

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION
ANTI-CORRUPTION CRIMINAL APPEAL NO. E016 OF 2022

DIRECTOR OF PUBLIC PROSECUTION.....APPELLANT

=VERSUS=

KIOKO MIKE SONKO MBUVI alias

MBUVI GIDEON KIOKO MIKE SONKO alias

MBUVI GIDEON KIOKO alias MIKE SONKO

MBUVI GIDEON KIOKO alias

MBUVI GIDEON KIOKO SONKO.....1ST RESPONDENT

ROG SECURITY LTD.....2ND RESPONDENT

ANTHONY OTIENO OMBOK alias JAMAL.....3RD RESPONDENT

*(Being an Appeal from the Ruling of Hon D. N Ogoti (Chief Magistrate),
delivered on 21st December 2022 in Nairobi CM's Court Anti-Corruption Case
No. 1 of 2010)*

JUDGMENT

1. This is an Appeal against the ruling that was delivered by Hon D. N Ogoti (Chief Magistrate) on 21st December 2022 in NAIROBI CM'S COURT ANTI-CORRUPTION CASE NO. 1 OF 2020. The Respondents who were the accused persons in that case had been charged with various corruption offences.

2. The charges were instituted through a Charge Sheet dated 27th January 2020. The same which is in this judgment referred to as the Original Charge Sheet, had the following eight (8) counts:

COUNT 1

Conspiracy to Commit an Offence of Corruption Contrary to Section 47A (3) As Read Together with Section 48 of the Anti-Corruption and Economic Crimes Act, Act No. 3 of 2003.

COUNT 2

Conspiracy to Commit an Offence of Corruption Contrary to Section 47A (3) As Read with Section 48 of the Anti-Corruption and Economic Crimes Act, Act No. 3 of 2003.

COUNT 3

Conflict of Interest Contrary to Section 42A (3) As Read with Section 48 of the Anti-Corruption and Economic Crimes Act, Act No. 3 of 2003.

COUNT 4

Conflict of Interest Contrary to Section 42A (3) As Read with Section 48 of the Anti-Corruption and Economic Crimes Act, Act No. 3 of 2003.

COUNT 5

Money Laundering Contrary to Section 3(b) (i) As Read with Section 16 of the Proceeds of Crime and Anti-Money Laundering Act, Act No. 9 of 2009.

COUNT 6

Money Laundering Contrary to Section 3(b) (i) As Read with Section 16 of the Proceeds of Crime and Anti-Money Laundering Act, Act No. 9 of 2009.

COUNT 7

Acquisition of Proceeds of Crime Contrary to Section 4 of the Proceeds of Crime and Anti-Money Laundering Act, Act No. 9 of 2009.

COUNT 8

Acquisition of Proceeds of Crime Contrary to Section 4 of the Proceeds of Crime and Anti-Money Laundering Act, Act No. 9 of 2009.

3. All the accused pleaded Not Guilty to the charges. Later the Prosecution filed an Amended Charge Sheet dated 7th September 2020. Unlike the Original Charge Sheet which had eight (8) counts, the Amended Charge Sheet for its part had thirteen (13) counts; meaning it more counts than the original Charge Sheet.
4. The thirteen (13) counts in that Amended Charge Sheet were as follows:

COUNT 1

Conspiracy to Commit an Offence of Corruption Contrary to Section 47A (3) As Read Together with Section 48 of the Anti-Corruption and Economic Crimes Act, Act No. 3 of 2003.

COUNT 2

Abuse of Office Contrary to Section 46 As Read with Section 48 of the Anti-Corruption and Economic Crimes Act, Act No. 3 of 2003.

COUNT 3

Conflict of Interest Contrary to Section 42A (3) As Read with Section 48 of the Anti-Corruption and Economic Crimes Act, Act No. 3 of 2003.

COUNT 4

Money Laundering Contrary to Section 3(b) (i) As Read with Section 16 of the Proceeds of Crime and Anti-Money Laundering Act, Act No. 9 of 2009.

COUNT 5

Acquisition of Proceeds of Crime Contrary to Section 4 of the Proceeds of Crime and Anti-Money Laundering Act, Act No. 9 of 2009.

COUNT 6

Acquisition of Proceeds of Crime Contrary to Section 4 of the Proceeds of Crime and Anti-Money Laundering Act, Act No. 9 of 2009.

