



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO.130 (B) OF 2019

ERASTUS KIOGORA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal against the original conviction and sentence by Hon. S. Abuya, SPM, in Meru Anti-corruption case No. 7 of 2018 on 30/07/2019)

JUDGMENT

1. **Erastus Kiogora, ('the appellant')**, was jointly with another person charged with the offence of corruptly soliciting for a benefit contrary to **section 39(3) (a) as read with section 48 of the Anti-corruption and economic crimes Act No.3 of 2003, section 27 and section 6(1) (a) of the Bribery Act as read with section 18 of the Bribery Act**. It was alleged that on 27/07/2016 at Miathene location of Tigania West Sub-county within Meru County, being a person employed by a public body, to wit, National Police Service, as Administration Police Sergeant, he solicited for a benefit of Kshs 20,000 from Rose Kimathi Zakayo as an inducement so as to forgo charging her with an offence of allegedly being in possession of illicit brew.

2. He faced a second count of corruptly soliciting for a benefit contrary to **section 39(3) (a) as read with section 48 of the Anti-corruption and economic crimes Act No.3 of 2003, section 27 and section 6(1) (a) of the Bribery Act as read with section 18 of the Bribery Act** in which charge it was alleged that on 27/07/2016 at Miathene location of Tigania West Sub-county within Meru County, being a person employed by a public body, to wit, National Police Service, as Administration Police Sergeant, he agreed to receive a benefit of Ksh.20,000 from Rose Kimathi Zakayo as an inducement so as to forgo charging her with an offence of allegedly being in possession of illicit brew.

3. He faced a third count of corruptly soliciting for a benefit contrary to **section 39(3) (a) as read with section 48 of the Anti-corruption and economic crimes Act No.3 of 2003, section 27 and section 6(1) (a) of the Bribery Act as read with section 18 of the Bribery Act**. It was alleged that on 27/07/2016 at Miathene location of Tigania West Sub-county within Meru County, being a person employed by a public body, to wit, National Police Service, as Administration Police Sergeant, he received a benefit of Kshs 11,500 from Rose Kimathi Zakayo as an inducement so as to forgo charging her with an offence of allegedly being in possession of illicit brew.

4. He faced a fourth count of corruptly soliciting for a benefit contrary to **section 39(3) (a) as read with section 48 of the Anti-corruption and economic crimes Act No.3 of 2003, section 27 and section 6(1) (a) of the Bribery Act as read with section 18 of the Bribery Act**. It was alleged that on 27/07/2016 at Miathene location of Tigania West Sub-county within Meru County, being a person employed by a public body, to wit, National Police Service, as Administration Police Sergeant, he received a benefit of Kshs 9,600 through MPESA from Julius John on behalf of Rose Kimathi Zakayo as an inducement so as to forgo charging her with an offence of allegedly being in possession of illicit brew.

5. He denied the charges, went through the trial in which the prosecution called seven witnesses, was found to have a case to answer and put on his defence, which he delivered by sworn statement and was ultimately convicted on count 1 and 2 and fined Kshs 200,000 in default to serve 3 years' imprisonment on each count. The sentences were to run concurrently. The 2nd accused person was subsequently acquitted of all the four counts of the offence.

6. Aggrieved by the said conviction and sentence, the appellant lodged this appeal raising 10 grounds which I have condensed into 5 as follows;

a. The trial court erred in law and fact by failing to analyze the contradictory evidence tendered by the prosecution hence finding the appellant guilty of soliciting and receiving Ksh.20,000.

b. The trial court misdirected itself by failing to consider the entire case in total despite it being clear that the appellant's camp had only 3 officers and at no time was it indicated that he was a lone ranger hence arriving to a wrong conclusion.

c. The trial court erred in law and fact by not appreciating the appellant's defence which created a reasonable doubt in the prosecution case hence arriving to a wrong conviction.

d. The trial court misdirected itself in law and fact by holding that the appellant was guilty of the offence on circumstantial evidence yet the complainant had reported a similar case to the police against the appellant.

e. The trial court's sentence and conviction was excessive and harsh.

