



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KERICHO
CRIMINAL APPEAL 21 OF 2008

1. Criminal Law
2. Criminal Appeal
3. Subject of subordinate court case.

a) Anti-Corruption case 24/05

R v George Onyango Athembo

- b) Appellant/accused public officer working with department of Weights and Measures.
- c) Went to petrol station and found two/3 wrongs
 - i) Offer of food on sale of minimum of Kshs. 1,000/= purchase of petrol as a gift not actually being done.
 - ii) Sale of diesel petrol advertised on board but different price on fuel pump.
 - iii) Diesel pump dispensing having an error
- d) Appellant/accused was alleged to have asked for a bribe to desist charging the complaints
 - i) amount asked Kshs. 5,000/= rejected
 - ii) then 50,000/= rejected
 - iii) then 100,000/=
- e) Charges under the **Trade Description Act Cap 505** as amended by the **Finance Act 2009 Section 57** and The **weights and Measures Act Cap. 513** Laws of Kenya
- f) The charges preferred to the
 - i) Limited liability company (Petrol Station)
 - ii) The three directions
 - iii) The two employees

- g) Appellant/accused demand a bribe from the managing director and an employee.
- h) Matters reported to Kenya anti-Corruption authority commission.
- i) Employee fitted with taping device. Conversation between employee, managing director of petrol station and accused/applicant recorded.
- j) After hearing by one magistrate, continued by another magistrate with files going to Nakuru Law Courts, Kericho law courts.
- k) Judgment delivered
- l) Sentence three years imprisonment
- m) Being dissatisfied appellant

4. **Appeal – Bail pending**

- a) Application for bail pending appeal. Withdraw and new one filed as judge not available G.B.M. Kariuki.
- b) Bail pending appeal rejected Ang'awa J

5. **Appeal**

- a) That the magistrate erred in judgment
 - i) By relying on a defective charge sheet
 - ii) By disregarding the overwhelming submissions
 - iii) By relying on uncorroborated testimonies
 - iv) By relying on inadmissible evidence
 - v) By prosecution failing to prove their case beyond any reasonable doubt
 - vi) By failing to regard applicant defence
 - vii) By trial magistrate failing to note that complainant were used by KACC to soliciting of benefits which appellant declined.
 - viii) Judgment produced with doubts.

6. **Arguments by appellant**

- a) Before Corruption charge is preferred

Consent of the Attorney General required

Kinyua V R (1972) EA 54-55

Dusara V R (1981) KLR 139

- b) Content and particulars of charge sheet

Evidence adduced must support charge

- i) It was the complainant who negotiated sum to be paid not appellant
- ii) Complainant and his employee gave contradictory evidence
- iii) Appellant had told complaint withdrawal of case be done without any payment.
- iv) No solicitation done by appellant
- v) Fore haring to charge complainant not court as charge already filed in court.
- c) Corroboration

Failure to corroborate facts. Evidence contradictory.

- d) Advisability of transcript and tape should only be a memo for witness.
- e) Doubt in the judgment by trial magistrate

6. In reply by state

- a) Consent by Attorney General
- i) No longer a requirement. amended by the Anti-corruption Act and Economic Crimes Act
- ii) Case laws no longer applicable
- b) Appellant involved in corruption. Offered to obtain funds to desist charging and or withdraw officer whose powers he led not.
- c) Confusion in organizing for bribe Kshs. 5,000/=, Kshs. 50,000/= then
Kshs, 100,000/=
- d) No contradiction in the evidence

7. Advocates

F.O. Koko advocate instruct edgy the firm of M/S Obondo Koko & Co. advocates for the appellant

State Counsel G.E. Mugambi instructed by the Attorney General for the State – present

Appellant – present

Appeal against both conviction and sentence of the Ag. Senior Principal Magistrate's court at Kericho, [W.NYARIMA., AG.SPM] delivered on 18th June, 2008 in Anti-Corruption Case No. 24 of 2005)

