



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL APPEAL NO. 703 OF 2010**

GEOFFREY OMBOGO MAKWORO ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

*(From original conviction and sentence in Anti-Corruption case Number 1 of 2009 in the Chief Magistrate's court at Nairobi Anti – Corruption Court before Hon.L. Nyambura Principal Magistrate on 21<sup>st</sup> November, 2010)*

**JUDGEMENT**

The appellant Geoffrey Wambogo Makworo was charged with three offences. In count I he was charged with the offence 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. It was stated in the particulars of the charge that on 15<sup>th</sup> January, 2009 at Carlos Restaurant along Limuru road, Nairobi being a person employed by Kenya Power and Lighting Company as a Technician II he corruptly solicited for a benefit of Kshs. 80,000/= from Hezron Kanyari Karanja as an inducement to reconnect electricity power supply in his rental houses plot Nos. 36/4/87 and 36/4/93 within Eastleigh Section 4, a matter in which the said Kenya Power and Lighting Company Limited was concerned.

In count II he was charged with soliciting for a benefit contrary to the same provisions as in count I in that on 16<sup>th</sup> January, 2009 along Kolobot road opposite Stima Plaza, Nairobi being a person employed by the Kenya Power and Lighting Company as a technician II he corruptly solicited for a benefit of Kshs. 50,000/= from Hezron Kanyari Karanja as an inducement to reconnect electricity power supply in his rental houses as set out in count I, a matter in which the said Kenya Power and Lighting Company was concerned.

In count III he was charged with the offence of receiving a benefit contrary to the same provision of the same Act. The particulars were that on 16<sup>th</sup> January, 2009 along Kolobot road, opposite Stima Plaza, Nairobi being a person employed by Kenya Power and Lighting Company as technician II he corruptly received a benefit of Kshs. 20,000/= from Hezron Kanyari Karanja as an inducement to reconnect electricity power supply in the same premises a matter in which Kenya Power and lighting Company Limited was concerned.

He denied the offences but after a full trial he was convicted of all the three counts and sentenced to pay a fine of Kshs. 100,000/= in default to serve 12 months imprisonment in count I and II and a further fine of Kshs. 40,000/= in count II in default to serve six months.. In count III he was fined Kshs. 50,000/= in

default to serve 12 months imprisonment. This appeal arises from the said conviction. As the first appellate court it is my duty to reevaluate the evidence and come to independent conclusions.

The evidence adduced by the prosecution in the lower court was that power supply to the premises owned by the complainant was disconnected. The complainant was informed by his care taker and then he contacted one Mr. Kariuki Wachira who revealed that it was his colleague, the appellant, who disconnected the power. They then paid the outstanding bills and in his own words “**met Ombogo and negotiated so that he could connect the electricity power.**” It was the evidence of the complainant P.W. 1 that the appellant needed Kshs. 200,000/= to reconnect the power supply. They negotiated and the figure came to Kshs. 100,000/= and they finally settled at Kshs. 80,000/= Kshs. 50,000/= was to be paid after one hour and Kshs. 30,000/= by the end of the month.

The complainant undertook to pay but eventually decided to report the matter to Kenya Anti corruption authority. A trap was laid and the appellant was arrested in his car while the complainant and his wife were present. The complainant had been provided with treated money which he handed over to the appellant and which was recovered at the time of the arrest.

The appellant was then led to Integrity Centre the offices of the Kenya Anti-corruption Authority where it was confirmed that the money he had received tallied with the photocopies retained by the investigators and further that he had handled the said money. The appellant gave a sworn statement in defence where he denied the offence and gave a chronology of events leading to his arrest. The learned trial magistrate (as she then was) believed the evidence of the prosecution witness, disbelieved the appellant’s defence and convicted him.

Other than the evidence of P.W. 1 the complainant and P.W. 2 his wife, Police Officers attached to the anti-corruption authority gave evidence and produced the tape recorders and transcripts used during the transaction leading to the arrest of the appellant. In that regard, the evidence of P.W. 8 Corporal Wickliffe Sirengo, P.W. 10 Salat Abdi Ali and P.W. 11 Francis Kidogo is instructive.

