



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU**

Criminal Appeal 58 of 2006

DAVID OSORO OMWOYO APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case number 279 of 2005 of the Chief Magistrate's Court at Kisumu)

JUDGMENT

The appellant David Osoro Omwoyo was charged with two counts of soliciting and receiving a bribe contrary to Section 39 (3) (a) as read together with Section 48 (1) of the Anti-Corruption and Economic Crimes Act (No. 3 of 2003). He was tried, convicted and sentenced to pay a fine of Shs. 15,000/= or to serve a 4 months jail term on the 1st count of soliciting a bribe and Shs. 45,000/= or six (6) months imprisonment on the 2nd count of receiving a bribe. Additionally, a mandatory fine of Shs. 20,000/= and a prison term of three (3) months in default were also metted out against the appellant in regard to count 2. He has now appealed against both the conviction and sentence on the grounds that:-

- (i) The prosecution did not prove its case beyond reasonable doubt as required by law**
- (ii) The charge against the appellant is not supported by the particulars thereof**
- (iii) The judgment of the lower court does not comply with the provisions of Section 169 (1) of the Criminal Procedure Code**
- (iv) The evidence tendered by the prosecution and the facts of the case were insufficient and/or did not support the charge**
- (v) The court erred in law and fact in shifting the burden of proof to the appellant and also lowered the burden of proof to the prejudice of the appellant and that it decided the case based on a presumption and surmises to buttress on otherwise weak prosecution's case**
- (vi) That the sentence imposed upon the appellant was manifestly harsh and excessive**

The particulars of the charge facing the appellant and

for which he was arraigned before the Principal Magistrate in Kisumu (Criminal case number 279 of 2005) read as follows:

In respect of count 1

“ David Osoro Omwoyo: On the 28th day of April 2005 at about 1:30 p.m. at Silver Pot Hotel at Kakamega town in Kakamega District within Western Province being a person employed by a public body to wit Ministry of Labour and Human Resource Development Corruptly Solicited for Kshs.30,000/= from Tom Omwayi Olewe as an inducement to forbear him from charging the said Tom with an offence under the Labour Laws a matter which the said public body was concerned”.

In respect of Count II

“ David Osoro Omwoyo: On the 28th day of April 2005 at Silver Pot Hotel Kakamega Town in Kakamega District within Western Province; being a person employed by a public body to wit the Ministry of Labour and Human Resource Development corruptly received Kshs. 10,000/= from Tom Omwayi Olewe as an inducement to forbear him from charging the said Tom with an offence under the labour laws a matter with which the said Public body was concerned”.

In support of the appeal counsel for the appellant Mr. Onsongo submitted that, whereas the prosecution sought to prove that the offence for which the appellant was charged was committed on 28th April 2005 and that an amount of Shs. 30,000/= was demanded by the appellant from PW1 and also that the appellant on that day received Shs. 10,000/= from PW1 as inducement to forbear the appellant from charging PW1 with a criminal offence, none of that was proved or can be said to be supported by the evidence on record. In particular, Mr. Onsongo told this court that the evidence tendered by the prosecution did not support the commission of the alleged offence as to the date, place and amount of bribe in question. He also pointed out to the fact that the set of facts, which suggest that the offence was committed through a sequence of events did not point towards the commission of an offence on 28th in April 2005 as sought to be proven and that nowhere in the proceedings in the lower court did the said date or the sum of Shs, 30,000/=, said to have been solicited by the appellant, appear. Counsel submitted that the prosecution sought to prove one thing but proved another. Counsel submitted further that there are contradictions in the prosecution’s evidence as to the threats by the appellant to prosecute the complainant in that whereas the complainant said in his evidence in chief that the threats were communicated in two letters, in cross – examination he said that no threats were contained in the letters. Still on evidence counsel submitted that the prosecution failed to produce evidence to corroborate the evidence of PW1 as regards telephone conversations said to have taken place between him and the appellant and urged this court to find that the failure to call that evidence was fatal, and that a presumption ought to be made that the reason for failure to call for the same was that the prosecution knew the same was prejudicial or unfavourable to its case. Also that tape-recorded evidence played at the trial was not proper and that in the absence of expert evidence to confirm the voices then the same ought not to have been believed. Also regarding the Kenya shilling notes produced as exhibits, counsel told the court that in the absence of evidence by the scene of crime officer who is said to have photographed the scene, took swabs and packed the exhibits but was not called to testify then the possibility of accidental contamination cannot be ruled out, a fact which counsel sees as creating a doubt which ought to have operated in favour of the appellant.

