



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI

ACEC CR. APPEAL NO. 19 OF 2018

GIDEON MAKORI ABERE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Introduction

1. Gideon Makori Abere herein referred to as the appellant together with one Pauline Wangechi Wanjau were on 19th May 2017 arraigned before the Chief Magistrate's court Nairobi vide Anti-Corruption Case No. 11/2017 facing various charges under the Bribery Act No. 41/2016.
2. Count 1, the appellant was charged with receiving a bribe contrary to Section 6 (1) (a) as read with Section 18 of the Bribery Act No. 47 of 2016. Particulars are that, on 23rd day of March 2017, along Ngong road within Nairobi City County being a person engaged by a public body to wit, National Police Service as a police corporal requested for a financial advantage of Kshs.3,000/= from Duncan Mwadima with intent that, in consequence, he would release his motor cycle registration No. KMDG 535 TVS Model 100 a matter related to the affairs of the said public body.
3. Count 2, the charge and particulars thereof are similar to count 1 save for the date of demand which is 24th March 2017. With regard to Count III, the appellant was jointly charged with Pauline Wangechi Wanjau with the offence of conspiracy to commit an offence of corruption contrary to Section 47 (a) (3) as read with Section 48 (1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. Particulars are that, on 24th March 2017 at Kilimani Police Station Nairobi City County, being persons employed by a public body to wit, National Police Service as a police Corporal and Police Woman Constable respectively, jointly and knowingly conspired to commit an offence of corruption by receiving a benefit of Kshs.3,000/= from Duncan Mwenda as an inducement so as to release his motor cycle registration No. KMDG 535 TVS Model 100, a matter relating to the affairs of the said public body.
4. Having entered a plea of not guilty, the case proceeded to full trial with the prosecution calling a total of six witnesses. At the close of the prosecution case, the applicant and his co-accused were put on their defence whereof they erected to give unsworn testimony with no witness to call.
5. On 19th October 2018, the court delivered its judgment and convicted the appellant of Counts I and II under Section 215 of the CPC. He was however acquitted of count III under the same provision. Consequently, he was sentenced to a fine of Kshs.50,000/= in default to serve one-year imprisonment for each count and sentences to run consecutively.
6. Aggrieved by the conviction and sentence thereof, the appellant filed what is referred to as a memorandum of appeal dated 25th October 2018 and filed on 2nd November 2018 citing nine grounds of appeal as follows:

(1) That the learned trial magistrate erred in law and fact by failing to find that the evidence adduced in court by the witnesses were contradicting and inconsistent.

(2) That the learned trial magistrate erred in law and fact by overlooking the fact that the evidence relied on was not watertight to justify a conviction.

(3) That the learned trial magistrate erred in law and fact in sentencing the appellant to 1 year imprisonment or fine of Kshs.50,000/= on each count which was excessive.

(4) That the learned trial magistrate erred in law and fact by convicting the applicant when the voice in the transcription was not identified by any of the witnesses.

(5) That the learned trial magistrate erred in law and fact by failing to consider the strong defence and submission by the appellant.

(6) That the learned trial magistrate erred in law and fact by relying in the insufficient evidence.

(7) That the learned trial magistrate erred in law and fact by convicting the appellant with the offence of receiving against the weight of evidence.

(8) That the learned trial magistrate erred in law and fact when the recording did not show the face of the appellant which raised doubt of identity.

(9) That the learned trial magistrate erred in law and fact by convicting the appellant when no duty roster and OB was produced to show exactly where the accused was assigned to work

Submissions by the Appellant

7. In support of the appeal, Mr. Mong'eri appearing for the appellant filed his submissions on 21st February 2019. Counsel collapsed the appeal into 8 issues. According to Mong'eri, the court convicted the appellant based on contradictory, inconsistent and insufficient evidence.

8. Counsel submitted that PW1 the key witness (complainant) admitted that he did not know the appellant before and that he did not identify his voice clearly. He further argued that there was no evidence electronic or otherwise tendered to prove that the appellant demanded for a bribe or received money from PW1 as a bribe. He further urged the court to find that from the video clip, there was no evidence of demanding for a bribe nor receiving any money. He contended that the video recording was not clear and none of the witnesses was able to identify the appellant's voice. To support this position counsel referred the court to the case of **Limbambula vs R 2003 KLR 683** where the court cautioned that evidence of voice identification must be taken with care.

