REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES HIGH COURT DIVISION

ACEC CRIMINAL APPEAL NO. 4 OF 2019

MATHEWS OMONDI NYADIGA ....APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Being an appeal against conviction and sentence in Criminal Case Anti-Corruption Case No. 7 of 2016 in Chief Magistrate Court L. N. Mugambi (Mr.) dated the 25th February, 2019)

JUDGEMENT

1. Vide ACC case number 7 of 2016, the appellant herein was arraigned before the Anti-Corruption Chief Magistrate's Court Nairobi charged with two counts relating to Corruption.

2. Count 1, he was charged with Corruptly soliciting for a 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. Particulars are that, on 15th day of May 2016 at University of Nairobi within Nairobi City County and being a person employed by a public body, to wit, University of Nairobi as a Legal Assistant, Corruptly solicited for a benefit of Kshs. 150,000/- from Moses Nabiswa Wakenya and Pamela Gakii Gitobu both students of University of Nairobi as inducement so as to help them be sworn in as Campus Representative and Finance Secretary respectively, a mater relating to the said public body.

3. Count two, he was charged with corruptly receiving a 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. Particulars are that on 17th day of May 2016, at Delta Hotel within Nairobi Central Business District, Nairobi City County, being a person employed by a public body, to wit, University of Nairobi as Legal Assistant, corruptly received a benefit of Kshs. 90,000/- from Pauline Gakii Gitobu, a student at the University of Nairobi, as an inducement so as to help her be sworn in as a Finance Secretary, a mater relating to the affairs of the said public body.

4. Upon entering a plea of not guilty, the matter proceeded to full trial. On 25th February 2019, the trial court found accused person guilty of both counts and convicted him accordingly. After considering accused's mitigation, the court sentenced him to:

Count 1 – Kshs. 800,000/- in default serve one (1) year imprisonment.

Count II – Kshs. 700,000/- in default serve one (1) year imprisonment

However, the court did not specify whether the sentences were to run concurrently or consecutively.

5. Aggrieved by both the conviction and sentence, the accused (appellant) lodged this appeal vide a petition of appeal dated 25th February 2019 and filed on 26th February 2019 citing eight (8) grounds as hereunder:-

i) The Learned Magistrate grossly misdirected himself in holding that the evidence adduced on record was sufficient to support the conviction for the offences the appellant was charged with.

ii) The Learned Magistrate erred in law and fact in finding the appellant guilty of the charge in count 1 and 2 where there was no evidence.

iii) That the Learned Magistrate erred in law and fact in proceeding to sentence and convict the appellant based on a defective charge sheet.

iv) That the Learned Magistrate erred in law and fact in proceeding to sentence and convict the Appellant based on evidence that had glaring omission gaps and was not clear (most importantly lack of a voice recognition certificate).

v) The Learned Magistrate erred in law and act in convicting and imposing sentence that is not in line with law and statutory regulations.

vi) The Learned Magistrate equally erred in law and fact in ignoring and excluding completely the evidence adduced by the appellant.

vii) The Learned Magistrate erred in law and fact in misapplication, misinterpretation and evaluation of the evidence adduced to enable him reach a just judgment.

viii) The verdict in its entirety is against the weight of the evidence on record and the sentence is in any event manifestly excessive, vindictive against legal and principles of sentencing.

6. On 26th February 2019, the applicant filed a Notice of Motion dated 25th February 2019 seeking the appellant to be admitted to bail pending appeal. However, on 13th October 2019, the application for bail pending appeal was compromised in favour of the hearing of the main appeal. Subsequently, on 11th December 2019, Mr. Were counsel for the applicant/appellant opted to abandon the appeal challenging conviction. He therefore chose to argue grounds challenging sentence only.

7. By consent, the grounds of appeal challenging conviction were abandoned and the appeal proceeded on grounds challenging only sentence. when the matter came up for hearing on 16th December 2019, the respondent served the applicant with a notice of enhancement of sentence under Section 354(3)(b) of the Criminal Procedure Act.

8. On his part, Mr. Were submitted that the trial court meted out an excessive sentence without considering that the appellant was a first offender. That the sentence arose out of the same transaction that is; soliciting and receiving a bribe which in law should have attracted a concurrent sentence.

9. Mr. Were further submitted that had the appellant been sentenced to concurrent sentence, he would have been released by now considering that remission is a $^{1}/_{3}$ of the sentence. In support of his submission, counsel referred the court to the decision in the case of **Muthangya Mutembei –vs- Republic (2019)Eklr** in which the court sentenced the appellants to serve concurrent sentence where a series of robberies were committed the same night against various complainants**.**

10. M/s Sigei opposed the appeal arguing that the sentence should run consecutively as the offences were distinct and committed on different days. That the trial Magistrate should have given him an additional mandatory sentence of double the amount benefitted hence the prayer to enhance the sentence. Counsel referred the court to the decision in the case of **Boniface Okerosi Misera & Others –vs- Republic [2018]eKLR** where the court directed a mandatory sentence to run consecutively.

