



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 513 OF 2010

CHRISTOPHER KAMAU MWANGI *Alias* NGUMBA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

1. **Christopher Kamau Mwangi alias Ngumba**, the appellant herein, was on the 5th February 2007, charged with 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**. In the third count he was charged with the offence of 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**.
2. The chief facts in **count I** and **count II** are that on 5th of February 2007 and 7th February 2007 at Kasarani within Nairobi area, and being a person employed by a public body, to wit, Nairobi City Council, as a City Constable he corruptly solicited for a benefit of Kshs.10,000/- and 5,000/- respectively from Wilson Maina Mwangi, as an inducement so as to allow the said Wilson Maina Mwangi continue with repair works and renovations to the house of his neighbour Mr. Samuel Ochieng, a matter in which the said public body was concerned.
3. In **count III**: It was alleged that on the 7th February 2007 at Sports View Hotel (Kasarani) within Nairobi area, being a person employed by a public body to wit, City Council of Nairobi, as a City Askari, he corruptly received a benefit of Kshs.5,000/- from Wilson Maina Mwangi as an inducement so as to allow the said Wilson Maina Mwangi continue with repair works and renovations to the house of his neighbour Mr. Samuel Ochieng, a matter in which the said public body was concerned.
4. Nine witnesses testified for the prosecution and a summary of their case was that **PW1** met the appellant in the company of the second accused person who had identified himself as J. M. on phone. The appellant a City Council employee asked for a bribe of Kshs.15,000/= to allow the renovation work that **PW1** was doing to go on since he had no building plan. **PW1** reported to

- KACC and they gave him Kshs.10,000/= treated money. Recording devices were fitted on him when he next went to meet the appellant and give him the treated money. The appellant was arrested and charged.
5. In his defence the appellant admitted to meeting **PW1** and discussing the construction works that **PW1** was involved in on the stated date. He also admitted that on 7th February 2007 he and **PW1** did meet at Kasarani Sports View Hotel where they discussed the construction works and **PW1** handed him some money. According to him that money was to be paid to an architect to prepare plans for the construction that **PW1** was supervising. He denied that he solicited for the money nor that it was for a bribe.
 6. At the close of the trial, the appellant was convicted on **count II** and **count III**. He was sentenced to pay a fine of Kshs.30,000/- in default to serve 4 months imprisonment in **count II** and Kshs.35,000/= in default 3 months in **count III** respectively.
 7. The appellant not being satisfied with the conviction and sentence, filed an appeal on grounds that:
 - i. *The trial court relied on a single identifying witness;*
 - ii. *There was no relationship between the appellant and the exhibits recovered;*
 - iii. *The prosecution evidence was uncorroborated, insufficient and contradictory;*
 - iv. *There was no certificate of translation issued;*
 - v. *The tape recorded evidence was neither clear nor audible;*
 - vi. *The prosecution's case was not proved beyond reasonable doubt.*
 8. Mrs. Nyauncho the learned State counsel for the respondent opposed the appeal and supported both conviction and sentence. She 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.
 9. I have re-assessed the evidence and 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.
 10. Indeed the charge sheet shows the complainant as the "**REPUBLIC OF KENYA THROUGH KACC**", although the charge sheet was titled "**KENYA POLICE 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”.
 11. 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.

12. Upon careful re-evaluation of the evidence as is my duty as the court of first appeal, I find that this appeal must succeed on the ground of the procedural flaw occasioned by the manner in which the case was investigated and prosecuted, although the conviction was founded on sound evidence. For the foregoing reasons 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 **15th day of May 2014.**

L. A. ACHODE

JUDGE