9. It was counsel's submission that where voice identification is not clear, a trial court should not convict. To support this proposition, counsel referred the court to the case of **Patrick Munguti Nunga vs Republic Appeal No. 123/2011 (2013) eKLR** where the court held that the element of demanding a bribe is critical and prosecution must prove the same before a court can convict on the offence of receiving a bribe.

10. Regarding video recording transcription, Mr. Mong'eri submitted that the same was irregularly done in the absence of the complainant (PW1). Learned counsel further submitted that prosecution did not produce any duty roster to show that the appellant was on the material day working at the particular point where he allegedly demanded for a bribe. He wondered why the 2nd accused one Pauline who was allegedly found with the money (bribe) was not convicted of demanding a bribe nor was she convicted of count 3 for conspiracy. Regarding sentence, he urged the court that the same was excessive in the circumstances.

Submissions by the Prosecution

11. On the other hand, M/s Sigei prosecution counsel appearing for the respondent filed their submissions on 12th March 2019. Counsel basically submitted that prosecution had proved its case beyond reasonable doubt based on well corroborated and consistent tendered evidence. She urged the court to find that the appellant was positively identified by PW1 and through video recording and voice identification by PW2 as the person who demanded for and received the bribe. Touching on sentence, counsel opined that the same was legal and lawful and that it was not excessive.

12. This being a first appeal, this court is obligated to re-examine and re-evaluate the evidence tendered before the court and make its own independent findings and conclusion bearing in mind that the trial court had the advantage of seeing witnesses and assessing their general demeanour (**See Pandy vs R (1957) EA 336 and Okeno vs R (1972) EA 32**).

Evidence before the Lower Court

13. Brief facts of this case are that, on 23rd March 2017, PW1 the complainant was riding his motor cycle registration No. KMDG 535 along Ngong road within Nairobi area, when a traffic police officer in this case the appellant flagged him down claiming that he (PW1) had committed a traffic offence. That the appellant switched off the motor cycle engine and call for a breakdown to ferry the motor cycle to Kilimani Police Station. That he offered to give the officer 300/= for the release of the motor cycle but the officer refused and had the breakdown driver demand for Kshs.3000/= before they could release the motor cycle.

14. Realizing that he was not getting any help, he decided to call on EACC office who advised him to report to their office. At the EACC office he was attended to by an officer known as James Wachira(pw6) who told him to report back the following day.

15. On 24th March 2017, he went back to EACC offices where he was given audio and video recorders (MFI.1 and MFI.2 respectively) with instructions to go to Kilimani Police Station for a follow up. He was given Kshs 4500/= as trap money. On reaching Kilimani Police Station he did not find the appellant. He therefore decided to go to Ngong road where the appellant was said to be performing traffic duties. When he met the officer (appellant), he spoke to him over the release of the motor cycle. The appellant allegedly demanded for Kshs.3,000/= and Kshs.1,500/= for the breakdown. After recording his conversation with the appellant, he reported back to EACC who later accompanied him

to Kilimani Police Station.

16. At the station he went inside alone with a view to seeing one Ndolo to whom the appellant had allegedly referred him to deal with his case. Upon talking to Ndolo, he referred him to Pauline Wangechi (original 2nd accused person). Upon introducing himself to Pauline, she (Pauline) asked him for the money.

17. That after handing over Kshs.4500/=, Pauline gave him back Kshs.1,500/= to go and pay for the breakdown. He was then given a gate pass and the motor cycle was released. He confirmed that immediately he left the office, EACC officers bounced on Pauline and recovered the Kshs.3000/= he had given her. He was later called to EACC office where he was shown a video transcript (MFI7) and audio transcript (MFI8) which he signed. On cross examination, he confirmed that he did not know the appellant before and that the appellant had asked for money but did not specify how much. On re-examination he stated that the 1st accused (appellant) had not demanded for money but rather it was the breakdown man who said the motor cycle could not be released without Kshs.3000/=.