7. The prosecution's case was that on the material day, **Rose Kimathi Zakayo (PW1)**, who was sleeping in her house heard a knock on the door and upon peeping through the window, she saw 7 people among them the appellant. When she opened the door, the appellant entered the house and sat on top of the table. She heard a knock on her kitchen's back door and upon opening, two men entered who identified themselves as police officers. They had 2 yellow jerricans which the appellant alleged belonged to her and that he was going to take her to court with the jerricans unless she bribed him with Kshs 20,000. She called her grandson (Tony) who was in another house next to the table room and sent him to go and call John Julius, her neighbor. When Tony and John Julius came back, she asked John to help her with the money so that she not be taken to court for allegedly having the jerricans containing alcohol. Mr John gave the witness Kshs 10,500 to which she added Ksh. 1,000 she had in the house and gave the total of Ksh. 11,500 to the appellant. When the appellant adamantly refused to leave without Ksh. 20,000, she requested John to call her sons in Malindi via his phone to send the balance of the money. Her sons Timothy and Titus, sent Ksh. 10,000 and Ksh. 5,100 respectively via MPESA to John's phone number which was subsequently forwarded to the appellant via MPESA to his mobile phone number. It was after the appellant and the 2 other officers had left when she realized she had given them more than Ksh.20,000 by Ksh.1,500 and decided to report the appellant to Miathene police station and subsequently to the chief that he had stolen her money but the two offices offered no assistance. She then shared with her neighbor called Joseph Nguchiria who took her to report to the Anti-corruption officers stationed at Isiolo who assisted her to have the appellant, whom she knew well, arrested. During cross examination by Mr. Mutunga for the appellant, she stated that she gave police money not to trap them but because she was scared of being taken to court. She admitted that her children lend John money occasionally and she denied knowing of the existence of a debt of Ksh. 15,000 John owed the appellant. She also confirmed that before the material day, her sons usually sent John money because Timothy's house was being plastered. She denied cooking, drinking or selling alcohol and confirmed the police had come to her house at 4.00 am. She further stated that John Julius was also called Kimathi and that he had witnessed her giving the appellant Ksh. 11,500. She stated that the police used to come for alcohol raids with the chief and the assistant chief but on the material day, the police came alone. In re-examination, she stated that when she peeped through the window, she saw the appellant and two other police officers but when she opened the door, the appellant entered in the house alone and started asking her questions. She testified that her children used to send John money in July 2016 for building which was still ongoing.

8. **PW2 Joseph Nguchine M'Amburuki**, stated that in August 2016, his neighbor, PW1, came to his house to seek help in order to recover Ksh. 20,000 she had given to the appellant who alleged she brews alcohol. He took her to Anti-corruption police in Isiolo on the same day to report. He knew the appellant personally but maintained he did not know who was arrested. During cross examination by Mr. Mutunga, he confirmed having seen the appellant before as they were together in Isiolo AC No. 2/2016 which was similar to this case. On 26/8/2016, he took his son to report the appellant who had taken his son's money but it was not the same day he took PW1 to report. He stated that he did not witness PW1 give police the money and that it was not a must that the chief be present during illicit brew raid. He denied that PW1 who was his neighbor prepared alcohol.

9. **PW3 Timothy Muchai Karia** told court that on 27/7/2016 at 6.00 am he was called on phone by his brother in law and neighbour, Julius John who told him that his mother, PW1 needed Ksh.20,000 but when he checked his MPESA, he realized he only had Ksh.10,000 which he immediately forwarded to John. He thought the money was for buying soil for his construction but he later learnt from his mother that the money he had sent had been given to 3 police officers who had framed her with alcohol. He subsequently called John on phone who confirmed that the money had been given to the police to secure PW1's release. John wanted him to refund Ksh.5,000 which he had borrowed in order to top up the money he had sent him to reach Ksh.20,000 which he did. He denied that his mother had ever been arrested for selling alcohol. During cross examination by Mr. Mutunga, he stated that neither his mother nor John had told him that they owed anyone and particularly the appellant money. He denied ever hearing or seeing his mother selling, preparing or drinking illicit brew.

