Mburu v Republic (Criminal Appeal 35 of 2020) [2024] KECA 594 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KECA 594 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 35 OF 2020

PO KIAGE, A ALI-ARONI & LA ACHODE, JJA

MAY 24, 2024

BETWEEN

DAN KANG'ARA MBURU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Ong'undi, J.) dated 22nd January, 2019 in ACEC Appeal No. 17 Of 2018)

JUDGMENT

1. The appellant, Dan Kang'ara Mburu, was arrested and arraigned before the Chief Magistrate's Court in Nairobi and charged with 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. The particulars of the offence were that on 9th November 2017, at Muthurwa area within Nairobi City County, the appellant being a person employed by a public body to wit, the National Police Service, as a Police Corporal attached to Makongeni Traffic Base, Traffic department, having reasons to believe that a certain property namely, Kshs 5,250 was acquired as a result of corrupt conduct, he held and concealed the said property.

2. In count 2, the appellant was charged with 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. The particulars of the offence were that on 9th November 2017, at Muthurwa area within Nairobi City County, the appellant being a person employed by a public body to wit, the National Police Service, as a Police Corporal attached to Makongeni Traffic Base, Traffic department, he 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 sections 105, 106 and 107 of the *Traffic Act*, Cap. 403 of the Laws of Kenya.

3. The appellant denied the charges leading to a trial in which the prosecution called 6 witnesses in support of its case.

4. Evidence was adduced that in the year 2017, the Ethics and Anti-Corruption Commission (EACC) received various anonymous reports that traffic police officers along Muthurwa Market and Jogoo Road solicited and received bribes. Rodger Akaki, PW1, the Assistant Director of Operations at the EACC analysed the reports and planned for surveillance to be carried out by one of the EACC officers namely, Ditim Musi, PW2. The officer prepared a Sony Digital Video Camera Serial No 1365928 and, together with his team, proceeded to Muthurwa Market on 27th September 2017. They found the appellant, unusually, working alone in uniform, and they took video clips of him as he performed his traffic duties. PW2 observed the appellant stop vehicles and enter on the co-driver's side. After a short distance, he would alight. PW2 stated that he received intelligence reports that during the time when the officer was on board the vehicles, he would receive a benefit or a bribe from the driver.

5. PW2 and his team went back to the scene on 28th September 2017, 10th October 2017 and 11th October 2017. On those days, he observed the appellant doing the same things: working alone and, entering vehicles and disembarking without inspecting or detaining the said vehicles. PW2 reported his findings to PW1. They viewed the video clips and decided to undertake a 'sting' operation on 9thNovember 2017. Armed with the same Sony Digital Camera, PW2 arrived at the scene at 6.45 am, led by one Alex Nyakundi, PW5. Also present were Erick Mabeta Machogu, PW4, and Amos Yankaso, PW6, both investigators with the EACC. PW2 filmed the appellant repeatedly entering public transport vehicles, popularly known as 'matatus' and routinely disembarking shortly thereafter up to 10.00 am. On returning to the office, he transferred the video clips to his official laptop and prepared a report on the operation. He also made a certificate under section 106(B) of the *Evidence Act*.

6. The video clips were played in court during the trial. The court observed the appellant in police uniform would raise his hand to stop a 'matatu'. He would then enter the 'matatu' through the co driver's door and the driver would move forward with him inside. It would then stop and he would alight. The court noted that the appellant did the same thing to several 'matatus'. In one instance, he was seen receiving something from a person in a 'matatu' uniform after communicating with him. He then transferred what he had been given from one hand to the other. In some cases, the appellant was seen hanging on the door of a moving 'matatu'. PW2 produced in court as exhibits, the surveillance report, the video clips and the certificate made under section 106(B) of the *Evidence Act*.

