



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC CRIMINAL APPEAL NO. 02 OF 2017

MARY MORAA ANGWENYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from conviction and sentence in Milimani Chief Magistrate's Court in Criminal Case No. 533 of 2013 delivered by E. Obaga, Senior Principal Magistrate on 21st February, 2011)

JUDGMENT

1. *Mary Moraa Angwenyi* the appellant was charged and convicted before the Nairobi Chief Magistrate's Court for the following offences;

C1: Corruptly soliciting for a benefit contrary to Section 39 (3) (a) as read with Section 48 (1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003

Particulars being that the appellant on the 6th day of April, 2010 at City Hall in Nairobi, within Nairobi Area, being a person employed by a public body to wit, City Council of Nairobi as a Clerical Officer attached to department of Public Health, corruptly solicited for a benefit of Kshs.2,000/= from Tom Mboya Ogada, as an inducement so as to facilitate the processing of a death certificate in respect of George Otieno Ogada deceased, brother of the said Tom Mboya Ogada, a matter in which the said public body was concerned.

C2: Corruptly soliciting for a benefit contrary to Section 39 (3) (a) as read with Section 48 (1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003

Particulars being that the appellant on the 19th day of May, 2010 at City Hall in Nairobi, within Nairobi Area, being a person employed by a public body to wit, City Council of Nairobi as a Clerical Officer attached to department of Public Health, corruptly solicited for a benefit of Kshs.2,000/= from Tom Mboya Ogada, as an inducement so as to facilitate the processing of a death certificate in respect of George Otieno Ogada deceased, brother of the said Tom Mboya Ogada, a matter in which the said public body was concerned.

C3: Corruptly receiving for a benefit contrary to Section 39 (3) (a) as read with Section 48 (1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003

Particulars being that the appellant on the 19th day of May, 2010 at City Hall in Nairobi, within Nairobi Area, being a person employed by a public body to wit, City Council of Nairobi as a Clerical Officer attached to department of Public Health, corruptly received a benefit of Kshs.2,000/= from Tom Mboya Ogada, as an inducement so as to facilitate the processing of a death certificate in respect of George Otieno Ogada deceased, brother of the said Tom Mboya Ogada, a matter in which the said public body was concerned.

2. Upon conviction she was fined Kshs.30,000/= in default six (6) months imprisonment on each count. She was fined a further Kshs.4,000/=, in default three (3) months imprisonment in accordance with Section 48 (2) (9) of the Anti-Corruption and Economic Crimes Act (ACECA).

3. A summary of the prosecution case is that **PW1 Tom Mboya Ogada** a businessman in Nairobi went to Sheria House on 29th March, 2010 at 9am to apply for a death certificate in respect of his late brother, **George Otieno Ogada**. The application could not be processed due to lack of a notification of death from Metropolitan Hospital, Buru Buru where the death occurred. He was referred to Nairobi City Hall where such notifications are sent.

4. At City Hall on 2nd floor, he presented his forms to a person at the counter who after checking referred him to the cash office where he paid shs.200/= and was issued with a receipt. He was referred to 3rd floor room 321 which is accessed through room 322 where he found a

lady and gave her the forms.

5. The lady asked him to come within a week for the notification of death. She wrote his name and telephone number at the back of the forms and further, gave her name as Mary Angwenyi. He returned to the said office on 6th April, 2010 and found the same lady in the office and she told him the documents were not ready. He demanded for his forms and it was at that point that she asked him to wait a bit at the visitors' bench. After going through the records, she pulled out a bundle of documents and called him from where he was seated.

6. She informed him that she had found the death notification and even showed it to him. When he asked her to give him the document to take to Sheria House, she told him, he needed to part with Kshs.2,000/= for processing. He told her it was okay and he left the office.

7. On 19th May, 2010 PW1 received a call from an unidentified number and when he asked who it was, the caller said she was Mary Angwenyi of City Hall. She asked why he had been away for too long yet his documents were ready. He asked her to wait for him there. He went later in the day though he did not have the money. He decided to approach a senior officer to intervene for him to get the documents from the appellant without having to bribe.

8. He finally met a **Mr. Maseti** and explained his predicament to him requesting him to ask the appellant for the documents. Mr. Maseti refused to do that and instead called officers from the Anti-Corruption Commission. Those who came were **Guyo Samiji** and **Mr. Nyagara** and they went with him to Integrity Centre.

9. At the centre, he was given a tape recorder (**Exhibit 1**) and a microphone (**Exhibit 2**) and trained by Mr. Nyagara on how to use it. **Sophia** showed him Kshs.2000/= (**Exhibit 3 and 4**) with their photocopies (**Exhibit 5**) of which he signed. The two Kshs.1,000/= notes were placed in half Khaki envelope (**Exhibit 7**) and he was advised not to touch the money until it was handed over the appellant at City Hall. The tape recorder (Exhibit 1) had a mini tape (**Exhibit 6**). He was also taught how to operate the tape recorder. He signed an inventory of the money (**Exhibit 8**).

10. They left for City Hall and went to the appellant's office on 3rd floor. They conversed and she asked him whether he had the message and he answered in the affirmative. She went through some documents and fished out a death certificate in respect of the late George Otieno Ogada, his brother (**Exhibit 9**). She took the appellant aside and gave her Kshs.2000/= which she received and confirmed. She in turn gave him the death certificate (Exhibit 9). It was then that he signaled the anti-corruption officers to come.

11. They came and the appellant sensing danger threw down the Kshs.2000/= on a heap of files. Her seniors were called and they witnessed the recovery and an inventory (**Exhibit 10**) was prepared and those present signed it. They went to Mr. Ngeno's office where the recording was played. He identified the police abstract his brother was using before his demise (**Exhibit 11**) and the transcript of his conversation with the appellant (**Exhibit 12**).

12. The recording was played in open court and the court issued a certificate to the effect that it was played in a Sony Radio which was in a good working condition. He also indicated that the conversation is mainly in Swahili with few English words. He identified the appellant as the lady called Mary who had demanded for Kshs.2000/= from him.

13. **PW3 William Cheruiyot Ngeno** was the Registrar of births and deaths within Nairobi and was based at City Council of Nairobi, City Hall 3rd floor room 324 which was in fact the Registry. On 19th May 2010 at 2.40 pm, he was called from room 319 by Mr. Opao a staff and led to room 324 where he found the appellant with anti-corruption officers who told him the appellant had received Kshs.2000/= to release a death certificate. He saw her remove two notes in one thousand denomination from behind some files he was holding. The place where the money was removed from and the appellant's hands were swabbed.

14. His boss (**PW2 Peter Wamae Wanjohi**) was called and together they compared the recovered notes and the photocopies the officers had. The tape was played in PW2's room which was room 322. He recognized the appellant's voice only, as she was a colleague and they had talked on phone severally. **PW6 George Okwach Opao** gave similar evidence as to the recovery of the money.

15. **PW4 Catherine Serah Murambi** the Government Analyst confirmed that contents of the controlled sample of the APQ powder were traced in the swab of Kshs.2,000/=, right and left hand swabs of the appellant; half cut khaki envelope, swab of the shelf where the money was recovered.

16. **PW5 Charles Samiji**, **PW7 No. 79364 Cpl. Sophia Nyambu**, **PW8 No. 75984 PC Guyo** and **PW9 No. 231545 Inspector John Otieno Nyagara** are investigators who were attached to KACC then. They were involved in the investigations and they have given similar evidence to that of PW1 on what took place on this date and the appellant was arrested after recovery of the treated money.

17. When placed on her defence, the appellant gave a sworn statement. She said she is a clerical officer with the Nairobi City Council, attached to the registry of births and deaths housed on 3rd floor, City Hall Building. She used to sit in room 324 accessed through room 326.

She testified that while in the office, PW1 came with a burial permit and wanted a number. She was unable to get it for him and asked him to return after a week.

18. He returned on 19th May 2010 and she was able to trace the record through another office. He insisted that she had to assist him and she sent someone to pay for the death certificate which was prepared. PW1 called her on her phone to ask if he could send her money but she refused and asked him to come for the death certificate.

19. When he came, she gave him the death certificate and told him "God bless you". He then returned with a police officer, saying he had dropped some money. She looked for it and saw some two notes which had been folded. She picked it, spread it and asked him if it was what

he was looking for.

20. While showing him the money, a police officer bounced on her and started swabbing her palms. She had asked “*God to bless*” PW1, because he had appreciated her efforts in assisting him. She denied the charges against her but admitted having paid Kshs.50/= for PW1’s death certificate.

21. Both counsels agreed to file written submissions. When the appeal came for hearing, **Mr. Nyaberi** for the appellant submitted that there was failure to comply with mandatory provisions of the law before the appellant was charged. These were Section 35 (1) and 22 of the ACECA. It was his submission that there had to be consent before the appellant was charged which was not the case. He referred to the case of **Patrick Nanguti Nunga [2011] eKLR**.

22. He further submitted that the charges in **C2** and **C3** were defective for duplicity as they related to the same date. Counsel contended that the learned trial magistrate in his judgment at page 8 line 6 shows he had a doubt in his mind. This doubt should have gone to the benefit of the appellant. He said there was no material evidence to support the charge. He raised issue with the language used by the court which the appellant did not understand.

23. It was his contention that the evidence adduced including the transcript, recording did not link the appellant to the charges. Counsel said there were two certificates issued by the learned trial magistrate, yet there was only one recording (Exhibit 1 and 6). Further that the trial court did not appreciate the evidence and exhibits before him. That it was not clear in which room the incident took place. PW2 talked of room 321 and 322, while PW3 said it was room 324 and PW6 said it was room 322 and 328.

24. He finally submitted that the appellant’s defence was never considered by the trial court.

25. **Mrs. Aluda** for the respondent opposed the appeal. She said the appellant was a clerk with the Department of Public Health City Council of Nairobi. The issue of language barrier could not therefore arise. She added that Mr. Nyaberi represented the appellant in the lower court. Counsel submitted that PW1 sought the help of the appellant’s seniors who referred him to the EACC. The EACC acted on the report and a conversation was captured on 19th May 2017. PW2 – PW7 identified the appellant’s voice in the conversation which was not denied by the appellant. The transcript was produced as Exhibit 12.

26. She further submitted that the recordings were on different dates hence the two certificates. She said there was proof that the appellant received the money. This was through the evidence of the Government Analyst and the appellant herself. It was her submission that the prosecution proved its case as there were no material contradictions.

27. On the issue of Section 35 (1) of ACECA, she submitted that there was compliance as the Attorney General issued a letter on 1st October, 2010 which was produced in court. She also contended that the report under Section 35 (1) ACECA is not part of the evidence to be tendered in court.

28. She argued that tape recordings are an aid to already adduced evidence. She referred to the case of **Elizabeth Chelangat –vs- Republic [2011] eKLR** to support that submission.

29. In a rejoinder, Mr. Nyaberi argued that it was the appellant who was on trial and not himself, as her counsel. He said, no letter of consent was produced in court. In reference to the case of Elizabeth Chelangat, he said the case should be looked at in its entirety.

30. This is a first appeal and this court has a duty to re-evaluate and reconsider the evidence afresh to arrive at its own conclusion. It should also bear in mind that unlike the trial court, it did not see nor hear the witnesses.

In the case of **Mwangi –vs- Republic [2004] 2 KLR 28**, the Court of Appeal stated thus;

1. An appellant on a first appeal is entitled to expert the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellant court’s own decision on the evidence.

2. The first appellant court must itself weigh the conflicting evidence and draw its own conclusion.

3. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusion; it must make its own finding and draw its own conclusion. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witness.”

31. I have considered the evidence on record, the grounds of appeal and the submissions plus authorities. I find the issues falling for determination to be;

- (i) Whether the appellant understood the language of the court;
- (ii) Whether consent was to be obtained under Section 22 and 35 (1) ACECA before the appellant was charged;
- (iii) Whether the charges were defective; and
- (iv) Whether the charges were proved to the required standard.

Issue No. (i) Whether the appellant understood the language of the court;

32. The prosecution called a total of nine (9) witnesses. Out of these witnesses, only PW1 and PW6 testified in Kiswahili language, the rest gave their evidence in English. The appellant also testified in Kiswahili language. The record does not indicate if there was any interpretation but it shows the presence of a clerk at every hearing.

33. There is no dispute that the appellant was represented by none other than Mr. Nyaberi. It is true that it is the appellant and not counsel who was on trial. As counsel representing the appellant then and above all as an officer of the court, he could not keep quiet if indeed the appellant was not understanding the language used by the witnesses.

34. Finally, in her defence, the appellant testified that she is a clerical officer attached to the registry of births and deaths at City Hall. She did not at any point state that she was a subordinate staff acting as a clerk, as submitted by Mr. Nyaberi. She did not state anywhere in her defence that she was unable to follow proceedings due to lack of interpretation.

35. My finding is that the appellant being a clerk is presumed to understand English/Kiswahili. Furthermore, if there was any challenge, nothing stopped her counsel from raising the issue before the trial court.