10. **PW4 Julius Kimathi**, was at home in the early morning of 27/7/2016 when he was called by a neighbour's boy who told him that his grandmother was calling him. When they reached the grandmother's place, he entered the house and found the woman and 3 police officers as well as 2 yellow jerricans. When the woman told him that she needed Ksh. 20,000 to secure her release after allegedly being found with alcohol, he went back to his house and come back with Ksh. 10,500 which he gave to the woman. Before he left, the woman told her that the money he had given her was not enough as the police wanted more but he told her he did not have any other money. She requested him to call her children on the phone and Timothy sent Ksh.10,200 via MPESA to his phone number. He then sent Ksh.9,600 to the appellant via MPESA to his mobile phone number after which he went back to his home leaving the officers and the woman there. He denied that the woman was ever arrested for selling or preparing illicit brew. He later asked the children of the woman to refund the money he had assisted their mother with and Timothy sent Ksh. 5,100 on 6/8/2016 while Titus sent Ksh. 5,100 on 27/7/2016. During cross examination by Mr. Mutunga, he denied knowing the appellant or ever asking him for a loan of Ksh. 15,000. He confirmed that he had witnessed the woman giving the appellant Ksh. 10,500 and denied having called Titus on the phone on the material day. He stated that both Titus and Timothy had sent him Ksh. 5,100 each in order to refund him Ksh. 10,500 he had given their mother. He denied owing 2 police officers money and he had identified the appellant and another officer who was not in court.

11. **PW5 Detective Constable Quintin Odeke**, from DCI Headquarters attached to Safaricom PLC Security department law enforcement liason office, received a court order to produce registration details of phone numbers 0726779413, 0722277843, 0720492321 and 0710459524 which information he provided. He confirmed that on 27/7/2016, the appellant had received via MPESA Ksh. 9,600 from PW4. During cross examination by Mr. Mutunga, he denied the existence of an abnormality in the transaction of 27/7/2016. He stated that when the appellant received the money, he forwarded Ksh. 4,700 to Simon Mugaa Kanyaru.

12. **PW6 Joseph Muthee** left his home at 7.00 am to go and look for grass but when he passed PW1's place, he found 3 male police officers at her gate. The appellant asked him to help in carrying 2 yellow jerricans to Harriet's gate. Upon arrival at Harriet's gate, he was given Ksh.50 by one of the officers. He went to PW1's house to enquire what had happened at her home that morning after which he, PW1 and

PW2 went to Isiolo to record their statements. He did not see PW1 give the police money neither did he know what was inside the jericans. He stated that he had never seen PW1 cook illicit brew. He had never seen the appellant before and only knew him because he heard him being called Kiogora. The appellant had a gun and was in full uniform. When cross examined by Mr. Mutunga, he confirmed that he knew the appellant and another officer who was not in court. He denied knowing whether the jericans had illicit brew.

13. **PW7 P.C Isaack Masai Chenje**, an investigator working with EACC Upper Eastern regional office, investigated this case after he received a report on 25/8/2016 from the complainant, PW1, and reiterated the evidence by PW1 on what took place on 27/7/2016 at about 4.00 am, as well as what other witnesses had told the court. He gave evidence of having reviewed the statements taken from witnesses which persuaded him that an offence had been committed and that he then sworn an affidavit and obtained an order from the court to help investigate the Mpesa accounts and a revelation was made that the appellant had received Kshs 9600 from PW4 as claimed by PW1. He then obtained the employment records of the accused from Tigania west and produced the same documents in court as exhibits to prove that the appellant was indeed a public employee.

