



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI LAW COURTS

ANTI-CORRUPTION APPEAL NO. 11 OF 2016

BEATRICE W. MUITAAPPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

1. Beatrice W. Muita hereinafter referred to as the Appellant was charged with the following offences;

Count I: 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

The particulars being that the Appellant on 18th day of July, 2013 at the Nairobi Area Traffic Headquarters in Nairobi County, being a person employed by a public body namely National Police Service as a Traffic Police Officer, corruptly solicited for a benefit of Kshs.500/- from Peter Oduor, as an inducement so as to facilitate the signing of Kenya Revenue Authority Form XVI, by an authorized police officer, a form that was necessary for application of a Public Service Vehicle driver's licence, a matter relating to the affairs of the said public body.

Count II: 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.

The particulars being that on the 19th day of July, 2013 at the Nairobi Area Traffic Headquarters in Nairobi County, being a person employed by a public body namely, National Police Service as a Traffic Police Officer, corruptly solicited for a benefit of Kshs.500/- from Peter Oduor, as an inducement so as to facilitate the signing of Kenya Revenue Authority Form XVI, by authorized police officer, a form that was necessary for application of a Public Service Vehicle driver's licence, a matter relating to the affairs of the said public body.

Count III: Corruptly receiving 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.

The particulars being that on the 19th day of July, 2013 at the Nairobi Area Traffic Headquarters in Nairobi County, being a person employed by a public body namely, National Police Service as a Traffic Police Officer, corruptly solicited for a benefit of Kshs.500/- from Peter Oduor, as an inducement so as to facilitate the signing of Kenya Revenue Authority Form XVI, by authorized police officer, a form that was necessary for application of a Public Service Vehicle driver's licence, a matter relating to the affairs of the said public body.

2. The matter proceeded to full trial and she was acquitted of the offence in Count 1 under Section 210 of Criminal Procedure Code and further acquitted of the office in Count 3 under Section 215 Criminal Procedure Code. She was, however, convicted of the offence in Count 2 and fined Kshs.20,000/=, in default, six (6) months imprisonment.

3. She has filed this appeal against both conviction and sentence in Count 2 citing the following grounds;

- 1. The Learned Magistrate erred in law and in fact in not finding that the Prosecution witnesses contradicted each other and further failed to connect the offence to the applicant.*
- 2. The Learned Magistrate erred in law and in fact in finding the Appellant guilty of Count II of CORRUPTLY SOLICITING FOR A BENEFIT CONTRARY TO SECTION 48 (1) OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT NO. 3 OF 2003 and convicting her when there was no evidence supporting the same.*
- 3. The Learned Magistrate erred in law and fact in failing to sufficiently appreciate that the complainant's evidence does not disclose an offence against the Appellant and the entire Prosecution's case fails to meet the standards of proof required in criminal cases and conviction of, "Beyond reasonable doubt".*
- 4. The Learned Magistrate erred in law and 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.*
- 5. The Learned Magistrate erred in law and fact in ignoring the Appellant's sworn statement given in her defence.*
- 6. The Learned Magistrate erred in law and fact in convicting the Appellant of the offence of soliciting, when the Prosecution had failed to prove that the Appellant's conduct was explicit and unequivocal.*
- 7. The Learned Magistrate erred in law and fact by making conclusion that are not supported by the evidence on record.*
- 8. The Learned Magistrate erred in law and in fact by shifting the burden of proof to the accused to prove her case when the same was legally and purely and duty of the Prosecution.*

4. The case presented to the Court was that **PW1, Peter Oduor Onganyo**, a driver went to Nairobi area Traffic offices on 18th July, 2013 in search of a Public Service Vehicle (PSV) licence. He went to the PSV customer desk for the application form. He met a female officer who directed him where to get the form. He got the form, paid Kshs.100/= for it, filled and signed it. He then joined the queue and thereafter handed in his application plus the necessary documents. The officer serving them told him, his certificate of good conduct had expired. His certificate had been issued on 7th August, 2012. The said certificate, copy of ID, official receipt and finger prints were produced as (**Exhibit 2**).

5. The same officer sent him to the man who had issued him with the PSV application form. He checked and told him his certificate of good conduct was still valid and he sent him back to the lady officer. He returned to the lady at the customer care desk and reported what the man had said. She looked at the documents again and asked him for Kshs.500/= to facilitate the signing of the form by her boss. He had to pay another Kshs.100/= for which he would be issued with a receipt. He asked if there was a receipt for the money (Kshs.100/=) and she answered in the negative.

