REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 590 & 591 of 2001

(Criminal Appeal No. 590 of 2006 consolidated with Criminal Appeal No. 591 of 2006 -

Appeal from decision by M.W. Wachira SPM in Original Criminal Case 53 of 2005 Nrb)

ESTHER THEURI WARURU ……..……..….1st APPELLANT

MARY MBAISI INDUSA……2ND APPELLANT

V E R S U S

REPUBLIC……...…… RESPONDENT

J U D G M E N T

Esther Theuri Waruru (***1st appellant***) and Mary Mbaisi Indusa (2nd appellant) have filed these appeals through their advocate Mr. Ngaira. They contest both conviction and sentence. The appellants were charged with soliciting for a bribe contrary to section 39 (3) (a) as read with Section 48 (1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. They were both acquitted on this count.

They faced a second count of receiving a bribe contrary to section 39 (3) (a) as read with section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 that on 12th day of October, 2005 at Kush Furniture along Lunga Lunga Road, within Nairobi area being persons employed by a Public body to wit the City Council of Nairobi as Public Health Officer, jointly and corruptly received Kshs.5000/= from Sarah Wangui Kariuki, as an inducement not to charge her with an offence of failing to comply with a notice contrary to section 115 as read with section 118 and 119 and punishable under section 120 and 121 of the Public Health Act Cap 242 Laws of Kenya.

The matter was heard by Hon. Mrs M. Wachira (SPM) and the appellants were convicted on the second count and each was sentenced to a fine of Kshs.80, 000/= in default 12 months imprisonment. The background to this matter is found in the evidence of Sarah Wangui Kariuki (P.W.1) who worked for Kush Furniture as the workshop manager. On 27/7/05 while at the workshop, the two appellants, described as inspector of Nairobi City Council came and inspected the premises. The two appellants noted areas that needed compliance with Nairobi City Council by-laws- these were, repair leakages on the floor, repair worn out floor, put in transparent iron sheets, provide workers with milk.

The workshop was given 21 days notice to comply. The two appellants returned on 22/8/05, re-inspected and found that there had been part compliance – the workers were not having milk and the repair of the worn out floor was incomplete. The appellants said they would write a report indicating the

non-compliance. P.W.1 knew the officers by name as Mary Indusa and Esther Theuri. They demanded Kshs.10,000/= so as to write a favourable report and issue a certificate of compliance. P.W.1 spoke to each one of them alternately and told them she could not oblige their request as she was not the one responsible and they had complied with conditions and expected them to extend time for compliance.

On 3/10/05, the appellants served P.W.1 with summons requiring her to attend court on 13/10/05 and the charges were in relation to all the omissions or conditions or tasks not complied with 2nd appellant is the one who served the summons and they left. Thereafter P.W.1 called 2nd appellant and asked her why she was charging them with omissions already complied with/rectified. P.W.1 made a phone call and demanded to know why appellant was charging the workshop with non existent offences – whereupon 2nd appellant told her she would come. On 5/10/05 1st appellant went to the workshop accompanied by 2nd appellant and despite P.W.1 pointing out the rectifications, the appellants insisted that one of the requirements had not been complied with and demanded for a bribe of Kshs.50,000/= so as to settle the case out of court threatening P.W.1 that in court she would be fined Kshs.200,000/=. P.W.1 reported these developments to the Director and he decided to report the matter to KACC (Kenya Anti-Corruption Commission). So on 11.10/05, P.W.1 reported the matter to KACC. P.W.1 called 2nd appellant on phone and they promised to come the following morning. On 12/10/05, P.W.1 was fitted with a micro-recorder connected to a microphone and inside the recorder was a cassette. The recorder was fitted in P.W.1's pocket whilst the microphone was concealed under her clothes and strapped onto her chest. P.W.1 was also given kshs.40,000/= treated money, out of which 35,000/= was fake currency. The money was put in an envelope – When the appellants went to the workshop at around 4.00 pm, the KACC officers were strategically placed on the mezzanine offices-the complainants held a conversation with the appellants where the appellants still insisted that the workshop pays Kshs.50,000/= or attend court and face the fine of Kshs.200,000/= - P.W.1 bargained but appellants refused to reduce it. P.W.1 gave the money to 1st Appellant to count and 1st Appellant noticed that the money was not genuine and asked 2nd Appellant to confirm while asking P.W.1 to call the Director. The Director came and pretended to be shocked and told P.W.1 to confirm the bad money and in the process the KACC officers came and found the appellant sorting out the good money from the bad money. The appellants had the money in their hands and the KACC officers declared them under arrest. All this time, the conversation was recorded and the officers showed them the copies of the money they had made. The photocopies had serial numbers of the money and the serial numbers on the photocopies were conformed with the serial numbers of the money. The taped conversation was played in court – it was in both English and Kiswahili. P.W.2 ***(Panchari Kirtikuriv Velji)*** is the director of Kush Furniture and confirms the visit by the two appellants to his workshop whereupon he was given a notice to do repairs within 21 days. Later on P.W.1 informed him of the summons requiring him to attend court and he, instructed P.W.1 to find out why they were being charged. P.W.1 informed him of the demands by appellants first for Kshs.10,000/= and the subsequent Kshs.50,000/= so as to drop the charges. He confirmed instructing P.W.1 to report the matter to KACC and how the appellants made a return visit and they sat in P.W.1's office and had conversation whereupon appellant's told P.W.2, they would know what to do after getting the money from him. So he told P.W.1 to give out the money and left the office to beckon to the KACC officers and while outside 2nd appellant called him to go and witness that some of the money was fake and appellants continued to sort out the fake money. In essence his evidence corroborates that of P.W.1. P.W.3 ***(Michael Ndirangu***) who works with Nairobi City Council's Public Health Department as Deputy Public Health Officer confirms that 1st appellant was attached to Makadara Division as a Public Health Technician and that her duties were to carry out inspections in trading places and certifying their fitness to carry out their trade.