7. Mary Kathure, PW3, the Deputy Divisional Traffic Officer (DTO) at Makongeni Police Station at the time, testified that on 13th December 2017, she received a phone call from one Amos of EACC asking her to go to the EACC offices for purposes of viewing some video clips and advising whether she recognised the subject in the videos. PW3 went to the EACC offices and, upon watching the video clips, identified the appellant in them. She was then asked to sign a certificate of image or voice recognition, which she did, having known the appellant for one year and three months. PW3 testified that on 9th November 2017, the appellant was assigned to the City Stadium as the Non-Commissioned Officer in charge of his colleagues. She recalled that one Chief Inspector Mwangi from EACC visited her at the Police Station and inquired about Motor Vehicle Registration No KBC 661G which the appellant had detained and preferred charges. Chief Inspector Mwangi wanted the vehicle released but PW3 declined informing him that the Divisional Traffic Officer was not around. PW3 stated that Chief Inspector Mwangi requested to see the vehicle in the yard and she did take him to see it. Upon viewing the vehicle, he acknowledged that indeed it was unroadworthy.

8. PW4 corroborated PW2's evidence and explained how the appellant was arrested on 9th November 2017 when the 'sting' operation was conducted. He indicated that while at Muthurwa, PW5 was

informed that the appellant had left with a vehicle branded 'Forward' and that he would return. The appellant returned in another vehicle also labelled 'Forward' and boarded yet another vehicle. PW4 and his colleagues rushed to the said vehicle and as it stopped, they approached it from both sides of the front cabin. They arrested the appellant and took him to the EACC offices. While at the offices, PW4 searched him and recovered a traffic police cap, a certificate of appointment, a traffic police yellow reflector jacket, a cane stick and a Samsung phone. PW4 also retrieved from the appellant cash totalling Kshs 5,250 in small denominations. He photocopied the money and prepared an inventory which he signed. The appellant also signed the inventory.

9. PW5 equally supported the evidence of PW2 and PW4. He recalled that when they approached the 'matatu' in which the appellant was, they first introduced themselves before arresting him. PW5 explained that due to the congestion at the bus terminus, they could not search the officer then and so they took him to their offices where the search was conducted. He testified that the money that was recovered from the appellant was in denominations of Kshs 50, 100, and 200 notes. PW6, the investigating officer also corroborated the account of PW2, PW4 and PW5.

10. At the close of the prosecution's case, the learned Magistrate (D. N. Ogoti, CM) found that the prosecution had established a *prima facie* case against the appellant and placed him on his defence. The appellant gave sworn testimony and denied committing the offences. He also called 3 witnesses in support of his case. The appellant, DW1, testified that he rears chicken and on the material day, he left home in Kiserian at around 4.25 am and drove to Jogoo Road to deliver chicken to one seller known as Peter Jeremiah alias Canaan, DW2. He delivered 16 chicken at the cost of Kshs 450 per piece of chicken. However, the appellant claimed, he was not paid the money immediately. He narrated that he proceeded to the City Stadium roundabout where he was assigned to work. At around 9.40 am, he bypassed DW2 on his way to the police station and he paid him Kshs 7,200 in loose denomination of Kshs 200, 100 and 50. In his wallet, he had Kshs 800. Hence combined, he had Kshs 8,000. He fuelled his car with Kshs 2500 and then proceeded to the police station.

11. The appellant recounted that he decided to go for a tea break and proceeded to Muthurwa by public means of transport. He boarded a 14-seater 'matatu' but on the way he found a traffic jam and he decided to disembark from the vehicle. He controlled the traffic jam and then boarded another vehicle to a hotel inside Muthurwa terminus. He took breakfast for Kshs 250 and embarked on another vehicle to go to City Stadium. On the way to the Stadium, the vehicle was blocked by EACC Officers who took him to their office. They interrogated him and took the money he had.

12. The appellant testified that prior to his arrest, he had prosecuted a traffic case involving vehicle registration number KBC 661G. He had booked the vehicle for various offences including lack of seat belts, worn-out tyres, and being unroadworthy. The appellant alleged that after a few days of booking the vehicle, the owner of the vehicle and Chief Inspector Mwangi from EACC visited PW3 requesting for the release of the vehicle. They also wanted to see the person who had detained the vehicle but PW3 refused to assist them. The appellant stated that thereafter he went underground until the day when he testified in the traffic case. He explained that between 25th September 2017 and 9th November 2017, the period when he was under surveillance, he was commander overseeing the City Stadium roundabout within Jogoo Road. The position he held allowed him to move around using public vehicles to check seat belts, excess passengers, among other offences.

