REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI- CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC APPEAL NO. 8 OF 2019

REPUBLIC……..……RESPONDENT

VERSUS

STEPHEN OUMA AMBOGO……APPELLANT

JUDGMENT

1. The Appellant, Stephen Ouma Ambogo was charged with two counts under **Section 39(3)(a) as read together with section 48(1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 (ACECA).**

2. In Count 1, he was charged with the offence of **Corruptly soliciting a benefit contrary to section 39(3) (a) as read with Section 48(1) of ACECA.** The particulars of the offence were that on the 2nd day of July, 2007, at Marshalls House along Harambee Avenue in Nairobi Central District within Nairobi County, being a person employed by a public body, to wit **Banking Fraud Investigations Unit,** corruptly solicited for a benefit of Kshs. 100,000 from **Jackson Gichuhi** and **Charles Ngure** as an inducement so as to facilitate the release of **Alex Warutere** and **Geoffrey Mwangi** who were arrested for an alleged offence of making a document without authority, a matter relating to the affairs of the said public body.

3. In Count 2 the appellant was charged with **Corruptly receiving a benefit contrary to Section 39(3)(a) as read with Section 48 (1) of ACECA.** The particulars of this offence were that on 2nd July 2007 at the then Home Park Restaurant along Harambee Avenue in Nairobi Central District within Nairobi County being a person acting for a public body to wit, the Kenya Police as an Inspector of Police attached to **Banking Fraud Investigations Unit,** corruptly received a benefit of cash Kshs 40,000 from **Jackson Gichuhi** and **Charles Ngure** as an inducement so as to facilitate the release of **Alex Warutere** and **Geoffrey Mwangi** who were arrested for an offence of making a document without lawful authority, a matter relating to the affairs of the said public body.

4. The appellant pleaded not guilty to the offences and a trial ensued in which the prosecution called eleven witnesses and adduced electronic evidence. Upon the close of the case for the prosecution the trial magistrate considered the evidence before him and came to the conclusion that there was not sufficient evidence to place the appellant on his defence on the charge of "corruptly soliciting a benefit" **(Count 1 of the charge)** and acquitted him under **Section 210 of the Criminal Procedure Code.** The reasons for the acquittal as stated in the judgment dated 28th February 2019 was deficiency in the electronic evidence adduced by the prosecution. The trial court however put the appellant on his defence on the charge of "corruptly receiving a benefit" and subsequently convicted him of the offence and sentenced him to a fine of Kshs. 300,000 and in default to imprisonment for a term of six months.

5. The appellant being aggrieved by the conviction and sentence appealed to this court. The appeal is premised on 27 grounds which I shall reproduce *verbatim*:

> ***"1. The learned trial magistrate erred in law and in fact by finding that the prosecution had proved its case against the appellant in count 2 on the charge sheet beyond reasonable doubt as required by law***
>
> ***2. The learned magistrate erred in law and in fact by shifting the burden of proof from the prosecution to the appellant which led to a miscarriage of justice***
>
> ***3. The learned magistrate erred in fact and in law in failing to appreciate or to appreciate fully submissions by counsel for the appellant that the prosecution had failed to discharge the said count 2 on the charge sheet***
>
> ***4. The learned trial magistrate erred in law and in fact by failing to give the appellant the benefit of doubt***

5. The learned trial magistrate erred in law and in fact by relying on insufficient evidence of the prosecution in total disregard of the appellant's defence and sworn statement

6. The learned trial magistrate erred in law and in fact by not taking cognizance of all the materials in terms of evidence the defence, written submissions placed before him and as a result arrived at erroneous conclusions

7. The learned trial magistrate erred in law and in fact by relying on the evidence of PW4 Murambi and Pros Exh 14 Government Analyst Report being evidence which was obtained through a questionable process of collection, handling and forwarding.

8. The learned Trial Magistrate erred in law and in fact by failing to appreciate DW2's evidence that challenged the evidence of PW4 Murambi and P.Ex 14, the Government Analyst Report

9. The trial magistrate erred in law and in fact by not considering strong evidence and the appellant's sworn statement

10. The trial magistrate erred in law and in fact by relying on the evidence of PW11 Musi and PW5 Karani who were involved in an untrusted/contaminated process of evidence collection, handling and forwarding to PW4 as contained in P. Ex 13(a) and (b) Exhibit Memo Form

11. The learned trial magistrate erred in law and in fact by relying on contradicting and misleading evidence regarding P. Ex7 trouser by PW4 Murambi who elected to analyse the right hand pocked and not the back pocket from where PW3 alleges to have recovered P. Ex 6 (i - xl) treated currency

