Omare v Republic (Criminal Appeal 107 of 2022)
[2023] KECA 708 (KLR) (9 June 2023) (Judgment)

Neutral citation: [2023] KECA 708 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 107 OF 2022

SG KAIRU, JW LESSIT & GV ODUNGA, JJA

JUNE 9, 2023

BETWEEN

TOM MAGUTU OMARE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Mombasa (Chepkwony, J.) delivered on 17th May 2018 in High Court Criminal Appeal No. 89 of 2017)

JUDGMENT

1. The appellant, Tom Magutu Omare, was on April 20, 2017 convicted by the Magistrate's Court at Kwale for 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 (ACECA). He was sentenced to a fine of Kshs 600,000.00 and in default to serve three years in jail, and an additional fine of Kshs 40,000 being twice the benefit.

2. On his first appeal, the High Court at Mombasa (D. Chepkwony, J), in its judgment delivered on May 17, 2018, upheld the conviction but varied the sentence by setting aside the additional fine of Kshs 40,000.00 on the basis that the appellant did not receive a benefit and nor was there proof that any person suffered loss because of his conduct.

3. Still dissatisfied, the appellant lodged the present second appeal urging the court to set aside the conviction and sentence. in his memorandum of appeal filed by counsel on the eve of the hearing of the appeal and dated November 14, 2022, the conviction is challenged on grounds that consent to charge the appellant as required under section 35 of ACECA was not obtained; that he was convicted on a defective charge sheet; and that conviction should not stand in the absence of a voice recognition certificate.

4. The facts are that the appellant was employed by the Judiciary of Kenya as an archivist. He was at the material time based at Mombasa Law Courts. On February 4, 2015 at about 8.30 a.m, the complainant, Albarn Wambua Kituku (PW1), was at home when the appellant, to whom he was known having previously dealt with him in 2012, called him. The appellant informed him that there was a warrant of arrest issued against him in a suit that had been instituted against him by one Daniel Kavoi, and that "the file was on his desk". The complainant, PW1, then called his lawyer who informed him that she had been trying to locate the court file but it could not be traced.

5. According to PW1, the appellant called him yet again and asked him for Kshs 50,000.00 to assist him. On advice of a colleague, PW1 reported the matter to the Anti-Corruption Office, Mombasa where he explained what was happening. Whilst at that office, the appellant called him, and on advice from Anti-Corruption Officers, he (PW1) informed the appellant that he had Kshs 20,000.00 whereupon a meeting at Treasury Square Garden, Mombasa was arranged. The complainant met the appellant at Treasury Square. The appellant was accompanied by another man, Ibrahim Mokaya Omariba, (the appellant's co-accused) who he introduced to the complainant as his cousin.

6. Police Constable Stephen Mbugua (PW6), Police Constable Rachel Rehema Nzalu (PW3) and Chief Inspector John Nyiro (PW4), are the officers at the Anti-Corruption Office who met with and interrogated the complainant, PW1, when he reported the matter at that office. PW1 having arranged to meet with the appellant at Treasury Square Garden, the officers arranged to execute a "sting" operation. PW3 prepared track money. She photocopied twenty currency notes of Kshs 1,000.00 each, made an inventory with serial numbers capture; treated the money with what was referred to as 'APQ chemical' and inserted the money in an envelope which was then handed over to the complainant.

7. PW4, Chief Inspector John Nyiro, having tested and confirmed that the same was in good working condition, issued the complainant with a tape recorder and a micro cassette to capture the conversation between the complainant and the appellant.

8. PW6, amongst other officers, accompanied the complainant to Treasury Square, monitoring on foot and later proceeded to the court building, registry archives, where they searched the appellant and his co-accused and recovered the treated money from the appellant's co-accused.

9. During PW1's meeting with the appellant, the recorder, which was inside his pocket, was on. The conversation between the appellant and the complainant at Treasury Square was duly captured in the recording and transcribed by PW3. The transcription was tendered into evidence based on which the appellant engaged the complainant in conversation about a warrant of arrest and asked the complainant to give the money to his cousin, the co-accused Ibrahim Mokaya.

10. The transcript of the recording accords with the complainant's testimony that upon meeting the appellant, he (the appellant) requested the complainant to switch off his phone before enquiring from him whether he had brought the money. The appellant then asked PW1 to give the money to his cousin. "He told me he was in-charge of the file and it was in his desk. He said that he would sort out the issue." After that, the appellant and his cousin walked to the law courts where they were followed by the Anti-Corruption Officers and arrested. The currency notes treated with APQ chemical were recovered from the appellant's co-accused and were analyzed by John Njenga (PW5) an analyst from the Government Chemist Department Mombasa.

