



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 330 OF 2009

RONALD MORARA ONDUSO..... APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

1. This appeal arises out of the conviction of the appellant in **count III** for 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**. He had been so charged in **ACC No. 17 of 2008** in the Chief Magistrate's Court at Nairobi.
2. The appellant had also faced another charge of 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** in **count I**, and an additional charge of 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** in **count II**. He was acquitted in both counts before the Chief Magistrate's court.
3. This appeal is therefore against both the conviction and the sentence of a fine of Kshs.90,000/= imposed upon him, in default of which he was to serve 12 months imprisonment in **count III**.
4. Mr. Oundu the learned counsel for the appellant based the appeal on two broad grounds. The first was that the prosecution was instituted and conducted by the Kenya Anti-Corruption Commission (KACC) through the Kenya Police in total disregard of clear provisions of the **Kenya Anti-corruption and Economic Crimes Act No. 3 of 2003** under which it was conducted. The rest of the grounds were encapsulated in the second ground which, in essence was that the conviction went against the weight of the evidence.
5. There was no response from the state despite ample opportunity being provided for them to file submissions on behalf of the respondent.
6. I have scrutinized and re-evaluated the lower court proceedings in their entirety together with the grounds of appeal and the submissions of both counsels to reach my own conclusion as is the mandate of the court of 1st appeal. In so doing I exercised caution bearing in mind that I did not have the opportunity of seeing the witnesses as they testified.
7. On the first ground of appeal raised by the appellant, I note that the appellant's prosecution was instituted and conducted by the Kenya Anti-Corruption Commission through the Kenya Police, in

contravention of **Section 35(1)** of the **Anti-Corruption and Economic Crimes Act No. 3 of 2003**. The **Anti-Corruption Commission** of Kenya had no authority to prosecute the appellant, without reference to the Attorney General. That therefore the trial was rendered a nullity.

8. Indeed the charge sheet shows the complainant as the “**REPUBLIC OF KENYA THROUGH KACC**”, and the charge sheet was titled “**KENYA ANTI-CONRRUPTION CHARGE SHEET**”. This makes the KACC the actual prosecutor. The **Economic Crimes Act No, 3 of 2003** sets out in **Section 35**, the procedure to be followed in investigation and prosecution under the act, in mandatory terms as hereunder.

“(1) Following an investigation the commission shall report to the Attorney-General 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”.

9. In my view the language of these provisions makes it mandatory for the Commission to present its investigations to the Attorney General before instituting prosecution. This interpretation found expression in **Cr. App No. 331 of 2010 Nicholas Muriuki Kangangi vs Attorney General**, in which the Court of Appeal interpreted the said **Section 35(1) (2)** to mean that prosecution was a nullity if it was done without the opinion or consent of the Attorney General, and that the proceedings and judgment thereto cannot be left to stand.
10. On the second ground of appeal, it is not clear whether the trap laid for the appellant on the day of his arrest was to trap him as he received cash he had demanded or to trick him into talking about a bribe so that he could be arrested. No evidence was extracted from **PW1**’s handset and that of the appellant to demonstrate that they had made calls in furtherance of the demand for a bribe or relevant to this case at the material time.
11. It was also not proper for the complainant to carry out the investigation of his case by participating in the process of preparing his transcript in view of his vested interest in the outcome of the case. The credibility of the evidence cannot therefore be vouched for. - see Warsame J’s decision in **Luke Ouma Ochieng v Rep Cr. App No. 226 of 2005 at Kisumu** (unreported) for persuasive force. In any case, the tape was of no probative value and could not be used to corroborate the evidence of **PW1** since it did not carry with it a certification to the effect that it had not been interfered with between the taping and the date of transcription.
12. For the foregoing reasons I find that the grounds and submissions tendered on behalf of the appellant have merit. Reasons wherefore, the appeal is allowed and it is ordered that the appellant be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

SIGNED DATED and DELIVERED in open court this 27th day of June 2013.

L. A. ACHODE

JUDGE