REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC APPEAL NO. E008 OF 2021

FRANCIS ZAKAYO DANIEL...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an appeal against the Judgment of Hon E. Nyutu (Mrs) SPM

delivered on 24th April, 2021 at the CM Anti-Corruption Court at Nairobi)

JUDGMENT

1. The Appellant was tried on four counts of Bribery related offences but was only found guilty and convicted on Count II of the charge whose statement of offence was:-.

> ***"RECEIVING A BRIBE CONTRARY TO SECTION 6(1) (a) AS READ WITH SECTION 18 of THE BRIBERY ACT No. 47 of 2016.***
>
> ***It was alleged that on the 2nd day of July, 2018 within Kasarani Police station, Nairobi City County being a person employed by a public body to wit National Police Service as a Police Constable received a financial advantage of Kshs. 20,000 from George Gituma with intent that, in consequence he would facilitate release of Julia Wambui Wamenju from police cells."***

2. Being aggrieved by the conviction and the subsequent sentence of a fine of Kshs.300,000/- in default 12 months imprisonment the Appellant preferred this appeal. The appeal is premised on 9 grounds to wit:-

> ***"1. THAT the Learned trial magistrate erred in law and fact by convicting the accused person on a charge whose ingredients had not been conclusively proved.***
>
> ***2. THAT the Learned trial magistrate erred in law and fact by admitting and considering in her analysis exhibits that were otherwise inadmissible.***
>
> > ***a. THAT the Learned trial magistrate erred in law and fact by admitting in to evidence Exhibits no. 7 & 8, which were recorded conversations between Pwl and the Appellant, in the absence of the phone make Infinix X551 of IMEI 545340000876658, which was allegedly used by PWl in calling the Appellant herein.***
> >
> > ***b. THAT the Learned trial magistrate erred in law and fact by admitting in to evidence, exhibits number 6,7 & 8 which had been transcribed by Pwll who is not a qualified transcriber.***
> >
> > ***c. THAT the Learned trial magistrate erred in law and fact by failing to consider the contents of exhibit no. 12 which showed that the Appellant had never spoken to Pwl, but went ahead and admitted exhibits no. 7 & 8 which were recorded over a telephone call.***
>
> ***3. THAT the Learned trial magistrate erred in law and fact by convicting the Appellant on the basis of evidence that was unsatisfactory, contradictory and very flimsy***

a. That the investigating officer, PW ll failed to establish that indeed PWl had an existing known business.

b. That the investigating officer failed to produce in court the gambling machines the subject of the charges against the Appellant.

c. That the investigating officer failed to take for analysis the phone of the Appellant in an effort to prove the existence of communication between the Appellant, PWl & Pw3.

d. That the investigating officer failed to produce in court the phone of PWl which was allegedly taken for analysis leading to the existence of Exhibits 7 & 8.

e. That the investigating officer failed to engage the services of a transcriber and went ahead and transcribed Exhibits 6,7&8 knowing very well he was unqualified for the same.

f. That the investigating officer did not bother to authenticate from Safaricom whether indeed the phone number provided by Pwl indeed belonged to the Appellant herein.

g. That the investigating officer failed to produce in court the frap money in relation to Exhibit. 4 that was to be handed over to the Appellant.

h. That the Investigating officer, PWll failed to prove that indeed Pw3 handed over Ksh. 20,000/- to the Appellant herein, by failing to produce in court the Mpesa statement of Pw3.

4. THAT the Learned trial magistrate erred in law and fact by convicting the accused person in the absence of evidence by Pvv3 that he indeed withdrew money from an Mpesa shop and handed over the same to the Appellant. No Mpesa transaction message was produced in court to prove this claim by PW3.

5. THAT the Learned trial magistrate erred in fact and law, by convicting the appellant in the absence of the initial complaint that was made at the EACC offices by PWl.

6. THAT the Learned trial Magistrate erred in law and fact by failing to subject the entire evidence tendered during the hearing to an exhaustive scrutiny and therefore arriving at a verdict that was manifestly unsafe.

7. THAT the Learned trial magistrate erred in law and fact, by convicting the accused based on exhibits 7&8, while it was not proven in court that indeed the Appellant herein was the owner of mobile phone no. 0720 455 308 that was allegedly used in the conversations.

8. THAT the Learned trial magistrate erred in law and fact by making a finding that the testimonies of the prosecution witnesses were one beyond reasonable doubt.

