



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI LAW COURTS)
CRIMINAL APPEAL 44 OF 2006

(From Original Conviction and Sentence in Criminal Case No. 64 of 2003 of the Chief Magistrate's Court at Anti-Corruption Nairobi)

CHARLES MUTHUI GITONGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Charles Muthui Gitonga, was arraigned in the Chief Magistrate's Court, Nairobi, with two counts of corruption. On the first count he was charged with corruption contrary to Section 39 (3) (a) as read with Section 49 (1) (a) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003. On count II, he was similarly charged with corruption contrary to Section 39 (3) (a) as read with Section 48 (1) (a) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003. This count was withdrawn before the commencement of the hearing.

The prosecution called 13 witnesses after whose testimony the appellant was put on his defence. He made a sworn statement on which he was cross-examined at length. He did not call any witnesses. The court found him guilty as charged on count 1, and fined him KShs. 30,000/= or in default 12 months jail. Dissatisfied with this finding, the appellant moved to this court on appeal against conviction and sentence.

The prosecution case was that at all material times, the appellant was the Public Health Officer, Kikuyu Division of Kiambu District. On 22nd September, 2003, and in the company of some officers from the Police and Provincial Administration, the appellant inspected the business premises of one Joseph Kiongo Njuguna (PW 2), the Complainant. They ordered that the said premises be closed down for failure to comply with public health requirements. As they left the premises, the appellant took with him the complainant's licence and ordered that the premises be closed until such time as the public health conditions were complied with. When the complainant tried to get his licence back, the appellant demanded KShs. 4000/= so that he could permit the complainant to open those premises. Since he was not ready to part with any money, the complainant reported the matter to the Kenya Anti Corruption Commission who laid a trap to record the appellant soliciting for the bribe. Thereafter the appellant was charged with this offence.

In his defence, the appellant denied soliciting any bribe as alleged or at all. He explained that before 22nd September, 2003, the District Commissioner, Kiambu, had summoned him along with the District Officer and the Officer Commanding the Station. The District Commissioner instructed them to ensure that all the premises selling liquor complied with the requirements of the Liquor Licensing Board as to licences and hygiene of the premises. It was on that understanding that the complainant's premises were inspected alongside those of other businessmen dealing in liquor. During the inspection, the District Officer delegated his position to Chief Inspector Munene of the Administration Police, and the Officer Commanding the Station delegated his position to his deputy, Inspector Ngetich. The three operated as a team and after inspecting the Complainant's premises, they ordered its closure and the appellant signed the closure order on behalf of the team. They never carried any document or any item from the complainant's premises. As this was the second time that the appellant had ordered closure of the complainant's premises, the complainant had developed a grudge against the appellant, and the issue of the bribe was propagated by the complainant to get back at the appellant. PC Odede (PW 12) also held a grudge against the appellant for similar reasons. The Appellant had declined to recommend PW 12's application for a liquor licence as he had no premises, and the appellant was surprised that PW 12 was the Investigation Officer in this matter.

Against this background, the appellant raised 8 grounds of appeal. These were that the charge against the appellant was not proved beyond reasonable doubt; that the evidence adduced was not sufficient to sustain a conviction; that the court failed to consider the issue of the grudge alleged between the appellant and the complainant; that the trial court erred in making a finding on count 2 yet that count had been withdrawn by the prosecution, that the trial court also erred in convicting and sentencing the appellant when it was unclear who the complainant was, and in relying on a tape which was inaudible and unclear, and in basing the conviction and sentence on uncorroborated evidence of the complainant.

Mr Kamau for the appellant stated that he would argue all the grounds of appeal as one. In so doing, he submitted that none of the witnesses corroborated the evidence of PW 2 (the complainant) as to the alleged soliciting of the bribe, and that PW 1 who was entrusted with the money by the complainant did not know what the money was for, otherwise she would be an accomplice whose credibility was called into question.. In any event, the licence under which the complainant was running business was not in his name and therefore he was not the proper complainant. He also submitted that there was a grudge between the parties.

As for the cassette which was meant to corroborate the soliciting of the bribe, Mr. Kamau argued that it was inaudible and the appellant's voice was not properly identified, and the original cassette was not produced. He submitted that it was a frame up and urged the court to allow the appeal.

Supporting the conviction and sentence, Mrs Kagiri for the Republic relied heavily on the evidence of the complainant (PW 2) because the trial magistrate referred to him as a truthful witness. According to the trial magistrate, there was nothing wrong with tapes and transcript as they were admitted in evidence and they corroborated the complainant's evidence. There was no grudge between the appellant and the complainant as alleged by the appellant, and the appellant's evidence did not in any way shake the prosecution's evidence. Learned State Counsel concluded her submissions by stating that the appellant's statements in mitigation after he was pronounced guilty pointed to his guilt.