Regarding the judgment, counsel submitted that the learned trial magistrate failed to give reasons for the decision to convict the appellant, did not consider the appellants defence and that by expressing his own concern as to why the appellant should have gone to a hotel to transact official business, the learned trial magistrate was lowering the burden of proof from one of “ **beyond reasonable doubt**” to one based on a balance of probabilities.

In reply, Karundu for the state submitted that the prosecution case was proved to the required standard and that the conviction and sentence were proper, the court having considered the evidence of both the prosecution and the defence and finding that the appellant was proved by the government analyst to have handled the money which had been chemically treated, and that the tape recording played in court laid a proper foundation for a conviction. The learned state counsel in particular pointed out the special application of the Anti-corruption and Economic Crimes Act and its outlier of the Criminal Procedure Act where the latter is inconsistent with the former (under Section 5 (2) (b)). He submitted also that no

corroboration of PW1's testimony was necessary in that he was not an accomplice and that, in any event, the requirement of such corroboration is exempted under Section 60 of the 2003 Act. Also that Section 58 of the said Act shifts the evidential burden on the accused person to disprove corrupt intention. Mr. Karundu further submitted that the charge and particulars thereof ought to have been challenged at the trial and at the earliest opportunity and not at the appeal. In conclusion Mr. Karundu told the court that the judgment was proper, and in compliance with the provisions of Section 169 (1) of the Criminal Procedure Code.

I have reviewed the record of the lower court wherein nine prosecution witnesses are shown to have testified. The appellant made an unsworn statement in his defence and judgment was delivered on 28th April 2006.

The complainant, Tom Omwayi Olewe (PW1) told the trial court that he is the proprietor of Bukura Community Maternity and Nursing Home put up by the Bukura Community. That he first met the appellant on 17th March 2005 when he came and questioned PW1 on how the workers at the centre were paid, The appellant said that the workers ought to be paid an extra Shs. 140,000/= and that the money should be taken to Kakamega. On being shown the centre's records the appellant refused to look at them and asked PW1 to pay Shs. 50,000/= after which the extra payment of Shs. 140,000/= to the workers would not be pursued. On being told by PW1 that he did not have the money, the appellant told PW1 to pay Shs. 20,000/= which he did not have. The following Monday the appellant telephoned PW 1 who told him he did not have any money. After a week PW1 went to seek police assistance from Kakamega Police Station where he met the O. C. S. and was introduced to an investigator. Meanwhile the appellant had written to PW1 two letters dated 20th April 2005 and 22nd April 2005 threatening to charge PW1 with an offence. He also called PW1 daily asking him to deliver the Shs. 50,000/=. On 28th April 2005 PW1 was summoned to Kakamega Police Station where he was introduced to an officer from the Anti-corruption Unit in Nairobi. Together with this officer and three others, PW1 drove towards Kakamega Town and after some briefing the officers gave PW1 Shs. 10,000/= and asked to call the appellant on the phone. PW1 asked him the appellant where he thought would be the best venue for him to hand over the money he had asked for. The appellant proposed the Silver Pot Hotel. PW1 and the Anti-corruption officers went to the hotel and laid an ambush . PW1 sat at a separate table where he was later joined by the appellant. PW1 had been given a tape recorder by the officers to record the discussions between himself and the appellant as he handed him the money. PW1 says that when he told the appellant that Shs. 50,000/= was difficult to come by the appellant said he could reduce it to Shs. 30,000/= and wanted to know how much PW1 had at the time. PW1 said he had Shs. 10,000/= which the appellant did not object to saying only that the balance of Shs. 20,000/= could be paid in two instalments. PW1 then gave the appellant the Shs. 10,000/= which he put in his left trouser pocket. PW1 then flashed the officers on his mobile and they came over. The appellant had stood up to go but was ordered back. He removed the money from his trouser pocket and threw it under a chair. Police officers from Kakamega Police Station were called, they came and photographed the scene and dusted the appellants hands. The group proceeded to Kakamega Police Station where the appellant was given a change of clothes and his own clothes taken as exhibits . PW1 identified the cassette recorder, the envelope in which the money had been placed as well as the Kaunda suit that the appellant had won during the meeting at Silver Pot hotel. The recording in the tape recorder was played at the trial and in cross – examination PW1 said that the appellant could be heard saying that if PW1 did not give him Shs. 30,000/= then the appellant would prosecute him.

