



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL CASE NO. 25 OF 2009

(From original conviction and sentence in Criminal Case No. ACC. No. 21 of 2005 of the Chief Magistrate's Court at Nairobi)

JAMES ONMWANGA MOEMI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Appellant Onwonga Moemi was charged with corruption contrary to Section 39 (3) (a) as read with Section 48 (1) of the Anti Corruption and Economic Crimes Act No. 3 of 2003.

He was tried and convicted hence this appeal. He has filed several grounds of appeal but he pursued only 1, 2, 3, 4 and 10 of them. The first submission was that the burden of proof is always in criminal cases on the prosecution. If there is any doubt it ought to benefit the accused.

The charge sheet disclosed that on 14/5/2005 being a person employed by a public body Natural Environment Management Authority (Nema) as District Environment officer corruptly solicited for himself a sum of Shs. 50,000 from Peter Bogondo Onchonga as an inducement to allow the construction of a Petrol Station matter in which the said public body was concerned.

The second charge was that on 26/5/2005 at Steers Restaurant Muindi Bingu Street in Nairobi being a person employed by the same Authority as Environment Officer corruptly received for yourself a sum of Shs. 50,000/= from Peter Bogo NKO Omchonga as an inducement to allow the construction of a petrol station a matter he said the public body was concerned. The tape was availed to the defence right from the beginning.

The prosecution case is that the complainant was constructing a petrol station under the name of Pepco Kenol Ltd. He applied for approval to construct the Petrol Station from the Local Authority at Nyamira. The project was approved.

The Appellant visited the site and stopped the construction. He was the District Environment Officer. The letter addressed to them by the Appellant required that they conform to the requirement to construction physical planning Act obtain approval and do environment assessment report. On 23/3/2005 the D.C. visited the site in company of A P officers and demolished a site they had put up.

On 14/5/2005 PW1 received a call from the Appellant saying he will come to collect money for bribe Shs. 50,000 the DC would receive 30,000/= he himself 10,000/= and 10,000/= would be passed to Director of NEMA.

On 25/5/2005 the Appellant travelled to Nairobi and when he reached Naivasha he telephoned complainant and told him to prepare for him as they were coming with his girlfriend. The complainant reported to KACC. He was given an audio recording tape. It was put on. He was connected to microphone that was concealed through his clothes and strapped on his chest. The recorder has cassette tape. He was instructed to obtain conversation from the Appellant. He was shown how to switch it on to record conversation.

When the Appellant arrived in Nairobi he called the complainant and he told him to meet at Sagret Hotel near Integrity House. The accused said on meeting the other day he gave me 50,000/= Chome Nyama Kisin. The following day they met at Steers Hotel at noon. He went to KACC Integrity Centre and left the officers playing tape.

The following day he went to Integrity House and was given Shs. 50,000/= treated in an envelope in 1000 denominations

Exhibited (ABDCE). The complainant was instructed to scratch his head to indicate that the Appellant had received money. The Appellant was arrested by officers from KACC. In the Hotel Appellant demanded that complainant take the money balance 45,000/= to him in Nyamira. This is second cassette No. 16. Thereafter Nema refused him permission to build.

The 2nd Tape was played in open court and the Appellant said he would convince the DC to allow the project to take off. In his defence the Appellant said he went to visit the site after being informed about it by the area chief. He found that the project was on going and the physical planner had approved it. It was going on in a water catchment area. He visited the site on 17/2/2005. **“We asked for approvals but we did not get Environmental Certificate we asked for.”** He asked the contractor to stop construction under Section 58 of the Act. The Appellant admits he met PW1 on 22/4/2005 between 6.00 p.m - 11 pm. He denied having asked any money from complainant. He did not demand 20,000/= from him. He said on 26/5/05 he was in Nairobi and received a call from him asking him to meet him at Steers Hotel. He wanted to put a letter in his pocket but the Appellant did not receive it. Then Anti Corruption people turned up. It was 5,000/= **“I did not demand it I did not receive it.”** The complainant met Appellant at Sagret on 24/5/2005 at about 5 pm after working hours. He admits he received 5,000/= from the complainant. There are authorities

(1) Samure vs Republic 2003 (364)

in which case circumstantial was discussed and in that case the evidence used to convict the Appellant did not satisfy the legal requirements of circumstantial evidence to warrant or justify the conviction of the Appellant.

(2) Salami Deam vs Republic in which case it was held

the opinion interpreter on a subsequent playing of the tape recording was adverse to Appellant case and was given to the Magistrate in absence of Appellant and his advocate and in accepting it the Magistrate committed a fundamental error depriving the Appellant not only of balance but of substance of fair trial. In this case police trap was laid.

(3) **Abdulah Jarso Dima vs. Republic**

in that case the charge was under Anti-Corruption and Economic Crimes Act Section 39 (3) (a) where reliance on tape recorder and in the absence of independent verification of the voices in the tape would be impossible to establish that the Appellant had indeed demand and was paid the bribe.

In the present appeal the Appellant was aware that he was recorded

(4) **Criminal Appeal No. 226 of 2005**

Luke Ouma Ochieng vs. Republic.

This is another charge under the Anti Corruption and Economic Crimes Act

(5) **Court of Appeal 1983 KLR 507 Obanda vs Republic**

Where it was held: holding (6) the tape recorder the cassette, and the transcript of the cassette were all admissible as evidence provided they were produced by the complainant and investigating officer.

In this case there was no objection to playing the recorded evidence. There was only 2 voices of complainant and the Appellant. In my view I hold that the Appellant did put the complainant into difficulties by stopping the complainant's constructions and he became a victim of obtaining bribery. The Appellant developed a relationship which would breed corruption and the charges of soliciting for himself 50,000/= as inducement from Peter Bogoko Onchonga to allow him to construct a Petrol Station. The defence does not deny the voice is not of the Appellant and the Trial Magistrate relied on the evidence the accused's hands were contaminated with APQ chemical as testified by PW8 the Government Analysts.

I find no merit in this appeal and the same is dismissed.

Dated and delivered at Nairobi this 3rd day of August 2010.

JUDGE