Issue No. (ii) Whether consent was to be obtained under Section 22 and 35 (1) ACECA before the appellant was charged;

36. Mr. Nyaberi has submitted that consent had not been obtained as required under Section 22 and Section 35 of the ACECA. Section 22 of ACECA provides;

“(1) The business and affairs of the Advisory Board shall be conducted in accordance with the Third Schedule.

(2) Except as provided in the Third Schedule, the Advisory Board may regulate its own procedure.

(3) Seven nominated members of the Advisory Board shall constitute a quorum for the transaction of any business of the Board.

(4) The Advisory Board may invite any person to attend any of its meetings and to participate in its deliberations, but such an invitee shall not have a vote in any decision of the Board.”

Section 35 (1) of ACECA provides;

“(1) Following an investigation the Commission shall report to the Director of Public Prosecutions on the results of the investigation.”

37. None of these two sections provides for a mandatory issuance of consent by the Attorney General or DPP before anyone who has committed an offence under the Act is charged.

Furthermore, the report and recommendation that are to be forwarded by the EACC to the DPP are not binding on him. He has to independently evaluate the evidence in the file presented to him and act accordingly under Article 157 (10) of the Constitution which provides;

“(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

38. The Director of Public Prosecution under Article 157 (6) may;

“(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

39. The repealed Prevention of Corruption Act under Section 12 made provision for a mandatory consent from the Attorney General before one could be charged. The consent was to enable the police to proceed to charge the suspects. Section 35 of the ACECA has no such requirement. There was therefore no such consent produced before the trial court as it did not exist.

40. If the appellant had wanted to be provided with the report under Section 35 ACECA or confirm its existence, she should have raised that issue with the trial court but did not. I entirely agree with the expressions of my brothers *Ngaah and Mativo JJ.*, in the cases of *Stephen Mburu Ndiba –vs- Ethics and Anti-Corruption Commission and Another [2015]* and *Michael Waweru Ndegwa –vs- Republic [2016]* respectively on the issue of consent under Section 35 of ACECA.

41. I find that there was no mandatory requirement for production of a consent under Section 35 of ACECA. Section 22 ACECA cited by Mr. Nyaberi has no bearing in this matter.

Issue No. (iii) Whether the charges were defective;

42. It was Mr. Nyaberi's submission that because all the three counts facing the appellant were brought under Section 39 (3) (a) as read with Section 48 (1) they were defective for duplicity. He particularly singled out Count 2 and Count 3 which were allegedly committed on the same day i.e. 19th May, 2010. Soliciting for and receiving a bribe are two distinct offences. One may commit any one of the offences in Section 39 (3) (a) ACECA or both of them, but separately. It's however clear that soliciting leads to receiving.

43. Furthermore, counsel who also appeared for the appellant in lower court did not challenge it there. I find no defect in the charges as presented as they are distinct offences.

Issue No. (iv) Whether the charges were proved to the required standard.

44. The appellant faced two counts of soliciting for a benefit on 6th April, 2010 and 19th May 2010. The benefit was for purposes of facilitating the processing of a death certificate in respect of PW1's deceased brother.

45. It is PW1's evidence that on 6th April, 2010 and after having an encounter with the appellant, the latter as a parting shot told him at page 14 lines 16 – 19, where he states;

“She then told me that in order to process the document, I was required to part with Kshs.2000/= to facilitate processing of documents. I told her that was okay with me. I left the office.”

46. The 2nd instant of soliciting was on 19th May, 2010. PW1 received a call from the appellant and went to City Hall. As at that point, the appellant had not asked him for money. Instead of going to her, he went round looking for a senior person who could talk to her to give him the documents without having to pay a bribe. When word reached the seniors of the appellant, the anti-corruption officers were called in and they came.

47. After reporting at the Integrity Centre and having been fitted with the recording gadgets, PW1 said he went to the appellant's office when after greetings, she asked him if he had the message. He confirmed to her that he had it.

48. I have read through the transcript of the recorded conversation between PW1 and the appellant, (Exhibit 6). I find no mention of the word “message” or two thousand shillings (Kshs.2000/=) at the beginning of the conversation.

49. The word (two thousand) only appears at the end of the conversation as follows;

Ogada: Sasa ulisema hiyo ni two, ndiyo hiyo.

Mary: Ni two thousand.

Ogada: Ni sawa?

