



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 12 OF 2019

JOSEPH CHARO DZOMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in Criminal Case No. 1 of 2016 of the

Chief Magistrate's Court at Malindi – S.R. Wewa, PM)

CORAM: Hon. Justice R. Nyakundi

Appellant in person

Ms. Sombo for the state

JUDGMENT

This is an appeal against the conviction of the appellant for the offence of corruptly offering a benefit contrary to Section 39(3)(b) as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

As per the particulars of the offence, the appellant on the 10th January, 2016 at Matsangoni road block at Watamu along Mombasa-Malindi highway within Kilifi-County corruptly offered a bribe of Kshs.2,000 to police constable **Munyao** of Malindi police Station so as to secure release of **Dennis Odhiambo Sundia** who had been arrested for being in possession of 200 rolls of bhang. The trial court sentenced the appellant to a fine of Kshs.500,000 in default to serve eight years imprisonment.

Being aggrieved with the conviction and sentence the appellant filed this appeal on the following grounds:

- a) The learned trial magistrate erred in law and in fact by failing to consider the sentence was manifestly harsh and excessive in all the circumstances and in breach of Article 50(2)(p) of the Constitution.***
- b) That the learned trial magistrate erred in law and in facts by failing to adequately consider defence***

The circumstances narrated before the trial court can be summarized as follows.

PW1 – Nicholas Sudi of Kenya Defence Forces with John Kioko PW2, and **P.C. Joseph Munyao (PW3)** all attached to Malindi Police Station were on 10th January, 2016 on duty at Matsangoni Road block. In the course of execution of their duties PW1, PW2 and PW3 testified to the effect that a motor vehicle registration vehicle No. KSA 454J was flagged down for purposes of routine inspection. The passengers were ordered to alight from the vehicle together with their respective bags. According to PW1, PW2 and PW3 it followed that one bag remained unattended requiring them to interrogate the conductor to provide information on ownership. The bus conductor pointed at one of the passengers who boarded the vehicle at Mombasa. While he did so **PW1, PW2, and PW3** told the court that a quick interrogation was carried out against the accused to verify the information from the conductor of the vehicle. Thereafter PW1, PW2 and PW3 in the presence of the accused the bag where an identification card was retrieved bearing the name of **Dennis Odhiambo**. In the evidence of PW1, PW2 and PW3 the bag contained suspected rolls of bhang.

As the accused was under arrest he requested that permission be granted to place a telephone call to one Joseph, appellant in this case. On arrival, the appellant offered Kshs.2,000 to **PW3 – P.C. Munyao** as benefit for them not to indict the accused **Dennis Odhiambo** with the

offence of being in possession of bhang.

All the three witnesses identified the Kshs.2,000 denomination notes with the appellant offered to **P.C. Munyao (PW3)** for purposes of securing the release of one **Dennis Odhiambo**.

PW4 Cpl. Ezekiel Arodi of Anti-Narcotics Unit gave evidence that on instructions from the DCIO – Malindi he took over investigations of the case against one **Dennis Odhiambo**. That is when he came to learn that the appellant had also offered a bribe to PW3 in the presence of PW1 and PW2 who at the time were manning Matsangoni road block.

PW5 – Hellen Yeri – of Anti-Corruption Unit testified that on 14th December, 2016 she received a media device – CD for purposes of translation as to the contents from – Giriama language to Kiswahili. The CD device was listened to by the learned trial magistrate at the hearing the case.

PW6 – Abel Kibor of Kenya Defence Forces testified as the one now in charge team at Matsangoni Road block where PW1 and PW2 had been assigned patrol duties on 10th January, 2016. According to PW6 he was present at the time when one **Dennis Odhiambo** was arrested and the entry of the appellant to the scene offering Kshs.2,000 as a bribe to PW3. In the testimony of PW6 the appellant had been called by **Dennis Odhiambo** when they effected an arrest in connection with the rolls of bhang discovered in his bag.

PW7 – James Wachira of EACC Nairobi gave evidence as the investigating officer in respect of the bribery by the appellant to the **PW3 Munyao** who was one of the patrol officers at Matsangoni Road block. PW7 took possession of the exhibits being the Kshs.2,000 and CD device containing the conversation between the appellant and the police officers at the scene.

The appellant in his defence denied that he corruptly offered a bribe to **P.C. Munyao** as alleged by the prosecution witnesses. The appellant case was that his friend **Dennis Odhiambo** had called him on phone that he was under arrest and needed some Kshs.2,000. The appellant on proceeding to Matsangoni road block was called aside by one of the officers who informed him that the money requested is Kshs.20,000 but nevertheless took the Kshs.2,000 in his possession. In so doing, the appellant told the court that he was arrested of offering a bribe which he vehemently denied.

