



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO

Criminal Appeal No. 69 of 2005

JOHN GATUA KABIRA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, John Gatua Kabira was charged with **receiving money contrary to Section 40 (2)(a) of the Anti-Corruption and Economic Crimes Act, 2003** (*hereinafter referred to as “the Act”*). The particulars of the offence were that on the 16th of September 2004, at Kaptembwa Estate Nakuru, the appellant received Kshs 10,000/= from Joseph Migosi in the pretext that he was in a position to assist the said Joseph Migosi in **Nakuru CMC Criminal Case No. 1820 of 2004**. The appellant pleaded not guilty to the charge and after a full trial he was convicted as charged. He was sentenced to serve five years imprisonment and to pay a total fine of Kshs 128,000/=. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

In his petition of appeal, the appellant has raised several grounds challenging the decision of the trial magistrate in convicting him. He was aggrieved that the trial magistrate had considered the evidence of PW1, 3, 6 and 7, who in his view, had conspired to give testimony against him because of the grudge that existed between the appellant and PW7. He was further aggrieved that the trial magistrate had failed to consider that his employment did not include performing clerical duties as adduced in evidence by the prosecution witnesses. He was aggrieved that the trial magistrate had convicted him without putting into consideration the fact that no sufficient evidence had been adduced by the prosecution to prove the charge against him to the required standard in law. He faulted the trial magistrate for convicting him whereas the money alleged to have been received was not produced as an exhibit in evidence. He was aggrieved that the trial magistrate has shifted the burden of proof and hence convicted him. He faulted the trial magistrate for sentencing him to serve a harsh and cruel punishment. He was aggrieved that he had been convicted based on an agreement which he, the appellant, had not signed.

At the hearing of the appeal Mr Nyamwange, learned counsel for the appellant submitted that the appellant had been charged and convicted based on an offence not known in law. He submitted that the appellant had not been convicted for any offence because the trial magistrate had not dated or delivered the judgment in open court. In the circumstances, it was his submission that this court could not re-evaluate the evidence and reach the same decision because of a non-existence and invalid judgment. He urged the court to allow the appeal. Mr Gumo, learned counsel for the State conceded to the appeal. He submitted that he had perused the judgment of the trial magistrate and realized that the same was neither dated nor was it stated where it had been delivered. He therefore submitted that he would not be opposing the appeal on conviction. He further submitted that the sentence which was meted out on the appellant was disturbing because **the Act** deprived courts discretion in the sentencing process. He

submitted that there should be flexibility in sentencing so that the ends of justice could be served. He submitted that the sentence meted out on the appellant was too draconian and if the courts were to strictly rely on **the Act** on sentencing it would deprive the court an opportunity to do justice. I will address the issues raised on this appeal after briefly setting out the facts of this case.

The appellant at the material time, was employed as a clerical officer at the law courts, Nakuru. According to PW1, Joseph Migosi Obare, he was arrested and charged with two offences, that of **stealing stock contrary to Section 278 of the Penal Code** and alternatively with **handling stolen goods contrary to Section 322(2) of the Penal Code**. The charge arose when PW1 was arrested in possession of two cows at Kaptembwa estate which were alleged to have been stolen from Kirobon from one Jackson Cheruiyot Kirui. When PW1 was arraigned before the trial court, he pleaded not guilty to the charge and was released on bond. The appellant, who was a court clerk in court number 4 where the plea was being taken, then approached PW1 and told him that he would be in position to 'assist' PW1 with his case which in the opinion of the appellant was 'bad'. PW1 told the court that the appellant then asked him to give him the sum of Kshs 10,000/= so that he could 'assist' to have the case finalized in favour of PW1. PW1 borrowed the money from PW2 Masingi Basikili and paid the said sum of Kshs 10,000/= to the appellant in the presence of PW2. PW2 corroborated PW1's evidence on this aspect of the evidence. PW1 testified that thereafter he attended the hearing of the case but the appellant was nowhere to be seen. In fact according to PW1, the appellant dodged and avoided seeing him. PW1 realised that he had been cheated because the appellant was not 'assisting' him to have the case finalized. He then made a report to the police after which the appellant was arrested.

PW3 Peter Ndunye Kaggia, PW6 Moses Koome and PW7 Patrick Ngare testified that after the arrest of the appellant, they went to the police station and were able to see the investigating officer in the presence of PW1 and were able to raise the sum of Kshs 6,000/= which was paid to PW1 on behalf of the appellant. An agreement was written which was produced in court as an exhibit. After the agreement, the appellant was released from police custody. The evidence by these three witnesses was corroborated by PW1 who confirmed that he had received a refund of Kshs 6,000/= but had not been paid the balance of Kshs 4,000/=.