6. He did not pay the money but left and went to the EACC offices to report the matter. He was referred to **PW7, Sophie Nyambura**, who advised him to return the next day which he did. PW7 informed him of the need to verify his allegation. For this to be confirmed, he had to go back to Nairobi Area Traffic offices to start the process again. He was therefore introduced to a recording device (Exhibit 3) which he

was to use to record his conversation with the person at the traffic offices. He was shown how to operate it. He signed a certificate to that effect (Exhibit 4).

7. He left for Nairobi Area Traffic Offices and was there at 11 am and switched on the device and went straight to the customer care desk and found the same lady of the previous day. He handed her his documents and she told him his certificate of good conduct had expired. He asked her how she could help him. She demanded for Kshs.500/= and Kshs.100/= for an official receipt. He asked again if there is any other way to be assisted and he was told “No”. He told her he did not have it, but promised to go and get the money. He then went back and gave the recording to PW7 who played it in his presence and that of Samiji. The demand was confirmed.

8. PW5, Francis Kamwara, was instructed to get trap money for PW1. He was given one note of Kshs.1,000/= Serial No. DM2613567 and another of shs.100 serial no. EJ 8120704 (cash Exhibit). Photocopies of the notes were taken and he signed on the photocopies (Exhibit 5). After treatment, the money was stashed in a khaki envelop (Exhibit 7) and given to him and he signed for it. He left for Nairobi Area Traffic offices with the officers. He found the lady at the customer care desk and she told him that her boss who signs the KRA forms was out for lunch. She requested him to come back at 2 pm with what they had agreed.

9. He went back at 1.50 pm and joined the queue. When his turn reached, the lady asked him for Kshs.600/= and he gave her the Kshs.1000/= note and she gave him a charge of Kshs.400/=. She took the form to her boss who signed it and it was rubber stamped by a police officer.

PW1 then called PW7 and gave him the Kshs.400/= change (Exhibit 8 a – d), the KRA form and certificate of good conduct. PW7 followed the customer care desk lady as PW1 watched from a distance. Later he got the driver’s PSV licence and was called by **PW3 Chief Inspector Fredrick Mwangi – 217995** for preparations of the transcript (Exhibit 10). He was able to identify his voice and that of the lady officer. The recording was played in Court after the trial Magistrate overruled the objection by the defence counsel. The witness identified the Appellant as the officer who had demanded for a bribe.

10. PW2 Musyoki Mutungi – 217563 was in the office on 19th July, 2013 at 3 pm when two men and a lady (EACC officers) and the Appellant entered his office. The officers told him they were pursuing Kshs.500/= which had been corruptly demanded by the Appellant. They swabbed the Appellant’s hands. She had been deployed at the PSV’s desk. They then instructed her to remove from her pockets all the money she had. They inspected the money but did not find what they were looking for. They then left with her to her desk which was outside their building. It was later reported to him by the officers that a treated Kshs.1000/= note was found in the drawer where money for PSVs had been kept. It was his evidence that the Appellant with others were issuing licences for PSV and the money being collected from Appellants was kept in a common drawer.

11. PW3 Chief Inspector Fredrick Mwangi – 217995 and **PW4 Wycliffe Sirengo** who are officers with EACC effected the arrest of the Appellant and witnessed the recovery of Ksh.1000/= from a drawer on the Appellant’s desk. PW3 was given the video to prepare a transcript which he did. The conversation was in Kiswahili and a bit was in Kikuyu which he translated (Exhibit 10). Both witnesses confirmed that PW7 swabbed the Appellant’s hands.

PW5 Francis Kamwara prepared the trap money. He did not accompany the rest of the officers for the sting operation.

12. The evidence of **PW6 Charles Samiji and PW7 Sophie Nyambura**, was that upon listening to the recording conversation, they established that there had been a demand of Kshs.500=/. Together they accompanied PW1 to Nairobi Area Traffic offices for execution of the sting operation.

Upon receipt of information that the money had been received, she retrieved from PW1, the half-cut envelop, certificate of good conduct and Form 16, the change of Kshs.400/=; plus Kshs.100 and she made an inventory (Exhibit 4). She swabbed the Appellant hands (right and left) and the swabs were produced

respectively (Exhibit 13 a & b). She recovered the Kshs.1000/= from the drawer from the Appellant's working desk. PW7 produced the Government analysis report and Memo (Exhibit 15 a & b).

The report indicates that the control sample was analysed and found to be a mixture of three compounds of Anthracene, Phenolphthalein and Quinine which was also detected in the other items presented to the Government Chemist.

13. In her sworn statement of defence, the Appellant denied the charges. She said she was on duty at Nairobi Area Traffic on 19th July, 2013 issuing PSV Licences. She was in her supervisor's (PW2's) office where she had taken some forms for signing when people came there and introduced themselves as EACC officers. The officers told PW2 they were after her on allegations of soliciting Kshs.500/= from a member of the public. They searched her but did not trace the Shs.500/= in the shs.14,100/= she had. They went with her to her working desk and she opened the drawer for them.

