IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.373 OF 2010

LEVI MATERE CHISAINA……APPELLANT

VERSUS

REPUBLIC……..….RESPONDENT

(An Appeal from original conviction and sentence in Nakuru ACC.CR.C.NO.4 of 2008 by Hon J. G. King'ori Senior Principal Magistrate, dated 3rd December, 2010)

JUDGMENT

The appellant was charged before the lower court with four counts as follows:

Count 1– **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**

Count 2 – **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**
Count 3 – **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**
Count 4 – **Receiving 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**

It was alleged that the offence charged in count 1 was committed on 14th August, 2008 at Heritage Club in Ngong Township where it is alleged the appellant, an employee of the Ministry of Public Health corruptly solicited Kshs.50,000/= from Albert Kazungu Pere (Pere), the Administrative Officer of Olkejuado County Council as an inducement to facilitate the withdrawal of criminal case No.1847/2008 at Kibera Court where the Olkejuado County Council Clerk had been charged.

In count 2, it is alleged that pursuant to the above scheme, the appellant solicited Kshs.50,000/= at the same venue (Heritage Club) on the following day (15th) from Pere for the same purpose.

The appellant was charged in the count 3 with soliciting Kshs.45,000/= from Pere at the Veterinary Centre in Ngong township on 17th August, 2008 for the same purpose.

Finally, it was alleged in count 4 that on 17th August, 2008 at Veterinary Centre, Ngong, the appellant received Kshs.15,000/= from Pere for the aforesaid purpose. The prosecution case may be stated briefly as follows:

The Ministry of Public Health through the appellant issued a notice to the Clerk of Olkejuado County Council drawing his attention to the unhygienic state of Ngong Open Air & Retail market which posed a health risk. The council took no action forcing the Ministry of Public Health to close the market. At the same time, the Clerk to the Council was charged in Kibera Criminal Case No.1847 of 2008. Two letters to the Ministry from the Clerk having failed to elicit a response, Pere, the Council Treasurer and the Auditor arranged a meeting with the appellant to explain to him that the situation had been addressed and to seek the reopening of the market. The last two officials also wanted to confirm whether indeed the previous day, on 14th August, 2008, the appellant had demanded from Pere Kshs.50,000/= to withdraw the charges in Kibera.

According to the witnesses, the meeting was held at Heritage Club where the appellant reiterated the demand for Kshs.50,000/=. Pere and the treasurer, at this stage resolved to report the matter to the Kenya Anti Corruption Commission (the Commission).

At the Commission, Pere was facilitated to lay a trap for the arrest of the appellant. He was given genuine Kshs.15,000/= and Kshs.35,000/= fake bank notes which were treated with APQ chemicals. The witness was also given a micro cassette, with a microphone.

A meeting with the appellant was then arranged for the purpose of handing to him Kshs.50,000/= which he was alleged to have demanded. Pere and the appellant met at Heritage Club. Their conversation was recorded as they drunk. At the time of retiring Pere and the appellant went to the latter's car, the recording still on-going. The money is said to have been given to the appellant in his car. The appellant then gave Pere Kshs.5,000/=from his bunch and in no time, the officers from the Commission struck, arresting him with the money stashed in his shirt pocket.

After retrieving the bank notes from the appellant and confirming that they are indeed the same ones which had been issued for the purpose, the appellant was arrested and subsequently charged.

In his defence, the appellant confirmed that Pere was his friend and that they had known each other for about 3 years. It was the appellant's evidence that on 17th August, 2008, Pere prompted him to go with him to Heritage Club where they had drinks from 1p.m. to 5 p.m. At 3p.m. Pere left him for about 40 minutes. When he returned he sought to have a private talk with him (the appellant) in a private room. At the end, Pere escorted the appellant to his car. The appellant sat in the car while Pere remained outside. Instead, he removed an envelope and pushed it into the appellant's shirt pocket. It was at this stage that the KACC officers arrived and arrested the appellant.

He denied meeting Pere or the Council Treasurer or both prior to this date. Similarly, he denied demanding a bribe from Pere in order to terminate the Kibera case. He swore that he did not receive the money and insisted that Pere pushed it into his pocket. The voice recorded in the tape was not his, he maintained.

In his view, the arrest was instigated by Pere to retaliate the case in Kibera court. The appellant's witness, D.W.1, Wilfred Omeri Anyona, who was in Heritage Club on 17th August, 2008 testified that the appellant was reasonably drunk.

The learned trial magistrate considered the evidence presented by both sides and found, in his judgment that there was discrepancy between the evidence and the charge in count 1, dismissed the charge and acquitted the appellant. He however, he found that the charges in count 2, 3 and 4 were proved beyond reasonable doubt and upon convicting the appellant sentenced him to a fine of Kshs.50,000/= or in default six (6) months imprisonment on each count, without stating whether or not to run concurrently but clearly the offences being a transaction the sentences ought to have been ordered to run concurrently.

The conviction and the sentence aggrieved the appellant who has now preferred this appeal on eight (8) grounds which can be summarized as follows:

i) that the prosecution did not prove its case beyond reasonable doubt;

ii) that his defence was not considered;

iii) that the evidence of JAMES MNAGHAMBE MARUTHA was disregarded;

iv) that the prosecution case did not corroborate each other and was contradictory;

v) that the learned trial magistrate disregarded the evidence of the Government analyst;

vi) that the trial magistrate shift the burden of proof to the appellant;

vii) that the trial magistrate erred in law and in fact in failing to find that the voice in the recording was not identified;

viii) that the trial magistrate erred in law and in fact in failing to find that the prosecution did not prove that the tape played in court was indeed the original tape;

Counsel for the respondent conceded the appeal. He submitted that counts 2, 3 and 4 were not proved; that it was not disclosed that appellant solicited funds; that P.W.1 is the one who consistently made offers; that the money was forced in the appellant who was excessively drunk; that there is no evidence of voice identification; that P.W.1 failed to confirm that the voice was that of the appellant and; that the court failed to caution itself on conviction of a voice identification based on tape recording.

Before going into the merit of this appeal, this court is enjoined to re-evaluate the evidence on record in order to arrive at its own independent conclusion, but bearing in mind that it neither saw not heard the witnesses.

The appellant was a Public Health Officer with the Ministry of Public Health and Sanitation and was therefore a public officer as defined in **Section 2** of the **Anti Corruption and Economic Crime Act**. It is not in doubt that he had made a complaint to Kibera Court against the Ol Kejuado County Council Clerk regarding the state of the council's market.

During the pendency of the complainant the appellant and Pere met. According to the prosecution, there were three meetings. The first meeting was prompted by Pere to follow up his letters to the appellant which had gone unanswered. During the meeting, it is alleged, the appellant demanded to be paid Kshs.50,000/= for him to re-open the market. The second meeting was for the Council Treasurer and Auditor to confirm the demand. The prosecution further contended that there was a third meeting, at which meeting, the appellant still demanded Kshs.50,000/= and received Kshs.15,000/=.

For his part, the appellant denied all the earlier meetings except the last meeting at which he maintained he did not demand any bribe but where he and Pere had a drink at the end of which the latter stuffed a bundle of notes into his (the appellant's) shirt pocket and he was arrested.

The following are the issues that fell for determination before the court below and also form the crux of this appeal;

i) whether the appellant solicited a benefit in the sum of Kshs.50,000 from Pere on 15th August, 2008 at Heritage Club;

ii) whether he again solicited for a benefit in the sum of kshs.45,000/= from Pere on 17th Augut,2008 at Veterinary Centre;

iii) whether on 17th August, 2008 at veterinary Centre in Ngong Township he received kshs.15,000/= from Pere;

iv) if he received Kshs.15,000/= whether it was an inducement or a reward.

Both Pere and the Treasurer**, P.W.3, Parsaloi Kapaya Torome** maintained that in their presence, the appellant demanded a bribe of Kshs.50,000/=. While Pere in his evidence was categorical that the appellant demanded the money for him to re-open the market, the Treasurer on his part maintained that the money was to be given to "*wazee*" in order for the market to be re-opened and the case in Kibera withdrawn.

It must also be noted that according to the treasurer, they met the appellant at a hotel at Bulbul without specifying the name of the hotel.

It was important for the two witnesses to be consistent in order to prove the charges in count 2 where it is alleged that the money was demanded for the withdrawal of the Kibera case and that the demand was made at Heritage Club in Ngong Township. The consistent proof of these facts were also critical in view of the appellant's defence that he did not meet Pere and the Treasurer or Pere alone prior to the date of his arrest.

Turning to the events of 17th August, 2008, according to the charge sheet, the appellant demanded Kshs.45,000/= from Pere at Veterinary Centre but received only Kshs.15,000/=. On this occasion, the appellant met Pere alone. Pere in his evidence on the events of 17th August, 2008, has not mentioned at all that the appellant demanded Kshs.45,000/= as stated in the charge sheet.