COUNT 7

Acquisition of Proceeds of Crime Contrary to Section 4 of the Proceeds of Crime and Anti-Money Laundering Act, Act No. 9 of 2009.

COUNT 8

Conspiracy to Commit an Offence of Corruption Contrary to Section 47A (3) As Read Together with Section 48 of the Anti-Corruption and Economic Crimes Act, Act No. 3 of 2003.

COUNT 9

Abuse of Office Contrary to Section 46 As Read with Section 48 of the Anti-Corruption and Economic Crimes Act, Act No. 3 of 2003.

COUNT 10

Conflict of Interest Contrary to Section 42A (3) As Read with Section 48 of the Anti-Corruption and Economic Crimes Act, Act No. 3 of 2003.

COUNT 11

Money Laundering Contrary to Section 3(b) (i) As Read with Section 16 of the Proceeds of Crime and Anti-Money Laundering Act, Act No. 9 of 2009.

COUNT 12

Acquisition of Proceeds of Crime Contrary to Section 4 of the Proceeds of Crime and Anti-Money Laundering Act, Act No. 9 of 2009.

COUNT 13

Acquisition of Proceeds of Crime Contrary to Section 4 of the Proceeds of Crime and Anti-Money Laundering Act, Act No. 9 of 2009.

5. The Amended Charge Sheet which was filed on 7th September 2020 and which was the subject of the court session for that day, substituted the Original Charge Sheet. In his address to the trial court, the prosecuting counsel Mr Namache informed the trial court and the defence, that the Amended Charge Sheet had more charges and counts than the original one of 27th January 2020 on which the case was scheduled for plea.
6. The trial court then at that same session scheduled the plea on that Amended (the court called it the Substituted Charge Sheet) for 14th September 2020. On that day (14th September 2020) the pleas were taken. With all the accused persons pleading Not Guilty to each of the 13 Counts, and the trial commenced with the testimony of PW1. Later, on diverse dates eighteen more prosecution witnesses testified for the prosecution.
7. With nineteen prosecution witnesses having testified, the Prosecution closed its case. Thereafter parties submitted on Case to Answer; with the defence submitting that the Prosecution had not established a *prima facie* case, hence that the Accused persons had No Case to Answer, and should be acquitted.
8. The trial magistrate (Hon D.N Ogoti, Chief Magistrate) in his ruling delivered on 21st December 2022, concluded that the Prosecution had failed to establish a *prima facie* case against the Accused

persons. He then acquitted all them under Section 210 of the Criminal Procedure Code (Cap 75 Laws of Kenya).

9. The learned magistrate in his said ruling first set out the charges against the Accused as per the counts, then set out *in extenso*, the testimonies of each of the nineteen witnesses (PW1 to PW19) that testified for the prosecution. He then analyzed the evidence in those testimonies together with the parties' rival submissions on No Case to Answer; and agreed with the defence.
10. The magistrate in his said ruling also made a finding, that the Charges stated in the Charge Sheet were defective, hence that that Charge Sheet was defective. He specifically stated at page 31 of his 33-page ruling, that the defect according to him, was the Charge Sheet's reference to the 1st Accused by his Title (As Governor Nairobi City County) instead of by his names. He stated that to his understanding, Governor of Nairobi City County is the public.

This Appeal

11. Dissatisfied with the trial court's said ruling, the Director of Public Prosecution (DPP) filed this Appeal. The grounds of the Appeal are set out in the Petition of Appeal dated 22nd of December 2022; and they are as follows:

- (1) *That in finding that the charges were defective, the learned trial magistrate misdirected himself by relying on the original Charge Sheet filed in court on 27th January 2020 instead of the Amended Charge Sheet filed in court on 7th September 2020.*

- (2) That the learned trial magistrate erred by holding as defective, a Charge Sheet that the trial court had itself admitted, and not rejected under the provisions of Section 89(5) of the Criminal Procedure Code.
- (3) That the learned trial magistrate failed to make a finding on each and every count as per the Amended Charge Sheet of 7th September 2020.
- (4) That the learned trial magistrate failed to make a finding on Counts 4, 9, 10, 11, 12 and 13 of the Amended Charge Sheet of 7th September 2020.
- (5) That the learned trial magistrate failed to analyze the evidenced adduced by the nineteen (19) prosecution witnesses, thereby arriving at an erroneous finding.
- (6) That the learned trial magistrate disregarded the evidence on record and failed to make a finding on whether or not the prosecution had established a prima facie case against the Respondents.
- (7) That the learned trial magistrate did not consider the Appellant's submissions, and instead placed more premium on the Respondents' submissions, thereby leading to their acquittal.
- (8) That the ruling delivered on 21st December 2022, did not comply with Section 169 of the Criminal Procedure Code.
- (9) That the learned trial magistrate in his said ruling misdirected himself by applying the provisions of Section

210 of the Criminal Procedure Code so mechanically and against public policy.