14. Upon searching, PW7 announced she had recovered a Shs.1000/= treated note from there. The drawer was for official money collected plus receipt books and rubber stamp. She was thereafter arrested and taken to the EACC offices and was shown a video recording. She denied everything about the said video. She said the video was not clear so she could not tell if it was in tandem with the transcript. She also testified that PW7 was with her in college and she had something against her, right from college.

15. Both counsels for the Appellant and the Respondent filed within submissions which were highlighted during the hearing of the appeal.

16. Mr. Ngaira submitted that the gist of their appeal was that there was no sufficient evidence to support the charge. It was his submission that the Anti-Corruption and Economic Crimes Act (ACECA) does not define the word "**solicit**". He therefore cited the definition from the Concise Oxford English Dictionary which defines it as: "**to ask for or to obtain something from someone**".

It was therefore his submission that the main ingredient of the offence of corruptly soliciting for a benefit are that an accused person must be shown to have, with a corrupt intent solicited for a benefit, that the accused person was an agent within the meaning of the Act and that the benefit solicited was a favour to render some service.

17. Counsel stated that PW1 went for a PSV on 18th July, 2013. He returned on 19th July, 2013 with a recording device. His mission on this day was to trap the Appellant. That in fact, there had been no soliciting.

18. He further submitted that the Appellant denied being the owner of the voice in the video and there was no independent witness to confirm that indeed that was her voice. To support this, he cited the case of **Patrick Munguti Nunga Criminal Appeal No. 123 of 2011 (Embu High Court)** and **Libambula -vs- Republic [2003] KLR 683 at page 686**.

19. He submitted that the Learned Trial Magistrate shifted the burden of proof from the Prosecution to the Appellant. That though the Appellant gave a sworn statement of defence, the trial Court ignored it completely.

20. Finally, he submitted that Section 35 of ACECA which is a mandatory provision was not complied with and this was fatal to the Prosecution's case. He cited the cases of;

i. Penina Kimuyu -vs- Republic CRA No. 106 of 2012 [2014] eKLR

ii. Peter Karanja Kimani -vs- Republic CRA No. 571 of 2009 [2014] eKLR

21. **M/s Aluda** for the State in response, opposed the appeal. She gave a definition of the word "solicit" from both the Concise Oxford English Dictionary and the Merriam Webster online dictionary which is similar to what had been submitted on by Mr. Ngaira. Section 2 (1) ACECA defines "**benefit**" as

“means any gift, loan, fee, reward, appointment, service, favour, forbearance, promise or other consideration or advantage.”

She pointed out the essential ingredients of the offence to be;

“The accused must have received a benefit as defined above, that it must have been received corruptly as an inducement to bring about some given results in a particular matter, that the benefit must not be legally due or payable.”

22. On compliance with Section 35 of ACECA she submitted that the issue was never raised before the trial Court, and the Appellant cannot adduce new evidence without leave of the Court.

Further, she submitted that investigations were conducted by the EACC but Prosecution was by a Prosecution counsel representing the Director of Public Prosecution as provided for under Article 157 (8) of the Constitution. That there was no better consent than their presence. She stated that this was distinguishable from the cases under the Prevention of Corruption Act. She cited the case of **Michael Waweru Ndegwa CRA No. 290A 2010 Nyeri**, to support her argument.

23. On the sufficiency of evidence, she submitted that seven (7) Prosecution witnesses had testified and there was a video recording produced. That though the Appellant denied the voice in the video to be hers, she said nothing about the video where her image appeared and the Court saw it. Finally, she submitted that the Prosecution had proved that the Appellant was a public officer and that she solicited for a benefit of Kshs.500/= in order to give the complainant a PSV driving licence.

24. This is a first appeal and this Court is enjoined to reconsider and re-evaluate the evidence and the appeal to arrive at its own conclusion. I am alive to the fact that this Court did not see nor hear the witnesses. The Court of Appeal in the case of **Patrick & Another –vs- Republic [2005] eKLR 162** stated this;

“3. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. It is not the function of first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusion.”

And in **Muthoko & Another –vs- Republic, [2008] KLR 297** the Court of Appeal held;

“4. It was the duty of a first appellate court to analyze the evidence and come to its own independent conclusion bearing in mind that it did not hear or see the witnesses and making allowance for that.”

Having been guided as outlined above, I have considered the evidence on record, the submissions for and against the appeal.

