REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(Coram: Ojwang, J)

CRIMINAL APPEAL NO. 433 OF 2006

BETWEEN

ERASTUS NDAMBUKI MUTISYA……..APPELLANT

-AND-

REPUBLIC……..…….RESPONDENT

(An appeal from the Judgement of Senior Principal Magistrate Mrs. M.W. Wachira dated 2nd August, 2006 in Anti-Corruption Case No.50 of 2002 at the Chief Magistrate's Court, Nairobi)

JUDGEMENT

Erastus Ndambuki Mutisya, the appellant herein, faced a charge in two counts under the Prevention of Corruption Act (Cap.65, Laws of Kenya). The first count was particularised as follows: the appellant, on *27th November, 2002* at Railways *Matatu* Terminus in Nairobi, within the Nairobi Area, being a person employed in a public body as a Police Constable, in the Kenya Police Force, corruptly solicited for himself a sum of Kshs.200/= from ***Peter Kionga***, as an inducement not to detain motor vehicle registration No. KAN 105T, a Toyota Hiace *matatu* belonging to the said ***Peter Kianga***, for obstruction contrary to s.53(4) of the Traffic Act (Cap.403, Laws of Kenya), a matter in which the said public body was concerned.

In the second count it was specified that on *28th November, 2002* at Railways *Matatu* Terminus in Nairobi, the appellant herein being a person employed in a public body as Police Constable, in the Kenya Police Force, corruptly received for himself a sum of Kshs.200/= from ***Peter Kianga***, as an inducement not to detain motor vehicle registration No. KAN 105 T, a Toyota Hiace *matatu* belonging to ***Peter Kianga,*** for obstruction contrary to s.53(4) of the Traffic Act, a matter in which the said public body was concerned.

The appellant was charged under s.3(1) of the Prevention of Corruption Act, which thus provides:

> ***"Any person who shall by himself, or by or in conjunction with any other person, corruptly solicit or receive or agree to receive, for himself or for any other person, any gift, loan, fee, reward, consideration or advantage whatever, as an inducement to, or reward for, or otherwise***

on account of, any member, officer or servant of a public body doing, or forbearing to do, or having done or forborne to do, anything in respect of any matter or transaction whatsoever, actual or proposed or likely to take place, in which the public body is concerned shall be guilty of a felony."

Did the appellant herein solicit a bribe of Kshs.200/= as an inducement? It was PW1's testimony that the appellant demanded Kshs.200/= from the driver on one occasion, and Shs.500/= from the driver on another occasion ? as the price for not detaining the complainant's motor vehicle. A tape-recorded transcript of the evidence of the said corrupt conduct was produced, and the Court heard the same. The legal basis for admitting the tape-recorded evidence was the Court of Appeal precedent in ***Obanda v. Republic*** [1983] KLR 507. The relevant remarks of the Court of Appeal in that case, are as follows (p.519):

"The former Supreme Court of Kenya….in *R v. Raojibhai Girdharbhai Patel & Another* (1956) 29 KLR 112 dealt with the admissibility in evidence of a recorder, recording and transcript. There were two transcripts produced in that case; one by the complainant and one by the investigating officer. It was held, among other things, that all were admissible provided there was evidence to show the machine worked properly, and the people whose speech was recorded or who heard it identified the voices. It is in principle undesirable that the magistrate (or judges) should decide whether a recorded voice is that of a witness or defendant heard in court and this should be done by a witness familiar with the voices recorded and the playback of them, which would carry more weight than the evidence of those whose words were recorded since some people are unable to recognise their own recorded voices. They were also of the opinion that the recording may be played back in a court if a proper foundation has been laid. This could include evidence of the recording having been made on the recorder, the nature of the matter recorded and evidence of the identity of the voice or voices of the person or persons recorded with the sound of the voice or voices being played in court. The opinion of the magistrate, judge or assessors would not do. We endorse all this."

The learned Magistrate held, in the instant case, that the prosecution had laid a proper basis for playing the tape-recorded evidence; that PW2's evidence showed that the recorder worked properly; but that the evidence of recording was only that of the complainant, which, consequently, required corroboration.

The trial Court held that the voices of the persons whose voices had been recorded, had to be identified by persons familiar with those voices. The complainant in this case had identified the voice of the appellant herein, and the defence had not objected to the identification of the voice, by the complainant.

The learned Magistrate held the tape-recorded transcript to be admissible as *aide memoire* to the Police officer who made the recording (reliance being placed on the Court of Appeal decision in ***Achieng' v. Republic*** [1988] KLR 436, at p.442).