Dw2 – Dennis Odhiambo gave in evidence in support of the appellant defence. He testified that on 10th January, 2016 he was arrested at Matsangoni Road block for being suspected to be in possession of bhang discovered in one of the bags in the motor vehicle he boarded as a passenger. Thereafter DW2 told the court that police officers demanded Kshs.20,000 as a bribe which he did not have at the moment. According to DW2 it was the police officers suggestion that he tried to call a friend or someone to bring the money as a pre-condition release. That is how he telephoned the appellant who came to the Road block with Kshs.2,000 which later formed the basis of the charge of corruptly offering a bribe.

On appeal counsel for the respondent **Mr. Nyoro** filed written submissions challenging the merit of the appeal on both conviction and sentence. The appellant relied on the grounds of appeal supporting affidavit and submissions.

Analysis and Resolution

This is a first appeal. Both issues of fact and law are in issue to be considered and determined. The guidelines and principles on exercise of discretion by the first appellate court are now well settled as laid down in **Peters v Sunday Post 1958 EA 424**. The fundamental issue in this appeal is whether the case against the appellant was proved beyond reasonable doubt, that he referred a bribe to **PC Munyao**.

The Law

The charge as framed falls within the provisions of Section 48(1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 which provides as follows:

“That a person commits the offence of corruption if he or she does any of the following acts –

a) The solicitation or acceptances, directly or indirectly, by a public official of any goods of monetary value, or benefits, such as gift, favour, promise, advantage or any other form of gratification for himself or herself or for another person or entity in exchange for any act or omission in the performance of his or her public function.

In the case of Mwangi v R 2015 eKLR the court held as follows on the ingredients of the offence under Section 48(1) of ACECA

“The main ingredients of the offence of soliciting and receiving a bribe are that the accused must be acting in any capacity, whether in public or provision section, or reply and by or acts on behalf of another person, that he must be shown to have obtained or attempted to obtain from any person gratification other than legal remuneration, that the gratification should be as a motive or reward for doing or for bearing to do, in the exercise of his official function, favour or disfavor to any person. The grave man of the offence is acceptance of or the obtaining or even the attempt to obtain illegal gratification as a motive or reward for inducing a public servant for corrupt or illegal means. The receipt of gratification as a motive or reward will complete the offence. In order to constitute an offence three things are essential. In the first place, there must have been solicitation or offer or receipt of a gratification, such a gratification must have been asked for, offered or paid as a motive or reward for inducing by corrupt or illegal means, and secondly, that someone should be acting in the public or private or employed or acts for and on behalf of another person, or confer a favour or ask for a favour to render some service.

Section 38(1) of ACECA defines an offence as:

“A person who in any capacity and whether in the public or private sector is employed by or acts for on behalf of another person.

The same section defines a principal as:

“A person whether in the public or private sector who employs an agent or for whom or on whose behalf an agent acts.”

Blacks Law Dictionary defines bribery as:

“The offering, giving receiving or soliciting of any item of value to influence the actions of an official or other persons, in charge of a public or legal duty.”

Article 2 of the Criminal Law Convention on corruption defines active bribery as:

“The provisions, offering or giving any person, directly or indirectly of any undue advantage to any public official for himself or herself or for anyone else, for him, or her to act or refrain from action of in the exercise of his or her functions.”

See also Article 15 (UN Convention against corruption). The English court on the case of **R. Harvey 1999 CRIM LR 70 CA** had the opportunity of provocation itself on the issue of what constitutes corruption where it was held:

“That dishonesty was irrelevant and corruption was to be constructed as deliberately offering favours intending that they should operate on the mind of the offeree to encourage him to enter into a corrupt bargain.”

I now turn to the appeal against conviction. From the record, the appellant as identified by PW1, PW2, PW3, PW4 and PW5 whose I have given the summary herein about.

As far as the prosecution case is concerned the appellant was arrested at Matsangoni Road block for offering a bribe of Kshs.2,000 to **PW3 P.C. Munyao** so as to secure the release of one **Dennis Odhiambo**. However on appeal the appellant submitted that it was the police officers who were soliciting for a bribe while acting in concert with Kenya Defence Forces officers at the scene.

According to the appellant he argued that **Dennis Odhiambo** telephoned that he needed assistance because he was under arrest by the police officers on duty at Matsangoni Road block. The appellant said in his submissions that on arrival he was asked for Kshs.20,000 as a condition to have his friend released. It is clear from the judgement of the trial magistrate that she relied wholly on the prosecution witnesses PW1, PW2, PW3, PW4, PW5 and in addition the recording in CD device between the appellant and one **P.C. Munyao (PW3)**. In order to draw inferences and conclusions, I have no hesitation in reproducing the Swahili translation of the video clip transcript conversation between **P.C. Munyao (PW3), Chemboi** and the appellant:

“TRANSLATED VISUAL CLIP TRANSCRIPT CONVERSATION BETWEEN JOSEPH, MUNYAO AND CHEMBOI HELD ON 10TH JANUARY 2016 AT MATSANGONI ROAD BLOCK:

KEY:

MUNYAO: VOICE OF MUNYAO

JOSEPH: VOICE OF MUNYAO

CHEMBOI: VOICE OF CHEMBOI

..... UNCLEAR CONVERSATION

MUNYAO: Na huyo ni nani

JOSEPH: Ni mtoto wangu

MUNYAO: Ni mtoto wako, sis tuko pamoja, na nyinyi mko pamoja. Pesa iko wapi

JOSEPH: Nimekwambia yenye niko nayo mimi

MUNYAO: Uko na pesa ya kuongesea

JOSEPH: Wacha nipigie ule mama

MUNYAO: Hatutaki mambo ya kutumana tumalisane hapa hatutaki maneno

JOSEPH: Wee Mgiryama tuma shilingi elfu tano ama elfu kumi haraka haraka tuje tumsaidie huyu mwenye ameshikwa eeh fanya speed basi ama mpatieni mtu wa pikipiki azilete eeh nyanyake Baraka alinambia kuwa nafika njiani akaniambia kuwa huyu ameshikwa sasa nikawa sijui ninini ilikuwa inatakikana juu tulikuwa twatafutana lakini simu yake ilikuwa yakatakata ndio nikafikiria ameshikwa hapa kwenye askari na nikamuona hapo kwenye road block, fanyeni bidi basi chap chap elfu kimu ziwe zaimefika sababu mi nik na mbili. Ngojeni kidogo zinakuja. Si afadhali ukimbie huko kwa mamako ... fanya speed

Huyo Faru yuaja mfanyieni speed hatakama haitafika lakini mfanyie haraka tuondoke hapa gari ya wenyewe imeshikwa basi imesimama kwasababu ya huyu ni hivyo ndio nakwambia kile utakachopata wee fanya bidi mzigo tumepewa tayari na huyo mwenyewa

MUNYAO: Ni ngapi hiyo

JOSEPH: Ni mbili

CHEMBOI: Mupatie huyo hizo peza

MUNYAO: Ni ngapi hiyo pesa

CHEMBOI: Corruption ndiyo tuna kata”

Further to the answers in the transcript, it is evident from the testimony of **DW2 – Dennis Odhiambo** that were under arrest at Matsangoni Road block. The police officers demanded for a bribe of Kshs.20,000, which he did not have at that particular time. It turned out that the same police officers asked him to seek assistance from a friend or any third person. It would appear from the appellant testimony that is how he came to visit the scene of the arrest of his nephew at the Road block. The prompt to call the appellant came from the police officers and more specifically during seizure of the rolls of bhang allegedly from the bag stated to be that of **Dennis Odhiambo**. The testimony of **DW2** and the transcripts tendered in court show that **P.C. Munyao** initiated the initial process of soliciting for money from the appellant.

It's beyond peradventure that in the conversation there was reference to a suspect in custody of the police and **P.C. Munyao** was the lead officer in the transaction that ensued thereafter of a bribe of Kshs.2,000/=.

It emerged that between the arrest of **DW2** and coming to the scene of the appellant **P.C. Munyao** was trying to lure and coerce him into offering a bribe. The evidence of soliciting money by **PW3** is invariably clear from the transcript which I think was cogent evidence of the prosecution case.

I do not see, if this is so how the appellant was in breach of Section 48(1) of the ACECA. I have already examined the circumstances in respect of the arrest and a follow up telephone call by the suspect of bhang to the appellant. The advance solicitation came from the arresting officers at the road block. The particular payment which was initiated is not verifiable whether it was for purposes of bail. It is strange, that the prosecution witnesses picked the issue of money with **Dennis Odhiambo** and while he appeared not come through with the request, the prompt to seek assistance from a friend or a relative came from the police officers more specifically (**PW3**).

In the triangle of communication between the appellant, **PC Munyao** and a third person out there the purpose of the money and how it was to be accounted for is missing. It is strange that **PW3** continued insisting that appellant secures the money and total failure of it ended up arresting him for an offence of offering a bribe.

After examining the electronic device relating to the offence, its integrity to prove the offence beyond reasonable doubt is questionable. The manipulator of the entire bribery process was being formulated by (**PW3**) against the appellant.

In light of the above, the prosecution witness ignored the bedrock of the right of the initial suspect **Dennis Odhiambo** for the offence of bhang is anchored under Article 49 of the Constitution. All what **PC Munyao** and his team was required to do is to inform him of the offence, the right to silence and right to counsel, right to bail etc. Article 49 sets the procedure that where the police fail to release a suspect on bail, he is supposed to be arraigned before a trial court to process him or her normally as provided for under Criminal Procedure Code. When one analyses the communication between the appellant and **PC Munyao** it is apparent the money being solicited for was not cash bail to release the suspect.

In the instant appeal the evidence taken together, the trial Magistrate failed to follow through to adequately consider the discrepancies between different sources of evidence as against the description of the charge, she will have created a reasonable doubt as to the appellant guilt.

In my view the Judgment was based on a wrongfully decided question of fact and Law and the same occasioned prejudice and an injustice to the appellant. In the premises, the prosecution did not prove its case against the appellant beyond reasonable doubt at the trial court.

Accordingly, the appeal is allowed, conviction and sentence quashed. The appellant is at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF DECEMBER 2019.

.....

R. NYAKUNDI

JUDGE