25. It is clear that Counts 1 and 2 of the charge sheet are basically the same save for the dates. The Appellant was acquitted on the 1st Count on the ground that there was no independent evidence to support the claims by PW1. The Appellant was also acquitted of Count 3 which count related to the receipt of Kshs.500/=. The reason for the acquittal on this count are given at page 26 – 28 of the Judgment. **“The evidence on this was quite fuzzy”**, the Court said. It was not clear how the money was given, received, and even recovered. The money was said to have been recovered from a drawer. PW2, the Appellant’s supervisor said this was a common drawer where all money collected for PSV Licences was put. It was not under the exclusive control of the Appellant. I agree with the Learned Trial Magistrate on this findings on Count 1 and 3.

26. The issue for determination is whether the evidence for soliciting for Kshs.500/= by the Appellant on 19th July, 2017 was sufficient, to sustain a conviction.

Mr. Ngaira for the Appellant raised an issue on the failure to comply with Section 35 of ACECA. He submitted that since the said provisions were not complied with, the charge was fatal. It has been confirmed that the Prosecution in the trial Court was conducted by a State Counsel and not a Police Prosecutor as before. The State Counsels or Prosecuting Counsels represent the DPP as is provided for under Article 157 (9) which states;

The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

27. Section 35 (1) and (2) of ACECA do not make provision for compulsory issuance of a consent by the DPP for Prosecution as was the case in the repealed Prevention of Corruption Act. The appearance of the Prosecuting Counsel on behalf of the DPP in Court in the matter clearly implies that the DPP has recommended Prosecution and the officers are acting in accordance with his general or special instructions.

Section 32 of ACECA also provides;

Without prejudice to the generality of Section 23(3), the Secretary and an investigator shall have power to arrest any person for and charge them with an offence, and to detain them for the purpose of an investigation, to the like extent as a police officer.

It is therefore clear that the EACC director and investigators have been clothed with powers not only to investigate, but to arrest and also charge.

28. There is also no legal requirement that the report of the investigation must be presented in Court. However, if a party is keen on knowing if there was a recommendation for charging by the DPP, the investigating officer is the person to clear that. And such an issue should be first raised in the trial Court. I am persuaded by the findings of ***Justice Ngaah*** in ***Stephen Mburu Nditsa –vs- Ethics & Anti-Corruption Commission & Another Misc. Criminal Application No. 20 of 2014 [2015] eKLR*** and ***Justice Mativo*** in ***Michael Waweru Ndegwa –vs- Republic Criminal Appeal No. 290 of 2010 [2016] eKLR*** on the issue of reports and on investigations under Section 35 (1) and (2) of ACECA.

29. The evidence of the demand by the Appellant was that of PW1. There is no dispute that the Appellant is a police officer and worked for the National Police Service a public body which was her Principal. The demand is in the evidence of PW1 and the contents of the video recording device (Exhibit 3). A transcript of the conversation was done by PW3 and produced as Exhibit 10. The instructions by PW7 were that he had to go back to Nairobi Area Traffic offices with the recording device to start the process afresh. That is why he was given Kshs.1,000/= and Kshs.100/= separately to cover the demand of Kshs.500/= and Kshs.100/= for the application form.

30. The explanation the Appellant gave for insisting that PW1's certificate of good conduct had expired is not tenable. Her boss (PW2) explained that even if a certificate had one day to go before expiry, it remained valid and that is the correct position under the law. The certificate of good conduct he had, had been issued on 7th August, 2012. Obviously it had not expired since it was valid for a year from 7th August, 2012. Mr. Ngaira's submission was that when PW1 returned to Nairobi Area Traffic offices, he went there to trap the Appellant as there was no soliciting.

31. The conversation in the transcript flows well and there is no evidence of pressure having been applied to the Appellant in this matter. She was also not bound to answer the prodding questions by PW1. On the submission that the voice in the video recording was not the Appellant's, I disagree. The Learned Trial Magistrate heard the recording and had the privilege of hearing the Appellant speak in Court. He found the voice in the video to be that of the Appellant. I would have no reason to make me find otherwise.

32. A stamped application form dated 19th July, 2013 was produced as Exhibit 1. The evidence adduced was that the form could not be given without payment of Kshs.100/=. It is therefore taken that this was

paid for.

The video (Exhibit 17) recording was listened to by the trial Court and a transcript (Exhibit 10) was produced. The video footage (Exhibit 17) and the transcript corroborate PW1's oral evidence, that indeed, there was a demand for Kshs.500/= for facilitation in the issuance and signing of the PSV application form.

33. After analyzing the evidence on record, I am satisfied that the charge of soliciting as contained in Count No. 2 was proved to the required standard. The result is that the appeal has no merit and is dismissed. The conviction and sentence are confirmed.

Orders accordingly.

Delivered and dated this 9th day of June, 2017 at Nairobi

H. I. ONG'UDI

HIGH COURT JUDGE