REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 123 OF 2011

PATRICK MUNGUTI NUNGA …..... ….....APPELLANT

VERSUS

REPUBLIC .....PROSECUTOR

From original conviction and sentence in Anti-Corruption Case No. 3 OF 2009 at the Chief Magistrate's Court at Embu by Hon. M. WACHIRA – CM on 22/07/2011

J U D G M E N T

PATRICK MUNGUTI NUNGA the Appellant herein was charged with the following offences;

COUNT 1

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 as stated in the charge sheet were as follows;

> **PATRICK MUNGUTI NUNGA: On the 5th day of May 2009, at the Civil District Registrar's office in Machakos town in Machakos District within Eastern Province, being a person employed by a public body to wit, Ministry of Immigration and Registration of persons, as a clerical officer, corruptly solicited for a benefit of shs.2000/= from Nicholas Nyile, as an inducement to facilitate the processing of a death certificate in respect of the late Mueke Mutyambwii, a matter in which the said Public body was concerned.**

COUNT 2

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 as stated in the charge sheet were as follows;

> **PATRICK MUNGUTI NUNGA**: **On the 24th day of July 2009, at the Civil District Registrar's office in Machakos town in Machakos District within Eastern Province, being a person employed by a public body to wit, Ministry of Immigration and Registration of persons, as a clerical officer, corruptly solicited for a benefit of ks.3,000/= from Nicholas Nyile, as an inducement to facilitate the processing of a death certificate in respect of the late Mueke Mutyambwii, a matter in which the said Public body was concerned.**

COUNT 3

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 as stated in the charge sheet were as follows;

> **PATRICK MUNGUTI NUNGA**: **On the 24th day of July 2009, at the Civil District Registrar's office in Machakos town in Machakos District within Eastern Province, being a person employed by a public body to wit, Ministry of Immigration and Registration of persons, as a clerical officer, corruptly received a benefit of ks.2000/= from Nicholas Nyile, as an inducement to facilitate the processing of a death certificate in respect of the late Mueke Mutyambwii, a matter in which the said Public body was concerned.**

He pleaded not guilty to all the counts and the matter proceeded to full hearing. The learned trial Magistrate acquitted the Appellant on count one (1) and count two (2) but convicted him on count three (3). He was fined shs.50,000/= in default six (6) months imprisonment.

Being aggrieved by the Judgment, he appealed against both conviction and sentence raising the following grounds;

1. ***That the learned trial Magistrate erred in law and fact by convicting the Appellant on the 3rd count while the charge itself was defective.***
2. ***That the trial Magistrate erred in law and facts by convicting the Appellant without considering the fact that the serial numbers and the denomination of the money alleged to have been received by the Appellant were not indicated in the charge sheet in count 3.***
3. ***That the learned trial Magistrate erred in law and fact by convicting the Appellant while the inventory of the recovery of the money did not indicate the place of the recovery of the money.***
4. ***That the learned trial Magistrate erred in law and fact by convicting the Appellant while the inventory of the recovery of the money did not indicate the place where the Appellant worked and from which part of the body that the money was recovered from.***
5. ***That the learned trial Magistrate erred in law and facts by disregarding the evidence of PW8 and the Appellant both of whom testified that PW1 had a grudge with the Appellant and that clearly demonstrated that the complainant (PW1) was out to settle scores with the Appellant.***
6. ***That the learned trial Magistrate erred in law and fact by finding the Prosecution had proved the third count beyond reasonable doubt while the prosecution's evidence was full of contradictions.***
7. ***That the learned trial Magistrate erred in law and facts by finding that the Appellant received money which is a benefit under section 2 of the Anti-Corruption and Economic Crimes Act.***
8. ***That the trial Magistrate erred in law and facts by disregarding the Appellant's defence that he received no money from PW1 thereby arriving at an erroneous Judgment.***
9. ***That the learned trial Magistrate erred in law and fact by convicting the Appellant's on a charge of receiving a benefit in count 3 while she acquitted him on count 2 of soliciting for the same benefit.***
10. ***That the learned trial Magistrate erred in law and fact by disregarding the Appellant's defence on oath denying receiving the alleged money from the complainant.***
11. ***That the learned trial Magistrate erred in law and facts by totally disregarding the defence***

submissions made on behalf of the Appellant.

12. ***That the learned trial Magistrate erred in law and fact by imposing a sentence which was excessive in the circumstances and mitigation offered by the Appellant.***

The facts of the case are that the Appellant was employed by the Ministry of Immigration and Registration of Persons as a clerical officer based at the Civil District Registry Machakos.

On 28/4/2009 PW1 was approached by his three (3) relatives (viz; PW5, PW6 and another) who needed some assistance in filing a succession cause. He took them to Machakos to apply for a death certificate. They reported to the reception desk and were directed to the Appellant who called them to his office. He gave them certain forms to fill. PW6 filled and returned them when the Appellant advised them to return the next day. PW1 and PW6 went as advised but the Appellant apologized for giving them wrong forms. He therefore gave them other forms and they gave him all the required annextures PEXB 2 a, b, 3, 4 and 5. After checking and confirming that the forms were in order he then asked for shs.2,500/= for his labour, which he reduced this to shs.2000/=. On 2/7/2009 PW1 went back to the Appellant who told him he could not do anything on their forms before he received the shs.2000/=. PW1 decided to report the matter to KACC. On 24/7/2009 he met KACC officers who organized for a trap against the Appellant. The said officers after listening to a taped conversation between the Appellant and PW1 were satisfied that a demand for shs.2000/= had been made. They gave PW1 treated money (EXB1 a & b) – amounting to shs.2000/=. He proceeded to the District Civil Registry Machakos, accompanied by several officers. He had the tape recorder fitted on him. He entered the Appellant's office. The Appellant asked for the money which PW1 gave him and promised to bring the balance later. He signaled the officer from KACC who entered and demanded for the money. The Appellant was arrested and his hands swabbed and the shs.2000/= recovered from the inner pocket of his trouser. On 16/9/2009 PW1 assisted in identifying the voices and making of the transcript. The translation was completed on 25/9/2009. (EXB14a). PW1 & PW4 were the ones who translated the recording which had been done in Kikamba. PW7 the Government analyst confirmed that the controlled APQ powder was detected in the items – khaki envelopes, containing right and left swabs of the Appellant, envelop containing shs.2000/= currency, khaki envelop containing a half cut khaki envelop and trouser pocket.

The Appellant in his sworn defence denied the charges. He stated that he had known PW1 since 2002 as he used to come to that office on brokering business. PW1 and his two people came direct to where the Appellant sat and requested for an application form which he gave. He said he sat in an open hall with 4 clerks and support staff. One officer from KACC asked him for money which he did not have. There was a grudge between him and PW1.

When the appeal came for hearing Mr. Ithiga for the Appellant made oral submissions relying on all the thirteen (13) grounds. He also cited one authority of ***ESTHER THEURI WARUIRU & ANOTHER -VS- REPUBLIC CRIMINAL APPEAL NO.48/08 COURT OF APPEAL NAIROBI*** where the Court had ruled that non compliance with section 35(1) & (2) of the Anti-Corruption and Economic Crimes Act was fatal to the Prosecution case.

Mr. Wanyonyi learned State Counsel opposed the appeal saying the evidence was overwhelming and that the Appellant who was represented by Counsel in the Court below had failed to raise up the issue of section 35(1) (2) before that Court. And it was therefore presumed that he had waived the right to raise it.

This being a first appeal this Court is enjoined to reconsider and re-evaluate the evidence and arrive at its own conclusions. The Court should also give an allowance for the fact that it did not see nor hear the witnesses. I am guided by the case of ***MWANGI -VS- REPUBLIC [2004] KLR Page 28*** where it was held as follows;

1. ***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 have the appellate Court's own decision on the evidence.***
2. ***The first appellate Court must itself weigh the conflicting evidence and draw its own conclusions.***

3. ***It is not the function of the first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's evidence and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court had the advantage of hearing and seeing the witness.***
4. ***The manner in which the Appellants' appeal was dealt with by the first Appellate Court fell short of its duty in re-evaluating the evidence. It is not enough for a first appellate Court to merely state that it has analysed the evidence adduced. That analysis of evidence must be seen to have been undertaken than simply stated.***

I have considered the submissions by both the State and Mr. Ithiga for the Appellant. I have equally subjected the evidence adduced to my own evaluation.

Ground 1 & 2

It is true that the charge sheet did not indicate the serial numbers and denomination of the money that was allegedly received by the Appellant. It simply indicated the amount of shs.2000/=. There is no requirement that the serial numbers and denominations must be contained in the particulars. However the question that the Court would deal with in a scenario like this one would be to ask if the omission of the serial numbers and denominations occasioned any injustice to the Appellant. I am guided by the cases of;

1. ***MEDARDO -V- REPUBLIC (2004)2 KLR 433***
2. ***NYABUTO & ANOTHER -V- REPUBLIC [2009] KLR 409***

In the present case the witnesses gave evidence on the notes that were prepared as the trap money. The denomination and serial numbers were given, inventories produced. Their evidence showed that the money talked about was actually shs.2000/=. My analysis of the evidence clearly shows that the Appellant well understood the charge facing him. The omission did not occasion any failure or miscarriage of justice.

The same goes for grounds 3 & 4. The inventory showed that the recovery was at the Civil Registry Office while the charge sheet showed it was at the Civil District Registrar's office Machakos Town. The witnesses in their evidence indicated that the Appellant used to issue Death certificates. The Appellant in his defence said he was in the Civil Registrar's office when PW1 came there. In cross-examination he confirmed he was a clerk at Births and Deaths registry. The inventory may not have shown from which part of the body the money was recovered from but the witnesses stated it in their evidence.

I will consolidate grounds 5-12 and deal with them simultaneously. It is basically to answer the question as to whether the evidence adduced could sustain a conviction. The Appellant had been charged with two counts of corruptly soliciting for a bribe of shs.2000/= and shs.3000/= on 5th May 2009 and 24th July 2009 respectively. He was acquitted of both counts. This is what the learned trial Magistrate stated in her Judgment at page 65 lines 1-14;

> ***"From the evidence on record, there is no prove that the accused solicited for money on both dates as charged, soliciting is a process which would entail accused using words urging the complainant to lead him to give him a benefit. That process is lacking in evidence and also in the recording that was produced herein – what come out of evidence is that accused demanded for a bribe and he did not hesitate to do so. However in ACECA, though bribing is a corrupt action, there is no provision to charge offence of bribery. Moreover as to 2nd count, the person who initiated the conversation is the complainant and that recording should not form a basis for a charge. It cant be a complaint because it had not been made as a complaint for that day. The recording is evidence to support either the 1st complaint or the subsequent charge of receiving. As such I find counts 1 and 2 fail and I acquit accused of both counts under section 215 of the Criminal Procedure Code".***

This 3rd count of which the Appellant was convicted stems from the 2nd Count. And the learned trial Magistrate found that PW1 was the one who initiated the conversation and that complaint would not form the basis for a charge. And she further said it could not be a complaint because it had not been made as a complaint for that day. And that the recorded evidence could not support either the 1st complaint or the subsequent count of receiving.

And if indeed the recorded evidence could not support the charge of receiving which was the 3rd count what then supported it? When convicting the Appellant on the 3rd count this is what the learned trial Magistrate stated at page 65 lines 15-20 through to page 66 line 1;

> ***"As to 3rd count of receiving, PW1 testified he gave the money to the accused after accused demanded for it. The money was treated as trap money. The accused hands and pair of trouser were found contaminated with APQ chemical which was used to trap the accused. I find the Prosecutor has proved that accused received shs.2000/= from the complainant. The money is a benefit under section 2 of ACECA. The money was to facilitate the issuance of a death certificate.***

Did the Appellant demand for this money? The reason why the 1st tape recoding was done was to establish if indeed the Appellant had demanded for a benefit. Though PW1 and the officers said there had been a demand the Court found that there was no such demand. What then was the basis of the 3rd count? Did the Appellant receive what he had not demanded for? If so why was PW1 bribing him?

PW8 who did a translation of the recorded conversation stated in cross examination at page 41 lines 15-17;

> ***"In the conversation I could hear a mention of shs.2000/= and shs.3000/=. It appeared a normal conversation of people who knew each other. It was not a form of demand in any way".***

It is not disputed that KACC treated money for the purpose of trapping the Appellant who had allegedly demanded for money.

The element of **"demanding"** is very material in cases of this nature. It is not just getting a tape recording and calling the complainant (an interested party) to identify the voices. In the case of ***LIBAMBULA -V- REPUBLIC [2003] KLR 683 at page 686*** the Court of Appeal held that;

> ***"Normally, evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, the witness was familiar with it and recognized it and the conditions obtaining at the time it was made were such that there was no mistake in testifying to it that which was said and who said it".*** See CHEGE -V- REPUBLIC [1985] KLR 1.

The learned trial Magistrate well considered the evidence of the soliciting and found it to be baseless. It was not established both by PW1's word of mouth in count 1 and the recorded tape in count 2.

The Appellant in his defence explained what according to him happened on 24/7/2009. He stated that PW1 was a person he knew well since 2002 as he used to come to their office to apply for Death certificates using peoples identification cards. The Appellant reported him to his boss, and he was warned. He was a bitter man. He had rejoiced at his arrest. This evidence of the Appellant ought to have been interrogated by the learned trial Magistrate. In line with the evidence that had been adduced, PW1 may have had another reason for making the KACC believe that the Appellant had demanded for money from him.

The Appellant having been acquitted of the offence of corruptly soliciting for a benefit, then the offence of corruptly receiving a benefit could not stand. My finding is that since the Prosecution failed to establish that indeed the Appellant had made a demand for a benefit meant that a charge of receiving a benefit could not stand. The evidence shows that the Appellant was in possession of shs.2000/= having received it from PW1 but the evidence of corruptly receiving the same cannot be found. The learned trial Magistrate ought to have found that there was no evidence to show that the Appellant corruptly received the said money and acquit him of the same.

May I add that receiving money in itself does not disclose any offence. It is the corruptly receiving it as a benefit that is an offence. Section 35(1) (2) of the Anti-Corruption and Economic Crimes Act mandatorily required KACC to make and submit a report of its investigations to the Attorney General with recommendation as to whether the Appellant should or should not be prosecuted for corruption or economic crime. In this case no such report was shown to Court. Its so sad that the State wanted the prompting of the Defence for it to comply with such a requirement.

In the case of ***ESTHER WARUIRU & MARY MBAISI INDUSA -V- REPUBLIC – CRIMINAL APPEAL NO.48/08 (NAIROBI)***, the Court of Appeal held that compliance with section 35 of the Anti-Corruption and Economic Crimes Act was not optional. It was obligatory. In an earlier decision in the case of ***NICHOLAS MURIUKI KANGANGI -V- ATTORNEY GENERAL CIVIL APPEAL NO.331/10*** the Court of Appeal had held that non-compliance with section 35 of the said Act is fatal in any Prosecution. It stated as follows;

> ***"Mr. Obiri, the State Counsel who represented the Republic before us submitted that whether a report was made or not to the Attorney General was as it were, a matter between the Attorney General and KACC. That cannot be right. The Procedure is set down in the Statute which creates KACC; KACC cannot ignore that procedure and say it is a matter between it and the Attorney General. As a creature of statute it must comply with the provisions of its creator. If it fails to do so, it is acting ultra vires and any such action is null and void".*** It is evident that the Prosecution of the Appellant was in total violation of section 35 (1) (2) of the Anti-Corruption and Economic Crimes Act. The non-compliance was fatal. The importance of such a report to the Attorney General was for his/her opinion. Upon evaluation of the evidence that the investigators were duly relying on, the Attorney General may have advised on the issue I have dealt with in relation to 1st and 2nd count *vis a vis* the 3rd count.

Having said all the above I do find that the charge of corruptly receiving a benefit as charged in count 3 was not proved beyond reasonable doubt. I therefore allow the appeal and quash the conviction. The fine imposed on the Appellant is set aside. Any fines already paid shall be refunded to him.

Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 2ND DAY OF JULY 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

M/s Ing'ahizu for State

Mr. Ithiga for Appellant

Njue – C/c