REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI -CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

ACEC APPEAL NO. 23 OF 2019

(FORMERLY CRIMINAL APPEAL NO 21 OF 2015)

LUCY WANGUI KAMAU..... APPELLANT

VERSUS

REPUBLIC…… RESPONDENT

(Being an appeal from the conviction and sentence in Criminal Case No ACC 30 of 2008 (Hon. L. Nyambara (PM) dated 8th October 2010)

JUDGMENT

1. The appellant was charged with various offences under the Anti-corruption and Economic Crimes Act (ACECA) No 3 of 2003. At count I, she was charged with the offence of soliciting for a benefit contrary to section 39(3) (a) as read with section 48(1) of ACECA. The particulars of the offence were that on the 22nd day of August 2008 at Beehive Bar and Restaurant in Nairobi within Nairobi area, being a person employed by a public body to wit the Ministry of Health as a Public Health officer II and seconded to the Nairobi City Council, corruptly solicited for a benefit of Kshs 50,000 from Mathew Ndonga Kabau as an inducement to facilitate withdrawal of Case Number 253 (A/08) at City Court Nairobi, a matter in which the said public body was concerned.

2. At Count II, the appellant faced a charge of soliciting for a benefit contrary to section 39(3) (a) as read with section 48(1) of ACECA. The particulars of the offence were that on the 25th day of August 2008, along New Pumwani Road in Nairobi within Nairobi area, in the same capacity as in count I, she corruptly solicited for a benefit of Kshs 50,000 from Mathew Ndonga Kabau as an inducement to facilitate withdrawal of Case Number 253 (A/08) at City Court Nairobi.

3. The appellant faced, at count III, the charge of receiving a benefit contrary to section 39(3) (a) as read with section 48(1) of ACECA. The particulars of the offence were that on the 25th day of August 2008, along New Pumwani Road in Nairobi within Nairobi area, in the same capacity as in count I and II, she corruptly received a benefit of Kshs 20,000 from Mathew Ndonga Kabau as an inducement to facilitate withdrawal of Case Number 253 (A/08) at City Court Nairobi.

4. Count IV charged the appellant with the offence of offering a benefit contrary to section 39(3) (a) as read with section 48(1) of ACECA. The particulars of the offence were that on the 25th day of August 2008, along University Way in Nairobi, in her capacity as a person employed by a public body as in the other counts, she corruptly offered a benefit of Kshs 50,000 to Robert Karani and Patrick Mbijiwe, investigators with the Kenya Anti-Corruption Commission (KACC) so that they would forebear from charging her with offences of soliciting and receiving of a benefit contrary to section 39(3) (a) as read with section 48(1) of ACECA.

5. The appellant pleaded not guilty to the charges against her and was tried before the Anti- Corruption Court (Hon. Nyambura, PM). In the judgment dated 8th October 2010, the appellant was found guilty on count II and III but was acquitted on count I and IV. She was sentenced to a fine of Kshs 100,000 on each count and in default to serve twelve (12) months imprisonment. She was also sentenced on count II to a mandatory sentence under section 48(1) of ACECA to a fine of Kshs 40,000 and in default to serve a term of imprisonment of 6 months. The appellant paid the fines on both counts.

6. Pursuant to orders issued on 28th January 2015 by the High Court (Kimaru J), the appellant was granted leave to file an appeal out of time. In the Petition of Appeal dated 3rd February 2015, the appellant appeals against both her conviction and sentence on the following grounds:

1. That the Learned Principal Magistrate erred in law and in fact in convicting the appellant on the charge before the court when the same was not proven to the required standards.

2. That the Learned Principal Magistrate erred in law and in fact in convicting the appellant when the evidence on record failed to support the charge.

3. That the Learned Principal Magistrate erred in law and in fact in the conviction on counts (ii) and (iii) despite there being no evidence on record to justify and/or support such conviction.