12. The learned trial magistrate erred in law and in fact by not considering submissions by the defence on P. Ex 7 trouser

13. The learned trial magistrate erred in law and in fact by relying on contradicting and misleading evidence of PW10 and PW5 on the alleged recovery of P.Ex (i - xl) treated currency

14. The learned trial magistrate erred in law and in fact by relying on the evidence by PW10 Gichuhi and PW5 Ngure on handling of P.Ex(i – xl) treated currency, P.Ex (1(a) and (b) and P.Ex 8(d) half cut envelopes as allegedly trained by PW2 Mumbi while failing to handle P.Ex 11 video recorder evidence which was rejected by the court

15. The learned trial magistrate erred in law and in fact by relying on the evidence of PW3 Wambua that the appellant compared P.Ex 6(i – xl) treated currency and signed on P.Ex 5 photocopies of currency, evidence which was not corroborated

16. That the learned trial magistrate erred in law and in fact by relying on uncorroborated evidence of PW10 Gichuhi that he gave P.Ex 6 (i - xl) treated currency to the appellant

17. The learned trial magistrate erred in law and in fact by relying on P.Ex12 video which did not show the appellant either receiving or dropping any money being the evidence of PW7 and PW8

18. The learned magistrate erred in law and in fact by relying on P.Ex12 video allegedly recorded by PW5 Karani, the author of P.Ex 4(a) and (b) transcripts which the court rejected

19. The learned magistrate erred in law and in fact by not considering that there was a grudge by PW10 Gichuhi, PW1 Ngure (an impostor no relation to PW7 Mwangi or PW8 Warutere) and Mr. Thinwa (not a witness) against the arrest of their relatives (PW7 and PW8 Warutere) for whom they were seeking their release by using the then KACC

20. The learned trial magistrate erred in law and in fact by not considering that PW7 Mwangi and PW8 Warutere had been released much earlier before the alleged incident took place

21. The learned magistrate erred in law and in fact by admitting a defective charge sheet in count 2 which was altered by the prosecutor and for which the appellant was not given an opportunity to plead to the charges afresh

22. The learned magistrate erred in law and in fact by failing to take into account that the appellant did not receive the benefit as alleged, the subject matter of the charge

23. The learned magistrate erred in law and in fact by convicting the appellant on the charge of receiving a benefit without proving soliciting, a charge in which the appellant was acquitted

24. The trial magistrate erred both in law and in fact by convicting the appellant when there were glaring contradictions in the evidence of the prosecution witnesses

25. The learned magistrate erred in law and in fact in convicting the appellant purely on circumstantial evidence when the same was based on mere suspicion, theory and hypothesis with no basis in law

26. The learned trial magistrate erred in law in convicting the appellant against the weight of evidence, submissions and the law

27. The learned magistrate erred in law in convicting the appellant in the circumstances of the case."

6. The appellant urges this court to allow the appeal, quash his conviction and set the sentence aside.

7. The appeal proceeded by way of written submissions.

The Appellant's Submissions

8. Learned Counsel for the appellant begun by pointing out that whereas the charges against the appellant were amended following an application made by the prosecution on 3rd June 2016 the trial court did not require the appellant to plead to the amended charge and only indicated that it would retain the plea of not guilty. Counsel also pointed out that he was in agreement with the magistrates finding on Count 1. In respect to the appeal Counsel grouped the 27 grounds of Appeal into two as follows:

"i. The errors in law and fact committed by the trial magistrate in evaluation of evidence as a whole and in resolving inconsistencies in favour of the appellant's acquittal

ii. The errors in law committed by the magistrate in lowering and shifting of the burden of proof"

9. On the first issue Counsel for the appellant started by urging this court to submit the evidence as a whole to a fresh and exhaustive examination and reach its own conclusions bearing in mind that it did not see or hear the witnesses. He relied on the decision of the Court of Appeal in the case of ***Mwangi vs Republic (2004)2KLR 28***. Counsel then proceeded to highlight what he referred to as material contradictions in the prosecution's evidence and submitted that the trial magistrate erred by not evaluating and weighing the inconsistencies against each other and against the evidence presented as a whole. Counsel then stated that firstly, the trial magistrate's finding that the charge of receiving was proved beyond reasonable doubt did not take into account the admissions by some of the witnesses that they were not present when the money changed hands and did not also take into consideration the inconsistencies of those who said they were present. Counsel submitted that PW10's evidence that the appellant actually received the Kshs.40,000 was not corroborated; that there was a major contradiction in the manner in which the Kshs. 40,000 was handled before being allegedly given to the appellant; that on one hand, there was evidence alleging that the Kshs. 40,000 was combined into one wad while on the other, it was alleged that the money remained separated in two envelopes of Kshs. 20,000 until it was removed and handed over to the appellant and that the appellant received the money in his hands. Counsel submitted that the trial magistrate ignored these and other material contradictions as elaborated in his submissions.