2nd Appellant was also a Public Health Technician attached to Makadara Division with similar duties to 1st appellant. He confirmed that the two appellants had preferred charges against the Director of Kush Furniture and that summons had been served and that after summons, the next step was to attend court. P.W.4 (***Mary Ann Wangui Njoki***) who works with Nairobi City Council as a Public Health Officer confirmed that she is the one who accompanied 2nd Appellant to Kush Furniture to serve the summons, which were received by P.W.1 on behalf of the director. P.W.5 (Chief Inspector Francis Kidogo) who is seconded to KACC as an investigator was briefed about the matter involving the two appellants and given treated genuine and fake currency which he gave to P.W.1 with instructions not to give out the money

unless demanded. He confirmed making photocopy of the money. P.W.6 (Police Constable Patrick Mbijiwe) also attached to KACC confirms that P.W.1 was fitted with a tape recorder and he was among the officers who went to Kush Furniture and sat upstairs. He saw the two appellants arrive, to P.W.1's office and hold conversation with her. He confirms that he heard one lady ask P.W.1 if she got the 40,000/= and P.W.1 argued that it was too much money, whereupon P.W.1 was told that if she thought it was a lot then she could attend court. He says it was 1st appellant who was talking to P.W.1. He also heard 1st appellant ask P.W.1 if the money given was genuine and after a short argument P.W.2 signalled to them and they went and found the two appellants who were asked to produce the money they had received – it was on the table and it was recovered.

Sergeant Salesio Kinyua Mugo is the other KACC investigating officer who was detailed regarding this incident and he fitted the recording device on P.W.1 and accompanied her to the workshop. It is his evidence that once at the scene, he says-

"***We waited and heard introductions. I went closer to get the conversation and heard" If you think 50,000/= is much, wait in court where you will be fined Kshs.150,000 and over***."

As conversation progressed, I heard the ladies counting and separating the genuine money from fake money… When I received the signals, I passed message to my colleagues. They ran downstairs and I found the two suspects holding the money. Each of them was holding money. Upon seeing me, they placed the money on the table… we arrested them. I recovered the money. That explains why P.W.6 says he found the money on the table.

Once the two appellants were taken to KACC's Integrity Centre Office, their hands were swabbed and the same forwarded to the Government Chemist along with the Exhibit memo. P.W.8 (***Edwin Okech***) is the Government analyst working at the Government and he did an analysis of the money swab plus the hand swabs of the two appellants and complainant's envelope and the controlled APQ powder and after analysis he found the APQ powder in the money, appellant's hand swabs and the half envelope.

