2011. Republic –vs- Francis Faya Ochieng. The prosecution further submitted that it had been established from the evidence prima facie;

- i. The first and Second accused were public officers
 - ii. That they dealt with suspect property
9. It was further submitted that the charges were properly before this court because the Director of Public Prosecution sanctioned and undertook the prosecution. The prosecution further submitted that section 35 of the ACECA only applies to the ethics and Anti-Corruption Commission and does not take away the duties of investigating and recommending charges by the Kenyan Police Service.

The Issues

I. Whether the charges are properly before the court bearing in mind that there was no report under section 35 of ACECA.

10. Section 35 of ACECA provides:
- “following an investigation the commission shall report to the DPP on the results of the investigation. The commission report shall include any recommendation the commission may have that a person may be prosecuted for corruption or economic crimes.”
11. Section 11 (1) (d) of the same Act provides the core mandate of the EACC to
- “...Investigate and recommend to the Director of Public Prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under this Act, the *Anti-corruption and Economic crimes Act* or any other law enacted pursuant to chapter six of the *Constitution*.”
12. The defense has argued that since the charges have been brought under ACECA and since section 35 was not complied with then the charges are bad in law and cannot be sustained. The import of the defense submission is that all offences under the ACECA, can only be investigated by the EACC and prosecuted upon receipt of a report and recommendation as contemplated by section 35 of the ACECA. In the case of Court of Appeal at Nairobi Civil Appeal No.102 of 2016 Engineer Michael Sistu Mwaura Kamau –vs- EACC and others. The Court of Appeal in dealing with this issue stated;
- “However while exercising his mandate, the DPP must under Article 157 (11) of the *Constitution* as read with section 4 of the *office of the Director of Public Prosecutions Act* No. of 2003, have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. Upon receiving the report and recommendations of the EACC, the DPP is expected to exercise his discretion to either prosecute or not to prosecute independently, guided only by the *Constitution*, the law, and the evidence. He is not a rubber stamp, to mechanically approve the recommendations of the EACC.
13. This brings us to the issue whether the decision to charge the appellant was based on information received from other sources. The DPP has the power to direct Inspector General of the National Police Service to investigate any information or allegation of criminal conduct. We readily agree with the respondents that the DPP can receive evidence from any source before determining who to charge and with what offence. That evidence does not have to come from the EACC alone. The important



question in this appeal is whether there was any evidence to suggest that the DPP made his decision to prosecute the appellant on the basis of evidence from other sources, other than the report and recommendations of the EACC.”

14. I am therefore persuaded that the charges before the court having been sanctioned by the DPP are properly before court. Section 35 of the ACECA does not in any way diminish the power of the Kenya Police Service to investigate cases. This function is specifically provided in the *National Police Service Act* Section 24.

(ii) Whether the accused person dealt with suspect property.

15. From the evidence on record, it is clear that the accused person voluntarily produced the money Kshs.6,250/= and Kshs.10,300/= from their pockets. From the evidence of the prosecution witness Ksh.150 was recovered from a motor vehicle parked nearby which vehicle belonged to the second accused person. However, from the inventories produced it is not clear which part of the recovered money was found from the accused persons because the Kshs.150/= has not been accounted for. The purported video recording of the accused person soliciting and receiving bribes was never produced in evidence. According to the prosecution witnesses the recordings were at Vigilance House. Secondly, none of the drivers who purportedly gave the bribes were called to testify including one Kinyanjui who had earlier been charged jointly with the accused person. In the absence of the testimonies of the drivers of these PSV's vehicles, who purportedly gave the recovered money to the two accused persons as bribes, it is not possible from the evidence to determine the purpose or objective of the money; if at all any was given to the accused persons. The failure to call this critical witness weakened the prosecution case.
16. These witnesses would have shed more light on the purpose of the money.
17. In the course of trial, something unusual happened. The prosecuting counsel reported to court that the recovered exhibits, specifically the money was lost after it had been marked for identification but before it had been produced in evidence. The Investigation Officer reported that the money had been handed over to the court. The record showed otherwise. I did direct that a probe be conducted. This of course led to delay. Eventually the Investigation Officer informed the court that the exhibits had been recovered at the police armory, Ngong police station, where he had put them. And when he gave his testimony he basically stated that the evidence gathered against the accused persons was weak. He, in not many words, pleaded for an acquittal. Bearing in mind his past conduct, his testimony was expected, and if his intention was to secure an acquittal, he has succeeded. As a neutral arbiter, the court does not descend into the arena of the trial intricacies. I can only rely on the evidence presented and apply the law. Despite the concerted efforts of the prosecuting counsel to unravel the truth and present the evidence, she was fighting a lost cause. The society lost.
18. For these reasons and applying the standards in the Ramanlal Bhatt case, I am of the view that this court would not be able to convict the accused person if no explanation was offered by the defence. I therefore acquit the accused persons under Section 210 of the Criminal Procedure Code.

Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 15TH DAY OF MAY, 2018.

KENNEDY A. BIDALI

CHIEF MAGISTRATE

Ruling delivered in open court on 15.5.2018.



Ms Gitau for the State

1st Accused – Present

2nd Accused – Present

M/s Gitau – I pray for certified copies of proceedings and Ruling

Accused – Me too plus a refund of cash bail.

Order – Certified copies of ruling and proceedings be availed. Cash bail be refunded to the depositors.