14. During cross examination by Mr. Mutunga, he stated that the MPESA transactions and other facts made him conclude that there was corruption. He stated that the 1st transaction was from Timothy Muchui to Julius John who was acting on behalf of the complainant. The 2nd transaction was from Titus Karithi to Julius John and the 3rd transaction was from Julius John to Erastus Kiogora. He stated that the money was sent via Julius's mobile phone number because the complainant's phone was not working at the time and that the total amount sent to Julius was Kshs 15,300 out of which Kshs 9,600 was forwarded to the appellant. He stated that the complainant had told him that she neither prepared nor sold illicit brew.

15. In his defence, the appellant gave sworn testimony to that on 25/5/2016, he was in the AP Camp when Julius John, whom he knew before, came and asked him to help him with Kshs 15,000 to resolve a family dispute. He gave him Kshs 10,500 which he had in his pocket and his colleague Kanyaru gave him Kshs 4,500, which he was to refund after 2 weeks. After persistently asking for his money from John, the latter eventually sent him Kshs 10,500 via the phone and he forwarded Kshs 4,500 to Kanyaru. He denied either going to PW1's home on the material day or knowing where she lived and that PW1 and PW2 had instituted this case against him because John had used the money sent by PW1's child to pay debts instead of the intended purpose of construction. During cross examination, he denied receiving Kshs 9,600 as alleged in the charge sheet and maintained he had received Kshs 10,500 on phone from John and forwarded Kshs 4,500 to Kanyaru but he did not have his MPESA statements to prove if these transactions indeed took place. He admitted only knowing PW2 and PW4 and maintained that he had lent PW4 money because he knew him before and they were friends.

16. The parties were directed to file their submissions on 30/06/2020 but it appears only the appellant filed. His submissions were to the effect that the prosecution witnesses' evidence was purely circumstantial. He faulted the trial court for its failure to appreciate that it was impossible for the appellant to have been a lone ranger despite there being evidence of malice on the part of the complainant. The trial court was further faulted for ignoring the appellant's request for a non-custodial sentence. It was concluded that the sentence meted out to the appellant was excessive and harsh and the court urged to quash the conviction and set aside the sentence against the appellant, set him at liberty and order for the release of the fines paid.

17. This being a first appeal, the court is duty bound to re-appraise, reevaluate and re-analyse the evidence afresh, draw its own conclusions and make its own independent findings, bearing in mind that it did not have the advantage of seeing the witnesses testify. See ***Okeno v. Republic [1972] EA 32.***

18. The issue for determination is whether, at the close of production of evidence on both sides, the prosecution proved their case beyond reasonable doubt to merit and support the conviction or if the evidence never met the threshold as to merit interference with the determination by the trial court.

19. The essential ingredients of the offence with which the appellant was charged and convicted were well set out in ***Michael Waweru Ndegwa v R (2016 eKLR)*** in following terms:

“there must have been solicitation or offer or receipt of gratification must have been asked for, offered or paid as a motive or reward for inducing by corrupt or illegal means and secondly, that someone should be acting in the public or private or employed or acts for and on behalf of another person, or confer or ask for a favour to render some service.”

20. In this matter, it was imperative that the prosecution proves that the appellant was an employ of a public body in which capacity, he solicited or received a gratification to forbear what it was his duty to perform, curb criminal acts, concerning illicit brew. The evidence by PW7 established and the appellant confirmed that he was indeed a serving employ of the national police service. That being a common position I do find that the first element of the offence was well established to the required standards of proof. That applies to all the four counts in the charge sheet.

