REPUBLIC OF KENYA

OFFICE OF THE ATTORNEY GENERAL
AND DEPARTMENT OF JUSTICE

CASE DIGEST ON CORRUPTION AND ECONOMIC CRIMES

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Executive Summary

Over the years, Kenya has had to grapple with the threat of corruption that threatened to permeate every sphere of society. In response, Kenya put in place several interventions ranging from setting up dedicated anti-corruption courts to developing several legal and policy frameworks on corruption. In 2003, Kenya passed the Anti-Corruption and Economic Crimes Act which provided a comprehensive legal and institutional framework under which anti-corruption efforts were premised. This was followed by the promulgation of the Constitution in 2010 which marked the start of far-reaching changes in Kenya's governance structure. In the middle of this remarkable progress is the Judiciary which plays a significant role in safeguarding transparency and accountability as is evident from its progressive judgments and rulings on corruption cases.

Court decisions have helped shape and steer the anti-corruption crusade a notch higher. The decisions provide useful reference points for the review and enactment of anti-corruption legislation. Decisions barring state officers from accessing their offices during the pendency of their corruption cases is one of many instances where case law is shaping and evolving the jurisprudence on corruption. Overall, these decisions provide us with an opportunity to better understand how the judiciary has interpreted the anti-corruption laws as well as identify gaps and weaknesses in existing laws.

This Case Digest aims to provide stakeholders with reference materials to assist them in the course of their duties. The Digest draws from judgments and rulings from the specialized anti-corruption courts to decisions rendered by the superior courts exercising their original and appellate jurisdictions. The decisions reflect the courts' interpretation of the relevant and applicable provisions of anti-corruption laws as applied against the facts.

The cases in the Digest are put together in line with the various corruption offences created under various laws on corruption. The Digest prominently feature corruption offences committed and prosecuted under the Anti-Corruption and Economic Crimes Act of 2003. In line with the offences created under this Act and other anti-corruption laws, the cases are grouped into nine main thematic areas:-

i) Abuse of Office
ii) Bribery, Soliciting and Receiving a Benefit
iii) Fraudlent Acquisition of Public Property
iv) Conflict of Interest
v) Conspiracy to Commit an Offence of Corruption or Economic Crime
vi) Failure to Comply With Procurement Laws
vii) Forfeiture and Recovery of Proceeds of Crime and Unexplained Wealth
viii) Bail and Bond Terms

Each case is presented with a headnote that introduces the reader to the main legal principle underpinning the case. This is followed with brief facts of the case, issues, relevant provisions of the law, holding of court and relevant orders issued by the court.

Acknowledgement

This Case Digest was developed by the Office of the Attorney General in collaboration with various stakeholders and partners. We extend our sincere gratitude to the Department of Justice, under the exemplary leadership of Ms. Maryann Njau-Kimani, EBS, for initiating and efficiently coordinating this project.

We also wish to recognize the unwavering commitment and support of officers from the Ethics, Integrity, and Anti-Corruption section whose relentless efforts ensured the timely development and finalization of this digest.

Special thanks go to the stakeholders in the anti-corruption sector, including the Ethics and Anti-Corruption Commission, the National Anti-Corruption Campaign Steering Committee, the Asset Recovery Agency, the Judiciary, the Office of the Director of Public Prosecution and Transparency International-Kenya. Their invaluable data, information, and expertise were crucial in reviewing the draft case digest.

We express our appreciation to the National Council for Law Reporting for their technical expertise in the development of this digest. Their support was crucial in ensuring the accuracy and quality of the final product.

Lastly, we are grateful for the partnership and financial support from the International Development Law Organization (IDLO), which significantly contributed to the successful completion of this case digest.

Hon. Shadrack J. Mose
Solicitor General
Office of the Attorney General and Department of Justice

Foreword

Corruption is not a new phenomenon; it has been a persistent issue that continues to affect the social and economic aspects of our society. The national values and principles of governance enshrined in the Constitution are our nation's commitment to ourselves and future generations. In this regard, the government has employed various strategies to combat corruption through policy, legislation and administrative processes. In addition to public education and awareness creation, some of the strategies adopted to fight corruption include the development of elaborate public finance management rules to ensure the prudent use of public resources and the criminalization of corrupt behaviour.

The National Ethics and Anti-Corruption Policy, Sessional Paper No. 2 of 2018, calls for regular monitoring and evaluation of anti-corruption strategies to determine the efficacy of the measures in place. One of the ways to measure the efficacy of these strategies is to track and report on investigations, prosecutions and adjudication of corruption and economic crime cases.

This Case Digest was envisioned in line with the function of the Office of the Attorney General as the Government agency mandated to coordinate ethics, integrity and anti-corruption strategies pursuant to Executive Order No. 2 of 2023.

The Digest seeks to provide a summary of the growing jurisprudence on corruption and economic crime cases in Kenya. The Digest has cases encompassing various themes in corruption such as; Abuse of Office, Bribery, Fraudulent Acquisition of Public Property, Conflict of Interest, Conspiracy to Commit an Offence of Corruption, Failure to Comply with Procurement Laws, Forfeiture and Recovery of Proceeds of Crime and Bail and Bond Terms.

This Case Digest will serve as a 'one-stop-shop' for its users as it summarizes landmark anti-corruption cases. I believe that this Digest will assure Kenyan citizens and other stakeholders that anti-corruption agencies work diligently to ensure that suspected cases of corruption are investigated, prosecuted and adjudicated to their logical conclusion.

Hon. J. B. N. Muturi, EGH
Attorney General
Office of the Attorney General and Department of Justice

Editorial Note:

The **Bribery Act** was changed to **Anti-Bribery Act** by Statute Miscellaneous Law Amendment Act No. 19 of 2023.

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ABUSE OF OFFICE

Erick Otieno Oyare v Republic [2022] eKLR

ABUSE OF OFFICE

1. Fraudulently making payments or excessive payment of imprest by a public officer in order to confer a benefit to himself was an abuse of office

The court highlighted the *mens rea* (improper use of public office) and the *actus reus* (conferment of a benefit to self or another person) under section 3 of ACEC for the offence of abuse of office.

Erick Otieno Oyare v Republic [2022] eKLR

Criminal Appeal No. E033 of 2021

High Court at Embu — February 28, 2022

L Njuguna, J

Criminal law *– corruption and economic crimes - fraudulent acquisition of property – where the appellant claimed excessive payment from the budgeted imprest - whether the act of claiming more imprest than was budgeted for by a public officer in order to confer a benefit to himself was an abuse of office – Anti-corruption and Economic Crimes Act (ACECA), sections 3 and 46*

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Criminal Law *- corruption and economic crimes – abuse of office – ingredients of – mens rea and actus rea - what were the ingredients of abuse of office by a public officer – ACECA section 3*

Brief facts

The appellant was charged with five counts of Fraudulent Acquisition of Public Property contrary to section 45 (1) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003; five counts of Abuse of office contrary to section 46 as read with section 48(1) and equally, five counts of False Accounting by a Public Officer contrary to section 331(1) as read with section 331(2) of the Penal Code. He was found guilty and sentenced to pay a fine of Kes. 3,309,000.00 and in default, to serve a period of 14 years imprisonment.

The appellant, dissatisfied with the conviction and sentence filed the instant appeal arguing that: the trial court erred both in law and in fact by convicting the appellant on counts 1-15 when there was no sufficient evidence; there was no evidence to show that the appellant knowingly and fraudulently altered the reimbursement schedules and authored false documents and as such, that was fatal to the prosecution's case and that the sentence meted out on the appellant was severe despite the mitigation presented on behalf of the appellant in that, he was sickly, unemployed and further, a first offender.

The respondent on the other hand argued that the ingredients of the offences of which the appellant was charged with were proved beyond reasonable doubt.

Erick Otieno Oyare v Republic [2022] eKLR

Relevant provisions of the law

Anti-corruption and Economic Crimes Act (ACECA), No. 3 of 2003

Section 41 - Deceiving principal

1). An agent who, to the detriment of his principal, makes a statement to his principal that he knows is false or misleading in any material respect is guilty of an offence.

2). An agent who, to the detriment of his principal, uses or gives to the principal a document that he knows contains anything that is false or misleading in any material respect is guilty of an offence.

Section 45. Protection of public property and revenue, etc.

(1) A person is guilty of an offence if the person fraudulently or otherwise unlawfully—

(a) acquires public property or a public service or benefit;

(b) mortgages, charges or disposes of any public property;

(c) damages public property, including causing a computer or any other electronic machinery to perform any function that directly or indirectly results in a loss or adversely affects any public revenue or service; or

(d) fails to pay any taxes or any fees, levies or charges payable to any public body or effects or obtains any exemption, remission, reduction or abatement from payment of any such taxes, fees, levies or charges.

(2) An officer or person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person—

(a) fraudulently makes payment or excessive payment from public revenues for—

(i) sub-standard or defective goods;

(ii) goods not supplied or not supplied in full; or

(iii) services not rendered or not adequately rendered,

(b) wilfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures; or

(c) engages in a project without prior planning.

(3) In this section, "public property" means real or personal property, including money, of a public body or under the control of, or consigned or due to, a public body.

Section 46 - Abuse of office

A person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence.

Section 48 - Penalty for offence under this Part

(1) A person convicted of an offence under this Part shall be liable to—

a) a fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both; and

b) 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.

(2) The mandatory fine referred to in subsection (1) (b) shall be determined as follows—

a) the mandatory fine shall be equal to two times the amount of the benefit or loss described in subsection (1)(b);

b) if the conduct that constituted the offence resulted in both a benefit and loss described in subsection (1)(b), the mandatory fine shall be equal to two times the sum of the amount of the benefit and the amount of the loss.

Erick Otieno Oyare v Republic [2022] eKLR

Penal Code (Cap. 63)

Section 331 - False accounting by public officer

(1) Any person who being an officer charged with the receipt custody or management of any part of the public revenue or property, knowingly furnishes any false statement or return of any money or property received by him or entrusted to his care or of any balance of money or property in his possession or under his control is guilty of a felony."

(2) A person convicted of an offence under this section shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding ten years or to both".

Issues

i. Whether the act of claiming more imprest than is budgeted for by public officer in order to confer a benefit to himself was an abuse of office.
ii. Whether presenting false financial documents by public officer was an abuse of office by the public officer.
iii. What were the ingredients of abuse of office by a public officer?

Held

1. The instant case being a criminal case, the burden of proof was on the prosecution to establish every element in all the charges beyond any reasonable doubt. The appellant prior to his sacking, was a senior research and policy officer at the Youth Enterprise Development Fund which was a state corporation within the Ministry of Public Service, Gender and Youth Affairs.
2. The issue that gave rise to the various counts facing the appellant was an imprest the appellant received from his employer for purposes of conducting trainings within the various regions in the Upper Eastern region. As an imprest holder, the appellant was entrusted with money for the assignment to train the youth in the various constituencies within the said region. From the evidence on record, there was no dispute that the imprest was received by the appellant since the same was confirmed by the evidence of the witnesses and further by the appellant himself.
3. Indeed the trainings took place but not in the way that was expected in that, there were instances where the amounts paid were inflated and further that, names of persons who did not attend the workshop included and figures of paid up cash indicated against their names.
4. In regard to the offence of fraudulent acquisition by a public officer contrary to section 45(1) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act, the law provided that in protection of public property and revenue, etc. A person was guilty of an offence if the person fraudulently or otherwise unlawfully – (a) Acquired public property or a public service or benefit; while a public officer meant an officer, employee or member of a public body, including one that was unpaid, part time or temporary.
5. The evidence by the prosecution and defence had established that indeed there were trainings that were held by the Youth Enterprise Development under the patronage of the appellant. That the appellant was the supervisor in all the trainings in specific constituencies within Embu County between the December 5, 2011 and January 20, 2012 in the Upper Eastern region. It was also not disputed that the appellant received an amount Kes. 870,000.00 in form of an imprest for purposes of the trainings; further, it was not contested or controverted that the appellant after paying all the expenditure incurred during the trainings, surrendered documents reflecting an over expenditure of Kes. 256,922.
6. In the same breadth, it was of equal importance to note that there were participants in the trainings whose particulars appeared in the attendance register, payment schedule but denied either attending or being paid the amount of money indicated against their names. PW2, PW3, PW25, PW26 who

were some of the prosecution's witnesses testified that they were paid Kes.200.00 for lunch and another Kes. 200 for transport; that they were never paid an amount of Kes. 500.00 and Kes 1000.00 as was indicated in P.Exh 4. In summary, the documents submitted by the appellant had anomalies that included: inflated figures, inflated number of alleged participants and alleged signatures belonging to alleged participants.

7. Having tendered imprest surrender documents inter alia attendance register, containing forged signatures, false ID numbers; the prosecution was able to prove the case against the appellant. In his defence, the appellant attempted to shift the blame to his driver, PW1 whom he said he had given the responsibility of *inter alia* transferring the names from the registration forms to the payment schedules and conducting the actual payments. It was the duty and responsibility of the imprest holder (appellant) to take full charge in authenticating the people rightfully entitled to receive payment by taking their identification details or documents among them an ID card to verify the actual participants and the correct payments paid to each of them.
8. He was under obligation to pay participants of the workshop which he did not deny paying, but, there were other people who allegedly got paid using other participants' identities and details". Further, the amounts indicated against the names of some of the participants as having been received by them had been controverted and the appellant had failed to offer cogent reasons for the discrepancies. The appellant was accountable to the employer as the principal by supplying accurate and correct supporting documents while surrendering the imprest, as an agent.
9. The Act did not define the term "office" but it defined "public officer" in section 3 to mean an officer, employee or member of a public body, including one that was unpaid, part-time or temporary. The same section defined "public body" to mean:
    a) the Government, including Cabinet, or any department, service or undertaking of the Government;
    b) the National Assembly or the Parliamentary Service;
    c) a local authority;
    d) any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law; or
    e) a corporation, the whole or a controlling majority of the shares of which are owned by a person or entity that is a public body by virtue of any of the preceding paragraphs of this definition.
10. From the foregoing, it could be deduced that the "person" referred to in section 46 meant a public officer and "office" in the same section meant a "public office". On the other hand, the Act defined "benefit" to mean any gift, loan, fee, reward, appointment, service, favour, forbearance, promise or other consideration or advantage. The offence of abuse of office, which under section 3 of the Act constituted corruption, if therefore committed by a public officer who used a public office to improperly confer on himself or on another person a gift, loan, fee, favour, advantage etc which he or that other person was not otherwise entitled to.
11. Section 3 sufficiently covered the *mens rea* (improper use of public office) and the *actus reus* (conferment of a benefit to self or another person); improper use of public office would include conscious violation or non-adherence to prescribed procedures and regulations with the aim of conferring a benefit on the public officer himself or on another person. The appellant was a senior research and policy officer at the Youth Enterprise Development Fund and claimed more than the budgeted amount even though

he had not fully utilized the amount budgeted.

12. To prove that the approval of payment was improper, the prosecution adduced evidence to show that the appellant demanded an extra amount of (Kes. 256,922 as an over expenditure) to the already budgeted amount. In his own statement, he was the sole custodian of the imprest and that in case of any discrepancies in the payments; he was responsible since he was the custodian of the records of money. In his own words, he did apologize for the wrong he had done and further offered an apology reasoning that he was not given the extra amount as he had demanded.
13. The prosecution successfully proved that the appellant had deceived his principal by tendering false documents. The documents tendered were meant to account for the imprest obtained by the appellant to conduct the activities referred to. In an attempt to account for the money received, the appellant tendered false accounting documents demanding more money than what was initially budgeted for. Therefore, there was no basis to differ with the finding of the trial court.
14. The severity of sentence was a matter of fact. There was nothing which could prevent the trial court from imposing a sentence as long as the same was within the law and therefore, the sentence imposed despite being harsh according to the appellant, was within the law and within the discretionary powers of the court. The court could not interfere with the exercise of the said discretion as the appellant did not justify the interference. The appellant did not prove that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle.
15. On punishment, penalties for an offence were provided in section 48 of ACECA. Having considered the above section, the sentence was not only lawful but also appropriate.

Appeal dismissed, no order as to costs.

2. Factors to consider for the offence of abuse of office

The court in determining the charge of abuse of office relied on section 46 of the Anti-Corruption and Economic Crimes Act to the effect that a person who uses his office to improperly confer a benefit on himself or anyone else was guilty of an offence. For an offence under section 46 to be established, it had to be shown that the person accused was a state officer and the person accused must have used his/her office to confer a benefit and that the nature of the benefit must be disclosed.

Republic v Antony Juma Opondo & Paul Martin Sao[2019] eKLR

Anti-Corruption Case No.10 of 2019

Milimani Chief Magistrate's Court January 27, 2020

E. Juma, Chief Magistrate

Criminal Law *– corruption and economic crimes – bribery – offence of receiving a bribe - Bribery Act, section 6(1) as read with section 18(1) and (2).*

Criminal Law *– corruption and economic crimes – abuse of office – ingredients of the offence of abuse of office – Anti-Corruption and Economic Crimes Act, section 46 as read with section 4 (1).*

Brief facts

The accused persons were legal officers employed by the Ethics and Anti-Corruption Commission. On April 27, 2017 at Uganda House in Nairobi City, it was alleged that the accused requested for a financial advantage amounting to Kes 15 million from Dennis Mombo of Mwananchi Credit Limited with intent that they would reciprocate by compromising a purported tax evasion investigation involving Mwananchi Credit Limited.

The two accused persons were arraigned in court and charged with four counts. They were jointly charged in counts I and II and separately charged on counts III and IV.

In Count I, the accused persons were charged for receiving a bribe contrary to section 6(1) of the Bribery Act, as read with section 18(1) and (2). In Count II, the accused persons were charged with conspiracy to commit a corruption offence contrary to section 47(3) as read with section 48(1) of the ACECA. In Count III and IV, the accused persons were charged with abuse of office contrary to section 46 as read with section 48 (1) of ACECA.

Issues

i. What was needed to be proved by the prosecution in an offence of bribery?

ii. What ingredients did the prosecution need to prove in an offence of abuse of office

Relevant provisions of the law

Bribery Act

Section 6 – Receiving a bribe:

A person commits the offence of receiving a bribe if – the person requests, agrees to receive or receives a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly whether by that person receiving the bribe or by another person.

Anti-Corruption and Economic Crimes Act, No. 3 of 2003

Republic v Antony Juma Opondo & Paul Martin Sao[2019] eKLR

Section 46 - Abuse of office

A person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence.

Held

1. The evidence on record was not sufficient to support the charge of the offence of bribery. The evidence that the accused persons had demanded for a bribe of Kes 15 million was allegedly made to PW10 and as such, evidence by all other witnesses on the bribe demand was hearsay. The court evaluated the evidence of PW10 and found that he did not state that a bribe was demanded from him. Further, in the evidence given by PW5 and PW10, both who are key witnesses, there was no mention of a demand for a bribe or evidence of any money paid to either of the two accused.
2. Based on the evidence on record, the two accused persons were entitled to the benefit of doubt on the first count.
3. In respect of conspiracy to commit an offence, the evidence on record failed to support the particulars of the charge. There was no evidence that either of the accused requested for a bribe.
4. Section 46 of the Anti-Corruption and Economic Crimes Act was to the effect that a person who used his office to impurely confer a benefit on himself or against else was guilty of an offence. For an offence under section 46 to be established, it had to be shown that:
   a) The person accused was a state officer.
   b) The person must have used their office as set out in section 46.

Both accused not guilty of counts I and II and were acquitted under section 215 of the Criminal Procedure Code. The first accused guilty and convicted of count III. The second accused guilty and convicted under Count IV.

3. Failure to adhere to procurement procedures by a public officer so as to improperly confer on himself or another a benefit is an abuse of office

The decision of the court highlights what amounts to an abuse of office where a public officer fails to adhere to procurement procedures and confers on himself or another a benefit.

Ann Wangechi Mugo and 5 others v Republic [2022] eKLR

Criminal Appeal No. E007 of 2021

High Court at Embu — February 28, 2022

L Njuguna, J

Criminal Law *– corruption and economic crimes – conspiracy – ingredients needed to be proved - what were the ingredients the prosecution needed to prove against accused person in an offence of conspiracy- what were the ingredients the prosecution needed to prove against accused person in an offence of conspiracy – Penal Code, section 21*

Criminal Law *– corruption and economic crimes – abuse of office – where appellants did not adhere to procurement procedures – where appellants awarded tenders to unqualified tenderers - whether failing to adhere to procurement procedures by a public officer so as to improperly confer on himself or another a benefit was an abuse of office – ACECA sections 3, 46 & 48*

Constitutional Law *– Office of the Director of Public Prosecutions – independence of the DPP – where section 35 of ACECA provided that the commission's report shall include any recommendation the commission may have that a person be prosecuted for corruption or economic crime - whether section 35 of ACECA on the commission recommending the commission may have that a person be prosecuted for corruption or economic crime meant that the DPP requires consent to institute criminal proceedings – ACECA, section 35*

Evidence Law *– secondary evidence – admissibility - copies of public documents – whether certified copies of public documents could be used as proof of the contents of documents which they purported to be copies of – Evidence Act sections 64, 68, 76 and 80*

Brief facts

The appellants who were all charged with the offence of conspiracy to commit an offence of corruption while the 3rd , 4th and 5th appellants were charged with abuse of office filed the instant appeal arguing that the trial court erred in law and in fact in not finding and holding that: the charges against the appellants were not sustainable as there was no evidence of compliance with section 35 of the Anti-Corruption and Economic Crimes Act, 2003; the trial court erred in law and fact in relying on inadmissible evidence and documents under sections 33, 67, 68 and 106(B) (2) (4) of the Evidence Act; and failing to comply with section 169 of the Criminal Procedure Code.

On the other hand, the respondents argued that in regard to section 35 of the Anti-Corruption and Economic Crimes Act the issue was comprehensively dealt with by the trial court. Further, that under article 157 of the Constitution of Kenya 2010, the DPP did not require any consent from any entity to conduct prosecution of any person.

Ann Wangechi Mugo and 5 others v Republic [2022] eKLR

Issues

i. What were the ingredients the prosecution needed to prove against an accused person in an offence of conspiracy?

ii. Whether failing to adhere to procurement procedures by a public officer so as to improperly confer on himself or another a benefit was an abuse of office.

iii. Whether section 35 of ACECA that the commission's report shall recommend a person be prosecuted for corruption or economic crimes meant that the DPP required consent to institute criminal proceedings.

iv. Whether certified copies of public documents could be used as proof of the contents of documents which they purported to be copies of.

Relevant provisions of the law

Anti-Corruption and Economic Crimes Act, No. 3 of 2003

Section 35 - Investigation report

1) Following an investigation, the commission shall report to the Director of Public Prosecutions on the results of the investigation.

2) The commission's report shall include any recommendation the commission may have that a person be prosecuted for corruption or economic crime.

Section 46 - Abuse of office

A person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence.

Section 47A - Attempts, conspiracies, etc.

(3) Any person who conspires with another to commit an offence of corruption or economic crimes is guilty of an offence.

Section 48 - Penalty for offence under this Part

1) A person convicted of an offence under this part shall be liable to–

a) A fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both; and

b) An additional mandatory fine if as a result of conduct that constituted the offence the person received a quantifiable benefit or any other person suffered a quantifiable loss.

2) The mandatory fine referred to in subsection (1)(b) shall be determined as follows –

a) The mandatory fine shall be equal to two times the amount of the benefit or loss described in sub-section (1)(b).

b) If the conduct that constituted the offence resulted in both a benefit and loss described in subsection (1)(b), the mandatory fine shall be equal to two times the sum of the amount of the benefit and the amount of the loss.

Penal Code (Cap. 63)

Section 21 - Primary evidence.

When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

Ann Wangechi Mugo and 5 others v Republic [2022] eKLR

Evidence Act (cap 80)

Section 65

1) Primary evidence means the document itself produced for the inspection of the court on the other hand secondary evidence is defined under Section 66 of the Evidence Act to include;

a) Certified copies given under the provisions hereinafter contained;

b) Copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;

c) Copies made from or compared with the original;

Section 141 - Accomplices.

"An accomplice shall be a competent witness against an accused person; and a conviction shall not be illegal merely because it proceeds upon the uncorroborated evidence of an accomplice."

Held

1. The 3rd, 4th and 5th appellants were all employees of the defunct Municipal Council of Chuka who held various positions to wit; Council Engineer in charge of Technical aspects of the roads, Clerk of Works supervising the roads and the Treasurer respectively, while the rest of the appellants were said to have improperly benefited from irregularly awarded contracts for the routine maintenance and repair of roads within the said municipality. Those funds were disbursed for the financial year 2009/2010 to the Council by Kenya Roads Board.
2. The Penal Code and ACECA did not define the word "conspiracy". The Black's Law Dictionary 9th Edition defined conspiracy as; An agreement by two or more persons to commit an unlawful act coupled with intent to achieve the agreement's motive and (in most states) action or conduct that furthered the agreement; a combination for an unlawful purpose.
3. The offence of conspiracy could not exist without the agreement, consent or combination of two or more persons so long as a design rested in intention only, it was not indictable. There had to be an agreement; proof of the existence of a conspiracy was generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them. To prove a conspiracy, the prosecution had to establish that the respondents together with others, agreed by common mind to defraud the complainant. The inference had to be made both from the actions of the accused and the evidence tendered in court.
4. On the offence of abuse of office, the Act did not define the term "office" but it defined "public officer" in section 2 to mean an officer, employee or member of a public body, including one that was unpaid, part-time or temporary. The same section defined "public body". From the foregoing, it could be deduced that the "person" referred to in section 46 meant a public officer and office in the same section meant a public Office. On the other hand, the Act defined benefit to mean; any gift, loan, fee, reward, appointment, service, favour, forbearance, promise or other consideration or advantage. The offence of abuse of office, which under section 3 of the Act constituted corruption, if therefore committed by a public officer who used a public office to improperly confer on himself or on another person a gift, loan, fee, advantage etc which he or that other person was not otherwise entitled to.
5. The provision sufficiently covered improper use of public office which included violation or non-adherence to prescribed procedures and regulations with the aim of conferring a benefit to the public officer himself or to other people like where the 3rd ,4th and 5th appellants ignored the procurement

procedures and regulations in order to improperly confer a benefit on the 1st ,2nd ,6th and 7th appellants by irregularly awarding the respective tenders to entities associated with the said appellants when they had either not qualified or they had not met the minimum requirements. In view of the foregoing, and the evidence on record, the appellants formed a common intention to prosecute an unlawful purpose in conjunction with each other and in prosecution of such purpose an offence was committed of such a nature that its commission was a probable consequence of the prosecution of such purpose.

6. In regards to non-compliance with section 35 of ACECA, the Court of Appeal while dealing with a similar issue observed that while under section 12 of the repealed Prevention of Corruption Act, prosecution for an offence under that Act could not be instituted "except by or with the written consent of the Attorney - General" that Act also provided that where a person had been arrested without such consent no further or other proceedings was to be taken until that consent was obtained. No such or equivalent provision was made in the ACECA. Therefore, the court was in agreement with the trial court when it contrasted the provision of section 12 of the repealed Prevention of Corruption Act with the provisions of sections 35 of ACECA.
7. Under article 157(10) of the Constitution which established the office of the Director of Public Prosecutions. The DPP would not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the directions or control of any person or authority. Section 35 of ACECA could not override article 157(10) of the Constitution.
8. The judgment of the trial court set out in graphic details how each of the appellants was involved in the process that led to the commission of the offences they were charged with. Much of it was documentary evidence. Each of the appellants and especially 3rd, 4th and 5th had separate and distinct roles in that process. The evidence adduced before the trial court against each of them pointed to their guilt. Similarly, the documents that were produced and which connected the other appellants to the offence of conspiracy to commit the offence of corruption were self-explanatory. Payment vouchers were signed and payments made for services that were never rendered to the Municipal Council of Chuka as testified by PW6.
9. Section 141 of the Evidence Act was very clear that a conviction would not be illegal merely because it proceeded upon uncorroborated evidence of an accomplice, but which was not the case hereon. The documents that were produced corroborated the evidence of PW1, PW2, PW3 and PW4 and so the trial court was right in convicting the appellants. The evidence on record against the 7th appellant showed that he admitted to be the owner of Seven Eleven Construction Company though he denied having purchased the tender and he did not know who was paid the money. His PIN certificate was used by the 1st appellant in her bid document for Ann J Cleaning Supplies and by Chalk Dust Supplies which was solely owned by the 2nd appellant.
10. Further, the evidence showed that his company Seven Eleven was evaluated for tender 5 though it had not bid for that tender. How did that happen? It was also clear from the record of the proceedings that he tendered for tender number 4 and he was awarded the contract. The bid documents that were used for that particular tender that was; the PIN certificate and the certificate of registration were his own and not that of his company and his company Seven Eleven was eventually paid. From the foregoing, it was not therefore true that the court shifted the burden of proof to him as alleged. The prosecution adduced sufficient evidence against him.
11. Section 64 of the Evidence Act provided that the contents of documents could be proved either by primary or by secondary evidence. Section 76 provided that documents had to be proved by primary

evidence except in cases mentioned in section 68 of the Act. The copies of documents complained of were public documents. Under section 80 of the Evidence Act, certified copies of public documents could be produced as proof of the contents of the documents or parts of the documents of which they purported to be copies. The trial court in its ruling on the objection analyzed the law and justified its decision to overrule the objection. There was no reason to fault that decision.

12. The trial court rightfully considered all material facts before it and further appreciated the objectives of sentencing and so reached a determination that was well founded in the law. As such, in the circumstances of the case, the sentence could not be said to be excessive and/or harsh.

Appeals dismissed with no order as to costs.

4. Article 236 of the Constitution which provided for the protection of public officers in the discharge of their official duties did not immunize or indemnify public officers against investigation or prosecution

The decision of the court addresses the issue of public officers having criminal charges preferred against them thereby alleging violation of article 236 of the Constitution of Kenya, and when the High Court could stay criminal proceedings before magistrates' courts.

Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 3 others [2013] eKLR

Petition No. 153 of 2013 (consolidated with Petition No. 369 of 2013)

High Court at Nairobi — November 1, 2013

D S Majanja, J

Constitutional Law*-public service-public officers-protection of public officers-whether the preferment of criminal charges against a public officer amounted to an infringement of the protection that was accorded to public officers as stated in article 236 of the Constitution-whether suspension of a public officer upon being charged with a corruption or economic crime as required by section 62 of ACECA constituted a violation of their rights-Constitution of Kenya, 2010 article 236 - Anti-Corruption and Economic Crimes Act (ACECA), section 62*

Constitutional Law*-fundamental rights and freedoms-right to fair trial - whether the delay of 4 years from the date of the subject transaction to the date of charges being preferred constituted unreasonable delay and hence a violation of the right to fair trial under article 50 of the Constitution-whether the right to be informed of the charge as provided under article 50(2)(b) of the Constitution required that the accused be provided with all prosecution material including witness statements and evidentiary materials before plea taking*

Statutes*-Interpretation of Statutes- Anti-corruption and Economic Crimes Act (ACECA)- constitutionality of sections 48, 53, 58 and 59 of the Anti-corruption and Economic Crimes Act (ACECA)-whether section 58 of the ACECA was unconstitutional and violated the right to a fair trial by contravening the principle of presumption of innocence guaranteed by article 50(2)(a) of the Constitution- Constitution of Kenya, article 50(2)(a)- Anti-Corruption and Economic Crimes Act sections 48, 53, 58 and 59*

Criminal Law*-offences under the Anti-corruption and Economic Crimes Act (ACECA)- penalties-imprisonment, fines and disgorgement of ill-gotten gains through corruption-whether the penalties as prescribed under the ACECA constituted cruel and degrading treatment-whether the discrepancy in penalties under the Penal Code and the ACECA rendered the provisions unconstitutional.*

Judicial Review*- jurisdiction of a judicial review court-whether the High Court could review the decision of the Director of Public Prosecution (DPP) to charge an accused person by considering the quality and sufficiency of the evidence gathered to support the charge- whether the High Court had the power to inquire into the competency of charge sheets and direct for their amendment.*

Brief facts

The petitioners had participated as Ministry officials, being Permanent Secretary, Ministry of Foreign Affairs; Head of Mission, Kenya Embassy Japan; and *Charge d' Affairs,* Kenya Embassy Japan, in the purchase of the Chancery and Ambassador's residence for the Kenyan Embassy in Tokyo Japan. Following the purchase, the petitioners were charged before the Chief Magistrate Court on the grounds that the purchase process

Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 3 others [2013] eKLR

flouted procurement rules thereby occasioning the loss of colossal sums to the Kenyan Government. The petitioners consequently challenged the prosecution claiming that the criminal prosecution was in contravention of their legal rights.

In the consolidated petitions, the 1st petitioner contended that the decision to charge him and the decision seeking his suspension were null and void on the ground that, among others, that his fundamental rights including the right to a fair trial and fair administrative action had been violated. He therefore sought orders to prohibit any magistrate from receiving or continuing the charges against the petitioner; an order of prohibition against suspending petitioner from his position; and lastly, an order of prohibition against the 1st and 2nd respondents from presenting to court or accepting the charges.

On their part, the 2nd and 3rd petitioners alleged violation of the right to fair trial on the basis that the charges as framed were defective and ambiguous for duplicity and violation of articles 29, 27(1), 47, and 157 of the Constitution of Kenya, 2010 (Constitution). They further challenged the constitutionality of sections 48, 53, 58 and 59 of the Anti-corruption and Economic Crimes Act (ACECA). The petitioners sought orders of judicial review prohibiting continued prosecution of the criminal case or any other case in connection to the facts; and, an order for permanent stay and for compensation.

Issues

i. Whether the High Court could review the decision of the Director of Public Prosecution (DPP) to charge an accused person by considering the quality and sufficiency of the evidence gathered to support the charge.

ii. Whether section 58 of the ACECA was unconstitutional and violated the right to fair trial by contravening the principle of presumption of innocence guaranteed by article 50(2)(a) of the Constitution.

iii. Whether the penalties (imprisonment, fines and disgorgement of ill-gotten gains through corruption) prescribed under the ACECA constituted cruel and degrading treatment.

iv. Whether the discrepancy in penalties under the Penal Code and the ACECA rendered those provisions unconstitutional.

v. Whether the preferment of criminal charges against a public officer amounted to an infringement of the protection that was accorded to public officers as stated in article 236 of the Constitution.

vi. Whether suspension of a public officer upon being charged with a corruption or economic crime as required by section 62 of ACECA constituted a violation of their rights.

vii. Whether the High Court had the power to inquire into the competency of charge sheets and direct for their amendment.

viii. Whether the delay of 4 years from the date of the subject transaction to the date of charges being preferred constituted unreasonable delay and hence a violation of the right to fair trial under article 50 of the Constitution.

ix. Whether the right to be informed of the charge, with sufficient detail to answer it as provided under article 50(2)(b) of the Constitution required that the accused be provided with all prosecution material including witness statements and evidentiary materials before plea taking.

x. Whether adverse media pre-trial publicity jeopardized a trial and impeded the right to a fair hearing.

xi. Whether the incomplete composition of the Board of Ethics and Anti-Corruption Commission (EACC) and the fact that the employees of the EACC have not been vetted as required jeopardizes the outcome of any activity undertaken by the organization.

Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 3 others [2013] eKLR

Held

1. The State's prosecutorial powers were vested in the DPP, who in the exercise of that function was not subject to the direction or control by any authority. However, the discretionary power vested in the DPP was not an open cheque and such discretion had to be exercised within the four corners of the Constitution. It had to be exercised reasonably, within the law and to promote the policies and objects of the law which were set out in section 4 of the Office of the Director of Public Prosecutions Act.
2. The court could intervene where it was shown that the impugned criminal proceedings were instituted for other means other than the honest enforcement of criminal law, or were otherwise an abuse of the court process.
3. The High Court was not the right forum to tender the justifications concerning the subject transaction let alone test the nature and veracity of the allegations as it was the trial court which was best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. It would be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.
4. It was the EACC's duty to investigate and make recommendations for prosecution to the DPP. The DPP applied his mind independently and made the decision to prosecute. Any defects in the process of investigation including incompetence of the investigator could not be attributed to the DPP's decision to charge the petitioners unless the petitioners could demonstrate that the DPP had not acted independently or had acted capriciously, in bad faith or had abused the process in a manner to trigger the court's intervention
5. The DPP exercised discretionary power and what was required was a reasonable basis for the exercise of the discretion. It would be crossing the line of independence of the Office of the DPP to descend into the arena to finding whether or not there was a prima facie case against those other persons, who were not even parties to the petition, quite apart from the fact that meandering along that path would usurp the jurisdiction of the trial court.
6. The legislature was entitled to adopt different levels of penalties to satisfy certain policy objectives. The question of severity of punishment could not of itself render a statute unconstitutional. The substance of legislation including the sentence to be meted out was within the realm of the legislature and the court's role was limited and would not interfere unless it was shown that such sentence violated any of the known Constitutional rights and freedoms.
7. The presumption in section 59 of the Anti-Corruption and Economic Crimes Act on authenticity of documents did not interfere or diminish the right to a fair trial as it only created a rule of evidence and did not impose a legal burden on the accused to disprove the evidence of the prosecution. The accused was still entitled to question or challenge the evidence of the valuer who presented the report under section 59 of ACECA, and on the whole, the State still bore the burden of proving the case beyond reasonable doubt.
8. The penalties prescribed by ACECA, including imprisonment, fines and disgorgement of ill-gotten gains through corruption were within the normal human standards of decency even though they may occasion mental anxiety and discomfort. They were within the legislative competence and could not be considered as cruel and inhuman in light of the Constitutional and legislative policy on corruption and economic crimes
9. Article 236 of the Constitution which provided for the protection of public officers in the discharge of their official duties did not immunize or indemnify public officers including the petitioners against

investigation or prosecution. The provisions re-emphasized the need for due process in dealing with a public officer.

10. The suspension of a public officer who had been charged with corruption or economic crimes under section 62 of the ACECA did not amount to a penalty but merely amounted to the suspension of certain rights pending determination of the trial. In the event the person was acquitted, the full benefits would be restored. If the person was convicted, then the suspension merged into a penalty. Section 62 of the ACECA had to be read in context of its purpose, the overall purpose of the Act and the spirit enshrined in Chapter 6 of the Constitution.
11. The competency of a charge sheet was a matter perfectly within the jurisdiction of the trial court. The matter was catered for under sections 89(5), 137 and 214 of the Criminal Procedure Code. The applicants only needed to move the trial magistrate to strike out the charge for being incompetent or the prosecution could seek to substitute the charges. The fact that the charge was defective did not raise a constitutional issue.
12. The right to trial without unreasonable delay was one of the components of a fair trial under article 50 of the Constitution. However, what constituted 'unreasonable delay' was not a matter capable of mathematical definition but one dependent on the facts and circumstances of the particular case. The general approach to the determination whether, the right had been violated was not by a mathematical or administrative formula but rather by judicial determination whereby the court was obliged to consider all the relevant factors within the context of the whole proceedings. The petitioners bore the burden of proving that there had been unreasonable delay in charging them to the extent that a fair trial was impaired and would thus have to satisfy a "relatively high threshold" before the delay could be categorized as unreasonable.
13. The right to be provided with material the prosecution wished to rely on was not a one-off event but was a process that continued throughout the trial period from the time the trial started when the plea was taken. The matter was easily dealt with during the trial as the magistrate was entitled to give such orders and directions as were necessary to effect the right, including granting the accused sufficient time and opportunity to prepare their defence when the fresh material was provided.
14. The applicants would be tried by qualified, competent and independent judicial officers who were not easily influenced by statements made by politicians to the press. There was hence no basis for the applicant's fears of adverse media pre-trial publicity.
15. The fact that the Board of the EACC lacked a chairman and that the employees of the EACC had not been vetted did not invalidate the work that had been undertaken by the Commission as that situation was catered for by section 53 of the Interpretation and General Provisions Act which provided that the powers of the board, commission, committee or similar body shall not be affected by: a vacancy in the membership thereof; or, a defect in the appointment or qualification of the person purporting to be a member thereof.
16. Where the DPP had exercised his independent discretion to charge the petitioners, any defect in the composition of the EACC would not arise because the decision of the DPP to prefer charges was undertaken independently, based upon available evidence.

Consolidated petitions dismissed with each party bearing their own costs

5. Arbitrary use of resources by a public officer to confer a benefit on himself amounted to an abuse of office.

The case highlights how the arbitrary use of fuel card by the appellant to confer a benefit to himself amounted to abuse of office.

William Ashael Osoro v Republic [2020] eKLR

Anti-Corruption Appeal No. 32 of 2019

High Court at Milimani — October 14, 2020

M Ngugi, J

Criminal Law *– corruption and economic crimes - making excessive payments from public revenues –where the appellant used a fuel card – where appellant made excessive payments - whether making excessive payment from public revenues by a public officer tasked with the management of fueling government vehicles was an abuse of office.*

Brief facts

The appellant was charged with the offence of abuse of office contrary to section 101(1) as read with section 102A of the Penal Code in count I and count II stealing by a person employed in the public service contrary to section 280 of the Penal Code was convicted in count I and sentenced to pay a fine of Kes. 600,000/= in default four (4) years imprisonment. After a full trial, he was acquitted of the charge under count II under section 215 of the Criminal Procedure Code.

Dissatisfied with both his conviction and sentence, he filed the instant appeal arguing that there was no corroboration of the evidence adduced against him by the prosecution.

Issue

i. Whether making excessive payment from public revenues by a public officer tasked with the management of fueling government vehicles was an abuse of office.

Relevant provisions of the law

Penal Code

Section 101(1) as read with section 102(A)

101(1)Any person who, being employed in the public service, does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another is guilty of a felony."

102(A) A person convicted of an offence under sections 99, 100, 101 or 102 of this Part shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding 10 years or to both.

Held

1. The charges against the appellant arose in relation to the use of card number 3953, a general card issued by National Oil Corporation (NOC) for fuelling of ODPP vehicles. It was not disputed that the appellant was, at the material time, an employee of the ODPP where he was a Senior Administration Secretary in charge of transport. He had joined the ODPP in 2012.
2. The trial court found that from the evidence of PW10, the appellant was the contact person for card number 3953, and that it was the appellant who made the requests for top up of the card. That evidence was corroborated by the evidence of PW2, whose testimony was that it was the appellant

who gave him card number 3953. That evidence, coupled with the email from NOC which identified the appellant as the contact person for the card led to the conclusion reached by the trial court that it was the appellant who was the contact person and was in custody of card number 3953. His juniors in the office did not know about the card.

3. The evidence before the court indicated that card number 3953 was used in the period July 1, 2017 to June 30, 2018 a manner that caused concern that fraud was being committed. That emerged from the evidence of PW2, who testified that they were struck, on an examination of the statement for the period, by the rate at which the card was being used. The consumption on the card for the period January 1, 2018 to March 31, 2018 was Kes. 1,033,266.94 yet, according to PW2, the monthly consumption by the DPP was Kes. 400,000.

Appeal dismissed and conviction and sentence upheld.

6. A police officer collecting bribes from PSV drivers instead of inspecting the PSVs to ensure they comply with the law abuses his office

Unexplained money found in possession of a traffic police officer in the course of duty is money obtained as a result of a corrupt conduct and by so doing abuses his office contrary to section 46 of Anti-Corruption and Economic Crimes Act.

Dan Kangara Mburu v Republic [2019] eKLR

ACEC Appeal No. 17 of 2018

High Court at Nairobi — January 22, 2019

Hedwig I. Ong'udi

Criminal Law *–corruption and economic crimes – abuse of office – where accused was arrested and found with money – where money was suspected was as a result of corrupt conduct - whether the arrest of a police officer and finding unexplained money on him/her, following a complaint on suspicion of bribery amounted to 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)*

Criminal Law *– corruption and economic crimes - dealing with suspect property – where accused was arrested and found with money – where money was suspected was as a result of corrupt conduct - whether the arrest of a police officer and finding unexplained money on him/her, following a complaint on suspicion of bribery, was proof of 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)*

Brief Facts

The accused was 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). 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 Crime Act No. 3 of 2003 (ACECA).

The particulars were that on November 9, 2017,at Muthurwa area within Nairobi County, being a person employed by a public body, 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 Kes.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.

The appellant denied the charges and the case proceeded to full hearing. He was found guilty and convicted on both counts. He was thereafter fined Kes. 500,000/- in default one(1) year imprisonment on each count with an order that the sentences run concurrently.

The appellant, dissatisfied with the conviction and sentence, filed the instant appeal raising several grounds of appeal key among them being that the prosecution did not prove their case against him to the standard required by law.

Dan Kangara Mburu v Republic [2019] eKLR

Relevant provisions of the law

Anti-Corruption and Economic Crimes Act 2003

Section 46 – Abuse of office

A person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence.

Section 48- Penalty for offence under this Part

1. *A person convicted of an offence under this Part shall be liable to—*
   (a) *a fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both; and*
   (b) *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.*
2. *The mandatory fine referred to in subsection (1) (b) shall be determined as follows—*
   (a) the mandatory fine shall be equal to two times the amount of the benefit or loss described in subsection (1)(b);
   (b) if the conduct that constituted the offence resulted in both a benefit and loss described in subsection (1)(b), the mandatory fine shall be equal to two times the sum of the amount of the benefit and the amount of the loss

Issues

i. Whether the prosecution proved its case beyond reasonable doubt as provided by the law

ii. Whether the sentence imposed by the trial court was manifestly excessive.

Held

1. The court was required, on first appeal, to evaluate the evidence on record afresh and come up with its own independent conclusion.
2. The case of the prosecution was that the arrest of the appellant was as a result of a surveillance conduced over a period of about two(2) months following reports and complaints against police officers taking bribes.
3. The appellant did not dispute his arrest and recovery of Kes. 5250/-(in denominations of 200/-, 100/= and 50/-(EXB10) on his person.
4. There were no threats issued to the appellant as alleged. The case facing the appellant was a result of surveillance conducted by the EACC under the directorship of PW1. The surveillance conducted was as a result of several complaints received from anonymous persons in respect of traffic police operations along Muthurwa bus terminus along Jogoo road.
5. There was clear evidence that the appellant was arrested at the scene of crime. He was found in possession of Kes. 5,250/ which was suspected to be money received as bribes. There was no evidence that he ever gave any explanation for the possession of the money.
6. The appellant had a duty to explain the possession of the money under section 111 Evidence Act.
7. The prosecution through its witnesses and exhibits (photos) sufficiently explained their suspicion of the source of the loose money (Kes. 5,250/-) found with the Appellant. The appellant, on the other

hand, could not demonstrate that the money in his possession were as a result of other activities that he alleged to have been undertaking at the material time.

8. The court was satisfied that after considering all the evidence and circumstances under which the appellant was found with the Kes. 5,250/- in his pockets, that the said money was obtained as a result of corrupt conduct as set out under section 47(2)(a) of the ACECA. He abused his office by collecting money from the PSV drivers instead of inspecting the PSVs to ensure that they were complying with the law.
9. There was no basis to make the court interfere with the finding by the trial court in convicting the appellant on both counts. The appellant was fined Ksh 500,000/- in default one year imprisonment on each of the two counts. The trial court, however, erred in directing that the sentences run concurrently. The law required that where there was a default sentence, the sentences were to run consecutively. That should have been the case.
10. In passing a sentence the court must take into account several factors including but not limited to the nature of the offence; the seriousness of the offence; any antecedents and mitigation.
11. The appellant had no previous records and so was treated as a 1st offender. His mitigation was considered and in spite of the appellant's wayward behavior, the court should have considered the value of the bribe which has to be proportionate to the deterrent sentence being passed. The fine of Kes. 500,000/- for the sum of Kes. 5,250/- was therefore too harsh and out of proportion. The fine imposed by the trial court plus the order that the sentences run concurrently was set aside.

Orders

The appeal against conviction was dismissed while the appeal against sentence was allowed and substituted with the following sentences;

i. The appellant was sentenced to a fine of Kes. 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.

7. A request by a public officer to perform a public duty for a sum of money amounts to bribery

The court highlighted the ingredients needed to prove bribery against the accused which was that the accused received money from PW1 and that PW1 needed a public duty to be performed which the accused took advantage of.

Republic v Justina Syonzua Malela [2018] eKLR

Acc No. 18 of 2017

Chief Magistrate's Anti-Corruption Court At Milimani July 24, 2018

D N Ogoti, CM

Criminal Law *– bribery – ingredients of bribery – where a public officer requested for money to issue a birth certificate - whether a request by a public officer, for issuance of a birth certificate, for a sum of money amounted to bribery - Bribery Act sections 6(1), 17 & 18*

Brief Facts

The accused faced several charges of abuse of office contrary to section 46 of the Anti-corruption and Economic Crimes Act No. 3 of 2003 as read with section 48(1) of the same Act. Alternatively she faced a charge of receiving a bribe contrary to section 6(1) as read with section 17 and 18 of the Bribery Act No 47 of 2016. In the second count the accused faced a charge 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. The facts of the case were that being a person employed by a public body, The Ministry of Interior and Coordination as a clerical officer II, the accused requested for a financial benefit of Kes. 2,500/= from Naum Syombua Musyoka, as an inducement to facilitate the processing of a birth certificate for Wayne Musyoka Maria, a matter relating to the affairs of the said public body.

Issues

i. Whether the offence of abuse of office contrary to section 46 as read with section 48(1) of ACECA Act No. 3 of 2003 was brought out by the prosecution.

ii. Whether a request by a public officer, for issuance of a birth certificate, for a sum of money amounted to bribery contrary to section 6(1) as read with section 17 and 18 of the Bribery Act.

Held

1. There was a conversation between the accused and PW1 and between PW1 and PW2. That in the conversation PW1 wanted a birth certificate processed and she was given accused number by PW2 to assist her process the certificate. PW1 received accused number from PW2 on August 30, 2016 at 9:02pm. On September 8, 2016, PW1 sent a message to the accused telling her she had sent the details of the birth certificate to be processed. On the same date, she asked accused whether she would take her the money in the evening. An investigation on the accused phone showed that she received money on September 8, 2016 around 11:51 and it read "Receipt No-K188NOOJO4.Funds received from 254702113032.Ksh 2,500/=, Naum Musyoka.
2. By the time of the investigation, the accused had been moved from the Kibera Huduma centre to Kasarani registration office. The prosecution produced the accused's employment letter dated January

19, 2009 for the Office of the vice President, Ministry of state for Immigration and Registration of persons. In the said letter, she was being appointed to the department of Civil Registration, Pexb4. He also found that PW1 had requested PW2 who could assist her process a birth certificate for her niece. PW2 then connected her to Accused who had assisted one of his friends to get a birth certificate. The birth certificate was never processed.

3. From Pexb2, at entry no-1099, PW1 received accused number from PW2 on 30/8/2016 at 9:02pm. Pex1, 2 and 3 indicate there was exchange of messages between PW1, PW2 and PW3. She did not answer nor respond to any calls or messages from PW1. It was as a fact that there was communication between PW1, PW2, and PW3.
4. It was a fact that the accused received Kes. 2,500/= form PW1. The accused was an employee of the Ministry of State for Immigration and Registration of persons. That was the ministry responsible for registration of persons. The issuance of birth certificate under the said ministry was a public duty. Therefore, the accused requested for a bribe to perform a public duty.
5. By the time the accused received the Kes. 2,500/= from PW1, the offence of receiving was complete. The prosecution demonstrated that the accused knew who the sender of the money was but accused went ahead to describe PW1 as a stranger. The evidence available demonstrated that PW1 only needed a public duty to be performed which the accused took advantage of.
6. PW1 got the accused's mobile number on August 30, 2016. After one week she called the accused. After explaining to the accused why she called, the accused asked for Kes.3, 000/= and promised to deliver the same by that evening. The figure was negotiated down to Kes.2, 500/= which the accused sent on the same day. Considering the evidence by PW1, the evidence strongly pointed to the fact that the accused requested for a bribe in order to perform a public duty.
7. The republic proved its cases against the accused person beyond all reasonable doubt in the alternative counts to both count I and Count II for the charges of requesting for a bribe receiving a bribe contrary to section 6(1) as read with section 17 and 18 of the Bribery Act No 47 of 2016.

Accused convicted under section 215 of the Criminal Procedure Code Cap. 75 Laws of Kenya.

Antony Mkala Chitavi v Republic (Criminal Appeal 11 of 2014) 2023) KECA 1564

8. Irregularly awarding a tender to a party amounts to abuse of office

A public officer who improperly awards a tender to a party notwithstanding that such a party was not the successful bidder for the tender, commits an offence of abuse of office

Antony Mkala Chitavi v Republic (Criminal Appeal 11 of 2014) 2023) KECA 1564 (15 December, 2023)

Court of Appeal at Mombasa

Criminal Appeal No. 11 of 2014 — 15th December 2023

SG Kairu, P Nyamweya GV Odunga, JJA

Criminal Law *– corruption and economic crimes – abuse of office – ingredients of the offence of abuse of office – mens rea and actus rea – what were the ingredients of abuse of office by a public officer - Whether the actions of a Managing Director of a public company, who awarded a tender to a bidder who was not qualified, amounted to an abuse of office – Anti-Corruption and Economic Crimes Act, 2003 sections 3 and 46*

Civil Practise and Procedure *– appeals – ground of appeals - where an appellant sought to argue points that where not in his memorandum of appeal – where ground was not raised in first appellate court – Whether an appellant without leave of the court, could argue a ground of appeal that was not specified in the memorandum of appeal or in any supplementary memorandum of appeal – Court of Appeal Rules, 2022 rule 74*

Brief facts

The appellant was charged with the offence of abuse of office contrary to section 46 as read with section 48 of the Anti-Corruption and Economic Crimes Act. The particulars of the offence were that the appellant while serving as the Managing Director of Mombasa Water and Sewerage Company Limited, used that office to improperly confer a benefit on Africa Merchant Assurance Company Limited (AMACO) by awarding it the tender for the provision of general insurance services for the calendar year 2008 notwithstanding that AMACO was not the successful bidder for the tender. The appellant faced an alternative charge of willful failure to comply with the law applicable to the tendering of contracts contrary to section 45(2)(b) as read with section 48 of Anti-Corruption and Economic Crimes Act.

He was tried before the Chief Magistrate's Court at Mombasa and was found guilty and convicted on the main as well as the alternative count. On the main count, he was fined Kes. 800,000 or three years imprisonment in default. On the alternative charge, he was fined Kes. 800,000.00, or in default, imprisonment for a term of three years. The sentences were to run consecutively.

On first appeal, the High Court upheld the conviction and sentence on the main count. The conviction and sentence on the alternative count were set aside. Aggrieved, he further appealed to the instant court primarily on the ground that the offence was not proved.

Issue

i. Whether the actions of a Managing Director of a public company, who awarded a tender to a bidder who was not qualified, amounted to an abuse of office.

ii. Whether an appellant without leave of the court, could argue a ground of appeal that was not specified in the memorandum of appeal or in any supplementary memorandum of appeal.

Antony Mkala Chitavi v Republic (Criminal Appeal 11 of 2014) 2023) KECA 1564

Anti-Corruption and Economic Crimes Act, 2003

Section 2 – Interpretation

"public body" means—

q. the Government, including Cabinet, or any department, service or undertaking of the Government;

r. the National Assembly or the Parliamentary Service;

s. a local authority;

t. any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law; or

u. a corporation, the whole or a controlling majority of the shares of which are owned by a person or entity that is a public body by virtue of any of the preceding paragraphs of this definition;

"public officer" means an officer, employee or member of a public body, including one that is unpaid, part-time or temporary

Section 46 – Abuse of office

A person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence.

Section 48- Penalty for offence under this Part

1. A person convicted of an offence under this Part shall be liable to—
   (a) a fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both; and
   (b) 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.
2. The mandatory fine referred to in subsection (1) (b) shall be determined as follows—
   (a) the mandatory fine shall be equal to two times the amount of the benefit or loss described in subsection (1)(b);
   (b) if the conduct that constituted the offence resulted in both a benefit and loss described in subsection (1)(b), the mandatory fine shall be equal to two times the sum of the amount of the benefit and the amount of the loss

Court of Appeal Rules, 2022

Rule 74 – The appellant shall not, without leave of the court, argue any ground of appeal that was not specified in the memorandum of appeal or in any supplementary memorandum of appeal.

Held

1. Section 46 of the ACECA provides that a person who uses his office to improperly confer a benefit on himself or anyone is guilty of an offence. A benefit was defined in section 2 to mean "any gift, loan, fee, reward, appointment, service, favour, forbearance, promise or other consideration or advantage." The ingredients of the offence of abuse of office which had to be established under section 46 were that the accused must have used a public office to confer a benefit either to themselves or another. It

must also be demonstrated that the benefit was obtained by improper use of the office.

2. Both courts determined that the Company the appellant worked for was a public company and despite the tender committee's recommendation to award the tender to a different bidder, the appellant unilaterally awarded it to AMACO. Evidence showed payments made to AMACO, resulting in a benefit being conferred.
3. The circumstances which the court of appeal may interfere with the concurrent findings of the lower courts are very limited. With this, the court considered what had prompted the conviction of the appellant and learnt from witness testimony that the company had advertised the tender and had received 3 bids from three bidders AMACO being one of them.
4. The tender committee had deliberated and decided that East Africa Limited be awarded the tender as it had been the successful candidate. However, the appellant who was the Managing director of the public company had gone ahead and awarded the tender to AMACO insurance because it was cheaper and would save the company about Kes. 600,000. However, the reasoning behind East African Company Limited being awarded the tender was due to the fact that it had passed the tendering process unlike AMACO.
5. The Director General of Public Procurement Regulatory Authority subsequently reviewed the tendering process and found out that the appellant had breached the Public Procurement and Asset Disposal Act when he awarded the tender to AMACO.
6. Based on the evidence, the court was satisfied that the concurrent findings by the trial court and the High Court that the prosecution established that the appellant, a public officer, abused his office by awarding the tender for provision of insurance services to AMACO notwithstanding that it was not the successful bidder for the tender was well founded
7. There was overwhelming and credible evidence to support the concurrent findings of the courts below. The court had no basis on which it could interfere with the decision of the High Court affirming the conviction.
8. The trial courts rightfully considered all material facts before them and further appreciated the objectives of sentencing and so reached a determination that was well founded in the law. As such, in the circumstances of the case, the sentence could not be overturned.
9. The complaint regarding non-compliance with section 200(1)(b) of the Criminal Procedure Code was not raised before the High Court. Neither was it a ground in the appellant's memorandum of appeal. As per rule 74 of Court of Appeal Rules, an appellant could not, without leave of court, argue any ground of appeal not specified in the memorandum of appeal or in any supplementary memorandum of appeal.
10. Rule 74 of the Court of Appeal Rules provided that the appellant shall not, without leave of the court, argue any ground of appeal that was not specified in the memorandum of appeal or in any supplementary memorandum of appeal. It is also noteworthy that it was not addressed in the appellant's written submissions. It was raised for the first time during the hearing of the appeal. It is with respect an afterthought.

Appeal dismissed

9. The Arbitrary issuance of a land title deed by a land registrar without following the laid out procedure amounts to an abuse of office

Issuing a land title deed without either receiving or cancelling the old one, gazetting it as lost, or indicating any reason as to why it was not surrendered amounts to abuse of office. A land registrar being the final authority in the process of land registration was mandated to verify and confirm that all the requirements were in place before issuing a new title deed.

Koros v Republic (Criminal Appeal 32 of 2019) [2022] KEHC 10250 (KLR) (30 June 2022) (Judgment)

Criminal Appeal No. 32 of 2019

High Court at Kabarnet — June 30, 2022

WK Korir, J

Criminal law – *corruption and economic crimes – abuse of office – elements of the offence of abuse of office - what were the ingredients of abuse of office by a public officer – – ingredients to be proved – issuance of a new title deed – whether the actions of a land registrar were arbitrary and an abuse of his authority as a land registrar - whether issuing a new land title deed without either receiving and cancelling the old one, gazetting it as lost, or indicating any reason as to why it was not surrendered amounts to abuse of office – what were the ingredients that the prosecution needed to prove in an offence of abuse of office under section 101(1) of the Penal Code - whether the actions of a land registrar issuing a new land title deed without either receiving and cancelling the old one, gazetting it as lost, or indicating any reason as to why it was not surrendered amounts to abuse of office - Penal Code, section 101(1)*

Jurisdiction – *jurisdiction of Magistrates courts – where appellant was charged with abuse of office under section 101 of the Penal Code and not under the Anti-Corruption and Economic Crimes Act, 2003 – whether a magistrate court had jurisdiction to hear and determine a case of abuse of office under section 101 of the Penal Code*

Criminal law – *sentencing – sentencing guidelines –sentencing of first time offenders – where appellant was charged and found guilty of abuse of office - whether imposing a maximum sentence on a first offenders offended the sentencing principle that first offenders should ordinarily not be imposed maximum sentences - Kenyan Judiciary Sentencing Guidelines at page 29, paragraph 11.11*

Words and phrases – *definition of - arbitrary' is defined as: 1. Depending on individual discretion… 2. (Of a judicial decision) founded on prejudice or preference rather than on reason or fact." Black's Law Dictionary, 8th edition, at page 112*

Words and phrases – *definition of – arbitrary - based on random choice or personal whim - The Concise Oxford English Dictionary, 12th edition, 2011*

Brief facts

The appellant was charged with the offence of abuse of office contrary to section 101(1) as read with section 102(A) of the Penal Code, Cap. 63. It was contented that as a Land Registrar, the appellant failed to follow due process in conferring title to land in question to one Reuben. He was found guilty and fined Kes. 1,000,000/= in default 12 months' imprisonment.

The appellant, dissatisfied with the conviction and sentence filed the instant appeal raising several grounds

of appeal key among them being that; the prosecution had not proved the case to the standard of beyond reasonable doubt; he was convicted and sentenced without analysing the prosecution and appellant's evidence on record and by disregarding or not looking into the appellant's submissions of which the court could have arrived on a contrary judgment, and that the court meted conviction and sentence which was harsh and excessive without considering the appellant's mitigation. The respondent on the other hand argued that the ingredients of the offences of which the appellant was charged with were proved beyond reasonable doubt.

Relevant provisions of the law

Penal Code, (cap 63)

Section 101 – Abuse of Office

(1) Any person who, being employed in the public service, does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another is guilty of a felony.

102A – Penalties

A person convicted of an offence under sections 99, 100, 101 or 102 of this Part shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding 10 years or to both.

