



**Republic v Mburu (Anti-Corruption Case 25 of 2017) [2018] KEMC 94 (KLR)
(Anti-Corruption and Economic Crimes) (1 August 2018) (Judgment)**

Republic v Dan Kangara Mburu [2018] eKLR

Neutral citation: [2018] KEMC 94 (KLR)

**REPUBLIC OF KENYA
IN THE ANTI-CORRUPTION MAGISTRATE'S COURT
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION CASE 25 OF 2017**

DN OGOTI, CM

AUGUST 1, 2018

BETWEEN

REPUBLIC PROSECUTOR

AND

DAN KANGARA MBURU ACCUSED

JUDGMENT

1. The accused stands charged with the offence of dealing with suspect property contrary to section 47(2) (a) as read with section 48(1) of the [Anti-corruption and Economic Crimes Act](#) No 3 of 2003 (ACECA).
2. The facts are that Dan Kangara Mburu: On the 9th day of November 2016, at Muthurwa area within Nairobi City County, being a person employed in a public body, to wit National Police service as a police Corporal, attached to Makongeni Traffic Base, Traffic department, having reason to believe that certain property namely Kshs 5,250/- was acquired as a result of corrupt conduct, held and concealed the said property.
3. He also faced another count of Abuse of office contrary to section 46 as read with section 48(1) of the [Anti-corruption and Economic Crimes Act](#) No 3 of 2003 (ACECA). The particulars were that On the 9th day of November 2017, at Muthurwa area within Nairobi County, being a person employed by a public body, to wit the National Police Service as a Police corporal, attached to the Makongeni Police Traffic Base, Traffic Department, used his office to improperly confer to himself a benefit of Kshs 5,250/- from various drivers as an inducement so as not to charge the said drivers with unspecified traffic offences, without following the laid down procedures of section 105, 106 and 107 of the [Traffic Act](#) Cap 403 Laws of Kenya. He denied the charges and the republic called 6 witnesses.



4. PW1, was one Rodgers Akaki an Assistant Director of operations at the Ethics and Anti-Corruption Commission (EACC). This witness informed the court that in 2017 the commission received various anonymous reports that traffic police officers along Muthurwa market and Jogoo road were soliciting and receiving bribes. He analysed the reports and planned for surveillance by assigning one officer between 27th September 2017 and 9th November 2017. In the process the accused was observed having formed a habit of entering Matatus and alighting without inspection. He was also observed taking something which they believed was money from the drivers. He organised his officers and had accused arrested on the morning of 9th November 2017. A search on the accused recovered Kshs 5, 250/- from his pockets.
5. In cross examination, this witness informed the court that the complainants did not identify themselves but said they were members of the public. They complained about all officers on jogoo road and Muthurwa market, however no names were mentioned. All the clips shown in court were recorded by his officers and only showed the accused. That in one of the clips the officers saw accused receive something from the driver, which thing was believed to be money. This witness was not sure whether accused was assigned duties alone. He knew CIP Mwangi of EACC whom the accused had complained against to the EACC but did not know when accused had started prosecuting him in traffic case No 4628 of 2017. Not only accused was being investigated but many more others.
6. PW2 was Ditim Wanyenje Juma Musi an investigator with EACC. Pursuant to reports against traffic police officers receiving bribes along jogoo road from matatu operators and personal vehicles, he was detailed by PW1 to undertake surveillance on the traffic police officers and confirm the allegations. He prepared Sony Digital camera S/no 1365928 and together with his team on 27/9/2017 proceeded to Muthurwa. They found an officer working alone. As they took clips they could see the officer stop vehicles and without inspection enter vehicles, sometimes when moving. He liked entering the front at the co-driver's seat and he would alight after a short distance. From intelligence reports, it was at that time that he would receive bribes. The same exercise was repeated on 28/9/2017, 10/10/2017 and 11/10/2017 and the same behaviour was noted from the same officer who was working alone. As a retired police officer, this witness knew that according to standards of police officers, they would work in pairs. He filmed the police officer and reported back to PW1. On 9/11/2017 armed with the same camera he arrived at the scene at 6:45 am and took video clips up to 10:00 am. He then informed Alex Nyakundi (PW5), who had the accused arrested. He proceeded to play the clips in court and the court observed and noted as follows; the 1st two show the face of accused very clearly. In the next one he enters in the front cabin of a matatu, communicates with a person in a matatu in uniform something is exchanged, he then exchanges it from one hand to another, the vehicle was christened Forward. In the several others that followed, he enters the matatus in front, closes the door and matatus move on while he is inside. In one clip, RECO 0015 this officer is seen hanging on a moving minibuss. He did so in several others. In one of the clips, the court saw a matatu KBS 910K turn on the main road while the officer is seated in the front. In cross examination this witness informed the court that complaints specifically targeted those police officers based at the Makongeni traffic base and in particular those who manned Muthurwa and Jogoo road. That the accused is the one who was found at the scene and it was unusual for an officer to work alone especially in uniform. That the officer entered matatus going nowhere which was not traffic work. He also did not inspect, arrest or release any matatu. His mode of operation was not that of a police officer. The accused was arrested around 10:00 am. PW3, his in charge at the traffic base was asked to go and watch a video at the EACC. She went, watched and identified the accused whom she had known for 1 year 3 months. On cross examination she informed the court that between 27/9/17 and 9/11/2017, the accused was never assigned duties alone as officers are never assigned duties alone. On the 9/11/2017, he was assigned duties at the city stadium as a Non-Commissioned Officer in charge of 3 of them. That she was aware about TC No 4628 of 2017 at