PW4 PC Mohammed Adulrahman dealt with the criminal case when it was reported to him by the complainant (PW1), arrested the appellant and charged him with the offence. PW5 Charles Kagwi the Executive Officer Nakuru Law Courts testified that when he received information of the report made by the complainant to the police, he informed the Registrar, High Court of Kenya and later authorized the police to investigate the allegations against the appellant. He told the court that the appellant was first charged before the Nakuru Law Courts, then taken to Molo Law Courts before finally being tried by the Principal Magistrate's Court Kericho. He denied that he had any grudge with the appellant.

When the appellant was put on his defence, he denied that he had been given the money by the complainant as an inducement to enable him 'assist' the complainant with the criminal case facing him. He testified that the complainant was an acquaintance whom he had borrowed the sum of Kshs 10,000/= from and because of financial difficulties had failed to re-pay him as agreed. It was his evidence that the allegation that he had been given the money corruptly was created by the complainant so that the police could act in a matter that was basically a civil case. He testified that in this case the complainant had acted in fear of the Senior Principal Magistrate, Nakuru who had influenced him to make the complaint against him. He testified that when the initial complaint was made against him, it was in relation to the offence of obtaining money by false pretences and not receiving money corruptly.

This being a first appeal this court is mandated to reconsider and to re-evaluate the evidence adduced before the trial magistrate's court so as to arrive at an independent decision whether or not to uphold the conviction of the appellant. In reaching its determination this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified (*See Njoroge -vs- Republic [1987] KLR 19*). The issue for determination by this court are two fold; firstly, whether the appellant was competently charged and convicted before the trial magistrate's court. Secondly, whether the prosecution proved its case on the charge against the appellant to required standard of proof beyond reasonable doubt. I have considered the submissions made before me by Mr Nyamwange learned counsel for the appellant and Mr

Gumo on behalf of the State. I have also carefully re-evaluated the evidence that was adduced before the trial magistrate. I will deal with the issue raised in the submissions as relates to the legality of the judgment by the trial magistrate first.

The appellant through counsel, has submitted that the judgment which was delivered by the trial magistrate was neither dated nor signed. Learned counsel for the appellant submitted that there was therefore no valid judgment which this court could consider. Mr Gumo for the State conceded to the appeal on this ground. I have read the typed proceedings which form part of the record of appeal in this case. It is true that when reading the said typed proceedings one would reach a conclusion that the judgment was neither dated nor the day it was delivered stated. However on perusal of the handwritten draft of the said judgment of the trial magistrate, it is clear that the said judgment was dated and signed by the trial magistrate. The judgment was delivered on the 2nd of August 2005 in the presence of the accused and Inspector Korir, the prosecutor. This appears at the beginning of the draft judgment but does not appear in the typed proceedings. Mr Gumo therefore conceded to the appeal under a mistaken belief that the typed proceedings reflected the true record of the trial magistrate. I will therefore disallow that ground of appeal and proceed to the second part of the issue for determination by this court.

Did the prosecution adduce evidence that prove the charge against the appellant to the required standard of proof beyond reasonable doubt? The **Anti-Corruption and Economic Crimes Act 2003** was enacted by Parliament **“to provide for the prevention, investigation and punishment of corruption, economic crime and related offences and for matters incidental thereto and connected therewith”**. This is the preamble to the **said Act**. **Section 40** of the **said Act** provides as follows:

“(1) This section applies with respect to a benefit that is an inducement or reward for or otherwise on account of, the giving of advise to a person.

(2) A person is guilty of an offence if the person –

(a) receives or solicits or agrees to receive or solicit, a benefit to which this section applies if the person intends to be secret from the person being advised; or

(b) gives or offers, or agrees to give or offer, a benefit to which this section applies if the person intends to be a secret from the person being advised.

(3) In this section, “giving advise” includes giving information”.

The punishment for a person found guilty under **part V** of the **Act** is provided for under **Section 48 of the Act**. In this case the appellant, an employee of the judiciary, was accused of soliciting and receiving the sum of Kshs 10,000/= from the complainant on a promise that he would ‘assist’ the complainant to have his case dealt with favourably.

According to the evidence which was adduced in court there is no dispute that the appellant received money from the complainant. What is in dispute is under what circumstances the said money was received by the appellant. According to the complainant, the appellant told him that he had a ‘bad’ case and would only be ‘assisted’ if he gave the sum of Kshs 10,000/= to the appellant. Evidence was adduced confirming that indeed the appellant was the clerk to court number 4 when the plea was taken in respect of the charges which the complainant faced. The complainant testified that the appellant failed to deliver his part of the ‘bargain’ hence his decision to report the incident to the police. On the other hand it is the appellant’s case that he had borrowed the sum of Kshs 10,000/= at two different instances as a friendly loan from the complainant which unfortunately due to his financial circumstances he was unable to repay in time. It is the appellant’s case that his debt to the complainant was a civil debt and not an inducement to him to facilitate corruption on the part of the criminal case then facing the complainant.

