



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO E007 OF 2020

FREDRICK NYAGAKA NYANG'ACHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon J. K. Ng'arngar (CM) delivered at Kisumu

Chief Magistrate's Court in Criminal Anti-Corruption Case No 7 of 2014

on 26th February 2020)

JUDGMENT

INTRODUCTION

1. The Appellant herein was charged with three (3) counts of the offence of corruptly soliciting for 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. He was charged with receiving Kshs 350,000/=, Kshs 50,000/= and Kshs 20,000/= in Count I, Count II and Count III respectively.
2. He was also charged with an alternative 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.
3. The Learned Trial Magistrate, Hon J.K Ng'arngar(CM) acquitted him on Count I and Count II but convicted him of Count III and sentenced him to pay a fine of Kshs 50,000/= and in default, to serve six (6) months imprisonment.
4. Being dissatisfied with the said Judgement, on 16th October 2020, the Appellant lodged the Appeal herein. His Petition of Appeal was dated 15th October 2020. He relied on seven (7) grounds of appeal.
5. His Written Submissions were dated 14th September 2021 and filed on 17th September 2021 while those of the Respondent were dated 21st January 2022 and filed on 24th January 2022.
6. This Judgment is based on the said Written Submissions which parties relied upon in their entirety.

LEGAL ANALYSIS

7. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
8. This was aptly stated in the case of **Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA 123** where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
9. Having looked at the Grounds of Appeal and the respective Written Submissions, it appeared to this court that the issues that had been placed before it for determination were as follows:-

a. Whether or not the Prosecution proved its case beyond reasonable doubt.

b. Whether or not in the circumstances of this case, the sentence and/or fine that was meted upon the Appellant by the Trial Court was lawful and/ or warranted.

10. The court dealt with the two (2) issues under the following distinct and separate heads.

I. PROOF OF PROSECUTION'S CASE

11. All the Grounds of Appeal were dealt with together as they were related.

12. The Appellant invoked Section 39 (3) (a) of the Anti-Corruption & Economic Crimes Act No 3 of 2003 and submitted that an accused person will be deemed to have committed an offence contrary to the said Section if the prosecution proved beyond reasonable doubt that the accused was/is 'an agent', that is, he was at the material time in employment of another, either in private or public sector, that there was a solicitation of a benefit, reward or inducement in fact, that there was proof that the accused received a particular benefit, reward or inducement and that there was a corrupt intention, that is, that there was demonstration of the fact that the purpose of the said solicitation or the receipt of inducement by the accused person was to influence the accused person to do or not to do, or to show favour or disfavour to any person in the matters relating to the affairs of the business of his principal/employer. In this regard, he placed reliance on the case of **Paul Mwangi Gathongo vs Republic [2015]eKLR** and **Michael Waweru Ndegwa vs Republic [2016]eKLR**.

13. He pointed out that according to Gad Omondi Opiyo (hereinafter referred to as "PW 1"), he was issued a tender through his Company Diaspora Design Build Ltd to put up a laboratory at Kisumu Polytechnic. He stated that PW 1 testified that he refused to issue him with a Final Certificate of Kshs 11,000,000/= until PW 1 paid him Kshs 350,000/= whereupon PW 1 reported to Ethics and Anti-Corruption Commission (hereinafter referred to as "EACC").

14. He explained how PW 1 testified that they agreed to meet him at Nyanza Club where he informed PW 1 to give him a report for the Project before he could issue him with the Certificate and PW 1 recorded the conversation. It was his submission that PW 1's evidence that he had demanded a sum of Kshs 350,000/= was not corroborated with electronic evidence as the recording was not audible. He contended that on 22nd November 2014, he met PW 1 at Kisumu Hotel where PW 1 handed to him Kshs 20,000/= given to him by EACC thus leading to his arrest which he believed was the Report he had asked PW 1 to give him before he could issue the Certificate.

15. In his defence, he denied having solicited for 20,000/= or Kshs 50,000/= or Kshs 350,000/= as was alleged by PW 1. He took the Trial Court through the process of valuation leading to the issuance of Final Certificate and faulted the Learned Trial Magistrate for having convicted him on the ground that he met with PW 1 in a hotel instead of his office while it was PW 1 who made such appointment of meeting him with full knowledge of EACC.