4. ***That the Learned Principal Magistrate erred in admitting and relying on the evidence of the recorded transcript despite the same having been largely discredited and illegible on large portions.***

5. That the Learned Principal Magistrate erred in law and in fact in failing to have regard to the fact that the ingredients of the offences on both counts had not been established.

6. That in particular the Learned Principal Magistrate erred in law and in fact in failing to consider adequately or at all the fact that the Applicant never made the promises alleged a fact that was demonstrated by the transcript and as a consequence the charges ought to have failed.

7. THAT Learned Principal Magistrate erred in law by failing to have regard to the fact that the mandatory provisions of S. 35 of the Anti-corruption & Economic Crimes Act had not been complied with.

8. That the sentence of the court is manifestly excessive.

7. The appellant asks the court to allow her appeal, quash her conviction and set aside the sentence against her.

8. As the first appellate court, I am under an obligation to re-evaluate the evidence adduced before the trial court and reach my own conclusion. In doing so, I bear in mind that I have neither seen nor heard the witnesses, which the trial court had the benefit of doing.

9. The prosecution called a total of 7 witnesses. The evidence of Mathew Ndonga Kabau (PW1), the complainant, was that he had been informed on 15th August 2008 that officers from the Nairobi City Council wanted to see him regarding his premises in Luthuli Avenue. He had spoken to one of the City Council officers, a woman, who told him that there was a serious matter and they would issue a warrant of arrest against him. On 19th August 2008, he was informed by one of his tenants that court summons had been fixed to his building.

10. He went to Nairobi on 20th August 2008 and was shown the summons. The appellant, who had signed the summons, told him she would want some money, Kshs 50,000. He had informed her that he could only raise Ksh 5,000, which she said was too little. He had then reported the matter to the Kenya Anti-Corruption Commission (KACC) who had given him money and a tape recorder. The money had been given to him by No 61226 Sergeant Eunice Njeri (PW4), a police officer seconded to KACC, whose evidence was that she had treated the money with APZ powder and had instructed him on how to use it.

11. PW1 had agreed to meet with the appellant and one Wanjiku at River Road, in his vehicle KAK 816Q. The appellant had entered his vehicle and they had discussed the money she was to receive. He had given the appellant the money which she had put in her handbag. She had tried to throw out the money from her handbag when KACC officers who were watching came. She was arrested and taken to KACC offices.

12. PW1 had recorded his conversation with the appellant on a recorder given to him by KACC. The recording and transcript of the conversation between PW1 and the appellant were produced in court, as well as the money (Kshs 30,000 which was fake and Kshs 20,000 which was real). The court noted that the tape recording was replayed back and that it captured the conversation between the appellant and PW1, which was in the Kikuyu language, and the conversation was clearly heard.

13. It emerged in cross examination that PW1 had recorded the conversation with the appellant on 25th August 2008, which is when she demanded Kshs 50,000. The purpose of the money was in order for the appellant to withdraw the case against PW1, No 253 (A) of 2008. He was the one who first mentioned the money in the transcript but she was the one who came up with the issue of the money.

14. No 56113 PC Patrick Mbijiwe (PW2) an employee of KACC, had been instructed by Livingstone Waihenya (PW7) to join him, Cecily Mumbi (PW5) and Robert Karani (PW6) in a sting operation. Mbijiwe had followed the complainant and the appellant and had stood near the complainant's vehicle in which the complainant and the appellant were. He had seen PW1 hand over the money to the appellant, who had put it in her handbag. He had prevented the appellant from removing the money from her handbag. PW6 (Karani) had swabbed the appellant's hands after she received the money, while PW7 (Waihenya) had written an inventory of the money. The money was recovered from the appellant's handbag by PW5 (Cecily Mumbi). It was not recovered from the floor of the vehicle.

15. Titus Nzao Mutini (PW3) from the Public Health Department of the Nairobi City Council had sent the appellant to carry out surveys on private pharmacies. The appellant had later called him and informed him that she had been arrested. He had been able to identify the voice of the appellant on the tape recording played to him by KACC.

