



REPUBLIC OF KENYA
 IN THE HIGH COURT OF KENYA AT NAIROBI

Criminal Appeal 266 of 2010

PAUL KIMANI KAMAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with 3 counts. In count 1 and count 2 he was charged with the offence of soliciting for a benefit contrary to Section 39 (3) (a) as read with Section 48 of the Anti – Corruption and Economic Crimes Act No. 3 of 2003. In count 3 he was charged with the offence of receiving a benefit contrary to Section 39 (3) (a) as read with Section 48 of Anti-Corruption and Economic Crimes Act No. 3 of 2003.

After a full trial he was convicted on the 1st and 3rd count on count one he was sentenced to pay a fine of Kshs. 100,000/= in default to serve 2 years imprisonment. On count three he was fined Kshs. 100,000/= in default to serve 2 years imprisonment and a mandatory fine of Kshs. 20,000/= in default 3 months under section 48 (1) (b) of the same Act.

He was acquitted on the 2nd count. This appeal arises from the said conviction and sentence. In his petition of appeal the appellant faults the learned trial magistrate for failing to appreciate that the charges as framed in the charge sheet were at variance with the evidence adduced, to wit, that the appellant solicited for a benefit not to charge the complainant which he had already done. The appellant also complains that the learned trial magistrate erred in law and fact in shifting the burden of proof to the appellant. It is also his case that, the learned trial magistrate erred in law and fact in replying on voice transcripts which were not translated into the English language and which were not produced in evidence.

The appellant also faulted the learned trial magistrate in finding corroboration in P.W. 3 who only testified in relation to count 2 on which the appellant was acquitted.

As the first appellate court I have gone through the record and analyzed the evidence adduced before the learned trial magistrate.

The only complaint by the appellant at this appeal is that the charges were at variance with the evidence adduced in that the appellant had already been charged, yet the charges showed that the inducement was intended to withhold the charges against the appellant.

It would appear, that is the position at least if the evidence were to be considered at face value. However, there was no doubt whatsoever that the appellant engaged the complainant in the presence of P.W. 3 to extract some money from him to influence or to put another, way to interfere with the cause of justice.

P.W. 1 was approached by the appellant at his clinic. The appellant was a public health officer who was allowed to inspect the complainant's clinic. There were some shortcomings and the complainant was allowed to comply with some conditions within 7 seven days. The appellant left some summons for the complainant to appear in court. On a subsequent contact the appellant demanded some inducement to speak to the prosecutor to withdraw the case, whereupon the complainant paid Kshs. 20,000/=

The complainant decided to make a personal visit to the City Court, where he found that no charges had been preferred against him and so he contacted the anti-corruption officers who facilitated the arrest of the appellant. The complaint now raised by the appellant is a case of splitting hairs. I have no doubt whatsoever that the appellant was aware, knew and participated in the trial the charges of which he was clear about. On whether or not the voice identification and translation was produced, I only have to go to the exhibit memo which shows clearly that this was done vide exhibit 15 by P.W. 4.

The defence of the appellant in this case was lacking in substance and was rightly disregarded. I have looked at the extract of the judgment that may have suggested that the learned trial magistrate shifted the burden of proof. When addressing the facts in respect of count one the learned trial magistrate said as follows,

“P.W. 3 was present when accused took P.W. 1 the complainant through the process of soliciting. P.W. 1 was urged to give accused Kshs. 40,000/= and complainant raised part of it being Kshs. 20,000/=. P.W. 3 was present and he counted the money and witnessed the accused given the money.

The defence of accused is silent on the encounter of accused, P.W. 1 and P.W. 3. As such I take the evidence of P.W 1 and P.W. 2 as regards count 1 as un-contradicted, indeed there is no defence on that evidence”.

With respect however, even if the learned trial magistrate had not made such comments, the prosecution case was sufficient enough to justify the conviction.

In the final analysis, I believe the charges against the appellant were proved beyond reasonable doubt and appeal lacks any merit. Accordingly the same is hereby dismissed.

Orders accordingly.

Dated, signed and delivered at Nairobi this 31st day of July, 2011.

**A. MBOGHOLI MSAGHA
JUDGE**