



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 25 OF 2016

OJUOK OGUTU PAUL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the judgment, conviction and sentence by Hon. D. K. Kemei, Chief Magistrate (as he then was) in Migori Chief Magistrate's Criminal Case No. 690 of 2014 delivered on 06/05/2016)

JUDGMENT

1. The Appellant herein, **Ojuok Ogutu Paul**, worked for South Nyanza Sugar Company Limited (hereinafter referred to as '**Sony Sugar**') as an Investigations Supervisor for ten years. He was arrested on 07/10/2014 and charged with the following two counts under the **Anti-Corruption and Economic Crimes Act No. 3 of 2003**: -

Count I:

CORRUPTLY SOLICITING 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.

On the 7th day of October 2014 at South Nyanza Sugar Company Limited, Migori County, being person employed by a public body to wit, the South Nyanza Sugar Company Limited as Investigation Supervisor, corruptly solicited a benefit of Kshs. 60,000/= from Rodgers Otieno Odera, as an inducement so as to facilitate the collection of 90 tons of scrap metal from the company scrap yard, a matter relating to the affairs of the said public body.

Count II:

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.

On the 8th day of October 2014 at South Nyanza Sugar Company Limited, Migori County, being person employed by a public body to wit, the South Nyanza Sugar Company Limited. Migori County as Investigation Supervisor, corruptly solicited a benefit of Kshs. 60,000/= from Rodgers Otieno Odera, as an inducement so as to facilitate the collection of 90 tons of scrap metal from the company scrap yard, a matter relating to the affairs of the said public body.

2. The Appellant denied the offences and he was tried and acquitted on the first count. He was however found guilty on the second count, convicted and sentenced to a fine of Kshs. 300,000/= in default to serve three years imprisonment. That was on 06/05/2016.

3. From the judgment two appeals were filed. One was **Criminal Appeal No. 24 of 2016** filed by the Appellant in person on 18/05/2016. The current appeal, Criminal No. 25 of 2016, was then filed through the firm of **Messrs. Omonde Kisera & Company Advocates** on 20/05/2016. The firm of **Messrs. Tom Mboya & Company Advocates** came on record for the Appellant and filed a Notice of Appointment of Advocates on 18/05/2016 in Criminal Appeal No. 24 of 2016.

4. Directions were taken and the two appeals were consolidated with Criminal Appeal No. 25 of 2016 being the controlling file. The firm of Messrs. Omonde Kisera & Company Advocates was retained by the Appellant.

5. The prosecution called a total of nine witnesses. **Rodgers Otieno Odera** testified as **PW1** and he was the complainant. **No. 231545 IP John Otieno Nyagara** attached to the **Ethics and Anti-Corruption Commission** (hereinafter referred to as '**the Commission**') as an investigator in the Commission's Kisumu Regional office testified as **PW2**. **Catherine Serah Murambi** testified as **PW3**. She was a Government Chemist attached at the Government Laboratories in Nairobi. **PW4** was **Polycarp Akoko Osoya**. He also worked for Sony

Sugar as a Security Supervisor. **No. 84301 PC Raphael Nyina** testified as **PW5**. He was also an Investigator attached to the Commission's Kisumu Regional office. Another investigator with the Commission was **Pauline Wambeti Munyi** who testified as **PW6**. **Kennedy Odhiambo Onyango** testified as **PW7**. He also worked for Sony Sugar in the security division. **Fredrick Wanjala Wanyama** testified as **PW8**. He was the Security Manager with Sony Sugar. The investigating officer one **No. 233148 IP Samuel Kingele** testified as **PW9**. He was also attached to the Commission's Kisumu Regional office. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court.

6. PW1 was awarded a tender to purchase some scrap metals from Sony Sugar. After collecting a portion thereof he encountered some problems and was asked to pay the sum of Kshs. 60,000/= as a bribe. Unwilling to engage in the sport, PW1 shared the issue with one of his friends who linked him up with the Commission. The Commission took up the matter seriously and investigations into the complaint began. PW9 led the investigations. PW9 organized for the mission to arrest all those culpable. He organized the usual operation kit which included a tape recorder, a micro cassette, Kshs. 30,000/= genuine money in Kshs. 1,000/= denominations and Kshs. 30,000/= in fake Kshs. 1,000/= denominations. He requested PW6 who treated the trap money with a special APQ powder chemical and prepared an inventory as well. That was on 06/10/2014.

7. PW9 then left Kisumu in company of PW2 and PW5 and headed to Awendo town where Sony Sugar is situated. The three met PW1 on 07/10/2014 at around 10:00am at Sugarland in Awendo town. PW9 interviewed PW1 and then inducted him on how to use the recording device. He also fitted PW1 with the said device and escorted him to Sony Sugar but left him outside the offices. After a while PW9 met with PW1, PW2 and PW5 at the said hotel and on playing the recording device PW9 established a demand for a bribe of Kshs. 60,000/= by the person PW1 had talked to. PW9 sent PW1 back to Sony Sugar to do a second recording. On 08/10/2014 PW9 met PW1, fitted him with the recording device and gave PW1 Kshs. 30,000/= which he instructed only to give out when demanded. PW2, PW5 and PW9 followed PW1 from a safe distance and proceeded to Sony Sugar. PW1 then called PW9 and informed him that the recipient had declined to take part of the sum and could only take the entire Kshs. 60,000/=. PW9 met PW1 and gave him the extra Kshs. 30,000/= in fake notes. PW1 agreed with the recipient to meet along Akoko Owiro road in Awendo town as to give him the money.

8. PW9, PW5 and PW2 escorted PW1 to the venue well before the recipient arrived and then took cover. They could clearly see PW1. The recipient arrived and after a short chat PW1 gave him the money. In a flash of a second PW2, PW5 and PW9 pounced on the recipient and arrested him. They recovered the money from one of the trouser pockets of the recipient. The recipient was the appellant herein. He was taken to Awendo Police Station where inventories were prepared and several swabs done. The appellant was placed in custody and appeared in court on 23/10/2014. PW9 referred the exhibits recovered during the sting operation for analysis by a Government Analyst and that was done by PW3. The recording device was also played in court during the hearing and PW4, PW7 and PW8 testified on how they had been called by PW9 to identify the voices in the recording device at the Awendo Police Station. The prosecution produced various exhibits in support of its case.

9. At the close of the prosecution's case, the trial court placed the Appellant on his defence where the Appellant opted to and gave a sworn defence and denied any involvement in the commission of any of the alleged offences. He contended that he was fixed by PW1 whom they had diffused as PW1 was suspected to have stolen scrap metal from Sony Sugar and the appellant was investigating the matter. He called no witness.

10. By a judgment rendered on 06/05/2016 the trial court acquitted the appellant on the first count but found him guilty and convicted him of the second count. As said, the appellant was sentenced to a fine of Kshs. 300,000/= in default to serve 3 years imprisonment.

11. In arguing the appeal Counsel for the Appellant narrowed down the arguments to three main grounds. That the second count could not stand in the absence of the first count, that the Commission had failed to comply with **Section 35** of the **Anti-Corruption and Economic Crimes Act** which is in mandatory terms and that the appellant's defence was not considered. The State relied on the evidence on record.

12. As this is the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

13. I will start with the issue of **Section 35** of the **Anti-Corruption and Economic Crimes Act No. 3 of 2003** (hereinafter referred to as '**the Act**'). The said section provides as follows: -

"35. (1) Following an investigation the Commission shall report to the Director of Public Prosecutions on the results of the investigation.

(2) The Commission's report shall include any recommendation the Commission may have that a person be prosecuted for corruption or economic crime."

14. I have carefully perused the record and the issue of the report to the Director of Public Prosecutions is nowhere. The State Counsel did not comment on the issue as well. I will then take it that the report was not made pursuant to **Section 35** of the Act. The question which now begs an answer is what is the effect of not complying with **Section 35** of the Act. The section is worded in mandatory terms. **Article 157** of the **Constitution** gives the **Director of Public Prosecutions** the sole mandate to instate and undertake all and any prosecution of criminal offences (save before a court martial) in Kenya. The Act on the other hand as well as the **Ethics and Anti-Corruption Commission Act No. 22 of 2011** do not donate any prosecutorial powers to the Commission. It therefore means that upon the Commission undertaking its duties and is of the opinion that it must prefer any charge(s) against any suspect it is only the **Director of Public Prosecutions** who can sanction that. Anything done otherwise is tantamount to usurping the constitutional mandate of the **Director of Public Prosecutions** as well as acting contrary to the Act. Such an act would be unconstitutional and *ultra-vires* with no legal legs to stand on regardless of the evidence gathered. (See the Court of Appeal cases of **Esther Waruiru & Mary Mbaisi Indusa vs. Republic Criminal Appeal No. 48 of 2008 at Nairobi**

(unreported) and Nicholas Muriuki Kangangi vs. Attorney General Civil Appeal No. 33q of 2010 (unreported). The conviction on the second count cannot stand even on that aspect alone.

15. Having so found, I will still look at the argument as to whether the second count can stand when the first one fails. The first count is '**corruptly soliciting a benefit**' whereas the second count is on '**corruptly receiving a benefit**'. The appellant was found not to have corruptly solicited for a benefit and he was acquitted. He was however found to have corruptly received a benefit and was convicted. The appellant was the only one charged in this case. In essence, there was no evidence that the appellant had made a demand for a benefit. Even though the appellant was found with the trap money, the law does not make receiving money an offence *per se*. It is the '**corruptly receiving**' that is an offence and that aspect must be strictly proved. In this matter, the aspect of 'corruptly receiving' was not proved.

16. To me, it is not likely for an accused person who is charged alone in a criminal case with the twin counts to be acquitted of the offence of 'corruptly soliciting money for a benefit' but be found guilty of the offence of 'corruptly receiving money for a benefit'. Such a scenario may only arise when several people are jointly and/or severally charged with committing criminal acts forming *res gestae*. An example may be where **A** corruptly solicits for the benefit and directs that the benefit be delivered to **B** at a certain point. **A** may be guilty of 'corruptly soliciting' and **B** may be guilty of 'corruptly receiving' and not vice versa. Having acquitted the appellant on the first count the learned trial magistrate erred in finding the appellant guilty on the second count. The conviction cannot once again stand.

17. I believe I have said enough. As the charge of **corruptly receiving a benefit** was not proved beyond reasonable doubt further to non-compliance with **Section 35** of the Act, I hereby allow the appeal, quash the conviction and set-aside the sentence. In the event the appellant paid any fine, the same shall be refunded accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 27th day of July 2017.

A. C. MRIMA

JUDGE