PW2 (Michael Amariati) testified that the appellant visited the Bukura Community Maternity and Nursing Home twice on the 17th March 2005. On the first visit he introduced himself and said he was on routine labour inspection and insisted he would want to talk to the proprietor who was not in then, hence the second visit in the evening of the same day. PW2 said he gave the appellant the visitors book, which he signed.

PW3 Morris Mwirigi a driver with the Kenya Anti-Corruption Commission testified how on the 28th of April 2005 he handed the complainant (PW1) Shs. 10,000/= in Shs.1,000/= denominations which he had received from Juma Mwisi (PW7) and explained to him how he was to handle the money (to be used in

arresting the appellant). Habil Akech (PW 4) the government analyst produced an analyst report ("EX P 2") and testified having received a left hand swab, a right hand swab, a khaki envelope, money swab (Shs. 10,000/=), papers from left trouser pocket, a black brief case, a grey pair of long trousers, a grey brownish Kaunda shirt and control APQ powder, and upon carrying out some analysis thereon he detected the APQ powder, from the left hand swab, right hand swab, Khaki envelope money swab, papers from the pockets of the grey trousers. On cross examination he said that no powder was detected on the briefcase but powder was detected on both side pockets of the appellant's trousers.

PW6, Bernard Otieno testified that on 28th April 2005 he, together with Chief Inspector Kidigo and Sergeant Njeri of the Kenya Anti-Corruption Commission, met with the complainant in Kakamega town who told the trio that a Senior labour officer was demanding a bribe. They planned an arrest of the suspect and PW6 instructed PW1 on how to use the tape recorder to record his conversation with the appellant. PW6 fitted PW1 with the recorder and they all proceeded to Silver Pot café where the trio posed as customers and sat at a different table leaving PW1 to meet with the appellant. The latter joined the complainant (PW1) at his table and a conversation ensued. After a while Chief Inspector Kidigo arrested the appellant and soon thereafter they were joined by scene of crime personnel from the PCIO's office in Kakamega. He later recorded a statement from the complainant.

PW7 Juma Musi an investigator seconded to the Kenya Anti-Corruption Commission testified having treated some Shs. 10,000/=, in Shs. 1,000/= denominations with chemicals and APQ powder, taking photocopies of the notes and making a of list of their serial numbers on 27th April 2005 before giving the same to a driver Morris Mwirigi (PW3). That he later, on 6th May 2005, he went to Kakamega and visited PW1 at Bukura where he back played a tape for him to identify a recorded conversation. After PW1 identified the conversation as the one he had with the appellant on 28th April 2005, PW7 then transcribed the same and handed the transcript to the investigating officer. PW7 produced before the learned trial magistrate the treated Shs. 10,000/= as " **P. exhibit 10**", the half envelope in which the money was handed to PW3 and then to PW1, (as P Ex.8) and an inventory of the serial numbers as

"**P Ex 9**". The transcript of the tape was also produced.

