



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**ACEC CRIMINAL APPEAL 6 OF 2017**

**REPUBLIC.....APPELLANT**

**VERSUS**

**ALPHONCE MUTUA VATA.....1<sup>ST</sup> RESPONDENT**

**PETER ONYANGO MORRE.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The appellant is the republic of Kenya while *Aphonce Mutua Vata* and *Peter Onyango Morre* are the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively.

2. The 1<sup>st</sup> and 2<sup>nd</sup> respondents were 1<sup>st</sup> and 2<sup>nd</sup> accused persons in the lower court, and were charged with the following offences:

**Count 1: Corruptly soliciting for a benefit contrary to section 39(3) (a) as read with section 48(1) of the Anti-Corruption and Economic Crime Act No. 3 of 2003.**

The particulars being that the 1<sup>st</sup> respondent on the 13<sup>th</sup> day of August 2014, at Huruma chief's camp, Nairobi within Nairobi City county, being a person employed by a public body, to wit Ministry of internal and coordination of national government as a senior chief Huruma location Nairobi, corruptly solicited for a benefit of ksh.2000/= from Philip Munywoki Kilonzo as an inducement so as to return repair tools to the said Philip Munywoki Kilonzo, a matter related to the affairs of the said public body.

**3. Count 2: Corruptly receiving a benefit contrary to section 39(3) (a) as read with section 48(1) of the Anti-Corruption and Economic and Economic Crimes Act No. 3 of 2003.**

The particulars being that the 2<sup>nd</sup> respondent on 13<sup>th</sup> day of August 2014, in Huruma chief's office Nairobi, within Nairobi city county, being a village elder at Huruma chief's camp, corruptly received a benefit of Ksh.2000/= from *Philip Munywoki Kilonzo* as an inducement so as to return repair tools to the said Philip Munywoki Kilonzo, a matter related to the affairs of the said public body.

4. The respondents denied the charges and the matter proceeded to full hearing with the prosecution calling eight (8) witnesses. After the close of the prosecution case the respondents were acquitted under section 210 criminal procedure code. The State being dissatisfied with the said acquittal filed this appeal citing the following grounds:

- (i) The learned Magistrate erred in Law and fact in acquitting both respondents under section 210 of the Criminal Procedure Code.
- (ii) The learned magistrate erred in law and fact in acquitting the 1<sup>st</sup> respondent on the charges of soliciting bribe.
- (iii) The learned magistrate erred in law and fact in acquitting the 2<sup>nd</sup> respondent on the charges of receiving a bribe.
- (iv) The learned magistrate misdirected himself in applying the law by ignoring the evidence hence leading to a wrong conclusion.

5. The case of the prosecution was that the 1<sup>st</sup> respondent is the chief of Huruma location. On 13<sup>th</sup> August 2014 **PW1 Philip Munywoki Kilonzo** received a call vide mobile No. 0722[particulars withheld] which he later learnt belonged to the 1<sup>st</sup> respondent his area chief. He asked him about the repairs he was doing at his stall without involving his office. He warned him that if he proceeded he'd demolish the stall.

6. Shortly thereafter he was informed by his *fundis* that the 1<sup>st</sup> respondent had taken away his materials and had said they collect them from his office.

7. He then met an officer Mr. Akeki (who did not testify) who asked him to call the chief and place the call on the speaker phone. He complied and thereafter the officer asked him to go with him to his office, where he was introduced to recording gadgets and how to use them. He was given treated money in the sum of Ksh.5000/= (EXB2) which was placed in a half khaki envelope (EXB3).

8. PW1 and other EACC officers proceeded to the chief's office. He found the 1<sup>st</sup> respondent and he identified himself. He even showed him the seized tools. PW1 had by then switched on his recording gadgets. He asked the 1<sup>st</sup> respondent how he could obtain his tools and the 1<sup>st</sup> respondent asked him for lunch money.

9. PW1 asked him to state how much he wanted and he said whatever amount he desired to give him. Despite pushing him to state a figure the 1<sup>st</sup> respondent refused to state. PW1 then proposed shs.100/= and that's when the 1<sup>st</sup> respondent stood up and told him he had a group he worked with and he could bring them in.

10. He went out and returned alone. He went out again and returned with the 2<sup>nd</sup> respondent and spoke in Kikamba saying "*Mine Yoou*" meaning "*Malizana na huyo.*"

The 2<sup>nd</sup> respondent then asked for ksh.2000/= to return PW1's materials. He gave him ksh.2000/= of the treated money and signaled the EACC officers who came and arrested the 2<sup>nd</sup> respondent and recovered the ksh.2000/= from him.

11. **PW2 John Muema Wambua** was the fundi whose tools were taken. He did not witness anything on the demand and receipt of the money.

12. **PW3 Gerald Morara Omoke** is an assistant county commissioner, Kadema division, Machakos County who testified that on 13<sup>th</sup> August 2014 the 1<sup>st</sup> respondent came to his office together with business persons from Huruma location and sought arbitration in a case between a welder (Mr. Muiruri) and a tenant (Mr. Kilonzo PW1). The 1<sup>st</sup> respondent had concluded that Kilonzo (PW1) continues paying rent but the latter had refused saying the stall belonged to him.

13. He said the stalls are at Juja road near Huruma flats and there was tension. He sent them to the scene and requested them to have PW1 come to his office as he had defied the chief's summons. He thereafter left for a funeral.

14. Upon his return he learnt that some people had gone to the chief's office and found the 2<sup>nd</sup> respondent whom they gave some money. That the two respondents had been arrested. **PW5 No. 93511 PC Reuben Njagi** of EACC treated the trap money with APQ chemical and also photographed it, (EXB 2). **PW6 Sophia Nyambu** and **PW7 No. 55971 Corporal James Wachira** who are EACC officers joined other officers in the chief's office on 13<sup>th</sup> August 2014.

15. They found the 2<sup>nd</sup> respondent holding Ksh.2000/= which he said he had received on behalf of the 1<sup>st</sup> respondent. PW6 swabbed his hands and placed the swabs in two separate envelopes (EXB 8b). An inventory (EXB 8c) of the recovered items, was prepared.

16. **PW8 Sergeant Richard Mbithi** was the investigating officer herein. He stated that PW1 had complained that the 1<sup>st</sup> respondent had demanded for money from him in order to let him build a furniture yard at Huruma flats area. He had also seized building tools from his repairer (PW2). After interviewing him he prepared the recording gadgets (EXB 1a & b) and showed him how to use them. Treated money for the purpose was prepared.

17. They left for the chief's office with full instructions to PW1. Once in the chief's office PW1 kept on informing him of the progress. When he told him that he had given out Kshs.2000/= to the 2<sup>nd</sup> respondent, the witness and his colleagues moved into the said office and introduced themselves.

18. The Kshs.2000/= was recovered from the 2<sup>nd</sup> respondent, and an inventory prepared (EXB 6). He listened to the recording which he translated from Kikamba language which was mixed with Kiswahili and English into English. He prepared a certificate to that effect (EXB 12).

19. He took the recovered money to the government chemist for analysis. In cross examination he said PW1's complaint was recorded. He also confirmed that in the recording the 1<sup>st</sup> respondent did not talk about money. The translation of the recorded conversation was produced as EXB 4(b).

20. Both counsels filed written submissions which were later highlighted by them. Mrs. Aluda in her submissions summarized the prosecution case and submitted that the case had been proved. That the learned trial magistrate erred in acquitting the respondents. She referred to the case of **Paul Mwangi Gathongo Versus Republic [2015] eKLR** to buttress her submissions.

21. **Mr. Kamwendwa** for the respondents opposed the appeal and submitted that the appeal was a non-starter, as it did not state the case number and ruling.

22. He submitted that the prosecution had failed to prove its case to the required standard, as the demand and receipt were not proved. He relied on the case of **Penina Kimuyu Versus republic Nairobi Criminal Appeal No. 106 of 2012** to support this submissions.

23. He contended that it was not sufficient proof to produce the audio recording alone. That the demand must be express and unequivocal. He cited the following cases in support of this submission:

(i) **Patrick Munguti Nunga –vs- Republic Embu High Court Criminal Appeal No. 123/2011**

(ii) **Geoffrey Ombogo Makworo –vs- Republic Nairobi Criminal Appeal No. 703 of 2010.**

Counsel submitted that there had been no demand for Ksh.2000/= and there was nothing wrong with anyone being found with money. It was his further submission that no evidence had been adduced to show that the respondents were public servants.

24. This is a first appeal and this court is enjoined to consider the evidence afresh, re-evaluate it and come to its own conclusion. The court must also bear in mind that it did not have the advantage of hearing or seeing the witnesses. I refer to the famous case of **Okeno –vs- Republic 1972 EA 32** where the Court of Appeal stated:

(vi) **“It is the duty of a first appellant court to reconsider the evidence, evaluate it itself and draws its own conclusion in deciding whether the judgment of the trial court should be upheld.**

25. This was followed in **Kariuki Karanja –vs- Republic 1986 KLR 190** where the court of Appeal held thus:

**“On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court’s own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the materials before the judge or magistrate with such materials as it may have decided to admit.”**

26. Bearing in mind the position in the above authorities and many others, I have set out the evidence that was adduced before the lower court. I have also set out the submissions by counsels during the hearing of the appeal. I have considered all these together with the cited authorities, and the grounds of appeal. I find the issue falling for determination to be whether the learned trial magistrate arrived at a wrong decision when he acquitted the respondents under section 21o Criminal Procedure Code. In other words did the prosecution establish a *prima facie* case against the respondents?

27. The terms “*prima facie case*” means the establishment of a case against a party and from which a verdict maybe made unless the evidence is rebutted.

In this instant it means establishment of a case against the respondents, such that if they elected to remain silent in their defence, the court would comfortably convict them.

28. I now wish to analyze the evidence on record to satisfy myself as to the correctness or otherwise of the learned trial magistrate’s decision.

29. First of all each of the respondents faced a separate and different charge. For them to have been charged in the same charge sheet means the two offences must have been related. Is that the case from the evidence adduced?

30. **PW3 Gerald Morara Omoke** the assistant county commissioner Kadema division Machakos County testified and confirmed that the 1<sup>st</sup> respondent Alphonse Yata the Chief of Huruma location came to his office on 13<sup>th</sup> August 2014. Chiefs administratively fall under the county commissioners’ office. The 1<sup>st</sup> respondent is therefore PW3’s subject and he knows him. He did not need to produce documents to prove that.

31. Who then is a public officer?

Section of the Anti-Corruption and Economic Crimes Act defines a public officer as:

**“An officer, employee or member of a public body, including one that is unpaid, part-time or temporary;”**

Article 260 of the Constitution defines a “public officer” as

(a) **any State officer; or**

(b) **any person, other than a State Officer, who holds a public office;**

32. It goes further to define a public office as:

**“an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament;**

33. From these definitions there is no doubt that the 1<sup>st</sup> respondent being a chief is a holder of a public office and so is a public officer.

It’s however not the same for the 2<sup>nd</sup> respondent who was alleged to be a village elder. Village elders are not public officers, as they are not

paid by government. There was also no evidence adduced to show that the 2<sup>nd</sup> respondent was a village elder.

34. The particulars in the first count are that the 1<sup>st</sup> respondent **“corruptly solicited for a benefit of Ksh.2000/= from Philip Munywoki Kilonzo as an inducement.”** In the evidence on record together with the audio recording is no scintilla of evidence showing that the 1<sup>st</sup> respondent made any demand of ksh.2000/=.

35. Curiously, in the recorded evidence **PW1 Philip Munywoki Kilonzo** does not mention anywhere that he ever made a report to the Ethics and Anti-Corruption Commission (EACC) in respect to this complaint. At page 17 of the record of appeal at lines 15 – 19 he states:

**“Shortly thereafter, my fundis called me and informed me that the chief had taken away my materials and had said that I should collect them from his office. I met an officer Mr. Akeki who asked me to make a telephone call to the chief and put it on speaker-phone. I did as I was told and spoke with him. He told me to go to his office.”**

36. In this evidence there is no mention of any report of the complainant. He simply met an officer who asked him to make a call to the 1<sup>st</sup> respondent and put it on speaker phone. Why was this and why was the officer Mr. Akeki asking him to do so? The said Mr. Akeki was not called as a witness in this case, so as to answer these questions.

37. The prosecution tried to link the receipt of kshs.2000/= by the 2<sup>nd</sup> respondent to the 1<sup>st</sup> respondent. PW1 testified that the 2<sup>nd</sup> respondent asked him for kshs.2000/= in order for him to release the materials. To understand where these two people (PW1 and 2<sup>nd</sup> Respondent) were coming from and going, it is important that one reads the translated transcript of the recorded conversation (EXB4b) at page 9.

38. It goes like this:

*Onyango (2<sup>nd</sup> respondent): How are you?*

*Kilonzo (PW1): Eh*

*Onyango: Give me*

*Kilonzo: Is what the chief has said*

*Onyango: Mhh*

*Kilonzo: Did the chief say two thousand?*

*Onyango: Mhh*

*Kilonzo: If I give you the two thousand, I will not be disturbed? What did he tell you when he called you outside?*

*Onyango: What?*

*Kilonzo: He told you two thousand?*

*Onyango: He said these things are here (tools)*

.....

*Kilonzo: What is the money for?*

*Onyango: It goes to the construction site.*

*Kilonzo: What is the money for?*

*Onyango: This is how the money is*

*Kilonzo: Ehe*

*Onyango: It awaits construction.*

39. Again from this conversation in the transcript it is clear that the 2<sup>nd</sup> respondent did not demand for any kshs.2000/=. If anything it is PW1 who was talking about kshs.2000/= throughout at page 9. If indeed the respondents had wanted kshs.2000/= in order to release PW1's tools, it would have come out very clearly. One gets the impression that PW1 was out to get the respondents into trouble at whatever cost.

40. This takes me back to the evidence by PW3 the assistant county commissioner. He said PW1 had an issue with his landlord and the chief

and the matter had been taken to PW3's office since PW1 had refused to honour the chief's summons. It is on the same day that the respondents were arrested. It also explains why the Mr. Akeki did not appear before court to testify on the confusion on the dates the complaint was made and PW1's failure to explain how he made his complaint to the EACC.

41. I am satisfied that there was no evidence presented to the court to prove any demand by any of the respondents. It was also not proved that the 2<sup>nd</sup> respondent was a public officer or/a village elder. What came out clearly is that PW1 had purposed to use any means to get at the respondents. Had a prima facie case been proved the 2<sup>nd</sup> respondent could have had a chance to explain how the Kshs.2000/= found on him landed in his hands.

42. I find that the learned trial magistrate evaluated the evidence well and arrived at the correct decision. I find no reason to make me interfere with it.

43. Consequently the appeal is dismissed. The Ruling by the learned trial magistrate is upheld.

Orders accordingly.

***Signed, dated and delivered this 20<sup>th</sup> day of March 2018 in open court at Nairobi.***

**HEDWIG I. ONG'UDI**

**HIGH COURT JUDGE**