



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 137 OF 2010

(Appeal arising from the original conviction and sentencing of the Chief Magistrate's Court Kisumu – Hon. A.C.Ong'ijjo – Senior Principal Magistrate)

TITUS MURIITHI NATHANAPPELLANT

VERSUS

REPUBLICRESPONDENT

INTRODUCTION

This is an appeal from the judgment of Principal Magistrate Kisumu whereby the appellant was convicted and sentenced to pay Ksh.2000/ for the offence of soliciting for a benefit. The issue for determination in this appeal is whether there was any sufficient evidence to support a conviction. This court is of the opinion that there wasn't sufficient evidence and the conviction must be reversed.

BACKGROUND

The appellant was charged with four counts as follows.

Count I: 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 the offence were that on 31/3/2008 at Kibirigo chiefs camp in Nyamira District within Nyanza province, being a person employed by a public body to wit, Office of the president as an Administration police constable, corruptly solicited for a benefit of kshs.2500 from John Omosa as an inducement so as to effect the arrest of four suspects who were to be charged with the offence of malicious damage to property of the said John Omosa, a matter in which the said public body is concerned.

COUNT II: 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 were that on 28/4/2008, at Kibirigo chiefs camp in Nyamira district of Nyanza Province, being a person employed by a public body to wit, Office of the president as an Administration police constable, corruptly solicited for a benefit of kshs.1500 from John Omosa as an inducement so as to effect the arrest of four suspects who were to be charged with the offence of malicious damage to property of the said John Omosa, a matter in which I which the said public body is concerned.

COUNT III: 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 of the offence were that on 29/4/2008, at Kibirigo chiefs camp in Nyamira district of Nyanza Province, being a person employed by

a public body to wit, Office of the president as an Administration police constable, corruptly solicited for a benefit of kshs. 1500 from John Omosa as an inducement so as to effect the arrest of four suspects who were to be charged with the offence of malicious damage to property of the said John Omosa, a matter in which I which the said public body is concerned.

COUNT IV: Concealing evidence contrary to Section 66(1) (c) as read with Section 66(2) of the anti-corruption and Economic Crimes Act No. 3 of 2003. The particulars of the offence were that on the 29th April 2008, at Kiribigo chiefs Camp in Nyamira district within Nyanza province, concealed evidence to wit ksh.1500/ which you had grounds to believe may be relevant to an investigation into an offence of receiving a benefit under the Anti-corruption and Economic Crimes Act No. 3 of 2003.

The appellant denied the charges and the prosecution called 6 witnesses.

PROSECUTION CASE

John Omosa morara (PW1) was informed by his farm worker on 26/3/2008 that his seedlings had been uprooted. He instructed the worker to report the matter to Nyamira Police station which he did on 28/3/2008. PW1 also went to the said police station on 28/3/2008 and recorded statement. On 31/3/2008, the investigating officer gave the PW1 an arrest order to take to Kibirigo AP camp to effect the arrest. PW1 then gave the appellant the original arrest order, but he demanded ksh.2500 before he could effect the arrest.

On 17/4/2008, PW1 reported the matter to the KACCA and recorded a statement. On 25/4/2008 he was called to integrity center to plan on how to travel to Nyamira and arrest the appellant. He was given ksh.2500 as trap money and a recording device. On 28/4/2008, PW1 traveled with Wekesa, Makomere and Guyo to Kibirigo AP Camp. The pW1 went to the appellants house and talked with him while taping the conversation. The PW1 promised to bring ksh.1500 the following day. On 29/4/2008, PW1 went to see the appellant and again recorded the conversation. PW1 gave the appellant ksh.1500 as agreed and the appellant put it on the table. PW1 then flashed Wekesa and left to a shop nearby.

After 5 minutes PW1 was called back to the camp and identified the appellant as the person to whom the trap money was given. PW1 was then told to go away. The money was never recovered from the appellant. The recorded conversation between the appellant and the PW1 was played in court during the trial and the PW1 identified the voices.

He stated that the appellant left him in his house to go and consult his boss and when returned he received the ksh.1500 and told the PW1 to go.

