



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT MILIMANI

ANTI-CORRUPTION CASE NO. 05 OF 2017

REPUBLIC..... PROSECUTOR

VERSUS

SETH NALIANYA BARASA)

EVANSON MUREITHI MUNYAKA)..... ACCUSED

JUDGEMENT

On the 10th of February 2017, the two accused persons **SETH NALIANYA BARASA and EVANSON MUREITHI MUNYAKA** were arraigned before this court facing three counts, two of them under the **Anti-corruption and Economic Crimes Act No. 3 of 2003** and a third count under the **Penal code Cap 63 Laws of Kenya**.

The 1st count is dealing with suspect property contrary to section 47(2)(a) as read with section 48(1) of the Anti-corruption and Economic Crime Act No. 3 of 2003.

The particulars being that on 28th January 2017 at Mukeu area along Kenol-Thika road, within Muranga county, being persons employed by public body, to wit National Police Service, as Inspector and police constable respectively and attached to Makuyu police station, traffic duties, jointly used your office to improperly confer to yourselves a benefit of Kshs.20,500/- from various drivers, at an inducement lot to charge the said drivers with unspecified traffic offences, a matter relating to the affairs of the said public body.

The second count is that 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 particulars of the said 2nd count being that on 28th day of January, 2017 at Mukeu area along Kenol-Thika road within Muranga County, in the Republic of Kenya being a person employed in the public service, to wit, National Police Service used your office to improperly confer yourselves a benefit of Kshs.20,500/- from various drivers as inducement to forbear carrying out necessary inspections on motor vehicles to detect traffic offences.

The 3rd count is being in possession of unlawfully obtained property contrary to section 323 of the penal code.

The particulars being that on **28th day of January 2017**, at Kenol-Thika road within Muranga County in Republic of Kenya, you were found in possession of **Kshs.20,500/-** suspected to have been unlawfully received from motorists as an inducement to forbear carrying out the necessary inspections to detect traffic offences.

The prosecution called eight (8) witnesses in this case.

Rodgers Akaki (PW 1) testified that he is an Assistant Director of Investigations in charge of operations at EACC. He stated that in the course of its work, the commission receives constraints of corruption even anonymously which are processed to the Department of Investigations by the Data Centre.

In this particular case, the commission had received complaints of extortion of money by Makuyu, Kiriaini and Thika police stations from IPOA – Independent Police Oversight Authority. He further stated that the Data Centre had processed and captured other complaint identified in their report as Nos. 64/06 of 23/1/2017, 61616 of 24/9/2016, 59865 of 5/7/2016, 59265 of 5/7/2016 and 55167 of 16/11/2015.

When the complaints were brought to his attention, he asked the surveillance team led by **John Wainaina Muturi (PW 2)** to undertake surveillance on the activities of the traffic police officers and compile a report for his review to enable him decide on the next course of action.

Initial surveillance was done on 23rd and 25th January, 2017 and video clips together with a report of surveillance submitted to him. He described what he saw after watching the video clips taken by surveillance team as follows:-

“... I could see police officers stopping vehicles and without checking them they could move to the conductor or driver to receive money and allow the vehicle to move on ...”

He constituted two teams to mount a sting operation on 28/1/2017; at an area called Mukeu, between Thika Town and Kenol, along the Thika-Kenol road. One team was to be led by **Nditihi Musi** while the other was led by **Joseph Lenjo**.

The operation was to take place early in the morning of 28/1/17 and the surveillance team was to go there in advance of the operation personnel to observe and shoot more videos before the operation team could swoop on the officers engaging in the suspected corrupt activities.

At around 10.20a.m. the surveillance team telephoned to confirm that it was the right time to strike which information he passed over to the operation team which was already on the ground. At 10.30a.m. Joseph Lenjo called and informed him that they had arrested three (3) officers but one had managed to escape into a nearby thicket. He advised him to continue with search and recovery and informed him he would be joining them as he was also around. He found the search on-going. According to the witness surveillance had revealed that officers would pick the money and take it somewhere.

A search recovered money stashed in water bottles inside black polythene hidden in a thicket next to where police officers were stopping the vehicles. He described the recovered as follows:-

“... I saw the polythene bag when it was opened. We had a lot of crumpled notes of various denomination. Some were hidden in used water bottles ...”