Issues

i. Whether a magistrate court had jurisdiction to hear and determine a case of abuse of office under section 101(1) of the Penal Code.

ii. What were the ingredients that the prosecution needed to prove in an offence of abuse of office under section 101(1) of the Penal Code Cap. 63.

iii. whether the actions of a land registrar issuing a new land title deed without either receiving and cancelling the old one, gazetting it as lost, or indicating any reason as to why it was not surrendered amounts to abuse of office.

iv. Whether imposing a maximum sentence on first offenders offended the sentencing principle that first offenders should ordinarily not be imposed maximum sentences.

Held

1. Offences under the Penal Code were tried by magistrates in accordance with the jurisdiction bestowed upon them by the First Schedule of the Criminal Procedure Code, Cap. 75. As per that schedule, a charge brought under section 101 of the Penal Code was triable by any subordinate court. The jurisdiction of the trial court could not therefore be impeached. The trial court was clothed with the jurisdiction to try the matter and impose the sentence provided by the law.
2. In determining whether the prosecution discharged its burden of proof, it was necessary to identify the elements of the offence of abuse of office. The Appellant was charged with the offence of abuse of office contrary to Section 101(1) of the Penal Code. Four elements of the offence of abuse of office emerged from the wording of section 101 of the Penal Code, namely:
   (a) the accused had to be an employee in public service;
   (b) the accused in abuse of his authority acted or sanctioned an act;
   (c) such act or direction to act must have been made arbitrarily; and
   (d) the act must have been prejudicial to the rights of another person.

   The offence created by section 101(1) of the Penal Code was distinct and independent from the one established under section 46 of the Anti-Corruption and Economic Crimes Act.

Koros v Republic (Criminal Appeal 32 of 2019) [2022] KEHC 10250 (KLR)

3. For a conviction to arise under section 101(1), the prosecution ought to prove all the four elements of the offence. It was not disputed that the appellant was an employee in the civil service at the time when the offence was alleged to have been committed. It was also not disputed that he worked as a land registrar and was mandated to process and issue title deeds.
4. It was not the business of a criminal court to determine the validity or otherwise of the title or ownership of the land. That issue remained within the purview of the Environment and Land Court. What the Court was concerned with was assessing whether the actions of the appellant while performing his duties amounted to misuse of his power or authority.
5. The question of whether the actions of the appellant were arbitrary and an abuse of his authority as a land registrar could be answered by assessing the evidence that was adduced at the trial.
6. The court narrowed down to the evidence of PW3 and the appellant because they were experts in matters of transfer of land and issuance of title deeds. The two were in agreement that there was a requirement that prior to issuing a new title deed, the old title deed ought to have been surrendered and the same cancelled. If the same was not available, the registrar was required to gazette it as lost or revoked. Additionally, reasons ought to have been indicated why such a title deed was not surrendered. However, the appellant issued a new title deed without either receiving and cancelling the old one, gazetting it as lost, or indicating any reason as to why it was not surrendered.
7. The appellant being the final authority in the process of land registration was mandated to verify and confirm that all the requirements were in place before taking the action of issuing a new title deed. Furthermore, it was the appellant who was tasked to ensure cancellation of the old title or the issuance of a gazette notice that the title had been lost. From the evidence of PW3 and the appellant it was clear that the actions of the appellant amounted to misuse of his authority as the custodian and issuer of title deeds.
8. An action not founded on law or predetermined procedure was arbitrary and in such a case, the prosecution has to prove that the Appellant's actions were done according to his will or whim without due regard to the legal requirements or procedures hence upsetting the predictability of the required procedures and outcomes.
9. From the evidence on record, the prosecution proved that the appellant acted arbitrarily hence the burden shifted to the appellant to prove that his actions were neither willful nor resulted into derogation of the predictability of the procedures and outcomes of the legal process of transferring titles. The appellant admitted that he knew that the old title ought to have been surrendered before a new one could be issued.
10. The appellant in his defence offered no explanation why he deviated from the normal procedure of transferring title to land. The actions of the appellant in processing a new title in disregard to the standard procedure and requirements and without any valid reason amounted to arbitrariness. In addition, the actions of the appellant were prejudicial to the rights of the registered owner of the land. The prosecution proved its case against the appellant with regard to the offence of abuse of office.
11. On the harshness of sentence imposed, it was a well-established principle of law that an appellate court could only interfere with the sentence of a trial court in specific circumstances. On appeal, the appellate court would not easily interfere with sentence unless, that sentence was manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle *(Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR)*.

Koros v Republic (Criminal Appeal 32 of 2019) [2022] KEHC 10250 (KLR)

12. The Judiciary Sentencing Guidelines at page 29, paragraph 11.11 provided how a court should determine the fine to impose. From the record of appeal, it was evident that the appellant had retired from the public service at the time of his conviction and sentencing. It was also apparent from the record that despite the negligence or omission on the part of the appellant, the complainant was careless in the manner he dealt with his title deed.
13. The Appellant's role in the whole process was therefore limited to processing the transfer request which the complainant admitted to have initiated for the purpose of helping Reuben to secure a loan. It was further observed that the appellant in his mitigation indicated that he was a first offender and remorseful
14. Taking all the above factors into consideration, the fine of one million shillings imposed by the trial court was harsh and excessive. The trial magistrate did not explain why he imposed the maximum fine provided by the law on a first offender. The fine imposed was not proportionate to the default sentence of one year in prison. There was an apparent imbalance between the fine and the default sentence.
15. In the circumstances of the case, the fine imposed by the trial court was not only excessive, but offended the sentencing principle that requires that the maximum sentence should ordinarily not be imposed on first offenders. The appellant had established a basis that required the court to interfere with the sentence imposed by the trial court. The sentence was set aside and substituted with a fine of Kes. 100,000/= in default one year's imprisonment.

Appellant's appeal against conviction was without merit and was dismissed while appeal against sentence was allowed

10. Use of public office to improperly confer a benefit to another constitutes corruption and is an abuse of office

The offence of abuse of office which constitutes corruption under section 3 of the Anti-Corruption and Economic Crimes Act is committed by a public officer who uses a public office to improperly confer on himself or on another person a gift, loan, fee, favour, advantage etc which he or that other person was not otherwise entitled to

John Simiyu Khaemba & another v Republic [2020] eKLR

Criminal Appeal No. 100 of 2019

Court of Appeal at Nairobi August 7, 2020

R N Nambuye, S Ole Kantai, K 'Minoti, JJA

Criminal Law – corruption and economic crimes – abuse of office – ingredients of mens rea and actus rea – what were the ingredients of abuse of office by a public officer – where the appellants influenced the award of a tender to a company that did not qualify for it - where a public officer breached procurement regulations to confer improper benefit - whether the breach of procurement regulations to confer improper benefit on another amounted to conflict of interest - Anti-Corruption and Economic Crimes Act sections 3, 46 and 48(1)

Evidence Law – uncorroborated evidence –accomplice witness - validity of – where the DPP used some of the appellants' colleagues as witnesses rather than to charge all of them - whether the decision of the Director of Public Prosecution to rely on uncorroborated accomplice evidence was lawful –Evidence Act, section 141

Brief Facts

The appellants were dissatisfied with the decision of the High Court confirming the judgment of the trial court that convicted them on a charge of abuse of office contrary to section 46 as read together with section 48(1) of the Anti-Corruption and Economic Crimes Act 2003. They were both convicted and sentenced to a fine of Kes. 300,000 or in default 1 year imprisonment on the charge of abuse of office necessitating the filing of the instant appeal.

The grounds of appeal were that the first appellate court erred by; ignoring the trial court's failure to comply with section 200 (3) of the Criminal Procedure Code; failing to properly evaluate evidence that was favorable to them; upholding their conviction for the offence of abuse of office without sufficient evidence; and failing to hold that the charges against them were duplicitous and defective.

The Prosecution who were the respondents opposed the appeal on the main ground that it had no merit.

Issues

i. Whether the trial court failed to comply with section 200(3) of the Criminal Procedure Code thus infringing the rights of the appellants

ii. Whether the breach of procurement regulations to confer improper benefit on another amounted to conflict of interest.

iii. Whether the charge of abuse of office was duplex and defective.

iv. Whether the decision of the Director of Public Prosecution to rely on uncorroborated accomplice evidence was lawful.

Relevant provisions of the law

Criminal Procedure Code (Cap. 75)

Section 200(3)- Conviction on evidence partly recorded by one magistrate and partly by another

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.

Anti-Corruption and Economic Crimes Act, 2003

Section 2 – Interpretation

"public body" means—

(a) the Government, including Cabinet, or any department, service or undertaking of the Government;

(b) the National Assembly or the Parliamentary Service;

(c) a local authority;

(d) any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law; or

(e) a corporation, the whole or a controlling majority of the shares of which are owned by a person or entity that is a public body by virtue of any of the preceding paragraphs of this definition;

"public officer" means an officer, employee or member of a public body, including one that is unpaid, part-time or temporary

Section 46 – Abuse of office

A person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence.

Section 48- Penalty for offence under this Part

1. A person convicted of an offence under this Part shall be liable to—

(c) a fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both; and

(d) 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.

2. The mandatory fine referred to in subsection (1) (b) shall be determined as follows—

(a) the mandatory fine shall be equal to two times the amount of the benefit or loss described in subsection (1)(b);

(b) if the conduct that constituted the offence resulted in both a benefit and loss described in subsection (1)(b), the mandatory fine shall be equal to two times the sum of the amount of the benefit and the amount of the loss

Held

1. On the first issue, court record indicated that the effect of section 200(3) of the Criminal Procedure

Code was explained to the appellants, and twice, through their advocates, they requested to proceed with the trial from where the previous magistrate had reached. The appellant thus had no basis to submit that they were not aware of their rights under section 200(3) of the CPC or that they were denied an opportunity to recall any of the witnesses they wished to recall.

2. Section 46 of ACECA created the offence of abuse of office under which both appellants were charged, section 3 of ACECA provided the definitions of a benefit, public officer and a public body. It could be deduced that the "person" referred to in section 46 meant a public officer and "office" in the same section meant a "public officer".
3. The offence of abuse of office, which under section 3 of the Act constituted corruption, was committed by a public officer who used a public office to improperly confer on himself or on another person a gift, loan, fee, favor, advantage etc which he or that other person was not otherwise entitled to. The provisions of the ACECA sufficiently covered mens rea (improper use of public office) and actus reus (conferment of a benefit to self or another person) of the offence of abuse of office and were thus not overly broad or general as claimed by the appellants. Improper use of public office would include conscious violation or non-adherence to prescribed procedures and regulations with the aim of conferring a benefit on the public officer himself or on another person. Accordingly the court was not persuaded that the provision in question was a loose provision or created an offence of strict liability as the appellant's suggested.
4. For the 1st appellant, the particulars of the charge were clear that he used his public office as the Uasin Gishu regional accountant of the Kenya Rural Roads Authority, to improperly confer a benefit to Kachur Holdings Ltd by approving payment to it of Kes. 4,213,001. To prove that the approval of payment was improper, the prosecution adduced evidence to show that the 1st appellant authorised payments to Kachur Holdings, which among other things, did not qualify because its tender was not the lowest as required by section 66(4) of the Public Procurement and Disposal Act; had among its directors, Hon Peris Chepchumba Simam, the Member of Parliament for Eldoret South Constituency contrary to section 33 of the same Act which bars a procuring entity from entering into a procurement contract with a public servant; and Kachur Holding's alleged maintenance and improving of the road in question was neither supervised as required, nor confirmed through supporting documents such as the measurements sheets and an inspection re-port. After considering the payment of Kes. 4,213,001 made to Kachur Holdings Ltd on the strength of the 1st appellant's approval, and in light of the above and other irregularities, the two courts below were satisfied that the 1st appellant had improperly conferred a benefit upon Kachur Holdings, to which it was other-wise not entitled to.
5. The court was satisfied that the two courts below did not proceed on the assumption that breach of procurement regulations per se constituted criminal offences. Rather, they found on the evidence before them that in the circumstances of the case, the breach of the regulations constituted improper conferment of a benefit to Kachur Holdings Ltd. It was not enough to claim, as the appellants did, that no public money was lost; a benefit was improperly conferred which otherwise should not have been.
6. The rule against duplex charges prohibited the prosecution from charging an accused person with commission of two or more offences in a single charge. The purpose was to ensure that the accused person knew with clarity the offence he was alleged to have committed to enable him prepare adequately to answer it, and to focus the trial court itself in terms of evidence, relevance and efficiency.
7. As regards accomplice evidence and the decision of the DPP to use some of the appellants' colleagues (PW4 and PW8) as witnesses rather than to charge all of them, The decision in and of itself could not be evidence of wrongdoing or trumped up charges. The Constitution had vested in the DPP the responsibility of conducting prosecutions and article 157(10) of the Constitution had insulated his

office from undue interference in the discharge of that mandate. While it was that the courts had to step in to stop any abuse of power conferred by the Constitution, including on the DPP, directing him on who to charge or who to use as a witness would constitute unjustified interference with his constitutional mandate.

8. Section 141 of the Evidence Act provided that an accomplice was a competent witness against an accused person and that a conviction was not illegal merely because it is based on the uncorroborated evidence of an accomplice. Under section 141 of the Evidence Act, an accomplice was a competent witness and a conviction based on his evidence was not necessarily illegal or irregular. However, the evidence of an accomplice witness required corroboration.
9. It was however a rule of practice only and in appropriate circumstances, the court may convict without corroboration if satisfied that the accomplice witness was telling nothing but the whole truth, and upon the court duly warning itself and the assessors, where the trial was with the aid of assessors, on the dangers of doing so.
10. The court upheld the conviction of the appellants as it held that the convictions were not based solely on the evidence of their colleagues whom they contended were accomplices. There was other independent evidence of the appellant's conduct which the two courts below found to constitute the offence of abuse of office.

Appeal dismissed.

Bribery: Soliciting and Receiving a Benefit

Bribery: Soliciting and Receiving a Benefit

11. Ingredients of the offence of receiving a bribe

The appellant had been charged and convicted of receiving a bribe. The court highlighted the ingredients of the offence of receiving a bribe. The court stated that the element of demanding a bribe was very material in proving the offence of receiving a bribe. The court further stated that it was not just about getting a recorder and calling the complainant to identify the voices, such evidence had to be admitted with great care.

Gideon Makori Abere v Republic [2019] eKLR

ACEC CR. Appeal No. 19 of 2018

High Court at Nairobi — July 2, 2019

J N Onyiego, J

Evidence Law *– admissibility of evidence– admissibility of voice identification – requirements to be met before receiving and admitting voice identification into evidence – admitting voice identification as collaborative evidence – where the voice in the voice identification could not be clearly identified or recognized – where it was alleged that there was no proper voice identification and face recognition -what were the requirements to be met before receiving and admitting voice identification in evidence.*

Criminal Law *– anti-corruption and economic crimes – bribery –offence of receiving a bribe - ingredients of the offence of receiving a bribe - what was construed to be a relevant function or activity to which a bribe related – Bribery Act, sections 6 and 7.*

Brief facts

The appellant was charged with receiving a bribe contrary to section 6(1)(a) as read with section 18 of the Bribery Act on March 23, 2017 (count I) and on March 24, 2017 (count II). In count III, he was charged jointly with the 2nd accused with the offence of conspiracy to commit an offence of corruption contrary to section 47(a)(3) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act. Having entered a plea of not guilty, the case proceeded to full trial.

The trial court convicted the appellant of the two counts of receiving a bribe and sentenced him to a fine of Kes. 50,000 in default to serve one-year imprisonment for each count and sentences to run consecutively. Aggrieved by the conviction and sentence, the appellant filed the instant appeal, arguing among others that the trial court erred in law and fact by relying on insufficient evidence.

Issues

i. What were the ingredients of the offence of receiving a bribe and what was construed to be a relevant function or activity to which a bribe related?

ii. What were the requirements to be met before receiving and admitting voice identification in evidence?

Gideon Makori Abere v Republic [2019] eKLR

Relevant provisions of the law

Bribery Act, No. 47 of 2016

Section 6 - Receiving a bribe

(1) A person commits the offence of receiving a bribe if – the person requests, agrees to receive or receives a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly whether by that person receiving the bribe or by another person.

Held

1. Section 7(1) of the Bribery Act (the Act) defined what was construed to be a relevant function or activity to which a bribe related to include a function of a public nature or any function carried out by a state officer or public officer pursuant to his or her duties. From the wording of the provisions, one could distil in summary the ingredients of the offence of receiving a bribe to be;
   a) one had to request, receive or agree to receive a financial or other advantage;
   b) there had to be the *mens rea* that by so receiving, some function or activity should be improperly performed by that person or by somebody else; and
   c) the function had to be of a public nature or of such a nature carried out by a public officer.
2. The appellant was at the material time a public officer who by the time he was alleged to have requested for a benefit was performing a public duty. However, what was in controversy was the allegation that the appellant demanded for a bribe from the complainant to forebear him from prosecution following the commission of a traffic offence. The appellant did not deny coming into contact with the complainant on the material day. He admitted stopping him from causing obstruction by making a wrong turn.
3. Nobody heard the appellant request for money from the complainant. The complainant confirmed on cross examination that the appellant did not specifically ask for a bribe. It would appear that the complainant assumed that the money the breakdown driver was demanding was a bribe on behalf of the appellant. Since there were two officers at the scene on March 23, 2017, it would not be distinguished that the breakdown driver was demanding for payment of money on behalf of appellant.
4. Since it was admitted that the appellant never specifically demanded for a bribe, one could not contextualise the appellant's statement that "it is not about *umefanya nini ama nini*, it was a matter of money" to imply a demand for a bribe. It was an assumption by the complainant, which alone could not form a basis for a conviction.
5. The events of the particular day were doubtful hence creating reasonable doubt as to whether the appellant demanded for a bribe. There was no evidence to corroborate the allegation by the complainant that the appellant requested for a bribe. The prosecution had an enormous duty to prove beyond a shadow of doubt that the appellant demanded for a bribe. That burden did not change and the same remained constant throughout the trial.
6. It was a gross misdirection by the trial court to have assumed that the money demanded by the breakdown driver was meant to be a bribe or a benefit requested by the appellant. Unfortunately, the breakdown driver was not called as a witness to shed light on whether the money he was allegedly demanding from the complainant was for ferrying the motor cycle or was requested by the appellant to ask for the bribe on his behalf.
7. In so far as the offence allegedly committed on March 23, 2017 was concerned, the prosecution did not prove their case beyond reasonable doubt.

Gideon Makori Abere v Republic [2019] eKLR

8. On March 24, 2017, the complainant went on a follow up mission well fitted with an audio recorder by the Ethics and Anti-Corruption Commission (EACC) with clear instructions to record every bit of conversation between him and the appellant. The objective was to confirm whether the demand for a bribe made the previous day was real. He was following on the release of his impounded motor cycle. From the conversation recorded in the video transcript that was played in court, the trial court was satisfied that there was a demand for Kes. 3,000.'*Miti tatu*' referred to in the video transcript meant '*ngiri tatu*' referring to Kes. 3,000 in Kiswahili language commonly known as sheng. One could only imply that the amount was meant to forebear the complainant from prosecution having impounded his motor cycle which was already in the police station without any charges being preferred.
9. The appellant did not deny having impounded the complainant's motor cycle. He however did not state whether he booked the motor cycle and recommended any prosecution. The complainant was not even given any notification to attend court.
10. From the video recording transcript, the appellant referred the complainant to his colleague in the office and that the complainant was to call him to confirm that he was okay. The complainant went to the office as directed and met the appellant's colleague who further referred him to the 2nd accused who received Kes. 3,000 and referred the complainant to a breakdown driver with the Kes.1,500. The 2nd accused was arrested with the trap money being Kes.3, 000 from her drawer which she admitted. The 2nd accused was charged but acquitted for lack of proof of conspiracy. Although it was not clear under what circumstances and for what purpose she was receiving the Kes.4,500, one could circumstantially connect the demand for Kes.4,500 at the scene allegedly by the appellant and the money received by the 2nd accused.
11. The voice in the video was not identified as that of the appellant. The officer in charge of Kilimani Police Station (PW2) was not in a position to identify or recognize the voice. The video was not clear. He could not identify the person wearing the uniform. He however identified the force number. The face of the person talking was not captured in the audio (video) recorder. The appellant disowned the voice in the video. Except for the complaint, nobody else could connect the person talking in the video with the appellant.
12. Considering that the appellant did not receive any money from the complainant, it was upon the prosecution to prove without the slightest doubt that the voice in the recorder was his. If the voice could not be recognized by people who ordinarily knew the appellant, it was doubtful that the appellant would know him before identifying it.
13. Where voice identification was in doubt, then there was no corroboration to the evidence of the complaint. Normally, evidence of voice identification was receivable and admissible in evidence and it could, depending on the circumstances carry as much weight as visual identification. In receiving such evidence, it 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 to it that in which was said and who said it.
14. The element of demanding a bribe was very material in proving the offence of receiving bribe. It was not just about getting a recorder and calling the complainant to identify the voices; such evidence had to be admitted with great care.
15. Since it was not clear as to whose voice it was that was demanding for a bribe, and since there were no audio images showing the appellant demanding for a bribe, and while considering that he did not actually receive the bribe, the video recording did not help much to ascertain the real culprit.

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16. Since the appellant had categorically stated that the voice was not his and people ordinarily conversant with his voice were unable to identify the same, the court was left with the evidence of the complainant alone which was not corroborated.
17. The image showing the force number of the officer near the complainant could not automatically be assigned to the appellant as the person whose voice was captured. The complainant was not properly inducted on how to use the audio recorder. The video recorder was not clear as the weather was windy. That was probably the reason why PW2 could not recognize the voice in the video tape.
18. The 2nd accused gave unsworn evidence and could not explain the purpose for the money she received. The breakdown driver was not called to explain the purpose of Kes. 3, 000 he allegedly demanded from the complainant. There was no proof that the appellant and the 2nd accused had conspired to demand for a bribe. The 2nd accused had a bigger responsibility to explain why she received the money yet she did not issue any receipt if the money was official.
19. Offences relating to corruption attracted grave consequences, including loss of employment and even loss of future opportunities for employment. Reliance on uncorroborated evidence tainted with suspicion and doubt would be an affront to the well-known principles of criminal law regarding the burden of proof and the responsibility of the prosecution to discharge the same.
20. The prosecution did not discharge its burden of proof effectively to the satisfaction of the court that indeed there was a demand for a bribe either expressly or impliedly from the appellant. The trial court relied on uncorroborated evidence to convict the appellant on both counts.

Appeal was allowed and the conviction in respect of all counts quashed and the sentence imposed thereof set aside

12. Evidence obtained through entrapment by State agents is illegal and thus inadmissible in a criminal case

The petition sought among others a declaration that the evidence sought to be relied upon in a criminal case against the petitioner was obtained through entrapment and was thus inadmissible. The court found that the investigator of the Kenya Anti-Corruption Commission did not confine himself to investigating the petitioner's criminal activities in an essentially passive manner but exercised an inference such as to incite the commission of an offence. The court thus held that the intervention and its use in the charges meant that right from the outset the petitioner was definitively deprived of a fair trial. The court further held that the evidence so obtained through entrapment by the State agent was illegal and unlawful and thus inadmissible.

Mohamed Koriow Nur v Attorney General [2011] eKLR

Petition No. 181 of 2010

High Court at Nairobi — September 30, 2011

M Warsame, J

Evidence Law *- evidence - admissibility of evidence - claim that evidence was obtained through entrapment - whether evidence obtained by a state agent through the process of entrapment admissible.*

Criminal Law *- defences - entrapment - nature of entrapment - factors to consider in addressing entrapment and the bar against self-incrimination - when did entrapment occur.*

Constitutional Law *- fundamental rights and freedoms - right to fair trial - where evidence against an accused person was obtained through entrapment- whether the use of evidence obtained through entrapment in charges amounted to violation of the right to fair trial.*

Brief facts

Around mid-March 2007 an investigator (the investigator) at the Kenya Anti-Corruption Commission (KACC) and therefore a State agent, had been assigned to investigate an alleged grabbing of a piece of land by the petitioner. The investigator proceeded to arrange a meeting with the petitioner on March 14, 2007 and he equipped himself with a tape recorder to assist him in his investigation.

In the course of the meeting, it was alleged that the petitioner asked the investigator to make a favourable investigation report about the acquisition of the land in question so that the land could not be repossessed from him. In return for such a report it was alleged that he promised to do anything that he would be asked for. Through a concealed recording, the KACC agent engaged the petitioner in a mock bribe-bargaining that led them to settle on a bribe of one million shillings payable in two instalments of Kes. 500,000 each. It was further agreed that the first instalment would be paid the following day.

On March 15, 2007 together with five other officers, the investigator proceeded to an agreed venue with a view to arrest the petitioner if he bribed him as he had promised the previous day. The petitioner arrived at the scene and allegedly gave a brown envelope which contained Kes. 500,000. He was promptly arrested and charged with three offences relating to the contravention of the Anti-Corruption and Economic Crimes Act, No 3 of 2003. It was against those criminal charges that the petitioner filed the instant petition seeking among others a declaration that the evidence sought to be relied upon by the respondent in the criminal case against him was obtained by or through the process of entrapment and was therefore inadmissible.

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Issues

i. Whether evidence obtained by a State agent through the process of entrapment was admissible.
ii. What was the nature of entrapment and when did it occur?
iii. What were the factors to consider in addressing entrapment and the bar against self-incrimination?
iv. Whether the use of evidence obtained through entrapment in charges amounted to violation of the right to fair trial.

Held

1. The law was that it was not acceptable that the State through its agents should instruct its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so. That could be a misuse of State power and an abuse of the process of the court. The unattractive consequences, frightening and sinister in extreme cases which the State conducted of that nature were obvious. The KACC was a creature of the statute, their activities had to be confined to the four corners of the Act.
2. Entrapment was a complete defence and it did not matter that the evidence against the person was overwhelming or that his guilt was undisputed. The court must refuse to convict an entrapped person not because his conduct fell outside the proscription of the statute but because even if his guilt was admitted, the methods and manner employed on behalf of the State to bring about the evidence could not be countenanced.
3. In law entrapment was viewed as a type of lawlessness by law enforcement officers. It was a substitute for skilful and scientific investigations. It was a tactic which was rationalized under the theory that the end justified the employment of the illegal means. Entrapment occurred if the action or the omission of the investigating officer in dealing with a person would likely have induced a normally law-abiding citizen to commit a crime which he would not have committed if the normal and the requisite warning was administered.
4. As entrapment usually depended on the conduct of a State agent, the courts would not take into account the defendant's conduct, character, intent or criminal history. In doing so, the court must address itself to the various surroundings and peculiar circumstances such as transactions, receding the offence, the suspect's response to the inducement, the gravity of the offence and the difficulty of detecting the commission of certain crimes.
5. Every law-abiding citizen would likely commit a crime if sufficiently motivated. In determining whether entrapment occurred, it was important to analyze and scrutinize how much and what manner of persuasion, pressure and cajoling was brought to bear by the law enforcement agent to induce persons to commit crime. Entrapment entailed;
   a) the use of pressure;
   b) creating an unusual motive;
   c) making the crime unusually attractive;
   d) creating an opportunity to commit a crime;
   e) criminal plan originated by State agents;
   f) gaining the confidence of the accused by taking reasonable steps to assure that the person was not being set up; and
   g) outrageous police conduct.
6. The petitioner was never charged with any crime and was never investigated for bribery before the current incident. It meant that there was no reason to believe that he was involved in criminal activities which the agent was interested to discover. From the conversation, it was the State agent who was

couching the petitioner as to how the crime was to be committed.

7. It was wholly wrong for a police officer to induce a person to commit an offence in order that an offence could be detected by that officer. It was not also right that the KACC should instruct, allow or permit and direct its officers to commit an offence so that they could prove that another person committed an offence. In law where a police officer persuaded someone to commit an offence he could lay himself open to adverse comments from the court.
8. Judicial response to entrapment was based on the need to uphold the rule of the law. An accused person was not excused because he was less culpable although he could be, but because the State agent behaved improperly. The State created crime was unacceptable and improper. To prosecute in such circumstances as the case of the petitioner would be an affront to the public conscience as such a prosecution would not be fair. It was not the role of a State agent to lure, incite, instigate or assist in the commission of a crime which was not initially intended by the accused person. The important questions to be answered in addressing the issue of entrapment and the bar against self-incrimination were;
   a. whether the petitioner entitled to the sanctuary of silence if the State agent was in possession of evidence incriminating him in the commission of a crime;
   b. whether it was sufficient that the petitioner was a potential not to distort and distract a candidate who was concerned with the commission of a crime;
   c. whether the bar against self-incrimination operated merely with reference to a particular acquisition in regard to which the police investigator interrogated;
   d. whether it was right for the State agent to expose the petitioner to the perils of inculpation;
   e. whether the constitutional and statutory shield of silence swung into action or could barricade an accused person against incriminating interrogation at the stages of police investigation; and
   f. what were the other parameters of permissible and impermissible interrogation and answers.
9. While the rise in organized crime required appropriate measures be taken, the right to a fair administration of justice nevertheless held such a prominent place, that it could not be sacrificed for the sake of expedience. In any case, a distinction had to be drawn between cases where the undercover agents' action created a criminal intent that had previously been absent and those in which the offender had already been predisposed to commit the offence. The State agent did not confine himself to investigating the applicant's criminal activities in an essentially passive manner but exercised an inference such as to incite the commission of an offence. There was nothing to suggest that without the intervention of State agent, the applicant would have committed the offences charged. That intervention and its use in the charges meant, that right from the outset the applicant was definitively deprived of a fair trial.
10. If the police could interrogate to the point of self-incrimination, the subsequent exclusion of that evidence at the trial hardly helped because the harm had already been done. The police would prove through other evidence what they had procured through entrapment which would in essence defeat the right to a fair trial. Self-incrimination testimony was obviated by intelligent constitutional mechanism and anticipation. The police must act in good faith and not for example, as part of a malicious vendetta against an individual.
11. In assessing the weight to be attached to police inducement and incitement, regard was to be had to the suspect's circumstances including his vulnerability. The criminal justice system would be compromised by allowing the State to prosecute and punish someone whom its agent had caused to transgress or expressly or impliedly participated in the commission of the crime.
12. The evidence so obtained through entrapment by the state agent was illegal and unlawful and thus inadmissible in a criminal case against the petitioner.

Petition allowed with no orders as to costs.

13. Sufficiency of a voice recording and its transcript to sustain a conviction against a person accused of soliciting and receiving a bribe

The appeal was against the conviction and sentencing of the appellant for the offences of corruptly soliciting a benefit and corruptly receiving a benefit contrary to section 39(3)(a) as read together with section 48(1) of Anti-Corruption and Economic Crimes Act. The court held that by themselves, the recording and transcript would not have been sufficient evidence to sustain a conviction against the appellant. The court noted that no objection was raised by the appellant, who was represented by counsel at the trial, to the admission of the recording and that the objection appeared to be an afterthought. The court also held that an appellate court would not interfere with the exercise of sentencing discretion by a trial court unless in exercising its discretion, the trial court acted on a wrong principle or overlooked some material factor or imposed a sentence that was manifestly excessive.

Dennis Paul Manoti v Republic [2021]eKLR

ACEC Appeal No. E004 of 2021

High Court at Nairobi — April 28, 2021

Anti-Corruption and Economic Crimes Division

M Ngugi, J

Evidence Law *- admissibility of evidence - objections to the admissibility of evidence - failure to raise an objection to the admissibility of evidence at the trial court - whether an objection to the admissibility of evidence could be raised on appeal where the same was not raised at the trial court.*

Evidence Law *- evidence - evidence in a case where an accused was charged with soliciting a benefit and corruptly receiving a benefit - whether a voice recording and its transcript were by themselves sufficient evidence to sustain a conviction against a person accused of soliciting and receiving a bribe.*

Jurisdiction *- jurisdiction of an appellate court - jurisdiction to interfere with the exercise of discretion by a trial court - under what circumstances could an appellate court interfere with the exercise of discretion in sentencing an accused person.*

Brief facts

The appellant was convicted by the trial court on two counts of corruptly soliciting a benefit of Kes. 6,000,000 and corruptly receiving a benefit contrary to section 39(3)(a) as read together with section 48(1) of Anti-Corruption and Economic Crimes Act (ACECA). The appellant was sentenced to a fine of Kes. 750,000 on each count, and in default to imprisonment for a period of two (2) years on each count. Aggrieved by the decision, the appellant filed the instant appeal challenging the conviction and sentence imposed by the trial court.

The grounds of appeal were, inter alia, there was no sufficient evidence to sustain a conviction of the offence of corruptly soliciting a benefit and the audio-recording relied on in convicting him was improperly admitted into evidence since it did not have a certificate from the certified government body. The appellant further claimed that the audio evidence used as evidence in court was not audible and therefore fell short of the standard required of evidence.

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Issues

i. Whether a voice recording and its transcript were by themselves sufficient evidence to sustain a conviction against a person accused of soliciting and receiving a bribe.

ii. Whether an objection to the admissibility of evidence could be raised on appeal where the same was not raised at the trial court.

iii. Under what circumstances could an appellate court interfere with the exercise of discretion in sentencing an accused person?

Relevant provisions of the law

Evidence Act (Cap. 80)

Section 106B - Admissibility of electronic records

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

a) identifying the electronic record containing the statement and describing the manner in which it was produced;

b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

c) dealing with any matters to which conditions mentioned in subsection (2) relate; and

d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate),

shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

Held

1. The recording at issue was made by PW6, who, together with PW2, were able to identify the voice of the appellant from the recording. PW2 had worked with the appellant for about a year and was able to recognize the voice of the appellant from a section of the recording as the appellant's voice was familiar to him. The recording had been transcribed by PW7, the investigating officer, who testified that he had transcribed the recording in the presence of PW6 who identified the voices.
2. The recording was played in court during the trial and the trial court observed that the recording was reasonably audible save for some parts which had a lot of background noise. PW2 was able to identify the voice of the appellant, who was his junior in the Rates Department of the City County. No objection was raised by the appellant, who was represented by counsel at the trial, to the admission of the recording, the objection appeared to be an afterthought.
3. In his evidence, PW7 produced a certificate (exhibit 16) which complied with the general requirements of section 106(B)4) of the Evidence Act. The certificate produced by the investigating officer complied with the requirements of section 106(B)(4).
4. From the transcript, there was a conversation between the appellant, the complainant and PW6. The appellant's voice was identified by PW2 and PW6 when the recording was played in court. Taken as a whole, the conversation showed an express and explicit demand for a bribe. By themselves, the recording and transcript would not have been sufficient evidence to sustain a conviction against the appellant. However, the evidence before the trial court showed that on the day following the recording of the conversation, PW6 visited the appellant at his office, and together they went into Ankara hotel.

PW6 testified that he gave the appellant Kes. 100,000 which he had been given by EACC after it had been treated with APQ powder.

5. An analysis by PW5 of various exhibits given to him, including swabs of the appellant's hands and his coat, showed that they were tainted with the APQ powder that had been used to treat the money. The totality of the evidence, including the fact that the powder was not only on the appellant's hands but also on his coat; the recording, and the evidence that he received the envelope with the money from PW6 established that he did indeed solicited and received a bribe from the complainant as charged in count I and 3.
6. Sentencing was within the discretion of the trial court, and an appellate court would not interfere with the exercise of such discretion unless it was demonstrated and found that the court, in exercising its discretion, acted on a wrong principle or overlooked some material factor or imposed a sentence that was manifestly excessive.
7. The appellant had not demonstrated that the trial court, in reaching its decision on sentencing, exercised its discretion wrongly, applied the wrong principles, or that the sentence was manifestly excessive. The penalty under section 18 of the Bribery Act being a term of imprisonment not exceeding 10 years and a fine not exceeding Kes.5 million, the penalty imposed on the applicant was not excessive but was reasonable in the circumstances. The trial court imposed a non-custodial sentence, a fine of Kes. 750,000 on each count, and in default of payment a term of imprisonment. The sentence was in accord with the provisions of the Bribery Act.

Appeal dismissed; conviction and sentence upheld.

14. Besides the certificate issued under section 106B of the Evidence Act there is no other certificate which is required in admitting electronic records

The appellant was charged and convicted of three counts of offences under the Anti-Corruption and Economic Crimes Act. The first and second counts were on corruptly soliciting for a benefit while the third count was on corruptly receiving a benefit. The court held that besides the certificate issued under section 106B of the Evidence Act on the admissibility of electronic records, there was no other certificate which should have been produced. The court also held that cash bail could be paid at any police station and not necessarily Nyayo Stadium Police Post.

Chrisantus Aleke Ateba v Republic [2018] eKLR

Anti-Corruption Criminal Appeal No. 4 of 2016

High Court at Nairobi — May 31, 2018

Anti-Corruption & Economic Crimes Division

H I Ong'udi, J

Criminal Law *- corruption and economic crimes - corruptly soliciting for a benefit - appellant convicted on three counts of corruptly soliciting for a benefit - where the appellant was a traffic officer - whether the evidence on solicitation and receipt of a bribe was properly adduced in the trial - whether the case was one of entrapment - whether there was sufficient evidence to convict the appellant - whether the sentence was harsh and excessive in the circumstances - Anti-Corruption and Economic Crimes Act (No. 3 of 2003) section 39(3)(a), 48 (1); Evidence Act (Cap. 80) section 106A and 106B.*

Evidence Law *- admissibility of evidence - admissibility of electronic evidence - whether there was another certificate in addition to a certificate under section 106B of the Evidence Act that was required before admitting electronic evidence - Evidence Act, Cap. 80, section 106B(4).*

Words and Phrases *- entrapment - definition of entrapment - the action of tricking someone into committing a crime in order to secure their prosecution - The dictionary.*

Words and Phrases *- entrapment - definition of entrapment - a law-enforcement officers or government agent's inducement of a person to commit a crime, by means of fraud or undue persuasion, in an attempt to later bring a criminal prosecution against that person; the affirmative defence of having been so induced. To establish entrapment (in most states) the defendant must show that he or she would not have not committed the crime but for the fraud or undue persuasion - Black's Law Dictionary Ninth Edition at page 612.*

Brief facts

The appellant was charged and convicted of three counts of offences under the Anti-Corruption and Economic Crimes Act No. 3 of 2003 (ACECA). The first and second counts were on corruptly soliciting for a benefit contrary to section 39(3)(a) as read with section 48(1) of ACECA. The 3rd count was on corruptly receiving a benefit contrary to section 39(3) as read with section 48 (1) of ACECA. Upon conviction the appellant was fined as follows; count 1 – Kes.50,000 in default to serve one (1) year imprisonment; count 2 – Kes.25,000 in default to serve six (6) months imprisonment; and count 3 – Kes.30,000 in default to serve six (6) months imprisonment.

The prosecution case at the trial court was that the complainant was driving motor vehicle and overlapped

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traffic. The appellant, a policeman, stopped the complainant and told her that she had committed an offence and asked her to give him Kes.3,000 which she did after reporting to the Ethics and Anti-Corruption Commission officers.

Being aggrieved with the conviction and sentence, the appellant filed the instant appeal on among other grounds that the trial court; erred in law in admitting entrapment evidence presented by the prosecution to prove the charges facing him and therefrom, reaching a finding that there was neither direct nor indirect inducement of the appellant into committing the offences charge and that the trial court erred in law in giving him an unduly harsh and severe sentence.

Issues

i. Whether there was another certificate in addition to a certificate under section 106B of the Evidence Act that was required before admitting electronic evidence.

ii. Whether cash bail for a traffic offence could be paid at any police station not necessarily where the accused person committed the offence.

Relevant provisions of the law

Evidence Act (Cap. 80)

Section 106B - Admissibility of electronic records

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

(2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—

(a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

Held

1. A traffic offence was committed by the complainant and was even booked in the occurrence book. There was no evidence that the complainant induced, enticed or unduly persuaded the appellant to receive money from her. The instant matter was not a case of entrapment.

2. The appellant was an employee of the National Police Service, a public body which had employed him as a police constable. There was no photo produced and/or admitted before the trial court for receipt under section 78 of the Evidence Act. The conditions to be complied with were those set out in section 106(2) of the Evidence Act. Those must be satisfied before the evidence was admitted.

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3. PW8 was the officer who prepared the recording gadget for the assignment. She prepared a certificate in compliance with section 106B of the Evidence Act. That certificate was produced as exhibit 3. In the certificate (exhibit 3), PW8 had clearly set out what she did and confirmed that the device had been tested in the presence of the complainant and the device was found to be in good working condition. That was all in support of the evidence being produced under section 106B of the Evidence Act. Besides that certificate there was no other certificate which should have been produced. Section 106B (4) was therefore complied with.
4. There was no evidence adduced to show that any of the conditions in sections 106B(2) and (4) of the Evidence Act was not complied with to make the evidence inadmissible. The electronic evidence was properly received. The appellant was properly identified in the clips.
5. Besides, the electronic evidence was the evidence of the complainant. She explained in detail what had transpired after she was stopped along Lang'ata road, which was next to Lang'ata Police Station. Lang'ata Police Station had a traffic department housed there. Cash bail could be paid at any police station and not necessarily Nyayo Stadium Police Post. There was therefore no good reason for having the complainant to go all the way to Nyayo Stadium.
6. The complainant's testimony had been well corroborated by the evidence of the recorded conversation and video and the transcript. The small differences in the tenses put in Kiswahili did not go to the root of the conversation. Indeed, the evidence on record supported the charges.
7. On sentence, count 1 and count 2 were similar. There was no explanation for one carrying a fine of Kes.50,000 while the other was Kes.25,000.

Appeal partly allowed.

Orders:

i. Sentence on count 1 imposed a fine similar to that in count 2 that was Kes.25,000, in default, six (6) months imprisonment.

ii. Any excess paid to be refunded to the appellant.

iii. Save for the sentence on count 1, the conviction and sentence was upheld.

15. The appropriate time and forum for determining whether the seat of a Member of County Assembly should be declared vacant as a result of his conviction for the offence of bribery was when the judgment and sentence was presented to the Speaker

The applicant, who was a Member of County Assembly, had been convicted and sentenced for offences under the Bribery Act by the trial court which also directed that the applicant be barred from holding public office as a Member of County Assembly. The applicant thus filed the instant application for stay of the execution of the sentence and order of the trial court barring him from serving as a member of the county assembly. The instant court held among others that the appropriate time and forum for determining whether the applicant's seat should be declared vacant as a result of his conviction for the offence of bribery was when the judgment and sentence was presented to the Speaker, and he acted in accordance with his constitutional and statutory mandate.

David Njilithia Mberia v Republic [2021] eKLR

ACEC Appeal No. E005 of 2021

High Court at Nairobi — April 28, 2021

Anti-Corruption & Economics Crimes Division

M Ngugi, J

Jurisdiction *- jurisdiction of the High Court - jurisdiction in an application of stay of execution of a trial court's orders - where the trial court had convicted and sentenced a Member of County Assembly for the offence of bribery and directed that the Member of County Assembly be barred from holding public office - whether High Court had the jurisdiction to determine whether the seat of a Member of County Assembly convicted and sentenced for the offence of bribery should be declared vacant.*

Criminal Procedure *- orders - excessive orders - claim that an order barring a Member of County Assembly convicted and sentenced for the offence of bribery from holding public office was excessive - whether such an order was excessive - Constitution of Kenya, 2010, article 193(2) and 260; Bribery Act, No 47 of 2016, section 18(8).*

Brief facts

The applicant was the Member of County Assembly for Karen, Nairobi City County. He was charged in the trial court with three offences under the Bribery Act No. 47 of 2016. He was found guilty as charged in counts II, III and IV and sentenced to pay fines or in default to serve 12 months' imprisonment on each count and the sentences were to run consecutively. In addition to the sentences, the trial court directed that the applicant be barred from holding public office as a Member of County Assembly in accordance with the law.

The trial court further directed that a certified copy of the judgment, sentence and order be served upon the Speaker of the Nairobi City County Assembly for his compliance and record. Aggrieved by both his conviction and sentence, the applicant filed an appeal and the instant application seeking, among others, orders that; the court stay the execution of the sentence and order of the trial court barring him from serving as a Member of County Assembly pending the hearing and determination of the application.

The applicant contended that upon receipt of the judgment of the trial court, the Speaker would declare his seat vacant, thereby rendering his appeal nugatory. He further contended that it would be prejudicial and irreparable for him to lose his seat should his conviction be eventually quashed and the sentence set

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aside, thereby compromising his constitutional right of appeal. The applicant further contended that his appeal had overwhelming chances of success because his sentencing under section 18(8) of the Bribery Act barring him from serving as an elected Member of County Assembly was outlawed by article 194 of the Constitution of Kenya, 2010 (Constitution) and section 63(4) of the Anti-Corruption and Economic Crimes Act.

Issues

i. Whether the High Court had the jurisdiction to determine whether a seat of a Member of a County Assembly convicted and sentenced for the offence of bribery should be declared vacant.

ii. Whether an order barring a Member of a County Assembly convicted and sentenced for the offence of bribery from holding public office was excessive.

Relevant provisions of the law

Bribery Act, No. 47 of 2016

Section 18 - Penalties

(8) If the convicted person is a State officer or a public officer, such person shall be barred from holding public office, in accordance with the provisions of the Constitution, the Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003), the Public Officer Ethics Act, 2003 (No. 4 of 2003), and the Leadership and Integrity Act, 2012 (No. 19 of 2012).

Held

1. Stay of execution of sentence and judgment in criminal cases was granted only in exceptional circumstances. As a court directing its mind to the appeal against criminal conviction and sentence of the applicant, the court was required to be satisfied that the applicant's appeal had overwhelming chances of success before it could exercise jurisdiction to grant orders of stay pending appeal.
2. The applicant was convicted and sentenced under the provisions of the Bribery Act, section 18(8). The applicant was a State officer as defined in article 260 of the Constitution. He had been convicted of a bribery offence in accordance with the provisions of the Bribery Act. In directing that the applicant be barred from holding public office and that the judgment of the court should be forwarded to the Speaker of the County Assembly of Nairobi, the trial court was acting in accordance with the statutory requirements under the Bribery Act. The applicant had not argued that the court had meted out an erroneous or manifestly excessive sentence.
3. In arguing his application for stay pending appeal, the applicant had not challenged the sentence of the court in relation to his conviction for bribery. He had not attempted to show the court that his appeal had overwhelming chances of success, which was a critical consideration in determining whether or not to issue orders of stay of the judgment and sentence of the trial court. As a court seized of an application for stay of a judgment and sentence in a criminal conviction, the court did not have anything before it that satisfied it that there was a basis for issuing the orders that the applicant sought.
4. Article 193(2) of the Constitution provided for disqualification from election as a Member of County Assembly. The Bribery Act was enacted in 2016. Its preamble stated that it was an Act of Parliament to provide for the prevention, investigation and punishment of bribery, and for connected purposes. In enacting the Act, Parliament was aware of the provisions of the Constitution and ACECA, yet it expressly provided that a public or State officer convicted of corruption should be barred from holding public office.
5. The applicant having been properly found by a court of competent jurisdiction to be guilty of the

offence of bribery under section 6 of the Bribery Act, the trial court properly made the declaration required under section 18(8) of the Bribery Act that the applicant was not fit to hold public office, and to direct the transmission of the judgment and sentence to the Speaker of the County Assembly of Nairobi. The decision of the trial court was in accord with the intention of the legislature in enacting the Bribery Act.

6. The duty to consider whether or not the applicant was entitled to the benefit of article 193(3) of the Constitution was a responsibility that fell on the Speaker of the County Assembly. The court seized of the criminal trial having done what it was required to do by statute, the question that the applicant asked the court to answer in the instant application could only be addressed to the Speaker upon receipt of the judgment and sentence which included the declaration that the applicant was unfit to hold public office.
7. The appropriate time and forum for determining whether the applicant's seat should be declared vacant as a result of his conviction for the offence of bribery was when the judgment and sentence was presented to the Speaker, and he acted in accordance with his constitutional and statutory mandate. To ask the court to issue the orders directed at the Speaker to prevent him from acting in accordance with the statutory requirements upon conviction of the applicant was to be speculative in anticipating the actions of the Speaker. Like the court, the Speaker was under an obligation, as provided under the Constitution, to abide by the Constitution. Should he fail to, then the applicant was entitled to raise a constitutional issue, in an appropriate forum and appropriate proceedings, relating to his entitlement to the 'benefit' of article 193(3).
8. The circumstances of the applicant in the instant matter could well present the opportunity to interrogate what the implications of article 193(3) and 99(3) of the Constitution relating to the position of Members of Parliament were *vis a vis* the entire constitutional and legislative framework established under Chapter 6 of the Constitution, ACECA, the Public Officers Ethics Act, the Leadership and Integrity Act, and the Bribery Act.
9. There would be a need, at an appropriate forum and in appropriate proceedings, to reconcile the provisions at issue, as the Constitution did not subvert itself. The question whether the Constitution intended to provide a strong framework for the inculcation of ethics and integrity in leadership and to combat corruption by virtue of articles 10 and Chapter Six while simultaneously undermining such framework by providing as it did in articles 193(3), 194 and 99(3) in relation to State officers convicted of corruption offences was a question for another forum.
10. The court had not been shown a basis for staying execution of a lawful judgment and sentence imposed against the applicant by a court of competent jurisdiction under the Bribery Act. What the court could do was put in place administrative directions that enabled the applicant to expeditiously prosecute his appeal and, should his appeal be successful, protect his entitlement to hold the public office that he sought to protect. That, the court had already done.

Application dismissed; applicant directed to proceed with his substantive appeal.

16. Essential ingredients for the offences of corruptly soliciting for a benefit and corruptly receiving a benefit

The accused was charged with the offences of corruptly soliciting for a benefit and corruptly receiving a benefit. The court in this case stated the essential ingredients for the offences of corruptly soliciting for a benefit and corruptly receiving a benefit.

Republic v Robert Kiriago [2018] eKLR

Anti- Corruption Court Case No. 15 of 2016

Chief Magistrate's Court at Nairobi May 18, 2018

JO Magori, SPM

Criminal Law *- corruption and economic crimes - offences of corruptly soliciting for a benefit and corruptly receiving a benefit - what were the essential ingredients for the offences of corruptly soliciting for a benefit and corruptly receiving a benefit - Anti-corruption and Economic Crimes Act, No. 3 of 2003, sections 2(1), 39(3) and 48(1).*

Words and Phrases *- soliciting - definition of soliciting - to ask for or try to obtain something from someone - Concise Oxford English Dictionary.*

Words and Phrases *- soliciting - definition of soliciting - to ask for something, such as money or help from people, companies, among others, to ask (a person or group) for money, help, among others.*

Brief facts

The accused was charged with four counts under the Anti-Corruption and Economic Crimes Act No. 3 of 2003(ACECA). In the first, second and third counts the accused was charged with the offence of corruptly soliciting for a benefit contrary to section 39(3)(a) as read with section 48(1) of the ACECA. In the fourth count the accused was charged with the offence of corruptly receiving a benefit contrary to section 39(3)(a) as read with section 48(1) of the ACECA.

After the close of the prosecutions case, the accused was acquitted in the second and third counts. The accused was placed on his defence in the first and fourth counts. The complainant testified that he was a civil engineer and was working at a construction site. He further testified that four officers including the accused who introduced themselves as officers from the department of Environment and Anti-Dumping County Government of Nairobi visited the construction site and told him to stop the excavation work until he obtained an approval letter. The complainant requested for the number of the accused to enable him communicate with him on how to get the letter quickly.

On October 10, 2016 the accused called the complainant and asked him to meet him in his office. He also asked him whether he had prepared himself with Kes.140,000. It was at that point the complainant decided to report the matter to the Ethics and Anti-corruption Commission (EACC) for assistance. The accused asked the complainant to give Kes.20,000 so as to continue with excavation work without harassment and Kes.120,000 to have the case against him pending in city court withdrawn. All that was recorded by a recording device given to the complainant by EACC officers. Later on, the accused picked the complainant and took him to his office and the complainant informed him that he had only managed Kes.90,000. The accused told him to place the money in the drawer he had opened half way. All that was captured in a recording.

Republic v Robert Kiriago [2018] eKLR

Issue

What were the essential ingredients for the offences of corruptly soliciting for a benefit and corruptly receiving a benefit?

Held

1. The accused was charged with the offence of corruptly soliciting for a benefit contrary to section 39(3) as read with section 48(1) of the ACECA in the first count. The prosecution was required to prove that; -
   a. the accused was an agent within the meaning of ACECA;
   b. the inducement benefit of reward was intended to influence the accused from doing or not doing something or showing favour or disfavour to any person on a matter touching on officers of accused's principal or employer; and
   c. there was solicitation.
2. In the fourth count in which the accused was charged with the offence of corruptly receiving a benefit contrary to section 39(3) as read with section 48(1) of the ACECA, the prosecution was required to prove that the accused received the alleged benefit.
3. The accused was an employee of Nairobi City County Government as a deputy incharge of the Anti-Dumping Unit in the Environment Department. The accused was therefore an agent of Nairobi County Government which was the principal in relation to him.
4. Soliciting was not defined under the ACECA. It was corruption to ask for any benefit not legally due in order to do one's appointed duty and against the public interest to secure a benefit by corruption. A public servant was paid a salary to perform his appointed duties and discharge those duties without seeking other emoluments corruptly.
5. As per the transcript of the recorded conversation held between the complainant and the accused at Helena Hotel on October 10, 2016, the accused was well familiar with the issue of the Kes.140,000. The responses of the accused indicated that they discussed the issue with the complainant and he asked for Kes 140,000. The accused therefore solicited for a benefit of Kes. 140,000 from the complainant as charged in count 1.
6. Benefit was defined in section 2(1) of ACECA as any gift, loan, fee, reward, appointment, service, favour, forbearance, promise, or other consideration or advantage. The essential ingredients of the offence were that the accused must have received a benefit, that it must have been received corruptly as an inducement to bring about some given results in a particular matter, that the benefit must not be legally due or payable. The accused received a benefit of Kes. 90,000 from the complainant as charged in count 4.
7. The defence by the accused was just a mere denial. The desk where the money was recovered belonged to accused and was not communal. Considering the evidence presented, the accused solicited for Ksh. 140,000 from the complainant as charged in the first count. The accused also received Ksh.90,000 from the accused as charged in the fourth count. The prosecution had therefore proved the case against the accused to the required standard of beyond reasonable doubt.

Accused found guilty as charged in counts one and four and was accordingly convicted in the two counts for the offence of corruptly soliciting for a benefit contrary to section 39(3)(a) as read with section 48(1) of the ACECA and the offence of corruptly receiving a benefit contrary to section 39(3)(a) as read with section 48(1) of the ACECA.

17. Failure to identify the voice of an accused person during the translation of a recording of a conversation in which the accused was alleged to be part of, did not invalidate the translation

The appellant had been charged with three counts of the offence of receiving a bribe. The trial court convicted the appellant on count I and sentenced her to a fine of Kes. 60,000 and in default to serve one (1) year imprisonment. In the instant appeal, the court held that the appellant's voice had been identified for the Ethics and Anti-Corruption Commission (EACC) officers by the complainant and a witness (PW3) when he was called to the EACC offices. The court also held that the fact that there was no one to identify the appellant's voice during the translation did not in any way invalidate the translation produced. The court further held that it would impose an onerous burden and virtually render prosecutions impossible if there was a requirement that one needed to be a linguist in order to translate a document.

Pamela Zipporah Moriasi v Republic [2021] eKLR

ACEC Appeal No. 8 of 2020

High Court at Nairobi — April 28, 2021

Anti-Corruption and Economic Crimes Division

M Ngugi, J

Evidence Law *- evidence - transcription of a voice recording - claim that the translation of a voice recording was not done by a professional linguist - whether it was mandatory for a person translating a recording from one language to another to be a professional linguist - whether failure to identify the voice of an accused person during the translation of a recording of a conversation in which the accused was alleged to be part of invalidated the translation.*

Brief facts

The appellant had been charged with three counts of the offence of receiving a bribe contrary to section 6(1)(a) as read with section 18(1) and (2) of the Bribery Act. The particulars of the counts were the same save for the date of commission of the offence. The particulars were that the appellant, being a person employed by a public body, to wit Ministry of Interior and Co-ordination of National Government as a chief requested for a financial advantage of Ksh 3,000 from the complainant as an inducement to issue her with a letter confirming the beneficiaries to carry out a land succession, a function to which the bribe related.

The trial court convicted the appellant on count 1 and sentenced her to a fine of Kes. 60,000 and in default to serve one (1) year imprisonment. She was acquitted on counts II and III. The gravamen of the appellant's case was that the trial court erred in convicting her on the basis of insufficient evidence, the prosecution having failed to prove its case against her to the required standard.

Issues

i. Whether failure to identify the voice of an accused person during the translation of a recording of a conversation in which the accused was alleged to be part of invalidated the translation.

ii. Whether it was mandatory for a person translating a recording from one language to another to be a professional linguist.

Pamela Zipporah Moriasi v Republic [2021] eKLR

Relevant provisions of the law

Bribery Act (cap 79B)

Section 6 - Receiving a bribe

(1) *A person commits the offence of receiving a bribe if —*

a. the person requests, agrees to receive or receives a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly whether by that person receiving the bribe or by another person;

b. the recipient of the bribe requests for, agrees to receive or accepts a financial or other advantage and the request, agreement or acceptance itself constitutes the improper performance by the recipient of a bribe of a relevant function or activity.

c. in anticipation of or as a consequence of a person requesting for, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly by that person, or by another person at the recipients' request, assent or acquiescence.

Held

1. A reading of section 6 of the Bribery Act demonstrated that requesting for a bribe was an element of the offence of receiving a bribe. The appellant was charged with the offence of receiving a bribe, an element of which was requesting for a bribe. The charge sheet before the court clearly set out the statement of the specific offence with which the appellant was charged, as well as the particulars of the offence with which she was charged. The particulars of the offence stated that being a person employed by a public body, she requested for a bribe as an inducement to write a letter for the complainant. The charge sheet was proper. It conformed to the provisions of the Criminal Procedure Code with respect to framing of charge sheets, and the appellant was clear with regard to what offence she was charged with. The challenge to the conviction and sentence of the appellant on the basis of the charge sheet had no merit.
2. The totality of the evidence presented before the trial court established, beyond a reasonable doubt, that the appellant requested and received from the complainant a benefit as charged in count I.
3. The evidence before the trial court was that PW9 was well conversant with the Ekegusii language. He was from the Kisii community and having studied the language in primary school, he was able to write and speak the language fluently. There was no challenge during the trial to the transcription on the basis that it had errors, was incorrect or was an inadequate reproduction of the conversation between the appellant and the complainant. There was no question of voice identification by the witness who did the transcription. The challenge to the conviction and sentence on the basis that the transcription was not done by a professional linguist in Ekegusii was without merit.
4. It would impose an onerous burden and virtually render prosecutions impossible if there was a requirement that one needed to be a linguist in order to translate a document or conversation from Kenya's multiple languages to English or Kiswahili.
5. From the evidence of PW9, he translated the recording from Ekegusii to Kiswahili. In doing so, he was not required to know that it was the appellant's voice that had been captured on the recording. The appellant's voice had been identified for the Ethics and Anti-Corruption Commission (EACC) officers by the complainant and PW3 when he was called to the EACC offices. The fact that there was no one to identify the appellant's voice during the translation did not in any way invalidate the translation produced.
6. In his evidence, the investigating officer testified with respect to the audio and video recording, and the transfer of the video to a CD. He also produced, among other documents, a certificate marked

as exhibit 21. In the circumstances, the challenge to the conviction and sentence on the basis that a certificate under section 106 of the Evidence Act was not produced was without merit.

7. The trial court considered the appellant's defence but concluded that based on the evidence on record, it was not satisfied that the prosecution of the appellant and the evidence adduced against her occurred because there was a grudge between her and the complainant.

Appeal dismissed; conviction and sentence upheld.

18. A person's lack of mandate to undertake a function to which a bribe relates is not a ground for defence to a charge of receiving a bribe

The accused was charged with four counts for the offence of receiving a bribe. The court pointed out that section 6(3) (a) of the Bribery Act did not regard one's lack of mandate to undertake a function to which a bribe related as a ground for defence to a charge of receiving a bribe. The court thus held that the fact that such a person that made the request for a bribe had no capacity to execute the particular activity or function to which the bribe related was immaterial.

Republic v Nelson Nickson Odaya [2020] eKLR

Anti-Corruption Case No. 22 of 2018

Chief Magistrate's Court at Nairobi — October 23, 2020

L N Mugambi, CM

Criminal Law *- anti-corruption and economic crimes - offence of receiving a bribe - where accused was neither an employee of the Anti-Counterfeit Authority (ACA) or its agent - whether a person's lack of mandate to undertake a function to which a bribe related was a ground for defence to a charge of receiving a bribe - when did improper performance of a relevant function occur with regard to the Bribery Act - Bribery Act, No 47 of 2016, sections 6 and 7.*

Words and Phrases *- improper - definition of improper - incorrect, unsuitable or irregular; fraudulent or otherwise wrongful - Black's Law Dictionary, Tenth Edition.*

Brief facts

The complainant was a businessman in Nairobi dealing with phone accessories. On February 13, 2017 some people who were accompanied by police officers went to his shop and carried out an inspection targeting suspected counterfeit products. Some of the phone accessories from his shop were seized and inventoried. Then the accused contacted the complainant offering to assist him in the case and requested a financial advantage of Ksh. 395,000 (which was later scaled down to Ksh. 180,000) from the complainant as an inducement to forbear charging him with the offence of having possession in the course of trade, counterfeit goods.

The accused was subsequently charged with four counts for the offence of receiving a bribe contrary to section 6(1)(a) as read with section 18 of the Bribery Act No. 47 of 2016. The particulars were that the accused, being a person employed by Extra-group consultant and acting as agents of Tecno Technologies requested a financial advantage of different amounts from the complainant as an inducement to forbear charging him with the offence of having possession in the course of trade, counterfeit goods contrary to section 32 (a) as read with section 35(1) of the Anti-Counterfeit Act, 2008 (ACA Act).

Issues

i. Whether a person's lack of mandate to undertake a function to which a bribe related was a ground for defence to a charge of receiving a bribe.

ii. When did improper performance of a relevant function occur with regard to the Bribery Act.