When placed on their defence, both appellants gave unsworn evidence. 1st Appellant confirmed serving the Director of Kush Furniture with the ultimatum notice of 21 days and on that day she was accompanied by 2nd appellant. She says at the expiry of 21 days they revisited the premises for re-inspection on 22/8/05 and found non-compliance so court summons were issued and served by inter alia 2nd appellant. On 12/10/05, she got a phone call from P.W.1 requesting them to see the director and she contacted 2nd appellant and gave the same information. Why did the director want to see them. 1st appellant says P.W.1 told her on phone that he wanted to consult on the charge sheet as he could not understand everything. So 1st and 2nd Appellant went and found P.W.2 who told them he felt he had complied with the earlier notice whereupon 1st Appellant told him the court would give him a hearing. P.W.2 asked if appellants could help – they told him there was no way because the case was already before court. P.W.2 persisted and became annoyed and that when P.W.1 drew her drawer and took some money and placed it on the table much to the surprise of the appellants. Appellants maintained that at no time did they ask for any money or receive any bribe and that it is P.W.1 and P.W.2 who were pushing for it. 2nd Appellant's defence is replicate of what 1st appellant states as regards material issues.

The learned trial magistrate, upon hearing the evidence noted that P.W.1 had conceded in cross-examination that recorded conversation did not contain the demand for Kshs.50,000/= and that she did not report the demand of Kshs.10,000/=. The learned trial magistrate also took into account P.W.1's denial the suggestion that the appellants went to the workshop to make an order for a chest of drawers worth Kshs.50,000/=. Having acquitted the appellants on count 1, the learned trial magistrate then considered the 2nd count and stated this:-

"They (sic) is no doubt that both accused persons received Kshs.5000/= as an inducement not to charge P.W.1, has (sic) they had already taken back the charge sheet and summons from P.W.1.

Secondly, both accused persons were arrested as they were in the course of counting and sorting out

the money they had received from P.W.1. The money had been treated with the APQ chemical and this was confirmed by the evidence of P.W.8 who also confirmed that the swabs were taken from the hands of the accused persons had presence of APQ chemical. This is conclusive evidence that accused's persons came into contact with the treated money……. They cannot claim that they say (saw?) the money at a distance and noticed that part of it was not genuine. The conversation from pages 13-16 of the transcript shows that both accused persons counted and sorted out the money ……. And continued after they were assured by P.W.2 that he would replace the fake money and the appellants were convicted on the second count.'' I needed to go through the entire evidence despite the fact that appellants were acquitted on count 1 because the transactions formed a series of events and were interrelated.

In their petition of appeal, the appellants submit that-

(1)*The learned trial magistrate erred in convicting*

and sentencing the appellants by relying on extraneous matters and wrong grounds and considerations in law

(2) *That the learned trial magistrate erred in law*

by taking into consideration selectively and unfairly inculpatory evidence and therefore failed to consider and weigh the evidence as a whole before convicting the appellant.

(3) *That the learned trial magistrate misdirected*

herself in fact and in law by failing to appreciate the essential ingredients of the offence of receiving a bribe.

(4) *The learned trial magistrate misdirected*

herself by failing to appreciate essential ingredients of the offence of receiving a bribe.

(5) *That the learned trial magistrate misdirected*

herself in relying and referring to evidence which was inadmissible.

(6) *That the learned trial magistrate did not*

sufficiently or at all, consider the Appellant's defence and considered the prosecution's case in isolation.

(7) *The learned magistrate considered matters of*

conjecture and speculative references without weighing and making a finding on the relevant evidence.

The appellants also complain that the learned magistrate did not consider mitigating factors favaourable to appellants and passed harsh and excessive sentence.