13. Peter Jeremiah Okalo, DW2, gave evidence that he sells chicken at Burma Market along Jogoo Road and the appellant was one of his suppliers. He testified that on 9th November 2017, the appellant went to his premises between 5.00 am to 5.30 am to deliver to him chicken. He sold him 16 pieces of chicken at Kshs 450 each. DW2 stated that he did not have money at the time so he requested the appellant to

return for the money later. The appellant went back for his money between 9.00 am to 9.30 am, and he gave him Kshs 7200, in small denominations.

14. No 231955 CIP Patrick Mwinchi, DW3, testified that between September to November 2017, he was the DTO at Makongeni Police Station and the appellant was one of his officers. He clarified that officers are not normally deployed alone. Further the appellant's role was to supervise officers to ensure that they report on time and to secure the free flow of traffic. DW3 indicated that he knew about traffic case No 4628 of 2017 where the appellant charged someone for operating an unroadworthy vehicle. He revealed that one Mwangi of EACC had called him requesting that the vehicle be released but he declined to release it. David Cornelius Nyang'au, DW4, an Executive Assistant in charge of the Traffic Registry at Makadara Law Courts, intimated knowledge of traffic case No 4628 of 2017.

15. After evaluating the evidence tendered before the court, the learned Chief Magistrate found the appellant guilty as charged. He sentenced him to a fine of Kshs 500,000 on each count and in default to serve a sentence of 1 year on each count. He also ordered that the sentences run concurrently.

16. Aggrieved by the trial court's conviction and sentence, the appellant petitioned the High Court at Nairobi. On 22nd January 2019, the learned Judge (Ong'udi, J.) delivered a judgment dismissing the appeal against conviction but allowing the appeal against sentence to the extent that the fine of Kshs 500,000 for the value of the bribe of Kshs 5,250 was too harsh and out of proportion. The learned Judge substituted the sentences with the following;

    i. The appellant is sentenced to a fine of Kshs 200,000 in default six (6) months imprisonment on each count from the date of conviction.

    ii. Sentences to run consecutively.

    iii. Any excess fine paid to be refunded to the appellant.

17. Still aggrieved, the appellant preferred the instant appeal, based on 11 grounds, which his counsel condensed in written submissions to 4 issues for determination as follows;

    a. Whether the Judge erred in law in finding that the appellant dealt with suspect property.

    b. Whether the Judge erred in law in finding that the appellant demanded or received a bribe.

    c. Whether the Judge erred in law in finding that the appellant abused office.

    d. Whether the prosecution proved the charges against the appellant beyond reasonable doubt.

18. During the hearing of the appeal, learned counsel Ms. Muenga and Mr. Kimani held brief for Mr. Mwongeri and Mr. Wandugi respectively, who are on record for the appellant while the respondent was represented by Mr. Okachi, the learned Prosecution Counsel. Both parties had filed written submissions, which they orally highlighted.

19. Ms. Muenga submitted that the allegations made against the appellant were not proved beyond reasonable doubt. She contended that the circumstantial evidence that was relied on by the prosecution was weak. Further, the appellant's defence was never considered by both courts below. Counsel took issue with the fact that the complainants were never called as witnesses. She argued that none of the prosecution witnesses testified to having seen the appellant take a bribe hence, the allegation that the appellant collected money from drivers of public service vehicles was never established. Ms. Muenga contended that the appellant in his defence accounted for all the monies that were found in his pocket.

20. Citing section 47 of the *Anti-Corruption and Economic Crimes Act* (ACECA), and the High Court decision in *Republic v Alfred Mureithi & another* [2018] eKLR, as cited in *Shadrack Ngatia v Republic*

[2018] eKLR, counsel asserted that it was paramount for the prosecution to establish that the money recovered from the appellant was acquired from corrupt conduct. She urged that the prosecution had failed to discharge that duty. Counsel submitted that the money that was retrieved from the appellant was never treated with any chemical and therefore, there was no way of establishing whether the money was a result of corrupt dealing or not. Ms. Muenga argued that the prosecution ought to have established the elements of corruptly receiving a bribe and/or soliciting for a bribe for the charge of dealing with suspect property to stand. For this contention, counsel relied on this Court's decision in *Peninah Kimiyu v Republic* [2014] eKLR. Counsel asserted that the 'sting' operation was illegal because there was evidence to the effect that the appellant had charged an officer from the EACC with a traffic offence and the matter was on-going. In the counsel's view, that evidence showed that the arrest of the appellant was instigated by that case. It was further submitted that the second count that the appellant was charged with was dependent on the first count and since no evidence was led to prove that the appellant demanded and/or received a bribe, he could not be said to have engaged in conduct that amounted to abuse of office.