(10) That the learned magistrate by his ruling failed to deliver substantive justice and relied on technicalities to acquit the Respondents.

(11) That the learned trial magistrate relied on extraneous reasons to acquit the Respondents.

Analysis and Determination

12. The duty of the court in a first appeal was reiterated in Okeno v. Republic [1972] EA 32, where it was stated that a first appellate court has a duty to analyze and re-evaluate evidence adduced in the trial court, and make its own finding thereon, as well as arrive at its own conclusion; without being bound by the finding of the trial court. But that in so doing, it has to all along caution itself that it never heard or saw the witnesses.

13. In a criminal Appeal, an appellate court needs to carefully analyze not only the Petition of Appeal, but also the charge in the trial court, together with the evidence on record comprised in the rival prosecution and the defence testimonies in that court. It also needs to studiously distill the rival submissions of the parties, the entire Record of Appeal, as well as the judgment of the trial magistrate. It also needs to apply to the applicable law and settled legal principles, to the facts and evidence on the trial court's record.

14. This Appeal was heard orally by oral submissions. I have in this judgment to decide the following issues:

- (a) *Whether the learned trial magistrate in his ruling of 21st December 2022, fell into error.*
- (b) *Whether the learned trial magistrate's finding that the Prosecution had not established a prima facie case, hence that the Respondents had No Case to Answer, was proper and in accordance with the relevant law and applicable legal principles.*
- (c) *Whether the acquittal of the Respondents by the trial court, should be set aside as prayed for by the Appellant in this Appeal.*

15. In making a determination in this Appeal, I have considered the grounds and prayers in the Petition of Appeal, the parties' filed Skeletal Arguments, their oral submissions at the hearing of the Appeal, as well the relevant law (including decisions of superior courts) and legal principles. I have also carefully and patiently rummaged through the impugned ruling of the trial court.

16. In many jurisdictions, their laws have prohibited or discouraged Appeals against acquittals. This as I earlier ruled on the objection raised in this Appeal, is not the case with Kenya. Unlike in those jurisdictions, our Criminal Procedure Code is permissive of these appeals.

17. As already stated in this judgment, the learned trial magistrate in his said ruling first set out the charges against the Accused as per the counts, then set out *in extenso*, the testimonies of each of the nineteen witnesses (PW1 to PW19) that testified for the prosecution. He then analyzed the evidence in those testimonies together with

the parties' rival submissions on No Case to Answer; and agreed with the defence.

18. He also made a finding that the Charges stated in the Charge Sheet were defective, hence that that Charge Sheet was defective. He specifically stated at page 31 of his 33-page ruling, that the defect according to him, was the Charge Sheet's reference to the 1st Accused by his Title (As Governor Nairobi City County) instead of by his names. He stated that to his understanding, Governor of Nairobi City County is the public office and not the person.
19. I need to begin with the magistrate's holding that the charges in the said case were defective. That holding has been as expected controverted by the DPP, but supported by the Respondents who were the Accused in the trial court. In determining whether a charge is defective, a court has to consider whether the charge sheet contains sufficient details and particulars as would enable the accused to know the offence alleged to have been committed by them, as well as the case against them. It will need to first be an offence known to law.
20. Such details and particulars include: *the wrongful act they are alleged to have committed; the date and sometimes the exact or approximate time of such act; the complainant/victim where appropriate; as well as the provisions of law violated.*
21. Any defects in a charge sheet need to be those that are manifest on the face of the record, and not those that arise from craft of interpretation, from sheer application of logic, philosophic rationalization, extravagant and pedantic examination, a tooth-

comb analysis, or those of mere grammar or punctuation. The latter would bother a grammarian and not a court of law. In essence, courts adopt a realistic and pragmatic approach to this; rather than an abstract and academic approach.