11. In his defence, the appellant stated that he had worked for the judiciary for 17 years: that he had known the complainant for about nine years; that on April 2, 2014, the complainant called him and requested him to meet at the Municipal Council Grounds in Mombasa, where he found him seated; that a boy who had been discharged from Shimo La Tewa Prison passed by and complained to him

(the appellant) that he had given money to somebody (who the appellant knew to be the complainant) to stand surety for him, but the complainant did not do so; that he asked the complainant to give the money to the boy, which he did; that thereafter, he went with the boy to the office and two hours later the Anti- Corruption officers arrived, searched his office, recovered Kshs 42,000.00 from him and Kshs 20,000.00 from his cousin, the co-accused. He was thereafter arrested alongside the co-accused and charged with the offence. He denied promising the complainant that he would destroy a court file or a warrant of arrest. He asserted that he had done many businesses with the complainant and that there was a time he had differences with him.

12. The trial court found that, "it is very clear from the evidence of the complainant and the recorded conversation that the accused person demanded money from the complainant" and concluded that the prosecution had discharged its burden of proof and convicted of the appellant.

13. Before the High Court, the appellant complained that the charge sheet was defective for separating the charge of soliciting from that of receiving; that the prosecution evidence was inconsistent and uncorroborated; that the conviction was based on a defective charge sheet which should have been amended when the co-accused absconded; and that the sentence was exceedingly harsh. Save for the finding that the trial magistrate ought not to have sentenced the appellant to an additional fine, the first appeal was not successful. The matter of consent to charge under section 35 of ACECA which has taken the central plank in this appeal, was not raised in the courts below. More on that later.

14. During the hearing of the appeal, learned counsel for the appellant Mr Amadi held brief for Mr Kadima, learned counsel and relied entirely on the appellant's written submissions. It was urged for the appellant that section 35 of ACECA requires the Commission to report results of its investigations to DPP with recommendations on whether prosecution for corruption or economic crimes should be undertaken or not; that prosecution under ACECA must be preceded by a written consent of the DPP; and that the failure to do so is fatal. Cited in support are decisions of this court in *Nicholas M. Kangangi v Attorney General* [2011] eKLR and *Esther T. Waruiru & another v Republic* [2011] eKLR.

15. Regarding the complaint that the appellant was convicted on a defective charge sheet, although counsel did not identify the defect complained, we presume the grievance to be the one taken before the High Court, namely that the charge was defective for separating the charge of soliciting and that of receiving. Cited was the case of *Isaac Nyoro Kimita & another v Republic* [2014] eKLR.

16. As regard the complaint regarding absence of voice recognition certificate, it was submitted that it was necessary to ensure that it was the appellant's voice that was captured in the recording and that great care must be taken in admitting such evidence. Counsel referred to the High Court case of *Patrick Munguti Nunga v Republic* [2013] eKLR where the judge stated:

> " It is not just getting a tape recording and calling the complainant (an interested party) to identify the voices. In the case of *Libambula v Republic* [2003] KLR 683 at page 686 the Court of Appeal held that;
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> "Normally, evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, the witness was familiar with it and recognized it and the conditions obtaining at the time it was made were such that there was no mistake in testifying to it that which was said and who said it".

17. According to counsel, in the present case, it is not clear whose voice was captured in the audio recording and considering the appellant did not actually receive the bribe, the audio recording was not helpful in ascertaining the real culprit.

18. Opposing the appeal, learned Principal Prosecution counsel Ms V. Ongeti in highlighting her written submissions dated November 10, 2022 submitted that the complaint that the charge sheet was defective because it separated the charge of soliciting from that of receiving has no merit. It was submitted that to sustain the charge of soliciting, it is not necessary that the act be actually consummated or that the accused benefits from it and that it is sufficient if a bribe was actually solicited for. The case of *Paul Nduve v Republic* [2019] eKLR was cited.

19. Regarding the complaint that the charge sheet was not amended after the charges against the co-accused were withdrawn under section 87(a) of the *Criminal Procedure Code*, counsel submitted that that was not a bar to further prosecution and that any discrepancy, if any, was curable under section 382 of the *Criminal Procedure Code*.

20. As for the alleged inconsistencies, counsel submitted that the testimony of PW1 and that of PW3, 4 and 6 was consistent and was corroborated by that of PW5 who analyzed the samples.

21. Regarding the sentence, counsel referred to section 48 of ACECA and urged that there was no error on application of sentencing principles to warrant interference with the sentence.

22. On the issue of consent of the DPP to prosecute, counsel urged that whilst consent to charge is not compulsory, the prosecution in this case was by DPP and the charge sheet was indeed signed by the ODPP.

