REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 39 OF 2016

NANCY NG'ENDO MBURU .... APPELLANT

VERSUS

REPUBLIC .... RESPONDENT

(Appeal against conviction and sentence in Nyeri Chief Magistrates' Court Criminal Case No. 3 of 2012 (Hon John Onyiego, Chief Magistrate) on 19th May, 2016)

JUDGMENT

The appellant was charged and convicted of two counts of 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. She was also convicted on two other counts of corruptly receiving a benefit contrary to section 39(3)(a) as read with section 48(1) of the Act and destruction of evidence contrary to section 66(1)(c) as read with section 66(2) of the same Act.

The particulars in the 1st count were that on the 11th day of April, 2011, at Nyahururu law courts within Nyahururu district of central province, being a person employed by a public body to wit, the judiciary, as secretary II and attached to Nyahururu law courts, the appellant corruptly solicited for a benefit of Kshs 2,000/= from Margaret Wanjiru Nderitu as an inducement so as to release court proceedings in succession cause No. 165 of 2006 at Nyahururu Principal Magistrates' court, to the said Margaret Wanjiru Nderitu, a matter relating to the affairs of the business of the said public body.

The particulars of the 2nd count were similar to those of the 1st count save for the amount solicited which in this particular count is alleged to have been the sum of Kshs. 1000.

As far as the 3rd count is concerned, it was alleged that on the 11th day of April, 2011 at Nyahururu law courts within Nyahururu district of central province, being a person employed by a public body to wit the judiciary, as secretary II attached to Nyahururu law courts, the appellant corruptly received a benefit of Kshs 1000 from Margaret Wanjiku Nderitu as an inducement so as to release court proceedings in succession cause No. 165 of 2006 at the principal magistrates' court Nyahururu to the said Margaret Wanjiru Nderitu, a matter relating to the affairs or business of the said public body.

As for the 4th count, the particulars were that on the 11th day of April 2011, at Nyahururu law courts within Nyahururu district of central province, being a person employed by a public body to wit the judiciary, as secretary II and attached to Nyahururu Law courts, she destroyed Kshs 1000/= serial number BY5671413, which she had reasonable ground to believe was to be used as evidence in the intended criminal proceedings against her for an offence of corruption under the Anti-Corruption and Economic Crimes Act.

The appellant was fined Kshs. 50,000/= or in default to serve 6 months imprisonment on each of these four counts. She appealed against the decision of the learned trial magistrate on the following grounds:

1. The learned trial magistrate erred both in law and in fact in convicting the appellant against the weight of the evidence on record.

2. The learned trial magistrate erred both in law and in fact by failing to appreciate that the main ingredient of the offences charged had not been proved to the required standard.

3. The learned trial magistrate erred in law and in fact by failing to find that the evidence by the prosecution did not support the charge against the appellant.

4. The learned trial magistrate erred in law and in fact by considering the evidence of the prosecution in total disregard of the appellant's defence.

5. The learned trial magistrate erred in law and in fact by not taking cognizance of all the materials in terms of evidence and defence, written submissions placed before him and arrived at erroneous conclusions that are oppressive and detrimental to the rights of the appellant.

6. The learned trial magistrate erred both in law and in fact by convicting the appellant when there were glaring contradictions in the evidence of the prosecution witnesses.

7. The conduct of the trial and the subsequent conviction of the appellant was oppressive and caused a serious miscarriage of justice.

8. The sentences meted out against the appellant were harsh and excessive.

9. The learned magistrate erred in law in ordering the sentences on each of the four counts to run consecutively rather than concurrently.

10. The learned trial magistrate erred in sentencing the appellant as he did in total disregard of the fact that she was a first offender; that she was remorseful and was over 50 years of age and suffering from arthritis and peptic ulcers.

11. The conviction and sentences meted out against the appellant were not founded on sound principles of law but were oppressive and caused a miscarriage of justice.

It is necessary at this juncture to consider the evidence on record not only to determine whether the learned magistrate could come to the decision that he came to but also for this court to appreciate the evidence, evaluate it afresh and come to its own conclusions. I am, however, cautious that as much as I am entitled to come to conclusions different from those of the learned trial magistrate, the latter had the advantage of hearing and seeing the witnesses.

The genesis of the case against the appellant was the complainant's quest for proceedings in the Nyahururu Principal Magistrates' Court Succession Cause No. 165 of 2006 in which she sought to succeed the estate of her late husband. She was apparently dissatisfied with the decision of the Magistrate's Court and therefore she intended to appeal against it hence the need for a certified copy of the proceedings.

She paid the sum of Kshs 500/= being the deposit for the proceedings; the court acknowledged this payment and issued her with an official receipt. When she sought to know how long it would take to have the proceedings ready, she was introduced to the appellant who promised to fast track the typing of the proceedings if she was paid Kshs. 2000/=. The complainant paid her the sum of Kshs 800/= which is the only amount she could afford at the time. However, later, when she went back to court to check on progress made in preparation of the proceedings, the appellant insisted on being paid the balance. It is then that she reported the matter to one Maina Mugo alias Fita Mugenda who referred her to the Ethics and Anti-Corruption Commission. She was linked to the officers of this Commission; the officers whom she identified as Eunice and Waihenya agreed to meet her in Nyahururu town and apparently conduct a sting operation for the arrest of the appellant.

On the material day, which I gather was the 11th April, 2011, the complainant and the Anti-corruption officers met as agreed. They took her through the process of trapping the appellant. This involved, among other things, fitting her with a micro tape recorder to record the conversation between her and the appellant and giving her the sum of Kshs 1,000/= treated with anthracene, phenolphthalein and quinine (APQ) powder to give to the appellant apparently in settlement of the outstanding balance which the complainant 'owed' her. It was the complainant's testimony that she visited the appellant twice on the material day; in the first instance, she negotiated for reduction of the amount which the appellant demanded from Kshs 2000/= to Kshs 1800/=. Once that was agreed she went back to the anticorruption officers who gave her a treated Kshs. 1000/= note. It is on the second occasion of her interaction with the appellant that she gave her the treated note. The conversations between the appellant and the complainant were recorded on each of these two occasions. When the recordings were replayed in court the complainant confirmed they represented the conversation between her and the appellant on the material day.

According to the complainant's testimony, as soon as she gave the appellant the money, she signaled the anticorruption officers who then quickly moved to the office where the appellant operated from. The officers demanded from her the money she had been given by the complainant. She could not produce it; however, after conducting a search in the office, they recovered the mutilated note of the Kshs 1000/- note hidden under a typewriter. This typewriter was usually used by the appellant's colleague with whom she shared that office; however, when the officers busted in the office, the appellant was found near the desk where this particular typewriter was. Apart from the treated money, the officers also recovered some other money and made an inventory of all these recoveries; as one of the witnesses to the recoveries, the complainant signed the inventory.

In their evidence, the anticorruption officers largely corroborated the testimony of the complainant. Cecil Mumbi Wairimu (PW2), an acting inspector of police attached to the anti-corruption commission was one of these officers. She confirmed, in her testimony, that on 8th April, 2011, her colleague, Eunice Njeri (PW7) approached her with two currency notes worth Kshs.1,000/= each. She treated them for purposes of conducting the sting operation. The treatment processes included applying the APQ powder on the notes and photocopying them. She made an inventory of the notes and recorded their respective serial numbers. She then handed over the notes to Livingstone Waihenya (PW10), the lead investigator; they both signed the inventory. She confirmed that the mutilated Kshs 1000 note was one of the two notes which she treated because it bore the same serial number of one of the two notes that she had recorded and was also similar to one of the notes that she had photocopied.

The other anticorruption officer, Eunice Njeri, (PW7), testified that indeed a complaint of corruption was made at the anticorruption offices by the complainant who reported that a lady at Nyahururu law courts demanded a bribe in order to release court proceedings. Following this report, she together with two other officers, Inspector Livingstone Waihenya(PW10) and Lewis Njeru (PW8) travelled to Nyahururu and met the complainant on 11th April, 2011. It is this witness who fitted the complainant with the tape recorder and showed her how to record the conversation between her and the appellant. She testified further that when they played the recording of the first conversation, they were

satisfied that a bribe demand had been made; it is then that the treated Kshs 1000 note was handed over to her to give to the appellant. She returned to the appellant and gave her the note; as it was during their first encounter on the material day, the complainant also recorded their conversation during this second encounter.

The officers confronted the appellant once the complainant signaled them that she had received the treated note. The appellant denied having received the note but surrendered a total of Kshs 35,000/=. The treated note was not among these notes and so the officer proceeded to search for the note where the appellant had been standing. She found it under the typewriter; it had been mutilated into two pieces.

Since parts of the mutilated note had apparently been chewed, the officer conducted a swab on the appellant's lips. The swab was forwarded to the government chemist for forensic examination. She also recorded an inventory of all that had been recovered. The appellant signed the inventory amongst other persons who witnessed the recoveries.

Lewis Njeru (PW8) who, as noted, was one the anticorruption officers testified that he also did a swab on the appellant's hands. He is the person who did a memo to the government chemist forwarding the swabs; he also did a similar memo to the document examiner forwarding the mutilated notes for examination.

Robert Karani (PW9) also an officer from the anti-corruption commission transcribed the recorded conversation into a written text. He also translated it from Kikuyu language into English language. The officer produced in evidence the transcripts of both languages. He also testified that the complainant was able to identify her own voice and that of the appellant when the recorder was replayed. The officer however, admitted that he did not sign the transcription certificates because of what he explained to have been an oversight on his part.

