



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT NYERI

HIGH COURT CRIMINAL APPEAL NO. 43 OF 2011

TOBIAS MUSYOKI MUTUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the conviction and sentence in Nyeri CM

Anti-Corruption Case No. 7 of 2008 delivered

on 10/03/2011 by Hon. S.M.Muketi CM)

JUDGMENT

FACTS

1. The appellant, **Tobias Musyoki Mutua** was charged with four(4) counts of soliciting for a benefit contrary to **Section 39(3)(a) as read with Section 48(1)** of the of the **Anti-Corruption and Economic Crimes Act No.3 of 2003**; the particulars of Count I was that on the 20/05/2007 at Kerugoya Police Station being a person employed by a public body to wit, the Kenya Police Force corruptly as a Police Constable solicited for a benefit of Kshs.100,000/- from Mithamo Karubiu as an inducement to forbear charging him with the offence of robbery with violence, a matter which concerned a public body;
2. The particulars of Count II was that on the 23/05/2007 at Kerugoya Police Station being a person employed by a public body to wit, the Kenya Police Force corruptly as a Police Constable solicited for a benefit of Kshs.70,000/- from Mithamo Karubiu as an inducement to forbear charging him with the offence of robbery with violence, a matter which concerned a public body;
3. Count III's particulars were that on the 24/05/2007 at Kerugoya Police Station being a person employed by a public body to wit, the Kenya Police Force corruptly as a Police Constable solicited for a benefit of Kshs.50,000/- from Catherine Nyawira Njogu as an inducement to forbear charging her husband one Mithamo Karubiu with the offence of robbery with violence, a matter which concerned a public body;
4. On Count IV the particulars were that on the 25/05/2007 at Kerugoya Police Station being a person employed by a public body to wit, the Kenya Police Force corruptly as a Police Constable solicited for a benefit of Kshs.20,000/- from Catherine Nyawira Njogu as an inducement to forbear charging her husband one Mithamo Karubiu with the offence of robbery with violence, a matter which concerned a public body;
5. *The* prosecution called a total of eleven (11) witnesses to prove its case and after the trial the appellant was found guilty on all the four (4) Counts; the trial court convicted him and meted out the following sentences;
 - (i) On Count I a fine of Kshs.50,000/- in default twelve (12) months imprisonment; and the mandatory sentence under Section 48(1) of the Act a fine of Kshs.200,000/- in default fifteen (15) months imprisonment.
 - (ii) Count II a fine of Kshs.50,000/- in default twelve (12) months imprisonment; plus the mandatory sentence under Section 48(1) of Kshs.140,000/- in default fifteen (15) months imprisonment.
 - (iii) Count III a fine of Kshs.50,000/- in default twelve (12) months imprisonment; plus the mandatory sentence under Section 48(1) of the Act a fine of Kshs.100,000/- in default fifteen (15) months imprisonment.
 - (iv) Count IV a fine of Kshs.50,000/- in default twelve (12) months imprisonment; plus the mandatory sentence under Section 48(1) of the Act a fine of Kshs.40,000/- in default nine (9) months imprisonment.

6. Being aggrieved by the conviction and sentences, the appellant filed a Petition of Appeal and the Grounds of Appeal are as summarized hereunder:-

- (i) The appellant's rights were violated as he had been held in police custody for more than twenty-four (24) hours;
- (ii) The evidence adduced from the tape was not audible and convincing;
- (iii) The evidence of the prosecution witnesses was not corroborated and could not support a conviction;
- (iv) The trial court rejected the appellants defence without giving reasons as stipulated in Section 169 of the Criminal Procedure Code;
- (v) The sentence was harsh and excessive.

7. At the hearing of the Appeal the appellant was represented by Learned Counsel Mr.Njuguna and Mrs. Gicheha was the Prosecuting Counsel for the State; both Counsels made oral submissions; hereunder is a summary of their respective presentations;

APPELLANTS SUBMISSIONS

8. The appellant submitted that he had seven (7) grounds of appeal;

(i) This court being the first appellate court it is enjoined to consider the entire evidence on record, re-evaluate and re-assess it and arrive at an independent conclusion; case law referred to **Okeno vs Republic (1972) EA 32**.

(ii) Ground 2 of the appeal was abandoned as the claim lies in a civil suit;

(iii) That there was no basis for the appellant to solicit for a bribe as the complainant had already been arrested and arraigned in court on 16/05/2007 at Kerugoya for the offence of robbery with violence and of being in possession of fake currency; that he was acquitted when witnesses failed to show up; that there were no proceedings in the lower court to counter this fact;

(iv) Count I committed on 20/05/2007;

Count II committed on 23/05/2007

Count III committed on 24/05/2007

Count IV committed on 25/05/2007

The dates mentioned take it outside the ambit of the commission of the offence by the appellant as the complainant was already locked in and therefore there no basis for soliciting or obtaining; Case law relied on **Ester Theuri Waruiru vs R**;

(v) There was non-compliance with Section 35 of the Anti-Corruption and Economic Crimes Act; the period relates to 2007 the requirement was that a report be made to the Attorney General; no such report had been taken to the Attorney General as required; this has now been repealed by the Miscellaneous Statutes Amendment Act now the Director of Public Prosecutions; this report not in vain;

(vi) This section is couched in mandatory terms; at the close of the prosecution there was no evidence that the section had been complied with; and this was fatal to the prosecution's case; the authority states that compliance as not optional; the application for bail pending appeal was granted on this basis;

(vii) The evidence of **PW5** was that Corporal Abuyeka and the appellant both demanded from him Kshs.100,000; the trial court failed to take this into consideration that there was an accomplice to the alleged offence; this evidence was adverse to Corporal Abuyeka and yet he was the witness who was called to identify the appellants voice; the trial court relied on this evidence without making a finding that it was satisfied with the accomplices evidence; case law referred to **Waringa vs R**;

(viii) That there were steps the trial court ought to have taken when the witness is an accomplice; first the trial court ought to have treated the evidence of Corporal Abuyeka as that of an accomplice; secondly the trial court ought to have considered whether there was any other independent evidence connecting the appellant with the offence.