Mr. Ngaira, Counsel for both appellants submitted that the way the charge was framed in count 2 is improper because section 3 (a) of the Economic Crimes Act envisages a benefit. That Section addresses the offence arising from bribing agents. Counsel asked court to consider that the same does not create an offence under the Act but is a mere example. I will be considering this section in a more detailed manner in a later part of the judgment. Suffice it to say that the definition of corruption under the Act Section 2 (1) includes-

(b) " bribery"

He further points out section 2 (1) of the Act defines what a benefit is. That section reads as follows-

"***Benefit means any gift, loan, fee, reward, appointment, service, favour, forebearance, promise, or other consideration or advantage."***

It is learned counsel's contention that once a person receives a benefit, then he is supposed to do a positive act to arrest or influence the decision of the recipient. So he argues that a bribe as framed in the Act is not recognized as an offence under Section 39 of the Act, saying that bribery or a bribe is merely an example and is separate from the meaning of the offence created under Section 39. This is opposed by Mr. Makura, the learned State Counsel who submits that the charge of receiving a bribe contrary to section 39 as read with section 48 of the Economic Crimes Act was proved because section 39 creates the offence and section 48 provides penalty for the offences and that when the two sections are read together, they create the offence of receiving a bribe and that in any event, if the charge is duplex, it is not to the extent of being materially amenable to section 382 of the Criminal Procedure Code. Section 39 of the Act reads thus:-

(1) This Section applies with respect to a benefit that is an inducement or reward for, or otherwise on account of, an agent,

(a) doing or not doing something in relation to the affairs or business of the agent's principal or,

(b) showing or not showing favour or disfavour to anything, including to any person or proposal, in relation to the affairs or business of the agent's principal,

2. For the purposes of subsection 1 (b), a benefit, the receipt or expectation of which would tend to influence an agent to show favour or disfavour shall be deemed to be an inducement or reward for showing such favour or disfavour.

Does this mean that a bribe is not an offence? – I think not. The side note reads "***bribing agents***" and the operative word is inducement.

Section 48 reads thus:-

(1) *A person convicted of an offence under this part shall be liable to –*

(a) a fine not exceeding one million or imprisonment …. or both.

(b) an additional mandatory fine, if as a result…….

Basically section 48 address the penalty for the offences under part V of the Act. Would this make the charge as framed improper and therefore fatal? What is the meaning of the offence created under Section 39 (a) – surely wasn't the evidence shown that appellants were employees of the Public Health Department at Nairobi City Council – the same institution that preferred the charges against Kush Furniture and had the summons served on P.W.1 on behalf of P.W.2? The answer is in the positive and this was indeed considered by the learned trial magistrate in her judgment.

The definition of the term benefit is clearly given in the Act – in the present case, the learned trial magistrate in fact noted in her judgment that the money – (which was a consideration) was an inducement so as not to charge P.W.1. The question of who ought to have been the person charged has been addressed in the later part of this judgment – the person appearing in court would be a representative of the furniture company, the company itself or the director.

The charge was not duplex although count 1 and count 2 referred to the same provisions of the law – one was soliciting, the other was receiving. Section 39 (3) clearly provides that a person is guilty of an offence if the person –

(a) corruptly ***receives OR solicits*** or corruptly agrees to ***receive or solicit***.

What are the ingredients of the charge? Appellants are alleged to have received a bribe of Kshs.5000/= from Sarah Wambui so as not to charge her. Mr. Ngaira submits that the learned trial magistrate failed to consider the evidence taking issue with the evidence of P.W.1 where she said – "***They insisted that I had not complied with one of the requirements…. They threatened that in court, I would be fined over 200,000/-"*** Now it is Mr. Ngaira's contention that at the time the charge sheet had been prepared, who was being charged? He submits that it was Kush Furniture, yet the charge sheet reads Sarah Wambui. Secondly he points out that whoever was to be charged wasn't there as there were already summons issued to Kush Furniture and not Sarah Wambui and trial magistrate didn't weigh all the evidence. Mr. Makura's response to this is that the judgment is elaborate and adheres to section 169 of the Criminal Procedure Code and the fact that the charge was drawn against Kush Furniture yet its Sarah Wangui who was charged in the City Court does not affect the sentence as Sarah was an employee of Kush and this doesn't amount to improper weighing of evidence. It is true that the learned trial magistrate despite addressing several issues in the matter, did not specifically address the issue as to who was being charged in the City Court. Yet a re-evaluation of the entire evidence shows that this entire incident was so intertwined and certainly went beyond the corporate veil – in fact P.W.2 says he was the one to whom the summons were addressed and that he in fact told P.W.1 to attend court in his place. And its all to do with the fact that although Kush Furniture was the offending body, it could be required to appear in court through its human operatives and it is explained why P.W.1 ended up being the one who went to court ***(which issue the learned trial magistrate considered).*** I don't consider that as conjecture or speculation, it is the legal reality. That limb is therefore not fatal to the final conclusion that the learned trial magistrate came to. Was the evidence which the learned trial magistrate relied on, inadmissible evidence? Mr. Ngaira submits that although taped recording is admissible, there must be a foundation laid by the prosecution and reference is made to the decision in ***Kurega –Vs- Uganda EALR (1969) 562*** at page 565 paragraph F where the police fixed a cassette type of recorder to the eye witness' trouser and sent him to his appointment and it was held that the tape recording was admissible in evidence as a proper foundation for its reception had been made. Paragraph 7 states thus:-