18. PW2 C.I.P. Francis Mulonzi the incharge traffic Kilimani Police Station then stated that on 9th June 2017, he was summoned by his OCPD who was in company of Mr. James Wachira (PW6) who wanted him to identify some people in a video clip which he had. That when the 1st clip was played, he could not identify the face of the person wearing the uniform but he only managed to identify the force tag No. as that of the appellant. He then signed an image recognition form (MFI12). When the second video clip was played, he was able to recognize some voices uttered as “**enda ulipe breakdown**” as those of Wangechi (original accused two) being one of his officers. He again signed a certificate of recognition.

19. PW3 one Karen Kiplagat an officer working with EACC confirmed that on 24th March 2017, she was in the office when her colleague James Wachira (PW6) gave her Kshs.4500/= which money was to be used in a trap operation. The money which was in notes of one thousand denomination and 1 note of 500 denomination was then photocopied and an inventory prepared (MFI5). She invited PW1 then present to confirm and both signed an inventory (MFI.6). She treated the money with APQ chemical and safely handed the same in a half khaki envelope to the complainant with clear instructions on how to hand it over to the person demanding the bribe.

20. PW4 Amos Yakaso, an investigator with EACC stated that, on 24th March 2017, he was in their office at Integrity Centre when pw6 requested him to accompany him to Kilimani Police Station for an operation. He (PW6), Abdi Hosman, Joseph Irungu and the complainant proceeded to Kilimani Police Station. On reaching the station, they remained at the gate as the complainant proceeded to the office. Later, at 4.30pm, the complainant rang his colleague. They then proceeded to the traffic office where the complainant pointed a lady (accused 2) as the person who had received the treated money. When they demanded for production of the money, the said lady drew a drawer and surrendered Kshs.3,000/=.

21. At the same time, his colleague Joseph Irungu appeared in company of a civilian known as Anthony the breakdown driver who had received Kshs.1500/= of the treated money. An inventory of the recovered money was prepared (Ex.14). He signed the same so is to the complainant, James Wachira and Hosman. They then arrested the lady (accused 2).

22. PW5 Lengo J. Kililo also an investigator with EACC who had accompanied PW1 and PW6 to Kilimani Police station for the trap operation corroborated the testimony of PW4. On cross examination, he stated that PW1 had informed them that the appellant had sent Pauline Wangechi (accused 2) to receive the money on his behalf.

23. PW6 James Wachira was the investigating officer in this case. He received the bribery complaint from PW1 on 23rd March 2017. He stated that PW1 informed him of a traffic police officer who had impounded his motor cycle for committing a traffic offence and that he wanted Kshs.3000/= in order to release the motor cycle. After recording the statement, he referred PW1 to report back the following day i.e. 24th March 2017 which he did. On 24th March 2017, he gave PW1 a video recorder (MFI.2) to go and record any conversation between him and the traffic officer (appellant) regarding the bribe demand.

24. That when PW1 returned the video back, he played it and confirmed that the appellant had indeed made a demand for Kshs.3,000/= to facilitate release of his motor cycle and Kshs.1500/= for the breakdown. He then requested PW4 to prepare trap money which she (PW4) did and then proceeded to Kilimani Police Station in company of Yakaso, Lengo and Abdi Osman to effect the arrest. He corroborated the testimony of PW4 in so far as the operation was conducted and the recovery of Kshs.3000/= from the 2nd accused and Kshs.1500/= from the breakdown driver. He also appended his signature on the inventory of the recovered treated money and arrested the second accused one Wangechi whom they later released on cash bail to appear later.

25. That on 30th March 2017 he summoned the appellant to his office where he recorded his statement and arrested him. He however released him on cash bail to appear in court.

26. He later prepared and forwarded the right hand and left hand swabs carried on accused 2, half khaki envelope containing the trap money, sample of APQ to the government chemist analyst for examination. He later received the results confirming the presence of APQ chemical on the swabs conducted on accused 2 (Ex. 19). He also prepared a transcript of the recorded conversation held on 24th March 2017 between the complainant and the appellant (Ex.17) as well as the one between the complainant and Wangechi (Ex.9). He also produced audio recorded conversation between the complainant and the appellant (Ex.10) and that of the complainant and accused 2 (Ex.11).