As this went on, another group of the EACC officers was combing the thicket for the officer who had escaped and after sometime, they emerged with him. It was the police inspector-in-charge of the said traffic officers.

PW 1 Rodgers Akaki viewed the various video clips when they were played in court and he confirmed that they are the OCS surveillance team had submitted.

In particular – for video **No. M2400387 P. Exhibit 6(c)** – he stated:-

“From that clip, I came to learn after arrest – police Inspector Seth Nalinya was one of the officers. I could recognize him for the video that has been played. I can also recognize police constable Mureithi. Both before court ...”

He went on:-

“... From the said video, you could see PC Mureithi after collecting money going to a nearby thicket and bending to place something there and come back. That is the spot we recovered money in black polythene bag ...”

On **cross examination**, he was asked if the police officers’ force numbers were visible in the video clip, to which he said:

“... I did not see the force number. A police officer is a human being, is not time only identifies ...”

On whether from the video clip he saw money actually changing hands, he stated:-

“... the way they are exchanging you cannot see the money ...”

And on the recovered polythene bag, he said:-

“... None of the officers was found holding the bag. we could link them through surveillance that we did ...”

On re-examination, he re-affirmed he identified the accused persons by their faces as they were clearly visible in the video clips.

He also said he did not participate in the recovery but he found it on-going.

John Wainaina Muturi (PW 2) told this court that he is responsible of heading a team of surveillance officers who undertake undercover investigations for the EACC.

He testified that in **January 2017; Mr. Rodgers Akaki (PW 1)** called him and detailed him to carry out surveillance on traffic police officers performing traffic checks along Thika-Sagana road following complaints received at his office that they were engaging in corrupt conduct.

This is an assignment that takes the form of observing the subject covertly from an observation point and could also entail trailing the subject under investigation. As the activity involved recording, he tested the camera that was to be used and assembled a team of three undercover officers for the first assignment on 23/1/17 and proceeded to a place called Mukeu along Thika-Sagana road, between Thika and Kabati shopping centre.

He narrated the initial observation made at an undisclosed observation point as follows:-

“... on close observation from our observation point we noted they would stop the vehicles especially matatus and when vehicles slowed down, the traffic officer would approach the driver and, in some occasions, the traffic officer would pick the benefit from the door handles and in other occasions, they would pick directly from the conductor or driver’s hand. We took video clips of those actions ...”

At around 11:00a.m. the traffic officers would move from that place and after trailing, we found they would set another one about 500 metres just before you reach Makuyu junction. That was on 23/1/2017. Again at Traffic check near Makuyu junction, we observed same conduct but observation point was not very clear from there. We revisited the same place on 25/1/2017.

According to PW 2 they also found out that the officer usually reported at 6.10am and would be there until 11:00a.m.

The conduct observed on 25/1/17 was the same as the one observed previously on 23/1/17. On 23/1/2017, it was three traffic police officers under the leadership of Senior Sergeant.

On 25/1/2017, the officers were under leadership of an Inspector but their conduct was the same.

He prepared and compiled a report of the observation made on the two occasions and briefed PW 1 which had shown a trend.

After that briefing, PW 1 Rodgers Akaki decided to have a sting operation on 28/1/17 – but further instructed that it be preceded by advance surveillance that very morning.

The surveillance team returned to Mukeu early morning at around 7.00a.m. on the morning of 28/1/2017. Four traffic officers were at the scene – two each on opposite sides i.e. on the side of road towards Thika from Kenol and the other side of Thika towards Kenol.

Observation was done between 7.00a.m. and 10.00a.m. The same conduct as observed previously was noted. He alerted the operation team that was on the ground and the said traffic police officers were arrested.

Several short video clips, a total of 30 in number were played before this court by PW 2 which he later produced on evidence as follows:-

- **Video clips taken on 23/1/2017 – P. Exhibit 3(a) to (k).**
- **Video clips taken on 25/1/17 P. Exhibit 4(a) to (k).**
- **Video clips taken on 28/1/17. P. Exhibit 6(a) to (m).**

He also produced the surveillance report which comprised of specific printed images that were produced several video frames of the said recording as **P. Exhibit 7(a)** together with the DVD which had the soft version of it as **P. Exhibit 9**.