As this is the first appellate court, it is duty bound to analyse and re-evaluate the evidence in the lower court in a bid to come to its own conclusions, always bearing in mind that it does not have the advantage which the lower court had of seeing and hearing the witnesses (**OKENO v. REPUBLIC** [1972] KLR). After considering the evidence on record and the submissions of counsel, the issues to be determined are whether the charge was defective; whether the complainant was the proper complainant; whether the complainant's evidence was corroborated; whether there was a grudge between the complainant and the appellant, and whether the prosecution had proved its case beyond reasonable doubt.

The first issue is whether the charge in this matter was defective. As stated at the beginning of this judgment, the appellant was initially charged with two counts. On count I, he was charged with corruption contrary to Section 39 (3) (a) as read with Section 49 (1) (a) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003. In count II, he was charged with corruption contrary to Section 39 (3) (a) as read with Section 48 (1) (a) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003. When the case came for hearing on 10th December, 2000 (which should probably have read 10th December, 2003) the prosecutor is recorded as saying -

“In reply I agree with the counsel I hadn’t noticed (sic) ... the duplicity and I have brought that to the attention of the investigation officer who has also agreed with me but that doesn’t mean that the charges are defective...”

Unfortunately the record does not show what “**the counsel**” had said, but the words attributed to the prosecutor suggest that it was something to do with duplicity of the two counts. The learned trial magistrate then responded in these words -

“I have read the Act and S. 49 (1) (a) does not exist.

I will ask the prosecution to withdraw count No. 2 as requested and the accused is discharged of the said count under S.. 87 (a) of the CPC”

After the withdrawal of count II, the Appellant was left to answer count I only. The charge under this count originally read as follows -

“Corruption contrary to Section 39 (3) (a) as read with Section 49 (1) (a) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003.”

After count II was withdrawn and the Appellant discharged under that count, the prosecutor made the following application -

“I apply to amend S. 49 (1) (a) to read S. 48 (1) (a) of the CPC.”

The defence counsel having no objection, the court then ordered -

“Application is granted.”

The effect of granting that application was that the charge was effectively amended to read as follows -

“Corruption contrary to Section 39 (3) (a) as read with Section 48 (1) (a) of the CPC.”

In our ordinary legal and judicial parlance, the initials “CPC” stand for the “**Criminal Procedure Code**”. As a result of the amendment, the Appellant stood charged with corruption contrary to Section 39 (3) (a) as read with section 48 (1) (a) of the Criminal Procedure Code. The Criminal Procedure Code is procedural and neither Section 39 (3) (a) nor Section 48 (1) (a) thereof creates any offence, let alone the offence of corruption. Mrs Kagiri for the Republic made a spirited effort to save the situation by arguing that the appellant was not prejudiced in any way. Her view derives support from the judgment of Sir Udo Udoma, CJ. In **AVONE v. UGANDA** [1969] EA 129 in which the appellant was charged with three counts of obtaining credit by fraud, forgery, and personation. The charge misdescribed the sections of the Penal Code under which two of the counts were preferred. After conviction on all three counts, the appellant appealed contending that a conviction based on such a charge was a nullity. Holding that the misdirection in the charge had not prejudiced the appellant, the court dismissed the appeal, Sir Udo Udoma saying at page 132 -

“It is a matter for considerable surprise that the learned trial magistrate did not trouble to see that the charges as laid were correct before even trying the case. These omissions are quite serious and it is incomprehensible how a magistrate could assume jurisdiction to try an accused person on a section of the law which does not

exist, or convict an accused person on a section of the Penal Code comprising several subsections without indicating the subsection of the section of the Penal Code under which an accused person was convicted. It is even more serious that a State Attorney appearing before the court to oppose an appeal does not take appropriate steps to satisfy himself that the charge under which an accused person was convicted was correctly laid under the appropriate section of the Penal Code ...

I am however prepared to overlook these serious lapses on the part of the prosecution and the learned trial Chief Magistrate because I am satisfied that the appellant was in no way prejudiced by these lapses. The appellant fully understood the substance and the essence of the charges against him. In my view no miscarriage of justice has been occasioned by these lapses."

In the instant case, however, we are not dealing with misdescription of sections in the Penal Code, but with a charge under some specified sections of the Criminal Procedure Code which do not spell out any offences at all. To the extent that the alleged offence is non-existent in the sections cited, the particulars in the charge are at variance with the charge and that renders the charge defective and that is prejudicial to the appellant.

Moreover, Section 214 (1) of the Criminal Procedure Code states as follows -

"Where at any stage of a trial before the close of the case for the prosecution it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that -

(i) Where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge ..."

When reference to Section 49 (1) (a) of the Anti-Corruption and Economic Crimes Act was amended to read Section 48 (1) (a) of the Criminal Procedure Code, the appellant should have been called upon to plead to the altered charge. Although this requirement is couched in mandatory terms, it was not complied with. It is my considered opinion that in its present form, the charge does not disclose any offence known to the law, and since it is at variance with the particulars of the offence, it is incurably defective. The defect is compounded by the trial magistrate's failure to comply with the mandatory provisions of Section 214 (1) proviso (i) as a result of which the appellant never pleaded to the amended charge. Under what section of the law was he tried convicted and sentenced?