27. The officer went further to produce an inventory of the recovered Kshs.3000/= from PC Pauline (2nd accused) (Exh.11) and half Khaki envelope (Ex.19). He received letters from NPSC confirming that the appellant and his colleague Pauline were employees of NPCC (Ex.22 a and b respectively).

28. On cross examination, he stated that it was the breakdown driver who demanded for Kshs.3000/= on 23rd March 2017. He told the court

that they did get interested with the breakdown driver as they wanted to know whether he was sent by the police officers. He also confirmed that no money was recovered from the appellant.

29. On his defence, the appellant gave unsworn testimony. He confirmed that on the material date, he was assigned traffic duties along Ngong road. That at 11.30am a motor cycle registration No. KMDG 835R ridden by the complainant caused obstruction by making a wrong turn at the junction. As a consequence, he decided to charge the cyclist (PW1) with obstruction as he ordered for the motor cycle to be loaded into a breakdown to be ferried to the Kilimani Police Station.

30. He denied ever demanding for any money from the complainant. That he was shocked when his incharge informed him on 25th March 2017 to report to EACC as his colleague Pauline Wangechi had been arrested over a bribe demand made on 23rd March 2017 and 24th March 2017. He questioned the authenticity of the video clip played in court as nobody identified his voice nor was his face visible. He denied the allegation that he had conspired with his colleague to demand and receive a bribe from PW1.

31. On the 2nd accused's part, she also gave unsworn statement and denied the charges. She stated that on 24th March 2017 she was in her office at Kilimani Police Station when five men among them one Wachira approached her. That they pulled her drawer and ordered her to remove the money that was inside. She was then arrested and taken to EACC offices where she was searched and later released on cash bail of Kshs.30,000/= pending further investigation and subsequent arraignment before court on 19th May 2017.

Determination

32. I have considered the evidence before the trial court, grounds of appeal and submissions by both counsel. The appellant cited nine grounds of appeal but collapsed them into 8. I will further break them down as follows:

(a) Whether there was sufficient evidence to convict the appellant.

(b) Whether the court relied on contradictory and inconsistent evidence to convict the appellant.

(c) Whether the court properly convicted the appellant without proper voice identification and face recognition in the video clip.

(d) Whether the sentence was excessive in the circumstances.

33. The accused was convicted of counts I and II which are similar save for the different dates the offences were allegedly committed. He was charged with receiving a bribe contrary to Section 6(1) (a) as read with Section 18 of the Bribery Act No. 47/2016. Section 6(1) provides:

“A person commits the offence of receiving a bribe if – the person requests, agrees to receive or receives a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly whether by that person receiving the bribe or by another person”.

34. Section 7(1) defines what is construed to be a relevant function or activity to include a function of a public nature or any function carried out by a state officer or public officer pursuant to his or her duties. From the wording of the two provisions quoted, one can conveniently distil in summary the ingredients of the offence as firstly, one has to request, receive or agree to receive a financial or advantage, there must be the mensrea that by so receiving some function or activity should be improperly performed by that person or by somebody else and lastly the function must be of a public nature or of such a nature carried out by a public officer.

35. In the instant case, there is no doubt that the appellant was at the material time a public officer who by the time he was alleged to have requested for a benefit was performing a public duty.

36. However, what is in controversy is the allegation that the appellant demanded for a bribe from the complainant to forebear him from prosecution following the commission of a traffic offence. The appellant does not deny coming into contact with the complainant on the material day. He admits stopping him from causing obstruction by making a wrong turn.

37. Did the appellant ask for a bribe as an inducement not to charge the complainant which amounts to an improper act? In his evidence in chief, the complainant told the court that when he was stopped, the appellant took his ignition keys and when he asked him what he had done, the appellant responded as follows: “it is not a matter of **“umefanya nini”** **“it was a matter of money”**. **“I told him that I had 300/= with me which I had budgeted for”**. That when the breakdown driver started loading the motor cycle, he demanded to know why he was loading it and that it was the breakdown driver who told him that it could not be released without money.