23. We have considered the appeal, which under section 361 of the *Criminal Procedure Code*, should be limited to matters of law. In *Karingo v Republic* [1982] KLR 213, the court stated that:

> " A second appeal must be confined to a points of law and this court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the track coach could find as it did."

24. With that in mind, the critical issue is whether the trial court and the High Court, respectively, erred in convicting, and in upholding the conviction in the absence of consent to charge under section 35 of the ACECA. As already indicated, the record does not show that this complaint was taken by the appellant either before the trial court or in his grounds of appeal before the High Court. The matter was picked up by the High Court in its judgment. The Judge went on to endorse the decision of the High Court (Ngaah, J.) in the case *Michael Waweru Ndegwa v Republic* [2016] eKLR to the effect that the Director and investigators of the Anti-Corruption Commission are clothed with powers to charge under section 32 of ACECA and consent of the DPP is therefore not required.

25. We have already set out above the arguments by counsel for the appellant on this issue. Counsel for the respondent on the other hand has urged that this is a non-issue as the charge was in any case instituted by the ODPP. The issue of consent under section 35 of ACECA has been the subject of pronouncements by this Court in numerous decisions. In *Nicholas M. Kangangi v Attorney General* (above) for instance, this court in its judgment delivered on July 29, 2011 considered the import of sections 35, 36 and 37 of the ACECA before pronouncing:

> " The Act sets out the procedure to be followed. That procedure cannot be circumvented by KACC asking the Kenya Police to prosecute on its behalf. There is no such provision in the

Act. In the case before us there is no evidence that this procedure was followed. Mr Obiri, the State Counsel who represented the Republic before us submitted that whether a report was made or not made to the Attorney-General was as it were, a matter between the Attorney-General and KACC. That cannot be right. The procedure is set down in the statute which creates KACC; KACC cannot ignore that procedure and say it is a matter between it and the Attorney-General. As a creature of statute, it must comply with the provisions of its creator. If it fails to do so, it is acting ultra vires and any such action is null and void. That is what the appellant contended before us. We accept that contention by the appellant."

26. In the case of *Esther T. Waruiru & another v Republic* (above) the court in its judgment delivered on December 9, 2011 pronounced that compliance with section 35 of ACECA

> " is not optional" but "obligatory." subsequently, and more recently, this court in its judgment delivered on December 20, 2018, in the case of *Susan Mbogo Nganga v Attorney General* [2018] eKLR, expressed that:
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> "There is therefore ample authority for the proposition advanced by the appellant that the power to prosecute under the ACECA resided with the Attorney General (and now with the Director of Public Prosecutions)."

27. As we understand it, the position as pronounced in decisions of this court is that under section 35 of the ACECA, the Commission requires the consent of the DPP to prosecute under ACECA. That said, in the present case it is apparent as submitted by counsel for the respondent that the prosecution was by DPP. On the face of it, the charge sheet issued by the Officer in Charge, Kwale Police Station, Kwale bears a stamp of the ODPP giving credence to the submission by counsel for the respondent that the prosecution was indeed by ODPP. We speculate that that perhaps is the reason counsel for the appellant in the lower court did not pursue the matter further. As the learned judge of the High Court noted, despite a letter having been written to the ODPP at the onset enquiring about the consent, the matter was not pursued beyond that and no issue was raised before the trial court and the High Court in that regard.

28. Lastly, there is the argument that the conviction is unsafe because of alleged inconsistencies in the prosecution evidence and because of absence of voice recognition certificate. There is no contest, as the courts below found, that the complainant and the appellant met on the material day at Treasury Square where they had a discussion and the amount of Kshs 20,000.00 of the treated money handed over by the complainant to the appellant's co-accused. The appellant readily agreed that the complainant was well known to him and he met up with him there. The point of departure in their versions of facts being the claim by the appellant, which the High Court found to be incredible, that the money handed over by the complainant to the appellant's co-accused was a reimbursement of surety money. The arresting officer then followed the appellant and his co-accused to the appellant's office where the treated money was recovered from the appellant's co-accused. In effect, even without the recording, there was overwhelming evidence in the form of the testimonies of PW1, PW3, PW4 and PW6 forming the basis of the concurrent findings by the trial court and the High Court. This was not a case where the conviction was based on or dependent on voice recognition. We have a duty, as held by this court in *Adan Muraguri Mungara v Republic* [2010] eKLR:

> " ... to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings."

29. As for the sentence, section 48 of the ACECA provides for the penalty of a fine not exceeding one million shillings or to imprisonment for a term not exceeding ten years or to both and an additional mandatory fine, if, as a result of the conduct that constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss. The additional mandatory fine, as already stated, was set aside by the High Court. The fine of Kshs 600,000.00 is legal and we have no basis to interfere with it.

30. All in all, the appeal fails and is dismissed in its entirety.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF JUNE 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR