



REPUBLIC OF KENYA

High Court at Embu

Criminal Appeal 150 of 2012

PAUL KIPCHUMBA KIYAI..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon. M.W. WACHIRA Chief Magistrate Embu in Chief Magistrate Anti Corruption Case No. 4 of 2009 delivered on 14/10/2010)

J U D G M E N T

PAUL KIPCHUMBA KIYAI the appellant herein was charged before the Embu Chief Magistrate's Court 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 CRIMES ACT NO.3 OF 2003

The particulars as stated in the charge sheet were as follows:-

On the 24th day of August 2009 at Makueni Police Station offices, in Makueni District within Eastern Province, being a person employed by a public body to wit, the Kenya Police Force as a Police Constable, corruptly solicited for a benefit of Kshs.4,500/= from Joseph Mutua Kyengo as an inducement to forbear charging the said Joseph Mutua Kyengo with the offences of selling illicit drugs and harassment of the wife of the said Joseph Mutua Kyengo, a matter in which the said public body is concerned.

COUNT 2

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

The particulars as stated in the charge sheet were as follows:-

On the 5th day of September 2009, at Wote Township in Makueni District within Eastern Province, being a person employed by a public body to wit, the Kenya Police Force as a Police Constable, corruptly solicited for a benefit of Kshs.2,500/= from Joseph Mutua Kyengo as an inducement to forbear charging the said Joseph Mutua Kyengo with the offences of selling illicit drugs and harassment of the wife of the said Joseph Mutua Kyengo, a matter in which the said public body is

concerned.

COUNT 3

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

The particulars as stated in the charge sheet were as follows:-

On the 6th day of September 2009, at Sharkitinagar Shabblas Cafe, Wote Township, in Makueni District within Eastern Province, being a person employed by a public body to wit, the Kenya Police Force as a Police Constable, corruptly received a benefit of Kshs.3,000/= from Joseph Mutua Kyengo as an inducement to forbear charging the said Joseph Mutua Kyengo with the offences of selling illicit drugs and harassment of the wife of the said Joseph Mutua Kyengo, a matter in which the said public body is concerned.

He pleaded not guilty to all counts and the matter proceeded to full hearing. The learned trial Magistrate acquitted the appellant on Count 1 and Count 2 but convicted him on Count 3 and discharged him under Section 35 of the Penal Code.

The appellant being dissatisfied with the judgment appealed against the judgment and conviction in respect of Count 3 raising the following grounds:-

1. ***The Honourable Chief Magistrate erred in law and in fact in convicting him on insufficient evidence.***
2. ***The learned Magistrate erred in law and in fact in convicting him when there was no evidence of any investigations which were being handled by him in respect of the complainant and therefore no basis for receiving a benefit.***
3. ***The leaned Magistrate erred in law and in fact when she failed to find that he was not properly identified by PW7 and on relying on the evidence of PW7.***
4. ***The learned Magistrate erred in law and in fact by failing to find that the APQ chemical and the exhibits were all under the control of the investigating officer and there was a real possibility that they could be tampered with before analysis by the Government analyst.***
5. ***The learned Magistrate erred in law and in fact by failing to appreciate that the exhibits and the sample were handled by the investigating officer and all forwarded to the Government analyst together contrary to to the Police Force Standing Orders. The exhibits were not sealed by the local scenes of crimes officers with the seal of the station of origin to authenticate the exhibits as required by the police force standing orders hence the exhibits were improperly handled.***
 1. ***The learned Magistrate erred in failing to find that having acquitted him on the offences of soliciting for a benefit, there was no basis upon which the offence of receiving a benefit could be sustained.***
 2. ***The learned Magistrate erred in failing to find that there was a doubt on whether the “trap money” was received by him and if so whether it was corruptly received as a benefit in failing to resolve the doubt in his favour.***

Both counsels appearing agreed to dispose of the appeal by way of written submissions. In his written submissions Mr. Nyolei for the appellant stressed that no relationship had been established between the complainant and the appellant to make the latter solicit for a bribe. And that no complaint by the complainant had been booked at the Wote police station. He also pointed out that everything concerning this case were undertaken by the same anti corruption officers.

The same portrayed some personal interest that the officers had in the matter. It was his submission that following the learned trial Magistrate's findings on Count 1 and Count 2 she ought to have acquitted the appellant on Count 3. He also raised an issue with Section 35 and 36 of the Kenya Anti Corruption and Economic Crimes Act. There was no report of the findings forwarded to the Attorney General as was required by law.

The learned State counsel Ms. Macharia conceded to the appeal on the following grounds:-

1. ***There was no evidence to confirm that the appellant corruptly received money from PW1.***
2. ***There was no complaint recorded in the Occurrence Book by any complainant for the appellant to investigate.***
3. ***Section 35(1)(2) of the Act was mandatory but was not complied with. No report to confirm was availed to Court.***

This being a first appeal this Court is enjoined to reconsider and re-evaluate the evidence adduced and arrive at its own conclusion and bear in mind that it did not see nor hear the witnesses.

Ref.