16. PW4, William Kailo Munyoki, had analysed exhibits which included a right hand swab of the appellant, a khaki envelope and gloves, the left hand swab of the appellant and a black bag from the appellant. The items had been sent to him by Waihenya (PW7). He had found the APQ powder on the right and left hand swabs of the appellant as well as on her bag and the money.

17. No. 835998 PC Cecily Mumbi (PW5) had been requested by PW7 (Waihenya) to assist in investigating the case against the appellant. Her evidence was that she and her colleagues had been informed by the complainant (PW1) that a Public Health Officer had demanded a benefit of Kshs 50,000 to withdraw a case against him. She had seen the appellant meet the complainant at a restaurant. Thereafter, she and her colleagues had followed the complainant and had seen him hand over money to the appellant in his car. When escorted to the KACC vehicle, the appellant had removed the money from her handbag and dropped it on the floor of the KACC vehicle. The appellant had offered PW5 and Karani) PW6 a bribe of Kshs 50,000 to release her, a conversation that PW5 had recorded.

18. No 60527 Sgt. Robert Karani (PW6) was also attached to KACC. He too was part of the trap operation relating to the appellant. He had followed the complainant and the appellant and seen the arrest of the appellant. He had taken swabs of the appellant's hands. He confirmed that Cecily Mumbi (PW5) had recovered the money from the appellant's handbag. He also confirmed the evidence of PW5 that the appellant had offered to give them money to forgive her.

19. PW7, No 231980 Livingstone Waihenya, had been informed that a public health Officer at Nairobi City Council was demanding a benefit of Kshs 50,000 from the complainant so as not to charge him with an offence under the Public Health Act. He confirmed the evidence of PW1, 2, 5 and 6 regarding the treatment of the money with APQ powder and the trap operation against the appellant. The complainant had contacted them after the appellant received the trap money. Some of the trap money was recovered in the appellant's bag and some on the floor of the vehicle. Waihenya produced the transcript of the recordings of the conversation between the appellant and the KACC officers. He stated in cross examination that one Elizabeth Wanjiku declined to record a statement as she was a friend of the appellant.

20. When placed on her defence, the appellant elected to make an unsworn statement in which she denied the offences with which she was charged. She stated that she had issued a statutory notice with respect to the complainant's premises. She had thereafter issued summons after the notice was not complied with. A woman called Elizabeth Wanjiku declined to sign the notice. On 25th August 2008, the said Elizabeth Wanjiku called her and told her somebody wanted to talk to her in a vehicle. She went to the vehicle and as she entered, money was thrown at her. She rejected it, there was a commotion, and she was bundled into a car and taken to Integrity Centre where she was charged with the offences she faced.

21. In its decision, the court found that the transcripts produced were admissible in evidence. It also found that the appellant was a public officer as a public health officer attached to the City Council. She had inspected premises owned by PW1. The appellant had demanded Kshs 50,000 to assist the complainant. The court found that as Elizabeth Wanjiku was not called as a witness, the charge in count I was not proved beyond reasonable doubt. The court, however, found that from the transcripts (exhibits 9(a) and 9(b)) the appellant had solicited a bribe of Kshs 50,000 so that she can assist the complainant in the public health case against him. The court also found that the evidence showed that the appellant had received Kshs 50,000 which she put in her handbag. It noted that the appellant's hands were swabbed and the APQ chemical which had been placed on the trap money was found on her hands.

22. The court further noted that the defence was that there was inconsistent evidence on where the money was recovered. It observed, however, that it was possible that the appellant dropped some money on the floor of PW1's vehicle when KACC officers told her she was under arrest. The court accordingly rejected the appellant's defence. It convicted and sentenced her as set out earlier in this judgment, leading to the present appeal.

Analysis and Determination

23. The appellant and the respondent filed written submissions which I have read and considered. From the submissions of the parties, the issues that arise for determination are:

i. Whether there was sufficient evidence on which to base a conviction;

ii. Whether the conviction should be quashed for failure by the prosecution to call a crucial witness;

iii. Whether there was a failure to comply with section 169 of the Criminal Procedure Code;

iv. Whether there was a failure to consider the defence case.