Makadara Law Courts. That CIP Mwangi from EACC had gone to the station and wanted the vehicle involved released. CIP Mwangi saw the vehicle and found it unroad worthy. He never mentioned the accused and did not threaten to deal with him. PW4 also an officer with EACC testified that on 9/11/2017 with other officers was called by PW1. They were briefed about the complaints received by PW1 and were detailed to go to the scene. PW5 was the team leader. At the scene they observed the accused who would enter vehicles at the stage, he would go in the vehicles to the roundabout and return in another. PW5 was informed by the surveillance officer that the accused had left in a vehicle branded Foreward and would return. The surveillance officer informed PW5 that the officer had boarded another vehicle. PW5 informed them about the same. They hurried to the vehicle which stopped as another was overlapping and had the accused arrested. Accused was taken to integrity centre. A search was conducted in him and currency notes amounting to Kshs 5,250/- in denominations of 50/-, 100/-, and 200/- were recovered. The money was photocopied and an inventory thereof made. The money was produced as Pexb6, photocopy of the recovered money as Pexb9 and the inventory as Pexb10 respectively. In cross-examination among other things this officer informed the court that he did not see the officer receive a bribe. That he new the officer was in the bus for a bribe though he did not see the accused take a bribe. PW5 corroborated what PW4 said and added that the search by PW4 recovered Kshs 5250/- in denominations of Kshs 50/-,100/- and 200/-. In cross-examination he informed the court that he arrested the accused while with the team as they suspected he had taken a bribe though he was not seen taking bribes. PW6 who was in the same company was the Investigating officer in the case. He reiterated the evidence of PW4 and PW5. He was not aware that the arrest of the accused related to TC No 4628/17 in Makadara and that he did not act on suspicion.

7. The accused in his defence while testifying on oath talked mainly on his events of 9/11/2017 the day he was arrested. He said he normally reared and sold chicken. On that day he left his residence at Kiserian at 4:24 am. He delivered his chicken to Peter Jeremiah (DW2). They had agreed on Kshs 450/- for each. He did not pick the money immediately and went to his place of work at City Stadium round about. He went back to DW2 at 9:40 am and picked his Kshs 7, 200/- in loose denominations of Kshs 50/-, 100/- and 200/-, with Kshs 800/- in his wallet the total came to Kshs 8000/-.He fuelled his car for Kshs 2, 500/-, he then proceeded to Muthurwa to go and have breakfast, got some traffic jam on the way, controlled it, boarded another vehicle to a hotel inside Muthurwa market and had breakfast of Kshs 250/-. He then boarded another vehicle towards City stadium and while on the way was arrested by EACC officers. Further that on 6/8/2017 he had detained MV regn no KBC 661G an Isuzu minibus and had it booked for various offences. That later CIP Mwangi from EACC went to the station and met with PW3 requested for the release of the said vehicle and wanted to see the officer who had arrested it. That the accused was told he was being looked for and went underground. He went to court and testified on 7/11/17. That CIP Mwangi had said that his vehicle had been arrested because he refused to give a bribe. He was then arrested on 9/11/2017. He produced a photograph of the chicken as dexb4. He wrote a complaint to the EACC and DPP but never received a response. In cross-examination he said he reported to Muthurwa at 9:50 am. That he took his vehicle to the station at 9:45 to 9:50 am and that that was the first time he was reporting to Muthurwa. He had worked under CIP Mwangi before and had had no issues. He contradicted himself and said that he did not go to hiding but was deployed in suburbs of Nairobi i.e. Eastleigh and Kiambu. The complaint to DPP was dated 13/11/2017. This witness called DW2 as one of his witnesses. DW2 testified of having bought chicken worth Kshs 7200/- from the accused on 9/11/2017. That the small denominations he paid DW1 were gotten from the bank. DW3 was the DTO Kilimani. He testified that it was not unusual for a traffic police officer to inspect a motor vehicle when there is suspicion of an offence. He acknowledged that CIP Mwangi called him, introduced himself as from EACC and requested for the release of the vehicle, however the owner had been taken to court. They did not meet. DW4 produced TC: 4628 / 2017 as dexb4. After the close of the defence case parties made final submissions and relied