GEORGE ONYANGO ATHEMBO APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

1. Procedure

1. The appeal before this court was preferred by George Onyango Athembo through his advocates.
2. Originally he had been charged with an offence of Soliciting for a benefit contrary to **Section 39(3)** as read with **Section 48(1)** of the **Anti-Corruption and Economics Crimes Act No. 3 of 2003** before the magistrate's Court at Kericho in the Anti-Corruption court.
3. He denied the charges that he was allegedly tried to induce or forbear charging the complainant and his employee if he was paid a benefit. The allegation was denied and the court proceeded to hear the trial. In the course of his case the trial magistrate was then transferred. The proceedings was taken over by a second trial magistrate under Section 200. The file actually was transferred to the subordinate courts at Nakuru. There being no magistrate available it was transferred back to Kericho subordinate courts. (*criminal court case 22/07, Kericho criminal case 24/05*).
4. After a full hearing and trial the said George Onyango Athembo was convicted and sentenced to a term of three years imprisonment. He applied for bail pending appeal. This was heard before G.B.M. Kariuki J, who was not able to conclusively complete the application having proceeded on leave. The application was withdrawn. A new one filed and heard before this court. The application was rejected for bail pending appeal but early hearing dates were given to hear the appeal.

II: Background

5. The said George Onyango Athembo was employed as a public officer since 2001 in the Weights and Measures department.
6. He went to the petrol station owned by the complainant and found two to three wrongs:-
 - i) **The petrol station had advertised that for every purchase of petrol at Kshs. 1,000/= and above there would be a gift of food offered. This was in the form of "chips". The appellant sent a G.K. driver from his department to purchase the petrol at Kshs. 1,000/= when he did the purchase he was not offered any food. He was therefore, as a member of Public being induced to buy petrol on a promise that he would be given a gift, a fact known to the complainant as being false.**
 - ii) **The appellant/accused approached the complainant managing director of the petrol station of this fact. He took possession of Kshs. 1,000/= paid and receipts issued for purposes of his evidence to charge the complainant and his employees.**
 - iii) **He then proceeded to inspect the pumps. There he discovered that diesel was being offered for sale but the amount actually being sold at the pumps had different prices. He therefore charged the complainant with the sale of diesel petrol advertised at different prices under the Trade Description Act Cap 505 as amended by the Finance Act Section 57. He further charged the complainant with using a pump that was dispensing fuel knowingly that it had an error, under the Weight and Measures Act.**
 - iv) **The appellant then approached the complainant in his offices at the petrol station and when asked to assist the appellant indicate with his fists that he wanted Kshs. 5,000/= when the employee of the complainant went to take this sums to the appellant he rejected it and wanted Kshs. 50,000/=. This of course was too much for the complainant. He sought advice and was referred to the Kenya Anti-corruption Commission. The**

officers there installed a taping device to one of the employees and she was given Kshs. 20,000/= to pay the appellant. The appellant rejected this sum and wanted Kshs. 100,000/= instead. The argument being that if the charge is preferred to court then a sum of Kshs. 120,000/= fine would be vetted out against the complainant. Further a chair of various persons would be required to be paid in order to desist charging the complaint.

7. Nonetheless, a charge was preferred against three directors and two employees of the company. The issue being whether on payment of the said sum he would require to withdraw the charges.

8. It seems a minimum of three visits were made to the appellant and according to the recordings the appellant insisted on payment of a certain sum but rejected the Kshs. 20,000/=(*which was moneys treated with chemicals*).

9. The appellant denied he took any bribe. He was convicted after trial and sentenced to three years imprisonment.

IV: Appeal

10. The appellant was dissatisfied with the conviction and sentence of his case. he filed an appeal in which he stated in his grounds that the trial magistrate erred in his judgment by:-

10. i) **relying on a defective charge sheet**

10. ii) **disregarding the overwhelming submissions**

10. iii) **relying on uncorroborated testimonies**

10. v) **relying on inadmissible evidence**

10. vi) **failure by the prosecutor to prove their case beyond any reasonable doubt.**

10. vii) **Failure to regard the appellant's defence.**

10. viii) **Failure to note that the complainants were "used" by the Kenya Anti-Corruption commission to prove the offence of Soliciting for benefit.**

10. ix) **The judgment was written with a lot of doubts by the said trial magistrate**

V: Argument

11. The arguments by the appellant was that of **consent**. Namely, that before prosecution of a corruption charge is preferred there must be consent by the Attorney general. The case of **Kinyua v R (1972) EA 54-55 and Dusara v R(1981) KLR 139** refers.