Held

1. The offence of receiving a bribe was set out in section 6 of the Bribery Act, No. 47 of 2016 which

had several paragraphs each prescribing specific forms that the offence could be committed as follows:

a) Section 6(1)(a) related to a situation where the person requested, agreed to receive or received a financial or other advantage intending to influence or to cause improper performance of the relevant function by himself or by another person.

b) Section 6(1)(b) applied to a situation where the person, who actually requested, agreed to receive or received the financial or other advantage knew or believed that his own conduct was in fact an improper performance of the relevant function or activity in question.

c) Section 6(1)(c) related to where the person was in anticipation of, or as a result of the requesting for, agreeing to receive or accepting a financial or other advantage the person in fact performed or caused another person to in fact perform a relevant function improperly at his request, assent or acquiescence.

d) The import of section 6(2)(a) was that if a third party was involved to be agent in the transaction, then both the principal and the third party, each would be regarded as the agent of the other, meaning the one for whom bribe was requested for or received on his behalf and the third party who requested were both liable for the actions of each other.

e) Likewise, under section 6 (2) (b), the one who requested, agreed to receive or received such financial or other advantage could not exonerate themselves just because they were not to benefit from such financial or other advantage in question as long as the object of the financial or other advantage was to cause or did cause a relevant function to be performed improperly by reason of such financial or other advantage that was involved.

f) The effect of section 6(3)(a) was that it did not allow anyone to escape culpability on the basis that they were not actually empowered to execute the particular activity or function for which a bribe was requested or received.

g) Section 6(3)(b) meant the motive or state of mind of the giver was irrelevant if the financial or other advantage resulted in improper performance of relevant function.

h) Section 6(3)(d) was a situation where the one canvassing for a bribe or even receiving it might be doing it behind the back of the person who was actually performing the function or activity, the fact that the person performing that function or activity was oblivious that there had been requesting or receiving the bribe would not be a ground for the person requesting or receiving the financial or other advantage to defeat his prosecution under section 6.

2. From the reading of section 7 of the Bribery Act, what comprised relevant function was explained in section 7(1)(a). Section 7(1)(b) laid out the conditions which must be met in performance of relevant function or activity, hence doing the contrary due to a financial or other advantage was what should be taken as improper performance of a given relevant function or activity. Improper performance thus occurred when the expectations laid down under section 7(1)(b) were defeated due to influence the financial or other advantage in question had in the performance of the relevant activity or function. The effect being to make the person executing the relevant function or activity to depart from applying the tenets of good faith, impartiality or conducting themselves with a character of a person in a position of trust while performing such relevant function or activity.
3. The offence of receiving a bribe under section 6(1) of the Bribery Act could succinctly be described as requesting, agreeing to receive or receiving a financial or other advantage to influence the improper performance of relevant function or by reason of which a relevant function was improperly performed.
4. Relevant function was not restricted to functions of public nature only; the list was extensive. It

included: a function of a public nature to be carried out by a State officer, pursuant to his or her duties, any function carried out by a foreign official pursuant to his or her duties, any activity connected with business, and or any activity performed by or on behalf of body of persons whether corporate or otherwise. Private interests were thus covered as well.

5. Since the Bribery Act set out a general criteria for determination of whether a relevant function or activity had been performed properly by making reference to good faith, impartiality or if it was done in accordance of what was ordinarily expected of a person in a position of trust; therefore the responsibility lay with the court to consider any given factual situation that came before it against that criteria to determine objectively whether or not the acts complained of amounted to improper performance of relevant function or activity by the person charged. Consequently, if something was demonstrated to have been dome with a fraudulent or dishonest intention, it constituted improper conduct.
6. There was nothing wrong with the particulars as framed in the charge sheet since they were consistent with the evidence adduced.
7. The submission that the accused was neither an employee of the Anti-Counterfeit Authority (ACA) or its agent, and could thus not execute the mandate under the Act, lacked merit in view of section 6(3)(a) of the Bribery Act which did not regard one's lack of mandate to undertake a function to which a bribe related as ground for defence to a charge under section 6(1) of Bribery Act. The fact that such a person that made the request for a bribe had no capacity to execute the particular activity or function to which the bribe related was immaterial.
8. Under section 34A of the Anti-Counterfeit Act (ACA Act), it was the executive director of the ACA who was mandated to undertake the process of dealing with a criminal matter under the ACA Act otherwise than through the court, it was not a mandate for an agent of a brand owner or even the brand owner himself.
9. From the conversation captured in the transcript between the accused and the complainant on February 16, 2017 at Tawi Hotel, the accused arrogated to himself the roles donated to the executive director of ACA. The hurried manner and finality with which the accused was hell bent to conclude the matter without bringing ACA on board to ascertain first what the complainant was required to pay was wrongfully fraudulent. It was contrary to the provisions of the Act and also against the evidence of ACA inspector who testified on the steps that should have been followed.
10. From the evidence reviewed, the accused deliberately perverted the law for purposes of inducing complainant to pay money, of which 83.3 % was meant for a principal whose private interests he was advancing as his agent. Even if the complainant had expressed his wish to settle the matter through alternative dispute resolution to the accused, the accused should not have dishonestly resorted into taking advantage of him through manipulation and encouraging him to seal a deal behind the scenes to principally benefit his principal contrary to the laid down procedure of handling disputes as required under the law.
11. The accused knew all along the limits of his role as an agent of a brand owner under the ACA Act but he dishonestly chose to assume the powers of the executive director of ACA under the ACA Act by determining and requesting the complainant to pay Kes. 180,000; money that had no approval of ACA as required by the law, and which the biggest chunk of it, namely Kes. 150,000, equivalent to 83.3% was according to him supposed to be deposited into an account of his own principal.
12. The overriding object behind the actions of the accused in explicitly disregarding the clear provisions of the law was to manipulate the complainant in order to gratify a private interest of his principal by

ensuring that the complainant deposited the money into his principal's account. That was a manifestation of greed and lack of good faith in his dealing with the complainant hence his actions constituted improper performance of the relevant function or activity which went against the provisions of section 6(1)(a) of the Bribery Act.

13. The request made by the accused for Kes. 180,000 on February 16, 2017 as reflected in the transcript and captured in count III thus infringed section 6(1)(a) of the Bribery Act as the intention of the accused was to cause improper performance of the relevant function or activity under the ACA Act by encouraging and dishonestly diverting the complainant from the laid down process with the aim of giving his principal some financial advantage or gain. The prosecution evidence had satisfied beyond reasonable doubt the guilt of the accused in count III.
14. Unlike count III where the complainant's evidence of their deliberations was corroborated by the contents of the transcript, in count I and II it was only the complainant's oral account in support of the two counts. Since offences relating to corruption attracted grave consequences including loss of employment and loss of future opportunities for employment, reliance on uncorroborated evidence as a basis for entering a conviction ought to be discouraged. In the two counts therefore, the court gave the accused a benefit of doubt and acquitted him under section 215 of the Criminal Procedure Code.
15. In count IV, which alleged the accused received Kes. 50,000; a thorough scrutiny of the transcript produced as an exhibit revealed that the discussion between the accused and the complainant had settled on depositing the agreed amount of Kes. 180,000 in two accounts that the accused was to provide. Cash payment was not part of the discussion at all. Even if the accused touched that money, it could not be said that he received it knowingly in the furtherance of the agreement they had just reached since the mode of delivery was not that cash payment would be made. The court acquited him of count IV.

Accused found guilty and convicted of count III for requesting payment of Kes. 180,000 of which the largest percentage, 83.3% was to be applied towards satisfying the private interests of his principal under circumstances that explicitly violated the provisions of ACECA Act thereby constituting improper performance of that function or activity through manipulation of the complainant in order to derive a financial advantage for the benefit of his principal, a clear breach of section 6(1)(a) as read with section 7 and section 18 of the Bribery Act.

19. Receipt of a bribe on behalf of a person who had solicited a bribe does not break the chain of causation in the offences of solicitation and receiving

Receipt of a bribe by an agent of an accused does not break the chain of causation that weaved its way to the 2nd accused person.

Republic v Felix Nzomo Mutinda & Another [2019] eKLR

Anti-Corruption Case No. 16 of 2014

Chief Magistrates Court at Nairobi — January 8, 2019

F Kombo, SPM

Criminal Law *- corruption and economic crimes - offences of soliciting and receiving a bribe - whether the receipt of a bribe on behalf of a person who had solicited the bribe broke the chain of causation in the offences of solicitation and receiving a bribe.*

Brief facts

The accused persons were charged with four counts under the Anti-Corruption and Economic Crimes Act (ACECA). The 1st accused was charged with the offence of corruptly soliciting for a benefit contrary to section 39(3)(a) as read with section 48 of the ACECA. The 1st accused was further charged with the offence of corruptly receiving a benefit contrary to section 39(3)(a) as read with section 48 of the ACECA. The 2nd accused was charged with the offence of corruptly receiving a benefit contrary to section 39(3)(a) as read with section 48 of the ACECA. The 2nd accused was also charged with the offence of corruptly receiving a benefit contrary to section 39(3)(a) as read with section 48 of the ACECA.

The accused persons worked as supply chain management officers at the Ethics and Anti-Corruption Commission (EACC). The particulars of the charges were that the 1st accused corruptly solicited for a benefit of Ksh 50,000 from the complainant as an inducement so as not to cancel an LPO for the supply of cameras to the EACC, a matter relating to the affairs of a public body. The 1st accused was further accused of corruptly receiving a benefit of Ksh 50,000 through M-pesa from the complainant as an inducement so as not to cancel another Local Purchase Order for the supply of cameras to the EACC.

The 2nd accused was accused of corruptly receiving a benefit of Ksh 28,000 through an agent from the complainant, as an inducement so as not to have her company get disqualified on the list of pre-qualifications of suppliers for the EACC for financial year 2014/2015, a matter relating to the affairs of a public body.

Issue

Whether the receipt of a bribe on behalf of a person who had solicited the bribe broke the chain of causation in the offences of solicitation and receiving a bribe.

Relevant provisions of the law

Anti-Corruption and Economic Crimes Act, No. 3 of 2003

Section 50 - Impossibility, no intention, etc., not a defence

In a prosecution of an offence under this Part that involves a benefit that is an inducement or reward for doing an act or making an omission, it shall not be a defence—

(a) *that the act or omission was not within a person's power or that the person did not intend to do the act or make the omission; or*

(b) *that the act or omission did not occur.*

Held

1. The LPO cited by the complainant showed that it was approved on March 4, 2014. The complainant testified that it was one of two that she received from the 2nd accused in March 2014. There was therefore general agreement between the date on the document and the testimony by the complainant. From the M-pesa statement produced therein, it would be about a month from the date of the LPO and the date when the complainant sent ksh 50,000 to the 1st accused.
2. The investigation of the complainant's complaint entailed audio recordings of telephone calls that were played in court and the transcript was admitted therein. The audio recordings were done by the investigator and PW4, who also heard parts of the conversations. The recorded audio comprised conversations between the complainant and the 2nd accused. In his unsworn statement, the 2nd accused did not question his participation in those conversations, although he made other denials.
3. A careful perusal of the translated transcript highlighted two important things, besides being proof of telephone calls themselves. One was that the name of the 1st accused featured prominently in the conversations and was repeatedly referenced by the complainant and the 2nd accused. Although there was no clarity in the conversations about the amount, the 2nd accused actively pursued the complainant to send money to him but seemed hesitant to personally meet her to collect it.
4. Taking her evidence and conduct in the matter, PW10 was not a candid witness and did not tell the court the whole truth. From the evidence, the 2nd accused in a bid to obfuscate his intentions, procured his friend PW8 to collect a bribe on his behalf, which he also cleverly disguised as a parcel.
5. Call data records produced were in agreement with the evidence by the complainant that the 2nd accused's mobile number had numerous outgoing and incoming calls to that of the complainant, especially on July 14th and 15th ,2014 when Ethics and Anti-Corruption Commission (EACC) officers executed the arrest operation. The audio recordings before court were of those calls and the 2nd accused had been identified as one of the speakers in those conversations, making it clear that he was the maker of those calls.
6. The audio evidence presented in court showed and corroborated that of the complainant that the 1st and 2nd accused persons worked together in relation to the events that culminated in the receipt of treated money by PW10.
7. From the entirety of evidence, the 1st accused's allegation that the Ksh 50,000 he received was a refund following a failed laptop purchase from the complainant, was wholly implausible and far-fetched. From the audio evidence, the complainant sent the 1st accused Ksh 50,000 by way of M-pesa in circumstances that were very different from those he described in his defence. The 2nd accused received Ksh 100,000, although it was not the subject of a charge. Both amounts were received in the transaction relating to the three LPOs issued to the complainant's firm, and which had been the subject of the 'odd' demand for Ksh 520,000 by the 2nd accused, and in the knowledge of the 1st accused.
8. Based on the testimony by the complainant, which was well corroborated in the audio recording, the 1st accused solicited and received a bribe in the sum of Ksh 50,000 from her. In relation to the 2nd accused, the evidence demonstrated that he was the intended beneficiary of the monies received by PW10, which he actively pursued, but seemed to develop cold feet, when his accomplice the 1st accused, raised alarm bells relating to a possible set-up. As such, he used PW8 as a conduit for the intended bribe but PW8

who was not personally available at the time, in turn sent PW10 for collection of what the 2nd accused had described to him as a parcel. At all material times, PW8 and PW10 were respectively acting at his direct and indirect instance and on his behalf, and therefore as his agents.

9. The receipt of the bribe by PW10 did not break the chain of causation that weaved its way to the 2nd accused person. The 2nd accused in his defence raised the prospect that because he had no role in the process of pre-qualification of suppliers, he would likely not have had a reason to receive a bribe from the complainant in the terms of charge in count 4. That contention however flew in the face of section 50 of the ACECA.
10. The evidence before court showed the 2nd accused made a solicitation and received a bribe. The procurement from which the charges therein resulted was properly a matter relating to the affairs of EACC. The 2nd accused's defence was rejected and the charge against him in count 4 was proved beyond all reasonable doubt.

The 1st accused was convicted in counts 2 and 3; the 2nd accused was convicted in count 4 under section 215 Criminal Procedure Code; right of appeal - 14 days

20. Failure of one witness to recognize the voice of an accused does not mean that the evidence of the complainant who recognized the voice cannot be relied on for lack of corroboration

The appellant had been charged with two counts of the offence of requesting a bribe. The appellant faced an alternative count of agreeing to receive a bribe and had been convicted by the trial court and fined Kes. 150,000 and in default, one (1) year's imprisonment. The instant court found that the testimony of PW3 that he did not recognize the appellant's voice did not mean that the evidence of the complainant that it was the appellant who was calling him and demanding a bribe could not be relied on for lack of corroboration. The court further stated that it was overwhelmingly supported by other prosecution evidence.

Vincent Mbindo Kathumo v Republic [2020] eKLR

ACEC Appeal No. 23 of 2018

High Court at Nairobi — September 30, 2020

M Ngugi, J

Evidence Law *- evidence - corroboration of evidence - corroboration of evidence in the recognition of the voice of an accused person demanding a bribe - whether the failure of one witness to recognize the voice of an accused in a recording meant that evidence of the complainant who recognized the voice demanding a bribe could not be relied on for lack of corroboration.*

Words and Phrases - *appreciation - definition of appreciation - recognition and enjoyment of the good qualities of someone or something - Oxford English Dictionary.*

Brief facts

The appellant was charged with two counts of the offence of requesting a bribe. The appellant faced an alternative count of agreeing to receive a bribe contrary to section 6(1) (a) as read with section 18 of the Bribery Act. The appellant was a public officer, a lecturer at the Faculty of Agriculture of the University of Nairobi Upper Kabete Campus. The complainant was his student whom he had found with his phone during an exam. He had confiscated the phone and the exam papers but later returned the phone. The appellant later on called the complainant and asked him to go to his office the following day. The complainant alleged that the appellant asked him for Kes. 2,000 for forgiveness for the exam irregularity and Kes. 3,000 in order to re-sit the exam.

The appellant was convicted by the trial court and fined Kes. 150,000 and in default, one (1) year's imprisonment. Aggrieved, the appellant filed the instant appeal.

Issue

Whether the failure of one witness to recognize the voice of an accused in a recording meant that evidence of the complainant who recognized the voice demanding a bribe could not be relied on for lack of corroboration.

Held

1. The appellant demanded and received a bribe from the complainant. He did not deny his contact with the complainant, or that he sent him PW7's number, or that PW7 received the amount at issue. The data from Safaricom and Mpesa records showed the telephone calls between the appellant and

the complainant, and the receipt of the money on behalf of the appellant. While the appellant stated in his defence that the complainant insisted on giving him an appreciation, he did not put that to the complainant in cross-examination, but only raised it at the defence stage. The appellant requested for a bribe with intent to improperly perform a public function and was properly convicted of the offence.

2. The testimony of PW3 that he did not recognize the appellant's voice did not mean that the evidence of the complainant that it was the appellant who was calling him and demanding a bribe could not be relied on for lack of corroboration. It was overwhelmingly supported by other prosecution evidence. The appellant called the complainant several times using his phone. He was placed on loudspeaker on at least two occasions. He was heard by at least five witnesses. The conversations were recorded by EACC officers. The trial court observed that the conversation in the audio clip played in court was mostly in English, clear and audible.
3. The case of *Gideon Makori Abere v Republic* was distinguishable from the facts of the instant case. It turned only on voice recognition, but there was so much more evidence to link the appellant to the offence, including his own admission that he sent the number to which the money was sent, it was the appellant who called the complainant several times to demand that he sends the money. In the circumstances, the appellant was properly identified as the person who was demanding money in the audio clip presented before the court.
4. The instant case demonstrated the dismal moral chasm into which society had fallen. The appellant, a lecturer holding a position of authority and responsibility requiring that he opens the mind of those under his charge, abused his position to intimidate and obtain financial gain from his students. The evidence before the trial court showed that far from wishing to appreciate the appellant, the complainant was an intimidated student, wishing to resolve an exam irregularity and re-sit his exams, who was subjected to a demand for a bribe by his lecturer.

Appeal dismissed; conviction and sentence upheld.

21. Key ingredients to be proved in a charge of corruptly soliciting a benefit

The court highlighted the key ingredients to be proved in a charge of corruptly soliciting a benefit. The court pointed out that a person could not put forward a defence that he was limited by the defined scope of his responsibilities from carrying out the task in question as long as he held himself out to another in that manner for purposes of soliciting or receiving the benefit. The court also highlighted the elements to be demonstrated for the defence of entrapment to be raised. The court held that where the instigation was solely done by a private citizen, the defence of entrapment could not be sustained. Further, the court held that the fact that a citizen who had made a report went ahead to assist in the investigation that led to detection of an offence did not make him or her an agent of that investigative agency or the State.

Republic v Robert Maina Ngumi [2020] eKLR

ACC No. 5 of 2014

Chief Magistrate Court at Nairobi — May 26, 2020

L N Mugambi, CM

Criminal Law *- defences - entrapment - elements for the defence of entrapment to be raised - claim that the instigation was solely done by a private citizen - claim that an agent held himself out as capable of performing a function that fell within his/her principal's or employer's mandate - whether an agent who held himself out as capable of performing a function that fell within his/her principal's or employer's mandate for purposes of committing an offence could put forward a defence that he was limited by the scope of his responsibilities - whether the defence of entrapment could be sustained where the instigation was solely done by a private citizen - whether a citizen who had made a report and went ahead to assist in investigations leading to detection of an offence was an agent of that investigative agency or the State - Anti-Corruption and Economic Crimes Act, No. 3 of 2003, section 50.*

Criminal Law *- corruption and economic crimes - offence of corruptly soliciting a benefit - what were the key ingredients to be proved in a charge of corruptly soliciting a benefit - Anti-Corruption and Economic Crimes Act, No. 3 of 2003, sections 39(3)(a) and 48(1).*

Words and Phrases *- agent provocateur - an undercover agent who instigates or participates in crime often by infiltrating a group suspected of illegal conduct to expose or punish criminal conduct; someone who entraps another, or entices another to break the law, and then informs against the other as a law breaker especially someone hired to encourage people who are working against the Government to do something illegal so that they will be caught - Black's Law Dictionary 12th Edition.*

Brief facts

The accused was an employee of Kenya Revenue Authority (KRA). He was charged with four different counts relating to the charge of corruptly soliciting 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). Under count I,II and III, the accused was said to have corruptly solicited for a benefit of Kes. 15,000,000 from PW1 as an inducement so as to issue her letter reducing the tax arrears due from her company (Space and Style Limited). As for count IV, the accused was charged with receiving a benefit of USD 1,100 in order to reduce the tax arrears due from Space and Style Limited.

Republic v Robert Maina Ngumi [2020] eKLR

The accused was an assistant commissioner in charge of the wholesaler and retailers sector from which a small team of KRA field officers formed and tasked to audit Space and Style Limited for tax purposes. It was alleged that he dispatched an emissary to reach out to the managing director of Space and Style Limited (PW1) and started engaging the two company directors (PW1 and PW2) in private night meetings in hotels well aware the department was auditing the company to recover collosal amount of tax. In a lone ranger style, the accused went on holding several meetings with the directors of the company discussing the on-going audit over tea and snacks or other drinks.

Issues

i. What were the key ingredients to be proved in a charge of corruptly soliciting a benefit?

ii. Whether an agent who held himself out as capable of performing a function that fell within his/her principal's or employer's mandate for purposes of committing an offence could put forward a defence that he was limited by the scope of his responsibilities.

iii. What were the elements to be demonstrated for the defence of entrapment to be raised?

iv. Whether the defence of entrapment could be sustained where the instigation was solely done by a private citizen.

v. Whether a citizen who had made a report and went ahead to assist in investigations leading to detection of an offence was an agent of that investigative agency or the State.

Held

1. For a charge of corruptly soliciting a benefit based on section 39(3)(a) of the ACECA; it was imperative for the prosecution to prove the following key ingredients beyond reasonable doubt:
   a. That the accused was an agent, that was, he was at the material time in employment of another, either in private or public sector.
   b. There was a solicitation of a benefit, reward or inducement in fact.
   c. In case of receiving, proof of the fact that the accused received a particular benefit, reward or inducement.
   d. There was a corrupt intention, that was, demonstration of the fact that the purpose of the solicitation or the receipt of inducement, benefit or reward by the accused was to influence the accused to do or not do; or to show favour or disfavour to any person in a matter relating to the affairs or the business of his principal /employer.
2. The employment of the accused by KRA was established. Consequently, for purposes of section 38 of the ACECA; the accused was an agent of KRA as his employer and therefore KRA was in that capacity his principal as far as the provisions of the ACECA were concerned. The mandate to assess and collect revenue due to the Government of Kenya was a responsibility of the KRA. That was as per the Kenya Revenue Authority Act, Cap 469 which established the KRA.
3. The involvement of KRA in the affairs of Space & Style Limited, whose directors were PW1 and PW2 was explained by PW3 to have been informed by the need to carry out an in-depth audit of the company's financial records in order to ascertain the amount of tax liability that should have been paid by the company in the period between 2008-2012. That activity was thus part and parcel of the mandate of KRA as per the Kenya Revenue Authority Act, Cap 469 hence a matter that related to the affairs of KRA, a public body that the accused worked for.
4. If it was proved that the accused solicited or received a personal benefit, reward or inducement so as to influence him to do or not do; or, to show favour or disfavour concerning a matter relating to the

affairs of his principal- namely, KRA, then the court must find him criminally culpable for an offence of corrupt solicitation, and if he received a personal benefit, reward or inducement thereof, the court must equally find him guilty of corruptly receiving the same.

5. According to the ACECA, once it was proved that an accused held himself out or represented himself as capable of performing a function that fell within the mandate of his principal or employer to another person for purposes of committing an offence under the ACECA, yet in reality, he did not possess such power in line with his specific responsibilities in that organization; under section 50 of the ACECA, he could not put forward a defence that he was limited by the defined scope of his responsibilities from carrying out the task in question as long as he held himself out to another in that manner for purposes of soliciting or receiving the benefit in contravention of the Act.
6. For the defence of entrapment to be raised, it had to be demonstrated that the offer to commit the crime was initiated and encouraged by the State itself or by a State agent or a private citizen directly working for State agent, commonly referred to as derivative' agent. That agency relationship must however be established before the defence could be successfully pleaded.
7. Where the instigation was solely done by a private citizen, the defence of entrapment could not be sustained. Moreover, for the defence of entrapment to succeed, it must be demonstrated that accused was in the first-place unwilling or reluctant to commit the offence in question were it not for the persistent encouragement, threats or even intimidation by the State agent which eventually made him to cave in. Consequently, if a criminal plan were to be presented to an accused who readily jumped into the opportunity, that would demonstrate he had an already willing mind to commit that offence and the defence of entrapment could as well not succeed.
8. The branding of PW1 as an agent *provocateur* was not borne out of evidence on record. There was no proof either explicitly or impliedly adduced by the defence or elicited on cross-examination that the complainant was an undercover agent working for the law enforcement agency, that was, the Ethics and Anti-Corruption Commission (EACC) or the fact that she was she hired as an agent by a law enforcement officer to instigate the accused to commit crimes the accused would not have otherwise committed. There was reasonable ground for suspecting that accused was likely to commit an offence since his conduct as a public officer in charge of a team that was auditing PW1's company raised serious ethical concerns at the moment. EACC's entry into the matter was bonafide to ascertain the real intention behind the accused's move.
9. The inquiry by EACC was triggered by PW1's report. The fact that a citizen who had made a report went ahead to assist in the investigation that led to detection of an offence did not make him or her an agent of that investigative agency or the State.
10. Merely providing the accused with an opportunity to achieve his objective by letting the complainant cooperate so that the accused could execute that intention did not constitute entrapment.
11. Evidence of a witness could not be perfunctorily rejected simply on the ground that she was 'interested.' It was possible to find such a witness credible or her evidence could as well be corroborated by other forms of evidence presented. Each witness's evidence must be assessed by the court carefully to determine its creditworthiness.
12. There were three clear encounters which PW1 had interacted with the accused, leaving out those that the accused did not talk about which were subject to proof. That exposure to the accused sufficiently acquainted PW1 with his manner of his speech as well as voice as to accurately recognize the accused by his voice in the recordings. The meetings took place and the participation of the accused had been

established.

13. The transcripts and the translations were admittedly ineptly done. In fact, even the transcriber herself (PW10) conceded that there many errors in those transcripts. Consequently, the court abandoned the evidence of transcripts and the corresponding translations but retained the original recordings thereof. The court could only refer to the original video clips played in the court which were distinctly produced as evidence in their own right to the extent that the court was able to independently comprehend the contents.
14. The original recordings were a mixture of Kikuyu, English and Swahili. It was thus a fact that the video clips were not entirely in official languages of the court which was either English or Swahili. In some recordings however, the court was able to decipher the general flow of the conversation where the language used was substantially Swahili or English and even went on to make its own remarks after the recording finished playing even before any explanation was received from the witness. Even without the aid of the transcripts and the translation, the court was able to generally discern the subject matter of the meetings by its own perception without the benefit of the transcript or the translation.
15. There was no tangible reason on record to distrust the evidence of PW1 and PW2. Going by their evidence therefore, it had been proved beyond reasonable doubt that the accused did in fact solicited the Kes. 15,000,000 during the meeting of March 7, 2014, hence the subsequent meeting of March 11, 2014 which they could be heard in the recording discussing the challenges of how to put the large amount of money together, change it into dollars and deliver it where among others, the issue of security during its delivery also came up.
16. Charging the same offence with same statutory elements arising from facts relating to a single continuing transaction in more than one count might increase the accused exposure to multiple criminal sanctions. It suggested the accused had committed more than one crime several times when in reality it was not correct.
17. The fact of the accused having touched the money was corroborated by the presence of APQ chemical control sample in the hand swabs obtained from him. That therefore confirmed the testimony of PW1 materially. The allegation by the accused that they went with PW1 to his car for purposes of giving them a ride to their car which was parked far away at the gate was just but an afterthought. When PW1 and PW2 testified in court, they were not confronted with that allegation despite giving different version that they went with him to his car after indicating to him that they had the money they wanted to off-load to him.
18. Contrary to the accused's assertion that he was framed, he authored his own misfortune. An average hardworking and honest civil servant could not have carried himself in the manner displayed by the accused. There was evidence that the solicitation and the receipt of that benefit was intended to enable the accused assist PW1's company to be issued with a letter reducing the tax liability which he actually issued, (although fake), the consideration being greasing the accused hands with a personal benefit of Kes. 15,000,000 which was to be converted in US Dollars. Evidence had shown that it was asked for, provided and received.

Accused found guilty in counts 1 and 4 and convicted and acquitted in counts 2 and 3. The Accused was sentenced in count 1 to pay a fine of of Kes.1,000,000/= [One Million] in default serve [18] Eighteen Months imprisonment. And in count four to pay a fine of Kes. 1,000,000 [One Million] in default serve [18] Eighteen Months imprisonment. Sentence shall be consecutive.

22. Receiving of money by a police officer within the parking yard of a police station does not *per se* suffice to show that it was received as a bribe

The accused was a police constable and had been charged with the offences of corruptly soliciting for a benefit and corruptly receiving a benefit. The court held that if the accused received the money within the parking yard of the police station, that did not per se suffice to show that it was received as a bribe. The court found that the investigator preferred charges against the accused based on the contents of the negotiation which he himself initiated through the complainant. The court thus held that the outcome of that stage-managed negotiation was entrapment. The court also held that there was no requirement on the part of the Director of Public Prosecutions to notify the parties that he had granted consent for prosecution because the obtaining of the requisite consent was an investigative step and it was mandatory.

Republic v Jeremiah Kimutai Ngetich [2019] eKLR

Anti-Corruption Case No. 18 of 2016

Chief Magistrates Court Nairobi — August 27, 2019

F Kombo, SPM

Criminal Law *- corruption and economic crimes - offences of corruptly soliciting for a benefit and corruptly receiving a benefit - claim that a police officer was handed money at the police station's parking yard - claim that the money was a bribe - whether money handed over to a police officer at a police station's parking yard amounted to a bribe.*

Criminal Law *- defences - entrapment - whether where an investigator advised a complainant to negotiate a bribe and preferred charges against an accused based on the contents of the negotiation amounted to entrapment.*

Constitutional Law *- Director of Public Prosecutions (DPP) - functions of the DPP - prosecution of cases - where the prosecution was undertaken by the Ethics and Anti-Corruption Commission (EACC) - whether there was a requirement for the DPP to notify parties in a case prosecuted by the EACC that he had granted consent to the prosecution - Anti-Corruption and Economic Crimes Act, No. 3 of 2003, section 35.*

Brief facts

The accused person was a police constable and an employee of the National Police Service. He was charged with three counts all derived from the Anti-Corruption and Economic Crimes Act (ACECA). In count 1 and 2, he was charged with the offence of corruptly soliciting for a benefit contrary to section 39(3)(a) as read with section 48 of ACECA. In count 3, the accused was charged with the offence of corruptly receiving a benefit contrary to the same sections.

It was alleged that the accused demanded for monies and which monies were given to him as an inducement to release the complainant's motor vehicle and forbear charging the complainant for an alleged traffic offence. It was alleged that the money was given to the accused at the parking yard within the police station. The conversation between the accused and the complainant was recorded via video recording.

Issues

i. Whether money handed over to a police officer at a police station's parking yard amounted to a bribe.

ii. Whether an advise by an investigator to a complainant to negotiate a bribe and preferred charges

against an accused based on the contents of the negotiation amounted to entrapment.

iii. Whether there was a requirement for the Director of Public Prosecutions to notify parties in a case prosecuted by the Ethics and Anti-Corruption Commission that he had granted consent to the prosecution.

Held

1. There was no requirement on the part of the Director Public Prosecutions (DPP) to notify the parties that he had granted consent for prosecution. Because obtaining the requisite consent was an investigative step and it was mandatory, the evidence of the investigator should ordinarily cover it and if so, that should suffice to demonstrate the fact. From the testimony of the investigator, it did not appear to cover it.
2. The court did not agree with the contention that there was nothing to show compliance by the prosecution with section 35 of the ACECA. There were other facts from which the court could deduce compliance. The instant case was directly prosecuted by a representative of the DPP acting on his general or specific authority. That was *prima facie* evidence of his consent under section 35 of the ACECA. The circumstances created a rebuttable presumption which the defence could not undo by mere allegation. There was compliance with section 35 in commencing the proceedings against the accused.
3. In relation to count 1 which was a charge of corruptly soliciting Ksh 20,000 on October 17, 2016, there was no evidence of such solicitation on the alleged date, besides the word of the complainant. Count 2 related to an alleged corrupt solicitation for the amount of Ksh 15,000 on October 18, 2016, and the audio transcript, appeared to expressly reflect that as a downward negotiation between the complainant and the accused from an initial Ksh. 20,000. Count 3 related to an alleged corrupt receipt of Ksh 10,000 by the accused. There was evidence in relation to count 3 that the accused had contact with APQ chemical even as he denied that he received the money. The evidence by the Government analyst showed that swabs delivered to him by the investigator contained traces of the APQ chemical used to treat the money.
4. From the excerpts of evidence, evidence from the complainant and amongst the Ethics and Anti-Corruption Commission (EACC) officers, all who were at the scene at the same time was incredibly inconsistent in its description of circumstances under which the treated money was recovered from the accused. It was not clear who recovered the money. The inconsistencies cast serious doubt on where the money was at the point of recovery, which further cast doubt on the allegation that the accused actually received it.
5. It was highly improbable that there was no conversation at all which could have been captured by the complainant's recorder, during the process of handing over the money by him and alleged return of the other allegedly seized items by the accused. It was suspicious that crucial points of his interaction with the accused during the arrest operation went unrecorded.
6. The accused's statement and the testimony of the complainant were in agreement that they were at the parking yard when the alleged corrupt transaction took place. There was no evidence called from the owner of the towed vehicle who ought to have witnessed the alleged receipt of the bribe money and return of the car keys and insurance sticker to the complainant.
7. There was doubt on the veracity of the allegation in count 3 that the accused in fact received the treated bribe money as alleged, the presence of APQ chemical on his hands notwithstanding, and notwithstanding that he signed the recovery inventory. It would have helped a great deal if the process

of recovery of the alleged bribe money from the accused was clearer and was not itself shrouded in mystery.

8. It appeared that the complainant lured the accused to the parking yard. There was no iota of credibility in the complainant's statement trying to justify the alleged receipt of the money as a bribe because it happened in the parking yard. From an examination of the audio transcript and recording, there was nothing to support the theory that the amount could not have been cash bail. While the audio transcript was clear about a negotiation between the accused and the complainant where agreement was reached at Ksh 10,000 from an initial amount of Ksh 20,000, there was nothing to suggest the purpose of the amount. There was no investigation done to rule out the contention that the amount was intended for cash bail.
9. If the accused received the money within the parking yard, if at all, that was still within the police station and that *per se* did not suffice to show that it was received as a bribe. In any case the evidence indicated that it was the complainant who lured him to the parking yard. The accused's explanation that he had no opportunity to issue a receipt did not, in the circumstances of his arrest, appear implausible. It did not also appear that any investigation was done to rule such an intention out.
10. Although faced with a legitimate complaint, the EACC investigator went too far in requiring the complainant, whom he had issued with an audio-visual recorder, to negotiate the alleged initial bribe afresh with the suspect and by virtue of that, became himself mired in the complaint and incapable of undertaking an independent investigation. The likely result of that would be that the complainant would thereafter manoeuvre the conversation with the suspect towards a desired end in line with the instruction by the investigator, in order to ensure arrest, and in the process compromising the credibility of the recording obtained. It could indeed be that that was the reason why the complainant drew the accused out of the office to the parking yard so that he would later allege as he did in this trial, that the treated money was received outside the office.
11. The investigator went beyond providing an opportunity for the suspect to finish the alleged reported offence and in effect, the instruction to negotiate led the complainant himself to make counter offers of bribery amounts, a matter that the law did not countenance. The investigator then preferred those charges against the accused based on the contents of the negotiation, which he himself initiated through the complainant. The outcome of that stage-managed negotiation was entrapment.
12. A further problem touching on the credibility of the audio transcript was that the investigator actually made it himself. Being himself interested in the outcome of the case, the investigator ought to have obtained independent transcription of the recording. It may not have mattered whether he could release it or not, but there was simply no evidence that it had been placed under his custody by the impounding officers. That therefore raised serious doubts on the complainant's statement that the accused demanded the bribe of Ksh. 20,000 to release the vehicle.
13. Proceedings in Traffic Case No. 22441/2016 showed that the complainant was ultimately charged at the end of investigations with the offence of careless driving contrary to section 49 of the Traffic Act. That was not a minor offence and required investigation. It was therefore not unreasonable, and was common for suspects facing such to be bailed pending completion and charge.

Accused acquitted under section 215 of the Criminal Procedure Code; right of appeal -14 days.

ELECTION OFFENCE OF VOTER BRIBERY

23. A single incident of commission of an election offence of bribery of voters and treating of voters by a candidate is sufficient to invalidate the candidate's election

The instant matter was an election petition challenging the election of the 1st respondent as a senator on grounds that he personally and/or with his agents and servants committed offences of bribery and treating of voters prior to and on the polling day. The court held that where the candidate was found to have committed an election offence of bribery of voters and treating of voters, his election became void. The court further held that in cases where the offences of bribery and treating of voters were committed by agents of the candidates, the law afforded the affected candidate an opportunity to claim exoneration from the acts of his agents. The court further held that a claim based on bribery and treating of voters by agents or other persons could require to be shown that the acts of bribery and treating of voters were so extensive that they affected the results.

Musikari Nazi Kombo v Moses Masika Wetangula & 2 others [2013] eKLR

Election Petition No. 3 of 2013

High Court at Bungoma

September 30, 2022

F Gikonyo, J

Electoral Law *– election offences – offence of bribery and treating of voters – distinction between electoral offences committed by the candidate himself and electoral offences committed by an agent to the candidate in the electoral process – whether a single incident of commission of an election offence of bribery of voters and treating of voters by a candidate in an election was sufficient to invalidate the candidate's election.*

Electoral Law *- standard and burden of proof - distinction between burden of proof and standard of proof - what was the standard of proof in election petitions where there were allegations of commission of electoral criminal offences.*

Brief facts

The instant matter was an election petition challenging the election of the 1st respondent as the Senator-elect for Bungoma County in Kenya's general election held on March 4, 2013. The petitioner and the 1st respondent were among those who contested for the position of Member of the Senate in that election. The petition was based on among other grounds; massive and widespread electoral malpractices and commission of electoral offences. The petitioner alleged that the 1st respondent personally and/or with his agents and servants committed offences of bribery and treating of voters prior to and on the polling day and asking them to vote for him and the other candidates vying under the CORD Coalition. The petitioner sought, among other reliefs, for scrutiny of votes cast and that the election of the 1st respondent as the Member of Senate for Bungoma County be determined and declared null and void.

Issues

i. Whether a single incident of commission of an election offence of bribery of voters and treating of voters by a candidate in an election was sufficient to invalidate the candidate's election.

ii. What was the distinction between electoral offences committed by the candidate himself and electoral offences committed by an agent to the candidate in the electoral process?

iii. What was the standard of proof in election petitions where there were allegations of commission of electoral criminal offences.

iv. What was the distinction between burden of proof and standard of proof.

Held

1. The distinction between the burden of proof and standard of proof lay in the finer distinction between the legal burden and the evidential burden. The legal burden in an election petition lay with the petitioner; for he/she was the party desiring the court to take action on the allegations in the petition. The evidential burden initially lay on the party who bore the legal burden but as the weight of the evidence given by either side during the trial varied, so did the evidential burden shift to the party who failed without further evidence.
2. The standard of proof referred to the level or degree of proof demanded by law in a specific case in order for the party to succeed. In election petitions, the standard of proof in allegations other than those of commission of electoral criminal offences was higher than that of balance of probabilities required in civil cases although it did not assume the standard of proof beyond reasonable doubt. However, where the petitioner alleged commission of criminal offences, the standard of proof on criminal charges was beyond reasonable doubt.
3. The 1st respondent and Hon. Alfred Khangati were engaged in treating of voters and bribery of voters contrary to sections 62 and 64 of the Elections Act. Hon. Khangati was not a party to the proceedings and was not afforded any opportunity to call evidence to show cause why he should not be reported to the Director of Public Prosecutions for prosecution. It was established beyond reasonable doubt that the two gave a sum of money of Ksh. 260,000 to bishops, pastors and other participants in a meeting held at Red Cross, Kanduyi.
4. The corrupt intention of giving money was to influence and induce voters to vote for the 1st respondent as Senator for the County of Bungoma and other CORD coalition candidates in other elective seats. Further, the intention of the bribery and treating of voters was to influence and induce voters to refrain from voting for particular candidates or political parties during the March 4th elections.
5. Where the candidate was the one who was found to have committed an election offence of bribery of voters and treating of voters, his election became void. In such a case, a single incident of commission of those offences by the candidate was sufficient to invalidate an election and it was not necessary to prove a series of bribery and treating of voters for such an election to be declared void.
6. The law was so designed to prevent a person from reaping leadership procured through illegal means. Elections were so sensitive to electoral malpractices and offences, and more so, when they were committed by those who were aspiring or claimed to be leaders of the people. In essence, the commission of electoral offences of bribery and treating of voters by the respondents completely altered and affects the results to the extent that the election was voided.
7. In cases where the offences of bribery and treating of voters was committed by agents of the candidates, the law afforded the affected candidate an opportunity to claim exoneration from the acts of his agents. Equally, a claim based on bribery and treating of voters by agents or other persons could require to be shown that the acts of bribery and treating of voters were so extensive that they affected the results.
8. There were extensive irregularities which impeached the electoral process and affected the validity of results. Forms 35s were questioned and results therein could not be said to reflect the will of the

people of Bungoma County. They contained serious negligent errors. A further apex opportunity was lost when the County Returning Officer did not collate and tally results before announcing results for Senator for County of Bungoma. Those malpractices obscured the final results thereby putting the victory of the 1st respondent in doubt. Those malpractices were so fundamental to the process and the results that they materially affected the results of the election in dispute.

9. The report on scrutiny and recount of votes revealed major electoral malpractices and irregularities on the part of the electoral officers. Some of the electoral evils revealed by the report included; cases of names being crossed twice in two incidental registers for the same stream or station; people who were not entitled to vote were provided with ballot papers and voted; results of the names which had been crossed were included in the final results; a marked register was found in possession of the returning officer and was only availed at the time of scrutiny; it was not clear how ballot papers were issued as the laid procedure was not followed. Those malpractices affected the results. There was real possibility that electoral offences prescribed under section 59 of the Evidence Act were committed by IEBC officers who manned the respective polling stations where electoral mishaps were detected by the report.
10. The petitioner proved to the required standard that the election for member of Senate for County of Bungoma was not conducted in accordance with the Constitution and the Elections Act. Article 81(e) of the Constitution was violated as the election was not free of improper influence or corruption, it was not transparent, it was tinctured with bribery and treating of voters and the results were not verified or verifiable. There were multiple malpractices and irregularities which substantially affected the validity of results for the election in dispute.

Petition allowed; costs awarded to the petitioner

Orders:

i. The 1st respondent was not validly elected. His election as the Senator for the County of Bungoma was declared null and void.

ii. Costs to the petitioner to be paid jointly and severally by the respondents, should not exceed Kes. 4,000,000.

iii. The security placed in court by the petitioner to be released to him.

24. A single act of corruption by a candidate is sufficient to void the candidate's election

The High Court nullified the election of the appellant as a senator. The High Court found the appellant guilty of the election offences of bribery of voters and threatening of voters. The instant court held that in the case of corruption by the candidate himself, one did not require a multiplicity of acts of corruption to void an election. The court also highlighted the distinction between electoral offences committed by the candidate himself and electoral offences committed by an agent to the candidate in the electoral process. The court also held that the standard of proof required in allegations of commission of election offences made in election petitions was beyond reasonable doubt.

Moses Masika Wetang'ula v Musikari Nazi Kombo & 2 others [2014] eKLR

Civil Appeal No. 43 of 2014

Court of Appeal at Kisumu — March 14,2014

D K Maraga, F Azangalala & J Mohammed, JJA

Electoral Law *– election offences – offence bribery and treating of voters – distinction between electoral offences committed by the candidate himself and electoral offences committed by an agent to the candidate in the electoral process – whether a multiplicity of acts of corruption by a candidate in an election was required to void an election.*

Electoral Law *- standard of proof in election petitions - standard of proof in allegations of election offences - what was the standard of proof required in allegations of commission of election offences.*

Brief facts

The appellant contested for the Bungoma senatorial seat and was declared the winner in the Kenya's March 4, 2013 general elections. the appellant's closest rival, the 1st respondent, being dissatisfied with the results petitioned the High Court to nullify the appellant's election. After hearing the petition, the High Court nullified that election thus provoking the instant appeal.

The appellant's grounds of appeal revolved around three main issues namely; whether he was guilty of the election offences of bribery and treating. Secondly, whether the Bungoma County senatorial election (the election) was conducted substantially in accordance with the principles laid down in the Constitution of Kenya, 2010 (Constitution) and with the written law of that election; and whether the irregularities allegedly committed in the conduct of the election affected the result of the election.

Issues

i. Whether a multiplicity of acts of corruption by a candidate in an election was required to void an election.

ii. What was the distinction between electoral offences committed by the candidate himself and electoral offences committed by an agent to the candidate in the electoral process?

iii. What was the standard of proof required in allegations of commission of election offences.

Held

1. Any election that was not conducted substantially in accordance with the electoral law of that election was null and void. Bribery and treating were among the election offences in Part VI of the Elections Act. Sections 62 and 64 of the Elections Act set out the acts that amounted to treating and bribery respectively.

Moses Masika Wetang'ula v Musikari Nazi Kombo & 2 others [2014] eKLR

2. The burden of proof was upon the petitioner to prove his allegations; and the standard of proof in election petitions was generally higher than on a balance of probabilities but not to the level of beyond reasonable doubt. However, if there were allegations of commission of election offences in an election, the law required that those allegations be proved beyond reasonable doubt. In other words, the standard of proof required in allegations of commission of election offences made in election petitions was beyond reasonable doubt.
3. From a re-evaluation of the evidence, the appellant gave Kes. 260,000 to the pastors and bishops who were assembled at the Red Cross offices at Kanduyi on February 22, 2013. Section 87(1) of the Elections Act required election courts to report to the Director of Prosecutions (DPP), the Independent Electoral and Boundaries Commission (IEBC) and the relevant Speaker candidates they adjudicated guilty of election offences.
4. Where commission of any election offence was alleged against any respondent in an election petition, that was sufficient notice to such respondent that the petitioner intended to prove criminal charges against him. Such respondent was put on notice that upon sufficient evidence being adduced against him of commission of an election offence, he was obliged, without assuming the burden of proving himself innocent, to rebut such evidence.
5. All that the election court was required to do was to afford such respondent a reasonable opportunity to defend himself. So when, after considering all the evidence on record including any evidence adduced by the respondent, an election court found that an election offence had been proved to the required standard against a respondent who had been afforded an opportunity to defend himself or herself, the trial court did not have to wait until such a respondent was proved guilty in a separate criminal trial.
6. The reporting requirement was not put in the Elections Act as a mere ornamental or lofty aspirational provision. It was supposed to be enforced and implemented. It was supposed to and should bite. The election court should therefore boldly go ahead and report such respondent and upon receipt of such report, the IEBC was, under section 72(3)(b) of the Elections Act, obliged to disqualify such candidate from contesting the next election.
7. Although the appellant was properly adjudicated guilty of the election offences of treating and bribery, the court could not itself report him to the authorities for the simple reason that there was no cross-appeal and the issue of reporting the appellant was therefore not canvassed before the court.
8. Unlike the English Representation Act, 1983, which automatically voided the election of any person found to have committed an election offence of corruption or illegal practice, Kenya's Elections Act did not have any such specific provision. Section 80(4) of the Elections Act forbade the election court from declaring as a winner any person found to have committed an election offence but that was only upon scrutiny and recount of votes.
9. Under articles 105 and 140 of the Constitution, anyone could challenge the validity of the election of a Member of Parliament or the President. Under section 75(2) of the Elections Act, an election could be challenged on, inter alia, the ground of a corrupt practice, and specifically alleging any payment of money or other act. "Other act" meant any other illegal act or practice. The Act did not define the phrase "corrupt practice" but it defined the phrase "illegal practice" as "an offence specified in Part VI" of the Act. Proof of commission of any election offence vitiated an election.
10. In election law, when determining the effect of commission of an election offence, a distinction should be drawn between corruption acts committed by agents of a candidate and those committed by the candidate himself. That was because, save where they were shown to have been express which was

quite rare, the corrupt acts of an agent had to be shown to have had the implied sanction or blessing of the candidate involved. To prove that nexus, there should be evidence of several corrupt acts of the agent or agents of the candidate which would establish a consistent pattern from which a reasonable inference could be drawn that the candidate concerned must have sanctioned or condoned those acts. In the case of corruption by an agent, care should also be taken to ensure that one was not an agent *provocateur* that was an agent planted by the opponent.

11. In the case of corruption by the candidate himself, one did not require a multiplicity of acts of corruption to void an election. What was condemned in that vice was one's mental attitude or personality. Proof of one act or incident of corruption therefore sufficed to demonstrate that one was a corrupt person or one was lacking in integrity.
12. Any election marred by acts of corruption or any illegal practice flouted the principles set out in the Constitution and election law. It was not necessary to prove the amount of bribery. It should suffice if it was shown that with [the] intention to influence voters to vote for a given candidate, bribes were given to voters.
13. Both the qualitative and quantitative irregularities committed by the IEBC's officials in the conduct of the Bungoma senatorial election did not affect the integrity or result of the elections. However, the commission by the appellant of the election offences of bribery and treating, amounted to conducting the election contrary to the election law and that vitiated the election.

Appeal dismissed with costs to the 1st respondent against the appellant and the 2nd and 3rd respondents jointly and severally, capped at Kenya Shillings four million (Kes.4,000,000).

25. There is no distinction between bribery in a criminal case and in an election petition and proof of the same must be beyond reasonable doubt

Bribery was an electoral offence and was also a criminal offence in ordinary life. Being such, proof of the same must be beyond reasonable doubt. There was no distinction between bribery in a criminal case and one in an election petition. Election petitions neither fell within the realm of civil law nor that of criminal law. However, the legal framework for electoral dispute settlement conferred upon the court a quasi-criminal jurisdiction which was not part of the established criminal code.

Moses Masika Wetangula v Musikari Nazi Kombo & 2 others [2015] eKLR

Petition No. 12 of 2014

Supreme Court of Kenya — March 17, 2015

W M Mutunga, CJ; PK Tunoi, KH Rawal, JB Ojwang & MK Ibrahim, SCJJ

Electoral Law *– election offences – offence bribery – offence of bribery in an election petition vis a vis a criminal case - whether there was a distinction between bribery in a criminal case and in an election petition - whether proof of commission of an election offence by a candidate was a basis for the court to disqualify that candidate from future elections - Constitution of Kenya, 2010, article 99; Elections Act, 2011, sections 24 and 72(1).*

Electoral Law *- standard of proof in election petitions - standard of proof in allegations of election offences - what was the standard of proof for the offence of bribery in elections.*

Jurisdiction *- jurisdiction of an election court - jurisdiction in determining election offences - whether an election court could exercise criminal jurisdiction in determining election offences - what was the nature of proceedings before an election court.*

Brief facts

The appellant filed the instant appeal contesting the judgment of the Court of Appeal which upheld the decision of the High Court which found that he had committed the election offences of bribery and treating of voters. The High Court had as a result of that finding nullified his election as the Senator for Bungoma County. The appellant in the instant appeal argued that the Court of Appeal erred in law in holding that allegations of commission of an election offence against a respondent in an election petition were sufficient notice to the respondent, that the petitioner intended to prove criminal charges against him.

The appellant further argued that the Court of Appeal erred in holding that a respondent in an election petition, upon service of the petition, must be prepared to defend himself in both the election petition, and in a trial for electoral offence. The appellant also argued that the Court of Appeal erred in law in holding that once an election court made a finding and reported the commission of an election offence to the Independent Electoral and Boundaries Commission (IEBC), the IEBC assumed a mandatory power to disqualify the affected candidate from contesting in the next general election.

The appellant faulted the Court of Appeal for holding that the ingredients of the two offences of bribery and treating, were established and proved against the appellant, beyond reasonable doubt. The appellant sought, among other reliefs, that the findings of the High Court and the Court of Appeal annulling his victory in the Bungoma Senatorial election of 2013 be set aside.

Moses Masika Wetangula v Musikari Nazi Kombo & 2 others [2015] eKLR

Issues

i. Whether there was a distinction between bribery in a criminal case and in an election petition.

ii. What was the standard of proof for the offence of bribery in elections?

iii. What was the nature of proceedings before an election court?

iv. Whether an election court could exercise criminal jurisdiction in determining election offences.

v. Whether proof of commission of an election offence by a candidate was a basis for the court to disqualify that candidate from future elections.

Held: by majority

1. The proceedings before an election court were neither criminal nor civil. While the election court had the competence to look into offences that were criminal in nature, such as bribery and treating of voters, its inquiries on the relevant instances of election offence did not constitute a criminal trial, with its dedicated procedures and safeguards.
2. Election petitions neither fell within the realm of civil law nor that of criminal law. However, the legal framework for electoral dispute settlement conferred upon the court a quasi-criminal jurisdiction which was not part of the established criminal code. Being derived from the fundamental elements of the criminal law, which imposed strict penalty in respect of prohibited acts, and which was attended with established trial safeguards, such quasi-criminal offences as were provided for in the electoral law, too, were required to be strictly proved, as a basis for any penal consequences.
3. Bribery was an electoral offence. It was also a criminal offence in ordinary life. Being such, proof of the same must be by credible evidence and nothing short of proving that offence beyond reasonable doubt would suffice. There was no distinction between bribery in a criminal case and one in an election petition. Bribery involved offering, giving, receiving, or soliciting of something of value for the purpose of influencing the action of the person receiving.
4. Under the Elections Act, bribery was an election offence under section 64 and both the giver and the taker of a bribe in order to influence voting were guilty of the offence upon proof. On account of that quasi-criminal aspect of bribery in elections, the offence was to be proved beyond any reasonable doubt. The petitioner had to adduce evidence that was cogent, reliable, precise and unequivocal, in proof of the offence alleged.
5. The offence of bribery was cognizable and a person alleged to have committed it was liable to arrest without warrant. That illustrated the gravity of the offence and signaled, that a high standard of proof was required. Accordingly, an allegation that an election offence had been committed had to be specific, cogent, and certain. That requirement guaranteed the right of fair trial for the persons(s) against whom such allegations were made.
6. Election petition proceedings were not part of the normal criminal process, it was not appropriate for the appellant to invoke the regular scheme of the criminal trial, with its strict substantive and procedural safeguards for the rights of the accused. Such rights safeguards include the right to silence. That did not apply in relation to the quasi-criminal offences attached to election proceedings.
7. Since the other accused person was not called to defend himself, the appellant could not avoid liability as determined by the trial court, only because an alleged co-accused had not been present in the election dispute proceedings.
8. The Supreme Court took judicial notice of the centrality of elections in the functioning of established governance bodies, as signaled by the Constitution in both general and specific terms. On that principle

alone, a party found on fact to have befouled the electoral process could not maintain an argument that his or her offence might not be declared, save alongside that of other parties. Each of such offences stood to be adjudicated upon in its own time, and when the relevant party was the subject of election-dispute proceedings. Consequently, after considering the record of fact and the findings of the trial Court, as appraised by the appellate court, the appellant had been involved in the offences in question.

9. The Elections Act recognized that an election offence had the trappings of a crime at large and stood to be further prosecuted within the realm of the general criminal law hence the provision of section 87(1) of the Act, that in addition to any other orders, a report had to be sent to the Director of Public Prosecutions (DPP), who would then act within the criminal law process.
10. The reference to the DPP was by no means compromised by a principle such as double jeopardy. Double jeopardy as a principle, while it had a proper place in criminal law, was inapposite in the domain of election petitions which were the subject of detailed statute law. Hence a finding by an election court could not be subsequently raised as a shield when a party had to answer to criminal charges in the ordinary sense.
11. Section 83 of the Elections Act empowered the election court to declare an election to be valid or invalid, following an election petition on the basis of certain conditions. The court could not appear to condone illegality in the election process and would therefore investigate any alleged breaches of the law even where those were not in the pleadings but arose in the course of the trial.
12. The election court was a source of relevant information for a possible criminal trial but whether or not such trial took place, fell to the prosecutorial discretion of the DPP. Such a scenario by no means turned the election court into a criminal court, and hence did not amount to a subjection of the affected party to double jeopardy.
13. Election proceedings which were of a *sui generis* nature did not fall in the category of trial for an offence and so would not attract the defence of double jeopardy. The appellant was not able to demonstrate that the proceedings before the election court led to either a conviction or an acquittal.
14. Notice of charges as it applied in criminal trial safeguards, did not require to be replicated in a *sui generis* cause such as an election dispute. For offences cited before an election court, the nature and extent of required notice would be dependent on the facts and circumstances of each case.
15. An election court would quite properly proceed and subject a party found culpable, to the specified sanctions set out under section 67(1) of the Elections Act, 2011, but it should be clear that even though the election court had the competence to deal with such offence of criminal character, the trial process itself was not criminal, and remained one of its own kind. The offences were acted upon within the parameters of the election law, rather than of the Criminal Procedure Code or the Penal Code. Penalty against the person found culpable, in that regard, was for befouling the solemn electoral expression of the people.
16. A distinguishing factor between the trial of electoral offence and that of the ordinary criminal offence with its special safeguards, was that the latter required proof beyond any reasonable doubt, in the context of prescribed safeguards for the accused, whereas the former, though requiring strict proof, did not run alongside such protective arrangements all that was required was that the court be convinced that proof had been effected beyond doubt. The penalties in respect of election offences were also of a special character, being contingent on actions by the IEBC disqualifying the culprit from participation in elections (Elections Act, 2012, section 72(1)) and the precise remedy deliverable by the court itself was annulment of the election in question.

17. The election court could send a report to the DPP to initiate substantive criminal trial in respect of a culpability that originated from election proceedings. The penalty meted out at the election court was to be regarded as confined to the wrong of undermining the electoral voice of the citizens. Therefore, the finding of the appellant as culpable for election offences by the election court, and confirmed by the Court of Appeal, could not be said to have violated the appellants rights under the Constitution.

Per K H Rawal, DCJ (concurring)

18. Disqualification of a person from the electoral process, upon a finding of guilt, could only be made pursuant to articles 99(2)(g) and (h), 99(3) of the Constitution, and section 24 of the Elections Act, and could only be effected after the completion of an appellate process on the charge in question, and not before. The provisions of article 99 and section 24 specifically of article 99(2) (g) and 99 (2)(h)) were incapable of a complex interpretation process and, appeared to govern the process of disqualification at the time of nomination, and of registration as a candidate for the election. They affected the nomination of persons, and the clearance of those persons by the IEBC to contest the seat for Member of Parliament. Article 99 and section 24 thus covered pre-existing (at the time of registration) and supervening (at the time of the election) grounds for disqualification.
19. It was an indelible principle of law that the proceedings before an election court were *sui generis*. They were neither criminal nor civil. The parameters of that jurisdiction were set in statute (Elections Act). As such, while determining an election matter, a court had to act only within the terms of the statute as guided by the Constitution.
20. An election petition was not an action at common law, nor in equity. It was a statutory proceeding to which neither the common law nor the principles of equity applied but only those rules which the statute made and applied. It was a special jurisdiction, and a special jurisdiction had to be exercised in accordance with the statute creating it. Concepts familiar to common law and equity had to remain strangers to election law unless statutorily embodied. A court had no right to resort to them on considerations of alleged policy because policy in such matters as those relating to the trial of election disputes was what the statute lay down.
21. Section 62 of the Elections Act lay out the offence of treating, specific to a candidate. Section 64 of the Elections Act on the other hand lay out the ingredients for the offence of bribery, also specific to candidates. While those two sections defined the ingredients of the cognizable offences of treating and bribery, section 67 of the Elections Act prescribed the sentences for those offences. Sections 62 and 64 needed to be read together with section 67, in order to complete the components of the offences. The specific mention of candidate in sections 62 and 64, had a direct bearing on the provisions of section 87 of the Elections Act, which stipulated under what circumstances after determination of the election petition the court should make a report to the DPP, the IEBC, and the relevant speaker of the parliamentary chamber.
22. While the Elections Act created election offences, and prescribed punishment upon a finding of guilt, it neither delineated the trial forums nor prescribed the procedure to be followed when the report was handed over to the DPP. An accused person ought not to be subjected to double jeopardy. Section 87(1) of the Elections Act was unclear, insofar as it signaled the possibility of a re-trial, within the criminal process, that ambiguity ought to be clarified through legislation.
23. An election court might make a finding after a careful evaluation of the evidence, that an election offence had been committed. The burden and standard of proof in the instance (election offences) was well established by the Supreme Court. Once that was established within the mechanisms of an

election court, which were not equivalent to those of a criminal trial, the inevitable remedy by the court was the nullification of the election in question, and the handing over of a report to the Office of the DPP for any further action.

[Obiter] I am aware that other countries with elaborate constitutions such as ours have undertaken legislative action to remedy complexities and ambiguities in the electoral law. India for instance, undertook legislative action to simplify the classification of election offences such as 'corrupt practices.' In addition, certain offences such as bribery and undue influence were incorporated into the Indian Penal Code (Chapter IXA-Offences Relating to Elections). The Indian Penal Code classifies the offence of bribery as non-cognizable, bailable and triable by Magistrate of the first class. As is the practice in India, Parliament should classify the various electoral and criminal offences, the resultant convictions, and how such convictions affect the status of a person in contesting an elective post. Parliament should also revise the Penal Code to incorporate offences relating to elections and which ought to be tried in a criminal Court.

[Obiter] There is a serious gap in legislation, and I recommend that the office of the Attorney General, and the Kenya Law Reform Commission should consider and attend to this matter with the expedition it deserves. Part VI of the Elections Act and the Penal Code should be reconsidered and re-formulated, adopting best practices from other jurisdictions such as India, so as to ensure the creation of a seamless process in the electoral and penal laws.

Appeal dismissed.

Orders:

i. The contest to the election court's jurisdiction in Bungoma High Court Election disallowed.

ii. The finding of the Court of Appeal in Kisumu as regards the commission of an electoral offence upheld.

iii. The finding of the Court of Appeal as regards disqualification of the appellant as an election candidate quashed.

iv. In accordance with section 87(1) of the Elections Act, 2011 (Act No.24 of 2011) [Rev. 2012], the Registrar of the Supreme Court, by proper form, was to serve a report of the commission of the election offence of bribery by the appellant, upon the DPP; the IEBC; and the Speaker of the Senate.

v. Apportionment of costs by the Court of Appeal upheld.

vi. As regards costs before the Supreme Court, the parties were to bear their own respective costs.