9. THAT the Learned trial magistrate erred in law and in fact in meting out a conviction and sentence in disregard of the weight of the evidence adduced by the defense."

3. By this appeal the Appellant urges this court to quash the conviction and set aside the sentence.

4. The appeal is vehemently opposed.

5. Briefly the facts of the prosecution's case against the Appellant were that on 2nd July, 2018 Julia Wambui Wamenju who operated a gambling business was arrested in a sting operation by a group of police officers and taken to Kasarani Police Station, where she was locked up in the cells. Her gaming machines were also seized and taken to the same police station. While she was in the cells she called her friend Grace Wambui Njoroge (PW2) and her brother George Gituma Kangai (PW3) who both proceeded to the police station. According to Julia Wambui and her brother George he arrived at the station at about 6 p.m. and went to see the Officer Commanding Station (OCS) in order to secure her release on bond but was told that that would only happen if he deposited a cash bail of Kshs.30,000/-. He pleaded with the OCS to reduce the bail to Kshs.20,000/- as that was all he had but the OCS would not budge. When he called Grace (PW2) to tell her what had transpired she intimated to him that the officer who had arrested Julia had given her his telephone number so they could call him once bail was posted. It was then that George (PW3) called the number and spoke to the Appellant who promised to be there in 10 minutes. When the Appellant arrived he beckoned PW3 to the police Land cruiser he had arrived in and introduced himself as Zakayo. George (PW3) testified that the Appellant confirmed it was him who had arrested Julia and asked for Kshs.30,000/- to facilitate her release. When George told him he only had Kshs.20,000/- the Appellant allegedly agreed to take that and George went to an Mpesa Agency and withdrew that sum and came and gave it to him and Julia was released. It was alleged that the Appellant asked Julia to return for the machines the next day but when she did the Appellant demanded another Kshs.20,000/- prompting Julia and her brother George to report the matter to the Anti-Corruption Commission. Efforts to trap the Appellant with treated notes of Kshs.20,000/- however proved futile even though he had allegedly been recorded asking for money on a tape recorder provided to Julia by investigators from the Commission. The Appellant was nevertheless arrested and subsequently charged with this offence and the other three for which he was acquitted.

6. In his defence the Appellant elected to give sworn testimony and told the court that on 2nd July 2018 he first went out on normal patrol with his colleagues following which they were deployed on a sting operation involving illicit gambling. He testified that at a place commonly referred to as maternity area they arrested a woman, confiscated her gambling machines and took her to Kasarani Police Station whereupon they left on patrol duties. He recalled receiving a call from a strange number whose caller was a woman who told him she had been released

by the officer in charge. He stated that when he asked her how she got his number she told him it was given to him by an officer at the report office. He stated that the woman was inquiring about her exhibits and he advised her to seek assistance from the OCS. The appellant denied that he asked for or received any money from George and contended that no Mpesa statement was produced in evidence to prove that George withdrew money from an Mpesa outlet to pay him. He denied ever encountering Julia and George prior to meeting them in the trial court and contended that the case against him was a witch hunt. He pointed out that the averment by George that it was him who released Julia from custody was a lie.

7. The appeal was canvassed by way of written submissions. In summary counsel for the Appellant submitted that the prosecution did not prove its case beyond reasonable doubt. Learned Counsel for the Appellant cited the case of **R v Lifchus [1997] 3 SCR 320** where the Supreme Court of Canada stated:-

> ***"The accused enters these proceedings presumed to be innocent. that presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty .... the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation yet something must be said regarding its meaning.***
>
> ***A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.***
>
> ***Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond reasonable doubt."***

8. Counsel faulted the trial magistrate for relying on uncorroborated evidence to convict the appellant. He urged this court to allow the appeal, quash the conviction and set aside the sentence.

9. The appeal is vehemently opposed. Quoting **Section 6(1) of the Bribery Act,** learned Prosecution Counsel representing the Respondent submitted that the evidence adduced clearly indicates that at the material time the Appellant was a public officer stationed at Kasarani police station. Counsel submitted that the evidence of PW1, PW2 and PW3 indicates that PW1 was indeed arrested on 2nd July, 2018 for operating a gambling machines business and that it was after that that the Appellant requested for Kshs.20,000/- in order to release the gambling machines they had taken away from her business. Counsel contended that there was evidence that the Appellant requested for Kshs.20,000/- to secure the release of PW1 and the gambling machines. Counsel asserted that the main ingredients of the offence of receiving a bribe are that one has to request, receive or agree to receive a financial or other advantage in order to perform a certain act improperly.