The digital video camera was produced as **P. Exhibit 10** and certificate under section 106(B) – **P. Exhibit 8**.

In the clips played before the court, the witness had captured police officers performing traffic duties where they would be seen stopping vehicles, or where such vehicles would slow down especially public service vehicles and a police officer would walk towards. The driver's door and after contact with the driver's door handle, the vehicle would drive off. Several instances of that nature were captured in the clips played.

In reference to the clips taken on 28/1/17, the two police officers, both accused in this case had been clearly captured on video and that the clips of 28/1/17 only related to the two accused before the court.

In introducing the said clips for viewing by the court, he requested an important fact through observation which he described as follows:-

“... the accused before the court are the ones in these videos. As surveillance was continuing, we noted that police officers would bend against the guard rail. I sent one of my officers to check what was there and noted there was a paper bag against the guard rail. It was used to place money as you would notice every time the officer stopped them vehicle, especially the constable, he would go and bend there against the guard rail ...”

Indeed, the court after watching the video clip **00385 – P. Exhibit 6(a)** made the following observation:-

“... officer seen money alongside the rail, bends and walk away ...”

The witness, **PW 2** further stated, he was able to identify the two accused in the video of 25/1/17 and 28/1/2017.

On cross examination, the defence counsel confronted PW 2 on his evidence that they had observed a particular officer making visits to a certain spot every time he came in contact with a motorist where he would be seen bending against the guard rail and on

sending one of the surveillance team officers, he found there was a paper bag there need for dropping money.

First, the defence counsel asked him if the surveillance team was able to capture the said paper bag on video he stated;-

“The camera was not able to capture the paper bag ...”

Secondly, he was asked how many times the said officer was captured on video visiting that particular point and bending to do the dropping; he replied:-

“... from the recording I have brought today, it was captured once. I watched severally but the clip captured once ...”

Thirdly, he was asked if he could tell what the officer was dropping, he replied;-

“... you could not see money where he was bending ...”

Fourthly, he was asked if that information was captured in his statement as whether the surveillance officer he had sent who saw the paper bag had recorded a statement, he stated:-

“... In my statement I have not recorded that I sent someone to go and check the point where the officer was bending. I sent an undercover officer by the name Jack Musomba. He has not recorded a statement ...”

Fifth, he was asked if he took the video of any office under the paper bag he said;-

“I did not capture officers hear – paper bag.”

Counsel further asked for a replay of the specific video clips along them.

M2UOU392 – P. Exhibit 6(m1) and asked the witness to confirm if it was possible to tell what was allegedly being exchanged to when he said;-

“... I am not able to see the benefit passed ...”

In **M2U – 00393 – P. Exhibit 6(1)** he said;-

“... I cannot say there was a benefit, I can only say there was a contact ...”

Nditini Wanyenji Juma Musi (PW 3) testified that he was part of the operation team that was constituted to carry out the sting operation on 28/1/17 and his main responsibility was to take video clips of the arrest and any recoveries.

He stated that on arrival at the scene he identified PW 2 Mr. Wainaina who had been in-charge of surveillance and took the black Sony digital video camera from him. He identified the same earlier produced as P. Exhibit 10. He tested it and he continued filming. He confirmed he filmed the arrest of 2nd accused the arrest of 2nd accused who was on the opposite side of the road as you head towards Nairobi. He then crossed over and also captured the EACC offices as they recovered the money from a small thicket across the road. He stated it was Wachira who recovered the money from a small bush in small plastic bottles cut on the top.

At that point and accused had ran away. He was however pursued and arrested and he took a video clip of 1st accused being escorted to the vehicle. He found him already handcuffed.

In the video – **M2U00407 – P. Exhibit 14(b)** which the witness (PW 3) played in court, the court observed:

“Several notes of money – crumpled notes are seen being poured from a black paper bag and others stashed in bottles are strewn on the ground ...”

The witness explained it was EACC officer, Wachira who was pouring the money after recovery.

