



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 571 OF 2009

PETER KARANJA KIMANI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

1. The appellant herein was on 30th May 2007, convicted on two counts of 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**. He was fined Kshs.25,000/= and in default to serve four months in jail on each of the two counts.
2. The chief facts in the two counts were that being a person employed by a public body, to wit, the Kenya Police Force as a Police Constable, he corruptly solicited for a benefit of Kshs.3000/= on 30th of May 2007, along Langata road within Nairobi area, and Kshs. 2000/= on 4th June 2007 at Nyayo Stadium along Uhuru Highway within Nairobi area from James Musyoki as an inducement to facilitate the release of his motor vehicle registration number KYJ 441 which motor vehicle had been detained at Langata Police Station for various offences including being driven on a public road with worn out tyres, a matter in which the said public body was concerned.
3. Upon conviction the appellant filed an appeal in person, in which he attacked the weight of the evidence adduced and the manner in which the evidence was evaluated by the learned trial magistrate.
4. Miss Aluda the learned State counsel for the respondent opposed the appeal and supported both conviction and sentence. The learned state counsel gave a summary of the case and urged the court to dismiss the appeal on grounds that the prosecution had proved their case against the appellant beyond reasonable doubt.
5. Eight witnesses testified for the prosecution, and the sum total of their evidence was that **PW1** made a complaint to the then Kenya Anti-Corruption Commission that the appellant herein had solicited for a bribe of Kshs.3000/= from him so as to release his car which had been impounded and was at Langata Police Station. **PW8**, Inspector Wekesa of Kenya Anti-Corruption Commission gave him Kshs. 3000/= and a recorder to capture the conversation. He went to Nyayo Police Post where he met the appellant and recorded the conversation. The appellant agreed to

receive the Kshs.2000/= when the complainant stated that that was what he called raise bribe. He however, insisted that he could only release the car keys if the complainant paid the bribe as requested. When **PW1** returned with the magistrate the appellant instructed him to give the money to one Irungu who would in turn give him his car keys. He complied and was given his car keys.

6. Upon careful re-evaluation as is my duty as the court of first appeal I am satisfied that this appeal can be determined on the ground of the procedural flaw occasioned by the manner in which the case was investigated and prosecuted.
7. I note that the appellant's prosecution was instituted and conducted by the Kenya Anti-Corruption Commission through the Kenya Police, in contravention of **Section 35(1)** of the **Anti-Corruption and Economic Crimes Act No. 3 of 2003**. The **Anti-Corruption Commission** of Kenya had no authority to prosecute the appellant without reference to the Attorney General and therefore the trial was rendered a nullity.
8. Indeed the charge sheet shows the complainant as the "**REPUBLIC OF KENYA THROUGH KACC**", although the charge sheet was titled "**KENYA ANTI-CORRUPTION CHARGE SHEET**". This makes the KACC the actual prosecutor. The **Economic Crimes Act No, 3 of 2003** sets out in **Section 35**, the procedure to be followed in investigation and prosecution under the act, in mandatory terms as hereunder.

“(1) Following an investigation the commission shall report to the Attorney-General on the results of the investigation.

(2) The Commission's report shall include any recommendation the Commission may have that a person be prosecuted for corruption or economic crime”.

9. In my view the language of these provisions makes it mandatory for the Commission to present its investigations and recommendations thereto, to the Attorney General before instituting prosecution. This interpretation found expression in **Cr. App No. 331 of 2010 Nicholas Muriuki Kangangi vs Attorney General**, in which the Court of Appeal interpreted the said **Section 35(1)(2)** to mean that prosecution was a nullity if it was done without the opinion or consent of the Attorney General, and that the proceedings and judgment thereto cannot be left to stand.
10. For the foregoing reasons I find that the appeal has merit. Reasons wherefore, the appeal is allowed and it is ordered that the appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

SIGNED DATED and DELIVERED in open court this **12th** day of **February 2014**.

L. A. ACHODE

JUDGE