PW8, Francis Kipchonjo Kidigo was the investigator in this case. He testified that on 26th April 2005, he was told of an assignment to be undertaken in Kakamega. On 28th April 2005 after a briefing in Nairobi the previous day, he and his team mates went to the PCIO's offices at Kakamega to receive a report on the complainant's complaint. They found the complainant at that office and together proceeded first to Lubao market where they all agreed on how the appellant would be arrested. That while at Lubao, the PW1's mobile phone rang and he told them it was the appellant calling him. They told him to telephone the appellant and propose they meet at a certain hotel in town. By this time P. C. Bernard Opiyo (PW6) had put a tape recorder on PW1. They proceeded to the hotel in Kakamega at about 11:00 a.m. to trap the appellant as he took the bribe from the complainant, having agreed on the signs to be given by PW1 after the appellant had taken the money. They sat away from the complainant but with a clear view of his position. They were able to observe the appellant join the complainant soon after and a conversation ensuing. At about 12:15 p.m. PW1 flashed PW8 (that being the agreed sign) on his mobile to signify that the appellant had taken the money. PW8 went straight to where the appellant and PW1 were and informed the appellant that he was under arrest for receiving a bribe. PW7 testified further that the appellant now removed the money from his left trouser pocket and threw it on the floor. PW7 then called the PCIO's office and personnel from the scene of crime office came and took swabs at the scene and packed the exhibits. The appellant was escorted to the PCIO Kakamega's office and a statement recorded after which PW7 and his team returned to Kisumu. The swabs were taken to Nairobi for analysis by the government Chemist. PW7 proceeded to produce the swabs, papers found at the scene, the currency notes, a grey Kaunda jacket and a grey pair of trousers that the appellant wore. He also produced, among other things, the signature book of Bukura Community Maternity and Nursing Home showing that the appellant had visited the centre.

The last to testify was Emmanuel Kenga an assistant Commissioner of police and a document examiner. His testimony touched only on the signatures and handwriting of the appellant as shown in the letters of

17th March 2005 and 20th April 2005, to PW1 and the visitors' book from the Bukura centre, which he concluded, after examination, to have been made by the same hand, that of the appellant.

The appellant having been put on his defence under Section 211 of the Criminal Procedure Code gave a short unsworn statement denying the charges. He testified that he had gone to PW1's premises for an inspection but was told by PW1 that the centre's records were with the accountant and that PW1 would bring them to him, which he never did. That instead, PW1 rang him and asked him to meet him at Silverpot hotel where he tried to bribe the appellant but the latter refused.

This court's study of the judgment of the lower court shows first of all that the learned trial magistrate properly summarized the evidence adduced before him and weighed the prosecution evidence against the one adduced by the Defendant. He considered the issues sought to be determined and set them down as follows:-

(1) Whether the accused (appellant) solicited for a bribe or not

and

(2) Whether the accused (appellant) received the bribe or not.

After analysing the evidence placed before him the learned trial magistrate went to find that the appellant's claim of innocence had been displaced by the finding of APQ powder on the appellant's clothing and the swabs of his hands which proved that the appellant had handled the treated money. The learned trial magistrate went further to find that the evidence on record eliminates any assumption of contamination by the officer who searched the appellant.

The learned trial magistrate also drew a conclusion that by readily agreeing to meet the complainant at a hotel without question, when ordinarily, official business is not transacted in hotels, the appellant must have solicited the bribe. He also found that the tape recording played in court gave credence to the prosecution's case that the appellant had solicited and did receive a bribe. In all the learned trial magistrate found that the prosecution had proved its case beyond any reasonable doubt and proceeded to find the appellant guilty and to convict him accordingly.

Mr. Onsongo challenged the judgment and particularly submitted that what the learned trial magistrate framed as issues for determination were not issues but particulars of the charge. With due respect to counsel the court is of the view that given the wording of Section 39 3 (a) of the Anti-Corruption and Economic Crimes Act which, inter alia, provides that

“ A person is guilty of an offence if the person corruptly receives or solicits, or corruptly agrees to receive or solicit, a benefit to which this section applies.....”,

the learned trial magistrate rightly formulated the two questions for determination, failing only, perhaps, to extending the same to include a question as to whether the bribe so solicited or received was so solicited or received corruptly. I see this as a third issue for determination and not an alternative to the two already framed by the learned trial magistrate. Counsel for the appellant did not raise the issue of whether or not the learned trial magistrate ought to have gone further to find specifically whether the money herein was corruptly solicited or received but the state did submit, and rightly so, that under Section 58 of the Anti-Corruption and Economic Crimes Act the evidential burden shifts on the accused person to disprove that the act which is the subject of the offence was not done corruptly. The said section states that:-

“ If a person is accused of an offence under part V an element of which is that an act was done corruptly and the accused is proved to have done that act, the person shall be presumed to have done that act corruptly unless the contrary is proved”.

