



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 268 OF 2009**

*(From Original Conviction and Sentence in Anti Corruption Case No. 9 of 2007 of the Chief Magistrate's Court at Mombasa: C.P. Mwangi – C.M.)*

**ELVIS CHARO CHANGAWA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

The Appellant **ELVIS CHARO CHANGAWA** has filed this present appeal challenging his conviction and sentence by **HON. C.P. MWANGI** Chief Magistrate Mombasa Law Courts. The Appellant had first been arraigned before the lower court on 8<sup>th</sup> November 2007 charged with three counts as follows:

**COUNT NO. 1 and 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 NO. 3**

**RECEIVING A BENEFIT CONTRARY TO SECTION 39(3) AS READ WITH SECTION 48(1) OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT NO. 3 OF 2003”**

The Appellant pleaded not guilty to three counts and his trial commenced on 8<sup>th</sup> November 2007. The prosecution led by **INSPECTOR NCHORO** called a total of seven (7) witnesses in support of their case. The brief facts of the prosecution case were that **PW1 CHIDUNGA SULEIMAN NDORO** was a complainant in a criminal case No. **3157/2005** which had been filed before the Kwale Law Courts. The Appellant **INSPECTOR CHARO**, was the prosecutor in court No. 1 at Kwale Law Courts who was prosecuting the said criminal matter. As it transpired the complainant in said case wished to have two (2) other suspects arrested and arraigned in the court over the same offence of stealing his goods. On 20<sup>th</sup> June 2007 **PW1** met with the Appellant who promised to facilitate the issuance of warrants of arrest for the two suspects on condition that **PW1** pay him a bribe of Kshs.7,000/- to do so. **PW1** reported the matter to the Kenya Anti-Corruption Offices in Mombasa. A trap was laid. **PW1** was fitted with a tape-recorder and on 21<sup>st</sup> June 2007 he met with the Appellant and captured the conversation in which the Appellant solicited for this amount of Kshs.7,000/-. On 22<sup>nd</sup> June 2007 the anti-corruption officers gave **PW1** treated money whose serial numbers were recorded and again fitted him with a tape-recorder. **PW1**

met the Appellant and handed to him the treated Kshs.7,000/- which the Appellant put into his back trouser pocket. Upon a pre-arranged signal the anti-corruption officers burst in and arrested the Appellant. The treated money was recovered. The Appellant was thereafter charged with the three counts.

At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed on his defence. He gave a sworn defence in which he vehemently denied having solicited nor received this sum of Kshs.7,000/- from **PW1**. On 16<sup>th</sup> September 2009 judgement was read in which the Appellant was convicted on all three counts. He was then sentenced to fines of Kshs.50,000/- in default 9 months on Count No. 1, Kshs.30,000/- in default 7 months on Count No. 2 and Kshs.30,000/- in default 7 months imprisonment in Count No. 3. The trial court further directed that these prison terms would be served consecutively. Being aggrieved by both his conviction and sentence the Appellant filed this appeal. **MR. ABUBAKER** Advocate appeared for the Appellant during the hearing of this appeal whilst **MR. ONSERIO** State Counsel appeared for the Respondent State.

Mr. Abubaker for the Appellant applied for and obtained leave to call additional evidence at the hearing of the appeal. Before I delve into an analysis of the strength or otherwise of the evidence adduced before the trial court, counsel for the Appellant raised a crucial question which in my view must be dealt with first as this question will affect the validity of the conviction and sentence of the Appellant. The question raised was whether **HON. C.P. MWANGI** was still properly in office at the time when she wrote the judgement in this matter. At this point it is imperative to narrate the history of the case. The trial commenced for hearing at the Mombasa Law Courts before **HON. B.T. JADEN** Ag. Senior Principal Magistrate. A total of five (5) witnesses testified before this magistrate. On 13<sup>th</sup> March 2008 when the matter came up for further hearing the trial magistrate did not proceed to hear witnesses but instead indicated that since she was proceeding on transfer she would not be able to continue with the matter. On 14<sup>th</sup> July 2008 **HON. C.P. MWANGI**, Chief Magistrate took over the hearing. She proceeded to hear the remaining two (2) witnesses. The matter was last mentioned before Hon. Mwangi on 30<sup>th</sup> June 2009. Thereafter she too left the Judiciary and the file landed on the desk of **HON. R.A. MUTOKA**, the new Chief Magistrate. At this point all that remained was that the judgement be written and delivered. Hon. Mutoka declined to write the judgement on the basis that she had no jurisdiction to hear and determine Anti-Corruption matters. S. 4 of the Anti Corruption and Economic Crimes Act provides:

***“4(1) Notwithstanding anything contained in the Criminal Procedure Code, or in any other law for the time being in force, the offences specified in this Act shall be tried by Special Magistrates only.***

***(2) Every offence specified in this Act shall be tried by the Special Magistrate for the area within which it was committed, or as the case may be by the special magistrate appointed for the case, or where there are more special magistrates than one for such area, by one of them as may be specified in this behalf by the Chief Justice***

***(3) .....***

***(4) .....***”

The above provision makes it clear that offences under the Anti Corruption and Economic Crimes Act are triable only by **“Special Magistrates”**. Though not specifically stated in the proceedings, the fact that both Hon. Jaden and Hon. Mwangi proceeded to hear witnesses in this case implies that both were special magistrates in terms of S. 4. Hon. Mutoka however was not at that time a Special Magistrate within the meaning of the Act and thus she declared at page 48 line 6:

***“I do not have jurisdiction and so doesn’t [sic] any other magistrate at Mombasa Law Courts. I will consult with Hon. Mwangi C.M. if she will write the judgement”***

It appears that after such consultation Hon. Mwangi acceded to the request and wrote the judgement which judgement Hon. Mutoka delivered on her behalf on 16<sup>th</sup> September 2009.

By the time Hon. Mwangi was writing this judgement she had left Mombasa Law Courts. **MR. THOMAS MOKAYA**, the Executive Officer at the courts confirmed that **HON. MWANGI** was

interdicted. He was however unable to show the court her letter of interdiction and was unable to state exactly the date when such interdiction took effect. This date was crucial because upon interdiction the trial magistrate ceased to perform judicial functions and ceased to have any jurisdiction to handle any matter. Infact she was required to hand over all files and vacate her office. By 10<sup>th</sup> August 2009 the record shows that Hon. Mwangi had left office and Hon. Mutoka took over the matter. At that point judgement had not yet been written. Mr. Onserio for the State effectively conceded to this appeal because there was no concrete evidence to confirm the exact date when the trial magistrate left office. Failure by the State to supply this crucial information means that this appeal court is unable to determine the status of the magistrate who wrote the judgement. Similarly failure by the Executive Officer to avail this information upon request by counsel can be construed to mean that such information may have been adverse to the State. There is every possibility that this judgement was written by a person who had ceased to exercise judicial functions and thus was null and void. This court cannot uphold a judgement which is possibly a nullity. Therefore notwithstanding the strength of the evidence which was adduced the facts reveal that the trial magistrate wrote this judgement whilst out of office very possibly whilst on interdiction. Such a judgement is null and void. I have no option but to allow this present appeal on that basis. The conviction of the Appellant on all 3 counts are hereby quashed. The subsequent sentences are also set aside. The Appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

**Dated and Delivered in Mombasa this 23<sup>rd</sup> day of May 2011.**

**M. ODERO**  
**JUDGE**

In the presence of:  
Appellant in person  
Mr. Onserio for State

APPELLANT: I apply for refund of the fine Kshs.107,000/-.

MR. ONSERIO: I leave it to court.

COURT: Since the Appellant was released on a mere technicality and not due to insufficiency of evidence I decline to order a release of the fine paid.

**M. ODERO**  
**JUDGE**  
**23<sup>RD</sup> MAY 2011**