on several authorities which have also been considered. The defence submitted that the proceeds found on accused were sales from chicken. That accused was being persecuted for arresting a motor vehicle where one of the officers from EACC, a CIP Mwangi had an interest. He also at the same time raised an alibi. The prosecution submitted that police officers were never deployed alone hence the conclusion that the accused was involved in corrupt conduct. Further that the Kshs 5,250/- recovered from him was as a result of corrupt conduct and that the prosecution had proved its case against the accused beyond all reasonable doubt. The above is the evidence upon which this court is required to consider in order to come to a conclusion as to whether or not the prosecution has dispensed with the burden of proof and established their case against the accused person beyond all reasonable doubt.

8. After considering the above, the court is to determine whether the accused dealt with suspect property and or whether he conferred on himself a benefit and thereby abused his office.
9. The evidence of PW1 was to the effect that in 2017 the commission received various anonymous reports that traffic police officers along Muthurwa market and Jogoo road were soliciting and receiving bribes. He analysed the reports and planned for surveillance by assigning PW2 between 27th September 2017 and 9th November 2017. PW2 was detailed to undertake surveillance on the traffic police officers and confirm the allegations. Together with his team comprising of PW2, PW4, PW5 and PW6 on 27/9/2017 proceeded to Muthurwa. They found an officer working alone. As they took clips they could see the officer stop vehicles and without inspection enter vehicles, sometimes when moving. He liked entering the front seats next to the driver, co driver's seat and would alight after a short distance. PW3 the senior to accused was asked to go and watch a video at the EACC offices. She went watched and identified the accused whom she had known for 1 year 3 months. On cross examination she informed the court between 27/9/17 and 9/11/2017, the accused was never assigned duties alone as officers are never assigned duties alone. On the 9/11/2017, he was assigned duties at the city stadium as a Non-Commissioned Officer in charge of 3 others. PW5 corroborated what PW4 said and added that the search by PW4 recovered Kshs 5250/- in denominations of Kshs 50/-, 100/- and 200/-. In cross-examination he informed the court that he arrested the accused while with the team as they suspected he had taken a bribe though he was not seen taking bribes. PW6 who was in the same company was the I.O. in the case. He reiterated the evidence of PW4 and PW5. He was not aware that the arrest of the accused related to TC No 4628/17 in Makadara and did not act on suspicion. PW2 proceeded to play the clips and the court observed and noted as follows; the 1st two show the face of accused very clearly. In the next one he enters in the front cabin of a matatu, communicates with a person in a matatu uniform, something is exchanged, he then exchanges it from one hand to another, the vehicle was christened Forward. In the several others following he enters the matatus front doors, closes the doors and the matatus move on. In one clip, RECO 0015 this officer is seen hanging on a moving minibus. He did so in several others. In one of the clips, on a matatu KBS 910K, the matatu turns on the main road while the officer is seated on the front. From the above evidence what comes out is that EACC received a complaint, detailed its officers to investigate. The complaint was that traffic police officers on Jogoo road and Muthurwa were soliciting and receiving bribes in denominations of between Kshs 50/-, 100/- and 200/-. Surveillance was conducted and video clips played in court. The court observed very clearly that the person in the clips was the accused. He entered so many vehicles and alighted without doing any traffic duty. He mostly entered the front cabin and sat. I saw him in one of the clips hanging on a matatu which turned in the middle of the road. I also saw and observed the officer communicating with a person in uniform then receiving something and then exchanging it to the other hand. Upon arrest by PW5 and his team, Kshs 5,250/- was recovered from him. This were in denominations of Kshs 50/-, 100/-, 200/-. And according to PW6 the investigating officer, the accused could not explain where he had received the money from. I find as a fact that upon receiving complaints and investigating them, the accused was arrested and Kshs 5,250/ recovered from him in denominations of Kshs 50/-, 100/-,