The genesis of the charges leveled against the appellant is the disconnection of the power supply to the complainant’s premises. One of the witnesses who gave evidence is Eric Sigei P.W. 5 who was a senior technician under whom the appellant worked. On the day the appellant was arrested, Sigei received a call from an officer from the anti-corruption commission informing him that one of his staff had been arrested. The relevant part of his evidence is where he told the court that the meter at the complainant’s premises had been interfered with. The seals had been interfered with, the receipts were fake, there was tampering with the meter and that it was a fraud.

He also told the court that he remembered an operation where Karanja, the complainant, was involved in illegal connection of electricity and that the appellant herein was involved. I refer to that evidence deliberately to show that this was not the first time the complainant was involved in tampering with electricity supply to his premises and that despite his denial, he may have known the appellant before.

Be that as it may, the evidence on record at least from the complainant and his wife stated that the appellant solicited a bribe by gestures. The tape recording transcripts which were played in court did not aid the prosecution at all. In fact the court observed from the recorded conversation, it is clear the accused person was very guarded in his conversation. There is no mention of any demand whatsoever in the transcripts for any money by the appellant from the complainant. While the complainant was in the office of P.W. 11, Inspector Francis Kidogo, the appellant is said to have called him. There was no direct mention of money by the caller.

That evidence notwithstanding the learned trial magistrate stated in the judgment that in the recorded conversation there is nowhere the appellant is resisting to take the money. The fraud relating to the power supply to the complainant’s premises was not investigated yet this was the most crucial evidence that related to the charges. The first contact between the complainant and the appellant was initiated by the complainant himself.

For the offence of soliciting to be proved the act or conduct of an accused person must be explicit and unequivocal so as to leave no doubt that it is intended to be so. There should be also some evidence that the giver of any money is compelled to do so and not suggestive of a player in the game. The conduct of the giver therefore must be beyond reproach. In the instant case there having been no evidence in the recorded conversation and the gestures of the appellant having not been defined, soliciting remains abstract.

A lot of emphasis has been laid on the recovery of the money in the appellant's car. The substratum of the offence of receiving is soliciting especially so where the offences are in the same transaction by the same person. It is true that the appellant's hands were swapped either at the time of arrest or at the offices of the Anti-Corruption Authority.

The witnesses were clear, they did not know who placed the money between the thighs of the appellant. No forensic investigation was conducted on the steering wheel of the appellant's car because, if he handled the money in the car, traces of the chemical would have been found on the steering wheel. Whether he handled the money in the car or at the offices as he said must be connected to the entire transaction. The offence of receiving hangs in the balance in the absence of proof beyond doubt of the offence of soliciting.

It is the evidence of the appellant that in the year of 2007 he disconnected power to the complainant's premises because he had tampered with the meter and illegal connection. He was subjected to a penalty by the company. I have entertained some doubts in this matter because of the conduct of the complainant and the attendant circumstances. There is an underlying degree of malice which cannot be wished away.

There is every indication that the complainant would have wanted to settle scores with the appellant in view of the fact that power supply to his premises had been disconnected following interference with the meter and fraud related thereto. The appellant gave a plausible explanation as to his encounter with the complainant and his wife. That evidence was given on oath and tested under cross-examination. At the end of it all it remained his word against that of P.W. 1 and P.W. 2 a husband and wife who had committed a fraud and wanted favours from the appellant.

There was evidence that some telephone calls were made between the complainant and the appellant. These were not investigated. This omission added doubt to the prosecution case.

There was a reasonable doubt which should have been accorded the appellant. The end result is that this appeal is allowed, conviction quashed and sentence set aside.

Orders accordingly.

**SIGNED DATED and DELIVERED in court this 3<sup>rd</sup> Day of July 2014.**

**A.MBOGHOLI MSAGHA**

**JUDGE**