The judgment to be brought to the attention of the Attorney-General, the Kenya Law Reform Commission, and the speakers of the two chambers of Parliament, for information, and to the intent that re-formulated legislation be considered, delimiting the respective mandates of the election court and the ordinary criminal court, with due attention paid to the issues of jurisdiction for the different courts adjudicating upon the two sets of matters.

26. Provision of free milling services to the electorate by a candidate close to an election date does not amount to bribery

The court in determining whether the 3rd respondent engaged in acts of voter bribery by way of printing and placing posters at the Ekalakala shopping center indicating that he would be providing free maize milling services amounted to bribing voters, stated that although the timing of the free milling services was suspect, one had to consider whether by itself, it influenced the outcome of the elections and also whether by itself it was enough for the court to vitiate the election.

Philip Muia Kimeu and 2 others v IEBC and 2 others [2018] eKLR

Election Petition Number 1 of 2017

Senior Resident Magistrates Court at Kithimani March 1, 2018

G Shikwe, SRM

Electoral Law *– bribery – standard of proof – where candidate provide free milling services to electorate - whether the provision of free milling service to the electorate by a candidate close to an election date amounts to bribery*

Brief facts

The instant matter was an election petition challenging the outcome of the elections of the Member of County Assembly of the Ekalakala Ward during the general elections held August 8, 2017. The 1st (IEBC) and 2nd (Returning Officer, Masinga Constituency) respondents supervised the exercise. The petitioners argued that: that the elections were conducted contrary to article 81(e) of the Constitution of Kenya (2010), the Elections Act 2011 and the Elections Regulations 2012 in that the 3rd respondent engaged in acts of voter bribery by way of printing and placing posters at the Ekalakala shopping center indicating that he would be providing free maize milling services, bribing voters at Itundumuini and Makuyu Markets and Isyukoni village and that he also went around various homes dishing out money to voters as an incentive for them to vote for him.

On the other hand, the 1st and 2nd respondent's denied that any case of electoral malpractice was brought to her attention by the petitioners during the electioneering period either through phone calls or in writing. Furthermore, that there were also no reports of posters that were put up to entice people to vote.

Issue

i. Whether the provision of free milling services to the electorate by a candidate close to an election date amounts to bribery.

Held

1. The standard of proof for electoral malpractices involving voter bribery was one of beyond any reasonable doubt. Voter bribery was a criminal offence. The witnesses who testified also mattered in that the superior courts gave greater weight to non-partisan witnesses than partisan witnesses.
2. In determining the effect of commission of an election offence, a distinction should be drawn between corrupt acts committed by agents of a candidate and those committed by the candidate himself. The corrupt acts of an agent had to be shown to have had the implied sanction or blessing of the candidate which would establish a consistent pattern from which a reasonable inference could be drawn that the candidate concerned had to have sanctioned the acts.

Philip Muia Kimeu and 2 others v IEBC and 2 others [2018] eKLR

3. It was not in dispute that free milling services were offered by the third respondent who claimed that he had been doing so repeatedly out of altruism to mitigate against the effects of drought and poverty in his region. The witnesses presented by the petitioners had not demonstrated if they were induced as claimed by the petitioner but appeared to have voted for the candidate of their choice.
4. The timing of the free milling services was suspect but the court had to consider whether by itself, it influenced the outcome of the elections and also whether by itself it was enough for the court to vitiate the election seeing that the other allegations had remained largely unproven. The courts would strive to preserve an election as being in accordance with the law, even where there had been significant breaches of official duties and election rules, providing the results of the election was unaffected by those breaches. That was because where possible, the courts sought to give effects to the will of the electorate.
5. The issue of providing free milling services to the residents of Ekalakala market so close to the election date was, by itself sufficient to negate the will of the voters in Ekalakala ward who freely expressed the said will in an election that was deemed largely free and fair. It was not enough to claim that there was an electoral irregularity but it was incumbent upon the petitioner to demonstrate how the alleged malpractice affected the electoral process to the extent that it could be claimed that the will of the electorate had been impeded. The petitioners, with the greatest respect, they failed to do so.

Petition dismissed with costs to the respondent.

Orders:

i. A declaration was issued that the 3rd respondent was duly and validly elected as the Member of County Assembly- Ekalakala Ward, Narok County;

ii. A certificate of validity to be issued to the 3rd respondent and be transmitted to the Speaker of the County Assembly –Machakos County; and

iii. The Petition was dismissed with costs to the respondents as determined above.

George Nyaucho Omaita v Independent Electoral & Boundaries Commission and 2 others [2018] eKLR

27. The offences of bribery and undue influence was akin to a criminal offence and the burden of proof was that beyond reasonable doubt

The court stated that the offence of bribery and undue influence was not proved by the witnesses beyond reasonable doubt.

George Nyaucho Omaita v Independent Electoral & Boundaries Commission and 2 others [2018] eKLR

Election Petition Appeal No. 2 of 2018

High Court at Kisii — July 31, 2018

M Muya, J

Electoral law *– electoral offences – bribery and undue influence – where the evidence of the appellant witnesses did not prove the offence beyond reasonable doubt - whether the offences of bribery and undue influence was proved beyond reasonable doubt – Election Offences Act, section 10*

Brief facts

The appellant dissatisfied and aggrieved by the decision of the trial court lodged the instant appeal which was premised on the following grounds that: the trial court erred in law in finding that the appellant had not tendered sufficient evidence to prove the election malpractices; the learned magistrate failed to render a determination as to the credibility and impact of the evidence tendered by the appellant and his witnesses; the appellant had not led evidence as to any voter who had changed their mind due to undue influence; That the learned magistrate erred in law by finding that the offence of bribery was not proved as alleged or at all and in so doing misapprehended the meaning of section 91 of the Elections Act.

The respondents contended that the burden of proof rested with the appellant to prove the allegations in his petition. Furthermore, as regards the issue of bribery. It was submitted that bribery was an election offence which was criminal in nature. The appellant was to prove the offence by clear and unequivocal evidence which must be beyond reasonable doubt. Mere suspicion was not enough.

Issue

i. Whether the offences of bribery and undue influence was proved beyond reasonable doubt.

Relevant provisions of the law

Elections Offences Act, No. 37 of 2016

Section 10 - Undue influence

(1) A person who directly, or indirectly in person or through another person on his behalf uses or threatens to use any force violence, including sexual violence, restraint, or material, physical or spiritual injury, harmful cultural practices, damage or loss, or any fraudulent device, trick or deception for the purpose of or an account of

a. Inducing or compelling a person to vote or not to vote for a particular candidate or political party at an election.

b. Inducing or compelling a person to refrain from becoming a candidate or to withdraw if he has become a candidate or

c. Impeding or preventing a person from being nominated as a candidate or from being registered as a

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voter commits the offence of undue influence.

Held

1. The offence of undue influence was provided for in section 10 of the Elections Offences Act. The evidence of undue influence relied on by the appellant was that of PW3 which was said to have been contradictory in nature. The contradiction as to which hand of the 3rd respondent was bandaged was admitted by the appellant but it was submitted that same was a minor contradiction which did not go to the root of the case and that RW3 who was said to have controverted PW 3's evidence was inside the polling station and could not have heard the words uttered by the 3rd Respondent while outside.
2. The trial court observation could not be said to be a slanted approach to the petition which was before the court. Unlike the instant court, the trial court had the opportunity to observe the demeanor of the witnesses. It observed that PW3 had recanted some of its averments in his own affidavit and constantly kept changing positions.
3. The offence of undue influence was a kin to a criminal offence and the burden of proof was that beyond reasonable doubt. That burden of proof lay on the appellant. There was no good reason to fault the trial court on his finding on the failure of the petitioner to have proved undue influence.
4. PW2 who was himself a candidate in the election and who was the petitioner's star witness in the case for bribery was not a truthful and reliable witness. The trial court was of that view and there was no reason to fault that finding. The offence of bribery was criminal in nature and the standard of proof was beyond reasonable doubt. The burden of proof lay with the petitioner.
5. The election was conducted substantially in accordance with the constitution of Kenya, 2010 and all other relevant laws. Therefore, the appeal had no merit.

Appeal dismissed with costs to the respondents which were assessed as Kes.300,000/= as instruction fees.

28. Statements of voter bribery by unnamed supporters, who did not record statements, cannot be relied on as evidence in an election petition

An allegation of bribery was a criminal offence, hearsay evidence was no evidence at all, and the probative value to be given to the same was insignificant.

Gideon Ndambuki Muthiani v Frank Kichoi and 2 others

Election Petition No. 2 of 2017

Senior Principal Magistrates Court at Voi — February 28, 2018

M Onkoba-SRM

Electoral law *– bribery – burden of proof – claim by the petitioner that the 1st respondent engaged in bribery and intimidation – where petitioner relied on supporters' statements – where supporters did not record witness statements - whether statements of voter bribery by unnamed supporters, who did not record statements, could be relied on as evidence in an election petition - Evidence Act Cap. 80, section 109*

Electoral Law *– agents – appointment of – claim that the petitioner did not receive forms 36A from polling station – where petitioner did not have an agent(s) at the polling station - whether failure by a candidate to be furnished with copies of polling station results, due to a candidate not having agents at the polling station rendered the results of the election invalid – Elections Act, 2011, section 30*

Electoral Law *– electoral irregularities – effect of – whether irregularities in the conduct of elections that did not demonstrate they affected the votes rendered the election process invalid*

Brief facts

The petitioner moved to court under certificate of urgency with a myriad of grievances that included: Bribery of voters, petitioner's agents, the security officers and the 3rd respondents officials by the 1st respondent, his officials and/ or agents and financiers; intimidation, bullying and threats of voters perceived to be supporters of the petitioner by the 1st respondent, his agents and financiers.

The 1st respondent averred that the elections were free and fair and that there was no violence, intimidation, improper influence or corruption. Furthermore, the 2nd and 3rd respondent contended that the employees of the 3rd respondent entrusted with the role of facilitating the election of member of county assembly for Chawia ward discharged their role with utmost fidelity to the Constitution of Kenya, 2010 (Constitution) and statutory instruments on the conduct of elections

Issues

i. Whether statements of voter bribery by unnamed supporters, who did not record statements, could be relied on as evidence in an election petition.

ii. Whether failure by a candidate to be furnished with copies of polling station results, due to a candidate not having agents at the polling station rendered the results of the election invalid.

iii. Whether irregularities in the conduct of elections that did not demonstrate they affected the votes rendered the election process invalid.

Held

1. A petitioner who moved to an election court seeking certain relief(s), had to be equipped with proof

of the grievances they had, in order for them to succeed in getting those reliefs. It was a cardinal rule of the law of evidence that he who alleged had to prove. Section 109 of the Evidence Act Cap 80 Laws of Kenya stated that the burden of proof as to any particular fact lay on the person who wished the court to believe in its existence, where it was provided by any law that proof of that fact would lie on any particular person.

2. Allegations of bribery were of a criminal nature. The superior courts had in a number of decisions addressed their minds on the standard of proof required to establish the same. The petitioner had conceded that he personally did not witness any bribery incident by the 1st respondent or any of his agents. He stated that his claims of wide spread voter bribery in the electoral ward were based on reports he received from third parties. Those parties did not record statements with the police or file affidavits in the matter.
3. The petitioner had no direct evidence to adduce to fortify his contention that the 1st respondent, either in person or through his lead agent were going round the villages and or polling stations on election day dishing out money to voters. By relying on what he was told by third parties, who are not witnesses in the matter, the petitioner was simply acting on hearsay evidence. Hearsay evidence was no evidence at all, and the probative value to be given to the same was insignificant. The evidence on record to say the least did not prove even a single incident of the alleged bribery of voters with regard to the elections of Member of County Assembly for Chawia Ward, held on August 8, 2017.
4. Copies of the polling station results were contained in a statutory form referred to as Form 36A. Under section 30 of the Elections Act, 2011, agents were appointed either by a political party, a candidate or a registered referendum committee. It was clear that was not the duty of the electoral body to appoint or provide agents for the political parties or candidates. It was incumbent upon the petitioner to ensure that his agents appointed by himself were at the polling stations, to receive the Forms 36A. In the absence of his agents, the 3rd respondent could not be faulted as they could not give the forms to a party not present or represented at the polling centres.
5. As regards the irregularities noted in the conduct of elections, the petitioner did not demonstrate how the alleged irregularities affected the votes he secured vis-a-viz those of the 1st respondent. The scrutiny report prepared by the Executive Assistant of Voi Law Courts dated February 7, 2018 was filed on even date. According to the report, the scrutiny was conducted in presence of all the parties. That each ballot paper, counterfoil, form 36A and candidate vote tally sheet were examined. Among the observations made, was that all the five ballot boxes were intact, the original Form 36A were not in the box but were availed by the 3rd respondent during scrutiny. That the votes tally was accurate for all the stations scrutinized.
6. If the petitioner's intention was to scrutinize those election materials, nothing would have been easier than for him to say so. Nowhere in his entire petition did the petitioner signify of his intention and or desire to have scrutiny of the kiems kits. The scrutiny of kiems kits being technology based gadgets would have involved the court making specific orders on ICT Personel to be available during the scrutiny to give their input. In its ruling delivered on February 1, 2018 allowing the scrutiny, the court had cited the case of *Hassan Mohammed Hassan and another –Vs- IEBC and 2 others, Petition No.6 of (2013) eKLR*. Taking guidance from the decision of the superior court, the court would not have had any basis to order for scrutiny of the kiems kit, where none of the parties especially the petitioner had raised any issue about them
7. The petitioner could not ask for scrutiny of the ballot boxes, but somehow hope to get an order for scrutiny for the kiems kits. The petitioner from the word go knew the existence of those election

materials. He laid basis for scrutiny of the ballot boxes and an order to that effect readily issued. His lamentations in regard to the kiems kit was just but belated and an afterthought. He raised the same at the final submissions stage and nothing could be done about it.

8. It was apparent that the petitioner had no evidence to fault the functioning and or working of the kiems kit, and his mention of the same as part of the election materials required for scrutiny was therefore an attempt to gather evidence. The petitioner did not have the said evidence when he moved to court seeking to impeach the outcome of the election in respect of Member of County Assembly for Chawia Ward.

Petition dismissed with costs to the respondents.

Orders:

i. *The 1st respondent was validly and duly elected as Member of County Assembly for Chawia ward in the election held on August 8, 2017.*

ii. *instructions fees payable was capped at Kes. 500,000/- i.e Kes 200,000 for the 1st respondent and Kes. 300,000/- for the 2nd and 3rd respondents.*

Fraudulent Acquisition of Public Property

FRAUDULENT ACQUISITION OF PUBLIC PROPERTY

29. Use of a forged document as a basis for fraudulent acquisition of public property

The state successfully mounted a prosecution against the accused persons for using a fraudulent document as a basis for the claim for storage charges and for the money which was paid to them from NCPB bank accounts pursuant to an alleged false claim and a fraudulent invoice for goods not supplied.

Republic v Grace Sarapay Wakhungu & 2 others

Anti-Corruption Case No. 31 of 2018

Chief Magistrate's Court at Milimani — June 22, 2020

E Juma, CM

Brief facts

The background to the instant case was that following a shortage of maize at the national grain reserve, the National Cereals and Produce Board (NCPB); the national government authorized tenders to be floated for the urgent importation of maize. The NCPB commenced the procurement process and that a tender committee sat on August 10, 2004 whereby five (5) firms were awarded the tender to supply the 180,000 metric tonnes of maize, among them the 3rd accused. The 1st and 2nd accused were directors of the third accused (Erad Supplies & General Contracts Ltd). Out of the five, four firms were issued with the letters of credit and that it was only the 3rd accused whose letter of credit was not opened. Out of the four (4), it was only two (2) firms that supplied the maize, the other two did not supply. There was a duly signed contract between the 3rd accused and NCPB signed on the August 26, 2004 which provided an arbitration clause in the event of any dispute.

Pursuant to that, the 3rd accused filed an arbitration cause against NCPB and was successfully awarded damages for loss of profit, cost of storage, suit and interests while the counterclaim by NCPB was dismissed. That award was confirmed before the High Court as required by the law. Thereafter, NCPB unsuccessfully attempted to set aside the award and the execution of the decree. Pursuant to the decree, Garnishee orders were obtained by the 3rd accused against the NCPB attaching the money held in the Judgment debtor's accounts in three banks: NBK, KCB and Cooperative Bank (Ksh.13,364,671.40, Ksh.297,086,505, USD.24,032). The said money was paid to the bank accounts belonging to the advocates who were representing the accused persons. Out of the decretal amounts recovered, the 1st accused received Ksh. 40,000,000 while the 2nd accused received Ksh. 50,000,000.

Therefore, the contention before the instant court was that the 3rd accused relied on PEX43 to secure the arbitration award on storage charges. The prosecution now contends that it was a fraudulent document and as such the arbitration award for storage charges was based on fraud. The prosecution blamed the accused persons for uttering PEX43 before the arbitrator, fraudulently acquiring public property and also the 1st accused for perjury during her testimony before the arbitrator. The prosecution brought these charges on allegations that the invoice which was the basis of the claim for storage charges and which was an exhibit in the arbitration proceeding was not genuine hence the claim was based on fraud. The accused persons were thus charged for the money which was paid to them from NCPB bank accounts pursuant to an alleged

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false claim and a fraudulent invoice. The three accused persons were jointly charged in counts 1, 3, 4 and 5 while the 1st accused was separately charged in count 2. The 1st and 2nd accused were directors of the 3rd accused which is a legal entity (a juristic person).

Under count 1 they were charged with the offence of uttering a false document contrary to section 353 as read with section 349 of the Penal Code. The particulars were that the accused persons knowingly and fraudulently uttered a false invoice No 12215-CF-ERAD for the sum of US Dollars 1,146,000 as evidence in the arbitration dispute between Erad Supplies and General Contractors Limited and National Cereals and Produce Board purporting it to be an invoice to support a claim for cost of storage of 40,000 metric tonnes of white maize purportedly incurred by Chelsea Freight.

In count 2, the 1st accused was charged with the offence of perjury contrary to section 108(1) as read with section 110 of the Penal Code. The particulars of the offence were that the 1st accused while giving testimony in an arbitration dispute between Erad Supplies and General Contractors Limited and the National Cereals and Produce Board knowingly gave false evidence for decisions for cost of storage of 40,000 metric tonnes of white maize purportedly incurred by Chelsea Freight.

Count 3, 4 and 5 related to separate offence of fraudulent acquisition of public property contrary to section 45(1) as read with section 48(1) of the ACECA 2003. The particulars were stated that the 3 accused persons on diverse dates jointly and fraudulently acquired public property to wit Ksh 297,086,505.00, Ksh 13,364,671.40 and US Dollars 24,032.00 purporting to be the cost of storage of 40,000 metric tonnes of white maize purportedly incurred by Chelsea Freight.

Issues

i. Whether the elements of uttering a false document had been satisfied.
ii. Whether the elements of perjury had been satisfied.
iii. Whether the accused persons fraudulently acquired public property**.**
iv. Whether the defence raised reasonable doubt to the prosecution's case**.**
v. Whether the accused were to be held liable to legal fees incurred by the advocates**.**
vi. Whether the 3rd accused being a juristic person was criminally liable**.**
vii. Whether PEX 43 was a genuine document.

Relevant provisions of the law

Anti-Corruption and Economic Crimes Act, No. 3 of 2003

Section 45 – Protection of public property and revenue , etc

(1) A person is guilty of an offence if the person fraudulently or otherwise unlawfully—

(f) *acquires public property or a public service or benefit;*

(g) *mortgages, charges or disposes of any public property;*

(h) *damages public property, including causing a computer or any other electronic machinery to perform any function that directly or indirectly results in a loss or adversely affects any public revenue or service; or*

(i) *fails to pay any taxes or any fees, levies or charges payable to any public body or effects or obtains any exemption, remission, reduction or abatement from payment of any such taxes, fees, levies or charges.*

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Penal Code

Section 353 - Uttering false documents

Any person who knowingly and fraudulently utters a false document is guilty of an offence of the same kind and is liable to the same punishment as if he had forged the thing in question

Section 349 - General punishment for forgery

Any person who forges any document is guilty of an offence which, unless otherwise stated, is a felony and he is liable, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for three years

Held

1. From the evidence of the investigating officer, PW 27 the court was told that the 2nd accused did not testify in the arbitration which is supported by PEX 41. The prosecution did not adduce any evidence to link the 2nd accused to the first charge, PW 27 on cross examination conceded that the 2nd accused did not utter PEX 43, even though there a possibility of common intention as directors of the 3rd accused, the evidence of PW 27 exonerated the 2nd accused on count 1 and the 3rd accused being a juristic person was not capable of committing the offence of perjury.
2. The document in question which was alleged to be fake was PEX 43, which was an invoice and there was no dispute that the defence relied on it during the arbitration and the evidence on record indicates that it was produced by the 1st accused during the arbitration. The defence maintained that it was a genuine invoice from Chelsea Freight. The court found that there was no dispute on the nature of evidence the 1st accused gave during the arbitration proceedings and the prayers made therein. What the court determined was whether her testimony during the arbitration and the said invoice number 122215-CF-ERAD (PEX 43) was genuine or not.
3. The elements of the offence of uttering a false document included;
   a. The document was a fake one;
   b. Accused used the document as a genuine one;
   c. Accused knew or had reason to believe that it was a forged document; and
   d. Accused used it fraudulently or dishonestly, knowing or having reason to believe that it was a forged document.
4. The evidence on the record was that the money in NCPB Bank accounts at KCB, NBK and Cooperative Bank were attached by a court order, Garnishee order, the evidence produced by the prosecution witnesses from the three banks as well as the investigators was that by Garnishee orders, the money was paid out to the advocates of the accused persons. That undisputed evidence was corroborated by the bank statements and by the bank advice slips from all the banks namely KCB, NBK, Cooperative Bank, Barclays Bank and First Community Bank.
5. There was no doubt that the first accused testified before the arbitrator and that she produced PEX 43 which was relied in support of their claim for storage charges.
6. The evidence the defence availed on the alleged communication with Chelsea Freight was one sided from the 3rd accused and there was no corresponding response from Chelsea Freight and the court found that the documents were not put to PW22 particularly during the cross examination. The court thus found the letters between the 3rd accused and Chelsea Freight were unreliable, and or made up, PW 22 was categorical that he did not issue the invoice and this honourable court had no reason to doubt his evidence.

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7. The letter of credit was a crucial document that was vital to initiate the process of importation of the maize and without that, the accused persons had no capacity to commence the process to the importation of maize.
8. The court found that the process of claim was flawed, they did not follow the right sequence of events their recourse was to pursue the contract and the failure by NCPB to issue the letter of credit rather than to resort to raise a false claim for storage charges. Clause 8 of the contract PEX2 gave the right to either party the option to terminate the contract, hence that contract had a way out, neither party took that route.
9. The court was satisfied that the 1st and 2nd accused were the co-directors of the 3rd accused hence responsible on the utilisation of the money, otherwise they ought to have protested or instructed their lawyers to distribute the money as they deemed fit, they were answerable if they allowed a non-director in the name of one Jacob Juma to meddle in the business of the 3rd accused. They did nothing which meant that they were satisfied in the manner the attached money was utilised, the dissatisfaction expressed in the defence was brought forth too late as a cover up and was not believable.
10. On the issue of criminal liability of the 3rd accused, since a company was an artificial person, it could only act through an agent. In law, the position was that the decisions of the directors of a company were deemed to be the decision of the company.
11. In that respect, the company was bound by the actions of its agents and directors. That agency relationship and company liability only ensued in the scope of the director's mandate. Anything aside from that, they would be personally liable. A corporation had the same criminal responsibility as a natural person.
12. Section 23 of the Penal Code stated that, where an offence was committed by either a natural or juristic person (a corporation), every person who was in charge of the control of the management of the affairs or activities of the company was guilty of the offence and was liable to be punished for it. That was the rule, which exempted liability from parties who either were not aware of the offence being intended or about to be committed, or that they did their due diligence and took all the necessary steps to avoid its commission. The court was therefore certain that the 3rd accused could be held liable and culpable in counts 3,4 and 5, however on account of the nature of count 1 that the 3rd was exonerated and accorded the benefit of doubt on count one.
13. There was no direct evidence how the defence obtained the questioned invoice, they had mentioned the involvement of third parties such as Chiko Slanders Ferenc Lago, Alfred Maynard and even Jacob Juma, were not available and did not testify.
14. Based on direct evidence of PW 22, the court was convinced that PEX 43 did not emanate from Chelsea Freights as such it was a fraudulent document made by the defence in support of a fictitious claim for storage charges.
15. The 3rd accused was used to defraud NCPB a huge quantifiable amount of money and during the process two companies namely KAPU Kenya and Dubai bank paid out money which they were yet to recover. A striking coincidence was that both KAPU Kenya and Dubai Bank no longer existed while the 3rd accused was said to be still in existence, the company (3rd accused) was therefore found to have been directly involved in the offences.
16. There was corroborated evidence on record from the prosecution and conceded by the defence that the 1st accused testified before the arbitrator and produced PEX 43 and there was no doubt that the claim for storage charges was supported by PEX 43.

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17. The court had the benefit to observe the demeanour of all the witnesses and it was satisfied that the prosecution gave a true and credible evidence which was well corroborated. The defence did not challenge the fact that they relied on PEX43 and that they received part of the money. The court having found that PEX43, the invoice in question was a false document made in support of a false claim for storage charges meant that the claim was based on fraud.
18. The evidence on record thus established that PEX43 did not originate from Chelsea freights on that account it was found to be a false document.
19. From the evidence on record there was sufficient evidence adduced by the prosecution in support of its case. There was no doubt that the accused persons committed the offences. The 2nd and 3rd accused were however accorded the benefit of doubt in respect of count 1.
20. On count 1, the 1st accused was found guilty and accordingly convicted. The 2nd and 3rd accused were found not guilty and acquitted under section 215 of the CPC. Under count 2, the 1st accused was found guilty and accordingly convicted while in count 3,4 and 5 all accused persons were found guilty and accordingly convicted.

30. Fraudulent acquisition of public property through a principal - agent relationship

This case demonstrates an incident of fraudulent acquisition of public property through a principal – agent relationship. The court observed that there need not to be a formal or structured contract between the contracting parties in order for a "principal" and "agent" relationship to be established. It could be an informal mutual agency, as was in the instant case. Funds were paid out to the Ist appellant (principal) through PW14 (agent). And there was no justification for the 1st appellant>s receipt of part of funds meant for a public purpose.

Boniface Okerosi Misera & Another v Republic [2021] eKLR

Criminal Appeal No. 89 of 2018

Court of Appeal at Nairobi — March 19, 2021

R N Nambuye, A. K. Murgor & S. ole Kantai, JJA

Criminal Law – *corruption and economic crimes – charge of fraudulent acquisition of public property – claim where the incident of fraudulent acquisition of public property arose through a principal – agent relationship – whether there had to be a formal or structured contract between the contracting parties before a principal – agent relationship could be established – Anti - Corruption and Economics Crimes Act, sections 38, 45 (1) (a) and 48.*

Brief facts

This was a second appeal arising from the judgment of the High Court in Anti-Corruption Criminal Appeal No. 5 of 2018 as consolidated with Criminal Appeal No. 6 of 2018. The background to the appeal was that the appellants were arraigned jointly with two others before the Chief Magistrates Court at Nairobi with six counts preferred under ACECA and the Penal Code. At the conclusion, the trial magistrate acquitted appellants co-accused's on all counts, absolved the appellants of the offences laid in counts 1-4 leaving only counts five (5) and six (6) falling for them to defend themselves.

In count (5), the 1st appellant faced the charge of fraudulent acquisition of public property contrary to section 45(1)(a) as read with section 48 of ACECA. The particulars of the offence were that Boniface Okerosi Misera fraudulently acquired from the City Council of Nairobi (NCC), public property (Kes. 10,000,000) while the 2nd appellant in count (6) also faced the offence of fraudulent acquisition of public property contrary to section 45(1)(a) as read with section 48 of ACECA. The particulars were that Cephas Kamande Mwaura fraudulently acquired public property from the City Council of Nairobi amounting to the sum of Ksh 9,300,000.

The appellants were found guilty as separately charged in count 5 and 6 and convicted accordingly. They were sentenced to two years' imprisonment each. In addition, the 1st appellant was fined Kes. 40 Million and in default, to serve a further one-years' imprisonment, while the 2nd appellant was fined Kes. 37 Million and in default to serve an additional one-years' imprisonment.

The appellants subsequently appealed their conviction and sentence to the High Court. The High Court upheld the trial court's findings prompting the appellants to appeal to the Court of Appeal raising several grounds of appeal. The 1st appellant complained that the High Court ignored and also failed to appreciate that: the charge was never proved beyond reasonable doubt; his right to fair trial was violated; no evidence was adduced to show that there existed a principal and agent relationship between him and PW14 within the meaning of section 38 of the Anti-Corruption and Economic Crimes Act; he was subjected to double

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jeopardy contrary to the preamble, Article 10 and 50(2)(k)(n)(o) and (p) of the Constitution; evidence of PW14 which required corroboration could not corroborate other evidence; the burden of proof was shifted 1st appellant to prove his innocence contrary to law; and, lastly, that the sentence meted out against him was not only excessive but also inhuman and degrading.

The 2nd appellant premised his appeal on the following grounds, that the learned Judge erred in law by failing to appreciate that: the charge was not proved to the required threshold; he was not accorded a fair trial; his right to presumption of innocence was blatantly violated; there were numerous misdirections committed by the learned Judge that resulted in an unjust decision; there was unmitigated shifting of the burden of proof; and the sentence meted out against him was unjust and should be interfered with.

The two courts below made concurrent findings of facts based on both oral and documentary exhibits albeit in a summary form that NCC desired to acquire land for a public cemetery at the material time. An escrow account was opened for purposes of receiving and disbursing public funds meant for a public purpose which turned out to be a fraud. Funds were paid out to the 1st appellant through PW14 whose evidence the two courts below found truthful and therefore credible.

Issues

i. Whether the High Court erred in cumulatively condensing the 1st appellant's grounds of appeal in both the memorandum of appeal and the supplementary grounds of appeal into five (5) and addressed them as such.

ii. Whether a principal and agent relationship between the 1st appellant and PW14 was established.

iii. Whether in the circumstances of the instant case, the burden of proof was shifted on to the appellants to prove their innocence.

iv. Whether there was violation of the appellants' constitutional rights resulting in a mistrial

v. Whether respective charges were not proven to the required threshold against the appellants

vi. Whether the sentences handed down against the appellants were inhuman, degrading and therefore unconstitutional and should not be sustained.

Relevant provisions of the law

Anti-Corruption and Economic Crimes Act, No. 3 of 2003

Section 45 – Protection of public property and revenue, etc

(1) *A person is guilty of an offence if the person fraudulently or otherwise unlawfully—*

(a) *acquires public property or a public service or benefit;*

(b) *mortgages, charges or disposes of any public property;*

(c) *damages public property, including causing a computer or any other electronic machinery to perform any function that directly or indirectly results in a loss or adversely affects any public revenue or service; or*

(d) *fails to pay any taxes or any fees, levies or charges payable to any public body or effects or obtains any exemption, remission, reduction or abatement from payment of any such taxes, fees, levies or charges.*

Held

1. The instant case being a second appeal, and by dint of the provision of section 361 of the Criminal Procedure Code, a second appeal had to be confined to only points of law.

2. As regards the 1st complaint that the court condensed the 1st appellant's grounds of appeal in both the memorandum of appeal and the supplementary grounds of appeal into five (5) and addressed them as such, the court considered section 169 of the Criminal Procedure Code and held that a court seized

of jurisdiction under the provision of section 169 (1) of CPC had discretion to address complaints raised by an appellant before it either seriatim or alternatively condense them into thematic issues and address them as such as deemed fit. Therefore, there was no basis in the complaint and it was accordingly rejected.

3. Black's Law Dictionary 10th Edition defined an "agent" *inter alia* as someone who was authorized to act for or in place of another, a representative etc. In its commentary there was an expression that "generally speaking anyone could be an agent who was in fact capable of performing the functions involved" and that the agent normally bound not himself but his principal by the contracts he made. It was therefore not essential that he be legally capable to contract. While principal in the same text was defined as "someone who authorized another to act on his or her behalf as an agent".
4. In the concise Oxford English Dictionary, an agent was defined as "a person that provides a particular service" while principal was defined as "a person for whom another acts as an agent or a representative."
5. There was nothing in the definitions of the words 'principal' and 'agent' that suggested that in order for a "principal" and "agent" relationship to hold there must be a formal or structured contract between the contracting parties. That, did not, therefore, rule out an informal mutual agency contract like the one concurrently ruled by the two courts below to have been in existence as between the 1st appellant and PW14 as at the time events resulting in the prosecution giving rise to this appeal were triggered.
6. In the circumstances of this appeal, the court found that it had been established to the required threshold that a principal/agent relationship was mutually created between the 1st appellant and PW14. The complaint that no evidence was adduced to show that there existed a principal and agent relationship between the 1st appellant and PW14 was likewise rejected.
7. The burden of proving the ingredients of the offence were entirely on the prosecution and the accused could not be called upon to prove his innocence. However, that rule was subject to exceptions provided in section 111 of the Evidence Act. The court affirmed the trial and first appellate court's finding that the burden of proof did not shift to the appellants to prove their innocence.
8. The first appellant complained on alleged denial of the right to recall witnesses in support of the complaint on infringement of his right to a fair hearing. As ruled by the trial court and which the instant court fully affirmed, this complaint was a subject of an appeal that was never pursued to its logical conclusion. That matter was, therefore, foreclosed. The complaint was thus rejected.
9. The provision of section 211 of CPC did not rule out the possibility of an accused person giving a written statement as such testimony. The court therefore ruled that neither the trial court nor the first appellate court erred when they allowed the 1st appellant to use that mode of procedure as his defence in the first instance and when the High Court affirmed the same process especially when the record was explicit that the court did not probe or induce the 1st appellant into adopting that mode of defence.
10. As regards the complaint that the trial court failed to sustain the 1st appellant's counsel's objection to the manner of cross-examination of the 1st appellant on his written statement of defence which according to him exposed him to self-incrimination, the 1st appellant was ably represented at the trial by legal counsel and if he was aggrieved by the trial court's rejection of his objection on the manner the State was conducting its cross-examination on him, he ought to have appealed against that order.
11. The alleged infringement of the 2nd appellant's right to "remain silent and not to testify during the proceedings" was rejected. The right stemmed from section 211 of the CPC which he did not dispute was accordingly complied with. Upon such compliance, it was incumbent upon him to exercise that right to remain silent. The moment he elected to give sworn evidence, he forfeited that right and opened

himself up for cross-examination. He could not, therefore, be heard to complain.

12. As for presumption of innocence, no infringement was occasioned against the 2nd appellant. That was why his plea of not guilty was accepted by the trial court triggering the full trial in which he fully participated.
13. There was no justification for the 1st appellant's receipt of part of funds meant for a public purpose. There was nothing to suggest that there was a misapprehension of those facts. There was, therefore, no basis for the court to interfere with the two courts below concurrent findings of facts with regard to the 1st appellant's culpability in the commission of the offence charged.
14. The 2nd appellant did not deny receipt of the payment. His explanation was that it was payment for survey services tendered to PW3 who raised no complaint against him for any wrongdoing. The record was explicit that PW3 never raised any complaint of any wrongdoing against the 2nd appellant. Neither did the NCC. However, neither the two courts below nor this court on a second appeal could found anything on the record to suggest that the funds came from PW3 so as to rule out the crystallized position that those funds came from the escrow account.
15. The need for the 2nd appellant to justify the payment to him of part of the public funds did not amount to a shifting of the burden of proof for him to prove his innocence. It was in line with the principle set out in section 111 of the Evidence Act as crystallized by the Supreme Court in the *Republic vs. Ahmad Abolfathi Mohammed.* The relevant matters highlighted by the trial court and upon which the learned Judge based her finding that they were within the respective appellants' knowledge were indeed within their knowledge. The court, therefore, affirmed High Court's findings that the prosecution case against both appellants was watertight and warranted no interference.
16. The court of appeal had no mandate under section 361 to address complaints relating to sentencing. They were addressed to the wrong forum in so far as they purported to challenge the constitutionality and or the legality of the sentences as provided for in law.

The consolidated appeals lacked merit and were accordingly dismissed.

31. Imprest holders have a duty to faithfully account for money entrusted to them.

This case demonstrates an incident where an imprest holder was charged with fraudulent acquisition of public property as well as the charge of false accounting by a public officer. The charges arose from the fact that the imprest holder who was entrusted with money to execute an assignment did not execute the said assignment in the manner that was expected and also in other instances the amounts paid were inflated.

Erick Otieno Oyare v Republic [2022] eKLR

Criminal Appeal No. E033 of 2021

High Court of Kenya at Embu — February 28, 2022

L M Njuguna, J

Criminal Law – *corruption and economic crimes – charge of fraudulent acquisition of public property – claim where an imprest holder was entrusted with money to execute an assignment but did not execute the assignment in the manner it was expected and also there were instances where the amounts paid were inflated - Anti - Corruption and Economic Crimes Act, sections 45(1); 48(1)*

Criminal Law – *corruption and economic crimes – charge of false accounting by a public officer - claim where an imprest holder was entrusted with money to execute an assignment but did not execute the assignment in the manner it was expected and also there were instances where the amounts paid were inflated – Penal Code, sections 331(1); 331(2)*

Brief facts

The appellant was charged with five counts of Fraudulent Acquisition of Public Property contrary to section 45 (1) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003; five counts of Abuse of office contrary to section 46 as read with section 48(1) and equally, five counts of False Accounting by a Public Officer contrary to Section 331(1) as read with Section 331(2) of the Penal Code.

The appellant filed the instant appeal having been dissatisfied with the conviction and sentence by the trial court in Embu Anti-Corruption Case No. 1 of 2013. The appellant was charged with upto 15 counts under the Anti-Corruption and Economic Crimes Act and the Penal Code. Counts 1,4,7, 10 and 13 related to the offence of fraudulent acquisition of public property contrary to section 45(1) (a) of Anti-Corruption and Economic Crimes Act, 2003.

The facts relating to the 5 counts were that the appellant on diverse dates while working as a Senior Research and Policy Officer at the Youth Enterprise Development Fund fraudulently acquired different sums of Kes.117,000; Kes. 91,3000; Kes. 82,400; Kes. 164,500; and Kes. 180,100 totalling to an imprest of an amount of Kes. 1,133,500.00 from the Youth Enterprise Development Fund, which money was intended to cater for training of Youth on Enterprise Development in several constituencies country wide.

Upon conclusion of trial, the trial court found the appellant guilty and sentenced him to pay a fine of Kes. 3,309,000.00 and in default, to serve a period of 14 years imprisonment. It was this conviction and sentence by the trial court that necessitated the filing of this appeal.

Issues

i. Whether the appellant fraudulently acquired public property contrary to section 45(1) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003;

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ii. Whether the prosecution proved the charge of false accounting by a Public Officer contrary to section 331(1) as read with section 331(2) of the Penal Code against the appellant.

Relevant provisions of the law

Anti-Corruption and Economic Crimes Act, No. 3 of 2003

Sections 45 – Protection of public property and revenue, etc

(1)A person is guilty of an offence if the person fraudulently or otherwise unlawfully—

(a) acquires public property or a public service or benefit;

(b) mortgages, charges or disposes of any public property;

(e) damages public property, including causing a computer or any other electronic machinery to perform any function that directly or indirectly results in a loss or adversely affects any public revenue or service; or

(f) fails to pay any taxes or any fees, levies or charges payable to any public body or effects or obtains any exemption, remission, reduction or abatement from payment of any such taxes, fees, levies or charges.

Held

1. The duty of the instant court while exercising its appellate jurisdiction was to submit the evidence as a whole to a fresh and exhaustive examination and weigh conflicting evidence and draw its own conclusions. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses. Further, the court was alive to the principle that a finding of fact made by the trial court could not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong principles.
2. It must be appreciated that the instant case being a criminal case, the burden of proof was on the prosecution to establish every element in all the charges beyond any reasonable doubt.
3. The issue that gave rise to the various counts facing the appellant was an imprest the appellant received from his employer for purposes of conducting trainings within the various regions in the Upper Eastern region. As an imprest holder, the appellant was entrusted with money for the assignment to train the youth in the various constituencies within the that region.
4. From the evidence on record, there was no dispute that the imprest was received by the appellant since the same was confirmed by the evidence of the witnesses and further by the appellant himself. In deed the trainings took place but not in the way that was expected in that, there were instances where the amounts paid were inflated and further that, names of persons who did not attend the workshop included and figures of paid up cash indicated against their names.
5. The evidence by the prosecution and defence had established that there were trainings that were held by the Youth Enterprise Development under the patronage of the appellant and that the appellant was the supervisor in all the trainings. It was also not disputed that the appellant received an amount of Kes. 870,000.00 in form of an imprest for purposes of these trainings. Further, it was not contested or controverted that the appellant after paying all the expenditure incurred during the trainings, surrendered documents reflecting an over expenditure of Kes. 256,922.
6. There were participants in the trainings whose particulars appeared in the attendance register, and payment schedule but denied either attending or being paid the amount of money indicated against their names. The documents submitted by the appellant had anomalies that included inflated figures, inflated number of alleged participants and alleged signatures belonging to alleged participants.

7. What the prosecution needed to prove was that the appellant fraudulently acquired public property. Having tendered imprest surrender documents inter alia attendance register, containing forged signatures, false ID numbers; the prosecution was able to prove the case against the appellant.
8. It was the duty and responsibility of the imprest holder (appellant) to take full charge in authenticating the people rightfully entitled to receive payment by taking their identification details or documents among them an ID card to verify the actual participants and the correct payments paid to each of them.
9. The appellant was under an obligation to pay participants of the workshop which he did not deny paying but who were these other people who allegedly got paid using other participants' identities and details? Further, the amounts indicated against the names of some of the participants as having been received by them had been controverted and the appellant had failed to offer cogent reasons for the discrepancies. The appellant was accountable to the employer as the principal by supplying accurate and correct supporting documents while surrendering the imprest as an agent.
10. The handwritings in the exhibits were glaringly different. Upon being questioned by the prosecution, the appellant conceded that he did not know where the mix up arose and further the trial court noted in its record that the documents were out rightly doctored.
11. There was adequate evidence even without calling an expert to verify the handwritings since in the end, the documents submitted by the appellant in surrendering the imprest were false thus misleading the principal. As a result, even if the handwriting expert were to be called, the evidence would not have watered down the prosecution's case.
12. The severity of sentence was a matter of fact. There was nothing that could prevent the trial court from imposing a sentence as long as the same was within the law. The sentence imposed was within the law and within the discretionary powers of the court. The appellate court could not interfere with the exercise of the trial court's discretion as the appellant did not justify the interference. He did not prove that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle.
13. The offence of abuse of office, which under section 3 of the ACECA constituted corruption, if therefore committed by a public officer who used a public office to improperly confer on himself or on another person a gift, loan, fee, favour, advantage etc which he or that other person was not otherwise entitled to.
14. That provision sufficiently covered the *mens rea* (improper use of public office) and the *actus reus* (conferment of a benefit to self or another person); improper use of public office would include conscious violation or non-adherence to prescribed procedures and regulations with the aim of conferring a benefit on the public officer himself or on another person. The appellant was a senior research and policy officer at the Youth Enterprise Development Fund and claimed more than the budgeted amount even though he had not fully utilized the amount budgeted.
15. To prove that the approval of payment was improper, the prosecution adduced evidence to show that the appellant demanded an extra amount of (Kes. 256,922 as an over expenditure) to the already budgeted amount. In his own statement, he was the sole custodian of the imprest and that in case of any discrepancies in the payments, he was responsible since he was the custodian of the records of money. In his own words, he did apologize for the wrong he had done and further offered an apology reasoning that he was not given the extra amount as he had demanded.
16. The prosecution successfully proved that the appellant had deceived his principal by tendering false documents. The documents tendered were meant to account for the imprest obtained by the appellant to conduct the activities referred to. In an attempt to account for the money received, the appellant

tendered false accounting documents demanding more money than what was initially budgeted for. In that regard, there was no basis to differ with the finding of the trial court.

17. The trial court explained why the appellant could not pass the buck to his driver in that, in the court's view, the driver never signed for the imprest but instead, it was the appellant. The court further explained that a senior officer could not be heard to blame a junior officer in accounting for funds especially when the junior officer did not sign for the money. The same had appropriately captured what the appellant had stated in his statement and submissions. It was therefore not true that the trial court did not take into account the appellant's defence and submissions.

Appeal dismissed.

Both the conviction and sentence by the trial court upheld.

32. Fraudulent Disposal of Public Property contrary to Section 45(1)(b) as read with Section 58 of the Anti-Corruption and Economic Crimes Act successfully proved

The prosecution successfully mounted a charge where an accused was alleged to have devised and executed a scheme to have a public property fraudulently transferred to himself.

Charles Kinuthia Gichane v Republic [2022] eKLR

ACEC Appeal No. 19 of 2019

High Court at Nairobi — July 14, 2022

Anti-Corruption and Economic Crimes Division

E N Maina, J

Criminal Law *– corruption and economic crimes – charge of fraudulent disposal of public property – claim where the accused person was alleged to have devised and executed a scheme to have a public property fraudulently transferred to himself - Anti-Corruption and Economic Crimes Act, sections 45(1)(b);48 (1) (a, (b) and section 5.*

Brief facts

The appellant together with his co-accused were charged with the offence of Fraudulent Disposal of Public Property contrary to section 45(1)(b) as read with section 58 of the Anti-Corruption and Economic Crimes Act. The particulars of the offence were that on diverse dates between July 4, and August 17, 2003 at Kenya Reinsurance Plaza situated within Nairobi County, he fraudulently acquired land parcel LR No. 209/10611/Villa Franca Estate belonging to Kenya Reinsurance Corporation.

The prosecution called seventeen (17) witnesses and the defence two witnesses namely the appellant and his co-accused. The prosecution's case was that the suit property belonged to Kenya Reinsurance Corporation, a public body and that the appellant acting in concert with his co-accused devised and executed a scheme to have the property fraudulently transferred to himself. The court heard that the house was paid for by monies that were intended to settle outstanding premiums owed to Kenya Reinsurance Corporation by Heritage Insurance Company. For that purpose, a cheque for the sum of Kes. 3,196,896 was issued by Heritage Insurance Company which the appellant who was an employee of Heritage Insurance Company collected and subsequently used to pay for the house purportedly on grounds that he was owed a similar amount by Kenya Reinsurance Corporation for consultancy services.

The defence case was that the cheque in question was a payment for consultancy services rendered by the appellant to Kenya Reinsurance Corporation. That at the material time the appellant heard that Kenya Reinsurance Corporation was selling some houses and because he was owed Kes. 3,789,937 by Kenya Reinsurance Corporation, he requested that his earnings be commuted for the purchase of the house.

However, after evaluating evidence and submissions from both sides the trial court found the appellant guilty and convicted him and sentenced him to a fine of Kes. 1,000,000 and in default one-year imprisonment; a mandatory fine of Kes. 6,393,792 under section 48(1) (b) of the Anti - Corruption and Economic Crimes Act since he acquired a quantifiable benefit of Kes. 3, 196, 896 and in default, three years' imprisonment; and pursuant to section 45(b) of the Anti - Corruption and Economic Crimes Act, the ownership of House No. 70 LR 209/10611/106 at Villa Franca would be reverted to Kenya Reinsurance Corporation

The appellant was aggrieved by the conviction and sentence and preferred the instant appeal raising several

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grounds of appeal. The appellant prayed that the conviction and sentence be set aside and that the appeal be allowed in its entirety.

Issues

i. Whether the prosecution proved the charge of Fraudulent Disposal of Public Property contrary to section 45(1) (b) as read with section 58 of the Anti-Corruption and Economic Crimes Act against the appellant beyond reasonable doubt.

ii. Whether the trial court's sentence was manifestly excessive and illegal in light of the mitigating factors advanced

Relevant provisions of the law

Anti-Corruption and Economic Crimes Act, No. 3 of 2003

Section 45 – Protection of public property and revenue,etc

(1) *A person is guilty of an offence if the person fraudulently or otherwise unlawfully—*

(a) *acquires public property or a public service or benefit;*

(b) *mortgages, charges or disposes of any public property;*

(c) *damages public property, including causing a computer or any other electronic machinery to perform any function that directly or indirectly results in a loss or adversely affects any public revenue or service; or*

(d) *fails to pay any taxes or any fees, levies or charges payable to any public body or effects or obtains any exemption, remission, reduction or abatement from payment of any such taxes, fees, levies or charges.*

Held

1. It was not in dispute that the appellant acquired the suit property from Kenya Reinsurance Corporation. It was also not disputed that the funds used to purchase the property were owed to Kenya Reinsurance Corporation by Heritage Insurance Company Limited. According to the prosecution the funds were misappropriated by the appellant to acquire the property and the Corporation thereby suffered a double loss.
2. Evidence presented by PW1, PW2, PW11 and PW14 confirmed that P.Ex3, the cheque for Kes. 3,196,896 used by the appellant to purchase the property originated from Heritage Insurance Company and was intended to be payment of a debt owed to Kenya Reinsurance Corporation by Heritage Insurance Company. At the time, the Appellant was a manager at Heritage and he was involved in the processing of the payment which Kenya Reinsurance Corporation demanded vide a letter produced as (P.Ex1).
3. The monies were clearly therefore not intended as a payment for services rendered by the appellant to Kenya Reinsurance Corporation but for settlement of a debt owed to Kenya Reinsurance Corporation by Heritage Insurance Company Limited.
4. Whereas the appellant alleged to have been owed a similar amount by Kenya Reinsurance Corporation he did not adduce evidence, other than that he had been hired to render consultancy services, that the services rendered were equal or equivalent to that sum of money.
5. The burden of proving that the appellant was entitled to payment of Kes.3,196,896/- being consultancy services to Kenya Reinsurance Corporation which he could then set off against the purchase price of the house in question laid upon the appellant as that was a fact within his special knowledge for which he had the burden to prove under section 11 of the Evidence Act.

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6. As a result of appellant's conduct Kenya Reinsurance Corporation Corporation suffered a double loss (the funds and the house) even though the house was reverted back to the Corporation by the court order. The conviction was thus upheld.
7. There was no error as regards sentencing. The Corporation suffered a double loss and the appellant conferred upon himself a double benefit. The sentence was lawful.

Appeal dismissed in its entirety.

Conflict of Interest

CONFLICT OF INTEREST

33. Section 56(1) of ACECA on preservation orders being granted or issued *ex-parte* did not violate the rights to fair hearing and fair administrative action

The court opined that preservation of property was not synonymous to deprivation of property under article 40 of the Constitution. The process was merely intended to support forfeiture proceedings and not to punish anybody. The law had provided a proper mechanism for anybody affected by the orders to challenge them. The orders were not cast in stone. The opportunity given to challenge *ex-parte* orders was nothing but a right to fair hearing. Section 56 was self-contained and inbuilt and it took care of article 47 and 50 of the Constitution.

Ethics and Anti-Corruption Commission v Moses Kasaine Lenolkulal & another (2019) eKLR

Miscellaneous Application No. 15 of 2019

High Court at Nairobi — August 14, 2019

Anti-Corruption and Economic Crimes Division

J N Onyiego, J

Constitutional Law *– constitutionality of statutes – constitutionality of section 56 (1) of the Anti-Corruption And Economic Crimes Act (ACECA) – where section 56(1) of ACECA provided that preservation orders could be granted ex-parte – claim that section 56(1) of ACECA violated the right to fair administrative action and right to fair hearing – whether section 56(1) of ACECA violated the right to fair hearing and fair administrative action by providing that preservation orders could be granted or issued ex-parte – Constitution of Kenya, 2010, articles 47 and 50; ACECA, sections 56(1), (4) and (5)*

Public Officer *– code of conduct and ethics - conflict of interest – where a public officer was a governor of a county – where public officer traded with the county government through a business name – where there was no distinction between public officer and the business – whether a public officer transacting business with a county or national government where he/she was employed amounted to conflict of interest – Public Officer Ethics Act, section 12*

Civil Practice and Procedure *– orders – preservation orders – where the Ethics and Anti-Corruption Commission sought preservation orders against suspected bank accounts – where accounts also had money from legitimate sources of income - whether a court could grant an order for preservation where suspected accounts also had legitimate sources of income - ACECA, section 56*

Brief facts

The applicant sought orders that a prohibition order be issued prohibiting the respondents by themselves, their agents, servants or any other persons from withdrawing, transferring or in any other manner dealing with the funds in accounts held at Kenya Commercial Bank Ltd pending conclusion of investigation and or institution of recovery proceedings.

The application was premised upon the grounds that several companies that tendered and were awarded high value contracts by the County Government of Samburu to provide goods and services were associated or owned by employees of the County Government of Samburu. That as a consequence, and owing to

conflict of interest as defined under section 2 of the Public Officer Ethics Act, the County Government of Samburu lost 673 million. Further, that several contractors to the County Government of Samburu gave huge bribes to county officials to the tune of 86 million to influence tender awards in their favor.

The applicants/respondents argued that he was not served with the application before the preservation order was issued which was against the tenets of the Constitution under article 50 (1) of the Constitution of Kenya, 2010 (Constitution) which underpinned the right to a fair hearing; that ACECA having been enacted before the 2010 Constitution, the interpretation of section 56 of ACECA had to be construed with necessary modification, adaptation and or alterations so as to be in conformity with the Constitution.

Issues

i. Whether a public officer transacting business with a county or national government where he/she was employed amounted to conflict of interest.

ii. Whether a court could grant an order for preservation where suspected accounts also had legitimate sources of income.

iii. Whether section 56(1) of ACECA violated the right to fair hearing and fair administrative action by providing that preservation orders could be granted or issued *ex-parte.*

Relevant provisions of the law

Anti-Corruption and Economic Crimes Act No. 3 of 2003

Section 56 - Order preserving suspect property, etc.

On an exparte application by the commission, the High Court may make an order prohibiting transfer or disposal of or order dealing with property if it is satisfied that there are reasonable grounds to suspect that the property was acquired as a result of corrupt conduct

(4) A person served with such an order under this section may within 15 days after being served apply to the court to discharge or vary the order and the court may after hearing the parties, discharge or vary the order or dismiss the application

Public Officer Ethics Act, No. 4 of 2003

Section 12 - Conflict of interest

(1) A Public Officer shall use his best efforts to avoid being in a position in which his personal interest conflict with his official duties

(3) A Public Officer whose personal interests conflict with his official duties shall –

(a) declare the personal interests to his superior or other appropriate body and comply with any directions to avoid the conflict; and

(b) refrain from participating in any deliberations with respect to the matter.

Held

1. The *ex-parte* orders the subject of the proceedings were issued pursuant to section 56 (1) of ACECA. After being served with the orders, the respondent was given an opportunity to discharge those orders within 15 days from the date of service. Under section 56 (5) of ACECA, such orders could be varied or discharged only if the court was satisfied that the property in respect of which the order was discharged or varied was not acquired as a result of corrupt conduct.

2. The only statutory duty imposed upon the Commission was to prove to the court that the property in question was reasonably suspected to have been obtained through illegitimate means or corrupt conduct. It appeared like quite a lenient condition by all standards. However, the court was also duty-bound to examine and interrogate the materials placed before it and to be satisfied that indeed there was a prima facie case established to warrant exercise of its discretion before issuing an ex-parte order.

Once a court had issued the order(s), the burden automatically shifted to the person accused of being in possession or handled property obtained through corrupt conduct.

3. Section 12(4) of the Public Officer Ethics Act provided that notwithstanding any directions to the contrary under sub-section 3 (c), a public officer would not award a contract, or influence the award of a contract to- himself; a spouse or relative or; a business associate or; a corporation, partnership or other body in which the officer had an interest.
4. It was not controverted that the 2nd respondent was not a legal person as it was a mere business name. It was also not in dispute that the 1st respondent was the owner and operator of that business name. It was not in contention that the 1st applicant was at the material time the governor of Samburu and that he did trade with the County Government by supplying petroleum products. There was no law or requirement that barred a public officer from transacting business with any government be it national or county except where there was conflict of interest.
5. The applicant only needed to prove that there was every reason to believe that the amount earned through the 2nd respondent was as a result of conflict of interest which would be proved on a balance of probability should the main suit be filed. There was evidence that the County Government of Samburu paid the 2nd respondent huge sums of money for the period between August 22, 2014 to May 29, 2018. There was no distinction between the 2nd respondent and the 1st respondent. They were one and the same thing. The money that the 2nd respondent received was indirectly money paid to the 1st respondent hence suspected to have been obtained through corrupt conduct given the element of conflict of interest alleged.
6. Although the 2nd respondent was not a legal person, its misjoinder was not prejudicial to the case. The anomaly was curable under order 1 rule 9 of the Civil Procedure Rules and article 159(2)(d) of the Constitution.
7. Section 56 of ACECA was concerned with illegitimate wealth or property. It was not concerned with any other money the targeted person could have earned through other legitimate means. There had to be a causal link between the money in question and a corrupt conduct. In the instant case, there was a nexus in respect to some accounts. That was clear from the monies received by the 2nd respondent from the County Government of Samburu which was evidenced by IFMIS payment records, payment vouchers and some money transfer from the 2nd respondent accounts to some accounts held by the 1st respondent.
8. There was a link between money transferred from the 2nd respondent bank account to the 1st applicant's bank accounts. Since there was already suspicion in the manner in which the award for the supply of petroleum products was made in favour of the 1st respondent, there was reasonable suspicion that the money could have been obtained through illegitimate means hence the justification in issuing freezing orders in respect of the bank accounts. The fact that such money was mixed with some legitimate sources of income like salaries did not mean that the account could not be frozen. At the instant stage, preservation was necessary pending further proceedings when the two could be severed.
9. There were no bank statements or documents relating to the account numbers and no proof that there was any money in those accounts suspected to be out of illegitimate means. The only money associated with the 1st respondent's corrupt conduct was money obtained from the County Government of Samburu. The Commission had to, on a prima facie basis, establish a link between the money in those accounts and money illegally obtained from Samburu County Government or that the money was generally suspected to be obtained through suspected illegal means. In the instant case, the Commission was specific on the connection between the money in question and the illegitimate source being the illegal

contract between the 1st respondent and the Government.

10. The Commission could not be allowed to casually walk into court with scanty information or evidence and seek to generally attach anything and everything in the name of a suspect under investigation based on a single suspicious financial transaction or deal. Kenyans had a right to invest and any particular transaction which was in question should be treated in isolation from other legitimate transactions. Section 56 of ACECA should not be used to generally ground a person's legitimate investment or affairs. It should strictly be used to target ill-gotten property and not an open cheque to launch an assault on everything owned by a person under investigation regardless of the source of income.
11. There was no link between the money obtained from the County Government of Samburu to the account numbers nor was there money transferred between those two accounts and the 2nd respondent accounts. Section 56 of ACECA could not be used to achieve a mareva injunction through the back door thereby attaching all accounts of a litigant in anticipation of entry of a judgment where there was no substantive suit. There was no evidence adduced to justify freezing orders in respect of the two accounts aforesaid.
12. Unlike an injunction under order 40 of the Civil Procedure Rules which had a provision for *inter-partes* hearing, *ex-parte* orders under ACECA had a definite lifespan of 6 months subject to extension by the court if convinced. Section 56 (1) of ACECA had no provision for neither service before hearing nor did it have a provision for inter-partes hearing.
13. In constitutional or statutory construction, there was a rebuttable presumption that all statutes were constitutional unless and until declared invalid or unconstitutional. There was no substantive prayer before the court for a declaratory order that section 56 of ACECA was unconstitutional.
14. The right to be heard under article 50 of the Constitution had to go hand in hand with the right to fair hearing which was enshrined under article 24 of the Constitution. However, section 56(4) of ACECA had created room for a party aggrieved to challenge such orders within 15 days which the applicants had done.
15. Preservation of property was not synonymous to deprivation of property under article 40 of the Constitution. The process was merely intended to support forfeiture proceedings and not to punish anybody. The law had provided a proper mechanism for anybody affected by the orders to challenge them. The orders were not cast in stone. The opportunity given to challenge ex-parte orders was nothing but a right to fair hearing. Section 56 was self-contained and inbuilt. It took care of article 47 and 50 of the Constitution.
16. When Parliament passed ACECA, it was definitely aware of the constitutional requirement even under the old constitutional regime that no one was supposed to be condemned unheard. To be condemned unheard presupposed orders made with finality without any room left for challenging the orders or the process. The section was intended in public interest to preserve property suspected to have been acquired illegally or irregularly from concealment or disposal before recovery process could commence. Therefore, section 56(1) of ACECA was not in violation of articles 47 and 50 of the Constitution.
17. The respondent had not proved that the lifting of orders in his favour outweighed the advantages or benefits in retaining them. In case of any inconvenience on the respondent's part, he could open new accounts and continue with his legitimate business as well as access his salary. He would not suffer any inconvenience in his daily operations and his money was safe until investigations were over.

Application partly allowed with each party to bear own costs.

Ethics and Anti-Corruption Commission v Moses Kasaine Lenolkulal & another (2019) eKLR

Orders:

i. The freezing orders affecting some KCB accounts as per orders were lifted.

ii. The freezing orders in respect of specific KCB bank accounts as per orders would remain in force.

34. Need for disclosure of personal interest when acting in an official public capacity

There was no standard prescribed manner or form for communicating disclosure of personal interest when acting in an official public capacity. All that the accused needed to demonstrate was that he had communicated by a letter, memo or whichever method as long as the communication was there.