21. We referred counsel to the record which indicates that many video clips were produced by the prosecution showing the appellant stopping 'matatus', entering, the 'matatu' moving on with him inside and in the end, he gets arrested in a 'matatu'. We inquired from counsel whether that is how traffic police officers are supposed to operate. Mr. Kimani answered that a traffic police officer needs to check whether motor vehicles are road-worthy and whether they have seat belts hence the need for the appellant to enter and move from vehicle to vehicle. We indicated to counsel that there are motor vehicle inspectors who are supposed to do that kind of work and in any event, seatbelts of a motor vehicle are not only found at the front where the appellant was fond of entering but also at the back where he never boarded.

22. We further sought to know the counsel's view on the fact that the money that was retrieved from the appellant was in small denominations of Kshs 50, 100, and 200. Mr. Kimani replied that the appellant had given a plausible explanation on the same in the sense he was a chicken seller and on the material day in the morning he had sold chicken to DW2. We probed counsel why it is that according to the video clips, the appellant seemed to be operating as a lone ranger yet according to his boss, PW3, he had been deployed with other colleagues. In response, counsel submitted that the appellant used to work around the City Stadium roundabout, along Jogoo Road, and his colleague was stationed on the other side of the roundabout.

23. In opposing the appeal, Mr. Okachi insisted that the prosecution proved its case beyond reasonable doubt. He urged that the trial court carefully observed the appellant's movement as captured in the video clips and the photographs, in addition to the money that was retrieved from him, and concluded that he was guilty of the offence that he was charged with. That decision was upheld by the learned Judge, save for the sentence which was commuted. Mr. Okachi urged us to uphold the decision of the High Court and dismiss the appeal.

24. We have considered the record of appeal and the submissions made by the parties and have distilled the single issue for determination to be whether the prosecution proved its case against the appellant beyond reasonable doubt. In determining that issue, we are aware of our role as a second appellate court, to restrict ourselves to consideration of questions of law only by dint of Section 361(1)(a) of the *Criminal Procedure Code*. This was affirmed by the holding of this Court in *David Njoroge Macharia v Republic*[2011] eKLR;

> "That being so only matters of law fall for consideration–see section 361 of the *Criminal Procedure Code*. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based

on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings - see *Chemagong v R* [1984] KLR 611."

25. The appellant contends that the prosecution did not prove its case beyond reasonable doubt. He asserts that none of the prosecution witnesses testified to seeing him take a bribe and thus the prosecution failed to establish corrupt conduct on his part. The appellant faults the two courts below for failing to consider his defence, in particular, the explanation of how he obtained the money that was found in his possession and, his contention that he was arrested because he had instituted a traffic case that involved one of the EACC officers. On the contrary, the prosecution maintains that it proved its case against the appellant beyond reasonable doubt.

26. It was the evidence of PW1 that in 2017 the EACC received various anonymous reports that traffic police officers along Muthurwa market and Jogoo Road were soliciting and receiving bribes. Upon analyzing the reports, he planned a surveillance to be carried out by one of his officers, PW2. PW2 testified that they undertook surveillance on 27th September 2017, 28th September 2017, 10th October 2017, 11th October 2017, and on 9th November 2017, when the appellant was arrested. The video clips that were taken on those occasions and which were played in court captured the appellant boarding public service vehicles on the co-driver's side, the vehicle moving forward with him inside, and him disembarking after a short distance. The same scenario was replayed in many of the video clips and in one instance upon entering a 'matatu' he was seen being given something in his hand by a person wearing a 'matatu' uniform. While we note the appellant's claim that none of the prosecution witnesses gave evidence that they saw him take a bribe, it is apparent that the prosecution case, believed by both courts below, was solely based on circumstantial evidence.