Aggrey Makomere (PW2) travelled to Kericho and Nyamira on 27/4/2008 to investigate a complaint by PW1 against the appellant for soliciting ksh.2500 bribe. He gave recording gadgets to the PW1 and ksh.1500 trap money. Pw2 was in the company of Guyo and Wekesa both police officers.

On 29/4/2008 he went with his colleagues and PW1 to the Kibirigo AP Camp. PW1 alone went to the appellant house with the money and the recording gadget. After some time PW1 beeped Wekesa to signify that money was handed over to the appellant. They rushed to the appellant house and arrested him. They did not recover the trap money from the appellant. PW2 swabbed the appellants' hands and later recovered the clothes the appellant was wearing before the arrest.

On cross examination PW2 admitted that the recorded conversation did show that the appellant asked for ksh.2000/ but ksh.1500/. The PW2 also admitted that the recorded conversation shows that the issue of ksh.1500/ came from the PW1 when he told the appellant that he (PW1) was bringing the money so as to settle his demand. The PW2 never witnesses the appellant receiving money from the PW1. PW2 also confirm that the appellant did not sign the inventory.

Ali Guyo (PW3) accompanied IP Wekesa and IP Magomere on 28/4/2008 to Kibirigo to investigate allegation of soliciting of a bribe. They were accompanying the PW1 who was fitted with recording

devices and given trap money. When they replayed the recorded conversation they found that the appellants had solicited for a bribe of ksh.1500/-. They arrested the appellant on 29/4/2008 after the PW1 gave the trap money to the appellant. PW3 confirmed that they did not search for the trap money at Kibirigo.

Catherine Serah Murambi (PW4) she did chemical analysis on the exhibits taken from hand swab and the clothes of the appellant. The APQ powder was found in the appellant shirt and right trouser pocket.

Martin Wekesa (PW5) met PW1 on 28/4/2008, recorded his statement and then proceeded to Kiringo for further investigation. PW5 showed PW1 how to operate a recording device. They went with PW2 and 3. PW1 recorded his conversation with the appellant and returned the device to PW5. Upon replaying the recorded conversation, he confirmed that the appellant demanded ksh.1500 and the money was to be given on 29/4/2008.

On 29/4/2008, PW5 fitted recording device on the PW1 and the Pw1 went to and gave the appellant ksh.1500/ in half envelope in the appellant house. As agreed, PW1 beeped the PW5 after handing over the money to the appellant. PW1 and his colleagues called the appellant out of his house and demanded back the money he received as bribe but he denied receiving any such money.

They called PW1 who confirmed that he gave the appellant the money and they took the matter to Superintendent Musyoka at the district headquarters. PW5 confirmed that the trap money was never recovered. From the time the PW1 beeped him to the time he reached the appellants house was between 2 to 4 minutes. They never entered into the appellant's house. That in the house there was a lady who disappeared. Later he confirmed also that the appellant did not sign the inventory of his clothes. PW5 further stated that the appellant solicited for ksh.2000/ according to the recorded conversation.

David Korir (PW6) was the officer in charge of Kibirigo AP out post Nyamira. On 28/4/2008 at 11.00am he received a report from a young man demanding the arrest of some suspects who had interfered with boundary. He advised him that because the dispute involved brothers he should-report to the Chief.

On 29/4/2008, the young man returned and escorted him to the chief and handed over the arrest order to the chief. When PW1 returned to the camp he met 3 men (PW2,3,& 5) who were demanding for money from the appellant. The appellant denied receiving any money and PW6 called his boss and they went to his office. They played the recorded conversations but they were not audible. PW6 confirmed that PW1 was never searched while at the scene. After considering the above evidence the trial court put the appellant to defence. The appellant however opted to remain silence and the trial court acquitted him on count 1, 3 and 4 but convicted him on count 2. The appellant was then sentenced to pay a fine of ksh.20,000 or in default one year imprisonment.

The appellant was aggrieved and appealed against the conviction and sentence.