Republic v Francis King'ori Githaiga

Anti-Corruption Case No. 12 of 2016

Anti-Corruption Court at Milimani June 25, 2018

L N Mugambi, CM

Conflict of interest *– public body – role of employee in the acquisition of service providers - where the employee had an interest in a company contracted by the employer to provide advertising services – failure to disclose interest – participation in the processing of payment to the company he had an interest having not disclosed his part ownership in it - whether the appellant owed a duty of care to the employer in his capacity to disclose his interest with the service provider – whether the appellants role in the dealings with the service provider amounted to conflict of interest - whether there was a standard prescribed manner or form for communicating disclosure of personal interest when acting in an official public capacity- Anti-Corruption and Economic Crimes Act, Section 42 ,45and 48.*

Conflict of interest *– public body – role of the employee in acquisition of service providers - where the employee had an interest in a company contracted by the employer to provide advertising services – failure to disclose interest – where co-worker had knowledge of their fellow worker's interest in the service provider company - whether a co-worker had a legal duty to disclose this information to their employer - whether a co-worker bore a legal duty to disclose conflict of interest.*

Brief facts

The accused was charged with various counts relating to conflict of interest offences committed at diverse dates. The facts of the case were that the accused being an agent of Sports Stadia Management Board, a public body, knowingly acquired interest at Bransons Limited, a company which had been contracted by Sports Stadia Management Board to provide advertising services.

He was also charged with failure to disclose private interest to one's principal contrary to section 42 (1) of Anti-Corruption and Economic Crimes Act, 2003. The facts were that the accused Sports Stadia Management Board offices at Moi International Sports Centre Kasarani and being the Assitant-Director Finance at Sports Stadia Management Board and also being director of East African Business Times Ltd, and well aware that Sports Stadia Management Board was not aware of his private interest in the said Company, failed to disclose his interest in the Company and participate in the processing of payments by signing cheques in favor of East Africa Business Times Ltd for advertisement services to Sports Stadia Management Board.

Issues

i. Whether there was a standard prescribed manner or form for communicating disclosure of personal interest when acting in an official public capacity

ii. Whether an accused in signing the cheques he was merely performing a ceremonial role or if it amounted to making a decision in law.

iii. Whether a co-worker bore a legal duty to disclose conflict of interest.

Republic v Francis King'ori Githaiga

Relevant Provisions of the Law

Anti-Corruption and Economic Crimes Act, 2003

42. Conflicts of interest

(1) If an agent has a direct or indirect private interest in a decision that his principal is to make an agent is guilty of an offence if—

(a) the agent knows or has reason to believe that the principal is unaware of the interest and the agent fails to disclose the interest; and

(b) the agent votes or participates in the proceedings of his principal in relation to the decision.

(2) A private body may authorize its agent to vote or participate in the proceedings of the private body and the voting or participation of an agent as so authorized is not a contravention of subsection (1).

(3) An agent of a public body who knowingly acquires or holds, directly or indirectly, a private interest in any contract, agreement or investment emanating from or connected with the public body is guilty of an offence.

(4) Subsection (3) does not apply with respect to an employment contract of the agent, or a related or similar contract or agreement or to any prescribed contract, agreement or investment.

Held

1. The law did not criminalize doing business with one's employer but instead frowned upon an employee doing business with the employer and participating in decisions in connection to that business while knowing the employer did not know or having reason to believe the employer was unaware, failed to disclose to the employer such dealing.
2. Even if the registration documents were with the accused, it did not shift the legal obligation to them to declare the accused of having conflict of interest.
3. The legal duty to disclose was always placed on the employee who had a conflict of interest and not on his fellow employee.
4. Whether or not co-workers were diligent, it was not their duty to pick out what was accused of conflict of interest and inform the employer. The duty to disclose was always vested on the accused by the law.
5. The grounds relied upon by the accused person that he believed or had reasonable grounds to believe that his employer was aware of his private interest in East African Business Times Ltd was non-existent.
6. The accused person's attempted to twist evidence to suit his narrative and tried to shift his legal duty to disclose to others did not succeed.
7. The manner the company was registered and eventually took over business and hitherto being done with Sports Stadia was a calculated move aimed to disguise.
8. The registration of East African Business Times Ltd in which the accused acquired personal interest was intended to ensure it continued doing business with the accused identity hidden in the background.
9. Decision to pay public money could not be termed as ceremonial. It was a critical decision that resided in a person who possessed sufficient authority to make the best decision that the payment was not only sufficient but also prudent, economical, sufficient and a transparent use of public funds under that person's control and disposal.
10. The accused at his level as the head of finance in Sports Stadia could not hoodwink the court that his role was merely clerical of signing cheques. Heads of Finance perform more than just being conveyer belts in regard to public funds.
11. The signing of cheques by the accused person was a key decision making moment that he was required

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to make on behalf of the Principal i.e the Sports Stadia Management Board.

12. There was no standard way, prescribed manner or form for communicating disclosure of personal interest when acting in an official public capacity. All that the accused needed to demonstrate was that he had communicated by a letter, memo or whichever method as long as the communication was there.
13. A conflict-of-interest register was not a requirement of law but a mere administrative arrangement. In light of the evidence, it was clear that the prosecution had satisfied the legal burden that the accused had contravened the law against conflict-of-interest contrary to section 42 of the Anti-Corruption and Economic Crimes Act.

Accused was found guilty.

35. Conflict of interest in acquisition of employer's property by an employee

The court in establishing conflict of interest in the transaction found that despite lack of proof of direct purchase of the property, direct ownership and physical occupation, the transfer was orchestrated by and for the benefit of the appellant through fraudulent means. There was sufficient evidence that the appellant jointly with others fraudulently acquired public property. The act of fraud was also evident from the fact that Rockhound did not pay any money yet it benefited from the transfer of the property into its name.

John Faustin Kinyua v Republic [2020] eKLR

ACEC Appeal No. 22 of 2019

High Court at Nairobi — January 14, 2020

Anti-Corruption and Economics Crimes Division

J N Onyiego, J

Criminal Law *– burden of proof – presumption of innocence - claim that trial court shifted the burden of proof to the appellant contrary to the established principles of law — Constitution of Kenya, 2010, articles 50.*

Conflict of Interest *– public property – role of employee in the acquisition of company property - where the employee facilitated transfer of property to the company – where there was no distinction between the employee and the business during the transaction – duty of care owed to the employer by the employee during the transaction – whether the appellant owed a duty of care to the employer in his capacity in respect of the property being transacted on – whether the appellants role in the acquisition of the suit property amounted to conflict of interest - Anti-Corruption and Economic Crimes Act, sections 42 ,45 and 48.*

Brief facts

The appellant was charged alongside four others with four counts of fraudulent acquisition of public property contrary to section 45(1)(a) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act, conflict of interest contrary to section 42(3) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act and fraudulent acquisition of public property contrary to section 45(1)(a) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. The trial court found the appellant guilty of all the charges and sentenced him to three years imprisonment for each count to run concurrently. necessitating the filing of the instant appeal.

Issues

i. Whether the charges against the appellant were proved beyond reasonable doubt.
ii. Whether the trial court considered the appellant's defence in rendering its decision.
iii. Whether the burden of proof could shift from the prosecution to the accused.
iv. Whether proof beyond reasonable doubt amounted to proof with 100% certainty.
v. Whether there was bias in the trial court's decision when it passed different sentences to the appellant and the accused yet both were charged with similar offences.
vi. Whether the trial court considered the mitigation advanced by the appellant when imposing maximum sentence.
vii. Whether the appellant's role in the acquisition of the suit property amounted to conflict of interest.

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viii. Whether the money received and held by the appellant's advocates was sufficient proof of payment received and acknowledged by the appellant.

Relevant provisions of the law

Anti-Corruption and Economic Crimes Act 2003

Section 42 - Conflicts of Interest

(1) *If an agent has a direct or indirect private interest in a decision that his principal is to make the agent is guilty of an offence if—*

(b) *the agent knows or has reason to believe that the principal is unaware of the interest and the agent fails to disclose the interest; and*

(c) *the agent votes or participates in the proceedings of his principal in relation to the decision.*

(2) *A private body may authorize its agent to vote or participate in the proceedings of the private body and the voting or participation of an agent as so authorized is not a contravention of subsection (1).*

(3) *An agent of a public body who knowingly acquires or holds, directly or indirectly, a private interest in any contract, agreement or investment emanating from or connected with the public body is guilty of an offence.*

(4) *Subsection (3) does not apply with respect to an employment contract of the agent, or a related or similar contract or agreement or to any prescribed contract, agreement or investment.*

Section 45 - Protection of Public Property and Revenue, etc.

(1) *A person is guilty of an offence if the person fraudulently or otherwise unlawfully—*

(a) *acquires public property or a public service or benefit;*

(b) *mortgages, charges or disposes of any public property;*

(c) *damages public property, including causing a computer or any other electronic machinery to perform any function that directly or indirectly results in a loss or adversely affects any public revenue or service; or*

(d) *fails to pay any taxes or any fees, levies or charges payable to any public body or effects or obtains any exemption, remission, reduction or abatement from payment of any such taxes, fees, levies or charges.*

(2) *An officer or person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person—*

(a) *fraudulently makes payment or excessive payment from public revenues for—*

(i) *sub-standard or defective goods;*

(ii) *goods not supplied or not supplied in full; or*

(iii) *services not rendered or not adequately rendered.*

(b) *willfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures; or*

(c) *engages in a project without prior planning.*

(3) *In this section, "public property" means real or personal property, including money, of a public body or under the control of, or consigned or due to, a public body.*

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Held

1. It was apparent from the evidence before court that the property was sold in secrecy to Rockhound. That was confirmed by the denial by one of the Directors of Rockhound Limited regardless of appending her signature on the sale agreement and the transfer document as verified from the document examiner's report. It was also curious that the appellant was denying having beneficial interest in the property yet he was the key player in the transaction. Key questions that were bound to arise were; why would the appellant follow cheques personally and present them to PW6 if he had no interest? Why would the appellant go to Alexander Forbes to pick a cheque and then bank it as money for the purchase of the house fully aware that the money was for a different purpose? Why would he instruct PW9 and PW11 to act on his behalf as the purchaser of the house through Rockhound?
2. Even with the remotest imagination, it was doubtful that the witnesses were lying as having been instructed by the appellant to represent him through Rockhound. From the appellant's conduct and the role he played in misrepresenting facts that cheques paid by Alexander Forbes and United Insurance for other purposes to Kenya Re were meant to be used for purchase of the house by Rockhound was proof enough that he had a beneficial interest in the house.
3. The appellant's expression of interest to DW2 his co-accused in taking Rockhound Company from her and the fact that he later got involved in the purchase of the house through that same company was itself a testimony that the appellant had a hand in the acquisition of the property without sweat and indeed succeeded in doing so.
4. Despite lack of proof of direct purchase of the property, direct ownership and physical occupation, it was clear that the transfer was orchestrated by and for the benefit of the appellant through fraudulent means. There was sufficient evidence that the appellant jointly with others through fraudulent means acquired public property. The act of fraud was also evident from the fact that Rockhound did not pay any money yet it benefited from the transfer of the property into its name.
5. Transfer of the property from the vendor to the purchaser was proof of acquisition of ownership. The grant (title) was already in the name of Rockhound meaning prima facie that they had acquired ownership. Failure to take physical possession was subject to the fact that there was an injunction in place affecting the same property pursuant to the suit filed by the original purchaser of the property (Dr. Ngok) which was yet to be determined.
6. There was sufficient circumstantial evidence to infer or conclude that the appellant was the beneficiary behind the acquisition of the property by Rockhound who were his proxy. The burden of proof at all times lay with the prosecution and the same did not shift to the accused. However, it was trite law that proof beyond reasonable doubt did not necessarily mean proof with certainty at 100%.
7. From the evidence on record, it was clear that the appellant was the mastermind in the illegal acquisition of the property in conjunction with other parties; Rockhound Company and its Directors. The trial court properly found the accused was liable and there was no error committed. There was no shift of the burden of proof and that the prosecution evidence was not shaken at all therefore, conviction in respect of that count was upheld.
8. From the analysis of evidence regarding the role the appellant played in facilitating transfer of the property to Rockhound Properties Limited, it was clear that, by the appellant hiding behind Rockhound Company, he caused the property to have it registered in its name. As an agent of the corporation, he caused and facilitated the purchase of the property to Rockhound knowing very well that he was in the end result going to benefit and have personal interest or private interest over the property.

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9. The application or use of the word private interest did not in any way derogate from the word personal benefit or interest. The action taken by the appellant was purely in conflict of personal interest. He owed a duty of care in respect of the property to the employer to the best of his ability. In the instant circumstances, he took private interest at heart to the prejudice of his employer's interest in the property. Accordingly, the trial court properly and correctly addressed itself to the evidence available and made appropriate conclusion in convicting the appellant.
10. It was clear that the money was still held by the firm of Muriu & Co. Advocates being agents to the appellant. The fact that he had not collected the money from his lawyers did not vitiate the fact that he had been paid through his agents Muriu & Co. Advocates who acknowledged receipt. Receipt of the amount by the firm on behalf of their client was sufficient proof of payment received and acknowledged by the appellant. Therefore, the trial court did not err by convicting the appellant in any way in that count as the money was duly refunded to the appellant through his advocates which was admitted.
11. The offence committed under section 48(1) ACECA was punishable by a fine of Kes.1 million in default ten years imprisonment or both. Where a penalty was prescribed by an option of a fine, the court should give reasons why the most punitive sentence should apply as opposed to a fine as a first option.
12. Taking into account that the trial court had found that the accused had been convicted in a separate matter with an offence committed in similar circumstances and the trial court having found that he had appealed hence treated him as a first offender, and the appeal having been dismissed, it implied that the appellant was not a first offender. The accused should not have been treated as a first offender. Despite that fact, there was no reason why he did not give the appellant an option of fine.
13. Considering his mitigation that he was sickly as per the medical report submitted in court from the Prisons Department indicating that he was suffering from high blood pressure, chest pain and blurred vision and further considering that the co-accused were given the option of fine, the sentence was substituted.

Orders:

Appeal against conviction disallowed and against sentence allowed to the extent that:

i. The appellant was sentenced to a fine of Kes. 1 million in default to serve three years imprisonment in respect of each of the 3 counts (Counts II, III and IV).

ii. The sentences in (a) above to run concurrently commencing from the date of sentence before the trial court.

iii. The Deputy Registrar to cause and draw an amended committal warrant to reflect the stated sentence above.

iv. The suit land - Karen house be surrendered to the Kenya Re-insurance by the Chief Land Registrar cancelling the title deed (grant) currently held in the name Rockhound Properties Limited as per the directions of the trial court.

v. The sum of Kes.132,504 held by the law firm of Muriu, Mungai & Company Advocates on behalf of Rockhound be refunded to Kenya-Re as directed by the trial court.

vi. Right of appeal 14 days.

Office of the Director of Public Prosecutions v James Aggrey Bob Orengo; Daniel Ogwoka Manduku & 2 others (Interested Parties) [2021] eKLR

36. Legal representation of a private party by a State Officer violates Chapter 6 of the Constitution

Granted that the Senator was entitled to pursue private gain, what perception did the public get when the accused person who was charged with economic crimes and/or corruption, has as his counsel, a Senator, a State Officer, driven to court in his official motor vehicle bought for him by the public. In the court's view, it did not require any taxing of the mind to find a glaring perception of conflict of interest.

Office of the Director of Public Prosecutions v James Aggrey Bob Orengo; Daniel Ogwoka Manduku & 2 others (Interested Parties) [2021] eKLR

Constitutional Petition No. 204 of 2019

High Court at Mombasa — April 27, 2021

E K Ogola, J

Constitutional Law *– Leadership & Integrity – Functions of the Senate - Conflict of Interests - - where a Senator represented an accused charged with economic crimes and/or corruption - whether there existed a conflict of interest where a Senator or A State Officer represented a person charged with economic crimes and/or corruption - Leadership and Integrity Act, 2012 sections 16 and 26 and Chapter six of the Constitution of Kenya*

Brief facts

By a Notice of Motion Application dated January 10, 2020, the Office of the Director of Public Prosecutions prayed for the following orders:

1. That the Honourable court be pleased to issue an order barring the respondent Honourable Senator James Aggrey Bob Orengo or any other state officer from appearing for the petitioner or any of the parties in the instant matter on account of conflict of interest.
2. That an order is directed to the 1st interested party to engage any other counsel who is not a State Officer to represent him.
3. That the Honourable Court be pleased to find and hold that the continued appearance of the respondent and or any other State Officer in these proceedings is against the letter and spirit of Chapter 6 of the Constitution of Kenya.

In the main case, the petitioner (1st interested party) sought orders to stop investigations and possible arrest over allegations of corruption, or economic crimes. The respondent was the lead counsel for the petitioner. The applicant's case was that the respondent herein by virtue of him being the elected Senator of Siaya County and a Minority leader of the Senate, is a full time State Officer who was required by law not to engage in any other gainful employment or engage in any practice that would conflict with the public interest that he was under a duty to protect.

In the grounds of opposition, the respondent's arguments were premised on the fact that his client, the 1st interested party, had a right to an advocate of his choice; that the law did not bar him from practicing as an advocate while being a Senator; and that no conflict arose in the case as he had not sat in any parliamentary hearings concerning the 1st interested party.

Office of the Director of Public Prosecutions v James Aggrey Bob Orengo; Daniel Ogwoka Manduku & 2 others (Interested Parties) [2021] eKLR

Issue

i. Whether there existed a conflict of interest where a Senator or a State Officer represented a person charged with economic crimes and/or corruption.

Relevant Provisions of the Law

Constitution of Kenya

Article 260– Definition of a state officer

> *"State office" means any of the—(a) President; (b) Deputy President; (c) Cabinet Secretary; (d) Member of Parliament; (e) Judges and Magistrates; (f) member of a commission to which Chapter Fifteen applies; (g) holder of an independent office to which Chapter Fifteen applies; (h) member of a county assembly, governor or deputy governor of a county, or other member of the executive committee of a county government; (i) Attorney-General; (j) Director of Public Prosecutions; (k) Secretary to the Cabinet; (l) Principal Secretary; (m) Chief of the Kenya Defence Forces; (n) Commander of a service of the Kenya Defence Forces; (o) Director-General of the National Intelligence Service; (p) Inspector-General, and the Deputy Inspectors-General, of the National Police Service; or (q) an office established and designated as a State office by national legislation."*

Article 75– Conduct of State officers

> *A State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids—(a) any conflict between personal interests and public or official duties; (b)compromising any public or official interest in favour of a personal interest; or (c) demeaning the office the officer holds."*

Article 77 (1) - Restriction on activities of State officers

> *A full-time State officer shall not participate in any other gainful employment.*

Leadership and Integrity Act, 2012

Section 16- Conflict of interest

1. *A State officer or a public officer shall use the best efforts to avoid being in a situation where personal interests conflict or appear to conflict with the State officer's or public officer's official duties.*

3. A State officer or a public officer whose personal interests' conflict with their official duties shall declare the personal interests to the public entity or the Commission._

7. Where a State officer or a public officer is present at a meeting, where an issue which is likely to result in a conflict of interest is to be discussed, the State officer or public officer shall declare the interest at the beginning of the meeting or before the issue is deliberated upon.

Held

1. The respondent was a State Officer by virtue of him being the elected Senator for Siaya County.
2. The respondent could not be said to be a full time State officer given that there existed no employer-employee relationship between Senators, Members of Parliament and the Executive. As such Members

Office of the Director of Public Prosecutions v James Aggrey Bob Orengo; Daniel Ogwoka Manduku & 2 others (Interested Parties) [2021] eKLR

of Parliament were at liberty to engage in gainful employment in as long as the nature of the gainful employment was not inherently incompatible with their duties and/or functions as State Officers. The Constitution also accepted that some state officers may be engaged on part-time rather than full time basis and the Constitution allowed that category to participate in any other gainful employment. Therefore, although the respondent was a State Officer he was free to engage in gainful employment pursuant to the provisions of section 16 of the Leadership and Integrity Act.

3. However, in pursuance of that gainful employment, the respondent was subject to the law and the Constitution and had to strictly operate within the law and the Constitution.

4. The respondent was required by law to sit in the committee that would interrogate the 1st interested party, in the event he was summoned by the Senate. In light of the above, there appeared to be a conflict of interest since the respondent on the one hand would be interrogating the 1st interested party on complaints levelled against him and on the other hand, he would be representing him before a court of law on the same issues raised before the Senate.

5. That was a tenuous scenario where there was a very thin difference between the interrogator and the advocate, hence against the principles of natural justice that: no one should be a judge in his own cause and Justice should not only be done, but manifestly and undoubtedly be seen to be done.

6. Granted that the Senator was entitled to pursue private gain, what perception did the public get when the accused person who was charged with economic crimes and/or corruption, had as his counsel, a Senator, a State Officer, driven to court in his official motor vehicle bought for him by the public. He was driven by a driver employed to drive him by the government, and then in court he submitted with the authority of a Senator. In the court's view, it did not require any taxing of the mind to find a glaring perception of conflict of interest. To the accused person he had the Senator as his advocate; driven to court in a State motor vehicle; chauffeured by a State provided driver; and the vehicle fueled by the State. To the accused, despite facing grave charges of economic crimes, his defence appeared to have the blessings of the State.

7. It was arguable that in the event of a possible conflict of interest, a Senator could easily recuse himself from such proceedings. However, as a matter of principle, the roles and/or functions of a State Officer as provided for by Constitution and the Leadership and Integrity Act among other statutes were binding on each and every State Officer and were not alienable. Further, a decision by Senate was not only binding on the committee members who made that decision but on all Senators. Therefore, whether or not the respondent or any other State Officer sits in the committee interrogating a public officer did not exempt them from the provisions of section 26 of the Leadership and Integrity Act. The fact that there were no active proceedings in relation to the 1st interested party currently before the Senate's Justice and Legal Affairs Committee did not in itself lessen the fact or perception of conflict of interest.

8. There was no denial that the 1st interested party was entitled to an advocate of his choice under articles 48 and 50 of the Constitution. There was no derogation to that right. The 1st interested party had, in fact, no right to demand to be represented in court by a counsel who had oversight over the 1st Interested Party's public role.

9. The Sections of the law quoted above, together with the Articles of the Constitution cited, left no doubt that State Officers, even when free to pursue employment for private gain, ought to avoid scenarios in which they were either conflicted, or in which they created perception of conflict of interest.

10. Accordingly, the continued representation of the 1st interested party by the respondent or any other

Office of the Director of Public Prosecutions v James Aggrey Bob Orengo; Daniel Ogwoka Manduku & 2 others (Interested Parties) [2021] eKLR

State Officer was against the spirit of Chapter 6 of the Constitution of Kenya, for failure to conform to the mandatory provisions of section 26 of the Leadership and Integrity Act.

The Notice of Motion dated January 10, 2020 was allowed.

Order:

The 1st interested party/petitioner was directed to engage the services of another advocate other than the respondent, S.C., to represent him in the proceedings.

Conspiracy to Commit an Offence of Corruption or Economic Crime

CONSPIRACY TO COMMIT AN OFFENCE OF CORRUPTION OR ECONOMIC CRIME

37. Need for proof of consensus to effect an unlawful purpose for a charge of conspiracy

To prove conspiracy, the prosecution had to establish that the respondents together with others, agreed by common mind to defraud the complainant. The inference must be made both from the actions of the accused and the evidence tendered in court.

Ann Wangechi Mugo & 6 others v Republic [2022] eKLR

Criminal Appeal No. E007 of 2021

High Court at Embu — February 28, 2022

L N Njuguna J.

Criminal Law *– corruption and economic crimes – corruption — allegation that the appellants jointly conspired to misappropriate funds disbursed to the Council by the Kenya Roads Board meant for the routine maintenance and repair of roads within Chuka Municipality – whether the offence of corruption had been proved.*

Criminal Law *– conspiracy – offence of conspiracy to commit a crime – common intention - where a common intention was formed to prosecute an unlawful purpose in conjunction with each other leading to the commission of the crime - whether the offence of conspiracy was proved beyond reasonable doubt - Anti-Corruption and Economic Crimes Act (Act No. 3 of 2003), sections 47.*

Evidence Law *– admissibility of evidence – documentary evidence – copies of documents - contents of a document – admissibility through primary or secondary evidence whether certified copies of public documents could be produced as proof of the contents of the documents or parts of the documents of which they purported to be copies of. - Evidence Act (Cap. 80), sections 64 and 80.*

Brief facts

The appellants were charged with, among other counts, the offence of conspiracy to commit an offence of corruption contrary to section 47A(3) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act (ACECA), 2003 where the appellants jointly conspired together with others not before court to misappropriate the sum of Kes. 4,734,577 that was disbursed for the financial Year 2009/2010 to the Council by the Kenya Roads Board for the routine maintenance and repair of roads within the Municipality of Chuka.

They were tried, convicted and sentenced to a fine of Kes.100,000/= and in default to serve 12 months imprisonment. The appellants were dissatisfied with the conviction and sentence and subsequently appealed vide different petitions of appeal which were eventually consolidated.

Issues

i) Whether the procurement procedure was followed in awarding the tenders to the entities.

ii) What were the conditions necessary to prove the offence of conspiracy?

iii) Whether the burden of proof could be shifted from the prosecution to the appellants.

iv) Whether certified copies of public documents could be produced as proof of the contents of the documents or parts of the documents of which they purported to be copies of.

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v) Whether the trial court was compliant with section 167 of the Criminal Procedure Code during the preparation of its decision.

vi) Whether section 35 of ACECA could override article 157(10) of the Constitution on the DPP's authority to commence criminal proceedings without the consent or permission of any person.

Relevant provisions of the law

Anti-Corruption and Economic Crimes Act, No. 3 of 2003

Section 47A - Attempts, conspiracies, etc.

Any person who conspires with another to commit an offence of corruption or economic crimes is guilty of an offence.

Section 48 - Penalty for offence under this Part

1) A person convicted of an offence under this part shall be liable to –

a) A fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both; and

b) An additional mandatory fine if as a result of conduct that constituted the offence the person received a quantifiable benefit or any other person suffered a quantifiable loss.

2) The mandatory fine referred to in subsection (1)(b) shall be determined as follows –

a) The mandatory fine shall be equal to two times the amount of the benefit or loss described in sub-section (1)(b).

b) If the conduct that constituted the offence resulted in both a benefit and loss described in subsection (1)(b), the mandatory fine shall be equal to two times the sum of the amount of the benefit and the amount of the loss.

Held

1. To prove a conspiracy, the prosecution had to establish that the respondents together with others, agreed by common mind to defraud the complainant. The inference must be made both from the actions of the accused and the evidence tendered in court.
2. It was not enough that two or more persons pursued the same unlawful object at the same time or in the same place. It was necessary to show a meeting of the minds and a consensus to effect an unlawful purpose. It required that a common purpose between them or among the subject parties was proved.
3. When two or more persons formed a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence was committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them was deemed to have committed the offence.
4. Though the 2nd and 6th appellants denied having tendered for the services, the bank statements showed that they received some payment from Municipal Council of Chuka during the period in issue. They did not give a reasonable explanation as to how the money ended up in their accounts and what it was for. The 2nd appellant was the proprietor of Chalk Dust General Suppliers. The 7th appellant, in his defence, admitted to be the owner of Seven Eleven Construction Company but denied having purchased the tender and did not know who was paid the money. Though there was no evidence that his signature was the one in the bid documents for Seven Eleven Company, his company was paid through two cheques by Chuka Municipal Council for and one of the signatories to that account was the 1st appellant. He could not deny any knowledge of the tender yet money was paid into an account for a company in which he had a legal interest in and he never questioned the source of the money.

5. The investigating officer in his evidence stated that he visited the roads and the work was never done. According to him, some are just foot paths and could not be classified as roads. There were no Bills of Quantities and what was there only stated "grading". The 3rd appellant was the works officer and his role was to inspect the works and prepare work measurement sheets. He stated that he prepared for all the road works and forwarded the same to accounts for payment. When he was put on his defence he did not produce the work measurements sheets that he stated he prepared. Even without shifting the legal burden, the investigating officer having testified that the roads were never done, the 3rd appellant had the evidential burden under section 111 to prove that he inspected the works and prepared the works measurements sheets as that was his work.
6. Though the 3rd appellant denied having signed for Inter Developer and Snow Ball, as the works officer, and being charged with the duty of signing for payments, he ought to have explained how the payments were made to those two companies and by whom, if he was not the one who made them.
7. The appellants formed a common intention to prosecute an unlawful purpose in conjunction with each other and in prosecution of such purpose an offence was committed of such a nature that its commission was a probable consequence of the prosecution of such purpose.
8. The court distinguished the authorities relied on in prosecution of an offence under the Act with the court of appeal decision in the case of *Susan Mbogo Ng'ang'a v Attorney General (sued for and on behalf of the Chief Magistrate's Court, Nyeri Law Courts & 2 others (Civil Appeal No. 66 of 2016)*. The Court of Appeal while dealing with a similar issue observed that under section 12 of the repealed Prevention of Corruption Act, prosecution for an offence under that Act could not be instituted except by or with the written consent of the Attorney - General. That Act also provided that where a person had been arrested without such consent no further or other proceedings was to be taken until that consent was obtained. However, no such or equivalent provision was made in the ACECA. Therefore, the trial court was not wrong when it contrasted the provision of section 12 of the repealed Prevention of Corruption Act with the provisions of sections 35 of ACECA.
9. Under article 157(10) of the Constitution which established the office of the Director of Public Prosecutions, the DPP did not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, was not to be under the directions or control of any person or authority. Section 35 of ACECA could not override article 157(10) of the Constitution.
10. The decision of the trial court set out in graphic details how each of the appellants was involved in the process that led to the commission of the offences they are charged with, much of it being documentary evidence. Each of the appellants and especially the 3rd, 4th and 5th had separate and distinct roles in that process. The evidence adduced before the trial court against each of them points to their guilt. Similarly, the documents that were produced and which connected the other appellants to the offence of conspiracy to commit the offence of corruption were self-explanatory. Payment vouchers were signed and payments made for services that were never rendered to the Municipal Council of Chuka. Section 141 was very clear that a conviction shall not be illegal merely because it proceeded upon uncorroborated evidence of an accomplice, but which was not the case in the instant circumstances. The documents that were produced corroborated the evidence and so the trial court was right in convicting the appellants.
11. The evidence on record against the 7th appellant showed that he admitted to be the owner of Seven Eleven Construction Company though he denied having purchased the tender and he did not know who was paid the money. His PIN certificate was used by the 1st appellant in her bid document for Ann J Cleaning Supplies and by Chalk Dust Supplies which was solely owned by the 2nd appellant. Further,

the evidence showed that his company Seven Eleven was evaluated for tender though it had not bid for that tender. He also tendered for tender number 4 and was awarded the contract. The bid documents that were used for that particular tender that was; the PIN certificate and the certificate of registration were his own and not that of his company and his company Seven Eleven was eventually paid. It was not therefore true that the court shifted the burden of proof to him as alleged. The prosecution had adduced sufficient evidence against him.

12. Section 64 of the Evidence Act was to the effect that the contents of documents could be proved either by primary or by secondary evidence. The copies of documents complained of were public documents. Under Section 80 of the Evidence Act, certified copies of public documents could be produced as proof of the contents of the documents or parts of the documents of which they purported to be copies. The trial court on its ruling on the objection, analyzed the law and justified her decision to overrule the objection. There was no reason to fault the decision in that regard.
13. Where there was no strict compliance with the provisions of sections 168 and 169 of the Criminal Procedure Code, it would not necessarily invalidate a conviction and the court would entertain an appeal on its merits in such a case if it can be done with justice to the parties.
14. Sentencing was within the discretion of the court. The court noted that before sentencing, the appellants were offered an opportunity to mitigate and it was clear the trial court indeed considered the mitigation before sentencing and so, it could not therefore be faulted since it had the opportunity to exercise its discretion. The sentence meted out was lawful and legitimate per the provisions of the law.

Appeal dismissed.

38. The power of the High Court to intervene and stay criminal proceedings before the Magistrates' Courts

An acquittal under section 210 fell under section 348(1) of the Criminal Procedure Code where the provision referred to an acquittal after a trial by a subordinate court or High Court. There was no way an acquittal under section 210 of the Criminal Procedure Code could be substituted for a conviction. One could only be convicted after his defense had been taken, under section 211 of the Criminal Procedure Code. The provision for appeal following an acquittal did not specify whether it was under section 210 or section 215 of the Criminal Procedure Code. It applied to both an acquittal under sections 210 & 215 of the Criminal Procedure Code.

Director of Public Prosecutions v Thuita Mwangi & 2 others [2018] eKLR

Appeal No. 1 of 2016

High Court at Nairobi — June 13, 2018

Anti-Corruption and Economic Crimes Division

H.I Ong'udi

Criminal Law *– burden of proof – prima facie case – requirement to establish a prima facie case – standard applicable in determining the establishment of a prima facie case - onus on the prosecution to prove beyond reasonable doubt – whether a prima facie case was proved if at the close of the prosecution, the case was merely one which on full consideration could possibly be thought sufficient to sustain a conviction.*

Jurisdiction *– acquittal – jurisdiction to substitute an acquittal under the Criminal Procedure Code – substitution with an order placing the appellant on his defence – whether an acquittal under the criminal procedure code could be substituted for a conviction – whether the court had jurisdiction to set aside the acquittal - Criminal Procedure Code (Cap. 75), sections 210, 348(1).*

Criminal Procedure *– charges – framing of charges – alternative charge – conspiracy – factors to consider - what were the factors that ought to be considered in determining whether a charge of conspiracy should be preferred*

Brief facts

The instant case was an appeal by the Director of Public Prosecutions against decision of trial court acquitting all the respondents of all counts under section 210 of Criminal Procedure Code.

The appellants had been charged with four counts of offences viz conspiracy to commit an offence of corruption contrary to section 47A (3) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act, 2003; abuse of office contrary to section 46 as read with section 48(1) of the Anti-Corruption and Economic Crimes Act. 2003; willful failure to comply with the law and applicable procedures relating to procurement contrary to section 45(2)(b) as read with section 48(1) of the Anti- Corruption and Economic Crimes Act, 2003 and false assumption of authority contrary to section 104(b) of the penal Code as read with section 34 of the Penal Code.

Particular facts for the offence of conspiracy to commit an offence of corruption was that the 1st, 2nd and 3rd respondents on diverse dates between January, 2009 and October, 2009 at the Ministry of Foreign Affairs Nairobi being the Permanent Secretary, Deputy Director of Administration, Ministry of Foreign Affairs, and the Charge D' Affairs at the Kenya Embassy in Tokyo, respectively; jointly conspired to commit an offence of corruption namely, breach of trust by approving the purchase of the property known as 3-24-3 Yakumo Meguro-ku in Tokyo for the Chancery of the Kenya Embassy and Ambassador's residence at a

price of 1.75 billion Japanese Yen while aware that a fair market price could have been obtained had proper procurement procedures been adhered to.

Issues

i. Whether the matter was among the cases investigated and prosecuted when the Ethics Anti-Corruption Commission was not fully constituted.

ii. Whether the court as a 1st appellate court had jurisdiction to substitute an acquittal under section 210 of Criminal Procedure Code with an order placing an appellant on his defence.

iii. Whether the prosecution established a *prima facie* case against the respondents on all or some of the counts to warrant their being placed on their defence.

iv. What were the factors that ought to be considered in determining whether a charge of conspiracy should be preferred?

Relevant provisions of the law

Anti-Corruption and Economic Crimes Act, 2003

Section 47A - Attempts, conspiracies, etc.

Any person who conspires with another to commit an offence of corruption or economic crimes is guilty of an offence.

Section 48 - Penalty for offence under this Part

1) A person convicted of an offence under this part shall be liable to –

a) A fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both; and

b) An additional mandatory fine if as a result of conduct that constituted the offence the person received a quantifiable benefit or any other person suffered a quantifiable loss.

2) The mandatory fine referred to in subsection (1)(b) shall be determined as follows –

a) The mandatory fine shall be equal to two times the amount of the benefit or loss described in sub-section (1)(b).

b) If the conduct that constituted the offence resulted in both a benefit and loss described in subsection (1)(b), the mandatory fine shall be equal to two times the sum of the amount of the benefit and the amount of the loss.

Held

1. The standard applicable in determining whether a prima facie case had been established was that the onus was on the prosecution to prove its case beyond reasonable doubt and a prima facie case was not made out if, at the close of the prosecution, the case was merely one which on full consideration could possibly be thought sufficient to sustain a conviction.

2. An acquittal under section 210 fell under section 348(1) of the Criminal Procedure Code where the provision referred to an acquittal after a trial by a subordinate court or high court. There was no way an acquittal under section 210 of the criminal procedure code could be substituted for a conviction.

3. One could only be convicted after his defense had been taken, under section 211 of the Criminal Procedure Code. The provision for appeal following an acquittal did not specify whether it was under section 210 or section 215 of the Criminal Procedure Code. It applied to both an acquittal under sections 210 & 215 of the Criminal Procedure Code.

4. The court had the jurisdiction to not only to set aside an acquittal but also to make any other orders that would serve the cause of justice, under section 354(3) (c) of the Criminal Procedure Code. Therefore,

the instant court had jurisdiction to issue the orders sought in the appeal.

5. There could have been no problem with the approval of the purchase of the property by the respondents if a fair market price was gotten. The problem arose because there was failure to follow laid down procedures hence the loss of 318,700,000 Japenese Yen which went to the benefit of Mr. Nobuo Kuriyama.
6. Some of the points to be considered in determining whether a charge of conspiracy should be preferred were:
   a) As a general rule where there was an effective and sufficient charge of a substantive offence, the addition of a charge of conspiracy was undesirable to include a charge of conspiracy which added nothing to an effective charge of a substantive offence. The conspiracy indeed could merge with the offence.
   b) Where charges of substantive offences did not adequately represent the overall criminality disclosed by the evidence it could be right and proper to include a charge of conspiracy.
   c) But a count for conspiracy should not be included if the result would be unfair to the defence and that had always to be weighed with other considerations.

   What the prosecution was trying to achieve in the conspiracy was also covered in the 2nd and 3rd counts and the evidence was the same. It would be unfair and prejudicial to an accused person for the prosecution to use the same evidence to prove a charge of conspiracy alongside other specific offences. It amounted to punishing an accused twice over the same facts.
7. There was material evidence that was not placed before the court to tie the loose ends. If the respondents were placed on their defence and they elected to remain silent then the evidence on record would not have been sufficient to found any conviction.

The appeal lacked merit and was dismissed.

39. Considerations to be made before including a count of conspiracy in a charge sheet

The court while evaluating the considerations to be made in including a count of conspiracy in a charge sheet observed that a count of conspiracy should not be included on a charge sheet if the result would be unfair to the defence and thus would be weighed along with other considerations.

Republic v Thuita Mwangi & 2 others [2016] unreported

Anti-Corruption Case No. 2 of 2013

Chief Magistrate's Court at Milimani — March 30, 2016

K Bidali, CM

Criminal Law – *conspiracy – essential elements of conspiracy – considerations to be made before including a count of conspiracy in a charge sheet – whether the elements of conspiracy had been sufficiently proved – what were the conditions precedent for an offence of conspiracy to be included in a charge sheet - Anti-Corruption and Economic Crimes Act, section 45, 46, 47 A, & 48(1).*

Brief facts

The accused, working with the Ministry of Foreign Affairs Nairobi was charged with various offences for approving the purchase of the suit property for the Chancery of the Kenya Embassy and the Ambassador's residence at a price of 1.75 billion Yen while aware that a fair market price could have been obtained had proper procurement procedures been adhered to.

The accused were charged with four counts being conspiracy to commit an offence of corruption contrary to section 47A as read with section 48(1) of the Anti-Corruption and Economic Crimes Act, abuse of Office contrary to section 46 as read with section 48(1) of the Anti-Corruption and Economic Crimes Act, wilful failure to comply with the law and applicable procedures relating to procurement contrary to section 45(2) (b) as read with section 48 (1) of the Anti-Corruption and Economic Crimes Act and false Assumption of Authority contrary to section 104 (b) as read with section 34 of the Penal Code.

Issues

i. What were the elements of the offence of conspiracy?

ii. What were the conditions precedent for an offence of conspiracy to be included in a charge sheet?

iii. Whether it was proper to maintain the charges of conspiracy together with other related substantive charges in the circumstances?

Relevant provisions of the law

Anti-Corruption and Economic Crimes Act, No. 3 of 2003

Section 46 – Abuse of office

a person who uses his office to impurely confer a benefit on himself or against else is guilty of an offence

Section 47A - Attempts, conspiracies, etc.

(1) Any person who conspires with another to commit an offence of corruption or economic crimes is guilty of an offence.

Republic v Thuita Mwangi & 2 others [2016]

Held

1. The elements of the offence of conspiracy were:
   a. an agreement between two or more persons to do or cause to be done an illegal act, or to do an act which was not illegal through illegal means;
   b. a specific intention by the parties to enter into the agreement to do the act in question; and
   c. an overt act done by at least one of the conspirators in pursuance of the conspiracy.
2. The desirability of including a count of conspiracy in a charge depended on facts of each case and the following issues should be considered;
   a. as a general rule where there was an effective and sufficient charge of a substantive offence, the inclusion of a charge of conspiracy was undesirable and it would add nothing.
   b. The exceptions to the general rule were that a count of conspiracy was justified where;
      i. it was in the interest of justice to present an overall picture with a series of small substantive offences could not do.
      ii. there was clear evidence of conspiracy but little evidence that the conspirators committed any of the overt charges/where only some of the conspirators committed a few but not all of the overt acts.
      iii. charges of substantive offences did not adequately represent the overall criminality disclosed in evidence.
3. A count of conspiracy should not be included in a charge sheet if the result would be unfair to the defence and thus would be weighed along with other considerations.
4. There was no evidence that the accused persons or any two of them agreed with the co-defendants to commit and offence of corruption or economic crime.
5. It was improper to charge the accused with the offence of conspiracy together with a substantive charge of abuse of office in the circumstances.

Accused were acquitted under section 210 of the CPC in respect to the charge of conspiracy to commit an offence of corruption.

40. Elements of conspiracy to commit an economic crime

This case involved public officers and a private person who conspired to commit an economic crime through fraud by dishonestly receiving and retaining Kes., 8,891,943/- purporting to be building plan approval monies meant for Nairobi City County Government.

Esther Nyambura Thongori v Republic [2020] eKLR

Criminal Appeal No. 33 of 2019

High Court at Nairobi — May 14, 2020

Anti-Corruption & Economic Crimes Division

M Ngugi, J

Criminal Law *– corruption and economic crimes – charge of conspiracy to commit an economic crime – conspiracy to defraud - where persons employed in the public service* as *a clerical officer III, building inspector and a private person respectively, conspired to commit an economic crime to wit fraud by dishonestly receiving and retaining Kes., 8,891,943/- purporting to be building plan approval monies meant for Nairobi City County Government - Anti - Corruption and Economic Crimes Act, sections 47 (A)(3); 48; Penal Code, section 317.*

Criminal Law *– corruption and economic crimes – charge of obtaining money by false pretenses – claim where the accused person with intent to defraud obtained the sum of Kes. 8,981,943/- by falsely pretending that he was in a position to obtain building approvals from Nairobi City County Government on his behalf, a fact he knew to be false - Penal Code, section 313.*

Criminal Law *– corruption and economic crimes – charge of making a false document - fraudulently uttering a false document namely Nairobi City County Government construction invoice – claim where the accused with intent to defraud, made a false document, namely a Nairobi City County Government construction invoice number 11517 purporting it to be a genuine invoice issued by Nairobi City County Government - Penal Code, section 347, 349 and 353.*

Brief facts

The background to the instant case was that, the complainant and his company, Elephant Real Estates Limited, wished to develop a 19 storey building in the Kilimani area. They consulted an architect, whom they requested to obtain approvals for them for their building. He submitted the plans no less than three times, the plans always being rejected as the County did not approve buildings of more than 8 floors in that area. The 2nd appellant emerged as the person who undertook to assist to obtain the approvals he wanted for a generous fee of Ksh.7 Million and also gave the complainant a receipt purporting it to be from the County Government in acknowledgment of the payment by the complainant.

Subsequently, the appellants were charged with various counts of corruption offences. At count 1, they were charged with the offence of conspiracy to commit an economic crime contrary to section 47(A) (3) as read with sections 48 of the Anti-Corruption and Economic Crimes Act, 2003 (ACECA). The particulars of the offence were that the 1st appellant and the 2nd appellant at City Hall in Nairobi City County and being persons employed in the public service as a clerical officer III conspired to commit an economic crime to wit fraud by dishonestly receiving and retaining Kes., 8,891,943/- building plan approval monies meant for Nairobi City County Government.

The accused persons were tried and found guilty as charged. They were sentenced, in respect of count 1

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on conspiracy to commit an economic crime, to each pay a fine of Kes.700,000/= in default to serve 12 months imprisonment. The appellants were dissatisfied with both their conviction and sentence and in a consequence thereof, filed their respective appeals challenging both their conviction and sentence.

Issues

i. What were the elements/ingredients that a prosecution had to prove in an offence of conspiracy to defraud?

ii. Whether the sentences imposed were excessive in the circumstances.

Relevant provisions of the law

Anti-Corruption and Economic Crimes Act, No. 3 of 2003

Section 47A - Attempts, conspiracies, etc.

(1) Any person who conspires with another to commit an offence of corruption or economic crimes is guilty of an offence.

Held

1. The meaning of the term conspiracy to defraud as defined in The Black's Law Dictionary 9th Edition at page 351, was: "An agreement by two or more persons to commit an unlawful act coupled with an intent to achieve the agreement's motive, and (in most states), action or conduct that furthers the agreement; a combination for an unlawful purpose."
2. The offence of conspiracy could not exist without the agreement, consent or combination of two or more persons. So long as a design rested in intention only, it was not indictable; there had to be an agreement. The agreement could be proved in the usual way or by proving circumstances from which the jury could presume it. Proof of the existence of a conspiracy was generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.
3. In order to prove an offence of conspiracy to defraud, the elements to be proved were the existence of an agreement and the intention to defraud the public.
4. The 2nd appellant entered into a written agreement with complainant (exhibits 44 and 45) under which he would obtain approvals for a fee of Kes. 7 million and a bonus of Kes. 1 million.
5. The complainant deposited Kes. 6,281,943 in the 2nd appellant's account and in return the 2nd appellant issued the complainant a receipt (exhibit 3) purporting it to be from the County Government as acknowledgment for payment.
6. The testimony of PW6, PW11 and PW7 showed that the receipt and invoice issued to the complainant were not genuine. Under Central Bank regulations, no payment above Kes. 1 million could be made in cash.
7. The trial court properly analysed the evidence before it, and properly arrived at the conclusion that the appellants were guilty as charged. The trial court also considered the defences offered by the appellants, which were basically denials.
8. The trial court observed in its judgment that there was an intricate web of conspiracy and deceit in the Nairobi County Planning Department between employees of the County, brokers and gullible victims. The 1st appellant and her co-accused, Bonnie, were employees of the County Government. The 2nd appellant emerged as a well-established broker, so well-known that he could command a fee of Kes. 7 million and a bonus to subvert County building laws at the behest of a developer, never mind the consequences to the city and its residents.

9. There was a bit of a discrepancy in the judgment of the trial court and the sentence imposed on the appellants. At page 20 of the judgment, after analysing the evidence, the trial court stated that "I consider count 1, 2 and 3 proved as required by law." It then proceeded to consider counts 4- 7 and concluded that the 2nd appellant was guilty as charged under those counts.
10. However, as emerged from the sentence imposed, the trial court did not sentence the appellants and their co-accused on count 2, though the judgment was that he found the count proved. The court noted that in her submissions, the prosecution counsel took the position that the trial court had acquitted the appellants on this count, which followed from the fact that he did not impose a sentence on them in respect thereof. While the court deemed that to have been an error on the part of the trial court, the court let it be.

Consolidated appeals were dismissed;conviction and sentences upheld.

41. Unique circumstances where it was undesirable to frame a substantive charge of conspiracy together with substantive charges for specific offences

This case dealt with multiple procedural issues including whether the charge sheet was defective for mis-joinder and duplicity; the prerequisites of proving an offence of conspiracy to defraud; whether an offence of conspiracy could stand against one person and whether it was illegal to frame a substantive charge of conspiracy together with substantive charges for specific offences.

Rebecca Mwikali Nabutola & 2 Others v Republic [2016] eKLR

Criminal Appeal No. 232 of 2012

High Court at Nairobi — May 19, 2016.

G W Ngenye – Macharia, J

Criminal Law *- charges and information-joinder of counts - joinder of two or more accused in one charge -whether the charge sheet was defective for mis-joinder and duplicity- whether it was illegal to frame a substantive charge of conspiracy together with substantive charges for specific offences Criminal Procedure Code, section 135 & section 136*

Criminal Law *–offences - offence of conspiracy - what was required in order to proof an offence of conspiracy to defraud-whether an offence of conspiracy could stand against one person - circumstances where it was it was undesirable to join a count of conspiracy with counts for substantive offences*

Brief facts

The appellants filed an appeal from the conviction and sentence in the Chief Magistrate Court. The 1st appellant contended that the court did not comply with sections 199, 211 and 200(3) of the Criminal Procedure Code and did not record the demeanor of the prosecution witnesses. He cited the charges as bad for duplicity, and that the court failed to address the issue of joinder of the accused persons in her judgment. He further contended that the evidence adduced did not prove the case beyond a reasonable doubt.

The 2nd appellant contended that the trial court shifted the burden of proof and erred in holding that the appellant ought to explain how the money was spent. The 2nd appellant also faulted the court's failure to consider the capacity in which he was charged, which amounted to a fatal error which rendered the charge sheet and entire proceedings null and void. He also faulted the court for applying the wrong facts on the charges.

The 3rd appellant argued that the prosecution evidence was contradictory and that the evidence was not sufficient to support a conviction, thus the prosecution had not proved its case beyond reasonable doubt. He further stated that the trial court relied on inadmissible evidence and that the findings were not based on actual evidence. The sentence imposed was manifestly excessive and wrong in law.

Issues

i. Whether the charge sheet was defective for mis-joinder and duplicity.
ii. What was required in order to prove an offence of conspiracy to defraud?
iii. Whether an offence of conspiracy could stand against one person.
iv. Whether it was illegal to frame a substantive charge of conspiracy together with substantive charges for specific offences.

Rebecca Mwikali Nabutola & 2 Others v Republic [2016] eKLR

Held

1. Section 200(3) of the Criminal Procedure Code required that where a succeeding magistrate commenced the hearing of proceedings and part of the evidence had been recorded by his predecessor, the accused person could demand that any witness be resummoned and reheard and the succeeding magistrate should inform the accused person of that right. The record showed that the court proceeded to inform the appellants of their right under section 200(3). The provision was explained to both the appellants and their respective counsels. Therefore, the trial court complied with section 200(3) of the Criminal Procedure Code.
2. Section 199 of the Criminal Procedure Code provided that when a magistrate recorded the evidence of a witness, he should also record such remarks (if any) as he thought material respecting the demeanour of the witness whilst under examination. That provision, as worded, particularly the use of (if any), meant it was not mandatory, and gave the presiding magistrate discretion to record such remarks, if he saw fit, on witnesses' demeanor. It was well within the law for the succeeding magistrate to proceed on the basis of the recorded evidence even in the absence of remarks as to the demeanor of the witnesses. The 1st appellant's argument in that respect failed and that ground of appeal similarly failed.
3. Section 211 of the Criminal Procedure Code required that where the court found that a case had been made out against the accused to justify placing the accused on his defence, the court should again explain the substance of the charge to the accused, and should inform him that he had a right to give evidence on oath from the witness box, and that, if he did so, he would be liable to cross-examination, or to make a statement not on oath from the dock, and should ask him whether he had any witnesses to examine or other evidence to adduce in his defence. The court should then hear the accused and his witnesses and other evidence (if any). The counsel for the various parties responded appropriately after the explanation and that was a demonstration that the parties understood what was required of them and the ground was consequently dismissed.
4. Section 134 of the Criminal Procedure Code stipulated that every charge or information should contain, and should be sufficient if it contained, a statement of the specific offence or offences with which the accused person was charged, together with such particulars as could be necessary for giving reasonable information as to the nature of the offence charged. Injustice would be occasioned where evidence was called relating to many separate counts all contained in one count because the accused could not possibly know what offence exactly he was charged with. The charge sheet had 11 counts of specific offences each with particulars describing the alleged contravention of the law. None of the counts as drafted contained more than one offence and the charges were therefore not bad in law for either duplicity or joinder of counts.
5. It was not illegal *per se* to join an alternative charge of conspiracy. Indeed, it was not necessarily illegal to frame a substantive charge of conspiracy together with substantive charges for specific offences. Each case must be considered according to its facts. The following points should be considered;
    i. As a general rule where there was an effective and sufficient charge of a substantive offence, the addition of a charge of conspiracy was undesirable. It was not desirable to include a charge of conspiracy which added nothing to an effective charge of a substantive offence. The conspiracy indeed could merge with the offence.
    ii. To that general rule there were exceptions, as for instance:-
        a) Where it was in the interest of justice to present an overall picture, which a series of relatively small substantive offences could not do; sometimes a charge of conspiracy could be the

simpler way of presenting the case.

b) Where there was clear evidence of conspiracy but little evidence that the conspirators committed any of the overt acts; or where some of the conspirators but not all, committed a few but not all, of the overt acts, a count for conspiracy was justified.

c) Where charges of substantive offences did not adequately represent the overall criminality disclosed by the evidence, it could be right and proper to include a charge of conspiracy.

iii. But a count for conspiracy should not be included if the result would be unfair to the defence, and that had always to be weighed with other considerations.

iv. It could be necessary to try a count for conspiracy separately from substantive counts which were only examples of carrying out the conspiracy.

v. Where the evidence disclosed more than one conspiracy, although not bad in law, it was undesirable to charge on conspiracies in one count.

vi. Other factors concerned the number and type of conspirators. For instance, the possibility of two being husband and wife, or of two conspirators the possibility that one may be acquitted, might need to be safeguarded.

The question was why or in what circumstances it was undesirable to join a count of conspiracy with counts for substantive offences. The main ground was unfairness to the accused, which was a general consideration. That might arise because the accused might not know with what he was charged with precisely, or might be embarrassed to be obliged to defend in the alternative.

6. Where an indictment contained substantive counts and a related conspiracy count, the court required the prosecution to justify the joinder, or failing justification, to elect whether to proceed on the substantive or on the conspiracy counts. A joinder was justified if the court considered that the interests of justice demanded it. Severance followed from the court's inherent powers to see that its process was not abused, in the sense that the accused was guarded against oppression or prejudice. It was for that purpose that the rule was that the objection must be taken at the earliest opportunity. Therefore, the inclusion of the charges of conspiracy together with substantive offences did not render the charges as drafted defective or undesirable.

7. Section 23 of the Penal Code recognized offences by corporations in that where an offence was committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons should be guilty of that offence and liable to be punished accordingly, unless it was proved by such person that, though no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission. The charges as drafted were proper, and no question of mis-joinder arose. The question of liability would only be determined upon consideration of evidence, and a further determination on whether the 2nd appellant borne liability as a director of the company.

8. In order to prove an offence of conspiracy to defraud, the elements to be proved were the existence of an agreement and the intention to defraud the public. It was not enough that two or more persons pursued the same unlawful object at the same place or in the same place. It was necessary to show a meeting of minds, a consensus to effect an unlawful purpose. It was not, however, necessary that each conspirator had been in communication with every other.

9. An agreement in a charge of conspiracy could be proved in the usual way or by proving circumstances

from which the court presumed it. Proof of the existence of a conspiracy was generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them. That required that a common purpose between or among the subject parties was proved. Common intention was set out in section 21 of the Penal Code where it was stated that when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence was committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them was deemed to have committed the offence. There was no evidence of an express agreement among the appellants to defraud from the facts set out. Since it was an offence of conspiracy, it could not stand against one person. The entire charge therefore failed.

10. Section 45 of the Anti-Corruption and Economic Crimes Act dealt with offences related to the protection of public property and revenue. Public property was defined as real or personal property, including money, of a public body or under the control of, or consigned or due to, a public body. Section 45(2)(b) provided that an officer or person whose functions concerned the administration, custody, management, receipt or use of any part of the public revenue or public property was guilty of an offence if the person willfully or carelessly failed to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures.
11. The charge of failure to comply with the law relating to procurement was against the 1st appellant because she was the accounting officer in the ministry and as such was enjoined to ensure that public funds under her charge were incurred prudently and in accordance with the law and procedures. From the facts, the actions and omissions of the 1st appellant amounted to careless failure in that regard. Section 3(a) defined an accounting officer as a public entity other than a local authority, the person appointed by the Permanent Secretary to the Treasury as the accounting officer or, if there was no such person, the Chief Executive of the public entity. Section 27 provided that an accounting officer should be responsible for ensuring that the public entity charged under him complied with the regulations and any directions with respect to each of its procurements. The Act also required that a procuring entity should have a procurement plan in line with its budgeting process. That charge was therefore proved.
12. The offence of abuse of office charged against the 1st appellant was couched under section 46 of the Anti-Corruption and Economic Crimes Act where a person who used his office to improperly confer a benefit on himself or anyone else was guilty of an offence. Under section 2 of the Anti-Corruption and Economic Crimes Act a benefit meant any gift, loan, fee, reward, appointment, service, favour, forbearance, promise or other consideration or advantage. The prosecution was under a duty, in proving the offence to show that the Appellant improperly used her public office to confer a benefit. It was also crucial as part of the ingredients to show the nature of benefit conferred.
13. The 3rd appellant was charged with willful failure to comply with the law relating to procurement. Section 26(3)(c) 48 of the Anti-Corruption and Economic Crimes Act required that all procurement procedures should be handled by different offices in respect of procurement initiation, processing and receipt of goods, works and services. The obvious objective behind that requirement was to among others ensure transparency and accountability in public processes and related expenditure. Section 29(3) of the Public Procurement and Disposal Act, required approval by the tender committee. Proper procurement procedure was not followed. None of the documentation presented was in relation to the subject matter.
14. Section 27(1) of the Public Procurement and Disposal Act provided that subject to the Act, all approvals

relating to any procedures in procurement should be in writing and properly dated, documented and filed. He ought to have provided a reasonable explanation as the accounting officer of Kenya Tourism Board. As long as public funds were to be expended whether by contribution or otherwise, the expenditure ought to have undergone the requisite procurement procedure. In line with Section 27, of the Public Procurement and Disposal Act, the 3rd appellant being the managing Director bore the responsibility of ensuring the Kenya Tourism Board complied with the procurement laws. The 3rd appellant failed in that respect, and the guilt on Count VI as charged was confirmed. The 3rd appellant was also charged with fraudulently making payments from public revenues for services not rendered. From the facts, the charges could not stand as the services were subsequently delivered.

15. The 2nd appellant and the 4th accused (Maniago Safaris) were charged with fraudulent acquisition of public property. Section 45(1)(a) of the Anti-Corruption and Economic Crimes Act created the offence of fraudulent or otherwise unlawful acquisition of public property or a public service or benefit. Fraudulent actions introduced the element of deception purposed at gaining a benefit. From the facts, the charge was not proved to the required standard.

Appeal allowed with respect to counts I, II, V, VII, X and XI. Conviction quashed and sentences set aside.

Decision upheld with regard to the case against the 3rd appellant in respect of count IV and against the 1st Appellant in respect of count VII

Failure to Comply with Procurement Laws

FAILURE TO COMPLY WITH PROCUREMENT LAWS

42. Recommending a tenderer who did not meet the mandatory conditions specified in a tender document violated Public Procurement and disposal of Assets Act, 2005

The court outlined various aspects of the tendering process such as the role and mandate of a technical evaluation committee, the mandatory requirements of a tender document and the termination of a tendering process and how public officers can abuse their office in a tendering process.

John Gakuo (Deceased) & 3 others v Republic [2020] eKLR

Criminal Appeal No. 9 of 2018

High Court at Nairobi — September 23, 2020

Anti-Corruption and Economic Crime Division Milimani

J N Onyiego, J

Procurement Law *– tender document – mandatory requirements – where a technical evaluation committee deviated from the required mandatory requirements – where the land in dispute did not meet the required criteria - whether a tender evaluation committee could deviate from the conditions set out in a tender document- whether recommending the name of a tenderer by a technical evaluation committee who did not meet the mandatory conditions specified in a tender document violated section 64(1) of the Public Procurement and disposal of Assets Act, 2005 – Public Procurement and Disposal of Asset regulations, 2006 regulation 16(5)*

Procurement Law – *technical evaluation committee – duty and mandate of a technical evaluation committee – where a technical evaluation committee did not exercise due diligence – where the technical evaluation committee recommended the purchase of the disputed land - Whether failure by the technical evaluation committee to exercise due diligence in regard to the subject matter of a procurement violated the provisions of the Public Procurement and Disposal of Assets regulations, 2006 regulations 16(5), 16(9), & 16(10(f)*

Procurement Law *– tendering process – termination of - whether a Permanent Secretary, who was not an accounting officer or head of a procuring entity, could stop a tendering process - Public Procurement and Disposal of Assets Act, 2005 sections 3, 27 & 44; Government Finance Act, section 18*

Words and Phrases *– false – definition of - untrue, deceitful, not genuine, inauthentic, wrong or erroneous - Black Law Dictionary 10th Edition*

Brief facts

The consolidated appeals revolved around a controversially acquired land (L.R. No. 14759 Machakos) by the then City Council of Nairobi sometime in the year 2008 to 2009 for purposes of rendering public cemetery services after it came out that the facility then and currently located at Langata public cemetery was full. The parcel of land which was acquired at a cost of Kes. 283,000,000/- allegedly from M/s Naen Rech Company LTD as the seller through competitive tendering method was according to the prosecution riddled with corrupt practices.

It was the prosecution's case that the eventual clearance for payment by the 1st appellant (Town Clerk) and

John Gakuo (Deceased) & 3 others v Republic [2020] eKLR

P.S for Local Government (3rd appellant) as the Accounting Officers while fully aware of the objections raised by the Department of Planning vide memos dated November 11, 2008 and December 19, 2008 was illegal hence amounting to abuse of office and willful neglect of official duty.

Issues

i. Whether a tender evaluation committee could deviate from the conditions set out in a tender document.

ii. Whether recommending the name of a tenderer by a technical evaluation committee who did not meet the mandatory conditions specified in a tender document violated section 64(1) of the Public Procurement and Disposal of Assets Act, 2005.

iii. Whether failure by the technical evaluation committee to exercise due diligence in regard to the subject matter of a procurement violated the provisions of the Public Procurement and Disposal of Assets Act, 2005.

iv. Whether a Permanent Secretary, who was not an accounting officer or head of a procuring entity, could stop a tendering process.