Secondly, the meeting was not at Veterinary Centre as declared in the charge sheet but at Heritage Club. Again in an offence like this, the venue where the money was exchanged is critical.

It was alleged by the prosecution that the conversation between Pere and the appellant was recorded. A transcript of the recording and a certificate were produced. It is apparent also that the tape was played. According to the transcript, the conversation was between two people – the appellant and Pere. The applicant disowned the voice on the tape recording. In view of that denial and as was held in **Luke Ouma Ochieng'** V. **Republic**, Ksm. H.C. Criminal Appeal No.266 of 2005, the prosecution was bound to avail an independent witness to confirm the voice on the recording. They called James Muaghambe Marutha, the appellant's senior at the Ministry, who was familiar with his voice. The witness, was however, unable to recognize the voice on the tape.

I must emphasis the holding in **Republic** V. **Maqsud Ali** and **Republic** V. **Ashiq Huss** that:

"A tape recording is admissible in evidence provided the accuracy of the recording can be proved and the voice recorded can be properly identified and that the evidence is relevant and otherwise admissible. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case."

It is therefore left to speculation whose voice it was on the tape. Another related point is the admission by Pere, a fact also discernible from the transcript, that at no point was the issue of Kibera court raised in the tape recording, yet this was the whole purpose of the operation. It is also not clear what the conversation was about. At various stages, the number five (5), 5K, 45 and fourty five thousand were mentioned without being specific that it was money that was being talked about.

Turning to the question of receiving, Pere stated that he gave the appellant the treated bunch of bank notes, which the latter counted before handing to him (Pere) Kshs,.5,000/=. But it was the government analyst's evidence that there was no trace of the appellant's finger prints on the notes; that he only traced the chemical on the appellant's shirt. This goes to buttress the appellant's defence that the notes were stuffed into his shirt pocket. It was unlikely that if indeed the appellant handle and even counted the money, the chemical would be found only on his shirt and not on the fingers. The learned trial magistrate appreciated this anomaly but proceeded to misdirect himself by stating that:

"I was concerned by the evidence of P.W.2, the analyst, that he did not find any trace of the APQ chemical in the hand swabs of the accused submitted to him but he did find traces of the APQ chemical in the accused's shirt. The accused has alleged that it is P.W.1 who dashed the money into

his pocket and that he never touched it. His evidence would appear to be supposed (sic) by the Government Analyst that he never touched the money but I do not find the evidence of the defence to displace the prosecution case……. I do not want to speculate but all evidence before me indicates that the accused received Kshs.15,000/= genuine money along with the fake notes."

With respect, it was not for the trial magistrate to insist on what evidence he wished to be presented.

The next point I wish to make regarding the recovery of the money from the appellate relates to where in particular the money was recovered. It is said that the recovery was made by Mr. Galgalo in the presence of P.W.4 P.C. Samuel Murage. While it was the evidence of P.C. Murage, that the money was recovered from the appellant's shirt pocket, in his own statement to the police, he stated that it was recovered from the appellant's trousers pockets, another grave discrepancy.

From the totality of the evidence on record, it is plain to me that the appellant was lured into the situation that led to his arrest. It was a case of entrapment. The appellant and Pere had been drinking but Pere had other plans. There is evidence that the appellant was reasonably drunk. Pere using officials from KACC entrapped the appellant. In **Achieng'** V. **Republic** (1988) KLR 437, the court decried such situations saying:

"Had the lower courts realized the equivocal nature of evidence against the appellant, the lack of supporting evidence which could have been called and was not and the failure of police trap to ascertain what was said at the time the money was handed over, they may well have come to different conclusion."

The position was eloquently stated in the English case of **Nothingham City Council** V. **Amin** (2000) 2 All ER at page 950 where the court stated:

"It seems to me that the court has adopted a fairly consistent line. On the one hand, it has been recognized as deeply offensive to ordinary notions of fairness if a defendant were to be convicted and punished for committing a crime which he only committed because he had been incited, instigated, persuaded, pressurized or wheedled into committing it by a law enforcement officer."

There was an effort to force the appellant to commit a crime which effort went as far as forcing money into his pocket.

For all these reasons, with the evidence analysed in this appeal, it was unsafe to convict the appellant. This appeal is allowed, the conviction is quashed and sentence set aside. The appellant if detained in prison for this offence to be set at liberty forthwith unless lawfully held.

Dated, Signed and Delivered at Nakuru this 22nd day of February, 2012.

W. OUKO

JUDGE