10. Counsel contended that the trial court only reproduced and relied on the prosecution evidence where it was in agreement and strategically omitted to deal with the inconsistencies. Counsel stated that the trial court did not also give reasons for believing one version over the other. To buttress this submission Counsel cited the case of ***Peter Leo Baraza vs Republic (1992) eKLR*** where the Court of Appeal reiterated the duty of trial courts to weigh the evidence in a case as a whole, including that which is conflicting.

11. Counsel for the appellant further questioned the omission to call Maina (an uncle to PW8) as a witness despite evidence that he played a major role in reporting the complaint to the Kenya Anti-Corruption Commission hence setting the whole operation in motion. Counsel contended that the said Maina's evidence would have been relevant to the appellant's defence and testimony that the operation constituted legally impermissible entrapment. Counsel for the appellant also averred that the trial magistrate's pronouncement that the appellant participation in the process of comparison of the actual currency serial numbers against the photocopied ones was erroneously misconstrued as an admission of guilt. Counsel contended that the appellant's co-operation with the officers did not amount to an admission of guilt but rather demonstrated the appellant was a law abiding police officer and acted as was expected of him throughout by properly cooperating during the arrest and investigations.

12. Counsel also raised the issue of the **burden of proof** and **standard of proof**. He submitted that while the trial court addressed the issue of whether the charge of receiving could stand in the face of the appellant's acquittal on the charge of soliciting, it applied a faulty reasoning to avoid a binding Court of Appeal decision ***(Peninah Kimuyu vs Republic [2014] eKLR)*** thereby arriving at a wrong decision. He stated that the trial magistrate erred in failing to appreciate the position of the Court of Appeal that **Section 39(3) of ACECA** does not create an offence of strict liability; that the mere allegation of receipt without demand ought not to automatically lead to a conviction and that the alleged receipt required to be proved to be corrupt to be criminal. Counsel stated that in this case the acts of soliciting and of receiving were charged in a single transaction hence for bribery to be established both had to be proved beyond reasonable doubt.

13. Counsel further argued that the trial court made a fundamental error in law by purporting to invoke **Section 58 of ACECA** to **"create circumstances"** so as to distinguish this case from the binding decision of the Court of Appeal. Counsel urged this court to find that mens rea is an essential ingredient of the offence herein. He stated that where a statute includes in the definition of an offence a requirement as to the state of mind of the offender as is the case in **Section 39(3)(a) of ACECA** there is no need to import any additional provisions into it and that proof of that state of mind was mandatory and it was not open for the court to rely on **Section 58** to interpret **Section 39(3)(a).** Counsel contended that Section 58 is only applicable in offences in which the "state of mind" element is lacking. Counsel submitted that by concluding that offences under **Section 39(3)(a) of ACECA** are strict liability offences, the trial magistrate shifted the burden of proof to the appellant to prove his innocence which is not permissible. Counsel urged this court to rectify this fundamental error by applying the position of the Court of Appeal in ***the Penina Kimuyu case (supra)*** in the appellant's favour.

The Respondent's Submissions

14. For the respondent it was submitted that the prosecution had proved the case against the appellant beyond reasonable doubt; that, it was not in dispute that the appellant was an **Inspector of Police** attached to the **Banking Fraud Investigations Unit** and that he was the investigator in a case involving Geoffrey Mwangi Gichuhi (PW7) and Alex Warutere Gicheru (PW8) who had been arrested on 29th June 2006 on suspicion of having committed the offence of forgery.

15. In support of the above submission, Counsel for the respondent cited the case of ***Erastus Ndambuki Mutisya vs Republic [2006] eKLR*** where the court upheld a conviction for the offence of receiving even though the appellant had been acquitted on the charge of soliciting. Counsel contended that it was proved that the appellant received the bribe and that the prosecution discharged its burden of proof to the required standard.

16. On the issue of inconsistencies, Counsel asserted that there were none. To buttress this submission Counsel put reliance on the case of ***Philip Nzaka Watu vs Republic [2016]eKLR*** where the court held as follows:

> ***"However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena the same way. Indeed, as has been recognised in many decisions of this court, some inconsistency in evidence may, signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies in question"***

17. Counsel concluded by stating that on the date of the meeting at Home Park Caterers Restaurant, none of the anti-corruption officers had ill motive towards the appellant, that due process was followed in preparing the treated money that was to be handed to the appellant and that there was no contradiction regarding the manner in which the money was given to the appellant. As to whether the trial magistrate erred in convicting the Appellant for **"receiving" (Count 2)** after acquitting him of **"soliciting" (Count 1**) Counsel for the respondent contended that the trial court duly analysed both the prosecution and defence evidence before making its findings and that the court did not therefore violate the provisions of **Section 169 of the Criminal Procedure Code.** Counsel urged this court to dismiss the appeal for lack of merit.