Relevant provisions of the law

Criminal Procedure Code (Cap. 75)

Section 169 - Contents of judgment

(1)Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

Anti-Corruption and Economic Crimes Act (ACECA), No. 3 of 2003

Section 38 - Meaning of "agent" and "principal"

(1) In this Part-

Agent means a person who, in any capacity, and whether in the public or private sector, is employed by or acts for or on behalf of another person;

"Principal" means a person, whether in the public or private sector, who employs an agent or for whom or on whose behalf an agent acts.

Section 41 - Deceiving principal

1 An agent who, to the detriment of his principal, makes a statement to his principal that he knows is false or misleading in any material respect is guilty of an offence.

2 An agent who, to the detriment of his principal, uses, or gives to his principal, a document that he knows contains anything that is false or misleading in any material respect is guilty of an offence.

Section 48 - Penalty for offence under this Part

1 A person convicted of an offence under this Part shall be liable to—

(a) a fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both; and

(b) 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.

2 The mandatory fine referred to in subsection (1)(b) shall be determined as follows—

(a) the mandatory fine shall be equal to two times the amount of the benefit or loss described in subsection (1)(b);

(b) if the conduct that constituted the offence resulted in both a benefit and loss described in subsection (1)(b), the mandatory fine shall be equal to two times the sum of the amount of the benefit and the amount of the loss.

Public Procurement and Disposal Act No. 3 of 2005

Section 36 - Termination of procurement proceedings.

Sub-Sec (1)- A procuring entity may, at any time, terminate procurement proceedings without entering into a contract.

(2) The procuring entity shall give prompt notice of a termination to each person who submitted a tender, proposal or quotation or, if direct procurement was being used, to each person with whom the procuring entity was negotiating.

(5) The procuring entity shall not be liable to any person for a termination under this section.

Public Procurement and Disposal Regulations, 2006

Regulation 16(5)

A technical evaluation committee established in accordance with paragraph (2) (a) shall be responsible for—

a. the technical evaluation of the tenders or proposals received in strict adherence to the compliance and evaluation criteria set out in the tender documents;

b. performing the evaluation with all due diligence and within a period of thirty days after the opening of the tenders.

Evidence Act (Cap. 80)

Section 111 - Burden on accused in certain cases.

111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

Held

1. It was the responsibility and indeed incumbent upon the trial court to analyze, evaluate and consider all the evidence tendered before court before making a determination. That duty was aptly captured under section 169(1) of the Criminal Procedure Code. From the record, the trial court did analyze the evidence and gave reasons for its determination. The reasons given for the decision may not necessarily

have been correct and pleasant to everyone. A trial court could make an error in its reasoning but that did not mean that there were no reasons advanced.

2. The 2nd and 4th appellants were accused of acting in contravention of section 41(2) of ACECA. The penalty for the prescribed offence was provided under section 48 of ACECA. For purposes of the offence under section 41(2) of ACECA, the court was duty bound to find whether the 2nd and 4th appellants acted:
   a. as agents.
   b. who was the principal in the case
   c. whether they gave to their Principal a document; and
   d. whether they knew that the document given contained false or misleading information.

   There was no doubt that the 2nd and 4th appellants at all material times to those proceedings were employees of Nairobi City Council. It was also not in dispute that they among other persons were appointed as members of the Evaluation Tender Committee in which they sat as Secretary and Chair respectively to the said committee.

3. The word agent and principal were defined at section 38 of ACECA. In the circumstances of the instant case, the 2nd and 4th appellants being employees of the City Council of Nairobi a public body as defined under section 2 of ACECA were acting as agents representing the Accounting Officer in that case the Town Clerk being the head of the procuring entity in the case City Council of Nairobi as their employer. The fact that the Deputy Town Clerk signed the letter of appointment to the Tender Committee did not make him principle because he was acting on behalf of the Accounting Officer in the case the Town Clerk in conformity with Regulation 11(3) and second schedule paragraph 5 of the PPDA regulations 2006.

4. From the minutes of the Evaluation Committee meeting held on October 14, 2008, they were signed by the two appellants on November 10, 2008 and then forwarded to the Tender Committee vide a letter dated November 5, 2008 addressed to the Director of Procurement and signed by the 4th appellant. It was not in dispute that the minutes of the Tender Evaluation Committee sitting on October 14, 2008 forwarded the name of Naen Rech as Secretary and Chair respectively to the said Committee. It was apparent from the minutes and forwarding letter to the Tender Committee that the two appellants did give to the Principal the impugned document.

5. From the evidence on record the process of acquiring land for Public Cemetery use commenced in the year 2006 and subsequently a committee to explore modalities of acquiring the much needed land was put in place. Consequently, the committee recommended acquisition of land within Nairobi Metropolitan City and the criteria thereof set out as reflected in the tender document at page 12.

6. A perusal of the Tender Evaluation Committee minutes dated October 14, 2008 at the award of points column revealed that, out of the 12 responsive evaluated bidders Naen Rech, a Company which was eventually awarded the contract did not meet all the mandatory conditions set out except for the title comprising all the required land under one title in which it was awarded 5 points. In fact, none of the bidders met the mandatory criteria fully.Besides, Naen Rech, bidder No. 7 appeared to have been given nil points in all categories of the conditions set out in the contract document except 5 points for having a title deed in which the entire land was comprised.

7. From the testimony of PW16 the investigating officer that, as at the time the evaluation exercise was

being conducted, Naen Rech had neither acquired nor owned L.R. 14759/1 which they purported to sell to the City Council of Nairobi. His testimony was also corroborated by the testimony of PW6 the registered owner of the land at the material time who stated: he sold 120 acres of the said land to Naen Rech on December 19, 2008 at Kes.110 million. That was further corroborated by the sale agreement dated December 19, 2008 between PW6 and Naen.

8. Based on the evidence, Naen Rech as at October 6, 2008 when they tendered for sale of land to the City Council and October 14, 2008 when the Evaluation Committee recommended their name to the Tender Committee for consideration had no land capable of being sold to the City Council of Nairobi for use as Public Cemetery. In any event, the land did not meet the most critical consideration of 6 feet or 1-8 metres depth for ease of grave digging and that the land was far beyond the 1km distance requirement from a classified all whether road.

9. PW6's evidence in which he denied being a shareholder or Company Director to Naen was not at all challenged or controverted leading to a reasonable inference that his inclusion to Naen directorship in the tender questionnaire was conveniently done and intended for some people to harvest without sowing. The Evaluation Committee should have done due diligence to know that Naen did not have land to sell at the material time as they did not have any ownership documents nor Certificate of Incorporation with proof of directorship From the word go, Naen Rech had no land capable of being sold nor did the quoted land meet the criteria for public cemetery use.

10. After the opening of bids, members agreed to physically visit various parcels of land offered by various bidders to ascertain their suitability. Among those who visited the said sites were PW2 representing Public Health Department as the user Department.

11. From the onset, the existence of red soil was not one of the conditions stated in the contract document. Therefore, the Evaluation Committee could not deviate from the conditions set out in the tender document in compliance with regulation 16(5) of the Public Procurement and Disposal Act Regulations of 2006. Since the tender document only emphasized on the depth of the soil, the introduction of an extra condition of red soil would be contradicting regulation 16(5) of the Public Procurement and Disposal Act Regulations of 2006 and section 64 (2) of PPDA.

12. Section 60(1) of PPDA gave the accounting officer powers to appoint a Tender Opening Committee which constituted at least 3 members one whom would not be involved in the processing of the evaluation. Under section 64(1) of the PPDA, a tender was said to be responsive if it conformed with all mandatory requirements. Section 65 of the PPDA 2005 further provided that, if the procuring entity declared that none of the tenders submitted was responsive, it would notify the members. Naen Rech did not meet the mandatory conditions hence should have been rejected as a non-responsive tenderer instead of recommending his name to the Tender Committee for consideration.

13. The appointment of an Evaluation Committee and its mandate was clearly spelt out under regulation 16 of the PPDA Regulations 2006. Reglation 16(9) went further to provide that an evaluation committee would provide a report on the analysis of the tenders received and submit a report to the tender committee. Regulation 16 (10) (f) bound an evaluation committee to submit a report under sub-regulation 9 with a recommendation to award the tender to the lowest evaluated tenderer or to the person who submitted the proposal with the highest total score. In compliance with regulation 16(5) of the PPDA Regulations 2006, the evaluation committee was duty bound to exercise due diligence to confirm that Naen did not have land for sale. They did not even find out Naen's Directorship or even

demand to know why he was offering for sale land they had not even bought nor assumed possession of from PW6 as part of due diligence before recommending the same for consideration for the award of contract.

14. The Evaluation Committee did forward the minutes of November 14, 2008 while fully aware that the information contained was misleading on the following grounds; Firstly, that Naen had scored the highest points hence recommending it for consideration of the tender and secondly; that PW2 and PW4 had attended the evaluation meeting. The technical use of the word recommended for consideration did not exonerate them from liability. The word recommended was aptly read and correctly understood by the Tender Committee as reflected in the minutes of November 12, 2008 at page 16 where they stated that the Technical Evaluation Committee had recommended bidder No. 7 (Naen).

15. Had the Technical Evaluation Committee given the correct position that Naen had failed from the word go, the Tender Committee could have taken a different trajectory. That did not mean that the tender committee was innocent. They too had the powers to re-examine the bids and reject the tenderer if they found the same not qualified or compliant. Both the Evaluation Tender Committee and Tender Committee failed the procuring entity by not performing their role properly and effectively as provided in the procurement law thus misleading their Principal.

16. From the minutes of November 12, 2008 in which the tender was awarded, the appellants were not members in conformity with regulation 16(4) which prohibited evaluation committee members from being members of tender committee. That was misdirection on the trial court's part which in any event did not affect the appellant's liability in relation to Count 3.

17. It was the duty of the prosecution even in circumstances where an accused opted to keep quiet to prove its case beyond reasonable doubt. However, the standard of proof beyond reasonable doubt did not translate to 100% certainty. Omissions or discrepancies that did not affect the substance of the charges or materially shake prosecution's case as to the culpability of an accused could not be relied on to exonerate an accused person from liability.

18. The valuation report was submitted to the Tender Committee by the 4th appellant. According to the valuation report tendered before the Tender Committee on November 12, 2008 for consideration, it gave the land in question a value of Kes. 325,150,000/-. Although the valuation report was not one of the criteria set out in the tender document, the procuring entity was duty bound to do due diligence by asking for a valuation report to inform its decision making process in buying land. It was not therefore necessary that it be included in the tender document specifically as a condition.

19. As to whether the document was genuine or false, the answer lay in its source which was denied. From the evidence of PW7, the Chief Valuer, the only conclusion to make was that the report was forged or obtained purportedly to influence the award at an inflated price to justify payment of the money over and above the actual price to be shared amongst other undeserving beneficiaries. Since the report was classified as not being genuine and considering that it was one of the documents considered by the Tender Committee before awarding the contract, the same was a false document. The prosecutor discharged its burden in proving that the document did not officially exist and the only logical conclusion was that the person who introduced it to the Tender Committee knew its source and in the absence of any evidence to the contrary, the 4th appellant was responsible.

20. Section 111 of the Evidence Act was one of the rarest exceptions in criminal proceedings where the burden of proof by law shifted to the accused. From the evidence on record the document was a scheme

to inflate the figure in order for some parties to benefit from part of the fund. Among the beneficiaries was the 4th appellant who received and acknowledged a sum of 13 million. Consequently, the 4th appellant was properly convicted of Count IV being the originator of the false valuation report and discharged of the alternative count.

21. It was not in dispute that the 3rd appellant held a public office being a Permanent secretary. It was also admitted that he authorized release of funds in question to Naen. The question to answer was; whether he acted improperly in releasing the funds and, whether legally he had the powers to stop payment hence frustrating the already executed contract. The trial court ought to have evaluated whether the 3rd appellant had any lawful role to play in the tendering process and whether he had authority under the PPDA 2005 and Public Procurement Act Regulations 2006 to stop the process.

22. The 3rd appellant was not the head of the procuring entity, City Council. The head of the procuring entity and therefore the accounting officer in the context of the procurement in question was the Town Clerk. The 3rd appellant was not the Accounting Officer for City Council. Therefore, the 3rd appellant had no role to pray in the tendering process.

23. Under section 36 of the PPDA 2005, the head of the procuring entity (city council) had powers to stop or terminate the contract before the expiry of 14 days after notification of the award. A procuring entity meant a public entity which was defined under section 3 of PPDA as a public entity including a local authority. It was clear that the Accounting officer (Town Clerk) had a role to play under section 36 of PPDA. In the circumstances of the case the 3rd appellant was not an Accounting Officer of the procuring entity hence had little role to play in terminating the contract which had long been awarded, accepted and signed. Under section 27(2) of the PPDA, the Accounting officer of a public entity was responsible for ensuring that the public entity performed its obligations under sub-Section 1.

24. Under section 5(1) of the PPDA, where there was a conflict between the PPDA and any other law or Act, the PPDA would take precedence as the parent Act. Section 5(2) further provided that any Act or law which gave any person or body authority to approve any works or expenditure would not not be construed as giving such person or body authority with respect to procurement proceedings. To that extent, the 3rd appellant could not interfere with the procuring process courtesy of any authority conferred by section 18 of the Government Finance Act or any other law. However, if he were the accounting officer of the procuring entity, he would have legally interfered under section 36 of the PPDA 2005 as read with the provisions of section 27 of the PPDA and Government Finance Act section 18.

25. The 3rd appellant had nothing to do with the legality of the sale agreement, the evaluation and tendering processes. It was the duty of the Evaluation Committee and Tender Committee and the head of procuring entity (Accounting Officer) to ensure that every bit of procurement process was followed to the letter as emphasized in the 3rd appellant's correspondence to the Town Clerk. His role was that of a conveyor belt upon being told that a contract had been awarded hence released the money.

26. The intention of parliament was to make procurement process as independent as possible and further insulate it from any external influence in compliance with section 44 of PPDA. The 3rd appellant would have been accused of interfering with the procuring process if he terminated the sale transaction. He could not be held liable for obeying the procurement law. Had the trial court properly addressed his mind to the relevant procurement provisions, he would have arrived at a different finding thereby exonerating the 3rd appellant.

27. Sentencing was at the discretion of the trial court. For an appellate court to interfere with the exercise

of sentencing discretion of the trial court it had to be satisfied that the trial court failed to take into account sentencing legal principles; took into account irrelevant factors or that the sentence was excessive and harsh. The court took into consideration the appellants' mitigation and sentenced the 2nd and 4th appellants to 3 years imprisonment.

28. The law provided for a fine of 1 million or 10 years imprisonment or both. Save for the imposition of the mandatory fine under section 48(1) (B) and 48(2), the first limb of the sentence was not challenged. There was no illegality in imposing a 3 year jail term against the 2nd and 4th appellants, given that the prescribed period was 10 years imprisonment. There was no reason to interfere with the same considering the gravity of the offence and that discretion was properly exercised.

29. As to the additional mandatory sentence of Kes. 32 million imposed against the 2nd appellant the same was set aside for the reasons already stated. As to the mandatory sentence of Kes. 52 million against the 4th appellant, the same was confirmed for reasons already stated.

Appeal partly allowed.

***Orders**:*

i. The conviction against the 3rd appellant was quashed and sentence set aside. The 3rd appellant was set free unless otherwise lawfully held.

ii. Conviction of the 2nd appellant in respect of count 3 was upheld.

iii. The sentence of 3years imprisonment against the 2nd appellant was confirmed.

iv. The mandatory sentence of Kes. 32 million under section 48(1)(b) and 48(2) of ACECA was set aside.

v. The conviction of the 4th appellant in respect of counts 3 and 4 was upheld.

vi. The sentence of 3yrs imprisonment in respect of the 4th appellant for counts 3 and 4 to run concurrently was upheld.

vii. The mandatory sentence of 52million in default to serve another one-year imprisonment against the 4th appellant under section 48(1)(b) and 48(2) of ACECA was confirmed.

viii. For avoidance doubt, the mandatory sentence against the 4th appellant was to be served consecutively with the terms of imprisonment of three years imposed in respect of counts 3 and 4 which were to run concurrently.

ix. The 2nd and 4th appellants' bail pending appeal be was cancelled and they forthwith be committed and detained at GK prisons to continue serving their sentence from where they had left when they were released on bail pending appeal.

x. The Deputy Registrar to cause, prepare and execute a committal order/Warrant in respect of the 2nd and 4th appellants to prison.

xi. The sureties in respect of the appellants would be discharged forthwith and any security deposited returned or refunded.

xii. Right of appeal 14 days.

43. Wilful failure to comply with the law relating to management of funds and incurring of expenditures

The prosecution successfully proved the allegations against the respondents in the case revolving around wilful failure to comply with the law relating to management of funds and procurement as well as procedures and guidelines relating to procurement and tendering of contracts, contrary to section 45 (2) (b) as read with section 48 (1) of the Anti-Corruption and Economic Crimes act, 2003.

Republic v Benedict Maurice Omollo Olwenyo & 8 others [2019] eKLR

Criminal Appeal No.8 of 2018

High Court at Homa Bay — July 18, 2019

J R Karanjah, J

Criminal Law – *corruption and economics crimes – charge of wilful failure to comply with the law relating to management of funds and incurring of expenditures – where the interim Chief Finance Officer unlawfully and irregularly authorized payment of money for services contrary to the laws on public procurement - Anti - Corruption and Economic Crimes Act, section 45 (2) (b); section 48 (1); Public Procurement and Disposal Act, section 26 (3) (a) and Public Finance Management Act, section 121*

Criminal Law – *corruption and economics crimes - charge of failure to comply with the law relating to procurement – where the interim Chief Finance Officer failed to comply with the law relating to procurement by initiating the procurement of services without an approved budget – unlawfully engaging in a project without prior panning - Anti - Corruption and Economic Crimes Act, sections 45 (2) (b) & 48 (1); Public Procurement and Disposal Act, section 26(3) (a) and Public Finance Management Act, section 121*

Criminal Law – *corruption and economics crimes - charge of wilful failure to comply with the applicable procedures and guidelines relating to procurement and tendering of contracts – where the interim Chief Finance Officer failed to comply with the applicable procedures and guidelines relating to procurement and tendering of contracts by irregularly authorizing payments for services without the certification of the inspection and acceptance committee as per the provisions of the Regulations on public procurement laws - Anti - Corruption and Economic Crimes Act, section 45 (2) (b); section 48 (1); Public Procurement and Disposal Act, section 26 (3) (a) and Public Finance Management Act, section 121- Public Procurement & Disposal Regulations, 2006 regulation 10 (2) (h)*

Brief facts

The appellant (the state) was aggrieved by the decision and judgment of the Senior Principal Magistrate in Homa Bay CMCC No.8 of 2017, in which the nine respondents were acquitted of the several charges preferred against them either jointly or severally under the Anti-Corruption and Economic Crimes Act, 2003. The state filed the instant appeal on the basis of the grounds set out in its petition of appeal. The appellants had been charged with five counts. In all the five counts, the base allegation against the respondents was wilful failure to comply with the law relating to management of funds and procurement as well as procedures and guidelines relating to procurement and tendering of contracts, contrary to section 45 (2) (b) as read with section 48 (1) of the Anti-Corruption and Economic Crimes Act, 2003**.**

In count 1, the first respondent in his capacity as the interim Chief Finance Officer in the Migori County Government was charged with irregular payment of Kes.7,986,750/76 to African Merchant Assurance Company (Amaco) Limited for Motor Vehicle Insurance Covers which had been procured in contravention

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of the Public Procurement & Disposal Act, 2005, contrary to the requirements of section 121 of the Public Finance Management Act, 2012**.** In count 2, the 1st accused and the 2nd accused/respondent, the interim Chief Finance Officer and interim head of supply respectively, were accused of failing to comply with the law relating to procurement by initiating the procurement of motor vehicle insurance covers worth Kes.7,986,750/76, without an approved budget. In count three, the charge was wilful failure to comply with the applicable procedures and guidelines relating to procurement and tendering of contracts, contrary to section 45 (2) (b).

The 2nd to 9th respondents, being the County Tender Committee, wilfully failed to comply with the law relating to procurement by awarding the tender for motor vehicle insurance worth Kes.7, 786, 750/76 to Africa Merchant Assurance Company Limited without ensuring that funds were available for the said procurement. In count four**,** the County Tender Committee members were accused of wilfully failing to comply with the law relating to procurement by approving the direct procurement of motor vehicle insurance worth Kes.7,986,750/76, from Africa Merchant Assurance Company Limited in circumstances that did not meet the criteria set out in Public Procurement & Disposal Act, 2005**.** Lastly, the 1st and 8th respondent, being the interim Chief Officer for Finance and the head of treasury accounting respectively, jointly failed to comply with the applicable procedures and guidelines relating to management of funds by irregularly authorizing payments of Kes.7,986,750/76 to African Merchant Assurance Company Limited on purchase of motor vehicle insurance without the certification of the inspection and acceptance committee as per the provisions of Public Procurement & Disposal Regulations, 2006**.**

After a full trial, the trial court found them not guilty as charged in all counts and acquitted them**.**

Issues

i. Whether the prosecution proved the allegations of wilful failure to comply with the law relating to management of funds and procurement against the appellant beyond reasonable doubt.
ii. Whether the prosecution proved the allegations wilful failure to comply with the procedures and guidelines relating to procurement and tendering of contracts beyond reasonable doubt.

Relevant provisions of the law

Anti-Corruption and Economic Crimes Act, No. 3 of 2003

Section 45 – Protection of public property and revenue,etc

(2) *An officer or person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person—*

(a) *fraudulently makes payment or excessive payment from public revenues for—*

(a) *sub-standard or defective goods;*

(i) goods not supplied or not supplied in full; or

(ii) services not rendered or not adequately rendered,

(b) *wilfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures; or*

(c) *engages in a project without prior planning.*

(3) *In this section, "public property" means real or personal property, including money, of a public body or under the control of, or consigned or due to, a public body.*

Held

1. The defence case was generally a denial. The obligation to prove their guilty on the standard of proof applicable to criminal cases i.e beyond reasonable doubt, lay on the prosecution.
2. No obligation was placed on the respondents to prove their innocence. It was only in exceptional

circumstances that the law placed a legal burden on the accused to prove his innocence especially where he was required to explain matters which were peculiarly within his personal knowledge.

3. Under section 45(2) (b), an officer or person whose functions concerned the administration, custody, management, receipt or use of any part of the public revenue or public property was guilty of an offence if he/she willfully and carelessly failed to comply with any law or applicable procedures and guidelines relating to procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures. Such person would also be guilty of an offence if he/she engaged in a project without prior planning as provided in section 45(2) (c) of the Act.
4. Section 121 of the Public Finance Management Act, 2012 provided for procurement for County Government entities to the extent that all procurement of goods and services and disposal of assets required for the purposes of the County Government or a County Government entity were to be carried out in accordance with article 227 of the Constitution and the Public Procurement and Disposal Act. Article 227 (1) of the Constitution provided that a state organ or public entity should contract for goods or services in accordance with a system that was fair, equitable, transparent, competitive and cost effective. In that regard, the Public Procurement and Disposal Act 2005, was the applicable statute.
5. It was incumbent upon the prosecution to first establish by necessary evidence that the procurement process which led to the payment of the impugned amount was flawed from the very beginning and that the first respondent despite having full knowledge and being aware of the flaw went ahead to ultimately authorize the payment in his capacity as the interim Chief Finance Officer.
6. Section 26(3) (a) of the Public Procurement and Disposal Act provided that all procurement should be within the approved budget of the procuring entity and should be planned by the procuring entity concerned through an annual procurement plan. The 1st respondent would be guilty of the first count if the impugned procurement was not based on an approved budget of the procuring entity and was not planned by the procuring entity through an annual procurement plan. He would also be guilty of the main second count or its alternative count along with the second accused/respondent.
7. The forensic investigator (PW1) did not establish any criminal conduct on the part of the 1st accused in relation to the first count or even the second count. He indicated that both the first and second respondents may not have played any significant role in the initial stages of the impugned procurement i.e. initialization and budgeting of the procurement. Consequently, the findings of the trial court with regard to the first and second counts were sustained.
8. The evidence in respect of the allegation in count 3 did not establish the particulars of the charge.
9. The function of a tender committee under regulation 10 (2) (h) of the Public Procurement & Disposal Regulations, 2006, was to review the selection of procurement method and where a procurement method, other than open tender, had been proposed, to ensure that the adoption of the other procurement method was in accordance with the Act, the regulations and any guidelines stipulated by the Authority.
10. Regulation 53(1) allowed restricted tendering such that a procuring entity could use restricted tendering only if the conditions provided in sections 29(3) & 73(2) of the Act were satisfied.
11. The particulars of the fourth count pinpointed section 74 which specifically provided for direct procurement to the extent that a procuring entity may use direct procurement as long as the purpose was not to avoid competition and as allowed under sub section (2) or (3).
12. The finding of the trial court with regard to the fourth count went against the weight of the evidence. This was more so considering that the adoption of the direct procurement method by the relevant

tender committee may have been an afterthought in view of the evidence adduced by PW9, PW10 and PW11 which clearly indicated that the preferred method of procurement was the open tender or competitive method. Those witnesses implied that the sudden change from the open tender method to the direct tender method was unusual and capable of raising "eyebrows".

13. There was undisputed evidence that the decision to change into the direct procurement method was made in a meeting of the tender committee held on December 3, 2013. All the respondents/accused in the fourth count admitted in their respective testimonies that they attended the crucial meeting and participated in the decision making.
14. The 2nd respondent though a mere secretary of the tender committee was expected to give proper and lawful guidelines and/or directions to the committee before the decision to change to direct procurement method was made. Had he done so, the committee would have observed and adhered to the legal guidelines and procedures applicable to direct procurement. It was the finding of the court that he in effect aided and abetted the committee's unlawful conduct of flouting the necessary procurement laws and regulations.
15. Ultimately with regard to the fourth count, the court found that the charge was proved beyond reasonable doubt. The acquittal of the second to the ninth respondents by the trial court was therefore erroneous and was quashed and substituted with a conviction.
16. With regard to the fifth count, PW4, PW7 and PW8 all indicated that the circumstances pertaining to the impugned procurement did not require the issuance of a certificate by the inspection committee. It would follow from the foregoing that the trial court's finding on count five was proper and was thus upheld.

Appeal allowed with regard to count 4 affecting all the respondents save for the first respondent.

Appeal dismissed with regard to counts 1,2,3 and 5.

44. Failure by a procurement unit to report direct procurement to PPOA within 14 days after notification of the award of the contract, without giving a reasonable explanation for delay, was a violation of procurement laws, regulations and guidelines.

The case revolved around public officers who were appointed as members of tender committee. They were alleged to have wilfully failed to comply with the applicable law relating to procurement by failing to adhere to the requirements provided for use of direct procurement. The court found that the prosecution failed to demonstrate any personal gain by the accused persons. There was no demonstration of computed loss of public resources by the public agency (Communications Authority of Kenya) either. Their only mistake was the failure to obey the laws regulating public procurement processes.

Republic v Joyce Nyambache Osinde Nyanamba & 8 others

Anti-Corruption Case No. 11 of 2019

Anti-Corruption Magistrates Court at Nairobi September 2, 2020

E Nyutu, SPM

Criminal Law *– corruption and economics crimes - charge of willful failure to comply with the law relating to procurement – where the head of procurement unit willfully failed to comply with the law relating to procurement by failing to issue a notice to all the bidders as required by law after the tender was considered terminated – where head of procurement unit willfully failed to report direct procurement of a value exceeding five hundred thousand shillings within the stipulated time to the Public Procurement Oversight Authority - Anti - Corruption and Economic Crimes Act, sections 45 (2) (b), section 48; Public Procurement and Disposals Act, sections 27(3); 36(2) and 74(2) and (3). Public Procurement Disposal Regulations, 2006 regulation 62(3)*

Brief facts

The 1st accused person was charged with two counts of willful failure to comply with the law relating to procurement contrary to section 45(2)(b) as read with section 48 of the Anti-Corruption and Economic Crimes Act.

On the first count, the 1st accused person was sued in his capacity as the Assistant Director for procurement and head of procurement unit. He was accused of failing to comply with procurement laws by failing to issue a notice to all the bidders as required by law after the Tender for the renovation of the Communications Authority (CA) Nairobi Agricultural Society of Kenya (ASK) show stand was considered terminated. That was despite the 1st accused person being a person whose function concerned the management of public property. On the second count, the 1st accused was sued for failing to comply with applicable procurement law by failing to report direct procurement of a value exceeding Kes. 500,000 within the stipulated time to the Public Procurement Oversight Authority in a Tender for the renovation of the CA Nairobi ASK show stand.

On the third count, the 2nd to 9th accused persons were jointly charged with willful failure to comply with the law relating to procurement contrary to section 45(2)(b) as read with section 48 of the Anti - Corruption and Economic Crimes Act. The particulars of the charge were that the accused persons being public officers employed by CA and having been appointed as tender committee members and being persons whose function concerned the management of public property, jointly failed to comply with applicable procurement laws by failing to adhere to requirements provided for use of direct procurement as they were bound by law to

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do in the tender for the renovation of the CA Nairobi ASK show stand.

Issues

i. Who bore the duty, between the head of a procurement unit or the accounting officer of a procurement entity, to prepare and submit to the Public Procurement Oversight Authority (PPOA) reports required under the Act, regulations and guidelines of the Authority?

ii. Whether failure by a procurement unit to report, without giving a reasonable explanation for the delay, direct procurement to PPOA within 14 days after notification of the award of the contract was a violation of the procurement laws, regulations and guidelines.

Relevant provisions of the law

Anti-Corruption and Economic Crimes Act, No. 3 of 2003

Section 45 – Protection of public property and revenue, etc

(1) *A person is guilty of an offence if the person fraudulently or otherwise unlawfully—*

(a) *acquires public property or a public service or benefit;*

(b) *mortgages, charges or disposes of any public property;*

(c) *damages public property, including causing a computer or any other electronic machinery to perform any function that directly or indirectly results in a loss or adversely affects any public revenue or service; or*

(d) *fails to pay any taxes or any fees, levies or charges payable to any public body or effects or obtains any exemption, remission, reduction or abatement from payment of any such taxes, fees, levies or charges.*

(2) *An officer or person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person —*

(a) *fraudulently makes payment or excessive payment from public revenues for—*

(i) sub-standard or defective goods;

(ii) goods not supplied or not supplied in full; or

(iii) services not rendered or not adequately rendered

(b) *wilfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures; or*

(c) *engages in a project without prior planning.*

(3) *In this section, "public property" means real or personal property, including money, of a public body or under the control of, or consigned or due to, a public body.*

Held

1. It was not proved beyond reasonable doubt that the 1st accused failed to issue a notice of termination to all the tenderers in both the 1st and 2nd attempts of procurement for renovation works.
2. The Tender Committee in its 255th meeting approved the use of direct procurement to SCANAD. Section 27(3) Public Procument and Assets Disposal Act No. 3 of 2005 obligated each employee of a public entity and each member of a board or committee of the public entity to ensure that procurement laws and any directions of the Authority are complied with.
3. Regulation 62(3) of the Public Procument and Assets Disposal Regulations 2006 provided that a procuring entity should, within fourteen days after the notification of the award of the contract,

report any direct procurement of a value exceeding five hundred thousand shillings to the Authority. Regulation 8(3)(s) PPDR 2006 stated that it was the function of the procurement unit of a procurement entity to prepare and submit to the authority reports required under the Act, regulations and guidelines of the Authority. In the matter before court, the procurement unit was the procurement department of CA which was headed by the 1st accused person.

4. The defence of the 1st accused that communication to the Public Procument Oversight Authority was done by the Director - General was not supported by any provision of the procurement law. As per Regulation 89(3)(s) it was the function of a procurement unit to prepare and submit to the Authority reports required under the Act, regulations and guidelines of the authority.
5. The role of the accounting officer was to establish a procurement unit. It was sufficiently demonstrated that there was a procurement unit in place at CA. It was the role of the procurement unit and not the accounting officer to submit reports on direct procurement to the Authority.
6. The law required that direct procurement should be reported to PPOA within 14 days after notification of the award of the contract**.** SCANAD was awarded the contract on September 22, 2014 (P.EXH.22). The statutory 14 days started running the following day and expired on October 6, 2014. The report before the court was dated January 21, 2015 which was over three months later. This was an inordinately long period of time yet there was no explanation for the delay.
7. In the instant matter it was the burden of the prosecution to establish that the accused persons intentionally breached the provisions of procurement law either consciously or for an evil purpose or out of inexcusable carelessness. The 1st accused person resumed her duties as the head of procurement unit during the dateline day of reporting the direct procurement to the Public Procument Oversight Authority. She failed to offer any plausible explanation for the failure to report the same and for that reason, the court was satisfied that there was wilful failure on the part of the accused person to report the direct procurement to the Public Procument Oversight Authority.
8. It was the duty of the prosecution to demonstrate that the accused persons had a criminal intent or were outright careless when they made the decision to award the tender to SCANAD by way of direct procurement. The prosecution neither demonstrated that the accused persons had criminal intent and were careless for awarding tender by way of direct procurement nor proved that accused persons had any interest in SCANAD.
9. Article 10(2)(c) of the Constitution bound public officers in making or implementing public body decisions to apply national values and principles of good governance, integrity, transparency and accountability**.**
10. The prosecution successfully proved beyond doubt that SCANAD was not the only entity that could supply the renovation services. Other companies had been prequalified for that service but were not considered for direct procurement; there were reasonable alternatives contained in the list of prequalified suppliers for maintenance and renovation works as per P.EXH.1 and that the purported urgency that led to the decision to use direct procurement was foreseeable and the same was as a result of dilatory conduct on the part of the procuring entity.
11. The prosecution further proved beyond doubt that the tender committee failed in the discharge of its mandate in approving the use of direct procurement. In addition, the protection afforded in section 138 PPDA 2005 did not apply where the persons in question knowingly failed to apply the express provisions of law governing direct procurement and instead chose to rely on extraneous reasons not authorised in procurement law. The accused persons contravened the law by resorting to direct procurement.
12. The 8th accused sat in the 255th TC meeting as secretary on behalf of the head of procurement who

was away at the time. In the circumstances, the 8th accused person did not participate in the decision making of the 255th TC meeting that approved direct procurement.

13. The minutes of 255th TC indicated that the 9th accused person was listed as being in attendance in the capacity of secretariat (D6.EXH.7). The prosecution did not tender any evidence that proved that he was a member of the TC or that he took part in making the decision of the 255th TC to adopt direct procurement method. In the circumstances, the charge against the 9th accused person failed.
14. The defence of necessity in criminal law was where the accused was arguing that it was necessary for them to commit a crime. It operated where the defendant had two alternatives either commit a crime or suffer or cause another extreme hardship.
15. The defence of necessity required that there was an urgent and immediate threat to life which created a situation in which the defendant reasonably believed that a proportionate response to that threat was to break the law. The harm that the 255th TC sought to avoid did not outweigh the danger of the prohibited conduct they were charged with. Two wrongs did not make a right.
16. Perpetuating an illegality in order to mitigate the consequences of a former illegality did not fall within the established principles of the defence of necessity. The 255th TC meeting had an alternative option to reject the recommendation for direct procurement.

Orders:

i. The prosecution failed to prove its case beyond reasonable doubt against the 1st accused person on count 1 of the charge and she was accordingly acquitted under section 215 CPC. Count 2 on the other hand was sufficiently proved beyond reasonable doubt and she was accordingly convicted under section 215 of CPC.

ii. The prosecution proved its case beyond reasonable doubt against the 2nd , 3rd , 4th , 5th , 6th and 7th accused persons on count 3 of the charge and they were all convicted.

iii. The prosecution failed to prove its case beyond reasonable doubt against the 8th and 9th accused persons on count 3 of the charge. They were accordingly acquitted.

45. Failure to subject direct procurement for approval by a tender committee was a violation of section 29(3) of the Public Procurement and Disposal Act.

An invoice for payment with no quotation gives an indication that the normal procurement procedure was not followed and any invoice issued as such will amount to willful or careless failure to comply with procurement laws and procedures. Procurement of goods or services under direct procurement ought to meet the conditions necessary for the use of such a method and be approved by the tender committee.

Rebecca Mwikali Nabutola & 2 others v Republic [2016] eKLR

Criminal Appeal No. 232 of 2012

High Court at Nairobi
G W N – Macharia, J

May 19, 2016

Procurement Law *– procurement procedures and processes – transparency – requirement that procurement procedures be handled by different offices in respect of procurement initiation, processing and receipt of goods, works and services – where 3rd appellant flouted the law by unilaterally asking PW5 to make the payment and deliver the cheque himself - whether the handling of procurement procedures by one individual or office was a violation of the procurement laws - whether failure to subject a direct procurement to approval by the tender committee was a violation of section 29(3) of the Public Procurement and Disposal Act - Public Procurement and Disposal Act 2005, sections 26(3)(c),29(3), 74(3) and 88*

Brief facts

The appellants appealed against the trial court's decision to convict them on 11 counts of corruption and flouting of procurement laws. The counts related to conspiracy to defraud contrary to section 327 of the Penal Code, abuse of office contrary to section 46 of the Anti-Corruption and Economic Crimes Act, willful failure to comply with the law relating to procurement contrary to section 45(2)(b) as read with section 48 of the Anti-Corruption and Economic Crimes Act, fraudulently making payments from public revenues for services not rendered contrary to section 45(2)(a)(iii) as read with section 48 of the Anti-Corruption and Economic Crimes Act and conflict of interest contrary to section 42(3) as read with section 48 of the Anti-Corruption and Economic Crimes Act.

At the conclusion of the trial, the court acquitted the 1st appellant on count III of the offence of abuse of office, while the 3rd appellant was acquitted on count VII of the offence of fraudulently making payments from public revenues for services not rendered. The 2nd appellant was also acquitted of the offence of conflict of interest. The court convicted and sentenced the appellants on the rest of the offences prompting the filing of the instant appeal.

Issues

i. Whether Section 200(3) of the Criminal Procedure Code was complied with.
ii. Whether Section 199 of the Criminal Procedure Code was complied with.

iii. Whether Section 211 of the Criminal Procedure Code was complied with.

iv. Whether the charge sheet was defective for misjoinder and duplicity.

v. Whether the handling of procurement procedures by one individual or office was a violation of procurement laws.

vi. Whether failure to subject a direct procurement to approval by the tender committee was a violation of section 29(3) of the Public Procurement and Disposal Act.

vii. Whether the sentences imposed were legal

Relevant Provisions of the Law

Anti-Corruption and Economic Crimes Act, 2003

Section 45 (2) (b) – Protection of public property and revenue, etc.

(2) An officer or person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person

a. fraudulently makes payment or excessive payment from public revenues for—

(xi) *sub-standard or defective goods;*

(xii) *goods not supplied or not supplied in full; or*

(xiii) *services not rendered or not adequately rendered*

b. wilfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures; or

Section 48 – Penalty for offence under this Part

(1) *A person convicted of an offence under this Part shall be liable to—*

(d) *a fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both; and*

(e) *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.*

(2) *The mandatory fine referred to in subsection (1)(b) shall be determined as follows—*

(a) *the mandatory fine shall be equal to two times the amount of the benefit or loss described in subsection (1)(b);*

(b) *if the conduct that constituted the offence resulted in both a benefit and loss described in subsection (1)(b), the mandatory fine shall be equal to two times the sum of the amount of the benefit and the amount of the loss.*

Public Procurement and Disposal Act, 2005

Section 29(3) – Choices of procurement procedure

(3) *A procuring entity may use restricted tendering or direct procurement as an alternative procurement procedure only if, before using that procedure, the procuring entity —*

(a) obtains the written approval of its tender committee; and

(b) records in writing the reasons for using the alternative procurement procedure.

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Section 74(3) – When direct procurement maybe used

(4) *A procuring entity may use direct procurement if the following are satisfied —*

(a) *there is an urgent need for the goods, works or services being procured;*

(b) *because of the urgency the other available methods of procurement are impractical; and*

(c) *the circumstances that gave rise to the urgency were not foreseeable and were not the result of dilatory conduct on the part of the procuring entity.*

Section 88 – Request for quotation

A procuring entity may use a request for quotations for a procurement if —

(a) *the procurement is for goods that are readily available and for which there is an established market; and*

(b) *the estimated value of the goods being procured is less than or equal to the prescribed maximum value for using requests for quotations.*

Held

1. The succeeding trial court complied with section 200(3) of the Criminal Procedure Code by explaining the provisions to the appellants and their respective counsels. Any assertion to the contrary failed.
2. The provisions of section 199 of the Penal Code on recording of evidence were complied with. The provision as worded meant it was not mandatory, and gave the presiding magistrate discretion to record such remarks, if he saw fit, on witnesses' demeanour. It was well within the law for the succeeding magistrate to proceed on the basis of the recorded evidence even in the absence of remarks as to the demeanor of the witnesses. The 1st appellant's argument in that respect failed and that ground of appeal similarly failed.
3. There was no requirement under that provision of section 211 of the Penal Code that the entire section 211 should be duplicated in the proceedings. As per page 253 of the proceedings, section 211 was complied with.
4. There was no duplicity of charges. There were 11 counts of specific offences each with particulars describing the alleged contravention of the law. None of the counts as drafted contained more than one offence. The charges arose from the same set of facts. The court found that the charges as drafted were not bad in law for either duplicity or joinder of counts.
5. The inclusion of the charges of conspiracy together with substantive offences did not render the charges defective or undesirable. The court therefore declined to summarily find the charges defective purely on the grounds of inclusion of the counts of conspiracy along with other counts of substantive offences.
6. On count iv, the charges arose in relation to the 3rd appellant's authorization for payment of Ksh. 400,000/- to Maniago Safaris Limited notwithstanding that the services of the said company had not been procured in accordance with sections 88 and 89 of the Public Procurement and Disposal Act, 2005.
7. An invoice for payment of Ksh. 400,000 was presented by Maniago Safaris. There were no quotations to this invoice, an indication that the normal procurement procedure was not followed. The question, therefore, was whether the 1st appellant's actions amounted to willful or careless failure envisaged under section 45(2)(b).
8. The 1st appellant's defence that she was not concerned with procurement was untenable. She took responsibility when she received the invoice and gave direction for its payment. Maniago Safaris was not procured by the Ministry. The justification that the payment was a contribution for the trip was

not supported by any prior process of procurement or outlined budget on the basis of which such a contribution would have been justified.

9. The 1st appellant incurred an expense without reference to any applicable law and procedure. The Ministry was neither presented with any specific budget as a stakeholder nor did she have an idea of how much each stakeholder was required to pay, including the Kenya Tourism Board.
10. The actions and omissions of the 1st appellant amounted to careless failure to comply with procurement laws and procedures. As the accounting officer in the ministry, the 1st appellant was enjoined to ensure that public funds under her charge were incurred prudently and in accordance with the law and procedures. That charge was found to have been proved.
11. The 3rd appellant was charged under count iv with wilful failure to comply with the law relating to procurement contrary to section 45(2)(b) as read with section 48 of the Anti-Corruption and Economic Crimes Act for directly sourcing for the services of Maniago Safaris Limited in disregard to the provisions of section 74(3) as read with section 29(3) of the Public Procurement and Disposal Act.
12. The engagement of Maniago Safaris to provide services for the coordination of the trip to Mara raised queries with the auditors. The direct payment by CTDLT to the company was one of the questions raised.
13. CTDLT disbursed Ksh. 182 million to Kenya Tourism Board which only acknowledged Ksh. 144 million, the difference being monies that were paid directly to 3rd parties including Maniago Safaris which received Ksh. 8,925,444/-. The monies were paid directly to third parties without going through the accounts of Kenya Tourism Board.
14. As per the testimony of PW1, Maniago Safaris was not procured in accordance with the laws and procedures governing the Kenya Tourism Board. The payment to Maniago Safaris, an expenditure that ought to have gone through the tender committee was not considered by the tender committee at the material period.
15. There was no evidence to show that the Tourism Ministry authorised the payment of Ksh. 8.9 million to Maniago Safaris. The Ministry sought the approval of Ksh. 30 million as additional budget to the Kenya Tourism Board, and thereafter directed that the money be released. It was not shown that the Ministry had involvement in the specific authorization of payment to the company.
16. The absence of a board was not an excuse for flouting procurement procedures. Section 26(3)(c) required that all procurement procedures should be handled by different offices in respect of procurement initiation, processing and receipt of goods, works and services. The objective behind that requirement was to among others ensure transparency and accountability in public processes and related expenditure.
17. The 3rd appellant flouted the law by unilaterally asking PW5 to make the payment and deliver the cheque himself against the requirement of section 26(3)(c) of Public Procurement and Disposal Act 2005 which required that all procurement procedures should be handled by different offices in respect of procurement initiation, processing and receipt of goods, works and services. The objective behind this requirement was to among others ensure transparency and accountability in public processes and related expenditure.
18. The evidence showed that the 3rd appellant took responsibility when he authorised payment to Maniago Safaris. It was not enough for him to say that he did not participate in the company's procurement. He ought to have subjected the presentation by Maniago Safaris through the procurement process.
19. The explanation of urgency of payment was not an excuse for flouting procurement procedures. The law in section 74(3) provided for instances when direct procurement may be allowed.

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20. If Maniago Safaris' engagement was a result of direct procurement, it ought to have been in accordance with section 29(3) of the Public Procurement and Disposal Act, which required approval by the tender committee. It was found that the prosecution had sufficiently shown that the proper procurement procedure was not followed.
21. Finally, none of the documentation presented was in relation to the subject matter. Section 27(1) of the Public Procurement and Disposal Act provided that all approvals relating to any procedures in procurement shall be in writing and properly dated, documented and filed.
22. The 3rd appellant sought to justify payment to Maniago but distanced himself from how Maniago Safaris was procured. The two must go hand in hand and he ought to have provided a reasonable explanation as the accounting officer of Kenya Tourism Board.
23. As long as public funds were to be expended whether by contribution or otherwise, the expenditure ought to have undergone the requisite procurement procedure. In line with section 27, the 3rd appellant being the Managing Director bore the responsibility of ensuring the Kenya Tourism Board complied with the procurement laws. The 3rd appellant failed in this respect, and the court therefore, confirmed the 3rd appellant's guilt on count vi as charged.
24. The 3rd appellant was further charged under count vii with the offence of fraudulently making payments from public revenues for services not rendered contrary to section 45(2)(iii) as read with section 48 of the Anti-Corruption and Economic Crimes Act.
25. The subject payment was Ksh. 8,925,000 made to Maniago Safaris. The payment was not supported by any documents such as quotations, invoices, or bills in support of expenditure. Furthermore, there was no indication that the budget in regard to the payment went through any approval process, whether by the Board or the internal procurement units.
26. The Public Procurement and Disposal Act provided for a procedure for requisition and authorization for the provision of goods and services. Procurement according to the Act involves all processes needed to certify the provision of goods and services. No procurement procedure was followed as required under the Act.
27. Payments were made without full disclosure of the purpose for the said payments and without accounting for the actual expenditures incurred.
28. As evidenced by PW5 and PW6, it was clear the services were rendered and the money was released for facilitating the trip which took place.
29. The provision of the Public Procurement and Disposal Act under which the charge was brought criminialises payment for services that were not rendered or adequately rendered. In this case, the charges were brought for the reason that the payment was made before the services were rendered. That was not the intent of the provision. The provision sought to ensure that public expenditure was not incurred where services were not rendered or are not adequately rendered.
30. The proper provision would have been section 45(2) (c) of engaging in a project without prior planning or Section 45(2)(b) on willfully or carelessly failing to comply with any law or applicable procedures and guidelines relating to the management of funds or incurring of expenditures. For this reason, count VII could not stand and it was found that the prosecution did not prove it beyond a reasonable doubt.

Appeal partially allowed

Rebecca Mwikali Nabutola & 2 others v Republic [2016] eKLR

Orders:

i. *The prosecution did not prove their case against the appellants in respect of counts I, II, V, VII, X and XI beyond all reasonable doubt. The Appeal succeeded respectively. The conviction was quashed and respective sentences set aside.*

ii. *The prosecution proved their case against the 3rd appellant in respect of count IV and against the 1st appellant in respect of count VII. The conviction and sentence in respect of the 1st and 3rd appellants in those two counts were upheld.*

iii. *For the bonds deposited, the sureties were discharged and any cash bails paid were to be forthwith refunded to the respective appellants. For avoidance of doubt, bonds in respect of the 1st and 3rd appellants were cancelled.*

46. Duty of public officers to protect public property and revenue by complying with any law or applicable procedures and guidelines relating Procurement

The instant case highlights that deliberate failure by a head of a procuring unit of a procuring entity to provide secretariat support to a Tender Committee resulting in the erroneous interpretation of the Threshold matrix by CTC members was a violation of procurement laws, regulations and guidelines. Furthermore, the case reiterates the gap in the Matrix for procuring entities wishing to use the Open Tender method, but with a budget that falls below ksh 6 million.

Republic v Eden Odhiambo Robinson & 6 others [2019] eKLR

Anti-Corruption Case No. 14 of 2012

Chief Magistrate Court at Nairobi July 31, 2017

F Kombo, SPM

Procurement Law *– procurement method - Request for Quotation – where a gap existed in the Matrix for procuring entities wishing to use the Open Tender method, but with a budget that falls below ksh 6 million – where the PPOA FAQ applied to Open Tender method - whether the PPOA FAQ document issued by the Public Procurement Oversight Authority could inform the method for procuring entities wishing to use the Open Tender method, but with a budget by that fell below ksh 6 million - Public Procurement and Disposal Act 2005, sections 29,88 & 89; Public Procurement and Disposal Regulations 2006, regulations 8(3) (a) & 59(1)(c)*

Procurement Law *– procuring unit – head of – functions of – provision of secretariat support to the Tender Committee – claim by members of a tender committee that they had not been trained on procurement laws and procedures – where accused was a person appointed on the basis of his knowledge and expertise in Procurement matters - whether deliberate failure by a head of a procuring unit of a procuring entity to provide secretariat support to a Tender Committee resulting in the erroneous interpretation of the Threshold matrix by CTC members was a violation of procurement laws, regulations and guidelines - whether the 4th accused, in his distinctive role as Head of the Procurement Unit, and his co-accused, were careless in the performance of their duties in ensuring that the right method of procurement was used in the tendering process - Public Procurement and Disposal Regulations 2006 regulations 10(1) (a) and 10(1) (c) regulation 10(1) (c)*

Brief facts

The accussed persons were jointly charged in count 1, with the offence of careless failure to comply with the law relating to procurement contrary to section 45(2) (b) of the Anti-Corruption and Economic Crimes Act. (Hereinafter 'ACECA'). Counts 2 and 3 in the Charge Sheet relate to the 4th accused person and both were charges of making a document without authority contrary to section 357(a) of the Penal Code.

The accused were all senior management employees of the Catering and Tourism Development Levy Trustees (CTDLT), a State Corporation whose name was later changed to 'Tourism Fund', following an expansion of its mandate. The 1st accused was the Head of Levy Operations, while the 2nd Accused was the Head of the Standard Department and also the Head of Human Resource. The 3rd Accused was the Chief Legal Officer, the 4th Accused was the Procurement Manager, the 5th accused was the ICT Manager, the 6th Accused was the organization's Deputy Regional Manager, Nairobi Region and also a Levy Inspector, and finally the 7th Accused was a Senior Human Resource Officer.

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The 1st, 2nd, 3rd, 5th, 6th and 7th accused were, also, by virtue of their positions, duly appointed Members of the CTDLT Corporation Tender Committee (CTC). The status of the 4th accused person, who was the Procurement Manager in the Committee, was the subject of controversy as he claimed that by virtue of his position he was not a member of the CTC.

In the Financial Year 2010-2011, the CTDLT planned to spend a part of its budget on the procurement of promotional materials. Following some preparatory management meetings, it was decided to undertake a process to procure Diaries, Wall and Desk Calendars, Polo and Ordinary shirts under the Promotional Materials budget item. The method of procurement that was settled upon was 'Request For Quotation'.

According to the Threshold Matrix for a Class A Procuring Entity; in the First Schedule of the Procurement Act Regulations, a Procuring Entity seeking to procure Goods using the Request For Quotation Method, the relevant provision states; 'Maximum level of expenditure under this method is Kes. 1,000,000'

Request for Quotation Forms in the names of the following five companies; Pinnacle Media Productions Limited , AD Gifts Limited, Ultra Limited, Stellan Consult Limited and Span Image Limited. Corresponding to each of the filled Request For Quotation Forms were printed but hand- filled, signed and stamped Confidential Business Questionnaires which contained *inter alia*, the company's Physical and postal address, Bankers, details of Directors, Trade Licence number and nominal and issued capital.

The evaluation Committe recommended to award the tender to M/S Pinnacle Production E.A Limited as the lowest bidder amount which totalled to ksh 11,203,450/-

The 4th accused person was alleged to have made, with intent to deceive and without lawful authority or excuse, two documents namely CTDLT Request for Quotation and CTDLT Confidential Business Questionnaire purporting that the said documents were submitted by M/S Ultra Limited as part of a bid for Tender No. CTDLT/Q/04/2010-201.

Issues

i. Whether as the Procurement manager the 4th accussed was a member of the CTC
ii. Whether the PPOA FAQ document issued by the Public Procurement Oversight Authority could inform the choice of method for procuring entities wishing to use the Open Tender method, but with a budget by that fell below ksh 6 million.
iii. Whether deliberate failure by a head of a procuring unit of a procuring entity to provide secretariat support to a Tender Committee resulting in the erroneous interpretation of the Threshold matrix by CTC members was a violation of procurement laws, regulations and guidelines
iv. Whether the 4th accused person was linked to the forgery of the documents concerning Ultra Limited

Relevant provisions of the law

Anti-Corruption and Economic Crimes Act No. 3 of 2003

Section 45(2) (b)

45. Protection of public property and revenue etc.

(2) An officer or person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person—

(a)....

(b) wilfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures;

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Public procurement and Disposal Act, 2005

Section 88(b)

88. A procuring entity may use a request for quotations for a procurement if-

(a) the procurement is for goods that are readily available and for which there is an established market; and

(b) the estimated value of the goods being procured is less than or equal to the prescribed maximum value for using requests for quotations.

Public Procurement and Disposal Regulations

Regulation 59

A procuring entity that conducts procurement using the request for quotations method pursuant to section 88 of the Act shall be subject to the procurement thresholds set out in the First Schedule.

Penal Code

Section 357(a)

Making documents without authority;

Any person who, with intent to defraud or to deceive—

(a) without lawful authority or excuse makes, signs or executes for or in the name or on account of another person, whether by procuration or otherwise, any document or electronic record or writing;

Held;

1. The 4th accused was not a 'member' of the Tender Committee. Membership to the Committee was in the decisional sense whereas the 4th accussed had no decision-making power in his role at the Committee. In the Minutes of the CTC produced his position was recorded as 'Secretary' and not 'member'. In that status the 4th accused had neither vote nor decision-making power in the CTC
2. The 4th accused, as the Head of the CTDLT Procurement Unit misled the CTC from the moment he purported that there was a properly founded agenda relating to the instant procurement for their discussion in a CTC Meeting which he personally convened, and not just when CTC members sought his guidance during the meeting as seen from the evidence of the 1st accused.
3. The 4th accused, as the Head of the CTDLT Procurement Unit misled the CTC, The accused ensured an unsuited procurement method namely Request for Quotations was used by deliberately misinterpreting the PPOA FAQ Document which clearly applied to Open Tender method. It was that misinterpretation that ensured that the 4th accused used a Pre-Qualified List which ensured that only one method- namely Request for Quotations would be used in the procurement. The choice of the method was, in view of the budget lines involved, a violation of section 26(3)(b) of the Act.
4. As a person appointed on the basis of his knowledge and expertise in Procurement matters, it follows that the fact that the CTC made an erroneous award in violation of the applicable threshold matrix shows that the 4th accused deliberately and wilfully misled them to the decision.
5. That for the method of procurement adopted, the limits provided for in the relevant Threshold Matrix applying to CTDLT were exceeded.
6. The charge in count 1 was not proved beyond all reasonable doubt against the 1st, 2nd, 3rd, 5th, 6th, and 7th accused, who were all charged by virtue of having been members of the CTC.
7. Section 45(2) of the ACECA which the CTC Members faced in count 1 was not a strict-liability offence and required the proof of the *mens rea* elements 'wilfulness' or 'carelessness'.

8. That carelessness in its ordinary meaning suggested action that was inattentive or negligent. That presupposed a knowledge or understanding of the matter under consideration in the first place
9. That the 1st, 2nd ,3rd ,5th 6th and 7th accussed had in mind the threshold matrix but gave it an erroneous interpretation, in which they determined that the amount of ksh 1 million referred to, related to the price of an individual item and not the total expenditure amount. It could not in those circumstances, be supposed that they disregarded the Threshold Matrix, as alleged in the charge as such. TheTender Committee therefore erred in good faith.
10. The 4th accused further violated regulation 8(3)(f) and regulation 59(1)(c) of the Regulations and section 89 of the Act when he purported to have issued Quotation Documents to the cited firms when he knew, as the evidence showed, that only one- Pinnacle Media Productions Limited received it. That the Quotation Documents produced and the accompanying Confidential Business Questionnaires were not issued by the CTDLT Procurement Unit as purported, and were forgeries.
11. Although the charge preffered against the 4th accussed in count 2 and 3 was that of making a document without authority under section 357(a) of the Penal Code. The proper charge was one of forgery contrary to section 349 of the Penal Code as read with section 345.
12. That the documents relating to the company known as Ultra Limited were filled by the 4th accused as derived from the evidence by the Prosecution Document Examiner- PW 14. The stamp impressions in those documents were forgeries and that by inference; the 4th accused made or caused the said stamp impressions to be made in the documents

The 1st, 2nd, 3rd, 5th, 6th, and 7th accused persons were acquitted of the charge in count 1 under section 215 CPC. The 4th accused was convicted in counts 1, 2 and 3 under the same provision.

Forfeiture and Recovery of Proceeds of Crime and Unexplained Wealth

Forfeiture and Recovery of Proceeds of Crime and Unexplained Wealth

47. Factors to be considered when rescinding or lifting of preservation orders against assets suspected to be proceeds of crime.

The application sought for orders that pending *inter-partes* hearing of the application, the court grants the respondent partial and reasonable access to the accounts and the funds, the subject of which the court had issued preservation orders. The applicant also sought the lifting of the freezing and preservation orders against the applicants' bank accounts. The issues which were handled in the case included; the factors to be considered in lifting of preservation orders against assets suspected to be proceeds of crime; procedure to be followed after a court had issued an order to preserve assets suspected to be proceeds of crime; factors to be considered before issuing preservation orders; and the nature of forfeiture proceedings.

Asset Recovery Agency v Ali Abdi Ibrahim [2020] eKLR

Application No. 12 of 2020

High Court at Nairobi — June 15, 2020

JN Onyiego, J

Civil Practice and Procedure *– civil forfeitures – recovery and preservation of property - preservation orders – lifting of preservation orders – where a bank account containing money suspected to be from proceeds of crime was frozen - factors to be considered in lifting of preservation orders - Proceeds of Crime and Anti- Money Laundering Act, No. 9 of 2009, sections 82, 83 and 84.*

Civil Practice and Procedure *– civil forfeitures – recovery and preservation of property – preservation orders – factors to be considered before issuing preservatory orders - where a court issued preservatory orders freezing a bank account containing money suspected to be from proceeds of crime was frozen - what was the procedure to be followed after a court had issued an order to preserve assets suspected to be proceeds of crime - Proceeds of Crime and Anti- Money Laundering Act, No. 9 of 2009, sections 82, 83 and 84.*

Civil Practice and Procedure *– civil forfeitures - forfeiture proceedings – nature of - what was the nature of forfeiture proceedings.*

Brief facts

Through an originating summon, the respondent sought for orders for the court to issue orders prohibiting the applicant from accessing the funds held in the accounts in question. The court granted the respondent the orders as prayed. The applicant then filed the instant application upon gazettement of the said orders seeking orders that pending *inter-partes* hearing of the application, the court grants the respondent partial and reasonable access to the accounts and the funds. He also sought orders that the freezing and preservation orders against the applicants' bank accounts be lifted and/or quashed.

Issues

i. What were the factors to be considered during proceedings for the lifting of preservation orders against assets suspected to be proceeds of crime?

ii. What was the procedure to be followed after a court had issued an order to preserve assets suspected to be proceeds of crime?

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iii. What were the factors to be considered before issuing preservatory orders?

iv. What was the nature of forfeiture proceedings?

Held

1. The impugned orders were issued exparte on April 3, 2020 pursuant to an originating motion dated April 2, 2020. The said orders were issued in accordance with section 82 of the Proceeds of Crime and Anti- Money Laundering Act (POCAMLA). Section 83 of POCAMLA went further to provide for gazettement of the preservation orders pursuant to section 84 of POCAMLA.
2. Upon gazettement of preservation orders, the same were bound to expire after 90 days unless there was an application for a forfeiture order pending before the court in respect of the property subject of the preservation order.
3. Before a preservation order was made, the court making such order had to be satisfied that there were reasonable grounds to do so. Having issued the orders, it was presumed that the court having perused material placed before it was satisfied that there was *prima facie* evidence or reasonable ground to believe that the property in question was obtained as a result of proceeds of crime or through money laundering. The court was therefore bestowed with wide discretionary powers to decide on whether to grant preservation orders or not.
4. As to whether eventually the preserved property was to be forfeited or not was a matter of evidence upon filing a forfeiture application or suit. The allegation that it was unconstitutional to issue *exparte* orders could not therefore apply as the orders were issued pursuant to a statutory provision, which provided a remedy under section 89(1) of POCAMLA for revision or variation of the orders if found not deserving. The issue of being condemned unheard was not sustainable.
5. The burden to prove that the applicant deserved the orders of rescission and variation of the preservation orders in accordance with section 89(1) of POCAMLA lay with the applicant. It was not enough to state that so and so was trading with so and so without proving that the business transacted was lawful and therefore the money generated therefrom was legitimate. Although the applicant had tried to connect the source of money as being proceeds out of construction works in completing Mandera County Government headquarters, which was subject to proof, the same amount had been mixed with other unexplained sources of income suspected to be proceeds out of money laundering.
6. The allegation that some money in terms of millions was from informal loan facilities without any evidence backing that allegation was not enough. That was a mere statement which required validation by way of cogent evidence. In the absence of any proof that such monies were obtained from legitimate sources of income, which was a matter of fact, the same had to be deemed money obtained through illegitimate means, which could be a crime by way of money laundering or fraud.
7. Since the applicant had not rendered a satisfactory account justifying receipt of the impugned deposits, the respondent had established a *prima facie* case that the preservation orders were based on reasonable grounds. The argument that similar orders were issued and vacated by the trial court was not a bar to the applicant from instituting forfeiture proceedings, which was an independent civil remedy as opposed to investigative proceedings before the trial court. The suit could not be declared *res judicata* on that account and therefore there was no need to appeal or seek review as the purpose for obtaining those orders was achieved by accessing and obtaining the intended bank related documents.
8. According to the replying affidavit and affidavit in support of the application for lifting the order, the applicant was a businessman. He was definitely going on with his normal business. The orders therein

did not stop him from doing further business. Although the applicant claimed that the money in the account was being used for family survival and doing business, the same was the subject of litigation, which if proved could be forfeited. Therefore, it would defeat the very purpose of preservation orders if courts were to release such monies for further expenditure unless proven purely on humanitarian grounds that the frozen amounts were the only source of income relied upon by the family to survive hence the need to make provision for reasonable daily upkeep. The applicant had not endeavored to prove that fact.

