



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NOS.33 AND 34 OF 2011**  
**(CONSOLIDATED)**

**BETWEEN**

**FREDRICK OTIENO ODUOR ..... 1ST APPELLANT**

**BENARD RUTO ..... 2ND APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in Nyeri CM's Court in Anti-Corruption*

*Case No.9 of 2006 delivered on 24th February 2011 – Hon. S.M. Muketi, (MRS) CM)*

**JUDGMENT**

The appellants **Benard Ruto** and **Fredrick Otieno Oduor** were charged with the offence of 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**, the particulars of which were that on 3rd day of April 2006 at Mukurweini Township in Nyeri District within the Central Province jointly being persons employed by a public body to wit Kenya Police Force as police officers and stationed at Mukurweini police station, corruptly solicited for a benefit of Kshs.5000/= from **Erick Gichuki Kinyahwe** as an inducement to forbear arrest and charging the said Erick Gichuki Kinyahwe for the offence of being in possession of contraband goods a matter with which the said public body was concerned.

They pleaded not guilty, were tried, convicted and sentenced to fine of Kshs.50,000/= each and in default 12 months imprisonment. Being aggrieved by the said conviction and sentence, they each filed a separate appeal which appeals were consolidated for purposes of hearing and in which they raised the following grounds of appeal:-

1. *The Learned Chief Magistrate erred in law and in fact in convicting the appellants on a fatally defective charge as the word “CORRUPTLY” was omitted thus convicting the appellants on unknown offence to the Law. Prejudice and a miscarriage of justice was occasioned to the appellants.*
2. *The Learned Chief Magistrate erred in law and in fact in convicting the appellants on insufficient, contradictory and uncorroborated evidence. A miscarriage of justice was occasioned to the appellants.*
3. *The Learned Chief Magistrate erred in law and in fact in shifting the burden of proof to the appellants. Prejudice was occasioned to the Appellants.*

- 4. The Learned Chief Magistrate erred in law and in fact in failing to consider sufficiently the appellants' defence not in isolation but in totality of the entire evidence adduced and the submissions of their Advocate. Prejudice and a miscarriage of justice was occasioned to the appellants.*

When the appeals came up for hearing before me, Mr. Njuguna Kamau Advocate appeared for the appellants while Miss Maundu appeared for the State and opposed the appeal.

#### Submissions

It was submitted by Mr. Njuguna that the appellants were convicted for a crime which was not known to Law. He submitted that the word **“Corruptly”** was omitted from the charge, it was further submitted that the appellants were convicted on insufficient and uncorroborative evidence. That the appellants were never charged with receiving the money but with soliciting for the money. It was submitted that there was no charge relating to 3rd June 2013.

It was further submitted that the trap money was the complainant's money which he took to the police and no photocopies were taken of the said money. It was submitted that the complainant was an aggrieved party interested with the outcome of the trap and therefore his evidence was of no value. In support thereof the case of **Luke Ouma Ochieng -vs- Republic Kisumu Criminal Appeal No.226 of 2005** was used while the judge held that no significance can be attached to evidence gathered by an interested party.

It was further submitted that the trial court shifted the burden of proof to the appellants whereas they were not in law required to cast a doubt on the prosecution's case. It was further stated that the appellants' defence were not considered and therefore the appeal should be allowed.

Miss Maundu for the State submitted that although the word **“Corruptly”** was omitted, the particulars of the charge contained the same. It was submitted that there was no need to call an independent officer since PW3 who did the tape gave it to PW6. It was further submitted that the trial court did not shift the burden of proof upon the appellants and that their defence were considered but did not cast doubt on how the appellants were arrested.

This being a first appeal, the court is required to re-assess the evidence tendered before the trial court and come with his own conclusion on the same.

The prosecution case was that PW1 **Erick Gichuki Kinyahwe** a shop keeper was on 29th March 2009 preparing to close his shop when the appellants appeared and searched the shop on the ground that he was selling illegal goods tiger batteries. They threatened to take PW1 to the station and demanded money so that he is not taken to the station. They demanded Kshs.10,000/= to which he told them that he could only get Kshs.5000/= which he did not have at that time. They agreed that he would give them on the following day.

He reported to CID headquarters and was assigned three officers whom he gave Kshs.5000/= which was then tracked. The following day the appellants went for the money which he gave them and they were subsequently arrested. At the said time he had been given a tape recorder which he handed over to the CID. He gave the money to an old man. Under cross examination he confirmed that it was the 1st appellant who made a call to him and asked for the money.

PW2 PC Paul Machia attached to Nyeri Provincial CID headquarters was instructed together with Sgt. Muriithi Gitonga and PC Omuluta to lay an ambush on the appellants who came in the company of civilian. It was during the day at 11 a.m. when they were arrested and upon search by Sgt. Murithi Kshs.5000/= was recovered. The appellants were subsequently escorted to the station and charged. Under cross examination he stated that the money belonged to the complainant and that the cassette was given to Cpl. Mugo. He stated that the money was recovered from one Ibrahim Kanyari in his presence.

PW3 Cpl John Mugo testified that he handed over the cassette plus the money to PW1. He subsequently

made a transcript, interpreted the same and handed it over to the investigating officer. Under cross examination, he confirmed that this voice on the tape was clear to him. PW4 SP Samuel Wambugu examined the appellants to confirm if they had come into contact with the chemical which had been used to treat the trap money and confirmed that that small portion were found on the 1st appellant's long trouser on the left hand pocket while nothing was found on the 2nd appellant.

PW5 Jacob Mureithi stated that he was in the group that arrested the appellants after they had meet with PW1 who signaled them that he had given out the money while PW6 Catherine Sera produced analyst report.

When put on their defence, the 1st appellant testified on oath that he was attached to crime office. On 3rd April 2006 he was instructed to escort a prisoner to Nyeri hospital for examination, got back to the station at 1 p.m. At 5 p.m. two officers who identified themselves as from DCIO's office arrested them. They were then taken to Embu and charged. The 2nd appellant gave sworn statement also stated that on 3rd April 2006 he was asked by CP Michael Kuria to escort a prisoner to Nyeri Provincial Hospital for a test which they did. He was thereafter arrested at 5 p.m. He stated that he had not gone to the shopping centre that day.

While convicting the appellants, the trial court had this to say:-

**“Is there evidence of soliciting? At page three of the transcript there is evidence that Ruto specifically solicited for the money. Otieno did not talk about the money in the transcript but from the bits on record, he was present when the soliciting was being done. It is not a coincidence too that he was in the company of Mr. Ruto when the money was collected. He was part and parcel of the scam, money was received. ....”**

From the proceedings and submissions herein, the following issues are identified for determination:-

- a. *Whether the charge was defective.*
- b. *Whether the prosecution's case was proved beyond reasonable doubt against the appellant.*

Whereas the word **“Corruptly”** was missing from the charge, the same was clearly stated in the particulars of the offence and therefore the appellants knew the charge they were facing. The charge sheet was therefore not defective and neither were the appellants prejudiced in any form.

The evidence tendered by the prosecution placed the appellants at the scene of the crime. However since they were charged with soliciting for a benefit, the tapes produced only confirmed that the 1st appellant solicited for the same which was received by one Ibrahim Kanyari Buri who admitted the charges and was subsequently convicted and sentenced.

There is no evidence tendered by the prosecution to confirm that the 2nd appellant FREDRICK OTIENO ODUOR solicited for money, the fact that he was present at the scene does not support the charge which was against him. He should have been charged with any other offence but not what he was charged with.

I therefore find that there was no evidence tendered to prove the offence against the 2nd appellant taking into account the trial court's finding that he did not talk about the money. I therefore find that the conviction of the 2nd appellant was not safe and therefore allow his appeal, quash the conviction and set aside the sentence against him. The 2nd appellant FREDRICK OTIENO ODUOR should be set free forthwith unless otherwise lawfully held and any money paid in respect of the fine herein to be refunded to the same.

As regards the 1st appellant, evidence of PW6, PW4 and PW1 connected him with the offence. I have looked on the case of **Luke Ouma Ochieng -vrs- Republic Kisumu High Court Criminal Appeal No.225 of 2005** and distinguish the same in that in the present case in addition to the recording and identification of the voices, there were other corroborated evidence tendered against the 1st appellant which included that of PW1 to the extent that he called him asking for money and the chemical analyst

report which confirmed that he was in contact with the trap money.

I therefore find that the case against the 1st appellant was proved beyond reasonable doubt and therefore his conviction was safe. The appeal by the 1st appellant Mr. BENARD RUTO therefore has no merit and is dismissed.

**Signed and dated        day of        2014**

**J. WAKIAGA**

**JUDGE**

delivered by Justice J. Ngaah on behalf of Justice Wakiaga this 25th day of November 2014

**J. NGAAH**

**JUDGE.**

In the presence of:-

----- for Appellants

----- for Respondent