Thereafter, the two accused were escorted to Integrity Centre. He produced the DVD that captured to recovery as **P. Exhibit 14(a) to (d)** and certificate under section 106(B) **P. Exhibit 18**.

James Wachira (PW 5) testified that he was briefed on 27/1/17 about an operation on 28/1/17 by the officer in-charge of operation, Rodgers Akaki. However, the specific nature of the operation was not disclosed until the following day when they reached Thika. The operation involved arrest of traffic police officers manning traffic under Keno along Thika road.

Together with his colleague Juma. He arrested the officer who was on side of the road joining Nairobi after identifying themselves as EACC officers. He said;-

“We arrested him and did search on him he had no money in his possession.”

He however said he checked beside the road and saw a paper bag. It had some money and two water bottles. One for half litre and the other for half litre also stashed with money. He said he then handed over to Kamira. He identified the 2nd accused as the person he helped arrest.

The police Inspector (1st accused) had been seen vanishing into the bush. He was also followed by his colleagues and arrested (i.e. 1st accused).

Francis Mwiti Kamwara (PW 9) said specific instructions to arrest traffic officers near Kenol were given by Rodgers Mkaki in-charge operation EACC to the operation team when already on the ground.

This team was to arrest officers on the side of the road from Thika towards Nyeri. While there was another team to arrest those on opposite side led by Mr. Musi. This team arrested the ones on the side of road facing Nyeri and these were charged in ACC 4/2017. They then crossed over to assist their colleague on the other side. The officer who had disappeared into the bush was pursued and arrested by Mukundi and Lenjo.

He said they searched the area and saw a black paper bag hidden behind the guard rail near where they had arrested the officers on the side of Nyeri towards Thika he said;-

“I recovered the paper bag and opened it. It was full of notes i.e. money in various denomination ... There was also two water bottles inside the same paper bag folded into small sizes. The denomination were in 50/-, 100/- notes”.

He put the money in an envelope and sealed since the same was crowded, they decided to leave so as to avoid a commotion.

At Integrity Centre, he opened to envelope and counted the money in presence of arrested accused and it came to **Kshs.20,500/-**.

He then prepared an inventory. He also prepared inventory of two bottles.

At Integrity Centre the two once officers were identified as **Inspector Seth Baraza** and **Evans Mureithi**, a police constable i.e. Accused 1 and accused 2 respectively. Others were Abdi Khalif and Shadrack Ngatia – both constables. He produced the inventory of the money and the water bottles as **P. Exhibit 11(a) and (b)**. He also produced the recovered money as **Kshs.20,500/- P. Exhibit 13**.

The two water bottles were produced a **P. Exhibit 11(a) and (b)**. He also produced the complaint letter from IPOA – **P. Exhibit 1** and letter from police headquarters confirming employment details of accused persons as police offices – **P. Exhibit 18**.

The black polythene bag was **P. Exhibit 12**.

On cross examination PW 9 was asked where money was recovered and he said:-

“... money was recovered from the bush ...”

Counsel then probed to find out if any sketch was drawn of the point of recovering relative to where accused were arrested, he said:-

“I did not have point cannot only be ascertained by sketch. Even video could do ...”

PW 4 Samuel Mukundi Njiru confirmed that he and his colleague Martin said are the ones who searched the bush after getting information he had disappeared there and flushed him out then arrested him. He later learnt his name was Inspector Seth Baraza.

Inspector Harrison Kiambuthi (PW 6) said at the time of the incident, he was the Deputy Base Commander, Makuyu traffic base. He ranked there between October 2014-February 2017. He said he was asked by Regional Traffic police officer to visit EACC in connection with arrest involving officers working under him. He met Mr. Kamwara (PW 9) who played him several clips and asked if he could identify the officers in those clips.

He said out of the four clips he watched, he was able to recognize:-

- 1) Inspector Seth Baraza.
- 2) Evans Munyaka.
- 3) Abdi Khalif

He confirmed Seth Baraza and Evans Munyaka were in court as 1st and 2nd accused respectively. In court – the video clip – M2U00387 was played P. Exhibit 6(c) and he stated:-

“... Inspector Baraza he was wearing khaki uniform. The other wearing light blue shirt and tunic blue is Mr. Munyaka ...” The ones identified are the ones before the court and they are the ones that worked under me ...”