1. ***MWANGI VS REPUBLIC [2004] 2 KLR***
2. ***SOKI VS REPUBLIC [2004] 2 KLR 21***

An over view of the evidence herein shows that PW1 was in his pharmacy on 24/8/2009 when two people went there. They introduced themselves as police officers from Wote police station. They searched his pharmacy and informed him of a complaint at the station from one Christine Nduku. The complaint was to the effect that he sold narcotic drugs, and wanted to kill her. He was arrested and taken to the station and taken to the office of Paul Chepsumba who gave him a statement of the said Nduku who happened to be his wife. He was given a paper to record his statement in response. The said Chepsumba then told him his boss was asking for Shs.4,500/= so that the case would be finalised. He only had Shs.1,000/= which he gave him and even bought him airtime of 50/=. A balance of Shs.3,500/= remained. The said officer continued pestering him over the balance of Shs.3,500/=. He even started issuing him with threats and fearing for his life he reported the issue to IP Wambua of Kenya Anti-corruption Commission. A trap was set and PW1 did a recording of the first conversation with the officer.

After confirming that there was a demand he was given Shs.3,000/= which was treated money. The same was placed in a half khaki envelop. This was on 6/9/2009. He linked up with Paul at Champderenga Chempelass hotel. Paul came to the Hotel and found PW1 waiting for him. They talked and he asked about the money which he was given. He offered to pay for the tea and gave the waiter one note Shs.1,000/=. He kept the balance of Shs.2,000/= in his front trouser pocket. PW1 signaled IP Wambua who came with other officers and Paul was arrested.

The Shs.2,000/= was recovered and the waiter also gave back the Shs.1,000/= given to him by Paul. He said the 4,500/= was to induce him so that he could not charge him with a criminal offence. He identified EXB1-12. PW4 who was in the investigation said PW1 told him that two police officers from Makueni Police Station demanded from him Shs.3,000/= to forgo charging him with a criminal offence.

PW9 IP Wambua said the complaint was a demand of Shs.3,500/=. But after listening to the tape the demand was reduced to Shs.2,500/=. The waiter (PW7) also testified on how he had received two customers that day and served them. Apparently none took tea as stated by PW1. He confirmed that the accused gave him Shs.1,000/=.

The appellant gave a sworn statement of defence and denied committing the offences. He denied demanding for any money from PW1. He said he resisted the 3 people who came to him because he thought they were robbers. He states that in the hotel he was served by a lady waiter. The officers who took the swabs wore no gloves. The learned trial Magistrate made the following finding:-

- ***The appellants voice in the recorded take was not identified. The tape recorded evidence did not meet the standards of admissibility of electron evidence.***
- ***There was no evidence to prove that the accused solicited for Shs.4,500/=***
- ***There was no complaint lodged by PW1 that the appellant had solicited for Shs.2,500/=***
- ***She however found that the appellant received treated money.***

She said she was satisfied that the appellant had received the money as a benefit to forbear him from investigating PW1. This finding by the learned trial Magistrate is very loaded.

The first two counts of corruptly soliciting by the appellant were dismissed by the learned trial Magistrate. So what was the basis of the receipt of a benefit in Count 3? The learned trial Magistrate found it was for the investigation of a criminal offence against PW1. Was this ever established.? There was no evidence adduced to show that there was any pending complaint against PW1 at Makueni police station. At page 14 lines 1-3 PW1 while under cross examination indicated that the complaint by his wife was never recorded in the Occurrence Book. That the lady had only recorded a statement. And if indeed there was no formal report in the Occurrence Book what could the appellant have been investigating to give him an opportunity to receive a benefit?

PW1 alleged to have reported to the CID on 30/8/2009 about threats by the appellant to shoot him. Seemingly his statement was recorded and he was referred to the Kenya Anti- Corruption Commission. All these reports and statements were never produced in Court as evidence. There was no evidence therefore to show that the appellant had been given instructions by his employer to investigate or charge PW1 with the offence of selling illicit drugs and harassment of the wife of PW1.

The charge was that he **CORRUPTLY RECEIVED** and not that he **“RECEIVED”**. It was for the Prosecution to prove that the money found on the appellant was corruptly received. Having been found not guilty of corruptly soliciting it was pointless convicting him for corruptly receiving. It was a mis-direction by the learned trial Magistrate.

Finally Section 25(1) & (2) of the Anti Corruption and Economic Crimes Act which required the then Kenya Anti Corruption to submit a report to the Attorney General with recommendations for Prosecution or not was not complied with. The issue apparently was not raised in the Court below to enable the learned trial Magistrate to deal with it. As such the proceedings cannot be said to have been properly conducted.

My finding therefore is that the appellant ought to have been acquitted of all the three counts that faced him. The result is that the appeal is allowed and the conviction on the 3rd count quashed. The order of discharge under Section 35 of the Penal Code is set aside.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU THIS 12TH DAY OF APRIL 2013.

H.I. ONG'UDI

JUDGE

In presence of:-

Mr. Miiri for State

Mr. Nyolei for appellant

Appellant

Njue CC