21. On the send the limb of the offence concerning solicitation of benefits, the question is whether the appellant indeed made such solicitations. Two eye witnesses were called by the prosecution to to prove the alleged demand for the money, PW1 and PW4. PW1 testified that PW4 gave her Kshs 10,500 which she added Kshs 1,000 she had in the house and gave the total of Kshs 11,500 to the appellant but the latter adamantly refused to leave without getting an aggregate of Kshs 20,000 hence she was forced to request PW4 to call her sons in Malindi on phone to send the balance of the money. According to PW1, her sons Timothy and Titus, sent Kshs 10,000 and Kshs 5,100 respectively via MPESA to PW4's phone number which was subsequently forwarded to the appellant via MPESA to his mobile phone number. The monetary transactions between the telephone number were sufficiently proved by the evidence of Pw5. In fact, the appellant himself admitted receiving money from Pw4. The defence by the appellant was one that qualifies as an alibi, when he totally denied ever

being at the scene of the offence on the alleged date. However, the prosecution availed evidence by PW6 whose gist was that on the material day he met three policemen at the gate of the complainant, one of them being the appellant, who asked him to help transport two jerricans to the home of one Harriet at a fee of Kshs 50. That evidence was never shaken by the cross-examination and I do find that the appellants defence was properly rejected by the trial court. That defence did not create any reasonable doubt on the evidence that the appellant was indeed at the locus in quo on the date alleged. This finding resolves the 1st, 2nd and 8th grounds of appeal as not being merited. The same are thus dismissed.

22. On the count one, the accusation was that the appellant solicited the sum of Kshs 20,000 from the complainant. The evidence by PW1 and 4 was very corroborative and I find same credible that the appellant indeed was at the home of the complainant, while there solicited to be paid the sum and did not leave till he was paid in both cash and by Mpesa. While the appellant asserted that he was being paid back a debt, his evidence was never supported by any other piece of evidence. In fact, his position that he received Kshs 10,500 and 4,500 by Mpesa on the same day needed proof to displace the evidence by PW5 & 7 supported by an Mpesa statement that only Kshs 9,600. I find the evidence to be incapable of belief as compared to that by the prosecution.

23. I do find that there is no contestation whether the money was given to the appellant. The fact of money changing hands was common ground and the only point of divergence was for what reason it was given. While the complainant was adamant that the money was to buy the forbearance from the appellant not to charge her with being in possession of illicit brew, the appellants position was that he did receive the money as a refund of a debt he had advanced to PW4. The question then for the trial court was to decide which of the two position was plausible and credible. In executing its mandate, the court rendered itself as follows: -

“On the other hand, I find the 1st accused defence that he was framed because he PW4 who had his debt of Kshs 15,000 paid him using the money he was supposed to use to construct PW1’s house but he was not at PW1’s house on the date in question is not believable defence as apart from PW1 and PW4 there was another witness (PW6) who met 1st accused and two other police officers at PW1’s gate and the 1st accused requested him to assist them to carry the two jerricans to one Harriet’s gate then the 1st accused paid him Ksh 50/=”

24. That analysis sufficiently addresses the defence put forth by the appellant and I do agree with the trial court that the defence was incredible as it totally failed to address the otherwise cogent evidence by the prosecution which placed him squarely at the scene. As found by the trial court, if the appellant was never at the house of the complainant on the material day and time, why would PW6, a boda-boda rider implicate him. He never offered any material to justify disbelieving the evidence by the prosecution which I find to have proved the allegations against him beyond reasonable doubt

25. After executing my mandate, as an appellate court of first instance, by re-evaluating the entire evidence on record, I am satisfied that all the four count in the charge sheet were duly proved to the required standards. I am further fully satisfied that there was never a basis to dismiss the offence in count 3&4 because the alleged benefit was adequately established to have been received by the appellant from the complainant through PW4 is that found in count 4. I however take note that there is no a cross-appeal by the prosecution to found my endeavour to address that finding towards interference with the acquittal.

26. In conclusion, I do uphold the entire decision by the trial court, conviction and sentence, find no merit in the appeal and order it dismissed in entirety.

DATED, SIGNED AND DELIVERED AT MERU, VIRTUALLY, BY MS TEAMS, THIS 21ST DAY OF MAY 2021.

PATRICK J O OTIENO

JUDGE