27. It is trite that a court can draw an inference of guilt of an accused person from circumstantial evidence so long as the inculpatory facts lead irresistibly to that conclusion, are incompatible with the innocence of the accused and there are no co-existing factors that can weaken the inference of guilt. See *Joan Chebichii Sawe v Republic*[2003] eKLR.

28. The Supreme Court had occasion to pronounce itself on the efficacy of circumstantial evidence in *Republic v Ahmad Abolfathi Mohammed & another* [2019] eKLR;

> "(56) On its application, circumstantial evidence is like any other evidence. Though it finds its probative value in reasonable, and not speculative, inferences to be drawn from the facts of a case, [Marie-Pier Couturier, "Circumstantial evidence should not be overlooked by Claims Adjusters".....available at; (mccagueborlack.com/emoils/articles/possessive.htm) and, in contrast to direct testimonial evidence, it is conceptualized in circumstances surrounding disputed questions of fact [*Jowitt's Dictionary of English Law*, 4th Edition, Vol. 1, p. 418], circumstantial evidence should never be given a derogatory tag. Jowitt's Dictionary of English Law, 4th Edition, states thus of circumstantial evidence:
>
> > "... with circumstantial evidence, everything depends on the context: circumstantial evidence can sometimes amount to overwhelming proof of guilt, as where the accused had the opportunity to commit a burglary, and items taken from the burgled house are found in his lock-up garage, ... a fingerprint recovered from the window forced open by the burglar matches

> the accused’s fingerprints, ... [or where there is] a ... DNA match between the accused’s control sample and genetic material recovered from the scene of the crime
>
> ....”
>
> (57) This is why, way back in 1928, the English Court of Appeal asserted that circumstantial evidence “is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics.” [See *R v Taylor Weaver and Donovan* [1928] 21 Cr. App. R 20.]”

29. It is not in dispute that the appellant was the person who was filmed and photographed entering the front cabin of public service vehicles and exiting upon the vehicle moving some short distance. In his defence, he argued that he was inspecting the vehicles as part of his job. However, no explanation was given as to why the video clips captured him entering the driver’s side of the vehicle only and not the rear side where passengers seat. Moreover, the appellant was not seen inspecting any of the vehicles as he alleges. In one of the video clips, the appellant was seen receiving something that the prosecution believed, not unreasonably, was a bribe. We find that his conduct as recorded in the videos was sufficiently corroborated by the evidence of PW2, PW4, PW5, and PW6.

30. The appellant faults the two courts below for failing to consider his defence. To the contrary, both the trial court and the High Court evaluated his evidence and found it not credible. On the claim that he had received threats from one Mr. Mwangi of EACC for the reason that he had detained motor vehicle KBC 661G and lodged a traffic case against its owner, both courts were of the view that if that was the case then PW3 would have testified about the said threats since she is the one who was approached by the said Mr. Mwangi. Further, the learned judge considered that in his evidence the appellant had testified that he had no differences with the said Mr. Mwangi who he had previously worked with. We also note that the appellant’s ingenious explanation of how he obtained the money that was recovered from him was appraised by both courts below. The courts observed that in view of the evidence that was adduced showing that he was at the scene of the incident up to 10.00 am, his explanation that he went to collect his money from DW2 at around 9.30 am, took tea and fuel his car was not believable. It was the learned judge’s finding, as we do also find, that the appellant did not leave the scene from the time PW2 started filming him at around 6.45 am, up to 10.00 am when he stopped. Indeed, the appellant and PW2 versions of when and where they met and exchanged the ‘chicken money’ do not tally. We are persuaded from the circumstances of this case, that the only inference that can be made is that the appellant received bribes from public service vehicles during the period in question and was thus guilty as charged. Consequently, it is our finding that the prosecution proved its case beyond reasonable doubt. We have no reason or basis for interfering with the concurrent findings of fact on which the conviction was based.

31. In the upshot, we find the appeal to be devoid of merit and we dismiss it in entirety.

    Order accordingly.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MAY, 2024.

P. O. KIAGE

..

JUDGE OF APPEAL

ALI-ARONI

…………………………………………

JUDGE OF APPEAL

L. ACHODE

…………………………………………

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR