



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 73 of 2011

MAURICE OUNGA MIKIMA..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in Acc Case No. 5 of 2008 of the Chief Magistrate's Court at Nairobi by R.E. Ougo – Chief Magistrate)

J U D G M E N T

MAURICE OUNGA MIKIMA, the appellant herein, was charged with the offences 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**; and **Receiving a benefit contrary to section 39 (3) (a)** as read with **section 48 (1) of the Anti-Corruption and Economic Crimes Act**.

He was acquitted on the charge of receiving a benefit. However, he was convicted for the offence of Soliciting for a benefit.

The learned trial magistrate sentenced the appellant to a fine of Kshs.40,000/- or in default, imprisonment for six (6) months.

In his appeal to the High Court, the appellant has challenged both the conviction and the sentence.

He has argued that the charge sheet was defective, and also that there were material contradictions in the evidence tendered by **PW 1** and **PW 7**.

As regards the alleged defect in the charge sheet, Mr. Nyakundi, the learned advocate for the appellant, submitted that pursuant to **Section 134 of the Criminal Procedure Code**, the charge sheet should contain a statement with reasonable particulars of the offence.

In particular, the charge sheet is supposed to have the words used by the offender, when he was soliciting for the benefit: that is the contention of the appellant.

As no such words were specified in the charge sheet the appellant argued that the said charge sheet was defective.

On the issue of contradictory evidence, the appellant asserted that the two (2) main witnesses for the prosecution were **PW 1** and **PW 7**. Those 2 persons were said to have been present when the offence was being committed, yet they testified about inconsistent facts.

One witness said that the appellant asked for Kshs. 1,000/- more, whilst the other witness heard the appellant asking for “chai”. Those pieces of evidence were said to be contradictory.

Furthermore, the said evidence was not corroborated, as the recording of the transaction failed to work.

The appellant also faulted the prosecution for failing to call, as a witness, the colleague of the appellant who was allegedly with him when he solicited for the benefit.

In answer to the appeal, Ms Maina, learned state counsel, conceded. She admitted that the evidence of **PW 1** and of **PW 7** were contradictory.

Secondly, as the consent of the Attorney General was not obtained before the trial commenced, that is said to have rendered the proceedings a nullity.

Being the first appellate court, I have re-evaluated the evidence on record, and drawn my own conclusions. The starting point in that process was the charge sheet.

The particulars of the charge sheet were as follows;

'MAURICE MUKIMA OUNGA: On the 28th February 2008 at Bridge Restaurant along Tubman Road within Nairobi area, being a person employed by a public body, to wit, the City Council of Nairobi, as Office Clerk, corruptly solicited for a benefit of Kshs.500/- from PAUL NGEI KIOKO as an inducement to facilitate the release of a certificate authorizing external repairs of Bridges Restaurant, a matter in which the Public body was concerned.'

PW 1 is a manager at the Right Bridges Organic Restaurant. On 18th February 2008, the restaurant started repairing the extractor which had broken down. Askaris from the City Council stopped the repair works because the restaurant had not obtained a permit for the same.

On 28th February 2008, the restaurant paid for the permit. Thereafter, 2 askaris from the Council visited the restaurant, to inspect the repair works. One of the 2 askaris was the appellant. This is what **PW 1** said about what transpired when the appellant was at the restaurant;

“Maurice solicited for the bribe for Kshs.1,000/-.

Yes it is in the statement.

'It will cost extra 1,000/- asked to make the process fast.'

Yes, those were his words.

Maurice asked for a bribe of 1,000/-.”

During cross-examination, **PW 1** admitted that;

“The statement does not state that the accused asked for Kshs.500/-”

PW 2 was the clerk who paid to the City Council of Nairobi the sum of Kshs.2,000/- for the permit to enable Bridges Restaurant to carry out repairs.

PW 3 is an Investigator with the Kenya Anti-Corruption Commission. He provided **PW 1** with a “treated” Kshs.500/- currency note, which was for use in a trap operation.

PW 4 is a Director of Bridges Restaurant. She wrote to the City Council of Nairobi, seeking authority to repair the fire Extractor at the restaurant. She also authorised the payment of Kshs.2,000/- to

the Council, as their fees for the permit to authorise the repairs.