16. He pointed out that the nature of his work was site based and it was natural for PW 1 to have requested for a meeting at a place where parties could talk freely on the ongoing projects.

17. It was his contention that the Prosecution did not adduce direct evidence showing that Kshs 20,000/= he received had been solicited or demanded and then given as an inducement for the preparation of the Final Certificate. He added that the audio produced neither mentioned the Kshs 20,000/= nor the Final Certificate. He placed reliance on the case of **Peninah Kimuyu vs Republic [2014] eKLR** where the court held that it cannot have been the intention of the parliament and it be surmised from a plain reading of the provision, that once it was shown that the accused person had some money on him, then he must have been bribed.

18. He explained that that is what happened to him and led to his conviction without direct evidence. He was categorical that none of EACC officers visited the site of the project to confirm whether PW 1 had completed the work to enable him obtain the Final Certificate and further to confirm if Kshs 11,000,000/= was owed to PW 1 as alleged. He argued that Sophie Nyambu (hereinafter referred to as "PW 7") confirmed that position when she testified that she did not confirm whether he was the Quantity Surveyor but only prepared trap money based on the complaint that was filed by PW 1.

19. He was emphatic that the impugned Kshs 20,000/= was conveniently planted on him with an ill intention of securing his arrest on corruption and the same was planted without due diligence and proper investigations by the EACC.

20. He was emphatic that the decision of the Trial Court was based on the suspicion that since he was at a hotel with PW 1 instead of his office and received the envelope which contained Kshs 20,000/=: then he had solicited for the said money.

21. He was emphatic that the Trial Court grossly misdirected itself by ignoring the legal principles governing circumstantial evidence and when to convict on such evidence. He submitted that the conviction was an injustice on his part as he did not demand for any amount of money.

22. He contended further that the law with regard to circumstantial evidence was well settled by the Court of Appeal in various cases where it had unanimously stated that the inculpatory facts must be incompatible with the accused's innocence and incapable of examination upon any other hypothesis other than his guilt. He added that the courts had further stated that suspicion however strong, could not provide the basis of inferring guilt which must be proved beyond reasonable doubt as was held in the cases of **Paul vs Republic [1980] KLR** and **Sawe vs Republic [2003] KLR 354**.

23. He was categorical that he had demonstrated that no proper investigation was done and that there was no evidence leading him to the alleged solicitation. In the premises, he submitted that his appeal had merit, and urged the court to allow the same and quash the conviction.

24. On its part, the State submitted that the Prosecution proved its case in respect of Count III against the Appellant beyond reasonable doubt as the evidence on record clearly showed that he received the benefit for Kshs 20,000/= from PW 1. It added that a recording was played before the court to prove that the Appellant actually solicited and received the Kshs 20,000/= from PW 1. It was categorical that the said evidence was corroborated by the evidence of EACC officers who had treated the money and laid the trap for the Appellant.

25. It placed reliance on the case of Paul Mwangi Gathongo vs Republic (Supra) that the Appellant also relied upon where the court outlined the ingredients of the offence of soliciting and receiving a bribe. It was emphatic that the Appellant was a public officer and the Prosecution proved that he actually solicited and received Kshs 20,000/=.

26. It added that the Learned Trial Magistrate did not err when he convicted the Appellant on Count III and thus urged this court to dismiss the Appeal as it was not merited.

27. This Court had due regard to the authorities cited by parties herein, and in particular Paul Mwangi Gathongo vs Republic (Supra) where the ingredients for corruptly soliciting for benefit were identified as proof of solicitation or offer or receipt of a gratification, such gratification must have been asked for, offered or paid as a motive or reward for inducing by corrupt or illegal means and that such person who had solicited had to be someone acting in the public or private or employed or acts for and on behalf of another person, or confer a favour or ask for a favour to render some service.

28. Notably, it was not in dispute that the Appellant was a public officer. What was in dispute in the appeal herein was whether the Appellant demanded and/or solicited for the impugned Kshs 20,000/= from PW 1. It was therefore not necessary to analyse the evidence and Appellant's Written Submissions relating to soliciting for a bribe of Kshs 350,000/= or Kshs 50,000/= as he was acquitted of Counts II and II respectively.