24. I will consider the respective submissions of the parties on each issue before rendering the determination of the court thereon.

Sufficiency of Evidence

25. The appellant argues that the court erred in convicting her when there was insufficient evidence to show that she solicited a benefit from the complainant. It is submitted on her behalf that the evidence was totally incapable of discharging the burden of proof. That PW1 had testified that he was informed about a matter in Nairobi on the 19th of August 2008. On 20th August 2008 he was shown summons and spoke to the appellant. The appellant submits that the complainant did not make any allegation on having talked to her on the 25th of August 2008 as alleged on the charge sheet, or that the appellant solicited for the sum of Kshs 50,000 or that she made a promise to assist in the alleged withdrawal of the case at City Hall. He had stated in cross- examination that the appellant demanded the sum of Kshs 50,000 in order to withdraw a case in City Hall.

26. The appellant argues that the recording of the conversation between her and the complainant was almost wholly inaudible. Further, that the court did not make a finding that the recording confirmed that the she solicited for a bribe, the court having only admitted the transcript and noted that the recorder was in good working order. She further submits that the court erred grievously in relying on the contents of the transcript when they had not been brought out in the proceedings. The evidence on record, according to the appellant, falls far short of establishing the burden of proof with regard to count I. I observe, however, that the appellant was acquitted on this count.

27. The appellant submits that there was clear evidence before court that it was PW 1 who brought out the issue of money. She notes that in the recording, the complainant can be heard egging on the appellant and asking her what she would do upon receipt of the money, and the appellant is heard to say that she would not assist. It is her submission therefore that the evidence shows that she did not solicit for money or make any promise to do anything upon receipt of the benefit. She therefore submits that the offence in count II ought to have completely failed and the court was wrong for having convicted her on the said count.

28. In opposing the appeal both on conviction and sentence, the respondent submits that the evidence tendered by the prosecution was overwhelming and it proved the two counts that the appellant was charged and convicted with. The state notes that the evidence of the complainant was that court summons signed by the appellant were fixed on a building that he owned. The appellant then demanded a bribe of Kshs. 50,000 from him so that she could facilitate the withdrawal of the case at City Court. He had reported the matter at the KACC and was given treated money to give to the appellant. He had met the appellant, who was arrested while receiving the bribe money from him. The state submits therefore that count II of soliciting a benefit on 25th August 2008 was proved beyond reasonable doubt from the evidence from the recorded conversation that was admitted as evidence.

29. The state further submits that the appellant is captured on the transcript saying that if she receives the money, she will go to court and see the people involved and the file can be removed. There was evidence relating to money that the appellant would be given by the complainant, and she can also be heard promising 'Wanjiku' that she will give her more money after she is given her share for facilitating the withdrawal of the case at City Court.

30. I have considered the respective submissions of the parties on this issue against the record of the trial court. I note that the appellant, a public health officer seconded to the Nairobi City Council, had been sent by PW3 to carry out surveys of pharmacies in the city. There is no dispute that she had issued a notice in relation to a building belonging to the complainant. She had thereafter issued summons against him. There is also no dispute that there was a case against him in City Court which was on the basis of which the summons had been issued.

31. There is evidence, from the recording and transcript produced before the trial court, that there was a discussion between the appellant, the complainant and one 'Wanjiku' with respect to money to be given to the appellant by the complainant, and money to be given by the appellant to 'Wanjiku' thereafter. I note that the trial court found that the recording was admissible and was in the Kikuyu language. The court also noted that from the transcript, the appellant had a conversation with PW1 in the presence of Wanjiku. The appellant had said if she received the money she would go to court and see the people involved and the file can be removed.