Clearly from the above, it was incumbent upon the appellant, who did not challenge the evidence adduced

in regard to the events of 28th April 2005, to prove that his meeting with the complainant on the said date and at the disclosed venue was an innocent, normal meeting which he did not. He did not question any of the witnesses on their evidence that he did receive Shs. 10,000/= from PW1 or that he put the same in his pocket and on being apprehended threw the money to the floor. He did not attempt to explain why PW1 would wish to victimize him if indeed, as submitted by his counsel before this court, PW1 had an interest in the outcome of the case. What interest, counsel did not tell this court.

It is clear from the judgment that the learned trial magistrate did give reasons for deciding the case as he did. Section 169 (1) of the Criminal Procedure Code cannot therefore be said to have been contravened.

As to whether the evidence before the trial court supported the charge this court has examined the evidence adduced as to the events of 28th April 2005, by PW1, PW2, PW5 PW6 and PW8. They all testified orally and a tape recording of the conversation between the appellant and PW1 played in court. Save for the attempt by counsel for the appellant to object to the production of the tape, and his submission that the voices in the tape were not verified, the appellant himself did not deny that the voice said to be his was his or that the conversation ever took place. I am of the view that, the said evidence taken together, and in the light of Section 58 previously discussed, did prove that on 28th April 2005 the appellant did corruptly solicit Shs. 30,000/= from the complainant, Tom Omwayi Olewe and did corruptly receive Shs. 10,000/= as an inducement to forbear him from charging PW1 with an offence under the labour laws as charged. The appellant had visited PW1's institution twice on 17th March 2005 and met with the complainant on that day after office hours. Evidence adduced shows that their meeting took place between 5:00 p.m and 6:00 p.m The Appellant queried certain personnel matters at the institution and based on information he had extracted from PW1's workers earlier in the day, told PW1 that the institution owed its workers Shs. 140,000/= a matter he would overlook if he was given Shs. 50,000/=. On 28th April 2005 at Silverpot café (or hotel) he is said by told PW1 to have told him that:-

“ he would reduce it to Kshs. 30,000/=”

On being told that PW1 had Shs. 10,000/= on that day to the appellant is said to have told PW1 that the balance would stand at Shs. 20,000/=. He was given the Shs. 10,000/= which he took and placed in his pocket. Counsel for the appellant is not therefore right in submitting that the amounts and dates appearing in the charge and those proved in evidence are at variance. My study of the lower court's record did not disclose any material discrepancies in the accounts of the Prosecution witnesses. That certain photographs taken at the scene did not show any money on the floor is not in my view strong ground to dispel the evidence adduced at the trial to show that the money did get into the appellant's hands and into his pockets.

In view of Section 58 of the Anti-Corruption and Economic Crimes Act and having observed that all the authorities submitted herein related to offences either under the Penal Code and the Prevention of Corruption Act (Cap 65, now repealed), the same are distinguishable as regards the burden of proof. The evidence before the trial court was, in my considered view consistent, sufficient and weighty enough to not only support the charge but to justify and sustain a conviction. Regarding the sentence I am of the view that the same cannot be said to be harsh or excessive given that Section 48 provides for a fine of upto Shs. One Million (Shs. 1,000,000) or imprisonment for upto 10 years or both, in addition to a mandatory fine of twice the amount of any benefit received by the accused person or the loss suffered by any person as a consequence of the offence. As earlier observed, the appellant in this case was on the 1st count sentenced to pay a fine of Shs. 15,000/= or to serve four (4) months imprisonment in default, and for count 2, a fine of Shs. 45,000/= or six months imprisonment in default plus a mandatory fine of Shs. 20,000/= or in default to serve 3 months imprisonment.

This court has also observed that in mitigation the Appellant expressed remorse and repentance for the offence and fell at the feet of the court, asking for a non – custodial sentence. Needless to say, the same goes to show that the appellant fully appreciated the finding of guilt on his part and the consequences of his actions leading to the conviction.

In the premises this appeal fails and is hereby dismissed. Accordingly the conviction and sentence of the lower court are upheld.

Dated and delivered at Kisumu this 18th day of July 2007

M. G. MUGO

JUDGE

MGM/aao