The trial Court acquitted the appellant in respect of the first count; in the learned Magistrate's words:

"The transcript conversation does not reveal the accused as requesting or seeking Kshs.200/= from the complainant. It does not urge or command or advise the accused to give a bribe to the complainant

The learned Magistrate found the appellant guilty on the second count, of actually *receiving* a bribe. The taped conversation which ensued between the appellant and the complainant, did culminate in a bribe being received – the Court held. After taking into account the appellant's investigation statement, the Court subjected him to a fine of Kshs.10,000= or, in default, a one-month jail term.

Learned counsel ***Mr. Opiyo*** who represented the appellant, submitted that since the trial Court had found no evidence of *bribe-soliciting* in the aforesaid tape-recorded transcript, it was wrong in law and fact to proceed to the finding that the appellant had *received* a bribe – since this count of the charge rested on the

first count, in respect of which the appellant was innocent.

Counsel urged that the charge against the appellant, insofar as it was in connection with motor-vehicle obstruction, could only be testified to by the driver, and not the owner of the motor-vehicle, and yet the driver was not called as a witness. In counsel's words: "Without the driver's evidence, the evidence relied on [by the trial Court] was hearsay."

Learned respondent's counsel, ***Mrs. Obuo*** contested the appeal. She contested a point raised the appellant, that the charge sheet had been defective for not having been duly signed. Counsel urged that the appellant had been ably represented before the trial Court, and so should not raise an entirely new challenge which was not the subject of representation and appropriate ruling by that Court. She urged that as required by s.137 of the Criminal Procedure Code (Cap.75, Laws of Kenya) the charge sheet was signed; and submitted that if it should be found that the same was not signed by some particular officer, then the shortcoming may be cured under s.382 of the Code, as no prejudice had been caused to the appellant.

Counsel urged that there would have been no significance to the driver of the motor vehicle in question coming as a witness. For the charge was corruption; the money involved, Kshs.200/= had been recovered; the money had been analysed, and the analysis had shown corruption to have taken place. Counsel urged that the evidence had been overwhelming, and there was no need to call the further evidence of the driver.

In his reply, ***Mr. Opiyo*** urged that the receipt of Kshs.200/= by the appellant was the *actus reus*, and it needed to coincide with the guilty mind (*mens rea*) to constitute an offence – which *mens rea* could only be read from count 1 (soliciting) in respect of which the appellant had been acquitted. So counsel urged: "merely receiving is not an offence, [where] an explanation is given; furthermore, bribing requires soliciting to have taken place."

I have given consideration to the evidence, and the submissions made on appeal. The burden of the appeal case, as I see it, is that while it's true the appellant received money from the owner of the motor vehicle by means of which a traffic offence had been committed, some innocent explanation could be found for that receipt of money, and there was no guilty mind associated with that receipt of money.

What is clear is that the motor vehicle in question was so managed as to be in breach of the law; and therefore it was the appellant's duty to enforce the relevant law; but he did not enforce the law, and ended up with a gift of money in his hands. Even if the appellant may not have made an *agreement to be compensated* in the said money, for forbearing to see to the due operation of the law, on what basis was he, in the circumstances prevailing, *receiving* Kshs.200/= from the owner of the subject motor vehicle? Is it the case he was receiving the said money without a guilty mind? In my view, the answer to this question must be in the negative; and this will not change whether or not there was a link between the first count (in respect of which the appellant was acquitted) and the second (in respect of which he was convicted).

The statutory provision under which the appellant was charged is *in pari materia* with s.1 of England's Public Bodies Corrupt Practices Act, 1889, which the Court of Appeal in that country, in ***Reg. v. Andrews-Weatherfoil Ltd, Reg v. Sporle, Reg v. Day*** [1972] 1 W.L.R. 118 thus interpreted (at p.127):

> ***"This court is of the opinion that the statute covers receipt of money for a past favour without any antecedent agreement and it was open to the jury to convict….on this basis."***

The Court further remarked:

> ***"Two counts in an indictment may be so closely connected that an acquittal or conviction on one would appear logically to a layman to lead to acquittal or conviction on another. The strict regard for the rules of evidence and the burden of proof however may lead to different verdicts…"***

I see a clear basis in law for holding that the fact the appellant was acquitted in respect of the first count, did not by any means dictate, in the instant case, that he be acquitted also on the second count.

I have considered the several secondary points raised for the appellant, such as: that the charge sheet ought to have been signed by some particular officer; that the driver of the subject motor vehicle was not called as a witness; that the trial Court had rejected the defence case without justification. I do not find any of these points sufficiently cogent to displace the standards of proof achieved by the prosecution case; and for the most part, I would agree with learned counsel for the respondent, that none of those points would vitiate the propriety of the trial that took place.

Consequently, I hereby dismiss the appellant's case; uphold the conviction recorded by the trial Court; and affirm the sentence imposed by the learned Senior Principal Magistrate.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 22nd day of September, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Appellant: Mr. Tolo

For the Respondent: Mrs. Obuo