22. I hold that it is not every minor or minute error or slip or goof in a charge that would amount to an actionable defect as to abort the charge. Such an approach would fly in the face of the express provisions of Article 159 of the Kenya Constitution. Which provisions enjoin courts to determine cases on merits and substantive justice, and not on lofty procedural technicalities.

23. In this particular case there were two Charge Sheets, namely, the original Charge Sheet of 27th January 2020 and the Amended Charge Sheet of 7th September 2020. While the Original Charge Sheet had eight (8) counts, the Amended Charge Sheet for its part had thirteen (13) counts; meaning it more counts than the original Charge Sheet, by five (5) more counts.

24. This fact did not come out well in the learned magistrate's impugned ruling and he all along kept referring to "the Charge Sheet". One does not need to read the entire ruling to know the Charge Sheet that the learned magistrate used in arriving at his ruling on No Case to Answer. He at the onset of his ruling, lists only 8 Counts, and in the same manner and order as they were in the Original Charge Sheet dated 27th January 2020.

25. Although this is the Original Charge Sheet that the Accused persons initially pleaded to when the case came up in the trial court for plea-taking, later, on 7th September 2020, the Prosecution filed an

Amended Charge Sheet dated even date. On which fresh pleas were taken. The effect of this new Charge Sheet was that it substituted and superseded the said Original Charge Sheet that instituted the case, i.e the initial one of 27th January 2020. The Prosecution called it a Substituted Charge Sheet.

26. I take the view that from then on, that initial Charge Sheet ceased to exist or ceased to be the one informing the trial. Hence reference could no longer be made to it. I hold that with the filing of the Amended Charge Sheet, and thereby substituting and replacing the Initial or Original Charge Sheet, the latter became spent, otiose and as dead as a dodo.

27. Therefore, the learned trial magistrate fell into grave error when he used it in arriving at a decision on whether on the totality of evidence so far adduced by the nineteen prosecution witnesses, a *prima facie* case had been established. This is akin to using a wrong question paper or marking scheme, to mark examination answers. On this alone, the said ruling falls flat on its tummy.

28. I agree with the DPP that the net effect of using a Charge Sheet that has less charges and counts, meant that the additional charges in the Amended Charge Sheet, were not and could not be considered in the ruling. In arriving at a ruling on whether or not the Prosecution has made a *prima facie* case, each count and the evidence on it ought to be considered, and a conclusion arrived at on each count. The finding cannot be *en masse*, and in a generalized manner. Even where the Charge Sheet has many counts, an Accused person shall be put on his defence on the

counts on which the prosecution has made a *prima facie* case; and acquit him on the rest.

29. Even in so holding, am conscious of the fact that having a Case to Answer is not the same as being found guilty. The phrase "Case to Answer" and the phrase "Prima Facie" have been defined umpteen times by superior courts. In *R.T Bhatt v. Republic [1957] EA 352*, a *Prima Facie* Case as one in which a reasonable tribunal properly directing its mind to the law and evidence before it, could convict if no explanation is offered by the defence.
30. That definition has been cited with approval by superior courts including the Court of Appeal. If successful, a No case to Answer submission has the effect of terminating the proceedings before any defence evidence is called, and without the defence being called upon to present its evidence.

Final Determination and Orders

31. In the end, I find that the learned trial magistrate (D.N Ogoti, Chief Magistrate) in arriving at the impugned ruling, fell into error. This Appeal therefore succeeds and is hereby allowed in the following terms:
- (a) The ruling delivered by Hon D. N Ogoti (Chief Magistrate) on 21st December 2022 in Nairobi CM's Court Anti-Corruption Case No. 1 of 2020 the subject of this Appeal and which ruled that the Respondents had No Case to Answer, is hereby set aside.

- (b) Consequently, the trial court's acquittal of the Respondents in the said case, is hereby also set aside accordingly.
- (c) This case shall be retried by a magistrate other than Hon D.N Ogoti. Who shall start by making a fresh ruling under Section 210 of the Criminal Procedure Code (Cap 75 Laws of Kenya), on whether on the basis of the evidence so far on record, the Accused persons have a Case to Answer.
- (d) The said ruling be made within 30 days from the date of this ruling.

DATED and DELIVERED Virtually at NAIROBI on this 11th Day of December 2024.



**PROF (DR) NIXON SIFUNA
JUDGE**