The two accused were placed on their defence on 13/7/2018. They both gave unsworn statement of defence.

The 1st accused told this court he is an Inspector of police. He narrated the event of the day he was arrested on 28/1/2017 as follows:-

On that day he left Makuyu police station in company of his colleagues **Evanson Munyaka, Shadrack Ngatia** and **Abdi Machobe** who were all police officers based at Makuyu. They were going for traffic duties on Kenol-Thika Road. Reaching at a section where Kenya Power poles are cured; they found an accident when had just accident vehicles to the police station and returned to work.

He together with Evanson Munyaka PW 1 were on the side of the road of Kenol facing Thika.

Behind them was a pineapple plantation but in between the plantation and the road where they were lies a bush. There is a footpath used by members of public visiting the farm for purchase of pineapples and others also cut grass for their livestock in that bush. The tarmac road is dual carriage way Thika Super-Highway.

He said that their work involved traffic duties – checking excess overloading and the like.

They worked for about half an hour. He started feeling some stomach discomfort and he decided to go into the bush to relieve himself. After he finished, he came out to take his position where he had left his colleagues. As he approached, he saw three men one of whom had a long beard. He asked him if he was armed to which he replied in the negative. The bearded man grabbed him and handcuffed him from behind. He asked if he had any money on him to which he replied he did not have any cent. He searched him and all he could find on him was a phone. He then announced he had arrested him for corruption.

He was put in the vehicle. Toyota Hiace where his colleague Antony Ngatia, Evanson Munyaka and Abdi Madola also were. They were driven to Integrity Centre. Later on they were shown a schedule which they were told is inventory of recovered money and asked to sign but he declined because the money was found on him. He only accepted to sign the inventory of the phone recovered from him.

He denied picking any money from anybody that day. He then went on:-

“I am seen in those video clips. There is a Probox which came there. I was only Insurance. Sometimes drivers came and slow down to say greetings, sometimes they extended hand and greet you, you do not throw their hands ...”

On the charges including complaint received from IPOA, he stated:-

“... This was a frame up. The time that Akaki said complaints were made, I was at Kenya Police College. The day I was arrested, I had been an Inspector like one month.”

The second accused **Evanson Mureithi Munyaka** also gave an unsworn statement of defence. He testified that he has been a police officer since 1981 he stated just like first accused now together 1st accused Inspector Baraza, PC Khalif and PC Shadrack Ngatia they left the station that day for traffic duties found an accident which occurred, had occurred, towed the vehicle to the station and went back to Mukeu to continue with traffic duties.

He said being a Saturday, traffic was not heavy that day and their work was mainly to check for excess and other traffic mistakes.

At some point, Seth Baraza told him he was feeling unwell and excused himself he was left standing alone and then three men approached. They did not identify themselves. Instead, they told him he had tarnished his job and he retorted that if they knew how better to do it, then they could do it.

They then told him they wanted to handcuff him but he told them his hand was not physically fit.

They asked him how much money he had and he told him he did not have anything on him. He put his hands in the pocket and flushed a bunch of keys.

He was escorted to the Landcruiser. Later they transferred him into a van. Of the video clips and photographs produced he said:-

“The photographs showed here are showing us speaking to driver.”

He went on:-

“Even those people who sent complaint, nobody came and said he was asked for money ...”

He further quipped:-

“If you have been found with something it is ok. If you have not, you have not ...”

He said he refused to sign the inventory because he was not found with any money. In view of Section 161 of the CPC, which

provides:-

“In cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not itself confer on the prosecution the right of reply:-

Provided that the Attorney General or Solicitor General when appearing personally as an Advocate shall in all cases have the right of reply.”

In the present case the accused have elected to give unsworn statements, the court ruled that prosecution had no right of putting in any submissions.

In brief submissions by the defence, Mr. Mongeli urged the court to look at the explanation offered by the accused persons and found that they had provided satisfactory explanation as to what transpired on 28/1/17.

He argued that none of the drivers or motorists came to testify any money was delivered from them and there was no evidence that any motor vehicle had any defects that they police officers overlooked.

