



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL APPEAL CASE NO. 242, & 243 OF 2009**

**JANE GATWIRI MBURUGU.....1<sup>ST</sup> APPELLANT**

**RICHARD KONDE.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellants, **JANE GATWIRI MBURUGU** and **RICHARD KONDE** were convicted for two offences, namely;

- (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; and**
- (ii) Receiving a benefit contrary to section 39 (3) (9) as read with section 48 (1) of the Anti-Corruption and Economic Crimes Act.**

On each of the two counts, they were then fined KShs.30,000/-, in default 3 months imprisonment.

In their respective Petitions of Appeal, the appellants raised the following issues;

- (a) The appellants were not employees of the City Council of Nairobi, as alleged in the charge sheet;**
- (b) The trial court failed to warn itself that the charge sheet was defective;**

- (c) *The judgment was against the weight of evidence;*
- (d) *The whole trial was a nullity because the fundamental rights of the appellants had been violated;*
- (e) *The charges were not proved beyond any reasonable doubt;*
- (f) *The defences were not given due consideration;*
- (g) *The evidence tendered did not support the charge;*
- (h) *The sentence was manifestly excessive.*

When the appeal came up for hearing, the Respondent did not raise any opposition to it. Instead, Mr. Murithi, learned state counsel, conceded the appeal.

In his view, none of the prosecution witnesses testified that the appellants solicited KShs.40,000/-, as alleged in the charge sheet.

Secondly, it was his view that there was no evidence to prove that the appellants had received an inducement for the purposes of facilitating the withdrawal of the case which was pending against the complainant, before the City Court.

A perusal of the record of the proceedings reveals that **PW 1** told the trial court that the appellants first demanded, from him, KShs.50,000/- as consideration for withdrawing the case which had been filed against SunFlag Textile and Knitwear Limited. However, after negotiating with the appellants, they agreed to lower the sum to KShs.40,000/-.

Thereafter, when **PW 1** had arranged to meet with the appellants, he carried a total of KShs.40,000/-. Out of that sum, KShs.20,000/- was in fake currency, whilst the rest was genuine currency.

**PW 2, PAUL WAWERU KANGETHE**, who is a Government Analyst testified that he “tested” a total of KShs.40,000/-, which was handed over to him by Inspector Wambua (**PW 8**).

He also analysed the swabs obtained from the hands of the appellants, and ascertained that the chemicals that had been used to “treat” the money, had been detected on the hands of the appellants.

**PW 4, PATRICK MBIJIWE**, who is an investigator with the Kenya Anti-Corruption Commission, also said that **PW 1** was given KShs.40,000/-, which he was to hand over to the appellants.

However, **PW 6, RANJIV GUMLEY**, recalled being told by **CHRISTOPHER BARASA MUKUNGI, (PW 1)** that some City Council officials were demanding KShs.14,000/- from him, so that they could withdraw some charges against Sunflag Textile and Knitwear Company.

**PW 7, SGT. JUMA MUS**, also confirmed that the amount of money which **PW 1** handed over to the appellants was KShs.40,000/-.

Therefore, it would be inaccurate for anyone to say that the prosecution witnesses did not mention the sum of KShs.40,000/-.

But it is also true that it was only **PW 1** who is on record as saying that that sum was sought for by the appellants. In other words, there was no other witness who heard the appellants solicit for the said amount of money.

When the appellants denied soliciting for any money, it meant that their defences constituted a denial of the assertions made by **PW 1**. At that stage, it became the word of one prosecution witness, against the word of each of the appellants.

In those circumstances, it became incumbent upon the trial court to fore-warn itself of the need to admit the evidence of the single witness only after giving due consideration to the issue as to whether not it was more deserving of belief than the appellants' version.

In **ABDALLA BIN WENDO & SHEM MWAMBERE** [1952] EACA 166, at page 168, the Court of Appeal for Eastern Africa expressed itself thus;

***“Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness, but this rule will not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.”***

Although that case dealt with the issue of identification, I believe that the principle laid down would apply with equal measure to other aspects of evidence tendered by single witnesses, especially when the accused persons denied what the said witness had said.

In this case, the investigators appeared to be well aware of the need for corroboration of **PW 1's** evidence concerning solicitation. I believe that that was why they took steps to obtain a tape-recording of the conversation between **PW 1** and the appellants.

In **KIRENGA Vs UGANDA** [1969] E.A. 562, at Page 565, Jones J. held as follows;

***“What the accused told the Sergeant was very much a matter of fact which was submitted to investigation by the court. Evidence given by the Sergeant of the conversation between him and the accused was not only admissible in court, but was essential for the successful prosecution of the case, that would sometimes be imperfect by reason of a faulty memory or imperfect hearing. It was not denied, or argued, that a tape recording of a conversation, when properly conducted is perfect. It would contain everything which the accused, or the witness, said, and not merely the recollection of what the witness or the accused said. Properly conducted, and laid, the tape-recorded conversation could and would therefore be infinitely superior to that of oral evidence by a witness of what he heard or thought he heard the accused say.”***

Regrettably, the recorded conversation was not played to the trial court, because it was not audible. There was too much noise in the background.

In the absence of the tape-recorded conversation, there was no corroboration of **PW 1's** evidence on solicitation.

It would therefore be unsafe to uphold the conviction of the appellants for the offence of soliciting.

Secondly, arising from the absence of evidence of the tape-recording, the court only had the testimony of **PW 1**, concerning the reasons why the appellants were allegedly soliciting.

As I have already held that there is insufficient evidence that the appellants' solicited, it would follow that there was insufficient evidence regarding the reasons for the alleged receipt of money from the complainant.

In the circumstances, I find that Mr. Murithi, state counsel, was right to have conceded the appeal.

Accordingly, the appeal is allowed. I quash the convictions and also set aside the sentences.

If the fines had been paid by the appellants, the same should be refunded to them.

**Dated, Signed and Delivered at Nairobi, this 10<sup>th</sup> day of May, 2011**

.....

**FRED A. OCHIENG**

**JUDGE**