Mary: Mm, na wewe ubarikiwe.

Ogada: Haya

The conversation before these utterances nowhere refers to the two thousand shillings, request or demand.

50. What then is soliciting for a bribe?

Black's Law Dictionary 9th Edition at page 1520 defines it as follows;

“The crime of asking or enticing another to commit bribery.”

51. In her telephone call to PW1, the latter does not allege anywhere that the former asked him for money let alone the Kshs.2,000/= so even when PW1 reported the appellant to her seniors, she relied on their chat on 6th April, 2010 and not a recent one. Did the conversation of 6th April, 2010 still hold as at 19th May, 2010 when PW1 was making a complaint to the appellant's seniors and later to EACC?

52. He did all this before speaking to the appellant on the said date. He did not say the appellant made any demand for money when she called him on 19th May, 2010. Even Mr. Materi who called the EACC officers did not testify in this case.

53. Going back to C1, was any demand made to PW1 on 6th April, 2010? According to PW1, it was made. I have already cited hereinabove what he stated in his evidence. It is noted that on this particular day, he did not complain to anybody, neither did he report until he was called by PW1, one a half months later. He was told the documents were ready for collection and he went. No demand was made in the call.

54. There is nothing besides his testimony that indeed the appellant asked him for a benefit on 6th April, 2010. Section 124 of the Evidence Act provides;

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.”

55. There is no evidence to corroborate PW1’s story of 6th April, 2010 on the issue of demand. My finding is that the offence of soliciting on both C1 and C2 was not proved to the required standard.

56. Coming to the 3rd count, Mr. Nyaberi submitted that the actual scene of incident was not known, as the witnesses mentioned several rooms. PW1 was a stranger in that place. PW2, PW3 and PW6 explained clearly the geography of the offices. From their evidence, the scene of incident was at room 324. It was also established that the appellant is an employee of a public body and hence subject to the ACECA.

57. There is no dispute that the appellant came into contact with the treated money produced here as Exhibit 3 and 4. The swabs taken from her left and right hand (Exhibit 14 and 15) and the shelf from where the money was recovered from (Exhibit 16) confirmed the presence of the APQ powder. This confirmed that the appellant had held that money with her hands and placed it on the shelf.

58. In her defence, she told the court that she touched the money as she picked it from the ground for PW1 who had said he had dropped the money. Had this been the position, PW1 would have been asked about it in cross-examination. Nothing of the sort was put across to him in cross examination.

59. **PW3 William Cheruiyot Ngeno** and **PW6 George Okwach Opao** said they witnessed the appellant produce Kshs.2,000/= from PW3’s table behind some files. It is therefore not true that she picked money that had been dropped down by PW1. This money was actually given to PW1. The issue is what the money was for.

60. PW1’s conduct is quite telling. When he spoke with the appellant on phone on 19th May, 201, she never asked him for money. Following the telephone call, he came to City Hall as he had promised her on phone. Instead of going to see the appellant, he went to seek help from her seniors. Why did he do that before talking to her?

As I have already found, there was no evidence of a demand having been made by the appellant on 6th April, 2010 and 19th May, 2010. Besides PW1’s verbal claims, the recorded conversation did not support him so, why was PW1 bringing treated money to the appellant? The EACC officers should not have given PW1 treated money before being satisfied that the demand for a bribe had been made.

62. I read some malice in the conduct of PW1 on 19th May, 2010. Even as he made his reports to the appellant’s seniors and EACC, he had not met with the appellant that day. He had last seen her on 6th April, 2010 which was about six (6) weeks after the said date.

63. He went to the appellant while armed with a recorder and treated money just to get her into problems for reasons best known to him. I also note that he had only paid for a notification of death and not the death certificate. However, when he went, he found the death certificate ready. This is a case where the truth and sincerity of PW1’s actions are in doubt.

64. PW1 may have had his own reasons for getting treated money in order to fix the appellant for reasons best known to him. I am not therefore satisfied that the appellant asked for this money that was brought to her. She will benefit from that doubt. The appeal has merit and it is allowed.

65. The convictions on the three (3) counts are quashed and the corresponding sentences including the sentence under Section 48 (2) (a) of the ACECA are set aside.

Any fines paid to be refunded forthwith.

Orders accordingly.

Delivered, signed and dated this 16th day of May 2018 at Nairobi.

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HEDWIG I. ONG’UDI

HIGH COURT JUDGE