38. In cross examination (at page 44 of the proceedings) he admitted that he did not report to EACC that the appellant had demanded for specific amount. He stated that it was the breakdown driver who asked for Kshs.3,000/= and not the appellant.

39. It is clear that nobody heard the appellant request for money from the complainant. The complainant himself confirmed on cross examination that the appellant did not specifically ask for a bribe. It would appear that the complainant assumed that the money the breakdown driver was demanding was a bribe on behalf of the appellant. Since there were two officers at the scene on the material day how will it be distinguished that the breakdown driver was demanding for payment of money on behalf of appellant?

40. Since it is admitted that the appellant never specifically demanded for a bribe, one cannot contextualise the statement that “it is not about

umefanya nini ama nini” it was a matter of money” to imply a demand for a bribe. It was an assumption by PW1 which alone cannot form a basis for a conviction.

41. The events of 23rd March 2017 are doubtful hence creating reasonable doubt as to whether the appellant did demand for a bribe. There is no evidence to corroborate the allegation by PW1 that the appellant did request for a bribe. The prosecution has an enormous duty to prove beyond a shadow of doubt that indeed the appellant did demand for a bribe on 23rd March 2017. This burden does not change and the same remains constant throughout the trial (See Peter Mwangi Kariuki vs R (2015) eKLR).

42. It was therefore a gross misdirection by the trial magistrate to have assumed that the money demanded by the breakdown driver was meant to be a bribe or a benefit requested by the appellant. Unfortunately, the breakdown driver was not called as a witness to shed light on whether the money he was allegedly demanding from pw1 was for ferrying the motor cycle or was requested by the appellant to ask for the bribe on his behalf.

43. In so far as the offence allegedly committed on the 23rd March 2015 was concerned, it is my finding that the prosecution did not prove their case beyond reasonable doubt. Having held as such, the appellant must be acquitted for count I hence the conviction thereof is quashed and the sentence set aside.

44. Did the appellant demand for a bribe on 24th March 2017? On the material day PW1 went on a follow up mission well fitted with an audio recorder by EACC with clear instructions to record every bit of conversation between him and the appellant. The objective was to confirm whether the demand for a bribe made the previous day was real. He was following on the release of his impounded motor cycle. When PW1 approached the appellant, the appellant asked him “wewe uko na ngapi?” According to the video transcript played in court the conversation on that day went as follows:

Makori (appellant): wewe unataka kutoa ngapi?

Duncan: Nitele ngapi? from sasa

Makori – wee umesikia ngapi?

Duncan: Niambie hii, mimi sina – najua tu.

Makori: Utaenda kortini kutengenezwa vizuri.

Duncan: Ehe

Makori: Kortini utanyoroshwa.

Makori: Toa miti tatu.

Duncan: Ngiri tatu? Mmm Nikuletee ngiri tatu tutamaliza hio story alafu

Makori: mmm wewe shilling tatu na shilingi 15?

Duncan: so nikileta 45 namaliza hiyo story niende na pikipiki.

Makori: Ehe.

Duncan: Na hakuna kwenda kortini.

45. From this conversation, the honourable magistrate was satisfied that there was a demand for Kshs.3,000. What does the word “miti tatu” stand for? For further understanding, one must contextualize the meaning of those words given the circumstances under which the conversation ensued. The word miti tatu was followed up with PW1 seeking clarification whether miti tatu meant ngiri tatu referring to three thousand in Kiswahili language commonly known as sheng to which I take judicial notice of. The appellant confirmed in the affirmative. I have no doubt, miti tatu could not have had any other meaning other than three thousand. What was the three thousand for? One can only imply that it was meant to forebear PW1 from prosecution having impounded his motor cycle which was already in the police station without any charges being preferred.

46. The appellant does not deny having impounded the PW1’s motor cycle. He however does not state whether he booked the motor cycle and recommended any prosecution. PW1 was not even given any notification to attend court.