29. Although the recording PW 1 made was inaudible and unreliable, it was not necessary that his evidence be corroborated by electronic evidence which the Learned Trial Magistrate correctly found could not have been safe to mount a conviction.

30. It was clear that PW 1's evidence was corroborated by Investigators with EACC, Samuel Mukundi, No 55971 Corporal James Wachira and Sophie Nyambu (hereinafter referred to as "PW 3", "PW 5" and "PW 7" respectively) who testified that treated money in the sum of Kshs 20,000/= was recovered from the person of the Appellant herein and tendered in evidence during trial.

31. Further, a Government Analyst Miriam Chege (hereinafter referred to as "PW 4") confirmed that the control sample of ABQ powder was found on the trap money in the sum of Kshs 20,000/=, swabs that had been taken from the Appellant's right and left hand, the A5 khaki envelope which had carried the money and an A4 khaki envelope that carried the A5 khaki envelope.

32. Whereas Oluoch Benard (hereinafter referred to as 'DW 2') testified that PW 1 did not complete his work to warrant the issuance of a Final Certificate, Gladys Maleté (hereinafter referred to as 'DW 3') stated that the valuation was properly done and George Wilson Wanyagole (hereinafter referred to as 'DW 4') testified that PW 1 had not requested for a Final Certificate, this court took the view that the same did not really rebut PW 1's evidence that the Appellant solicited a bribe from PW 1. It merely attempted to show that the Appellant had no reason to solicit for the bribe. The fact that a person should not solicit for a bribe does not necessarily imply that such person cannot seek a bribe.

33. Whereas there was no electronic evidence to prove that the Appellant solicited for Kshs 350,000/= from PW 1, the Appellant was arrested after he received the sum of Kshs 20,000/= that had been treated.

34. The Appellant's assertion that he had gone to collect a Report from PW 1 was negated by his evidence and that of DW 2 that PW 1 had not done work to warrant the issuance of a Final Certificate. The Appellant did not also explain the relevance of the Report he was to collect from PW 1 as he testified that the Final Certificate was written by the Project Manager. When he was cross-examined, he explained that his role was to release all the monies to PW 1 after the Defect Liability Period and that the contract was not over and ripe for payment.

35. In the absence of any plausible explanation why the Appellant met PW 1, this court was persuaded by the determination of the Learned Trial Magistrate that the Appellant's defence that he was to collect a Report from PW 1 was not plausible.

36. This court therefore was of the considered view that the Prosecution proved its case in respect of Count III beyond reasonable doubt and that the Learned Trial Magistrate did not err in having convicted the Appellant.

37. In the premises, Grounds of Appeal Nos (1), (2), (3), (4), (5), (6) and (7) were not merited and the same be and are hereby dismissed.

II. SENTENCE

38. The Appellant had argued that the conviction to pay fine of Kshs. 50,000/= or in the alternative six (6) months imprisonment was against the weight of evidence. He added that prior to the charges filed against him, he was a law-abiding citizen with no record of criminal offence and that he was working diligently until when he was maliciously removed from office resulting to him losing his job and earnings which was used to sustain his family and his ailing mother. He thus urged this court to set aside the sentence and set him at liberty.

39. On its part, the State submitted that the sentence meted and/or the fine of Kshs 50,000/= in default for Count III was very lenient. It was its contention that the sentence was therefore lawful and should be upheld.

40. Section 48(1) of the Anti-Corruption and Economic Crimes Act 3 states as follows:-

“A person convicted of an offence under this Part shall be liable to:-

a. A fine not exceeding one million shillings or 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.”

41. This court was satisfied that the Learned Trial Magistrate was lenient in having fined the Appellant a sum of Kshs 50,000/= in default and a term of imprisonment of six (6) months.

DISPOSITION

42. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Petition of Appeal lodged on 16th October 2020 was not merited and the same be and is hereby dismissed. The conviction and sentence that was meted upon the Appellant herein be and is hereby upheld as the same was lawful and safe.

43. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF APRIL 2022

J. KAMAU

JUDGE