and 200/-. There is nowhere accused was captured inspecting the vehicles. He was also working alone against expectations. PW3 informed the court that on the date of arrest the accused had been assigned duties at the city Stadium round about to be in charge of three others. The accused was arrested at Muthurwa working alone. This coupled with the fact that he stopped so many vehicles entered inside without inspecting them, was seen receiving something and when arrested pursuant to a complaint money was recovered from him as complained, I find that the recovery of the currency notes soon after his arrest fell within the meaning of dealing under section 47(2)(a) of ACECA. The court also finds that the case was not that of mere suspicion which in law cannot form a basis for a conviction but that of reasonable suspicion which in the circumstances lead to the issue of a rebuttable presumption that the said monies recovered from accused were obtained as a result of corrupt conduct. As such I also find that the evidential burden shifted to the accused pursuant to section 111 of the Evidence Cap 80 LOK and hence as provided in law accused was required to rebut the presumption.

10. As the case developed the accused informed the court that he was being persecuted by one CIP Mwangi of the EACC. According to him this was as a result of mv rgn no KBC 661G that he had detained and charged the owner in Makadara TC No 4628 of 2017. That the said officer had threatened him till he went underground. However PW3 in her testimony said that she was aware about TC No 4628 of 2017 at Makadara Law Courts. That CIP Mwangi had gone to the station and wanted the vehicle involved released. He saw the vehicle and found it unroad worthy. He never mentioned the accused and did not threaten to deal with him. Other evidence from accused indicated that he never met with CIP Mwangi who he had worked under and had not had any differences. PW6 in his evidence also informed the court that he was not aware that the arrest of accused was related to the case in Makadara. Further in his defence, accused introduced another angle to his defence at the defence hearing. While on oath he informed the court that the money he was found with were proceeds on chicken sales to DW2 on the date he was arrested. However on the evidence on the date of his arrest, the court noted as follows: that PW2 informed the court that on 9th/11/2017 armed with the same camera arrived at the scene sat 6:45 am took video clips up to 10:00 am He the informed Alex Nyakundi who had the accused arrested. I find that the accused did not leave the scene. This was also alluded to by the other prosecution witnesses. I find that the introduction of the aspect of the defence of the chicken business after the close of the prosecution's case is an afterthought and is dismissed as such. His evidence in defence of an alibi did not displace the prosecution case that squarely placed him at the scene of crime. The requirement in section 47(2)(a) of ACECA is that the prosecution has to establish that there was reasonable suspicion that the monies found on accused was as a result of corrupt conduct. I find that that burden was dispensed with in this case. Consequently I do find that the accused failed to rebut the presumption that the currency recovered from him was obtained as a result of corrupt conduct and also that he abused his office by conferring on himself a benefit of Kshs 5,250/-by virtue of his office. Further that the republic proved its case against the accused person beyond all reasonable doubt and is convicted under section 215 of the CPC Cap 75 LOK accordingly for the offences of :-

1. Dealing with suspect property contrary to section 47(2)(a) as read with section 48(1) of the Anti-corruption and Economic Crimes Act No 3 of 20003 (ACEAC).
2. Abuse of office contrary to section 46 as read with section 48(1) of ACECA.

DATED AND DELIVERED IN OPEN COURT ON THIS 1ST DAY OF AUGUST, 2018.

D.N.OGOTI [MR]

CHIEF MAGISTRATE

1.8.2018

In the presence of:-



M/A Awino for state

Korir Court Asstant

Mr. Juma for accused

D.N. OGOTI [MR]

CHIEF MAGISTRATE

1.8.2018