GROUND OF APPEAL

1. The learned Principal magistrate erred in law and in fact in convicting the appellant when in fact the evidence on record did not support by the charge.
2. The learned trial magistrate erred in law in accepting the prosecution case and thereafter casting on the defence the onus of rebutting the same.
3. The sentence given to the appellant is too harsh, excessive, oppressive and it is against the weight of evidence on record.

The appellant however abandoned ground number 3 during the hearing and only argued ground 1 & 2.

APPELLANTS SUBMISSIONS

Mr. Adiso, learned counsel for the appellant submitted that the evidence adduced by the prosecution did prove the charge in count 2 of which conviction was made. According to the learned counsel the transcript extracted from a tape recorded did not show that a bribe was solicited. Instead the transcript shows that the appellant only referred the Pw1 to his boss (PW6). That the appellant told the PW1 that he (appellant) could not do anything without orders or instructions from his seniors. The counsel concluded by observing that nowhere in the transcript did the appellant demand ksh.1500 as a bribe.

RESPONDENTS' REPLY

Mr. Magoma learned state counsel opposed the appeal. He submitted that the charge was against the appellant beyond reasonable doubt through transcript from recorded conversation between the appellant and the PW1. In addition the PW1 identified the appellant as the person who demanded the bribe and eventually received it from him.

ANALYSIS AND DETERMINATION

The duty of the court in this appeal is to reevaluate and make a decision on whether the trial court erred in convicting the appellant based on the evidence on record. The appellant said nothing in defence and as such the only evidence to consider is that of the prosecution. The court has evaluated the transcript from the tapped conversation. It appears that the appellant did not refuse to do the work of effecting arrests. He was waiting for orders from PW6 who was the station boss. He did not demand ks.2000 as an inducement to effect the arrests. It appears that the PW1 had been asked to pay some money to the station probably by PW6 but chose to avoid that by requesting the appellant to breach protocol and proceed with the arrest. It is highly probable from the interpretation of the transcript that when the appellant refused to breach protocol, the PW1 induce the appellant with a bribe. Page 5 of the transcript clearly shows how PW1 pushed the appellant to the point where he wanted the appellant to assist not as an officer but as a friend.

In page 6 the appellant adamantly maintained that he could not go against what the PW1 had been told to pay. The PW1 then in reply pleaded with the appellant to accept one thousand. Upto page 6 of the transcript the culprit was the PW1. He seems to have been desperately pushing the appellant to mention a figure so that the same could be used as a basis for maliciously instituting charges.

I find that the fact that the appellant mentioned ksh.1500 be paid was not **perse** soliciting for a bribe. The context under what the money was sought may have been different and occasioned by PW1. There seems to have been more than what meets the eye in this matter.

Why could the PW1 prefer to deal with the appellant and not the PW6 who was in charge of the station? Why didn't the PW1 complain to the PW6 that a bribe is being sought before an arrest?. Why also didn't PW1 go back to the Nyamira police station to report that the AP camp at Kibirogo had refused to arrest without a bribe? This court does not see merits in the allegation that the PW1 initially gave the original arrest order to the appellant who demanded for bribe before arrest can be made. Instead the court believes the evidence of PW6 that he had the original arrest order all the time which he gave to the area chief to deal with because the dispute was between brothers who were quarreling about a land boundary.

This court also agrees with the evidence of PW6 that the taped conversation was not audible and clear. The voices recorded were not from the appellant and PW1 only but included those of other people and even a nearby radio. The conversation also involved telephone conversation between the appellant and other people on matters which were not related to the dispute before the court and all the foregoing matters only cast doubt whether or not the transcript was in relation to the case of soliciting bribe. In fact the transcript had dashes which represented parts of the conversation which were not clear according to the witnesses.

The foregoing shadow of doubt and the fact that it is the PW1 who first proposed a bribe of ksh.1000 with intention to maliciously trap appellant this court finds that the conviction was not safe. The court also finds that the investigations done was shoddy if not reckless.

DISPOSITION

The appeal is consequently allowed and the conviction and sentence quashed. The fine if any paid shall be refunded forthwith to the appellant.

Signed, dated and delivered this 21st day of November 2013

ONESMUS MAKAU

JUDGE