9. The applicant did not state how much on average his family required for daily upkeep so as to persuade the court. He did not also tell the court whether the money in the account was the only source of income he had. The court was not convinced that the orders should be lifted on that ground.
10. If the orders were lifted, the applicant would withdraw, transfer or spend the money. Taking into account the amount involved, it was unlikely that such monies could be recovered easily without incurring unnecessary tax-payer's money to recover the transferred or spent amount. It would be prejudicial to the public interest if the orders were to be lifted and money withdrawn and spent.
11. To order withdrawals or transfer of the money would be tantamount to perpetuating an illegality which was being addressed by the applicant. The essence of instituting preservation of assets and forfeiture proceedings was not to benefit the State but to protect public money, and discourage reliance on illegitimate sources of income as a source of wealth. Therefore, the risk of lifting the order was higher than the hardship likely to be suffered by the applicant which in any event was short lived as the money was saved pending expiry of the 90 days since gazettement or institution of forfeiture proceeding which had to be proven on a balance of probability. At that stage the respondent's property was safe hence no cause to worry.
12. The society had legitimate expectation that courts would reasonably balance individual interest with public interest, which in any event was superior unless proved that the application for preservation was extremely malicious, founded on bad faith and amounted to an abuse of power or court process.

Application dismissed with no order as to costs.

48. Civil Procedure Rules cannot be read into the POCAMLA thus limiting the application of a preservation Order to an injunction

The case highlighted how POCAMLA gave ARA powers to institute forfeiture proceedings in four levels or stages. Investigations carried out was the first level towards forfeiture; the second level was preservation orders; the third level was Gazettment; and the fourth level was Application for Forfeiture proceedings.

Assets Recovery Agency v Mike Sonko Mbuvi Gideon Kioko [2020] eKLR

Miscellaneous Application No. 5 of 2020

High Court at Nairobi — July 30, 2020

J W Lesiit, J

Civil Practice and Procedure *– forfeiture proceedings – preservation orders as part of the different stages of forfeiture proceedings – preservation orders under POCAMLA viz-a-viz injunctions under the Civil Procedure Rules – whether the Civil Procedure Rules and Act could be read into the POCAMLA thus limiting the application of a preservation Order to an injunction envisaged in the Civil Procedure rules – Proceeds of Crime and Anti-Money Laundering Act, sections 81 & 82*

Civil Practice and Procedure *–forfeiture proceedings- instituting of proceedings- stages/levels of instituting proceedings- preservation orders as part of the different stages of forfeiture proceedings - what are the stages of instituting forfeiture proceedings- Proceeds of Crime and Anti-money Laundering Act No. 9 of 2009 section 81,82, 83, 90, 92*

Civil Practice and Procedure *– res judicata – where the respondent applicant was of the view that the issues in the proceedings were the same raised in another case - whether the forfeiture proceedings were res judicata- Civil Procedure Act Cap. 21 section 7*

Brief facts

The Asset Recovery Agency (ARA) approached the High court with an Originating Motion seeking preservation orders over various named Bank Accounts of the respondent/applicant. The ARA caused the Preservation Orders to be Gazetted and served the orders upon the respondent/applicant. The ARA then filed forfeiture application. Aggrieved, the instant application was filed by respondent/applicant seeking that the orders made against him be set aside and that the proceedings against the respondent/applicant be dismissed.

Issues

i. Whether the Civil Procedure Rules could be read into the POCALMA thereby limiting the application of a preservation Order to an injunction envisaged in the Civil Procedure rules?
ii. What were the four stages/levels of instituting forfeiture proceedings as per POCALMA?
iii. Whether the forfeiture proceedings were res judicata
iv. Whether the applicant met the threshold of having the orders varied or rescinded

Assets Recovery Agency v Mike Sonko Mbuvi Gideon Kioko [2020] eKLR

Relevant Provisions of the Law

Proceeds of Crime and Anti-money Laundering Act No. 9 of 2009

Section 82 - Preservation orders

(1) The Agency may, by an exparte application apply to the court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.

(2) The court shall make an order under subsection (1) if there are reasonable grounds to believe that the property concerned:

a) Has been used or is intended for use in the commission of an offence; or

b) Is proceeds of crime."

Section 84 - Duration of preservation orders

Preservation Order shall expire ninety days after the date on which notice of the making of the order is published in the Gazette, unless –

a) There is an application for a forfeiture order pending before the court in respect of the property subject of the Preservation Order

Held

1. The process applied by ARA was the civil process as provided under POCAMLA, Part VIII thereof. The Act broke down the civil process into four stages. The application before the court was stage two of the process and was premised under sections 81 and 82 of the Act. The Civil Procedure Rules & Act could not be read into POCAMLA to limit the application of the preservation order to an injunction as envisaged under the Civil Procedure Rules. The two were worlds apart, as they served different purposes, and both the process of applying and of processing them were different. There was no merit in the challenge of the application on the basis that it was not premised on any known process of law
2. POCAMLA gave ARA powers to institute forfeiture proceedings in four levels or stages. Investigations carried out under the Evidence Act and Criminal Procedure Code was the first level towards forfeiture. The second level was preservation orders provided under sections 81 and 82 of the Act. That was the stage at which the proceedings were premised. The third level was Gazettment under section 83 of the Act. The fourth level was Application for Forfeiture proceedings under section 90 and section 92 of the POCAMLA.
3. The proceedings were not *res judicata* and the jurisdictions of the instant court to entertain it had not been ousted by any law. ARA followed the process as prescribed under the POCAMLA which was the law governing investigations, preservation and forfeiture of proceeds of crime and money laundering.
4. The order sought to be set aside and the proceedings sought to be struck out and dismissed were properly filed and orders issued regularly and ought not to be struck out or set aside. Conversely, the applicant had not met the threshold under section 89 of the POCAMLA to have the impugned preservation orders varied or rescinded or for any other order provided thereunder.

Application dismissed.

49. The threshold for determining unexplained assets in corruption cases

The decision of the court sought to explain the concept of unexplained assets in ACECA which was a legal innovation to combat the vice of doubtful source of wealth, money laundering and suspicious corrupt practices. Underlying the concept was the theme, you failed to satisfactorily explain the lawful source of assets, you forfeited it.

Stanley Mombo Amuti v Kenya Anti-Corruption Commission [2019] eKLR

Civil Appeal No. 184 of 2018

Court of Appeal at Nairobi — May 10, 2019.

P N Waki, S G Kairu & J Otieno-Odek, JJA

Statutes *- interpretation of statutes - interpretation of section 26 of the Anti-Corruption and Economic Crimes Act - notice to furnish the Kenya Anti-Corruption Commission with a statement of a suspect's property - what was the nature of the notice to furnish the Kenya Anti-Corruption Commission with a statement of a suspect's property - whether evidence recovered pursuant to a notice to furnish the Kenya Anti-Corruption Commission with a statement of a suspect's property could be used in criminal proceedings-Anti-Corruption and Economic Crimes Act, 2003, sections 26, 30 and 55*

Jurisdiction *– jurisdiction of the Court of Appeal – appellate jurisdiction - jurisdiction to interfere with the exercise of a trial court's discretion - what was the role of the Court of Appeal as a first appellate court and could the Court of Appeal interfere with a trial court's exercise of discretion*

Evidence Law *- burden and standard of proof - burden and standard of proof in determining unexplained assets - where a person was alleged to have assets disproportionate to his/her legitimate sources of income - who bore the burden of proof where a person was alleged to have assets disproportionate to his/her legitimate sources of income - what was the threshold for determining unexplained assets where a public servant had assets disproportionate to his/her legitimately known sources of income - Anti-Corruption and Economic Crimes Act, 2003, sections 26 & 55; Evidence Act, section 112*

Evidence Law *– witnesses - calling of material witnesses to testify - failure of calling material witnesses to testify - effect of - what was the effect of failure to call a material witness to testify in a corruption case - Anti-Corruption and Economic Crimes Act, 2003, section 55; Evidence Act, section 112*

Constitutional Law *- rights and fundamental freedoms - right to property - nature of - where a person was asked to explain the source of assets disproportionate to his/her legitimately known sources of income - what was the nature of the right to property where a person was asked to explain the source of assets disproportionate to his/her legitimately known sources of income - Constitution of Kenya, 2010, article 40; Anti-Corruption and Economic Crimes Act, 2003, sections 26 & 55(2)*

Brief facts

The respondent issued a notice under section 26 of the Anti-Corruption and Economic Crimes Act, 2003 (ACECA) requiring the appellant to furnish a statement of his property. The respondent in the said notice claimed that the appellant's various assets were estimated at tens of millions of Kenya Shillings and were disproportionate to his salary. Considering that the appellant's salary from employment in the public service

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was his only source of income during the period within which he acquired the said assets, the respondent suspected the appellant of engaging in corruption and economic crimes. The appellant was required to explain the source of cash deposits made to his accounts. The notice required the appellant to explain his wealth for 16 years being the period 1992 to 2008. It was contended that the respondent unlawfully altered the period of investigation and inquiry to 10-months namely from September 2007 to June 2008.

The appellant complied with the notice and gave explanation for his wealth and assets. Dissatisfied with the explanation, the respondent moved to the trial court seeking orders for forfeiture of the unexplained assets. The Trial Court held that the appellant was in possession of unexplained assets valued Ksh. 41,208,000/=. A decree was issued that the appellant was liable to pay the Government of Kenya the sum of Ksh. 41,208,000/=. Aggrieved by the Trial Court's decision, the appellant lodged the instant appeal.

Issues

i. What was the threshold for determining unexplained assets where a public servant had assets disproportionate to his/her legitimately known sources of income?
ii. What was the nature of the notice to furnish the Kenya Anti-Corruption Commission with a statement of a suspect's property under section 26 of Anti-Corruption and Economic Crimes Act?
iii. Whether evidence recovered pursuant to a notice to furnish the Kenya Anti-Corruption Commission with a statement of a suspect's property could be used in criminal proceedings.
iv. What was the role of the Court of Appeal as a first appellate court and when could the Court of Appeal interfere with a trial court's exercise of discretion?
v. What was the nature of the right to property where a person was asked to explain the source of assets disproportionate to his/her legitimately known sources of income?
vi. Who bore the burden of proof where a person was alleged to have assets disproportionate to his/her legitimate sources of income?
vii. What was the effect of failure to call a material witness to testify in a corruption case?

Relevant provisions of the law

Anti - Corruption and Economic Crimes Act, No. 3 of 2003

Section 2 - Interpretation

"*unexplained asset" means assets of a person:*

1. *acquired at or around the time the person was reasonably suspected of corruption or economic crime; and*
2. *whose value is disproportionate to his known sources of income at or around that time and for which there is no satisfactory explanation.*

Section 26 - Statement of suspect's property

1. *If, in the course of investigation into any offence, the Secretary is satisfied that it could assist or expedite such investigation, the Secretary may, by notice in writing, require a person who, for reasons to be stated in such notice, is reasonably suspected of corruption or economic crime to furnish, within a reasonable time specified in the notice, a written statement in relation to any property specified by the Secretary and with regard to such specified property:*

a) enumerating the suspected person's property and the times at which it was acquired; and

b) stating, in relation to any property that was acquired at or about the time of the suspected corruption or

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economic crime, whether the property was acquired by purchase, gift, inheritance or in some other manner, and what consideration, if any, was given for the property.

2. *A person who neglects or fails to comply with a requirement under this section is guilty of an offence and is liable on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three years, or to both.*

3. *The powers of the Commission under this section may be exercised only by the Secretary.*

Section 55 - Forfeiture of unexplained assets

(5) If after the Commission has adduced evidence that the person has unexplained assets the court is satisfied, on the balance of probabilities, and in light of the evidence so far adduced, that the person concerned does have unexplained assets, it may require the person, by such testimony and other evidence as the court deems sufficient, to satisfy the court that the assets were acquired otherwise than as the result of corrupt conduct.

(6) If, after such explanation, the court is not satisfied that all of the assets concerned were acquired otherwise than as the result of corrupt conduct, it may order the person to pay to the Government an amount equal to the value of the unexplained assets that the Court is not satisfied were acquired otherwise than as the result of corrupt conduct.

Evidence Act Cap. 80

Section 112 - Proof of special knowledge in civil proceedings.

In civil proceedings when any fact is especially within the knowledge of any party to those proceedings the burden of proving or disproving that fact is upon him.

Held

1. The scourge of money laundering, economic crimes and corruption was threatening the moral and social fabric of society. In Kenya, one of the legislative instruments designed to deal with the scourge was the ACECA. In its preamble, ACECA sought to provide for prevention, investigation and punishment of corruption, economic crimes and related offences. ACECA established the Kenya Anti-Corruption Commission(respondent) as a body corporate whose Chief Executive Officer was the Secretary/Director to the Commission.

2. Entrenched in ACECA was the concept of unexplained assets which was a legal innovation to combat the vice of doubtful source of wealth, money laundering and suspicious corrupt practices. Underlying the concept was the theme, you failed to satisfactorily explain the lawful source of assets, you forfeited it.

3. A notice issued under section 26 of ACECA was a civil investigatory tool aimed at collecting information and data from a person suspected of corruption or economic crime. By virtue of section 55(9) of ACECA, the provisions of section 55 of ACECA were retroactive and a section 26 notice could issue regardless of when the property was acquired. The notice could issue in relation to property acquired before ACECA came into force.

4. Evidence recovered pursuant to section 26 of the ACECA on unexplained assets was for civil recovery only. Pursuant to section 30 of ACECA, the material received pursuant to the notice could not be used in criminal proceedings against the respondent (except in certain limited circumstances including prosecution for perjury, or on a prosecution for another offence where the respondent had provided inconsistent evidence).

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5. The court's primary role as a first appellate court was namely: to re-evaluate, re-assess and re-analyze the evidence on the record and then determine whether the conclusions reached by the trial court were to stand or not and give reasons either way.

6. The 10-month period from September 2007 to June 2008 was within the 16-year timeline of 1992 to June 2008 stated in the notice dated July 9, 2008. The notice required the appellant to furnish details of the enumerated property and cash deposits for the 16-year period. The greater period included the lesser period and no fresh or new notice was required for the 10-months between September 2007 and June 2008. That lesser period was already within the longer 16-year time-frame. Further, the originating summons at paragraph 4 thereof and at paragraph 10 of its supporting affidavit expressly identified and informed the appellant the period under investigation was September 2007 to June 2008.

7. It was not the duty of the Trial Court to identify the period of investigation. Under section 26 of ACECA as read with section 55 of the ACECA, it was the duty of the respondent to identify the period under investigation. The evidence on record identified the period of investigation to be September 2007 to June 2008. Accordingly, the ground and submission that the Trial Court erred in failing to identify the period of investigation had no merit. Likewise, the contestation that the originating summons as filed was fatally defective for being grounded on a 10-month period had no merit.

8. The appellant's right to fair hearing under article 50 of the Constitution as well as his right to be accorded reasonable opportunity to explain the source of the monies recovered as required by section 55(2) of the ACECA were not violated. The appellant was required to explain the source of cash deposits in his various bank accounts for the period under investigation. It was the appellant who identified the assets in explanation of sources of cash flows in his bank accounts. The appellant had an opportunity to explain the source of those cash assets.

9. An appellate court should be very hesitant to assume jurisdiction in cases where a litigant was challenging the exercise of discretion by another court. In the instant matter, under section 55(5) and (6) of the ACECA, the Trial Court had discretion to decide if the respondent had tendered evidence on balance of probability establishing the appellant had unexplained assets.

10. The Trial Court had discretion to let the appellant satisfactorily explain the source of his assets. Interfering with an exercise of discretion on the part of the trial court would be tantamount to directing a court on how to exercise its powers, in essence restraining its liberty. An appellate court could only interfere with exercise of discretion if the appellant could show that in exercise of its discretion:
    a. the court acted on a whim or that;
    b. its decision was unreasonable and
    c. it was made in violation of any law or that;
    d. it was plainly wrong and had caused undue prejudice to one party.

11. In the instant appeal, the appellant had not demonstrated that the trial court in permitting the appellant to testify exercised its discretion under section 55(5) and (6) of ACECA unreasonably, whimsically or injudiciously or that an injustice had occurred or violation of any law had taken place. Accordingly, there was no reason to interfere with the exercise of the discretion by the trial court.

12. The threshold for determining unexplained assets was provided for in sections 2 and 55(2) of the ACECA. A reading of section 2 and 55(2) established the threshold for existence of unexplained assets to be:

i. there had to be set time period for the investigation of a person;
ii. the person had to be reasonably suspected of corruption or economic crime;
iii. the person had to have assets whose value was disproportionate to his known sources of income at or around the period of investigation, and
iv. there was no satisfactory explanation for the disproportionate asset.

13. Section 362A of the United Kingdom's Proceeds of Crime Act 2002 (POCA) on unexplained wealth order was in *pari materia* to section 55(2) of the ACECA which lay emphasis on assets being disproportionate to an individual's known legitimate sources of income. Section 55(2) embodied the concept of income requirement guaranteed whereby an individual's assets should be proportionate to his/her legitimate known source of income.

14. The protection of the right to property had socio-political, moral, ethical, economic and legal underpinning. The right protected the sweat of the brow; it did not protect property acquired through larceny, money laundering or proceeds of crime or any illegal enterprise. There was no violation of the right to property if an individual was requested to explain the source of his assets that was disproportionate to his legitimate source of income.

15. In the instant matter, the provisions of sections 26 and 55(2) of the ACECA did not violate the right to property as enshrined in article 40 of the Constitution. In any event, constitutional protection of property did not extend to property that had unlawfully been acquired. If it were to be held that the requirement to explain violated the right to property under article 40 of the Constitution, enforcement of a notice issued under section 26 and the requirement to explain the source of disproportionate assets would be rendered nugatory.

16. The concept of unexplained assets and its forfeiture under sections 26 and 55(2) of ACECA was neither founded on criminal proceedings nor conviction for a criminal offence or economic crime. Sections 26 and 55 were non-conviction based civil forfeiture provisions. The sections were activated as an action in *rem* against the property itself. The sections required the respondent to prove on balance of probability that an individual had assets disproportionate to his/her legitimately known sources of income. Section 55(2) made provision for evidentiary burden which was cast upon the person under investigation to provide satisfactory explanation to establish the legitimate origin of his/her assets. That evidentiary burden was a dynamic burden of proof requiring one who was better able to prove a fact to be the one to prove it. Section 55(2) was in sync with section 112 of the Evidence Act.

17. Under section 55(2) of ACECA, the theme in evidentiary burden in relation to unexplained assets was to prove it or lose it. In other words, an individual had the evidentiary burden to offer satisfactory explanation for legitimate acquisition of the asset or forfeit such asset. The cornerstone for forfeiture proceedings of unexplained assets was having assets disproportionate to known legitimate source of income. Tied to that was the inability of an individual to satisfactorily explain the disproportionate assets.

18. A forfeiture order under ACECA was brought against unexplained assets which was tainted property; if legitimate acquisition of such property was not satisfactorily explained, such tainted property risked categorization as property that had been unlawfully acquired. The requirement to explain assets was not a requirement for one to explain his innocence. The presumption of innocence was a fundamental right that could not be displaced through a notice to explain how assets had been acquired.

19. In the instant matter, the appellant was given reasonable opportunity to explain his disproportionate

assets. He gave evidence on oath and tabled documentary evidence, however he did not discharge his evidential burden to offer satisfactory explanation as required under section 55(2) of the ACECA. A person with lawful income had no trouble proving the legal origin of his or her assets. The law protected only the rights of those who acquired property by licit means. Those who acquired property unlawfully could not claim protection provided by the legal system. It was in that context that article 40(6) of the Constitution provided that protection of the right to property did not extend to property that had been unlawfully acquired.

20. Whereas the appellant was under no obligation to call any witnesses to testify on his behalf, there were three crucial individuals that he ought to have called to testify. Those individuals were crucial to corroborate the appellant's testimony that the named individual lawfully gave him cash in form of friendly loan or installment towards purchase of plot/houses.In civil as in criminal proceedings, the plaintiff (prosecution) was solely responsible for deciding how to present its case and choosing which witnesses to call. The respondent alone bore the responsibility of deciding whether a person would be called as a witness in its case. A court could not ordinarily direct a party to call any witness. Save in exceptional circumstance, a trial court could not call any witness. The appellant's contestation that the respondent should have called the three individuals as witnesses had no legal foundation. In law, the appellant could not compel the respondent to call a witness to support or rebut the respondent's case; all that the respondent was obligated to do was call credible and material witnesses to prove its case to the required standard.

21. The failure to call a particular witness or voluntarily to produce documents or objects in ones possession was conduct evidence. In principle, failure by a party to call a material witnesses could be interpreted as an indication of knowledge that his opponents evidence was true, or at least that the tenor of the evidence withheld would be unfavorable to his cause. An inference would not be allowed if a party introduced evidence explaining the reasons for his conduct and reason for failure to call a witness and if the evidence was truly unavailable or shown to be immaterial.

22. Section 55(4) of the ACECA stipulated that the person whose assets were in question had to be afforded the opportunity to cross-examine any witness called and to challenge any evidence adduced by the respondent and, had to have and could exercise the rights usually afforded to a defendant in civil proceedings. In the instant matter, the appellant did have opportunity to cross-examine the respondent's witnesses.

23. The appellant did not offer satisfactory explanation as to the source of admitted sum of Ksh. 15.5 million from the alleged Sudanese National; the source of Ksh. 1,000,000/= allegedly for community electricity project; the source of Ksh. 10.9 million and the source of Ksh. 9.5 million for sale of properties. The contestation that the trial court erred in applying and interpreting sections 26 and 55 of ACECA had no merit. The trial court did not err in holding that the admitted cash monies received were part of the appellant's unexplained assets that should be paid over to the Kenya Government.

Appeal dismissed, no order as to costs.

50. The validity of orders for forfeiture is not affected by the outcome of criminal proceedings

The applicant sought among others orders that the money held in various accounts, some motor vehicles and some parcels of land belonging to the respondents were proceeds of crime and therefore liable for forfeiture to the State. The court found that the respondents were not able to demonstrate a legitimate source of funds from which it would be possible to separate what was acquired from legitimate sources of funds and what was acquired from proceeds of crime.

Assets Recovery Agency v Joseph Wanjohi & 3 others [2020] eKLR

Anti-Corruption and Economic Case Application 7 of 2019

High Court at Nairobi — February 21, 2020

M Ngugi, J

Civil Practice and Procedure *– orders – forfeiture orders – validity of forfeiture orders - whether the validity of forfeiture orders was affected by the outcome of criminal proceedings - Proceeds of Crime and Anti-Money Laundering Act, 2009, sections 82, 90 and 92(1).*

Constitutional Law *– fundamental rights and freedoms – right to property - whether orders for forfeiture of property acquired from the proceeds of crime violated the right to property – Constitution of Kenya, 2010, article 40.*

Brief facts

The applicant, the Asset Recovery Agency, filed the instant application against the respondents seeking among others orders that the money held in various accounts, some motor vehicles and some parcels of land belonging to the respondents were proceeds of crime and therefore liable for forfeiture to the State. The applicant stated that the 1st and 2nd respondents were arrested and charged with various offences including possession of wildlife trophies. The applicant claimed that it established that certain assets and funds in the respondents' accounts were proceeds of crime obtained from the illegitimate trade in wildlife and narcotic drugs.

The applicant further claimed that there were reasonable grounds to believe that the assets and the funds in the accounts belonging to the respondents were obtained through the illegitimate trade in wildlife trophies, drugs and illegal substances. The respondents, according to the applicant, had not given any reasonable explanation to prove any legitimate source of the funds. The applicant asserted that the assets and funds in the respondents' accounts were unlawfully acquired and were therefore proceeds of crime.

Issues

i. Whether the validity of forfeiture orders was affected by the outcome of criminal proceedings.

ii. Whether orders for forfeiture of property acquired from the proceeds of crime violated the right to property.

Held

1. Part VIII of the Proceeds of Crime and Anti-Money Laundering Act, 2009, (POCAMLA) set out the procedure to be used in cases of civil forfeiture. At section 82 of POCAMLA the applicant, was empowered to apply for preservation orders in situations where there were reasonable grounds to

believe that the property concerned had been used or was intended to be used for commission of an offence or that it was proceeds of crime. Section 90 of POCAMLA contained provisions with respect to forfeiture of property preserved under orders issued pursuant to section 82.

2. The validity of an order for forfeiture under section 92(1) of POCAMLA was not affected by the outcome of criminal proceedings. In order for the court to make orders of forfeiture under the civil forfeiture process set out in Part VIII of POCAMLA, the applicant did not need to establish that there were criminal proceedings related to the property at issue. Once the applicant established, on a balance of probability, that the assets in question were suspected to be the proceeds of crime, a duty was cast on the respondent to establish the contrary.
3. On a balance of probabilities, the applicant had established that the assets and funds were the proceeds of crime. The respondents had not been able to rebut that.
4. The Constitution at article 40 protected the right to property. However, article 40(6) was clear that such protection did not extend to illegally acquired property. Thus, property acquired from the proceeds of crime, was not protected. Making an order for its forfeiture did not therefore violate the right to property.
5. The respondents had not been able to demonstrate a legitimate source of funds from which it would be possible to separate what was acquired from legitimate sources of funds and what was acquired from proceeds of crime.

Application allowed with costs to the applicant.

51. Circumstances under which orders of preservation could be varied/set aside/ rescinded

The court determined whether the threshold had been met and therefore preservation orders could be varied. It was noted that lifting the preservation orders would not serve the purpose of obtaining them.

Assets Recovery Agency v Abdi Mohamed Ali & another [2020] eKLR

Miscellaneous Application 11 of 2020

High Court at Nairobi — August 12, 2020

J N Onyiego, J

Civil Practice and Procedure *- orders – variation orders – variation of orders of preservation – considerations to be made when varying/rescinding/setting aside orders of preservation – what criteria ought to be met before setting aside/varying preservation orders – Proceeds of Crime and Anti-Money Laundering Act, section 89 (1)*

Civil Practice and Procedure *– affidavit – manner of drawing an affidavit – where an affidavit was jointly sworn by two deponents instead of one – distinguishing oaths taken in singular and oaths taken in plural – whether an application could be rendered defective by virtue of a supporting affidavit being sworn jointly by two deponents – Civil Procedure Rules, order 19 rule 5*

Words and phrases*- reasonable grounds- definition of 'reasonable grounds- means fair and sensible; able to reason logically; as much as is appropriate or fair; fairly good- Concise Oxford English Dictionary 9th Edition*

Brief facts

Ex parte preservation orders were issued against the respondents/ applicants on March 19, 2020 freezing their two bank accounts pursuant to sections 81 and 82 of POCAMLA. The respondents / applicants moved the court seeking to rescind or lift the said preservation orders citing various grounds as provided under section 89(1) of POCAMLA.

Issue

i. What was the criteria set out for grant or varying of preservation orders?

Relevant provisions of the law

Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009

Section 89- Variation and rescission of orders;

1 A court which makes a preservation order;

(a) may, on application by a person affected by that order, vary or rescind the prohibition order or an order authorizing the seizure of the property concerned or other ancillary order if it is satisfied-

(i) That the operation of the order concerned will deprive the applicant of the means to provide for his reasonable living expenses and causes undue hardship for the applicant: and

(ii) that the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred and

(b) shall rescind the preservation order when the proceedings against the defendant concerned are concluded.

Assets Recovery Agency v Abdi Mohamed Ali & another [2020] eKLR

Held

1. The impugned affidavit was jointly sworn by the two respondents. However, the affidavit was sworn in plural by the two by stating "We, Abdi Mohamed Ali & Saadia Sheikh Osman". The expression "we" implied that the deponents were taking oath each confirming the information contained in the affidavit as true and correct information. That was different from where the oath was taken in singular meaning that only one of the deponents was taking oath. The joint affidavit was sworn in plural hence there was nothing irregular.
2. The underlying factor for consideration by a court before issuing preservation orders under section 82 of POCAMLA was the conviction by such court that there were reasonable grounds to warrant issuance of such orders. The expression reasonable ground was subjective. What might sound as reasonable ground to somebody might not necessarily be reasonable to another person. The court had to be satisfied when looking at the facts at hand from the lens of an ordinary person, given the set of facts or material presented before it, that any ordinary person would arrive at the conclusion that the monies in the frozen accounts could be as a result of money laundering or proceeds of crime.
3. Despite the law not providing for inter partes hearing upon hearing an ex parte application for preservation orders, the court had to adequately assess the material or evidential facts presented before it to be convinced that they lay a factual basis for such orders to issue.
4. By the court issuing the impugned ex parte orders of preservation, the presumption was that, it was satisfied that from the material before it, there was sufficient reason to so grant. The court had jurisdiction to grant the prayers sought or refuse if satisfied that there was no sufficient ground to do so. Although on the face of it the respondent could appear to have been condemned unheard, there was a remedy under section 89(1) of POCAMLA where the applicant could move the court to rescind or vary the orders in question. With that provision, the respondent could not argue that he was condemned unheard and that his constitutional rights were trampled upon.
5. From the definition of the word 'proceeds of crime' the applicant had to endeavor to connect the alleged proceeds of crime with some offence or criminal activity directly or indirectly. In other words, there had to be a nexus between the money in question or property involved whether acquired directly or indirectly or even converted into some form of assets through some criminal activity. The applicant/respondent could not rise up one morning and decide to brand somebody's property as proceeds of crime without any evidence or proof that the money or property that is the subject of investigation had a relationship with a crime of some kind.
6. Under POCAMLA, the burden of proof shifted to the person alleged to have possession of what could not reasonably be justified as legitimate sources of income. It was upon the respondent to discharge that burden to the satisfaction of the court given that there was no explanation offered to support the huge deposits. The only reasonable conclusion or inference was that the money was not obtained through legitimate sources of income hence likely to be the subject of money laundering whether from a known source or not. Without rendering any explanation to the satisfaction of the court, it was reasonable to conclude that the respondents ought to have known that the money deposited in their account was not legitimate and therefore obtained or retained illegally for purposes of cleansing which was an offence.
7. On the question whether the money included the 1st respondent's salary, the same was mixed as there were withdrawals and deposits. At the prevailing stage, the instant court could not be able to separate the two. That could only be done during the hearing of the forfeiture proceedings.
8. Lifting the preservation orders would subject the money in question to greater risk in recovery in the

event the same was transferred and the intended forfeiture proceedings succeeded. It would be difficult and costly to trace such huge sums of money if transferred to third parties or spent. It would also render the intended forfeiture proceedings nugatory if the same succeeded. In short, lifting the orders would not serve the purpose for obtaining preservation orders

9. The money in question was in safe custody. If at the end of the day the applicant did not institute forfeiture proceedings or prove their forfeiture claim if filed, the money would be released to the respondents together with the accrued interest. Public interest would best be served by preserving the funds which was actually a reasonable balancing act as no party took undue advantage over the other.

Application partly allowed

Orders:

i. The 1st respondent/applicant was allowed to withdraw Kes. 3,000,000 from Account No [xxxx] Equity Bank Mandera Branch in the name of Abdi Mohamed Ali.

ii. Costs shall be in the cause.

52. Burden and standard of proof in applications for forfeiture of funds suspected to be proceeds of crime

The application sought for orders of forfeiture of funds in the respondent's accounts suspected to be proceeds of crime. The court held that being civil in nature, the burden of proof on the part of the applicant was on a balance of probability to prove that the assets in dispute were proceeds of crime or instrumentality of crime.

Assets Recovery Agency v Josphat Kamau [2021] eKLR

Civil Application 13 of 2020

High Court at Nairobi — June 8, 2021

J Wakiaga, J

Evidence Law *- burden and standard of proof - burden and standard of proof in applications for forfeiture of funds suspected to be proceeds of crime - who bore the burden of proof and what was the standard of proof in such applications - Evidence Act, Cap. 80 section 107.*

Brief facts

The applicant filed the instant application seeking the declaration that funds held in the respondent's named bank account were proceeds of crime and therefore liable for forfeiture to the Government. It was the applicant's case that it had conducted investigations and established that the respondents motor vehicles had been involved in smuggling goods.

The applicant claimed that an analysis of the respondent's bank statements revealed several suspicious transactions and that there was reasonable ground to believe that the respondent had no known source of legitimate business.

Issues

i. Who bore the burden of proof in an application for forfeiture of funds suspected to be proceeds of crime?

ii. What was the standard of proof in an application for forfeiture of funds suspected to be proceeds of crime?

Held

1. Being civil in nature, the burden of proof on the part of the applicant was on a balance of probability to prove that the assets in dispute were proceeds of crime or instrumentality of crime. Once evidence was placed before the court in terms of section 65 of the Proceeds of Crime and Anti-Money Laundering Act, it was for the respondent to show that the same had a legitimate source of income sufficient to justify the interest in any property which was claimed.
2. Even if the modifications to create a secret compartment where the illicit goods were hidden were done without his knowledge, the proceedings were in *rem*, against the property and since it was proved that the same were converted for the purpose of conducting criminal undertaking, it logically followed that the said motor vehicles were instrumentality of crime and were therefore liable to forfeiture.
3. Tax compliance certificate was proof that the respondent was engaged in legitimate business undertaking. It was upon the respondent to show that he was engaged in some legitimate business with records of the transactions if any, for the period under inquiry he had failed to sufficiently account for the sums

of money received as evident from the bank records and also the large cash withdrawals from the accounts. He needed to place before the court evidence in support of the deposit and in the absence thereof, the only logical conclusion was that the payments were in respect of criminal undertaking of proceeds of crime.

Application allowed; each party to bear its own costs.

53. It had to be proven, on a balance of probabilities, that properties subjected to civil forfeiture were proceeds of crime

The court sought to determine that the property to be forfeited were proceeds of crime. It was found that the Agency had proven, on a balance of probabilities that the property to be forfeited were proceeds of crime. The court found that the 1st respondent's explanation of the sources of the funds in her accounts was not tenable. The issuance of a forfeiture order was not a violation of her rights under article 40.

Assets Recovery Agency v Charity Wangui Gethi & another [2021] eKLR

Miscellaneous Application 78 of 2017

High Court at Nairobi — February 25, 2021

M Ngugi, J

Evidence Law *– standard of proof - standard of proof in civil forfeiture – balance of probabilities – whether it had been proven, on a balance of probabilities, that the subject properties were proceeds of crime and therefore subject to civil forfeiture – Proceeds of Crime and Anti-Money Laundering Act, section 90*

Civil Practice and Procedure *- forfeiture – civil forfeiture viz-a-viz criminal forfeiture – where parties subject to a civil forfeiture had not been convicted for any offence on fraud in a criminal proceeding – whether the validity of an order on civil forfeiture was dependent on the outcome of criminal proceedings – Proceeds of Crime and Anti- Money Laundering Act, section 92 (1).*

Civil Practice and Procedure *– affidavits – form and content of affidavits – affidavits annexed to another affidavit – probative value of an affidavit annexed to another affidavit – where an affidavit relied on the affidavit of others to adduce evidence – whether an affidavit annexed to another affidavit held any probative value – Civil Procedure Rules, order 19 rule 3.*

Brief facts

The court issued preservation orders prohibiting the respondents and or their agents or representative from transferring or dealing with Kes. 97,682,424. The preservation order was gazetted by the applicant, the Assets Recovery Agency (the Agency). It was the Agency's case that there were reasonable grounds to believe that the funds held in the respondents' bank accounts were directly from the National Youth Service (NYS) and were transferred to the respondents' accounts in order to conceal, disguise, and hide the source of the funds. The Agency therefore sought the forfeiture of the funds and pleaded that it was in the interests of justice that the orders that it sought against the respondents be granted.

Issues

i. Whether it had been proven, on a balance of probabilities, that the subject properties were proceeds of crime and therefore subject to civil forfeiture

ii. Whether the validity of an order on civil forfeiture was dependent on the outcome of criminal proceedings

iii. Whether an affidavit annexed to another affidavit held any probative value

Assets Recovery Agency v Charity Wangui Gethi & another [2021] eKLR

Held

1. Order 19 rule 3 of the Civil Procedure Rules provided that affidavits should be confined to statements of fact. In interlocutory proceedings, however, or with leave of the court, an affidavit could contain statements of information and belief showing the sources and grounds thereof. The 1st respondent's affidavit sought to rely on the affidavits of other parties annexed thereto. Such affidavits were of no probative value. Such evidence as the 1st respondent sought to adduce on the basis of the said affidavits, including the alleged tax status of Horizon Ltd, the bank statements of Horizon Ltd, the letters of various Government agencies purportedly clearing that Horizon, was all hearsay. Hence, considering and determining the issues raised in the instant matter was confined solely to such averments of the 1st respondent as would meet the provisions of order 19.
2. The 1st respondent was not required to show a legitimate source of funds as provided under section 65 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA). That was because the Agency's application was brought under the civil forfeiture provisions of POCAMLA. Section 65 was contained in Part VII of POCAMLA and provided for forfeiture pursuant to criminal proceeding. It was not applicable to the instant matter.
3. The Agency had established, on a balance of probabilities, that the funds in the respondents' accounts were proceeds of crime, having been part of the funds fraudulently transferred. As proceeds of crime, they were liable to forfeiture to the State.
4. The validity of an order under section 92 (1) of POCAMLA was not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned was in some way associated. The issuance of a forfeiture order in the instant matter was not dependent on whether or not anyone was ever convicted in relation to the fraudulent transfer of funds from the NYS.
5. The 1st respondent had not been able to discharge the burden placed on her to demonstrate the source of the funds deposited in her account, and to displace the Agency's evidence that showed that it was part of the NYS funds. In the face of such failure, there was no refuge that the 1st respondent could find in alleging that there had been no conviction in relation to the NYS funds.
6. The right to property was guaranteed in the Constitution and was available to all citizens. However, under article 40(6) of the Constitution, property that was found to be unlawfully acquired was not protected. The 1st respondent's explanation of the sources of the funds in her accounts, was not tenable. The issuance of a forfeiture order was not a violation of her rights under article 40.

Application allowed.

54. Factors to consider in the issuance of forfeiture orders against a motor vehicle

The application sought the forfeiture of a vehicle claimed to have been bought by funds embezzled from the National Youth Service (NYS). The court highlighted what is required before it could issue the forfeiture orders sought. The court stated that it had to be proved that the vehicle was actually purchased by use of money fraudulently acquired from the NYS.

Asset Recovery Agency v Charity Wangui Gethi [2018] eKLR

Anti-Corruption And Economic Crimes Miscellaneous Application 16 of 2016

(Formerly Misc. Application 221 of 2016)

High Court at Nairobi — November 20, 2018

H I Ong'udi, J

Civil Practice and Procedure *– orders - forfeiture orders - what were the factors to consider in the issuance of forfeiture orders against a motor vehicle – Proceeds of Crime and Anti-Money Laundering Act, 2009, section 92.*

Brief facts

The applicant, the Asset Recovery Agency, filed the instant application seeking the forfeiture of a motor vehicle belonging to the respondent claiming that it was a procced of crime. The application was based on among other grounds that investigations conducted by the Directorate of Criminal Investigations into allegations of theft and fraud of funds amounting to Kes. 791,385,000 from the State Department of Planning in the Ministry of Devolution revealed massive fraud and embezzlement of public funds. The investigations further revealed fraudulent transfers of funds from the National Youth Service (NYS) to various bank accounts and part of the funds used to purchase the motor vehicle.

Issue

i. What were the factors to consider in the issuance of forfeiture orders?

Held

1. Before any forfeiture order was made, the court had to be satisfied that the property sought to be forfeited was a proceed of crime or was to be used to perpetuate a crime. The applicant had a duty to prove that indeed the vehicle in issue was procured by use of money fraudulently acquired from the NYS.
2. It was the applicant's duty to connect the respondent's money at the Standard Chartered Bank account and the NYS money. The record showed and it had not been rebutted by the applicant that the Horizon Limited company was investigated and was not found to have been involved in the NYS scandal, and had never been charged.
3. Even if the respondent could have been shown to have received questionable amounts in her account, that in itself could not lead to the conclusion that the vehicle was bought using funds from NYS deposited in her account long after the redemption of March 26, 2015. The respondent's source of money for purchase of the vehicle was not linked with the Kes. 17.6 million and 18 million deposited into their account.

Application dismissed with costs.

55. Conviction in criminal trials is not necessary for the institution of suits for recovery of funds or assets reasonably believed to be proceeds of crime

The applicant filed the instant application seeking, among others, orders, for the court to declare that the funds in the respondents' accounts as proceeds of crime and that the funds be forfeited to the Government and transferred to the applicant. The court held that since the outcome of criminal proceedings did not have a bearing on forfeiture proceedings, the applicant did not have to await the conclusion of a criminal trial before instituting civil proceedings for recovery of funds or assets reasonably believed to be proceeds of crime.

Assets Recovery Agency v James Thuita Nderitu & 6 Others [2020] eKLR

ACEC Civil Suit 2 of 2019

High Court at Nairobi — April 22, 2020

M Ngugi, J

Civil Practice and Procedure *– suits – institution of suits – institution of suits for recovery of funds or other assets reasonably believed to be proceeds of crime – where the owner of the account in which the funds were in had been charged with conspiracy to commit an offence of economic crime and fraudulent acquisition of public property - whether conviction in a criminal trial was necessary before a suit for recovery of funds or other assets reasonably believed to be proceeds of crime could be instituted - Proceeds of Crime and Anti-Money Laundering Act, 2009, section 92(4).*

Constitutional Law *– fundamental rights and freedoms -enforcement of fundamental rights and freedoms – right to fair hearing - whether an application for forfeiture of funds suspected to be proceeds of crime violated the right to fair hearing where the funds were subject of an ongoing criminal case.*

Brief facts

The 1st and 3rd respondents were charged with criminal offences including conspiracy to commit an offence of economic crime and fraudulent acquisition of public property. The applicant claimed that it established that the respondents had received funds fraudulently from the National Youth Service (NYS) through their business entities and personal accounts and associates split in several transactions amounting to Ksh. 39,647,426.00 held at Equity Bank, Mandera Branch Account number 1000176315716 in the name of Ali Abdi Ibrahim and Ksh. 3,857,943.02 held at Equity Bank, Mandera Branch Account number 100019392183 in the name of Ali Abdi Ibrahim. The applicant further claimed that the funds were intra-transferred into accounts owned by the respondents' family members and associates.

It was the applicant's case that it had established that the accounts were holding funds suspected to be proceeds of crime and hence liable for forfeiture to the Government. The applicant thus filed the instant application seeking among others orders, that the court declares that the funds in issue be declared as proceeds of crime and that the funds be forfeited to the Government and transferred to the applicant.

Issues

i. Whether conviction in a criminal trial was necessary before a suit for recovery of funds or other assets reasonably believed to be proceeds of crime could be instituted.

ii. Whether an application for forfeiture of funds suspected to be proceeds of crime violated the right to fair hearing where the funds were subject of an ongoing criminal case.

Assets Recovery Agency v James Thuita Nderitu & 6 Others [2020] eKLR

Held

1. A conviction in a criminal trial was not necessary before a suit for recovery of funds or other assets reasonably believed to be proceeds of crime could be instituted. Section 92(4) of Proceeds of the Crime and Anti-Money Laundering Act (POCAMLA) provided that, even where an investigation or prosecution was launched, its outcome did not have an impact on a suit for recovery of proceeds of crime. The instant application was not premature.
2. As the outcome of criminal proceedings did not, under the law, have a bearing on forfeiture proceedings, the applicant did not have to await the conclusion of a criminal trial before instituting civil proceedings for recovery of funds or assets reasonably believed to be proceeds of crime. The applicant had placed material before the court that indicated that funds were transferred to the respondents in circumstances that showed, on a balance of probabilities, that those funds were the proceeds of crime.
3. The 1st and 3rd respondent had been charged with a criminal offence, but they had not been convicted. However, whether they were convicted or not, under the provisions of POCAMLA, once it was established on a balance of probabilities that the funds in their accounts were proceeds of crime, they had an obligation to show that such funds were legitimate, and that they were not proceeds of crime. That, the respondents had not even attempted to do.
4. The bank statements placed before the court showed that indeed there were funds deposited in the respondents' accounts from the Ministry of Public Service and Youth. Those funds were first deposited in the respondents' accounts, but were thereafter transferred to other accounts. The respondents needed to go beyond the allegation that they had wide ranging businesses and show how those businesses translated to the credits of millions from the State Department of Public Service and Youth, under which the NYS fell, into their accounts.
5. Apart from banking institutions, there were no entities whose business involved the transfer of funds from one entity to another. In order for funds to be transferred from one entity's account to another's account, the entities had to have legitimate businesses from which they obtained the money that they transferred between themselves.
6. To explain the large deposits from NYS into their accounts, the respondents had the evidential burden of placing before the court the nature of the business they transacted with the NYS. They did not do so, confining their pleadings to assertions that the 1st respondent had had business with other government ministries, and their submissions to an assertion that they had businesses far and wide. The applicant had established that the funds in the respondents' accounts were proceeds of crime, and that they should be forfeited to the State.
7. *Assets Recovery Agency v Charity Wangui Gethi [*2018] eKLR turned on the court being satisfied that the funds used for the purchase of the vehicle that the applicant sought to be forfeited had been deposited in the respondent's account prior to the deposit of funds linked to the NYS into the respondent's accounts. That was a vastly different situation from the instant case in which the funds sought to be forfeited, though only a small fraction of the funds that the respondents received in their accounts, had a clear and direct link to the funds transferred from the NYS to the respondents' accounts.
8. Whether or not the1st and 3rd respondents were to be convicted, the other respondents, the corporate entities that received the funds from the Ministry of Public Service and Youth, had an obligation, in an application for forfeiture such as the instant one to explain the legitimate basis on which they received the considerable funds deposited into their accounts. The Central Bank of Kenya, the regulator under the Banking Act and regulation 22 of the POCAMLA Regulations, had already imposed penalties

on the banks into which those funds were deposited. In the absence of an explanation regarding the legitimate basis for the transfer of the funds, the conclusion that the funds were proceeds of crime and liable to forfeiture was inevitable.

9. The respondents had an opportunity to present their case before the court seized of the civil application, which they had done. That their case was confined to an argument that the instant application was premature was entirely their choice. No violation of the right to be heard had, in any event, been demonstrated.

Application allowed; respondents to bear the costs of the application.

56. The High Court can only grant an order prohibiting the transfer or disposal of or other dealing with property if there is evidence that the property was acquired as a result of corrupt conduct

The Ethics and Anti-Corruption Commission sought orders to prohibit the withdrawal, transfer, or disposal of or other dealings of money held in the 2nd respondent bank on the grounds that they were public funds illegally transferred into those accounts. The court held that it could only grant such an order if there was evidence that the property was acquired as a result of corrupt conduct. The court noted that under section 56(2) of the Anti-Corruption and Economic Crimes Act, an order could be made against a person who was involved in the corrupt conduct or against a person who subsequently acquired the property. However, section 56(2) did not limit the category of persons against whom the order could be made. The court also held that it could discharge or vary such an order only if the court was satisfied, on the balance of probabilities, that the property in respect of which the order was discharged or varied was not acquired as a result of corrupt conduct.

Ethics & Anti-Corruption Commission v Ministry of Medical Services & Another [2012] eKLR

Miscellaneous Application 174 of 2012

High Court at Nairobi — July 26, 2012

G V Odunga, J

Criminal Procedure *- orders - orders in anti-corruption and economic crimes - orders prohibiting the transfer or disposal of or other dealing with property that was acquired as a result of corruption - whether such orders could be granted where the property had not yet been acquired - whether such orders could be made against a party holding funds or property for third parties - Anti-Corruption and Economic Crimes Act, No. 3 of 2003, section56.*

Evidence Law *- standard of proof - standard of proof in discharging or varying of orders - what was the standard of proof in discharging or varying an order prohibiting the transfer or disposal of or other dealing with property on evidence that the property was acquired as a result of corrupt conduct - Anti-Corruption and Economic Crimes Act, No. 3 of 2003, section56.*

Brief facts

The applicant, the Ethics and Anti-Corruption Commission filed the instant application seeking orders to prohibit the withdrawal, transfer, or disposal of or other dealings howsoever described with the sum of Ksh. 60,090,290.10 and Kes. 32,209,000.00 in accounts held in the 2nd respondent bank for a period of six (6) months from the date of the order on the grounds that the funds were public funds which were illegally transferred into those accounts. The 2nd respondent filed an application that it be granted leave to file the application out of time.

The 2nd respondent stated that it held the sum of Kes. 19,793,000 and Kes. 32,209,000 as collateral security in respect of letters of credit issued by it at the request of the 1st respondent. The 2nd respondent, however, denied that it held a sum of Kes. 60,090,290.00 as alleged by the applicant. The 2nd respondent claimed that the amounts were remitted to it in respect of supply and delivery of cold-room machines and supply

and delivery of washing machines and dryers to the 1st respondent. The 2nd respondent argued that the sum frozen by the order had already been committed to third parties and that the 2nd respondent was legally bound to honour its obligations pertaining to the letters of credit hence it risked a legal suit for breach of contract.

According to the applicant, the letters of credit made provision that their payment would only be done on receipt of the goods at the Ministry headquarters, inspection and acceptance thereof and on confirmation by a letter executed by the ministry. According to the applicant, the two tenders had not been completed. The applicant claimed that the entities involved in both tenders shared common addresses, telephone and fax numbers but did not operate from the indicated offices.

Issues

i. Whether an order prohibiting the transfer or disposal of or other dealing with property that was acquired as a result of corrupt conduct could be granted where the property had not yet been acquired.

ii. Whether an order prohibiting the transfer or disposal of or other dealing with property that was acquired as a result of corrupt conduct could be made against a party holding funds or property for third parties.

iii. What was the standard of proof in discharging or varying an order prohibiting the transfer or disposal of or other dealing with property on evidence that the property was acquired as a result of corrupt conduct?

Relevant provisions of the law

Anti-Corruption and Economic Crimes Act, No. 3 of 2003

Section 56 - Order preserving suspect property, etc.

i. *On an ex parte application by the Commission, the High Court may make an order prohibiting the transfer or disposal of or other dealing with property if it is satisfied that there are reasonable grounds to suspect that the property was acquired as a result of corrupt conduct.*

ii. *An order under this section may be made against a person who was involved in the corrupt conduct or against a person who subsequently acquired the property.*

iii. *An order under this section shall have effect for six months and may be extended by the court on the application of the Commission.*

iv. *A person served with an order under this section may, within fifteen days after being served, apply to the court to discharge or vary the order and the court may, after hearing the parties, discharge or vary the order or dismiss the application.*

v. *The court may discharge or vary an order under subsection (4) only if the court is satisfied, on the balance of probabilities, that the property in respect of which the order is discharged or varied was not acquired as a result of corrupt conduct.*

Held

1. There was an explanation proffered with respect to the application for extension of time. There must be a distinction between cases where no explanation was offered and where the explanation offered by the applicant was not satisfactory. It had not been alleged that the explanation was not satisfactory. In computing the period of delay the time to be taken into account was the period outside the time

within which the application should have been made.

2. The relevant period for the purposes of extension of time was the period after the 15 days provided by the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 (the Act) which was 9 days. Whereas, the law was that a delay, however short, must be explained, to expect a party to explain what happened on each day thereafter would be the vainest pedantry. The delay had been explained on the fact that documents had to be collated and in between there were Easter holidays. The explanation proffered was not so unreasonable to disentitle the 2nd respondent to favourable exercise of discretion.

3. The court could only grant an order prohibiting the transfer or disposal of or other dealing with property if there was evidence that the property was acquired as a result of corrupt conduct. The property was no longer under the classification of public funds, the sum in dispute fell under property which had been acquired. Had the argument been that the money was still the property of the Government, in which case there was not as yet acquisition, the applicant would have been hard put to justify the continued existence of the orders because it was only property that had been acquired that fell within section 56(1) of the Act.

4. Under section 56(2) of the Act, an order could be made against a person who was involved in the corrupt conduct or against a person who subsequently acquired the property. The 2nd respondent's case was that it was not involved in or had subsequently acquired the property since it was simply holding the funds for the third parties. That could be so. However, section 56(2) of the Act did not limit the category of persons against whom the order could be made.

5. For the court to grant the orders under section 56(1) of the Act a *prima facie* case must be presented before court that the property in question had been the subject of some corrupt dealings. It was not enough for the applicant to simply walk into court with a request and expect the orders to be granted. Where the orders were granted and it turned out that either the court was misled or no *prima facie* case existed that the property was acquired as a result of corrupt conduct, the court would be perfectly entitled to vacate the orders.

6. By granting the orders sought by the 2nd respondent, the court would not be stopping the applicant from conducting investigation. The applicant was free to conduct its investigations but in a lawful manner. If the conduct of the investigations infringed upon the rights of an individual, the individual was entitled to complain and if the complaint was valid the court was empowered to bar the applicant from improper use of the powers vested in it. The applicant's power was meant for the good of the public and not for the purposes, for example, of settling personal scores. As what was sought by the 2nd respondent was not to stop investigations, the authorities relied upon by the applicant were not relevant.

7. It was arguable whether in cases where a party was disabled from fulfilling their contractual obligations due to a lawful court order, the party would be liable. However, that was not a matter that could be conclusively decided in the proceedings. The machines had not been installed, inspected and approved by the authorities concerned for the sums in question to be released. At that stage, the court did not have sufficient material to decide and was not entitled to decide conclusively whether the procurement procedures were adhered to.

8. The instant matter was not aproper case for the court to set aside the orders made March 21, 2012. The court could discharge or vary an order under section 56(4) of the Act only if the court was satisfied, on

the balance of probabilities, that the property in respect of which the order was discharged or varied was not acquired as a result of corrupt conduct. From the wording of that provision, once an order was made under section 56(1) of the Act the burden shifted to the person against whom it was made to prove, albeit on a balance of probabilities, that the property was not acquired as a result of corrupt conduct.

9. From the circumstances of the case, the court was unable to find on a balance of probabilities that the property in question was not acquired as a result of corrupt conduct. There existed loose ends in the matter which needed to be tied before that conclusion could be arrived at. Accordingly, the application dated April 16, 2012 did not meet the threshold in section 56(5) of the Act.

Time within which the application was made was extended with such period as to validate the same; application dismissed with costs to the applicant.

57. Applications for orders of forfeiture of property believed to be proceeds of crime are not violations of the rights to own property, fair hearing and fair administrative action

It was the applicant's case that the respondents had acquired the properties, the subject of the application, using proceeds of crime and that the court should issue the orders of forfeiture. The court held that a conviction was not necessary in order for the court to make an order of forfeiture. The court further held that the protection of the right to property did not extend to property found to have been unlawfully acquired.

Assets Recovery Agency v Phylis Njeri Ngirita & 2 others; Platnum Credit Limited(Interested Party) & another [2020] eKLR

Anti -Corruption And Economic Crimes Civil Suit 1 of 2019

High Court at Nairobi — August 26, 2020

M Ngugi, J

Constitutional Law *– fundamental rights and freedoms – enforcement of fundamental rights and freedoms - rights to own property, fair hearing and fair administrative action - whether an application for and an order of forfeiture of property believed to be proceeds of crime was a violation of the right to own property, right to fair hearing and fair administrative action – Constitution of Kenya, 2010, articles 47 and 50; Criminal Procedure Code, Cap. 75, sections 118 and 121; Proceeds of Crime and Anti-Money Laundering Act, 2009, Part VIII.*

Civil Practice and Procedure *– orders – forfeiture orders – process to be followed before the issuance of forfeiture orders - whether a conviction was necessary before the issuance of an order for forfeiture of property shown to be proceeds of crime - Proceeds of Crime and Anti-Money Laundering Act, 2009, sections 2 and 92.*

Evidence Law *– standard of proof - standard of proof required to establish that property in an application for forfeiture - what was the standard of proof required to establish that property in an application for forfeiture had been obtained from proceeds of crime.*

Brief facts

The applicant, the Assets Recovery Agency (the Agency) filed the instant application seeking to recover motor vehicles and real property from the respondents believed to be proceeds of crime. The interested parties also filed applications respectively asking the court to make orders in respect of their interests in the motor vehicles the subject of the forfeiture application prior to making orders for forfeiture of the vehicles to the State.

The Agency claimed that the respondents and their business entities and associates received funds fraudulently from National Youth Service (NYS) split in several transactions. The money received from NYS through their business entities and personal accounts was further intra-transferred within the same bank into accounts owned by their family members and associates held at the same bank. It was the Agency's case that it established that the respondents acquired the properties, the subject of the application, using proceeds of crime fraudulently obtained from the NYS and that it was in the interests of justice that the court should issue the orders of forfeiture.

Issues

i. Whether an application for and an order of forfeiture of property believed to be proceeds of crime was

a violation of the right to own property, right to fair hearing and fair administrative action.

ii. Whether a conviction was necessary before the issuance of an order for forfeiture of property shown to be proceeds of crime.

iii. What was the standard of proof required to establish that property in an application for forfeiture had been obtained from proceeds of crime?

Relevant provisions of the law

Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2009

Section 2 - Interpretation

"proceeds of crime" means any property or economic advantage derived or realized, directly or indirectly, as a result of or in connection with an offence irrespective of the identity of the offender and includes, on a proportional basis, property into which any property derived or realized directly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains or benefits derived or realized from such property from the time the offence was committed;

Section 92 - Making of forfeiture order

1) The High Court shall, subject to section 94, make an order applied for under section 90(1) if it finds on a balance of probabilities that the property concerned—

(c) has been used or is intended for use in the commission of an offence; or

(d) is proceeds of crime.

2) The Court may, when it makes a forfeiture order or at any time thereafter, make any ancillary orders that it considers appropriate, including orders for and with respect to facilitating the transfer to the Government of property forfeited to it under such an order.

3) The absence of a person whose interest in property may be affected by a forfeiture order does not prevent the Court from making the order.

4) The validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated.

Held

1. The argument by the Agency that by the time the court issued the ruling of December 19, 2018 an order had been issued and gazetted for the preservation of the motor vehicles in question was not controverted. Accordingly, the application for forfeiture could not be challenged on the basis that it was brought in disobedience of an order of the court. All the pleadings on record were there with the leave of the court.
2. There was no failure on the part of the Agency to carry out investigations in the instant matter. It had been deposed expressly for the Agency that it had carried out investigations into the acquisition of properties by the respondents.
3. From a reading of sections 2 and 92 of Proceeds of Crime and Anti-Money Laundering Act (POCAMLA), a conviction was not necessary, for the purposes of Part VIII of POCAMLA, in order for the court to make an order of forfeiture with respect to property shown to be proceeds of crime. Once it was established, on a balance of probabilities, that the property in question had been obtained from proceeds of crime, then an order for forfeiture could be made. It did not matter in whose hands the property in question was found. Nor did it matter that no one was ever convicted in respect of any

crime in connection with the property. The instant application was not premature, and it needed not wait for completion of the criminal cases against the respondents.

4. Article 40 of the Constitution of Kenya, 2010 (Constitution) protected the right of every person to own property in any part of Kenya. However, as provided under article 40(6), the protection of that right did not extend to property found to have been unlawfully acquired. Should the court find that the properties the subject of the application were proceeds of crime, then it would not be a violation of the right to property for the Agency to apply for, and for the court to issue, an order of forfeiture.
5. Article 47 of the Constitution provided that every person had the right to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair. The complaint with regard to the violation of the right to fair administrative action and fair hearing was unmerited. The complaint appeared as an afterthought, the respondents seeming to have determined, at a late stage in the proceedings, to approach their response to the forfeiture application by an assault on the preliminary applications made by the Agency in obtaining orders to investigate their accounts. That could not properly be done in the instant matter. But even if it could, that was an assault that was not sustainable. Section 118 and 121 of the Criminal Procedure Code under whose provisions the authority to search the respondents' accounts was obtained did not provide for notice to be issued to the parties concerned.
6. The instant proceedings presented the opportunity for the respondents to be heard with respect to the properties the subject of the application. The Agency was given the power, under Part VIII of POCAMLA, to lodge a civil claim for forfeiture of properties believed to be proceeds of crime. The respondents were given the right to respond to the claim before a court of law and present their position with regard to the lawfulness of their acquisition of the properties in question. Therefore, there had been no violation of the respondents' rights under the cited provisions of the Constitution.
7. The evidence placed before the court by the respondents did not demonstrate that they had the capacity to supply goods of the value of the money deposited in their accounts in the 2015-2018 period. The funds deposited in their account were therefore deposited there fraudulently, and the properties that they purchased in the period that they obtained the funds from NYS were therefore proceeds of crime.
8. The respondents were mere minnows in the entire scheme to rob the public. That, however, did not mean that they should not be pursued, through proceedings for the forfeiture of the properties purchased from the funds, for recovery of the public funds that went into their accounts. What was expected of the Agency and the other State agencies charged with investigation and prosecution of corruption offences, as well as with recovery of ill-gotten wealth, was that they would pursue the other beneficiaries with the same vigour and subject them to similar proceedings to recover the public funds lost in nefarious schemes such as were perpetrated at the NYS. The motor vehicles and real properties the subjects of the instant application were proceeds of crime and should be forfeited to the State.
9. Section 93 of POCAMLA was intended to protect third parties in the circumstances set out under its provisions. The Agency did not place any material before the court on the basis of which the court could conclude that the interested parties were involved in the offences out of which the property the subject of forfeiture was acquired, or that they knew that the motor vehicles were tainted properties at the time they acquired such interests.
10. There was a danger that a party who acquired property in circumstances similar to what was before the court could obtain financing on the security of such properties with a view to concealing the source of the properties or defeating forfeiture proceedings, and those who acquired such interests could be complicit. However, no such evidence had been placed before the court by the Agency. The interests

of the interested parties merited the protection of the court under section 93 of POCAMLA.