On the offence of being in possession of unlawfully obtained property, he submitted that there was no evidence to show they were in actual possession of the said cash as none of the said cash was recovered from any of them.

He argued that even the doctrine of constructive possession cannot apply as there was evidence that for officers were arrested at the scene, 2 on either side of the road; he wondered who among the four called the money he said to attend to.

Further, it was evident for both prosecution and evidence the place it was recovered from was a public place, matatus stopping there, members of public going to pineapple plantation, people walking along the road, hence possibility of what was recovered not belonging to the accused persons were very high.

He further argued that upon arrest, accused was deprived the opportunity to witness the recovery hence it could not be ascertained if indeed the recovery was from that scene.

On video clips he said none of them showed any of the accused putting any monies in the said paper bag.

He further said even PW 2 who took the videos could not categorically tell what was actually changing hands wondering what the court can do when the key witness says, he does not know.

He cited the case of *James Tinega Omwenga V. Republic* C.A. 59/2011 where the court stated that **“suspicion cannot be the basis of inferring guilt which must be proved by evidence ...”**

He submitted that the conduct depicted in the videos is that of mere suspicion. He submitted the defence gone by both accused are strong, believable and unshaken and should therefore be acquitted of all charges under section 215 of the CPC.

After a careful and detailed study of the particulars upon which the three separate counts against the accused are anchored, it is evident to live that although the statutory provisions have created three separate offences, the conduct complained as offending then these legal provisions are basically the same in each of the three counts.

It is as if the same conduct has been criminalized or prescribed in three different ways under the three different legal provisions.

In my humble view, it is not tenable under those circumstance to punish under more than one, and acquittal or conviction and/or sentence under either one should bar a prosecution or conviction for the same set of facts.

For instance, **the offence of dealing with suspect property under section 47(2) of ACECA** and that of **having property suspected to have been unlawfully obtained under section 323 of the penal code** share some common characteristic in terms of elements to be proved.

There is only a slight difference in the wording under ACECA – which restrict itself to prove that the suspect property was “reasonably acquired in the course of or as a result of corrupt conduct ...” but logically speaking the same would still fall within the definition of the words “**unlawfully**”.

Consequently, I will evaluate both count I and count II concomitantly. Turning to the legal definition of the two offences, it is definite that under **section 323**, possession constituted the actus reus while “**dealing**” in **Section 47(2)(a)** is constituted by **holding, receiving, concealing, using or causing property to be used** forms the actus reus in respect to the offence under that section.

Preceding any other inference therefore, it must first be established that the accused was in possession or had in one way or the other power to exercise control over the property in question.

Once this fact is firmly established, the question of **mens-rea** then becomes necessary, the prosecution must adduce the evidence of circumstance or facts which must make the court inescapably reach the conclusion that either the property in possession of accused or under this direction and control must have reasonably been acquired as a result of corrupt conduct in case of charge under ACECA or unlawfully obtained of the charge is under section 323 of the Penal code.

In other words, the offences created in the two legal provisions is an “**inference crime**” as the sections provide a basis of making reasonable presumption that a crime has been committed or is being committed.

As expected therefore, evidence that is usually relied on to make the deduction is often circumstantial as any direct evidence of commission of a particular offence would go towards proving the specific offence charged e.g. theft or bribery and not as a basis for establishing a reasonable belief of reasonably engaging in corrupt conduct for instance.

The court must be cautious in evaluating the circumstantial evidence relied upon and make deduction based on proven facts, not prejudice assumptions or false deductions.

Further before making any such conclusive deduction of commission of an offence based proven circumstance. The explanation by the accused should also be considered and only when the court considers it not credible, or is unreasonable or improbable or when it is effectively displaced by the prosecution evidence or accused fails to offer any account of all should the court return a guilty verdict.

Having set out the relevant law therefore, I must now determine if the evidence adduced has established the offences charged against the accused beyond reasonable doubt.

First and foremost, is the question of possession or control of the item/property said to have been suspected to have been corruptly acquired or as a result of corrupt conduct and in the penal code, reasonably suspected to have been unlawfully obtained.