12. In reply to this point the state counsel R.K. Koech stated that this provision had been done away with and is no longer a requirement. The Anti-corruption, Economics Crimes Act amended the law on prevention of corruption. The two case law are therefore no longer applicable.

13. The second argument by the appellant is that the content and particulars of the charge sheet was defective. That the arguments deduced in support of the charge could not stand. This was because the evidence deduced did not support the charge on grounds that it was **NOT** the appellant who negotiated the said bribe. There was contradictory evidence. For instance, the inducement not to charge the complainant when in fact they had indeed been already charged.

14. The appellant did no solicitation. No payment was asked for, if the case against the complainant would be withdrawn.

15. Thirdly, there was no corroboration by the prosecution on this case. The evidence was contradictory. The transcript of recording was admitted to the court in evidence but it has been held in case law (**Barda V R (1983) KLR 587**) that the transcript and tape should only be a memory for the witness to use.

16. In reply the state said that the evidence showed there was funds obtained to desist charging and or withdrawing the offence against the complainant. There was bargaining on how much to be paid for Kshs. 5,000/=, Kshs. 50,000/- then Kshs, 100,000/=. There was no contradiction in the evidence given.

17. This court is asked by the appellant to quash his conviction and set aside his sentence while the state prays that the conviction be upheld.

IV: Opinion

18. I wish to begin with the issue of the consent to prosecute from the Attorney General of an offence falling under the prevention of corruption. This was not a ground of appeal. If in the event it had been, the state has explained that the requirements is no longer required.

19. As to the issue of evidence before this court, there are two key witnesses who gave evidence. This is the director managing the petrol station and his employees. The appellant is said to intimate that he is required to be paid five(5). This was interpreted to mean five thousand shillings. It went up to fifty thousand shillings and finally one hundred thousand shillings. By now the employees witness was fitted with a tape device. I have had an opportunity to go through the transcript. The same actually shows the appellant declining to take the moneys given. The reasons being that he actually wanted more from Kshs. 20,000/= offered to Kshs. 100,000/- namely an additional of Kshs. 80,000/=. This sum was meant to be shared by others.

20. Once the appellant preferred charges to court he indeed had a grater advantage over the complainant as to the negotiation of the bribe moneys.

21. The appellant is no doubt a public officer. Once he has preferred charges against a person who committed a wrong and does so after adequate investigations, and once the matter is actually before a court of law, such matter is referred to as being **sub judice**. No further discussion on the case is to be discussed by the parties except in the presence of the magistrate, the prosecution and the accused. It is here that the accused may admit the charge, deny the charge, offer to make amends as a **mitigating** factor for a lighter sentence.

22. Instead the etiquette seen by the appellant was that he continued to engage the complainant long after the matter was in court. He gave the impression that the powers to withdraw the charges laid with him when in fact it necessarily may not.

23. I find that there is sufficient evidence to uphold the conviction against the appellant. I accordingly dismiss the appeal against conviction.

24. As to sentence I was not adequately informed on the aspect of the sentence. I nonetheless hold that sentence is at the discretion of the magistrate unless it is an illegality. I accordingly dismiss the appeal on sentence.

25. This appeal is dismissed. The conviction and sentence by the trial magistrate is upheld.

DATED this 30th day of June, 2009 at **KERICHO**

M.A. ANG'AWA

JUDGE

Advocates

F.O. Koko advocate instruct edgy the firm of M/S Obondo Koko & Co. advocates for the appellant

State Counsel G.E. Mugambi instructed by the Attorney General for the State – present

Appellant – present