11. In the case of the motor vehicles registered in the name of the 2nd and 3rd respondents and the 1st interested party, though they were proceeds of crime, they would be excluded from the properties the subject of forfeiture to protect the interests of the 2nd interested party.
12. With regard to the motor vehicle that was used as security for a loan of Kes. 800,000 to the 1st respondent, the amount was held in the 1st respondent's account. The amount was not subject to forfeiture and was properly due for refund to the 2nd interested party. The motor vehicle was accordingly liable to forfeiture to the State. The funds in the 1st respondent's account would be released to the 2nd interested party.

Application partly allowed; respondents to meet the costs of the Agency and the interested parties.

Orders:

i. It was declared that the following properties were proceeds of crime:

c. Motor vehicle registration number [particulars withheld] Toyota Station Wagon, 2009 green in colour registered in the name of the 1st respondent and the 2nd interested party.

d. Motor vehicle registration number [particulars withheld] Toyota Station Wagon, 2016 blue in colour registered in the name of the 2nd respondent and the 1st interested party.

e. Motor vehicle registration number [particulars withheld] Toyota Pickup, 2016 silver in colour registered in the name of the 3rd respondent and the 1st interested party.

f. Title No. [particulars withheld] measuring 0.70HA situated within Trans Nzoia County registered in the name of Sylvia Ajiambo Ongoro but sold to the 2nd respondent vide sale agreement dated June 2, 2016.

g. Title No. [particulars withheld] being leasehold from the County Government of Nakuru for the term of 99 years from September 1, 2014, sold by New Hope for all Nations Church to the 2nd respondent vide sale agreement dated July 8, 2016.

h. Title No [particulars withheld] measuring quarter of an acre registered in the name of John Wachira Wahome but sold to the 2nd respondent vide sale agreement dated April 25, 2017.

i. Title No. [particulars withheld] approximate area 0.0840ha. Subdivision of [particulars withheld] sitated in Kiamunyi, Nakuru County registered in the name of Robin M. Aondo but sold to the 3rd respondent vide sale agreement dated October 28, 2016.

j. Title No [particulars withheld] approximate area 0.0450, subdivision of [particulars withheld] registered in the name of the 3rd respondent on July 1, 2016.

ii. It was declared that the following properties would be forfeited to the State and transferred to the Agency:

a. Motor vehicle registration number [particulars withheld] Toyota Station Wagon, 2009 green in colour registered in the name of the 1st respondent and the 2nd interested party.

b. Title No. [particulars withheld] measuring 0.70HA situated within Trans Nzoia County registered in the name of Sylvia Ajiambo Ongoro but sold to the 2nd respondent vide sale agreement dated June 2, 2016.

c. Title No. [particulars withheld] measuring 0.2305HA, being leasehold from the County Government of Nakuru for the term of 99 years from September 1, 2014, sold by New Hope for

all Nations Church to the 2nd respondent vide sale agreement dated July 8, 2016.

d. Title No. [particulars withheld] measuring quarter of an acre registered in the name of John Wachira Wahome but sold to the 2nd respondent vide sale agreement dated April 25, 2017.

e. Title No [particulars withheld] approximate area 0.0840ha. subdivision of P/No 3283 situate in Kiamunyi, Nakuru County registered in the name of Robin M. Aondo but sold to the 3rd respondent vide sale agreement dated October 28, 2016.

f. Title No [particulars withheld] approximate area 0.0450, subdivision of P/No 17217 registered in the name of the 3rd respondent on July 1, 2016.

iii. It was ordered that the amount of Kes. 800,000 held in the 1st respondent's account in Kenya Commercial Bank, Account Number [particulars withheld] would be released to the 2nd interested party.

58. Factors a court would consider before setting aside, varying or rescinding preservation orders

The court set out and determined circumstances under which preservation orders could be set aside, varied or rescinded. The court noted that the preservation orders were proper since it had been proven that the assets owned by the respondent could have been proceeds of crime.

Assets Recovery Agency v Jane Wambui Wanjiru & 2 others [2019] eKLR

Miscellaneous Application 53 of 2018

High Court at Nairobi — April 25, 2019

J N Onyiego, J

Civil Practice and Procedure *- orders - preservation orders – preservation orders during asset recovery – ex parte orders of preservation viz-a-viz the right to be heard – circumstances under which orders of preservation could be made – where there was reasonable suspicion that the property in question was a proceed of crime – whether the preservation orders that were in place were reasonably justified and therefore ought not to be varied – Proceeds of Crime and Anti-Money Laundering Act, section 82.*

Civil Practice and Procedure *- orders - preservation orders – preservation orders during asset recovery – variation of preservation orders – grounds for variation of preservation orders – elements to be proven before an order to vary preservation orders could be made – whether there was sufficient grounds and proof that the preservation orders ought to be varied – Proceeds of Crime and Anti-Money Laundering Act, section 89.*

Brief facts

The Assets Recovery Agency obtained *ex parte* preservation orders prohibiting the respondents (applicants) from transacting, withdrawing, transferring, using or engaging in any other dealings in respect of their private property. Upon gazettement of the orders and service of the application on the respondents, the respondents moved the court and sought orders that the freezing and preservation orders made against the applicant's private property be lifted or quashed for causing unnecessary hardship to the applicant, orders that caveats registered against the applicant's property be lifted and motor vehicles belonging to the applicant be released from the custody of the Director Criminal Investigations, Nairobi.

According to the applicants, the respondents had not demonstrated any reasonable grounds to believe that the properties preserved were either used or intended for use in the commission of crime or that they were proceeds of crime and therefore had not met the required threshold. Further, that the applicant's business stalled as a consequence of the frozen accounts thus jeopardizing their business transactions.

Issue

i. Whether the preservation orders which were in place were reasonably justified and therefore ought not to be varied.

Relevant provisions of the law

Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009

Section 82 - Preservation orders

(1) The Agency Director may, by way of an ex parte application apply to the court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in

any manner with any property.

(2) The court shall make an order under subsection (1) if there are reasonable grounds to believe that the property concerned—

(a) has been used or is intended for use in the commission of an offence; or

(b) is proceeds of crime.

(3) A court making a preservation order shall at the same time make an order authorising the seizure of the property concerned by a police officer, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order.

(4) Property seized under subsection (3) shall be dealt with in accordance with the directions of the court that made the relevant preservation order.

Held

1. An *ex parte* order issued under section 82 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) was a lawful order sanctioned by statutory law and which could not be subjected to *inter partes* at that stage for reasons that; if the respondent was alerted well in advance, the property subject of preservation could be disposed of or transferred to 3rd parties or concealed. However, the right to be heard on *ex parte* orders was also guaranteed under section 83 of POCAMLA which provided for service of the *ex parte* orders on the offended person who would then be at liberty to challenge the orders. In other words, the door was not sealed at the grant of *ex parte* orders.
2. Based on undisclosed source of information that led to a search being carried out in the applicants' house, four elephant tusks were recovered. That further information revealed that cash in the applicants' accounts and some of their assets could have been acquired through proceeds of crime. Pursuant to that allegation, the court had reasonable ground to grant the orders.
3. In the circumstances of the instant case, it was only fair and logical to conclude that there was a probability that the primary source of the money earned by the applicants could be as a result of trading in wild life trophies. As regards proof of reasonable suspicion, the same had to be grounded on existence of facts and not mere imagination or malice. Based on the information and materials placed before the court, the court was justified to issue the orders *ex parte*.
4. Reasons to justify variation of revision of *ex parte* preservation orders were well articulated under section 89 of POCAMLA. It was incumbent upon the applicant to prove existence of the elements set out under section 89. The burden of proof squarely lay on the applicant. The applicant had to also prove existence of an error or omission in the proceedings giving rise to the grant of *ex parte* orders which was lacking.
5. The applicants had not alleged that they had closed business. The wholesale and retail business had to be up and running. They could as well operate new accounts and continue with legitimate business. Further, prohibition orders against the sale of land held in their agents' names was not affected as forfeiture proceedings were ongoing. There was no loss suffered by preserving the properties pending the hearing of forfeiture proceedings presently filed under ACEC No 7/19.
6. Section 90 of POCAMLA provided that while preservation orders were in force, the Agency could apply to the High Court for forfeiture proceedings. Since the Agency had already filed forfeiture application, the applicants had a chance to challenge the orders. In accordance with section 84 of POCAMLA, a preservation order would expire ninety days after the date in which notice of the making of the order was published in the gazette. The ninety days period having not expired, the orders could not

automatically expire.

7. There were previous similar orders before the Magistrate's Court, however, disclosure of the same would not affect issuance of the impugned orders. Although good practice demanded disclosure of the same, those orders were not in force by the time the *ex parte* orders were issued hence nothing material to disclose. Regarding return of the alcoholic drinks, again it was not so material so as to affect the issuance of the *ex parte* orders.
8. It was unfortunate that the law had set such a low bar of proof of evidence for a party to obtain *ex parte* orders and even retention of the same by the court. That being the law, a court could only sympathise with the situation but enforce the law at such a low bar based on reasonable suspicion. The *ex parte* orders were regularly and lawfully issued and there were no sufficient reasons to warrant variation or review of the same.

Application dismissed.

59. Preservation orders could not lapse during the pendency of a forfeiture application

The application for variation was premised on the grounds that the preservation orders had lapsed, hence the subject property could be transferred during a business transaction. The court noted that preservation orders could not lapse during the pendency of a forfeiture application as per section 84 POCAMLA. Hence property subject to such orders could not be part of a business transaction or transfer.

Assets Recovery Agency v Samuel Wachenje & 9 others [2018] eKLR

Miscellaneous application 3 of 2016

(Formerly Miscellaneous Application 601 of 2015)

High Court at Nairobi — May 14, 2018

L A Achode J

Civil Practice and Procedure - *orders - preservation orders – Preservation orders during asset recovery – orders to vary/set aside/ rescind preservation orders – circumstances under which orders of preservation could be varied/ set aside/rescinded – claims of lapse of a preservation orders – claims that preservation orders had lapsed hence the subject property could be subjected to a business transaction - whether preservation orders could lapse during the pendency of a forfeiture application – whether property subject to preservation orders could be subjected to a legitimate business transaction – Proceeds of Crime and Anti-Money Laundering Act, sections 84 and 89*

Brief facts

There were two applications. The first application dated March 15, 2017, was filed by the 1st objector/ applicant. The second application was dated March 16, 2017 and was filed by the 2nd objectors/applicants. The application was premised on the grounds that the subject motor vehicles were registered in the name of the 1st and 2nd objector who had valid and legal logbooks and as such the respondent had no right to seize the same in execution of an order against other respondents who were strangers to the 1st and 2nd objectors. The applicants sought orders of variation and order for stay of execution of the orders dated December 31, 2015

The Agency submitted that the subject motor vehicles were proceeds of crime within the meaning of section 2 of the POCAMLA and the act of alleged sale or transfer of the said motor vehicles by the 3rd and 7th respondents amounted to money laundering contrary to sections 3, 4 and 7 of the Act.

Issues

i. Whether preservation orders could lapse during the pendency of forfeiture application

ii. Whether property subject to preservation orders could be subjected to a legitimate business transaction

Relevant provisions of the law

Proceeds of Crime and Anti-money Laundering Act, No. 9 of 2009

Section 84 - Duration of preservation orders

A preservation order shall expire ninety days after the date on which notice of the making of the order is published in the Gazette unless-

a. there is an application for a forfeiture order pending before the court in respect of the property subject to the preservation order;

Assets Recovery Agency v Samuel Wachenje & 9 others [2018] eKLR

b. there is an unsatisfied forfeiture order in force in relation to the property subject to the preservation order; or

c. the order is rescinded before the expiry of that period.

Section 89 - Variation and rescission of orders

1)"A court which makes a preservation order-

a. may, on application by a person affected by that order, vary or rescind the preservation order or an order authorising the seizure of the property concerned or other ancillary order if it is satisfied-

i. that the operation of the order concerned will deprive the applicant of the means to provide for his reasonable living expenses and cause undue hardship for the applicant; and

ii. that the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed, or transferred; and

b. shall rescind the preservation order when the proceedings against the defendant concerned are concluded."

Held

1. The applicant bore the burden of demonstrating that the preservation orders deprived them of the means to provide for reasonable living expenses. In addition, the applicants had to show that they suffered hardship as a result of the preservation order, which hardship outweighed the risks of dissipation of the property concerned.
2. The applicants failed to demonstrate that they relied on the subject motor vehicles for their daily reasonable expenses. All that the applicants did was to state that they were the legal and registered owners of the motor vehicles and as such the preservation orders over the motor vehicles could not stand. It was not enough to claim ownership of the subject motor vehicles, the applicants had to also show that the orders operated to their detriment.
3. Preservation orders could not lapse during the pendency of a forfeiture application by virtue of section 84 of POCAMLA. Hence, the applicants had to demonstrate that they lawfully acquired the motor vehicles, having conducted due diligence. The applicants had not tendered evidence before the instant court to indicate when the forfeiture application was filed, to demonstrate that there were no preservation orders in force at the time of purchase. The preservation orders issued by the court were still in force and had been since they were issued. The applicants could not purport to have purchased the subject vehicles when orders prohibiting any such dealings with the motor vehicles were in force.
4. The respondents knew that the subject motor vehicles were believed to be proceeds of crime and they should not have involved the motor vehicles in any business dealings until the determination of the forfeiture application. At no point was ownership transferrable because the subject motor vehicles were already under a caveat.
5. The applicants had failed to meet the threshold required under section 89 of POCAMLA for the instant court to grant the orders sought. It would therefore not be in the interest of justice to grant the orders sought.
6. The 1st objector's application for stay was made one year 6 (six) months after the orders of the instant court were issued. That was unreasonable delay. The stay had also been overtaken by events by the filing of the forfeiture application and as such could not be granted.

Applications dismissed, no orders as to costs.

60. The proper procedure to be applied when making an application for freezing orders

In determining an application for revision of freezing orders, the court noted that the lower court order resulted from irregular proceedings. The application for the 'freezing' order, being equivalent to a restraint and/or seizure order should have been brought under the provisions of Proceeds of Crime and Anti-Money Laundering Act.

Ruth Wendy Wambui v Republic [2016] eKLR

Miscellaneous Criminal Application 11 of 2016

High Court at Naivasha July 25, 2016

C Meoli, J

Civil Practice and Procedure *- orders – freezing orders – application for freezing orders during asset recovery proceedings – manner and procedure for application of freezing orders – which was the proper body tasked with the making of an application for freezing orders - what was the applicable law as far as restraint and seizure orders were concerned – Evidence Act, section 180; Criminal Procedure Code, sections 118 & 121; Proceeds of Crime and Anti-Money Laundering Act, sections 103, 104, 105, 106 & 107*

Brief facts

The applicant's Notice of Motion invoked the court's revision jurisdiction under section 362 of the Criminal Procedure Code. The subject of the application concerned the orders of the lower court that froze the applicant's bank account. According to the applicant, the freezing order violated the applicant's constitutional rights since section 180 of the Evidence Act only allowed for inspection of bank books. In addition, the application for such a freezing order ought to be made formally to accord a hearing to the subjects. It was argued that the proper body to make an application for a "freezing order" was the one created for this purpose under the Proceeds of Crime and Anti-money Laundering Act –the Assets Recovery Agency.

Issues

i. What was the applicable law as far as restraint and seizure orders were concerned?

ii. Which was the proper body tasked with making an application for freezing orders?

Held

1. There were two sets of provisions dealing with issuance of warrants to police officers to search accounts, retrieve documents, among others, namely section 180 of the Evidence Act on the one hand, and sections 103, 105, 106, 107 of the Proceeds of Crime and Anti - Money Laundering Act, on the other. While the provisions of section 180 of the Evidence Act, and sections 118 and 121 of the Criminal Procedure Code did not conflict, regarding the fundamental objects with corresponding provisions of the Proceeds of Crime and Anti-Money Laundering Act, as far as restraint and seizure orders were concerned, the provisions of the Proceeds of Crime and Anti-Money Laundering Act, must prevail.
2. POCAMLA assigned the role of making relevant applications for restraint and seizure to the Assets Recovery Agency. Secondly the law prescribed the application of the Civil Procedure to such applications. Equally, while police officers could apply for warrants to investigate accounts under section 180 of the Evidence Act, they could also, depending on the circumstances of the matter under investigation, apply to the court under Sections 103 – 107 of the Proceeds of Crime and Anti-Money Laundering

Act with regard to documentary material.

3. Sections 68 and 69 of the Proceeds of Crime and Anti-Money Laundering Act provided for a notice to the affected party, who could apply to vary or to rescind the restraint/seizure order. That meant that such a party was accorded a hearing with regard to the orders in question. The procedure adopted regarding the freezing of the applicant's bank accounts had not taken into account the provisions of the Proceeds of Crime and Anti-Money Laundering Act, particularly Sections 68 – 71. The Assets Recovery Agency could not have officers everywhere in the Republic, but exigency could not defeat the prescribed procedure under of the law.
4. The lower court order resulted from irregular proceedings. The application for the freezing order, being equivalent to a restraint and/or seizure order under sections 68 – 71 should have been brought under the provisions of Proceeds of Crime and Anti-Money Laundering Act, and, by the director of the Assets Recovery Agency or his/her appointed agent.
5. In the circumstances, the freezing orders by the lower court was set aside and it was directed that a fresh application be lodged in compliance with Proceeds of Crime and Anti-Money Laundering Act. That would give an opportunity to the applicant to respond to the material to be relied on in support of the application. Pending such application by the relevant party, the court's and decision thereon, the funds held in the stated bank accounts should not be interfered with by any party, including the applicant, the Investigating Officers or any other third parties acting on their behalf.

Application allowed.

61. The power to alienate land was delegated to the commissioner of lands in limited circumstances

Section 3 of the Government Lands Act (GLA), vests the power to alienate unalienated Government land in the President. The power to alienate was delegated to the Commissioner of Lands in limited circumstances for educational, charitable, sports and other purposes as set in the GLA.

Kenya Anti-Corruption Commission v Online Enterprises Limited & 4 others [2019] eKLR

Environment and Land Case 708 of 2015

High Court at Nairobi — January 25, 2019

M A Odeny, J

Land Law *– ownership – proof of ownership – lease/certificate of lease - where there was contention to a Lease or Certificate of Lease held –- whether the mere possession of a Lease or a Certificate of Lease by a person was enough to assert that he had good title Land Registration Act, 2012 sections 26 and 80(1)*

Land Law *– powers of the Commissioner of lands – power to alienate land – power to alienate unalienated Government land - where suit property - had been alienated and designated for particular purposes – where land had been reserved for Kenya Railways - what were the circumstances in which the Commissioner of lands could alienate government land - Government Lands Act (Cap. 280), section 3*

Brief facts

The plaintiff sued the defendants jointly and severally seeking for the following orders:

a) A declaration that the issuance of a lease by the 5th defendant to the 1st defendant over Kisumu Municipality Block 7/474 was null and void *ab initio* and ineffectual to confer any right, interest or title upon the 1st defendant in the first instance.

b) A declaration that the transfers and issuance of certificates of lease over Kisumu Municipality Block 7/474 to the 2nd, 3rd and 4th defendants were null and void and ineffectual to confer a good title upon any of them.

c) An order for rectification of the lands register by cancellation of the lease over Kisumu Municipality Block 7/474 and certificate of lease issued to the 3rd and 4th defendants so as to restore the suit property to the Corporation.

d) An order of permanent injunction against the 3rd and 4th defendants by themselves, their agents, servants or assigns restraining them from leasing, transferring, charging, taking possession, developing or in any other manner howsoever from dealing with Kisumu Municipality Block 7/474.

e) General damages as against the 1st and the 5th defendants only.

The land in question belonged to Kenya Railways Corporation after it had been reserved way back in 1935. Also the maps showed that the land belonged to the Corporation. After conducting further investigations, by a land administrator, it was established that the said parcel of land had been irregularly allocated to individuals.

Kenya Anti-Corruption Commission v Online Enterprises Limited & 4 others [2019] eKLR

The defendants also went ahead to claim that the 5th defendant was the Commissioner of Lands and that therefore his actions bound the Government. The plaintiff contended that the actions of the 5th defendant as Commissioner of Lands were illegal. The Government could not therefore be liable for the illegal acts of its servants as illegalities did not bind the office. The liability of the 5th Defendant was personal and could not be transferred to his office. It could not be said that he was acting in the course of his employment as the terms of employment did not include acting contrary to the law. Once he broke the law he took himself outside the protection of his office and became personally liable for his actions.

Issues

i. What were the circumstances in which the Commissioner of Lands could alienate government land?

ii. Whether the mere possession of a Lease or a Certificate of Lease by a person was enough to assert that he had good title

iii. Whether the 5th Defendant acted illegally and contrary to the provisions of the Government Lands Act (Cap. 280), the Kenya Railways Corporation Act (Cap. 397) and the State Corporations Act (Cap. 446) when he purported to issue a lease over the suit property to the 1st defendant.

Relevant provision of the laws;

Section 26 of the Land Registration Act

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

Section 80 (1) of the Land Registration Act, 2012

The court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

Section 7 of the Government Lands Act, Cap. 280

The Commissioner or an officer of the Lands Department may, subject to any general or special directions from the President, execute for and on behalf of the President any conveyance, lease or licence of or for the occupation of Government lands, and do any act or thing, exercise any power and give any order or direction and sign or give any document, which may be done, exercised, given or signed by the President under this Act: Provided that nothing in this section shall be deemed to authorize the Commissioner or such officer to exercise any of the powers conferred upon the President by sections 3, 12, 20 and 128.

Held

1. In order to determine the question whether the lease held by the 1st defendant was valid, it had to be demonstrated that it was properly acquired. It was not enough that one waves a Lease or a Certificate of Lease and assert that he had good title by the mere possession of the Lease or Certificate of Lease. Where there was contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, had to demonstrate, through evidence, that the Lease or Certificate of Lease that he held, was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition was material and important especially when there were doubts

regarding the process. The assertion of the defendants that they were innocent purchasers who were not aware of the fraudulent transaction did not hold water as the purpose of section 26 of the Land Registration Act, was to protect the real title holders from the unscrupulous persons.

2. Under the Government Lands Act (Cap. 280, Laws of Kenya) the Commissioner of Lands could only make grants or dispositions of any estates, interests or rights in over unalienated government land. (Section 3). The two parcels of land among others had been alienated and designated for particular purposes. It was not open for the Commissioner of Lands to re-alienate the same. So the alienation was void a*b initio*.
3. The Commissioner of Lands had no authority to alienate the suit land as section 3 of the GLA, vested the power to alienate unalienated Government land in the President. The power to alienate was delegated to the Commissioner of Lands in limited circumstances for educational, charitable, sports and other purposes as set in the GLA. None of the exceptions set out empowered the 1st defendant to alienate the suit property to the 2nd defendant. The 5th defendant acted illegally and contrary to the provisions of the Government Lands Act (Cap. 280), the Kenya Railways Corporation Act (Cap. 397) and the State Corporations Act (Cap. 446) when he purported to issue a lease over the suit property to the 1st defendant.
4. The 5th defendant had no authority to alienate land that had been reserved for Kenya Railways as had been proved by the evidence and the documents produced. The defendants irregularly, fraudulently and procedurally registered the suit land in their names.

Judgment entered for the plaintiff against the defendant; cost of suit to be paid by the defendants.

Bail and Bond Terms

BAIL AND BOND TERMS

62. Attaching stringent conditions to the grant of bail for the petitioner not to set foot in the offices of the County Government of Kiambu whilst the trial was ongoing was not tantamount to a removal of the Governor from office.

The petitioners in this case challenged the imposition of stringent bail conditions imposed against the Ist Applicant in his capacity as the Governor of the County of Kiambu barring him from setting foot into the County Offices pending the hearing and determination of the trial. The court held that such imposition of stringent bail terms was not tantamount to removal of a Governor from office.

Ferdinand Ndung'u Waititu Babayao & 12 others v Republic [2019] eKLR

Anti-Corruption Revision No. 30 of 2019

High Court at Nairobi — August 8, 2019

G W N - Macharia, J

Devolution *– governors – removal of governors from office – procedure for the removal of governors from office - claim that barring of governors from accessing their offices pending their prosecution for corruption offences amounted to removal from office - whether the barring of a governor from accessing his/her office pending his prosecution for corruption offences amounted to his removal from office - Constitution of Kenya, 2010, article 181; County Governments Act, 2012, section 33; Anti-Corruption and Economic Crimes Act, 2003 section 62(6).*

Civil Practice and Procedure *– revision – revision application to the High Court – supervisory jurisdiction of the High Court – application for revision to call for and examine the record of any criminal proceedings before any subordinate court – what were requirements to be met before filing an application for revision to the High Court as matter involving the involving the interpretation of the Constitution and Statutory law – Constitution of Kenya 2010, article 165 (6) and (7); Criminal Procedure Code, sections 362 & 364.*

Constitutional Law *– fundamental rights and freedoms – rights of arrested persons – right to bail - what were the factors courts considered when exercising discretion whether or not to grant bail pending trial - Constitution of Kenya, 2010, article 49(1)(h).*

Jurisdiction *– jurisdiction of High Court – supervisory jurisdiction of the High Court - jurisdiction to interfere with the exercise of discretion by trial courts - when could the High Court interfere with the exercise of discretion by a trial court to call for and examine the record of any criminal proceedings before any subordinate court.*

Brief facts

The applicants were charged with various counts of corruption charges at the Anti-Corruption and Economic Crimes Court. Following their plea, they were each admitted to bail/bond terms. The 1st, 3rd and 4th Applicants were to either pay cash bail of Kes. 15,000,000/- or bond of Kes. 30,000,000 with a surety of a similar amount. For the 2nd and 5th applicants cash bail was set at Kes. 4,000,000/- or bond of Kes. 10,000,000/- with a surety of a similar amount. With regards to the 6th, 7th, 8th, 9th and 10th applicants their cash bail was set at Kes. 1,000,000/- or bond of Kes. 3,000,000/- with a surety of a similar amount. The court also set further conditions that the Applicants had to comply with as part of their admission to bond or bail. The 1st applicant, Ferdinand Waititu (then Governor Kiambu County) was barred from

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accessing his office until his criminal case was heard and determined. Equally accused persons who were employees of the county were also barred from accessing their offices during the pendency of the criminal Case. The rest of the accused were also barred from setting foot in Kiambu County Offices pending full trial. All accused were required to deposit their travelling documents with the court to minimize the risk of the accused travelling out of the court's jurisdiction without leave of court.

They were all dissatisfied with the decision and filed this application urging the High Court to exercise its supervisory powers as laid out under article 165(6) of the Constitution and section 362 of the Criminal Procedure Code. They were uniformly aggrieved at the amount of bail that was set by the trial magistrate and urged the court to revise the same. Further, the 1st applicant was aggrieved by the term of the bond that limited his access to his office.

Issues

i. Whether the court had jurisdiction to entertain the application.

ii. Whether the trial court erred in imposing a condition to the bail terms that the 1st applicant does not set foot in his office pending the hearing and determination of the trial.

iii. Whether the bail terms imposed on the applicants not to set foot in the offices of the County Government of Kiambu whilst the trial was ongoing were harsh and excessive.

Relevant provisions of the law

Constitution of Kenya, 2010

Article 181 - Removal of a county governor

1. A county governor may be removed from office on any of the following grounds–

c. gross violation of this Constitution or any other law;

d. where there are serious reasons for believing that the county governor has committed a crime under national or international law;

e. abuse of office or gross misconduct; or

f. physical or mental incapacity to perform the functions of office of county governor.

2. Parliament shall enact legislation providing for the procedure of removal of a county governor on any of the grounds mentioned in clause (1).

Article 165 – High Court

(5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

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Criminal Procedure Code (Cap. 75)

Section 362 - Power of High Court to call for records

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

Held

1. The instant matter was not a matter in which the applicants had been convicted. It was neither a matter that had arisen out of a concluded issue. It was an interlocutory issue sought to be determined in the course of the trial. An appeal therefore did not lie and in light of the issues raised before the court, the court found that the application was an appropriate case for the court to exercise its supervisory jurisdiction conferred under section 362 and 364 of Criminal Procedure Code.
2. The supervisory jurisdiction of the court was conferred upon the court under section 362 and 364 of the Criminal Procedure Code. Section 362 gave the High Court power to 'call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.'
3. That provision was buttressed by article 165(6) and (7) of the Constitution. Article 165 crystallized the purpose of the revisionary jurisdiction of the High Court as in furtherance of its supervisory jurisdiction over the subordinate courts.
4. In as much as State Officers were exempt from suspension from office because the Constitution provided for a mechanism for their removal, that statement in the legislation was against the spirit and letter of Chapter Six of the Constitution. That was because section 62(6) of ACECA ought to be understood to be restating the supremacy of the Constitution. Similar sentiments were restated under sections 63(4) and 64(2) of ACECA. To that extent, since the Constitution provided for mechanisms of removal or vacating of such state offices no other law would supersede it.
5. In respect to a governor, the procedure for removal or vacating of office was provided under article 181 and 182 of the Constitution as read with section 33 of the County Government Act.
6. The instant case was one where a governor was charged with criminal offences under ACECA alongside other persons. Together with his co-accused a condition was set that they should not set foot into the offices of the County Government of Kiambu whilst the trial was on-going. The court having aligned itself to the supremacy of the Constitution held that attaching conditions to the grant of bail was not tantamount to a removal of the Governor from office.
7. The trial court considered one key factor in granting bail; which was the likelihood of interference with witnesses due to the relationship the accused persons would have with the witnesses. That was buttressed by the condition barring them from contacting the witnesses. The question that the court registered was why that condition should apply to the rest of the accused persons and not the 1st applicant.
8. The simple rationale was premised on the charges that the accused persons faced. Without restating the charges, it was clear that they concerned either abuse of office, dealing with property of the County government, engaging in fraudulent procurement practices, fraudulent acquisition of public property or money laundering all revolving around the County Government of Kiambu.

9. In as much as the accused persons remained innocent until otherwise proven, it would make a mockery, not only to the people of the County of Kiambu but to the letter and spirit of the Constitution that persons charged with such weighty offences could be allowed to go back to the office to continue with dealings that they were alleged to have committed against the law. Furthermore, the objects and purpose of ACECA could be glimpsed from its preamble which stated that the Act was meant to provide for the prevention, investigation and punishment of corruption, economic crime and related offences and for matters incidental thereto and connected therewith.

10. It was clear that the drafters of the Constitution intended to ensure that corruption did not infiltrate public offices; and in there lay an indication that accountability was a key tenet of leadership and integrity. The 1st applicant had been charged in court because of the doubt the public had in his integrity. Until such a time that he was vindicated or convicted, he was yet to fulfil his duty to account for the alleged breach of the public trust entrusted in him under article 73 of the Constitution. Therefore,, absurdity would reign in if the court allowed him to go back to the office to continue executing his duties.

11. Article 73(1) and (2) of the Constitution clearly laid out the responsibilities of leadership and the guiding principles of leadership and integrity which applied to the 1st Applicant as a State Officer.

12. It was clear then that the 1st applicant was required to act selflessly in the conduct of his public duty demonstrating objectivity and impartiality in his decision making by ensuring that he was not influenced by nepotism, favouritism, other improper motives or corrupt practices. He was also expected to exercise his authority while paying special cognizance to the fact that he was entrusted with the public trust and he was therefore to demonstrate respect for the people, bring honour to the Nation and dignity to the office while ensuring that the public's confidence in the integrity of the office endured or was promoted.

13. Whilst once again bearing in mind the principle of presumption of innocence until proven guilty, it was clear that the charges facing the 1st applicant were antithetical to the letter and the spirit of the Constitution. No doubt, the Constitution confered upon a trial court or the instant court the power to set such conditions as it deemed reasonable when admitting an accused person to bail. That resonated with article 49(1)(h) of the Constitution on arrested person's right to bail.

14. A trial court was therefore called upon in granting bond or bail to set reasonable conditions that an accused person must comply with. In that case, the court below issued several conditions, with only one being in contention namely; denying the 1st applicant access to the Kiambu County Government offices.

15. The Judiciary in its Bail and Bond Policy Guidelines' general principles stated, inter alia, that bail or bond conditions should be reasonable given the importance of the presumption of innocence. Further, that the conditions should be appropriate to the offence committed and take into account the personal circumstances of the accused person. Therefore, in each case what was reasonable ought to be determined by reference to the facts and circumstances prevailing in the case and the court must ensure that it balances the rights of the accused person, the interest of justice and the rights of the victims.

16. At paragraph 4.9 the Guidelines set out factors to consider when granting bail or bond generally amongst them being the nature of the charges, the likelihood of interfering with the witnesses and the relationship between the accused and potential witnesses particularly where he stands in a position of influence. The Guidelines urges the court to attach suitable bond or bail conditions to ensure that the relationship between the accused and potential witnesses does not undermine the interests of justice.

17. After considering the nature of the charges, the whereabouts of potential witnesses, the source of evidence and the position of influence held by the 1st applicant, it was reasonable for the trial court

to attach the condition that the 1st applicant will not access the Kiambu County Government offices. In the respect of the 1st Applicant he was placed on such a high pedestal that his office required him to execute his duties while beyond reproach. The charges facing him were so grave that owing to his position, the weight of the offence and the public interest there was demand that stringent terms of bail be attached. The instant court therefore found no fault in the decision of the learned magistrate in barring the 1st Applicant, alongside the other accused persons from setting foot into the offices of the County Government of Kiambu.

18. The court was alive to the fact that the 1st applicant may have been arrested unexpectedly and may have left behind personal belongings he may require for his personal use. For that purpose only, the court shall accommodate him on a single date he elects to be accompanied by the investigating officer with the authority of the Secretary/CEO EACC to go back to the office. Thereafter, he must keep off the office until the conclusion of the trial.

19. The court also bore in mind what impact the absence of the 1st applicant would have in the running of the County Government of Kiambu. Whereas, that was not a question the court was asked to determine; such a case ought to be considered as a case of "moral ill health". The court was also alive to the fact that other counties had suffered similar impacts when their governors had fallen ill and had been absent from office. The course taken by those Counties in such instances should apply to the County of Kiambu.

20. Additionally, the court took solace in the fact that there were mechanisms and officers in place, namely; the County Executive Committee and Deputy Governor who could ably carry out the management and coordination of the functions of the County administration and its departments. They were required to be accountable to the people of Kiambu through the provision of full and regular reports to the County Assembly. That mandate was provided under article 179 of the Constitution. The best that both the 1st applicant and the prosecution could do was to mobilize all resources and ensure that the trial was expedited.

21. In the premises, the court found no irregularity, impropriety, illegality or incorrectness in the order of the trial court in directing the 1st applicant to not set foot in the offices of the County Government of Kiambu whilst the trial was ongoing save for the window accorded by this court to go and collect any personal belongings.

22. The court was under a duty to consider the grant of bail for each individual accused person, examine their circumstances before setting commensurate bond or bail terms and attaching conditions. It was trite that the setting of bond or bail amounts was an exercise of discretion by the trial court and before interfering with that exercise the court must be cautious. Therefore, with regards to the 1st applicant the amount of Kes. 15,000,000/ cash bail or bond of 30,000,000/- with a surety of a similar amount was appropriate, more so, in view of the court's observation regarding the reasons the conditions to the grant of bail were attached.

23. With regards to the 3rd applicant it was clear as submitted by Mr. Njoroge that he was not initially placed in the 1st tranche. He was only grouped after the court deliberated whether to include the 5th accused in this group. It was also apparent that the 3rd applicant was charged in one count which was serious. In view therefore, the Court set aside the order of the trial court requiring him to deposit Kes. 15 million cash bail or bond of Kes. 30 million or a surety of a similar amount and substituted the same with a cash bail of Kes. 2,000,000/- or bond of Kes. 5,000,000/- with a surety of a similar amount.

24. With regards to the 4th applicant, the court considered his circumstances. He was charged alongside

the 5th accused as the directors of the 11th accused corporation. Both were spouses and the toll of meeting their collective bail or bond terms must be outsized in their circumstances. That being the case it seemed only prudent to set similar bond terms. The court also revised the terms of bail set by the learned magistrate and substitute them with a cash bail of Kes. 4,000,000/- or bond of Kes. 10,000,000/- with a surety of a similar amount.

25. As regards the 2nd, 5th, 6th, 7th, 8th, 9th and 10th applicants, having in mind the offences charged and their respective circumstances, the court had no reason to disturb the bail/bond terms granted.

26. The sum total of the decision was that the application lacked merit.

Application was dismissed save for the variation of bail terms for the 3rd and 4th applicants.

Ferdinand Ndung'u Waititu Babayao v Republic [2019] eKLR

63. Granting bail on terms that a county governor, who faced corruption charges, would not access his office until the conclusion of the corruption case is lawful.

Barring access to office as a condition attached to bail/bond term does not equate to removal from office of Governor to warrant application and reliance to section 62 (6) of ACECA

Ferdinand Ndung'u Waititu Babayao v Republic

Civil Appeal No. 416 of 2019

Court of Appeal at Nairobi — December 20, 2019

D K Musinga, S Gatembu Kairu & A K Murgor, JJA

Constitutional Law *– fundamental rights and freedoms - rights of an arrested person - right to bail - conditions attached to the grant of bail - reasonableness and lawfulness of conditions requiring an accused person not to access his office until the conclusion of the corruption case and orders for cash bail or bond- Constitution of Kenya 2010, article 49(1)(h); Anti-Corruption and Economic Crimes Act, No. 3 of 2003, sections 62(6) and 62(1).*

Statutes *- interpretation of statutory provisions - scope of applicability of sections 62(6) and 62(1) of the Anti-Corruption and Economic Crimes Act (ACECA) - where section 62(1) of ACECA allowed for the suspension on half pay of public officers facing corruption and economic crimes charges while section 62(6) of ACECA provided that section 62 of ACECA was inapplicable to public offices for which the Constitution provided for the mode of removal of the public officer - whether the provisions were applicable to the grant of bail to an accused person, a county governor facing corruption charges, on terms that required him not to access his office until the case was concluded - Constitution of Kenya 2010, article 49(1)(h); Anti-Corruption and Economic Crimes Act, No. 3 of 2003, sections 62(6) and 62(1).*

Brief facts

The Governor of Kiambu County, (the appellant) and 12 others were arraigned before the Anti-Corruption Court at Nairobi in Anti-Corruption Case No. 22 of 2019. The appellant was released on bail with terms including an order that he would not access his office until the criminal case was heard and determined. He sought a revision of the courts decision.

In determining the revision application, the High Court held inter alia that attaching terms to the grant of bail was not tantamount to removing a governor from office and that the orders for Kes. 15,000,000 cash bail or bond of Kes. 30,000,000 with a surety of similar amount were not harsh or excessive. The application for revision was dismissed. An appeal was lodged against the High Court decision at the Court of Appeal.

Issues

i. Whether the grant of bail on terms that an accused person, a county governor facing corruption charges, would not access his office until the corruption case was concluded was unlawful and unconstitutional on grounds that it amounted to the removal of a governor from office in a manner not contemplated by the law.

ii. Whether a reading of sections 62(6) and 62(1)of the Anti-Corruption and Economic Crimes Act, which provided for the suspension on half pay of public offices facing corruption and economic crimes charges and the inapplicability of that suspension to public offices for which the Constitution provided for the mode of removal of the office holder, meant that court orders requiring a county governor not to access his office until the conclusion of a corruption case in which that governor was an accused

person, could not be issued.

iii. Whether it was reasonable to grant bail to a county governor who faced corruption charges on terms that he would not access his office until the corruption case was concluded.

iv. Whether it was reasonable for a trial court to exercise discretion and grant bail, in a corruption case, on terms which included orders for Kes. 15,000,000 cash bail or bond of Kes. 30,000,000 with a surety of similar amount where the subject matter of the corruption case related to a sum of Kes. 51,249,000.

Relevant provisions of the law

Anti-Corruption and Economic Crimes Act, No. 3 of 2003

Section 62 - Suspension, if charged with corruption or economic crime

(1) A public officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge until the conclusion of the case...

(6) This section shall not apply with respect to an office if the Constitution limits or provides for the grounds upon which the holder of the office may be removed or the circumstances in which the office must be vacated...

Held

1. The case at the trial court was a criminal case and the revision of the trial court's ruling on bail was a criminal revision at the High Court. However, the appeal filed against the criminal revision was a civil appeal. It was noteworthy that appeals dealing with constitutional issues could be civil in nature. The appeal would not be struck out as filing it as a civil appeal as opposed to a criminal appeal was a matter of form rather than substance and it would be contrary to the spirit and intent of article 159(2)(d) of the Constitution.
2. Article 49(1)(h) of the Constitution provided that an arrested person had the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there were compelling reasons for that person not to be released. Under section 62(1) of ACECA, a public officer facing corruption or economic crime charges had to be suspended on half pay until the conclusion of the case but under section 62(6) of the same Act, the provision relating to suspension on half pay did not apply to offices to which the Constitution provided for the removal of the office holder.
3. Neither the trial court nor the High Court purported to remove or suspend the appellant from the office of Governor, Kiambu County and therefore section 62(6) of ACECA was inapplicable to the matter. The High Court could not be said to have failed to apply the omitted case cannon of statutory interpretation in affirming the terms on grant of bail.
4. The issue about the constitutionality of section 62(6) of ACECA was not before the Court of Appeal for determination. The court could not offer an opinion on it.
5. Considering the nature of the charges that the appellant was facing, the circumstances relating to the commission of the offence and the fact that some prosecution witnesses were county staff answerable to the appellant, the prosecution, apprehension of the possibility that the appellant could interfere with the witnesses and thereby compromise the case, if not barred from accessing his office, was not farfetched.
6. The statutory function and responsibilities of county governor, the structure of governance and administrative functions of a county, were such that the impugned bail terms were unlikely to paralyze the operations of Kiambu County.
7. The High Court correctly held that the grant of bail by a trial court was an exercise of discretion which it could not interfere with unless it was shown that the decision was plainly wrong or granted without considering the relevant factors. The High Court was right in holding that the orders for Kes.

15,000,000 cash bail or bond of Kes. 30,000,000 with a surety of similar amount were appropriate and not harsh or excessive.

Appeal dismissed with costs to the respondents.

64. Barring a Governor from accessing his/her office pending his/her prosecution for corruption offences does not amount to removal from office.

Limiting the appellant's access to the county offices of Kiambu County pending the determination of trial did not equate to his removal from office as contemplated under article 181 of the Constitution.

Ferdinand Ndung'u Baba Yao Waititu v Republic

Petition 2 of 2020

Supreme Court of Kenya October 22, 2021

MK Ibrahim, SC Wanjala, NS Ndungu, I Lenaola & W Ouko, SCJJ

Devolution *– governors – removal of governors from office – claim that barring of governors from accessing their offices pending their prosecution for corruption offences amounted to removal from office - whether the barring of a governor from accessing his/her office pending his prosecution for corruption offences amounted to his removal from office - Constitution of Kenya, 2010, article 181; County Governments Act, 2012, section 33; Anti-Corruption and Economic Crimes Act, 2003 section 62(6).*

Civil Practice and Procedure *– appeals – appeals to the Supreme Court – appeals as of right in matters involving the interpretation or application of the Constitution - what were the requirements to be met for one to appeal to the Supreme Court as a matter involving the interpretation or application of the Constitution - Constitution of Kenya, 2010, article 163(4)(a).*

Jurisdiction *– jurisdiction of the Supreme Court – jurisdiction to determine appeals over interlocutory decisions - what were the circumstances in which the Supreme Court could allow appeals over interlocutory decisions.*

Constitutional Law *– fundamental rights and freedoms – rights of arrested persons – right to bail - what were the factors courts considered in exercising discretion whether or not to grant bail pending trial - Constitution of Kenya, 2010, article 49(1)(h).*

Jurisdiction *– jurisdiction of appellate courts – jurisdiction to interfere with the exercise of discretion by trial courts - when could an appellate court interfere with the exercise of discretion by a trial court.*

Brief facts

The appellant was arrested and charged with three counts of alleged dealing with suspect property and a charge of conflict of interest. The appellant denied the charges and applied for admission to bail and/or bond. The trial court granted bail by ordering that the appellant could either pay a cash bail of Kes.15,000,000 or a bond of Kes.30,000,000 with surety of a similar amount. Further, the trial court went on to attach conditions to the grant of the bail terms by stating that the appellant could not access his public office until the hearing and determination of his case and; that the appellant and all his co-accused were also to deposit their travel documents with the court and were not to contact witnesses either directly or indirectly or in any other way tampering with the exhibits or any evidence.

Aggrieved by the orders made by the trial court, the appellant filed a revision of the trial court's order relating to the bail and bond terms. In the revision application, the appellant, inter alia, stated that the bail and bond terms were excessive, issued per incuriam and the terms amounted to a constructive denial of bail and bond without compelling reasons. The appellant further claimed that the bail terms estopped him from attending to his constitutional office and that the trial court's orders constituted constructive

removal from office.

The High Court found that it had supervisory and revisionary jurisdiction over interlocutory issues sought to be determined in the course of trial, such as the one that was before the court. The High Court further found that attaching conditions to the grant of bail was not tantamount to removal of the appellant from office. Aggrieved further by the decision of the High Court, the appellant moved to the Court of Appeal. Upon considering the appeal, the Court of Appeal upheld the High Court's decision and dismissed the appeal. Aggrieved, the appellant filed the instant appeal.

Issues

i. Whether the barring of a governor from accessing his/her office pending his/her prosecution for corruption offences amounted to his removal from office.

ii. What were the requirements to be met for one to appeal to the Supreme Court as a matter involving the interpretation or application of the Constitution?

iii. What were the circumstances in which the Supreme Court could allow appeals over interlocutory decisions?

iv. What were the factors courts considered in exercising discretion whether or not to grant bail pending trial?

v. When could an appellate court interfere with the exercise of discretion by a trial court?

Relevant provisions of the law

Constitution of Kenya, 2010

Article 181 - Removal of a county governor

1. A county governor may be removed from office on any of the following grounds–

a) gross violation of this Constitution or any other law;

b) where there are serious reasons for believing that the county governor has committed a crime under national or international law;

c) abuse of office or gross misconduct; or

d) physical or mental incapacity to perform the functions of office of county governor.

2. Parliament shall enact legislation providing for the procedure of removal of a county governor on any of the grounds mentioned in clause (1).

Held

1. Article 163(4)(a) of the Constitution of Kenya, 2010, (Constitution) had to be seen to be laying down the principle that not all intended appeals lay from the Court of Appeal to the Supreme Court. Only those appeals that arose from cases involving the interpretation or application of the Constitution could be entertained by the Supreme Court. It was not the mere allegation in pleadings by a party that clothed an appeal with the attributes of constitutional interpretation or application.

2. The appeal had to originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant had to be challenging the interpretation or application of the Constitution that the Court of Appeal used to dispose of the matter in that forum. Such a party had to be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation of the Constitution, it could not support a further appeal to the Supreme Court under article 163(4)(a) of the Constitution.

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3. The substantive matter as originally filed was pending before the trial court and what was before the instant court was the subject of an interlocutory appeal. The court generally lacked jurisdiction to entertain appeals from interlocutory decisions. The right of appeal against interlocutory decisions was available to a party in a criminal trial but should be deferred, and await the final determination by the trial court. A person seeking to appeal against an interlocutory decision had to file their intended notice of appeal within 14 days of the trial court's judgment. However, exceptional circumstances could exist where an appeal on an interlocutory decision could be sparingly allowed. They included;
   a) where the decision concerned the admissibility of evidence, which, if ruled inadmissible, would eliminate or substantially weaken the prosecution case;
   b) when the decision was of sufficient importance to the trial to justify it being determined on an interlocutory appeal; and
   c) where the decision entailed the recusal of the trial court to hear the cause.
4. Although what had triggered the instant appeal was a question on the exercise of judicial discretion in issuing bail terms during the pendency of the trial, the court assumed jurisdiction as the question of whether judicial exercise of discretion had been done in accordance with established principles of law was one which was of sufficient importance in a trial and if not well exercised, provided justification for it to be determined in an interlocutory appeal. In addition, it was possible for bail terms imposed to be final in nature and an accused person, invoking article 49(i)(h) of the Constitution had to ventilate the issue before the close of his trial.
5. The constitutional right to bail as guaranteed under the Constitution was subject to being granted on reasonable conditions pending trial or unless there were compelling reasons not to do so and did not mean that the right was absolute. In the end, the discretion to grant bail and determine the conditions rested with the court. In exercising that discretion, the court however had to seek to strike a balance between protecting the liberty of the accused person and safeguarding the proper administration of justice.
6. The trial court, at the point of consideration of the application of bail, was not called upon to make a determination on the interpretation of the provisions of section 62(6) of the Anti-Corruption and Economic Crimes Act. Section 62(6) prohibited the suspension of a public officer charged with corruption or economic crime where the Constitution already provided a method for removal, which in the case of a governor, was provided for under article 181 of the Constitution.
7. Imposing conditions subject to the release of an accused person, the appellant, barring him from accessing his office pending his prosecution for the corruption offences, did not equate to his removal from office, since he remained Governor. There was therefore no need for the application of section 62(6) of the Anti-Corruption and Economic Crimes Act. In addition, the constitutionality or otherwise of section 62(6) could not have been addressed in a bail/bond ruling nor in a revision ruling. Neither could it be properly invoked at both stages of the proceedings.
8. Article 49(1)(h) of the Constitution provided that an arrested person could be released on bond or bail on reasonable conditions and it entrenched the right of the arrested person to be released on bail subject to the imposition of reasonable conditions. The right to bail was an inalienable right and could only be restricted by the court if there were compelling reasons for an accused not to be released. In granting bail or bond, the trial court was called upon to exercise its discretion and if there were no compelling reasons to deny an accused person bail or bond, the trial court should exercise its discretion in favour of the accused.

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9. When it came to the issue of whether to grant or refuse bail pending the trial of an accused by the trial court, the law had set out some criteria which the trial court should consider in the exercise of its judicial discretion to arrive at a decision. The criteria included among others, the following; -
   a) the nature of the charges;
   b) the strength of the evidence which supported the charge;
   c) the gravity of the punishment in the event of conviction;
   d) the previous criminal record of the accused, if any;
   e) the probability that the accused would not surrender himself for trial;
   f) the likelihood of the accused interfering with witnesses or suppressing any evidence that could incriminate him;
   g) the likelihood of further charges being brought against the accused;
   h) the probability of guilt;
   i) detention for the protection of the accused; and
   j) the necessity to procure medical or social reports pending final disposal of the case.
10. Limiting the appellant's access to the county offices of Kiambu County pending the determination of trial did not equate to his removal from office as contemplated under article 181 of the Constitution. Barring a governor from accessing his office pending his trial for corruption charges could not be equated to removal from office. The trial court merely attached a condition to the bail granted for the appellant not to access his office and did not order his removal from office. Removal from office had to be undertaken by the procedure set out in section 33 of the County Governments Act. The procedure was only invoked, not through the ruling of the trial court but by notice to the Speaker of the Kiambu County Assembly which led to the eventual removal of the appellant as Governor.
11. Discretion by a trial court could be exercised to limit the enjoyment of bail if the accused was likely to interfere with witnesses or suppress the evidence against him. There was no reason to fault the trial court in exercise of that discretion noting the specific circumstances of the case facing the appellant and where his office could be the source of incriminating evidence and staff under him being witnesses. If the appellant was dissatisfied by any condition in the bail ruling, the proper procedure was to seek a review at any stage of his trial and show that the condition was no longer efficacious and ought to be lifted.
12. The appellant clutched onto the misguided notion of constructive removal, a mirage, when all he had to do was focus on bail terms and conditions and use lawful means to challenge the same. Removal was later conducted, and he was no longer in office. The trial court's ruling could not therefore be said to be the basis for his eventual removal, and as a basis for challenging the bail ruling.
13. The trial court considered the nature of the corruption charges and considered the possibility of the appellant interfering with witnesses, who were his subordinates at the time. The need to preserve the integrity of the evidence of the witnesses by finding that it would not be right if the witnesses were to be intimidated by them being suppressed was therefore a valid consideration. The trial court in the event properly considered the usual criteria a court took into account while imposing bail terms. The bail terms imposed were sufficient.
14. An appellate court should not interfere with the exercise of the discretion of a trial court unless it was satisfied that the trial court misdirected itself in some matter and as a result arrived at a wrong decision, or unless it was manifest from the case as a whole that the trial court was clearly wrong in the exercise of its discretion and that as a result there had been misjustice.

15. The appellant had not demonstrated how the exercise of discretion was not judicious and how the High Court and the Court of Appeal erred in failing to interfere with the exercise of the trial court's discretion. There was no reason to interfere with the Court of Appeal's findings.

Appeal dismissed.

Order

Appellant to bear the costs of the appeal.

65. Barring a County Governor from accessing the County offices while being charged with corruption or economic crimes was constitutional, reasonable and in the public interest

A bail term barring a Governor from accessing County offices while being charged with corruption or economic crimes is constitutional, reasonable and in the public interest.

Moses Kasaine Lenolkulal v Republic [2019] eKLR

Criminal Appeal No. 109 of 2019

Court of Appeal at Nairobi — December 20, 2019

DK Musinga, SG Kairu & AK Murgor, JJA

Constitutional Law *- Bill of rights - rights of arrested persons - right to bail or bond – application for revision of bail and bond terms - where the accused was a state officer who was barred from accessing his office as part of the bail terms imposed - whether there was justification to decline to review bail and bond terms under article 49 (1)(h) of the Constitution - whether the bail terms imposed on the appellant were unconstitutional, unreasonable and unlawful because they were applied without appreciation of the mandatory requirements of section 62 (6) which provided that a constitutional office holder could not be suspended, if charged with corruption or economic crime where the Constitution already provided a method for removal -Constitution of Kenya, 2010 - article 49 (1)(h), 181 (1); Anti-Corruption and Economic Crimes Act, section 62 (1), 62 (6)*

Statutes *- interpretation of statutory provisions - constitutionality of statutory provisions - violation of the letter and spirit of the Constitution vis-à-vis unconstitutionality of a statutory provision-whether a declaration that a statutory provision violated the letter and spirit of the Constitution was equivalent to a declaration that a statutory provision was unconstitutional*

Brief facts

The appellant (Moses Kasaine Lenolkulal, the then Governor of Samburu County), was aggrieved by the decision of the High Court which upheld the trial court's ruling that barred the appellant from accessing the Samburu County Government offices without the prior written authorization of the Chief Executive Officer of the Investigative Agency (Economic and Anti-Corruption Commission (EACC)). The order barring the appellant from accessing the county offices resulted from a bail ruling that was issued on the appellant and 13 others after they were charged with four counts under the Anti-Corruption and Economic Crimes Act (ACECA).

Dissatisfied with the decision of the High Court not to review the bail terms that barred the appellant from office, the appellant filed the instant appeal.

Issues:

i. Whether bail terms imposed on a state officer that barred him from accessing office were unlawful because they were applied without appreciation of the mandatory requirements of section 62 (6) which barred state officers from being suspended if charged with an economic crime or a corruption offence where the Constitution already provided a method for their removal from office.

ii. Whether a declaration that a statutory provision violated the letter and spirit of the Constitution was equivalent to a declaration that a statutory provision was unconstitutional.

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iii. Whether there was justification to decline to review bail and bond terms under article 49 (1)(h) of the Constitution of Kenya, 2010 (the Constitution).

Relevant provisions of the law

Anti-Corruption and Economic Crimes Act No. 3 of 2003

Section 62 - Suspension, if charged with corruption or economic crime.

(1) A public officer or state officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge until the conclusion of the case:

Provided that the case shall be determined within twenty-four months.

(6) This section does not apply with respect to an office if the Constitution limits or provides for the grounds upon which a holder of the office may be removed or the circumstances in which the office must be vacated.

Held

1. A proper reading of section 62 of the ACECA required that a public or state officer did not continue to perform the functions of the office of governor while the criminal charges against him were pending. However, if section 62(6), which violated the letter and spirit of the Constitution, particularly Chapter Six on leadership and integrity, was to be given an interpretation that protected the applicant's access to his office, then conditions had to be imposed that protected the public interest. The statement above could not in any way be interpreted or construed as a declaration of section 62(6) to be unconstitutional. The High Court merely remarked that the provision stood against the intent and purport behind the leadership and integrity provisions of the Constitution, and stopped there. The court did not then proceed to declare or hold the provision unconstitutional.
2. A finding of any legislation to be unconstitutional was not a matter to be taken lightly. It involved a definitive process initiated either through a petition to Parliament, under article 119(1) of the Constitution, or upon the placing of a substantive issue of interpretation, to the effect that the provision was inconsistent with or in contravention of the Constitution before the High Court which under article 165 (3)(d)(i) was endowed with that mandate or any court of competent jurisdiction. No such question was placed before the court, and from a reading of the ruling, no determination of that nature was made in respect of the impugned provision. The High Court did not declare section 62(6) to be unconstitutional.
3. The intent or purport of section 62(6) of ACECA was not that despite the corruption charges for alleged abuse or misuse of their offices to the detriment of the public, such state officers should remain in office, particularly when the impugned provision was considered alongside article 49(1)(h) of the Constitution, which allowed courts to grant bail on reasonable terms. On the basis that the application was grounded on article 49 (1) (h), the High Court concluded that, section 62(6) of ACECA was irrelevant to the instant case. In so finding, the High court held that the trial court was entitled to apply the bail terms it did, including one which barred the governor from accessing the County offices.
4. The application for review in the High Court arose from a bail application in the trial court, which the respondent did not oppose, but nevertheless requested for the imposition of stringent bail conditions on the appellant. Article 49(1)(h) of the Constitution, allowed the trial court to impose bail terms. Section 62(6) of ACECA prohibited application of section 62(1) of ACECA in the case of a constitutional office holder charged with a corruption offence, where the Constitution already provided a method for removal, which in that case was, article 181 of the Constitution. When those provisions were considered against article 49(1)(h) which allowed for imposition of reasonable bail terms, it became patently clear that they addressed two disparate circumstances. One was concerned with removal from

office and the other imposition of bail.

5. Limiting the appellant's access to the County offices whilst he was facing trial for corruption offences could not be construed or equated to a removal from office. The appellant had not been ordered to vacate his office. He could access his office, but on the conditions imposed by the court. Though the appellant access was limited, he remained the Governor. The allegation that the imposition of bail terms barring the appellant from the County offices was tantamount to a removal from office was unfounded. The High Court did not err in holding that application of section 62(6) of ACECA was unnecessary; the High Court was not compelled to apply that provision to the circumstances of the case.
6. Both the Constitution and the law stipulated that an arrested person could be released on bond or bail on reasonable conditions. In granting bail or bond to an accused person, the court was being called upon to exercise its discretion. In such exercise, the court was guided by certain well- established principles. Unlike in the past when an accused person had to demonstrate why he should be released on bail/bond, that duty now properly belonged to the state. The court in exercising its discretion as to whether or not to grant bond was to be guided by the following parameters: -
   a) the seriousness of the offence although that carried greater weight under the old constitutional dispensation;
   b) the weight of the evidence so far adduced if the case was partly heard;
   c) the possibility of the accused interfering with witnesses;
   d) the safety and protection of the accused once he/she was released on bail/bond;
   e) whether the accused would turn up for trial; and
   f) whether the release of the accused would jeopardize the security of the community.
7. When it came to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law had set some criteria which the trial court would consider in the exercise of its judicial discretion to arrive at a decision. Such criteria included, among others, the following: -
   a) the nature of the charges.
   b) The strength of the evidence.
   c) The gravity of the punishment in the event of conviction.
   d) The previous criminal record of the accused, if any.
   e) The probability that the accused could not surrender himself for trial.
   f) The likelihood of the accused interfering with witnesses or could suppress any evidence that could incriminate him.
   g) The likelihood of further charges being brought against the accused.
   h) Detention for the protection of the accused.
8. No other reasons were advanced to demonstrate that the bail conditions imposed were unconstitutional, unreasonable or unattainable. The High Court granted bail on the conditions that it did after appreciating the nature of the corruption charges preferred, and after considering the possibility of witness interference or suppression or the possibility of tampering with evidence. These were the usual criteria upon which a court would take into account when granting bail terms.
9. Both courts below acceded to the dictates of the national values and principles of governance under article 10(1)(b) of the Constitution; they took into account the imperatives of Chapter 6 of the Constitution on leadership and integrity and other public interest elements of the Constitution. They

arrived at bail terms that were reasonable and constitutional.

10. Both courts below properly exercised their discretion when they took into account the appropriate principles or guidelines on bail. There was no wrong in the two courts application of the national values and constitutional imperatives set out in Chapter 6 of the Constitution to arrive at bail terms imposed. Under both articles 10(1)(b) and 259 (1) of the Constitution, courts were duty bound to take into account the national values, principles of governance, and the principles on leadership and integrity under Chapter 6 of the Constitution when applying provisions of the Constitution.
11. The Constitution of a nation was not simply a statute which mechanically defined the structures of government and the relationship of government and the governed. It was a mirror reflecting the national soul the identification of ideas and aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution had to, therefore preside and permeate the process of judicial interpretation and judicial discretion. The provisions of the Constitution had to be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other.
12. The High Court's application of the constitutional imperatives and the public interest factor were not newly introduced issues, but were applicable criteria to the circumstances of the case. On that basis, the bail terms were constitutional and lawful. Much as there would be a measure of inconvenience to the appellant in accessing the County offices, it was recognized that the bail terms imposed were intended to eliminate the possibility of witness interference and evidence tampering, in exchange for the granting of bail, as did the High Court, that was a necessary intervention for the effective enforcement of the court's orders. The implications of directing that the applicant did not access his office were provided for in section 32 (2) of the County Governments Act, which stated that the deputy governor would deputize for the governor in the execution of the governor's functions. There would be no vacuum in the County offices and there had been instances, where due to ill health, a governor had been unable to attend to his duties and given the fact that the Constitution provided for the seat of deputy governor, the counties had continued to function.
13. The bail terms did not remove the appellant from office, but merely required compliance with constitutionally sanctioned terms that of necessity limited his access to the County offices until determination of the trial. The High Court sufficiently addressed the issue by pointing out the relevant constitutionally crafted remedy. The High Court determined and analyzed only matters that were placed before it, and there was no misdirection in the exercise of discretion to have basis upon which to interfere with the High Court's decision.

Appeal dismissed with costs to the respondent.

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