32. The recording and transcript, however, was not the only evidence before the trial court. The evidence before the court showed that the appellant had gone to OTC where she entered the complainant's vehicle. The evidence of the complainant was that he gave the appellant money which he had been given by KACC, after it had been treated with APQ powder. From the evidence, the appellant received it, but when KACC officers arrived and told her she was under arrest, she tried to take it out of her bag. The analysis report produced by PW4 following analysis of items given to him by PW7, including swabs of the appellant's hands, showed that the appellant's hands and bag were tainted with the APQ powder that had been used to treat the money. In my view, the totality of the evidence before the trial court established, beyond a reasonable doubt, that the appellant solicited and obtained from the complainant a benefit as charged in count II and IV.

Failure to call a crucial witness

33. The second issue raised by the appellant relates to the alleged failure by the prosecution to call a crucial witness. She submits that in the alleged discussions between her and PW1, the name of one Wanjiku featured prominently. The court had also noted the failure to call this witness. The appellant submits that this Wanjiku was the person who had first discussed the matter with her, and she was therefore the nexus with the complainant. It is her submission that while the prosecution is not bound to call a superfluity of witnesses, it is expected to call crucial witnesses. Wanjiku was a crucial witness, and the failure to call her was fatal to the prosecution case as the court was bound to draw the inference that had she been called, she might have tendered evidence contrary to the prosecution case.

34. In response to the contention that there was a failure to call a crucial witness, the state responds that such failure was not fatal to the prosecution case. It submits that it was the evidence of the investigating officer, PW7, that the said Wanjiku refused to record her statement because she was a friend of the appellant. The states cites section 143 of the Evidence Act relating to the calling of witnesses to submit that the evidence on record was sufficient and it proved the case against the appellant beyond reasonable doubt despite the failure to call Wanjiku as a witness. It notes that the complainant was given trap money which was prepared by the use of APQ powder. There is evidence that the appellant received the money and put it in her handbag. Her hands were swabbed when she was arrested and the APQ chemical was found on them. Her bag and phone were also found to be contaminated with the APQ powder which was on the trap money. The recorded conversation was also played in court and it proved that indeed the appellant solicited for and received a bribe.

35. The state cites in support the decision in **Daniel Kipyegon Ng'eno v Republic (2018) eKLR** for the circumstances under which an adverse reference will be made against the prosecution for failure to call a witness. Its submission is that in this case, since the evidence was adequate and it proved the two counts against the appellant, an adverse inference cannot be drawn.

36. I have considered the above submissions by the parties. Section 143 of the CPC provides as follows:

> ***"No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact."***

37. There is thus no particular number of witnesses that the prosecution is required to call in order to prove its case. However, should it fail to call a crucial witness, the court can draw an adverse inference that the evidence of such witness, if he or she had been called, would have been adverse to the prosecution case. This is the law as enunciated in the leading case of **Bukenya & Others v Uganda [1972] EA 549**. However, as the court observed in **Daniel Kipyegon Ng'eno v Republic (supra)** after citing the holding of the court in **Bukenya v Uganda**:

"…the prosecution is not expected to call a superfluity of witnesses. The adverse inference will only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly it will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case."

38. I have already analysed in some detail earlier in this judgment the evidence that was placed before the court. In my view, and on this I agree with the trial court, the failure to call Wanjiku was not fatal to the prosecution case. There was an overwhelming amount of evidence in the oral testimony of the prosecution witnesses as well as the audio recording and transcript and the report of the analysis of swabs of the appellant's hands and her handbag to establish the prosecution case beyond reasonable doubt. There is no basis for drawing an adverse inference from the failure of the prosecution to call Wanjiku, whom PW7 testified had declined to appear in court as she was a friend of the appellant.

Failure to Comply with section 169 of the Criminal Procedure Code

39. The appellant contends that the trial court did not comply with section 169 of the Criminal Procedure Code which sets out what must be contained in judgments. She submits that the section provides in mandatory terms that the judgment must contain the issues for determination, but in this case, the trial magistrate did not observe the provision. Accordingly, since the provision is a mandatory demand of the law, failure to comply with it rendered the judgment null and void, and her appeal should therefore be allowed. The state's submission on this issue is that the two requirements in section 169 of the CPC were complied with in the judgment of the trial court.