10. As regards the admissibility of the transcribed evidence Counsel contended that the same was properly admitted in accordance with the rules of evidence. Counsel stated that exhibits 7 and 8 were transcripts of recorded conversations between the Appellant, PW1 and PW2 on various dates and that the investigating officer (PW11) who was in conduct of the case was competent enough to produce the transcribed recordings. Counsel contended that there is no express provision that one required certain qualifications to transcribe. In support of this proposition Counsel relied on the case of **Nancy Ng'endo Mburu v Republic [2018] eKLR** and the case of **In Re Estate of Veronica Njoki Mungai (deceased) [2017] eKLR** cited in the case of **Pamela Zipporah Moriasi v Republic ACEC Appeal 18 of 2020.** Counsel urged this court to find that there was no error in convicting the Appellant as the oral testimonies and the transcribed recordings were all consistent.

Analysis and determination

11. As the first appellate court my duty is to reconsider and evaluate the evidence before the trial court so as to arrive at my own independent decision while keeping in mind that unlike the trial magistrate I did not hear or see the witnesses who gave evidence (**See Okeno v Republic [1972] EA 772)**

12. The appellant was charged with four counts of the offence of Receiving a bribe contrary to **Section 6(1)(a)** of the Bribery **Act.** He was acquitted on three counts and convicted on Count II.

13. The offence of bribery is defined in **Section 6(1)(a)** of the **Bribery Act** which states: -

> "***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"***

14. The Judgment of the trial magistrate reveals that the Appellant was convicted only on one count but not two as alleged by Counsel for the Appellant. The definition of the Offence of Bribery is fairly straight forward. The offence is completed when one either requests (solicits), agrees to receive or receives a financial advantage intending that a relevant function or activity should be performed improperly whether by the person receiving the bribe or by another person. Therefore to be convicted for the offence the prosecution need not prove solicitation.

15. What constitutes a relevant function or activity is defined in **Section 7 of the Act** as:-

"7. Function or activity to which a bribe relates

(1) ***For the purposes of this Act, a function or activity shall be construed to be a relevant function or activity if —***

(a) it includes —

(i) any function of a public nature;

(ii) any function carried out by a State officer or public officer, pursuant to his or her duties;

(iii) any function carried out by a foreign public official, pursuant to his or her duties;

(iv) any activity connected with a business;

(v) any activity performed in the course of a person's employment, and

(vi) any activity performed by or on behalf of a body of persons whether corporate or otherwise;

(b) it meets one or more of the following conditions —

i.) that the person performing the function or activity is expected to perform it in good faith;

ii.) that the person performing the function or activity is expected to perform it impartially; and 8 [Rev. 2019] Bribery No. 47 of 2016

iii.) that the person performing the function or activity is in a position of trust by virtue of performing it. (2) For purpose of this section, a function or activity is a relevant function or activity even if it is performed in a county or territory outside Kenya."

16. From the above definition there is no doubt that the functions performed by a police officer constitute a relevant function or activity within the meaning of **Section 7** of the **Bribery Act**. In regard to Count II it was alleged that upon arresting PW1, seizing her gambling machines and taking her into custody at Kasarani Police Station the Appellant requested for and received a sum of Kshs. 20,000/- in order to release her. According to PW1 and her friend PW2, her brother PW3 first approached the Officer Commanding the Station (OCS) but was asked to pay a cash bail of Kshs. 30,000/- so that PW1 could be released. However, PW3 only had Kshs. 20,000/- so he approached the Appellant who agreed to take it in order to release her. According to PW3 he went to an Mpesa shop and withdraw the cash and gave it to the Appellant and PW1 was released. The release of PW1 from custody was an activity which was ordinarily performed by the Appellant in the course of his employment not to mention that it was a function carried out by him pursuant to his duties as a public officer. The activity meets all the conditions set out in (i), (ii) and (iii) of **Section 7** of the **Bribery Act**. In his defence the Appellant adduced evidence that he did not himself have authority to release prisoners from custody; that that function fell upon the OCS but not any other officer. However, that it was not him but the OCS who could release prisoners is irrelevant in view of the provisions of **Section 6(3)(a)** of the **Bribery Act** which states that it shall not matter whether the recipient is the one charged with performing the function or activity. The issue for determination herein is whether or not there was evidence beyond reasonable doubt that the appellant received a sum of Kshs.20,000/= from PW3 so that he could release PW1 from custody.