When **PW 4** learnt that the concerned official at the Council refused to release the permit unless he was bribed, she escorted **PW 1** to the Kenya Anti-Corruption Commission, to report the incident.

However, **PW 4** conceded that she did not hear the appellant demand any bribe.

PW 5 is a secretary at the City Council of Nairobi. On 5th March 2008, at about 4.00p.m, police officers arrived at her offices, and recovered a specific Kshs.500/- currency note.

According to **PW 5**, the appellant was one of the officers who works with her, in the City Planning Department. On the material day, the appellant never went into **PW 5**'s office, before the police officers arrived there.

PW 6 is an Investigator with the Kenya Anti-Corruption Commission (KACC). He was a member of the KACC team which recovered the “treated” money at the desk of **PW 5**.

PW 7 was an Accountant at the Bridges Restaurant. He said that he was present when the appellant asked **PW 1** for “chai”. According to **PW 7**, the appellant asked for Kshs.1,000/-, but **PW 1** told him that he could only give Kshs.500/-.

***“Yes, these are the exact words I heard. I gave
the story. I heard the accused asking for chai.***

'Give us chai and we can quicken the issuance

of the certificate.'

The main word was 'chai' ”

PW 8 was a Planner at the City Council of Nairobi, he was a “Boss” to both **PW 5** and the appellant.

On 5th March 2008, **PW 8** was present when officers from KACC started searching **PW 5**'s office.

After the officers recovered a Kshs.500/- currency note, **PW 8** signed a document to confirm the said recovery.

PW 9 is a Government Analyst. He analysed the currency note that was recovered. He also analysed the swab from the appellant's hands. His analysis showed that the appellant had handled the currency note.

However, **PW 9** said that he could not tell when the appellant's hands were swabbed.

PW 10 was a police officer attached to KACC. He was with **PW 1**, **PW 6** and **PW 11** when the 500/- currency note was recovered from the desk of **PW 5**. According to **PW 10**, the appellant had gone to the office of **PW 5** immediately after **PW 1** handed over to him the incriminating currency note.

PW 11 was the Investigating Officer. He said that **PW 1**'s complaint to KACC was that the appellant had;

“demanded from him a benefit of Kshs.1,000/-

to facilitate the permit to be released to them.

He also told me that the officer came to Kshs.500/-”

However, when **PW 11** was shown his statement, he said;

“Yes it is in my statement. It has no date. The statement that the accused demanded 1,000/- and went down to 500/- is not in my statement.”

When **PW 11** was further cross-examined by Mr. Agina, the learned advocate for the accused, he said;

“The specific allegation was that the accused solicited for money so as to release a certificate from Nairobi City Council authorising repairs at the premises. It is alleged to have been made on the 28.2.2008. I don't have the certificate here. As per the allegation accused solicited 1,000/- that day but later came down to 500/-. The charge is for soliciting 1,000/-”

All the evidence points at an alleged solicitation of Kshs.1,000/-. Thus, the evidence adduced did not support the charge.

Secondly, the alleged solicitation took place on 28th February 2008. **PW 1** and **PW 7** were present. But whereas **PW 1** heard the appellant asking for more money, **PW 7** heard the appellant specifically asking for “chai”. **PW 1** made no mention of “chai” at all. Yet, in contrast, **PW 7** described the word “chai” as the main word that was uttered by the appellant.

The evidence of those 2 witnesses was not consistent.

The money was recovered from the desk of **PW 5**. She admitted that fact. And the said fact was corroborated by **PW 1, PW 6, PW 7, PW 10** and **PW 11**.

Whilst the officers from KACC Commission testified that the appellant had gone into **PW 5's** office just before the envelope containing the money was recovered, **PW 5** said that the appellant had not been to her office. Thus, the prosecution provided 2 versions of the events. I find no reason why the learned trial magistrate chose one version over the other. At least, the trial court did not offer an explanation for the choice it made between one prosecution witness and the other 5.

In the result, it would be unsafe to sustain conviction. The respondent was right to have conceded the appeal.

I therefore allow the appeal, quash the conviction and set aside the sentence. If the appellant paid the fine, the same should be paid back to him.

Dated, Signed and Delivered at Nairobi this 25th day of February, 2013

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FRED A. OCHIENG

JUDGE