Having carefully re-evaluated the evidence and particularly the evidence of the complainant and PW2, it is clear that prior to the complainant being charged with the criminal offence, the said complainant had not known the appellant. The complainant came into contact with the appellant when plea was being

taken in the Nakuru Magistrate's Court No. 4 where the appellant was a clerk. The evidence of the complainant, a layman who was not aware of the court process appear to be cogent and consistent. The appellant told him that he had a 'bad' case and unless he parted with the sum of Kshs 10,000/= he would not be 'assisted' in the criminal case facing him.

The appellant knew this information to be false. He solicited the said sum of money from the complainant. He induced him to pay the said sum of money. He received the said sum of money from the complainant. The appellant's protestation in his defence that he had borrowed the said money from the appellant as a friendly loan does not cut much ice. The complainant being a person who had been arrested and charged for serious offences which could result in his being sent to prison, was naturally anxious to have the case determined in his favour. The appellant took advantage of the complainant's anxiety.

On re-evaluation of the evidence, it is clear that the prosecution proved that the appellant corruptly solicited and received the sum of Kshs 10,000/=. There is no evidence to support the appellant's contention in his petition of appeal that the prosecution witnesses had colluded to fix him in the case. When the appellant was arrested, he made a clumsy attempt to repay the complainant the said sum of Kshs 10,000/= through his work-mates. Unfortunately for him, once he solicited and received the money in advancement of a corrupt transaction, it was immaterial that he refunded the money.

His defence that he had been given the said sum of money as a friendly loan does not hold water. This is because the appellant was not known nor was he a close friend of the complainant to the extent that he could have borrowed the sum of Kshs 10,000/= from him. From the evidence adduced, it is clear that the complainant was not a person who could have spared the sum of Kshs 10,000/= to lend to someone else, least of all the appellant. Indeed the sum of Kshs 10,000/= paid to the appellant was borrowed by the complainant from PW2.

Upon perusal of the charge sheet, I noted that the said charge had a defect. The charge did not indicate the punitive section of **the Act**. The charge should have read in accordance with **Section 40(2)(a)** as read with **Section 48 of the said Act**. This was however a curable defect which I hereby amend as provided for under **Section 382 of the Criminal Procedure Code**. In my view, the appellant was not prejudiced nor was miscarriage of justice occasioned by this defect. As was held in the case of **Ndirangu Nderitu Mureithi & Anor -vs- Republic C.A. Criminal Appeal No. 175 of 2004 (Nakuru) (unreported)** at page 3

“So that for the curative provisions of Section 382 of the Criminal Procedure Code to apply, there must, in the first place, be a defined crime with a prescribed penalty, and the definition of the offence and its penalty must be set down in written law. This is a basic and fundamental principle in our constitutional jurisprudence and was obviously provided for in our constitution to prevent a leader with dictatorial or tyrannical tendencies from saying:-

“It is crime because I do not like or approve of it”.”

In this case the offence is stated and the penalty is provided for. No miscarriage of justice was occasioned. I therefore find no merit whatsoever in the appeal filed by the appellant on conviction. I proceed to dismiss to the said appeal on conviction.

On sentence **Section 48 of the Anti-corruption and Economic Crimes Act** provides that a person who is convicted for committing an offence under the said Act shall be fined a sum not exceeding Kshs One million or to imprisonment for a term not exceeding 10 years or both. In addition such a person would be fined a sum equal to two times the amount which constituted the quantifiable benefit that he received as a result of the corrupt transaction. In the instant case, I agree with Mr Gumo that the sentence that was meted out on the appellant was excessive and harsh in the circumstances. I will therefore set aside the said sentence of the trial magistrate and substitute it with a sentence of this court;

(i) The appellant is hereby fined the sum of Kshs 50,000/= or in default he shall serve eight months

imprisonment.

(ii) The appellant shall pay an addition fine of Kshs 20,000/= being two times the amount of Kshs 10,000/= that he received corruptly from the complainant in default he shall serve four months imprisonment.

(iii) The appellant having been convicted, is barred from holding any public office for three (3) years after he has served the sentence as provided by **Section 64(1) of the Act.**

In the event that the appellant shall fail to pay the fine, the two custodial sentences imposed shall run concurrently. The said custodial sentence shall take effect from the 2nd of August 2005 when the appellant was imprisoned by the trial magistrate. It is so ordered.

DATED at NAKURU this 7th day of March 2006.

L. KIMARU

JUDGE