17. The trial magistrate relied on the evidence of PW1, PW2 and PW3 and the transcription of a recording made by PW1 of conversations held between herself, PW3 and the Appellant on various days, to come to the conclusion that the appellant indeed received the money. Whereas I agree with the trial magistrate that the standard of proof required in criminal cases is not one of absolute certainty but one only of beyond reasonable doubt it is my finding that the prosecution did not prove its case against the Appellant beyond reasonable doubt. There is no evidence save for PW3's word that the Appellant requested him for Kshs. 20,000/- or even that the Appellant received that money from him. PW1 was in the cells and did not witness what transpired between PW3 and the Appellant. As for PW2 I discerned that she was not a trustworthy witness because her version of what transpired differed sharply with those of PW1 and PW2. For instance, it was her testimony that she spoke to the Appellant who told her that he would only release PW1 and her machines if he was paid Kshs.20,000/-. She also claimed to have witnessed PW3 giving the Kshs.20,000/- to the Appellant and stated that upon counting the money and putting it in his pocket the Appellant told them to wait and he left and returned with PW1. This is in contrast to the evidence of PW1 that upon PW3's arrival at the station at about 6.30 p.m. the police officer at the OB is the one who informed her that she was now free as her brother had come for her. PW1 did not make any mention that Kshs. 20,000/- was paid by PW3 to secure her release. What she however mentioned was that PW3 informed her that he had been asked to pay a cash bail of Kshs.30,000/- to secure her release. She did not also allege to have been told by PW2 of the demand of Kshs.20,000/- made by the Appellant. It would be perplexing that she could have forgotten that very important detail. It is even more perplexing that PW3 could have paid a bribe of Kshs.20,000/- to secure her release and failed to inform her. Concerning her release she did not, contrary to PW2's testimony, state that she was fetched from the cells by the Appellant who walked out with her to meet her (PW2) and PW3. Instead PW1 stated that she was just called by the person manning the cell and told to go home. It is also instructive that PW3 did not state that PW2 told him the amount of money the Appellant had asked for in order to release PW1. Neither did PW3 allege that PW2 was present when he gave the money to the Appellant. It is no wonder then that the trial magistrate turned to the transcript of the recording to look for evidence which would confirm that the appellant received the money. At page 18 of her judgment the Learned Trial Magistrate stated: -

"I have looked at the transcript of recorded conversation between Julia Wambui, Francis Zakayo and George Gituma on 11th July, 2018 at Kasarani police station. The same was admitted into evidence as P.Exh6.

In that conversation, the accused person has been captured on 3 instances saying the (sic) he had assisted PW3 to secure the release of PW1 ....

From the above snippets of conversation, it is clear that there was a discussion over money to secure the release of PW1 from the police cells. This therefore corroborates evidence of PW2 who was an eye witness and that of PW3 who actually handed over the money.....”

18. As I have already stated PW2 did not impress me as a truthful witness and therefore nothing much turns on her evidence. As for the transcript I have perused it several times and have not found anything that suggests that the Appellant requested for or received money in order to release PW1. On the contrary the conversation in the transcript is about the release of the gaming machines and at one point PW3 is heard offering Kshs. 20,000/= to the Appellant to release the machines. That in the transcription (PExh. 6 MFI 6) the Appellant talks of having assisted “mama” to go home cannot by any stretch of imagination be construed to mean that he admitted to have received money to facilitate her release. That he received Kshs.20,000/= in order to release her required to be proved beyond reasonable doubt but what the court received is no more than mere allegations. From the transcripts one highly suspects that the Appellant received money but as the adage goes suspicion no matter how strong cannot be the basis of a conviction and where there is doubt in the court’s mind the benefit of that doubt must be given to the accused person.

19. The upshot is that there was no sufficient evidence upon which the Appellant could be convicted of the offence of bribery. It is my finding therefore that his conviction was not safe. In the premises this appeal is allowed, the conviction is quashed and the sentence is set aside. The Appellant should be set at liberty forthwith and if the fine or any part thereof was paid the same should be refunded. Orders accordingly.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 24TH DAY OF MARCH, 2022.

E.N. MAINA

JUDGE