(ix) The tape played in court was inaudible; the fact of inaudibility was confirmed by the wife of the complainant and **PW9** when called to identify the appellant's voice stated that he was not sure if it was the appellants voice; maybe this was as a result of it being inaudible; it was incumbent upon the trial court to make a finding on audibility of the tape; this was never done;

(x) The trial court never considered or distinguished the authorities relied on voice identification; if it had it may have arrived at a different conclusion;

(xi) The trial court erred in law by shifting the burden of proof to the appellant;

(xii) The judgment delivered was not in conformity with Section 169 of the Criminal Procedure Rules as the issues were not identified; and an erroneous judgment arrived at;

(xiii) The sentence of Kshs.680,000/- was harsh and excessive;

9. The appellant prayed that the appeal be allowed; that the conviction be quashed and the sentence be set aside.

RESPONDENTS SUBMISSIONS

10. In response Prosecuting Counsel for the State stated that there was overwhelming evidence to support the appeal; but after perusal of the record found no evidence that the consent of the Attorney General was obtained;

11. That non-compliance with Section 35 is mandatory regardless of there being overwhelming evidence;

12. Counsel thereby conceded the appeal just on this one ground and opted not to belabor herself on the other grounds of appeal;

ISSUES FOR DETERMINATION

13. In this instance the Prosecuting Counsel for the State submitted that there was overwhelming evidence placed before the trial court and that the conviction was based on the evidence and circumstances; but conceded the appeal on the ground that there was no consent from the Attorney General; and upon conceding the appeal chose not to belabor herself on the other grounds of appeal; likewise after taking into consideration the submissions made by both counsels this court has also opted not to belabor itself on the other grounds of appeal raised and has only framed one issue for determination; which is;

(i) Whether the failure to comply with Section 35 of the Act was fatal to the prosecution's case;

ANALYSIS

14. This court being the first appellate court it is enjoined to consider the entire evidence on record, re-evaluate and re-assess it and arrive at an independent conclusion; Refer to the case of **Okeno vs Republic (1972) EA 32**.

Whether the failure to comply with Section 35 of the Act was fatal to the prosecution's case:

15. It is noted that the offences the appellant was charged with were committed in the year 2007; at that point in time the law was that it was the duty of the Attorney General to authorize prosecutions on corruption; that the law was couched in mandatory terms and that no prosecution could proceed before written consent had first been had and obtained from the Attorney General;

16. It is not in dispute that the Kenya Anti-Corruption Commission (KACC) as it was then, arraigned the appellant in court before obtaining the Attorney General's consent as provided by Section 35(1) of the Anti-Corruption and Economic Crimes Act (Act No.3 of 2003);

17. In the old dispensation the powers of KACC was limited to conducting investigations; it was required to report to the Attorney General on the outcome of the investigations; and make recommendations to the Attorney General on the prosecution of person(s) under investigation; it was obligatory under the Prevention of Corruption Act (now repealed) but which was still operational when the appellant was arraigned, that the prosecution must be preceded by a written consent from the Attorney General.

18. Upon careful perusal of the record by this court finds that there is no evidence of any report made to the Attorney General nor is there any record of the recommendations the Attorney General may have made; as correctly pointed out by Prosecuting Counsel for the State the record did not have any evidence that the consent of the Attorney General was ever obtained;

19. This court is guided by the Court of Appeal case of **Nicholas Muriuki Kangangi vs Attorney General Civil Appeal No 331 of 2010**; and the more recent case of **Esther Theuri Waruiru & Anor vs R Cr.App.No 48 of 2008**; where it was held that compliance with Section 35(1) was not optional but obligatory; and that non-compliance with the section is fatal to any prosecutions' case;

20. This court is satisfied that KACC failed to brief the Attorney General's office pursuant to the provisions of Section 35(1) of the Act; that no recommendations from the Attorney General or consent form part of the prosecution's evidence; and that Prosecuting Counsel for the State correctly conceded the appeal;

21. This ground of appeal is found to be meritorious and is hereby allowed;

FINDINGS AND DETERMINATION

22. In the light of the forgoing this court finds that the failure to comply with the provisions of Section 35 of the Act was fatal to the prosecution's case and makes the following determination;

(i) The appeal is found to be meritorious and is hereby allowed;

(ii) The convictions on all the four (4) counts are hereby quashed;

(iii) The sentences on all the four (4) counts are hereby set aside;

(iv) The appellant be set at liberty forthwith unless otherwise lawfully held; or in the alternative any fines paid be refunded to the appellant.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 25th day of January, 2018.

HON.A.MSHILA

JUDGE