Determination

18. This being the first appellate court it is obligated to reconsider and evaluate the evidence in the trial court so as to arrive at its own independent conclusion while keeping in mind that it did not hear and see the witnesses – (see the case of ***Okeno v Republic [1972] EA 72*** and the case of ***Mwangi V Republic [2004]2 KLR 28.)***

19. The issues that arise for determination in this case are:-

> ***a) Whether the conviction on the charge of receiving can properly stand given the acquittal on the charge of soliciting.***
>
> ***b) whether the charge of receiving was in any event proved beyond reasonable doubt.***

20. Briefly the facts of this case are that on 29th June 2007 the appellant, then an Inspector of Police attached to the Banking Fraud Investigations Unit visited a business known as Medal Lane Computer Services Ltd in Gill House and arrested Alex Warutere and Geoffrey Mwangi who were suspected of making a document without authority. It was the prosecution's case that the arrest culminated in the appellant requiring the relatives of the two suspects to pay a sum of Kshs.100,000/- so that he could forebear arraigning them in court and that the said sum was thereafter negotiated to Kshs.60,000/-. The court heard that a cousin of one of the suspects, one Maina, led the two relatives (Jackson Gichuhi and Charles Ngure) of the suspects to report the matter to the Kenya Anti-Corruption Authority, as it then was following which a sting operation was put in place to arrest the appellant. The court heard that the operation involved the use of treated cash and a recording of the appellant both on audio and video and that he was arrested when he followed Jackson Gichuhi (PW10) to a toilet at Home Park Caterers Restaurant to receive the money. Evidence was led that the appellant received the money but that on seeing the officers from the Kenya Anti-Corruption Authority, as it then was, he dropped the money on the floor. The Court was also told that the treated cash that had been given to Jackson Gichuhi and Charles Ngure was Kshs.40,000/-.

21. In his defence the appellant while admitting that he arrested the two suspects vehemently denied that he asked for or received any money so as not to take them to court. He stated that he had indeed been instructed by his supervisor to prepare a free bond for the two suspects and one James Wambua. He stated that thereafter he proceeded to Home Park Caterers for lunch and that as he was about to finish he was approached by two gentlemen who identified themselves as relatives of the suspects. He stated that the two gentlemen shook his hand and enquired about the investigations but he advised them to seek further assistance from the office and proceeded to the toilet and it was then that one of the gentlemen – Jackson Gichuhi – entered followed in quick succession by four other men. He stated that one of the men instructed Gichuhi to put "dawa" on his (appellant's) hands and a struggle ensued between them as Gichuhi struggled to put something in his (appellant's) hands as the officers ransacked his (appellant's) pockets. He stated that the officers only removed a bunch of keys and Kshs.1450 and as they were struggling the item Gichuhi was trying to put in his hands fell to the floor. He stated that an officer called Waihenya tried to unclench his hands after which they dragged him back to the hotel in a most undignified manner before taking him to their offices at the Integrity Center. He stated that he had intended to write the free bonds at about 4 p.m. so that the suspects could be set free and that they had already been released before the encounter at Home Park Caterers Restaurant took place. He contended that he had no power to detain or release a suspect. He however conceded that the encounter was captured on video.

22. On the issue that the appellant had no power to detain or release a suspect and hence had no reason to ask for a benefit, I fully agree with the learned trial magistrate's finding that based on **Section 50 of Anti-Corruption and Economic Crimes Act** it is not a defence that the act or omission was not within the appellant's power. I am however not in agreement with the trial magistrate's finding that this case is similar to that of ***Paul Mwangi Githongo Vs Republic [2015] eKLR*** because in that case the only issue in contention was whether the charge was defective for omitting to include the word "corruptly". The issue of whether an accused person could be properly convicted for the offence of corruptly receiving when he had been acquitted of the offence of "corruptly soliciting" which is the issue in contention in the instant case, did not arise. It is also worth noting that in that case **(Paul Mwangi Githongo Vs Republic, Supra)** the appellant admitted that he had asked for and received a sum of Ksh.1000 his only contention being that he had not done so corruptly. In that case as correctly stated by the trial magistrate the court observed that the two offences could be charged separately as both require ***"proof of additional facts separate from each other."*** That court was not however called upon to address the issue that arises in the instant case. This same issue however arose in the case of ***Paul Kipchumba Vs Republic [2013] eKLR*** and in the case of ***Patrick Munguti Munga Vs Republic [2013]***