47. From the video recording transcript (MFI.7) the appellant referred the complainant to his colleague one Ndolo in the office and that PW1 was to call him to confirm that he was okay. Indeed the complainant went to the office as directed and met Mr. Ndolo who further referred him to Pauline (accused two) who received Kshs.3,000/= and referred PW1 to a breakdown driver with the Kshs.1,500/=. Pauline was arrested with the trap money being Kshs.3000/= from her drawer which she admitted. She was charged but acquitted for lack of proof of conspiracy. Although it is not clear under what circumstances and for what purpose she was receiving the Kshs.4500/=, one can circumstantially connect the demand for Kshs.4500/= at the scene allegedly by the appellant and the money received by Pauline who was later acquitted.

48. According to Mong'eri, the voice in the video was not identified as that of the appellant. The officer in charge of Kilimani Police Station (PW2) was not in a position to identify or recognize the voice. The video was not clear. He could not identify the person wearing the uniform. He however identified the force number. What is the relationship between the wearer of a police uniform with a known force number with the voice in the video recorder? Unfortunately, the face of the person talking was not captured in the audio (video) recorder. The appellant disowned the voice in the video. Except for the complaint, nobody else could connect the person talking in the video with the appellant.

49. Considering that the appellant did not receive any money from the complainant, it is upon the prosecution to prove without the slightest doubt that the voice in the recorder was his. If the voice could not be recognized by people who ordinarily knew the appellant, how could the appellant who did not know him before identify it?

50. Where voice identification is in doubt, then there is no corroboration to the evidence of the complaint. In the case of **Iimbambuli vs R 2003 (Supra)**, the court when confronted with the evidence on voice identification had this to say:

“normally, evidence of voice identification is receivable and admissible in evidence and it can depending on the circumstances carry as much weight as visual identification. In receiving such evidence, it would be necessary to ensure that it was the accused person’s voice, the witness was familiar with it and recognized it and the conditions obtaining at the time it was made were such that there was no mistake to it that in which was said and who said it”.

51. Similar position was held in the case of **Patrick Munguti Nunga vs Republic (2013) eKLR Cr. Appeal No. 123/2011** where J. Ong’udi stated that the element of demanding a bribe is very material in such cases. It is not just about getting a recorder and calling the complainant to identify the voices and that such evidence must be admitted with great care.

52. Since it is not clear as to whose voice it was that was demanding for a bribe, and since there were no audio images showing the appellant demanding for a bribe, and while considering that he did not actually receive the bribe, it is obvious that the video recording did not help much to ascertain the real culprit.

53. Since the appellant has categorically stated that the voice was not his and people ordinarily conversant with his voice are unable to identify the same, the court is left with the evidence of PW1 alone which is not corroborated.

54. The image showing the force number of the officer near the complainant cannot automatically be assigned to the appellant as the person whose voice was captured. The complainant was not properly inducted on how to use the audio recorder. I have tried to listen to the video recorder; the same is not clear as the weather was windy. That is properly the reason why PW2 could not recognize the voice in the video tape.

55. Unfortunately, Pauline (PW2) gave unsworn evidence and could not explain the purpose for the money she received. The breakdown driver was not called to explain the Kshs.3000/= money he allegedly demanded fromPW1 was for what purpose. At least there was no proof that the appellant and Pauline (accused 2) had conspired to demand for a bribe. Infact Pauline had a bigger responsibility to explain why she received the money yet she did not issue any receipt if the money was official.

56. Offences relating to corruption attract grave consequences including loss of employment and even loss of future opportunities for employment. Reliance on uncorroborated evidence tainted with suspicion and doubt would be an affront to the well known principles of criminal law regarding the burden of proof and the responsibility of the prosecution to discharge the same.

57. In the instant case, I am persuaded by the appellant’s submissions that the prosecution did not discharge its burden of proof effectively to the satisfaction of the court that indeed there was a demand for a bribe either expressly or impliedly from the appellant.

58. It is my holding that the trial magistrate relied on uncorroborated evidence to convict the appellant on both counts. Consequently, the appeal herein is upheld and the conviction in respect of all counts quashed and the sentence imposed thereof set aside. The applicant shall follow the procedure laid down to seek for the refund of the fine already paid. Right of appeal 14 days.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF JULY, 2019.

J.N. ONYIEGO

JUDGE