Coming to the other grounds of appeal, Mr. Kamau argued that there was no evidence adduced to show that the appellant was a public health officer. That is not correct. He was invariably described as a public health officer by the complainant (PW 2); a public health technician with the Ministry of Health (PW 3); one John Ngetich, an Inspector of Police stationed at Kikuyu (PW 9); Stanley Mulwa, a Police Constable stationed at Kikuyu who testified as PW 10 and said that he was told by his colleague that the suspect was a public health officer; Gideon Odede, a Police Constable at CID headquarters (PW 12); and last, but most important, the appellant himself said in his statement in self defence -

"In the year 2003 I was the Public Health Officer Kikuyu division in Kiambu District."

We could not have had better evidence than his own statement.

Another issue raised by Mr. Kamau was that the complainant before the court was not the proper complainant as the licence for the business was not taken out in his name. With respect, if the complainant

before the court had his landlord's authority to carry on the business in the landlord's name, as he said he did, then he was entitled to complain if he perceived the business to be improperly interfered with. The landlord himself had no locus to complain as he was not the one running the business. Nothing turns on that point.

Mr. Kamau, however, raised the issue that the appellant had not repossessed the complainant's licence and therefore the appellant could not have sought any bribe to give back that which he had not taken. Whether the appellant had taken the licence or not is a matter of fact to be proved by evidence. The complainant testified on oath that the appellant impounded the licence and gave it back only on 30th September, 2003. The appellant also stated on oath that he did not take the licence. The trial court found the complainant a credible witness, a fact on which Mrs Kagiri heavily relied. However, she did not make any finding on the appellant's credibility, whether positive or negative. It was therefore the complainant's word against the appellant's. But the appellant's word was corroborated by PW 4, who was on the inspection team whereas the complainant's word was not corroborated. PW4 testified on oath that they did not take the licence or any other documents from the complainant. This was a prosecution witness and when his evidence goes against the grain of the prosecution case, it cannot be taken lightly. I therefore find that PW 4 contradicted PW 2 on that issue, and therefore the prosecution did not prove beyond reasonable doubt that the appellant had taken away the complainant's business licence. This erodes the very basis upon which the appellant allegedly sought a bribe. He could not have been asking for bribe to return that which he had not taken.

Finally is the issue as to the contents of the cassette. From the evidence on record, some witnesses have poked some dents on the quality of the taping. After PW 2 had started giving evidence, the trial magistrate remarked on her own volition "... **the tape is not clear**". Under cross examination on the quality of the tape, PW 2 did not agree with defence counsel that many parts of the tape were inaudible. However, he agreed that some words were not clear. And in her judgment, the learned trial magistrate had this to say about that tape -

"... The accused does not deny the conversation but claims it was poorly done or could have been tampered (sic). I do agree that some parts of the tape were inaudible however there are some sentences within the transcript which suggest some soliciting was going on. At B2 - VI there is the accused statement 'what did I tell you to do so that I assist you' Njuguna then replies 'I bring you five thousand.' then Gitonga states okay so what do you say Mr. Njuguna then responds that you reduce a bit." Assist me reduce a bit to three thousand. This conversation clearly shows that some solicitation was going (on) ..."

The trial court therefore agreed that some parts of the tape were inaudible. The conversation alludes to something having to be done "**so that I assist you**". But the sort of assistance that was to be given is not disclosed. The complainant, who knew the purpose for which the taping was being done, should have been explicit as to what was to be done and what the "**assistance**" was about, but he was not. Secondly, reference to some parts of the tape being inaudible is not favourable to the prosecution case. A question arises as to what those parts contained. In cross examination, PW 12, P.C. Gideon Odede, admitted that the tape was "**inaudible and noisy**." And PW 13, Cpl. William Gichohi Ngure, confirmed in cross examination that "**in some parts the tape was inaudible. Some parts you could not get the conversation. There are some parts that we could not get the words. There were some parts you could not hear because of disturbances ...**" He also said that -"**Nothing that was taped was prejudicial to the accused person.**" This statement is very crucial. If nothing that was taped was prejudicial to the accused, then where did the allegedly incriminating sentences originate from? The answer might possibly

lie with the appellant's apprehension that the tapes might have been tampered with.

In my view, it would be grossly prejudicial to the appellant if he were to be adjudged on the basis of a few isolated sentences extracted from a fragmented, noisy and unclear conversation. The unclear and missing parts

of that conversation could possibly have been unfavourable to the prosecution case which would have paved the way for the appellant's acquittal.

Finally, Mrs Kagiri said that in mitigation, the appellant told the court that he regretted having committed the offence and apologized to the complainant and to the court, and that this pointed to his having committed the offence. Whatever he said in mitigation was not part of the evidence which formed the basis for his conviction and therefore should not be held against him.

For all the above considerations, the appellant's appeal is allowed and his conviction for corruption is quashed and the sentence set aside. He is hereby set at liberty unless he is otherwise lawfully held.

Dated and delivered at Nairobi this 15th day of October 2009.

L. NJAGI

JUDGE