eKLR and in both cases, the court emphatically held that the "appellant having been acquitted of the offence of corruptly soliciting for a benefit, then the offence of corruptly receiving a benefit could not stand." While I note that the decision of Ojwang J (as he then was) in the case of ***Erastus Ndambuki Mutisya Vs Republic [2008] eKLR*** was that ***"the fact that 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 am more persuaded by the decisions in the cases of **Paul Kipchumba and Patrick Munguti (supra**) as the same find support in the Court of Appeal case of **Peninah Kimuyu Vs Republic [2014] eKLR.** In that case the Court of Appeal was called to determine a case where the High Court had quashed the appellant's conviction on two counts of soliciting a benefit but had upheld the conviction and sentence on a charge of receiving a benefit. The court framed the issue as follows: -

> ***"This finding brings into sharp relief the point of law that we are called upon to determine and which finds expression in the appellant's memorandum of appeal in various formulations; can a person be convicted of an offence of receiving a benefit contrary to Section 39 (3) (c) of the Act if he gets acquitted of soliciting that very benefit. Put another way, can one be guilty of receiving if he did not solicit under the provision?"***

The court then held as follows:-

> ***"It seems quite clear to us that Section 39(3) of the Act does not at all create an offence of strict liability. There is no deeming of criminal culpability from the mere fact of receipt of a benefit, itself an often contentious issue as the facts of this case show. It cannot have been the intention of Parliament and it be surmised from a plain reading of the provision, that once it is shown that an accused person had some money on him, then he must have been bribed. Were that the case, nothing would be easier than for sums of money to be conveniently placed within the possession and control of persons who never demanded, solicited or knew about it and thereby secure their automatic conviction on charges of receiving bribes. ….***
>
> ***The receipt must be corrupt to be criminal. It is upon the prosecution to establish every element of the offence and for this particular one it must be shown that where a person did receive a benefit, he did so corruptly. <u>That is why the element of bribery has to be established and the way to go about it, where a person is charged with both a solicitation and receipt in a single transaction must be by a demonstration that what was received had been solicited or demanded and then given as an inducement for the doing or not doing of something in relation to the affairs of the accused person's Principal, in this case the Kenya Police. It must follow that if that essential connection is not made, (or it is merely alleged but not proved) between the receipt and a prior demand or solicitation, the element of corruption in the receipt remains unfulfilled and so there cannot be a valid conviction entered</u>. The situation would be different of course, where the receiving is not tied to the charge of solicitation which care other evidence of corruption in the receiving would suffice." (****Emphasis mine)*

The court then concluded by stating that the State Counsel had done well to concede the appeal and proceeded to allow the appeal, quash the conviction and set aside the sentence for the offence of receiving. It is my finding that the issue herein being similar to the one in the above case, the Trial Magistrate ought to have upheld the decision therein as it is a binding decision and that he erred in distinguishing it. On my part, I find that the circumstances of this case are the same as in the above case given that the receiving was closely related to the soliciting. Indeed it was the Magistrate's finding that the two counts were closely related. The holding in that case is therefore applicable to this case. I do also find that the provisions of **Section 58** of the Act cannot be properly imported into the offences in **Section 39(3)** and the prosecution was bound to prove beyond reasonable doubt that the appellant received the benefit corruptly.

23. It is my further finding that the fact of "***receiving"*** was not in any event proved beyond reasonable doubt. As correctly submitted by Counsel for the Appellant there was no direct eye witness to the events that took place when the appellant and Gichuhi (PW10) went into the toilet. There were also inconsistencies in the evidence of the witnesses as to the actual events but in the end the KACC officers were candid that they found the money on the floor. The appellant vehemently denied that he had taken any money from PW10 and contended that it was forcibly given to him when the KACC officers entered. He also gave an explanation for having the ink that was found on his hands. What we have here therefore is the prosecution's word against that of the appellant. It would have helped if the video taken by the officers showed the exact moment when it is alleged the appellant "took" the money from PW10 but it did not. In the absence of that evidence and given the inconsistencies in the evidence of the witnesses the benefit of doubt must be given to the appellant.

24. The upshot is that this appeal has merit. It is allowed and accordingly the conviction of the Appellant is quashed and the sentence is set aside. If still in custody, he shall be set at liberty forthwith unless otherwise lawfully held.

Signed, dated and delivered electronically this 18th day of November, 2021.

E. N. MAINA

JUDGE