11. On his rejoinder, Mr. Were submitted that a mandatory sentence is not applicable in this case as the appellant did not benefit from the money nor did the giver lose. According to Mr. Were, the money given was dropped down immediately it was handed over and the same was recovered by the giver hence nobody lost or benefitted.

12. I have considered the grounds of appeal challenging the sentence imposed by the trial court as excessive and punitive and that it should have run concurrently. It is trite law that sentencing is the discretion of the trial court. However, in exercise of those powers, the sentencing court must act judiciously and not capriciously. Therefore, a court must be guided by the evidence on record and sound legal principles governing sentencing among them the sentencing policy guidelines.

13. In the case of **Shadrack Kipchoge Kogo –vs- Republic**, the Court of Appeal had this to say:-

"Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of these, the sentence itself is so excessive and therefore an error in principle must be inferred."

Similar position was held in **Janet Muthoni Thiaka –vs- Republic (2016)eKLR** and **Muthangya Mutembei (supra)**.

14. This court is duty bound to re-analyse and re-evaluate the nature of the offence committed, circumstances under which it was committed and the mitigation on record. Before meting out the sentence, the trial court at page 39 stated that it had considered the mitigation on record to the effect that the appellant was a first offender, a young man with a young family and responsibilities extending to his elderly father. The court however, castigated the appellant for demanding a bribe from students who were struggling. It is therefore not correct to say that the court did not consider the mitigation on record.

15. It is apparent that the trial court did not pronounce itself as to whether the sentence was to run concurrently or consecutively. The appellant was found guilty of both counts. The penalty section is Section 48(1)(a), of ACECA which provides that any person convicted of an offence under this part shall be liable to:-

a) a fine not exceeding one million shillings or to imprisonment for a term not exceeding ten years or 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.

Sub-section 2 –

> **"The mandatory fine referred to in subsection (1)(b) shall be determined as follows—**
>
> **(a) the mandatory fine shall be equal to two times the amount of the benefit or loss described in subsection (1)(b);**
>
> **(b) if the conduct that constituted the offence resulted in both a benefit and loss described in subsection (1)(b), the mandatory fine shall be equal to two times the sum of the amount of the benefit and the amount of the loss."**

16. It is obvious from the sentence the court did not address itself as to whether the sentences were to run concurrently or consecutively. Pursuant to Section 14(1) of the CPC, in my view, this is a grave omission on the part of the trial court as it left the prisons department to speculate on the actual sentence to be served by the appellant. To that extent the court is duty bound to interfere and correct the ambiguity in the sentence pursuant to Section 354 (3)(b) of the CPC.

17. As stated, the first limb of the sentence is a fine of 1 million or 10 years imprisonment or both. Considering the circumstances under which the offence was committed, I am of the humble view that the fine imposed was appropriate considering that the appellant a person in authority deliberately decided to ask for a bribe from poor and vulnerable students. That sentence is therefore commensurate to the offences committed.

18. Should the sentences have run concurrently or consecutively? Section 14(2) of the CPC allows a Magistrate to direct a sentence to run concurrently or consecutively depending on the circumstances under which the offences were committed. What determines whether a sentence is to run concurrently or consecutively is whether the offences were committed in a chain of events constituting a common transaction. In the case of **Nathan –v- Republic (1965) EA 77,** the Court of Appeal held that;

> **"If a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose, or by relation of cause and effects as to constitute one transaction, then the offences constituted by these series of acts are committed in the course of the same transaction."**

19. In the instant case, the act of soliciting in respect of count 1 and receiving a bribe count 2 constitutes a chain or series of events which constitutes a common transaction hence in the circumstances should have attracted a concurrent sentence. The two events (offences) cannot be separated despite taking place on different days. What is material is the criminal criminality in the criminal intent and continuity of action and purpose. To that extent, the trial court should have ordered for the sentences to run concurrently.

20. Regarding the mandatory sentence under Section 48 1(b) and (2) of ECECA, the appellant did not benefit from the bribe as the money was recovered immediately the trap was successful. Equally, nobody lost as the trap money was recovered in full. In the circumstances, the mandatory sentence does not apply as there was no benefit derived from the bribe nor did anybody suffer loss so as to attract the amount benefitted or lost. This case can therefore be distinguished with that of Misera Okerosi case above quoted by the prosecution where there was actual benefit and loss as the bribe was received much earlier before even the complaint was made.

21. For the above stated reasons, the prosecution's prayer to enhance sentence is not applicable. Consequently, the appeal against sentence partly succeeds and partly fails with orders as follows:-

> **a) That the sentence of the trial Magistrate be and is hereby substituted with a fine of Kshs. 800,000/- or, one year imprisonment in respect to Count 1 and, a fine of Kshs. 700,000/- or, one year imprisonment in respect to count 2 and, sentences to run concurrently calculated from the date when it was imposed.**
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> **b) That the Deputy Registrar shall cause an amended and substituted committal warrant to be drawn and served upon the Prisons Department where the appellant is held for purposes of compliance.**
>
> **c) That the issue of remission if applicable shall be determined by the Prisons Department in accordance with the applicable provisions governing the same.**

Right of Appeal 30 days.

Dated, delivered and signed at Nairobi this 20th day of December, 2019.

J. N. ONYIEGO

JUDGE