This is an important limb of the offences as it constitutes the actus reus. In fact possession or proving the fact that accused was the one with authority to exercise control over the thing or property in question in the primary element that must be proved before evidence of inference of how it was acquired can come into play.

Having said so, has this been established by the prosecution beyond reasonable doubt”

For purposes of this case, the property subject matter of the charge is **Kshs.20,500/- - P. Exhibit 13** which was recovered during the arrest of the two accused person, before the court.

From the prosecution’s account, the money was recovered hidden in a nearby thicket next to where the accused were performing traffic duties contained in a black polythene bag that also had two water bottles with clogged heads that were also stashed wit notes

of money in different denomination.

None of the said monies was recovered from any of the two accused persons and they also disowned it and refused to sign the inventory of recovery insisting it did not belong to them.

PW 2 John Wainaina Muturi – had in his evidence sought to link the accused person to the recovered cash by explaining that at the time of carrying out the surveillance, the surveillance team had noticed that one of the police officers, a constable, would be seen constantly visiting a particular spot along the rail guard after every encounter with a motorist where he would bend.

On sending one of his surveillance officers to find out what was there **one Jack Musomba**, the surveillance officer discovered there was a paper bag attached to the guard rail that was being used for dropping money obtained from motorists.

However, on cross examination, it emerged that the officer who made that crucial discovery and witnessed this polythene bag, a **Mr. Jack Musomba** did not record a statement and was thus not a prosecution witness making that piece of evidence inadmissible hearsay.

It was further elicited through cross examination that the said paper bag was not even captured on video by the surveillance team.

Moreover, the said video clips produced in court did not corroborate PW 2's account of a particular officer visiting a particular spot severally and bending. Instead there was only one single incident that a police officer was captured bending. During cross examination, PW 2 conceded:-

“From the recording I have brought today, it was captured once. I watched severally but the clip captured once ...”

Further, **PW 2 John Wainaina Muturi** – admitted that this particular aspect of his testimony concerning the said paper bag was not in his recorded statement. To this court this was a very crucial evidence, could he really have forgotten to put such evidence in his statement or was this aspect a later embellishment that was informed by recovery made”

For the offences against the accused persons to be proved; possession or dealing with a particular property or control of specific property must be established. It is the foundational fact in primary fact around which other evidence is centered. Without that element being established, the offence cannot lie.

In the case of **Shadrack Ngatia Vs. Republic ACC No. 27 of 2018** which is one of the appeals to emanate from these set of fact in a case concluded by my brother chief magistrate Kennedy Bidali:- Justice Ong'udi observed:

“PW 2 was doing the videos covering event of 28/1/2017. He did not cover how money was taken to the bushes and who did it. These are omissions which strictly ought to have been covered ...”

She then concluded:

“... I find that the prosecution failed to link appellant to bribe taking and could therefore not link him to constructive possession ...”

I have also demonstrated how this vital link is missing in this case.

Consequently, inspite of effort made in gathering evidence of conduct, which I must confess after watching the said videos I find the manner the accused went about carrying their traffic duties wanting and obviously disturbing and obviously suspicious. The failure by the prosecution to effectively link them to this crucial recovery was a fatal blow to its case. I would agree with **Mr. Mongeli** – for the accused that evidence of suspicion conduct alone cannot suffice to prove the offence charged, to establish the offence, the suspect property must be demonstrated to be in possession or under the effective control of the accused persons which is missing in this case.

In the present case, if this vital link had been established; this is a recovery that bears all the hallmarks of criminality and the court would not have hesitated from making that inference especially considering the circumstance of recovery – money in polythene bag, hidden in a bush, crumpled notes stashed in water bottles, that would have been perfect circumstantial evidence for finding a crime was committed under the provisions charged.

However, this is not to be for the necessary nexus between the accused and this recovery has not been demonstrated to this court beyond reasonable doubt.

The upshot of this is that both accused are acquitted under section 215 of the CPC in all the counts.

Judgement read in open court.

In the presence of:

M/S Macheru holding brief for M/S Mogeni for accused.

M/S Mitchell holding brief for M/S Oloo.

Court clerk Pretty.

Accused present.

L.N. MUGAMBI

CM

2/11/18



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