The last of the anti-corruption commission's officers to testify was Chief Inspector of Police Livingstone Waihenya (PW10). He was the head of the investigations team. It was his evidence that the appellant was identified to them by the complainant as the person who received the Kshs 1000 note when they entered her office; there were two other ladies in the office at the material time. The appellant, according to his evidence, was seated near a typewriter. When he informed the appellant that she was under arrest and asked her to produce the Kshs 1000 note, she produced Kshs 10,000 instead. The particular note he was interested in was not amongst the ones the appellant surrendered. This note was recovered under the typewriter. The officer testified that the note had been partly chewed and torn. The executive officer (PW4) at the law courts was present when the search was conducted; she had been summoned by this officer to witness the search and ultimately, she witnessed the recoveries made. He corroborated Njeru's and Njeri's evidence that a swab was taken on the appellant's lips and hands.

Besides the anti-corruption officers, a prosecutor at the Nyahururu law courts, Inspector of Police Charles Mugambi (PW3) testified that he found the appellant, her colleagues whom he identified as Grace and Penina in the typing pool together with the anti-corruption officers and the complainant. He saw Kshs 35,000 thousand on the table and one mutilated note of Kshs 1000; according to his evidence, one half of the note was completely mutilated while the other half had one of its serial numbers partially illegible. He identified the note as the one exhibited in court. He too signed the inventory as one of the officers who witnessed the recoveries.

Grace Wangeci Mwangi (PW4) an executive assistant at Nyahururu law courts confirmed that indeed the complainant applied for a certified copy of the proceedings in succession cause No. 165 of 2006; she was asked to wait for one month after she paid Kshs 500 for the proceedings.

On the material day, one of the anti-corruption officers asked her to accompany him to the appellant's work station. She found the appellant's hands being swabbed. She also witnessed the recovery of the treated note under the typewriter and Kshs 35,000 from the appellant's desk. The witness also recognised the appellant's voice when tape recorder was played to her.

The document examiner, Chief Inspector of Police, Michira Ndege (PW3) confirmed that the two pieces of the mutilated note were not only of the same note but also that the note was a genuine Kenya currency. He was able to decipher the torn part of the note's serial number and confirmed that it was the same treated note that the anti-corruption officers had referred to in their evidence. It was also his evidence that the note had been destroyed by mechanical means.

On her part, the Government chemist, Catherine Serah Murambi (PW6) testified that she examined the mutilated note, the right and left hand swabs of the appellant, the appellant's mouth swab, the khaki envelope in which the treated note was kept and the sample APQ powder. According to her findings, the APQ powder was detected on the currency note, on both the appellant's right and left hand swabs; her lips; and, the Khaki envelope in which the note was kept before it was handed over to the appellant.

In her defence, the appellant admitted that sometimes around March, 2011 an advocate's clerk whom she named as Githinji introduced her to the complainant. The three of them met in a hotel; it is here that Githinji requested her to type proceedings for the complainant. Contrary to the testimony of the court's executive assistant (PW4) the appellant testified that proceedings would ordinarily take up to a year to prepare. She asked the complainant to pay for the requisite fees for the proceedings and proceeded to type them 'after discussions'.

On the fateful day, that is the 11th April, 2011, the complainant came and requested to talk to the appellant outside her office. She informed the complainant that the proceedings would be ready at 2 PM on the same day. She also told her to come and pay the balance of Kshs 880 that was due. The complainant returned as had been agreed. The appellant directed her to the cash office to pay. Even then, the appellant gave her Kshs 1000 and they both went to the cash office. However, so the appellant testified, since the queue at that office was long, the appellant introduced the complainant to the cashier and went back to her office. As soon as she arrived there, the complainant and two other people followed her. They sought to know who the appellant was and the complainant pointed her out. They demanded the money given to her by the complainant but the appellant denied having received any money. However, the appellant admitted that the money was recovered under her colleague's typewriter. Besides the particular note of Kshs 1000, they also recovered Kshs 30,000 from the appellant's desk. She testified that this money had been given to her by her husband. The appellant admitted that her hands were swabbed but denied that her mouth was similarly swabbed. She said also that she was not aware whether the complainant ever paid for the balance of the amount required for the proceedings. She denied that the voice in the tape recorder played in court was hers.

From the foregoing evidence there is no doubt that the appellant and the complainant were familiar with each other; their point of acquaintance was nothing else other than the complainant's bid for a typed and certified copy of the proceedings in a succession cause. It is as a result of the complainant's quest for the proceedings that she was introduced to the appellant. The appellant herself admitted that the rendezvous where they got to meet each other and discussed the processing of the proceedings was in a hotel, and in her own words 'outside the working hours'. Evidence was produced, and it is not in doubt, that the complainant paid deposit fees for typing of the proceedings.

According to the appellant, the processing of the proceedings would ordinarily take a year although her evidence in this regard contradicted that of the court's executive assistant who testified that the proceedings could be ready for collection within a month of the date of the application. Whatever the case, if the appellant is taken at her word, there is some force in the complainant's claim that she was asked to do something more than just pay for the official fees in order to obtain proceedings earlier than the time it would ordinarily take to prepare them. I do not see any other reason why the appellant should have found it necessary to meet the appellant in a hotel outside office working hours to discuss the official business of the court. I am prepared to accept this as corroborative evidence that the appellant solicited for a bribe to expedite the preparation of the proceedings.

Equally strong corroborative evidence are the conversations recorded between the appellant and the complainant. The recordings were played in court and the learned trial magistrate who had the advantage, which I do not have, of hearing them concluded that a bribe demand had not only been made and but also that it had been received. He appreciated that the transcript of the tape recordings had not been signed but that, this, in itself, was not fatal to the prosecution case.

There is nothing on record that suggests that the learned trial magistrate misdirected himself in this regard and therefore I have no reason to fault him for the conclusions made upon hearing the recordings; as noted, he heard the recordings which were translated from Kikuyu language to English language. No evidence was led to demonstrate that the translation was improper or was not reflective of the contents of the conversation between the appellant and the complainant. Although the transcriptionist did not sign the transcription, he owned it in his testimony and gave an explanation, which in my view was sufficient, that he did not deliberately omit to sign the transcription but was an oversight on his part.

I also agree with the learned magistrate that the conviction of the appellant on all the four counts or either of them did not solely hinge on the tape recordings or the transcription for that matter. Apart from the tape recordings there was other alternative evidence which, in my humble view, was sufficient to support the charges made against the appellant.

In the first place, the learned trial magistrate found the complainant was a credible witness; on my part, I see no reason why the learned magistrate should have discounted her testimony. Her evidence in my view, was never shaken; there was no evidence that she was driven by malice or ill motive against the appellant as to raise the complainant against her. In my assessment, she was not even aware that she could make a complainant of corruption at the Ethics and Anti-Corruption Commission until someone referred her to the commission.

The evidence of the Government chemist and that of document examiner was also conclusive as to the facts intended to be proved. Their evidence surrounded the Kshs 1000 note given to the appellant as a bribe. The Government chemist was categorical in her evidence that indeed the note was treated with APQ powder traces of which were found on the appellant's hands and mouth. The logical conclusion one can possibly make out of this analysis is that the appellant handled the note and, in this regard, it was proved beyond doubt that she had been given a bribe of Kshs. 1000.

A further confirmation that the note in issue was the same note that the anti-corruption officers had given to the complainant to give to the appellant was by the document examiner; according to him, the serial number on the note was the same as the serial number of the photocopied note. He also confirmed that the note had been mechanically destroyed but, as far as the trial against the appellant was concerned, he was still able to detect its vital features. Coupled with the evidence of the Government chemist, his evidence was consistent with the fact that the appellant destroyed the evidence by chewing the treated Kshs 1000 note.

I note from the appellant's testimony in her defence that she indeed received Kshs 1000 from the complainant apparently to pay for the balance due for the proceedings; however, she never testified that she paid for the proceedings or handed over this money back to the complainant; as a matter of fact, she testified that she was not sure whether the balance due was paid. Her testimony was that she accompanied the complainant to the cash office and introduced her to the cashier because 'queue was long'.

It is apparent, even from the appellant's own testimony, that she received the Kshs 1000 note, not to settle the outstanding fees due to the government but in settlement of the bribe demand. I have no doubt in my mind that it is this note that was eventually traced in her office. If at all she received this money for payment of the proceedings as the appellant alleged, there is no reason why it should have been in her office when the complainant was at the cash office to pay for the same proceedings which this particular money was meant for. There is no reason why the appellant should have left the complainant on the queue and went back to her office with the money that was meant to pay for the proceedings in the first place.

Although the appellant complained that swabs should have been taken of all the three secretaries in the office, this was unnecessary because the complainant was clear on whom she gave the money. The government analyst would eventually demonstrate that she is the one who not only received the money but also destroyed it.

I agree with the learned magistrate that the appellant's defence was wanting; to put it more aptly, it did not raise any reasonable doubt on the prosecution case on all the four counts for which the appellant was charged and eventually convicted. I must reach the conclusion that the appellant was properly convicted on each of the four counts.

As far as the sentences are concerned, the offences were committed in the same transaction and therefore there is no reason why the learned magistrate should have ordered the sentences to run consecutively rather than concurrently. I will therefore allow the appeal on sentence only to the extent that the learned magistrate's order in this respect is substituted with the order that the prison terms to run concurrently in the event of default of fine. It is so ordered.

Signed, dated and delivered in open court 21st day of September, 2018

Ngaah Jairus

JUDGE