REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 381 of 2010

WILSON NAHASHON KANANI…………………………….APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

JUDGMENT

1. The appellant herein was on the 27th October 2006, convicted on two counts 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,** while the third count was for the offence 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.**

2. He was fined Kshs.25,000/= on **count I** and **II**, in default three months in jail on each count. In **count III** he was fined Kshs.30,000/= in default three months in jail.

3. The appellant filed an appeal in person based on grounds which I have summarised as follows:

1) The appellant was convicted against the weight of the evidence, and that the prosecution case was not proved beyond reasonable doubt.

2) The charges were totally defective and did not disclose any offence known in law.

3) No sufficient grounds were given for accepting the prosecution evidence.

4) The appellant's evidence in defence was not considered.

5) The burden of proof was shifted on to the defence.

6) The prosecution evidence was incorroborated, insufficient and contradictory.

7) The trial court did not comply with Section 169(1) Criminal Procedure Code.

8) Sentence was manifestly excessive in the circumstances.

4. When Mr. Oundu learned counsel came on record for the appellant, he filed a supplementary

ground in the Petition of appeal, wherein he urged that the learned trial magistrate erred in law and fact by convicting the appellant, without considering that the 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,** as 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. He relied on **Kangangi and anor v Rep 333 of 2010** (unreported).

5. 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".

The language of these provisions makes it mandatory for the Commission to present its investigations to the Attorney General before instituting prosecution.

6. Miss Maina the learned State Counsel opposed the appeal on behalf of the state, urging that the prosecution had proved its case beyond reasonable doubt, but conceded the supplementary ground of appeal, and admitted that the charges were not brought to court in accordance with the Act under which the appellant was charged.

7. The learned State Counsel however urged the court to order a re-trial as opposed to acquitting the appellant, and referred to the cases of:

Republic v Vincent Otieno Odawa KLR [2006]

Ratilal Shah v Rep [1958] E. A. 3,and

Elirema & anor v Rep [2003] KLR 537,

which set out the factors to be considered in determining whether to order a re-trial. She urged that this case meets the test set out in the above cases.

8. The learned State Counsel urged that even in **Kangangi v Rep 331 of 2010** upon which the appellant relied, the High Court did not order an acquittal but terminated the trial in the lower court with direction that the prosecution was not barred from instituting fresh proceedings.

9. The overriding factor in determining whether or not the court should order a re-trial as stated in the three cases above is whether that re-trial will be in the interest of justice and whether witnesses will be readily available. It is not intended to give the prosecution a second bite at the cherry, and allow it to fill in gaps in its evidence at the first trial.

10. The evidence herein shows that **PW1** made contact with the appellant when she already had the trap money. She herself looked up his contact at the back of the notice served upon their office, and contacted him. At that point there is no evidence that any solicitation had taken place or that any report or complaint had been filed with the KACC.

11. In her testimony **PW1** said that **PW7** was the one who spoke with the appellant and said that the appellant had asked for Kshs.30,000/=. **PW7** on the other hand testified that it was **PW1** who spoke to

the appellant on phone and said the appellant was asking for Kshs.30,000/=. On the way to follow **PW6** who was already under arrest, **PW1** told **PW7** that they had to return to the office because **PW6** had told her to go and get Kshs.40,000/= from the office, to give to the appellant.

12. The three main witnesses therefore appear to contradict each other materially in their evidence, leaving questions as to when and to whom the demand for a bribe was made. It is not clear who made the demand and what figure was demanded.

13. The testimony of **PW1** gave three positions. Firstly that she looked up the appellant's contact herself at the back of the notice and called the appellant. She did not state how much money he solicited from her if any at his point. Secondly, that the appellant had called earlier and solicited for 40,000/=, and lastly that **PW7** told her that the appellant had talked to him and solicited for Kshs.30,000/=.

14. **PW7** in his testimony did not appear to be aware of any soliciting. He said he only wanted to talk to the appellant because they were friends, and he wanted to prevail upon him to release **PW6** and let him pay the outstanding monies to the City Council. He did not hear the appellant demand for money. But while in his car he heard the appellant say he could take Kshs.10,000/=. His evidence is supported by **PW6** who testified that he warned **PW1** not to let **PW7** know about what they were planning for the appellant, and **PW1** who stated that **PW7** did not know what was going on when they met the appellant at Kobil Petrol Station.

15. The taped conversation did not receive any consideration, from the learned trial magistrate, and from the evidence it does not seem to form part of the record. The report that should have provided proof that the residue of the APQ powder that was applied to the trap money was found on the swab done on the appellant's hands was not produced in evidence, either.

16. The appellant's defence that he coincidentally met **PW1** in **PW7**'s car at a petrol station deserved consideration in view of the fact that **PW7** said he arranged that meeting with a view to persuading the appellant to release **PW6** so that he could go and pay the outstanding money to Nairobi City Council. It has already been established that **PW7** was unaware of the arrangements that **PW1** and **PW6** were making with the KACC.

17. That being the evidence on record it would appear that this case was put together in haste and without any balance of order. I do not see that the interest of justice will be served by ordering a re-trial in a case whose evidence is as set out above, and which was determined more than two years ago, and in which the amount the subject matter of **count** No. **III**, was only Kshs.3,700/=.

For the foregoing reasons the appeal is allowed.

SIGNED DATED and **DELIVERED** in open court this ***27th day*** of ***November*** **2012.**

L. A. ACHODE
JUDGE