



**REPUBLIC OF KENYA**

**High Court at Nairobi (Milimani Law Courts)**

**Criminal Appeal 527 of 2010**

EPHANTUS MAINA MUTONYI .....APPELLANT

V

REPUBLIC .....RESPONDENT

*(From original conviction and sentencing in Criminal Case No. 34 of 2007 In the Chief Magistrate's Court at Nairobi by R.E. Ougo C.M.)*

**JUDGMENT**

The appellant was charged with two offences under the Anti-Corruption and Economic Crimes Act No. 3 of 2003. 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 said Act. In Count II he was charged with the offence of receiving a benefit contrary to Section 39 (3) (a) as read with Section 48 (1) of the same Act. He denied the offences but after a full trial he was convicted on both counts and fined Kshs. 35,000/= in default 6 months imprisonment on each count. The sentences were ordered to run consecutively if the fine was not paid.

Being dissatisfied with the said conviction and sentence he filed this appeal. He raised several grounds of appeal in his petition but because of the ultimate decision that I am about to make, it shall not be necessary for me to set out a concise analysis of the evidence and the decision made thereunder.

The learned counsel for the Republic concedes the appeal but asks for a retrial in respect of count II on the grounds that in respect of count I, there was insufficient evidence adduced by the prosecution with regard to the identification of the voice of the appellant. With respect to count II there was sufficient evidence upon which the conviction was founded but regrettably the consent of the Attorney General was not obtained before the prosecution was mounted. The lack of consent by the Attorney General vitiated

the trial but this does not prohibit an order for a retrial.

On my part I have gone through the entire record before me, and with respect agree with the learned counsel for the Republic that there was not sufficient evidence upon which the first count could be sustained. However, there was sufficient evidence upon which the 2<sup>nd</sup> count was based to arrive at the conviction by the learned trial magistrate.

It is true that such offences required the consent of the Attorney General before prosecution. This having not been obtained, the trial was null and void. Does this mean that the appellant should be acquitted? This court must fall back to the evidence adduced and, with respect, the fact that a trial is a nullity because of a procedural or technical error does not mean that the accused person is innocent.

The learned counsel for the Republic has asked for a re-trial. In so doing she cited the case of **Republic versus Vincent Otieno Odawa (2006) klr** in which guidelines for ordering a retrial were set out. A retrial will be ordered:

**I. When the original trial was illegal and defective.**

**II. Each case must depend on its own peculiar facts and circumstances.**

**III. That the order of retrial should only be made where the interest of justice require it.**

**IV. It will not be ordered if by so doing an injustice or prejudice will be occasioned to the accused.**

**V. An order of the trial will not be made for purposes of enabling the prosecution to fill gaps in its evidence at the first trial.**

**VI. A retrial should not be ordered unless the court is of the opinion that a proper consideration of the admissible and potentially admissible evidence a conviction must result. – see Ratilal Shah Vs Rep (1958) E.A.3**

Other considerations relate to the availability of witnesses who testified in the original trial, the seriousness of the offence and I add, public interest.

There is no doubt that to this day the appellant knows the nature of the offence upon which he was convicted. It has not been alleged that the witnesses are not available and if they are not available, this is not the time to raise that issue. The offence relates to corruption an issue that is in the public interest. I cannot see any prejudice that may be occasioned to the appellant if a retrial were to be held. If anything, public interest takes precedence.

I have seen no void that the prosecution may want to fill in the retrial and if any steps are taken to the prejudice of the appellant in any retrial, then the court will be addressed accordingly. I am persuaded that this is an appropriate case for a retrial.

Accordingly I allow this appeal on both counts, quash the convictions and set aside the sentences. In the event, the fine was paid, the same shall be refunded to the appellant. I order that the appellant shall be subjected to a retrial in respect of count II by a court of competent jurisdiction. The appellant shall present himself to Kilimani Police Station within the next seven (7) days so that the retrial may be initiated. In the meantime he shall execute a bond of Kshs. 100,000/= pending his presentation at the Police Station.

Orders accordingly.

**SIGNED DATED and DELIVERED in open court this 2nd day of May, 2013.**

**A. MBOGHOLI MSAGHA**

**JUDGE**