"***There is no difference in principle between a tape recording and a photograph. A tape recording is admissible in evidence, provided the evidence is relevant and otherwise admissible. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances. But there could be no question of laying down any exhaustive set of rules regarding the admissibility of such evidence. "***

The defence counsel admits that tape recording evidence is admissible. I think the yardstick is really the manner in which the recording was obtained – was it fair and proper? Mr. Makura's response to this is that the same is irrelevant to Count 2, as it was used to demonstrate demand or soliciting. He further submits that in any case, prosecution witnesses led evidence to show appellants were caught red handed as they tried to sort out money given by P.W.1 and P.W.2.

The record of the trial court as regards the recording indicates the basis for using tape recording, the fitting process, how it was placed on P.W.1 and there is nothing in the record to suggest that the process was unfair, or that the tape was not clear. So there really was no reason why the learned trial magistrate should not rely on the same in making her decision. She even certified that the conversation was audible and Mr. Ngaira's submission with all due respect is misplaced, the record shows clearly that as the tape was played in court, P.W.1 identified the voices, in fact the prosecutor spoke thus-

"***I will now play the taped conversation in open court and you shall identify the voices of the speakers in the conversation. I submit a transcript to the court. I shall pause at intervals to enable you identify the voices."***

Whereupon P.W.1 proceeded this –

"***I identify the voice of the officer who made the certificate at the beginning of conversation as that of Mr. Kinyua. I identify the speaker in that transcript as at page 1 and 2 ….. In the conversation as***

at pages 3-5, the director was speaking with both Esther and Mary. The Director discussed that we had complied with most conditions. The ladies insisted other neighbours had done good work.

The conversation as at pages 5-8 is between the 4 of us. The Director was explaining of the things we had complied with. The conversation at page 9 is that Mary was insisting ……. At page 11 I spoke to both accused and we discussed the summons and charge sheet. The conversation as at page 13-15, they realized there was fake money and were sorting out the genuine and fake currency."

So who else should have been called to corroborate that evidence, when P.W.1 was in fact a participant in the conversation? And her evidence as to what went on between the two appellants, herself and P.W.2 ***(the director***) is corroborated by the evidence of P.W.2. Surely the prosecution could not have "**created**" an independent witness, when the event just involved those four individuals.

The other issue raised by the Appellant's counsel is that one Waihenya who swabbed the appellant's hands was never called to testify and that it is P.W.7 Sergeant Mugo who said Waihenya swabbed Appellant's hands and so Waihenya's findings remain hearsay evidence. Further that no explanation was given by prosecution as to why Waihenya was not called to testify and so the finding by the trial magistrate that Sergeant Waihenya did the swabbing was fatal? I don't think so simply on one ground, even if Waihenya did not testify, it was never disputed by the defence that appellant's hands were swabbed and what was submitted to the Government analyst confirmed the outcome of the matter.

The money had been treated with APQ chemical as confirmed by the evidence of P.W.8, and when the two KACC officers moved in, they found the appellants with the money in their hands counting it and indeed the trial magistrate stated in her judgement that "***they cannot claim they say (sic) the money form a distance and noticed that part of it was not genuine. The conversation from pages 13-16 of the transcript shows that both accused persons counted and sorted out the money. And they continued to sort out after they were assured by P.W.2 that he would replace the fake money…."*** So that the prosecution case did not just hinge on the swabbing by Sergeant Waihenya – that portion of the evidence only went to buttress what was seen and witnessed by the prosecution witnesses. Consequently, my finding is that the conviction is safe and secure and I confirm it. The sentences were neither harsh nor excessive and the same are upheld.

Delivered, signed and dated at Nairobi this 10th day of April, 2008.

H.A. OMONDI

JUDGE.