40. Section 169 of the CPC states that:

(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

41. I have read and considered the judgment of the trial court. I note that the court considered the evidence presented before it, and then noted that the issue before it was whether the prosecution had proved beyond reasonable doubt that the accused had solicited for and received a bribe on the stated date. The court then went on to analyse the evidence vis a vis the counts with which the appellant was charged. In my view, the court properly dealt with the matter before it in accordance with section 169 of the CPC. It set out the ***'point or points for determination, the decision thereon and the reasons for the decision.'*** I can find no basis for faulting the trial court on this score.

Failure to consider the defence case

42. The appellant submits that the court has a duty, at the end of the trial, to consider the entire evidence before it. It must consider both the prosecution as well as the defence case. The appellant submits that in this case, the record shows that the trial court considered the prosecution evidence but did not consider her defence. She had made an unsworn statement, which she was entitled to do, and defended all the allegations against her. She was presumed innocent under Article 50 of the Constitution, and she even had a right to remain silent. The burden was on the prosecution to prove its case beyond reasonable doubt, but once an accused person has made a statement, the court could not just ignore it but was under a duty to analyze it and make a decision on whether it was plausible or not.

43. According to the appellant, the failure by the court to give consideration to the defence was therefore wrongful, it completely vitiates the prosecution case, violates the appellant's right to a fair trial under Article 50 of the Constitution, and was highly prejudicial to her and resulted in a miscarriage of justice. The appellant cites the cases of **Paul Mwangi Kariuki v Republic Criminal Appeal No. 90 of 2007** and **Julius Mutugi v Republic Criminal Appeal No. 86 of 2011** and urges this court to adopt the reasoning in the two decisions and quash the conviction as there was no doubt that the lower court completely ignored her defence, thereby denying her a fair trial. She further cites **Charles Mwita v Rep Criminal Appeal No. 248 of 2003** in which the court underscored the duty of the court to weigh all the conflicting evidence.

44. The state denies that the trial court failed to consider the defence evidence. It submits that the appellant was not prejudiced since the court analysed and evaluated the entire evidence before coming to a conclusion. The state submits that the appellant's defence was that she was called by Elizabeth Wanjiku after she posted summons on the complainant's building. She then met the said Wanjiku at OTC and the said Wanjiku told her that somebody wanted to talk to her inside a nearby motor vehicle. That when she entered the motor vehicle money was thrown at her. The state submits that the defence was duly considered in the judgment. The court dismissed the defence by the appellant that money was thrown to her as her hands were found to be contaminated with the APQ powder that was on the trap money. The state submits that the court therefore concluded that the appellant touched the money and it was not thrown to her as she alleged.

45. It is the state's submission that the court also considered the defence that there was inconsistent evidence on where the money was recovered. It had noted that it is possible that the appellant dropped some money on the floor of the motor vehicle when KACC officers appeared and told her that she was under arrest.

46. I have considered the submissions of the parties with respect to the alleged failure of the trial court to consider the appellant's defence against the judgment of the trial court. In its judgment, the court noted that the appellant had told the court that she was called to the complainant's motor vehicle and money was thrown at her. It, however, considered her evidence and noted that the evidence showed that she had a lengthy conversation with the complainant about money as evidenced by the recording and its transcript (exhibit 9(a) and (b). Her hands were swabbed and on analysis, the swabs were found to have APQ powder which was on the trap money. I am satisfied that contrary to the assertion by the appellant, the trial court did consider, and reject, her defence.

47. In light of my findings on the four issues identified and analysed above, I find that there is no merit in this appeal. It is accordingly dismissed, and the conviction and sentence upheld.

Dated Signed and Delivered electronically at Nairobi this 27th day of January 2021.

MUMBI NGUGI

JUDGE