REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 122 OF 2011

YVONNE KARAINTO MARANGU.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTION

(Being an Appeal from the Conviction and Sentence by M.W. WACHIRA Chief Magistrate Embu in Anti Corruption Case No. 2 of 2009 on 22/7/2011)

J U D G M E N T

YVONNE KARAINTO MARANGU the Appellant herein was charged before the Anti Corruption Court with the following offences

COUNT I

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

Particulars as stated in the charge sheet were as follows:-

On the 9th day of July 2009, at Chuka Law Courts in Meru South District of Eastern Province, being a person employed by public body to wit, the Judiciary as a Court Clerk attached to Chuka Law Courts, corruptly solicited for a benefit of KShs.20,000/= from one MECPHERSON MAWIRA MUCHUNKU as an inducement so as to influence the court to give a favourable judgment to the said MACPHERSON MAWIRA MUCHUNKU in a criminal case Chuka No. 356/09, a matter in which the said public body was concerned.

COUNT II

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

***On the* 14th day of July 2009, at Chuka Law Courts in Meru South District of Eastern Province, being a person employed by public body to wit, the Judiciary as a court clerk attached to Chuka Law Courts, corruptly solicited for a benefit of KShs.10,000/= from one MECPHERSON MAWIRA MUCHUNKU as an inducement so as to influence the court to give a favourable judgment to the said MACPHERSON MAWIRA MUCHUNKU in a criminal case Chuka No. 356/09, a matter in which the said public body was concerned.**

COUNT III

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

On the 14th day of July 2009, at Chuka Law Courts in Meru South District of Eastern Province, being a person employed by public body to wit, the Judiciary as a court clerk attached to Chuka Law Courts, corruptly received a benefit of KShs.7,000/= from one MECPHERSON MAWIRA MUCHUNKU as an inducement so as to influence the court to give a favourable judgment to the said MACPHERSON MAWIRA MUCHUNKU in a criminal case Chuka No. 356/09, a matter in which the said public body was concerned.

The matter proceeded to full hearing and the appellant was acquitted on 1st and 2nd counts. She was however convicted on the count and

Shs.50,000/= in default 6 months imprisonment. She was dissatisfied with the Judgment and filed this appeal raising the following grounds.

1. The learned trial Magistrate erred in Law and in fact by convicting her on the third count without taking into consideration that the charge was defective.

2. The learned trial Magistrate erred in Law and in fact in convicting her without considering the fact that the serial numbers and the denomination of the money alleged to have been received by her were not indicated on the charge sheet in count 3.

3. The learned trial Magistrate erred in Law and in fact by failing to consider the demeanor of PW1 and that he was a suspect in Principal Magistrate's Chuka Criminal Case No. 356 of 2009 whereby he was tried and convicted.

4. The learned trial Magistrate erred in Law and in fact in arriving at a conclusion that the prosecution has proved that she received a benefit of Shs.7,000/= whereas prosecution evidence as full of contradictions.

5. The learned Magistrate erred in Law and in fact in making a judgment that she received a benefit which falls within the definition of Section 2 of the Anti-Corruption and Economic Crimes Act.

6. The learned trial Magistrate erred in Law and in fact by convicting her while the inventory of the recovery of money does not indicate the time of recovery and that it was not signed by her.

7. The learned trial Magistrate erred in Law and in fact by convicting her on the third count while in the particulars of the offence the money was alleged to have been received at Chuka Law Courts while the evidence of PW1, PW2, PW7 and PW8 was that the money was allegedly received at Sky Limit petrol station within Chuka Town and not at Chuka Law Courts which are two different places.

8. The learned trial Magistrate erred in Law and in fact by failing to consider that cell phones that were alleged to have been tools of communication between her and PW1 were not produced as exhibits.

9. The learned trial Magistrate erred in Law and in fact by disregarding her defence that she did not receive any money from PW1 who was the complainant.

10. The learned trial Magistrate erred in Law *by convicting her on a charge of receiving a benefit in count 3 while she acquitted her on count 2 of soliciting for the same benefit.*

11. The learned trial Magistrate erred in Law *by totally disregarding the defence submissions made on her behalf.*

12. The learned trial Magistrate erred in Law and in fact *by convicting her without taking into account that there was no written consent from the Attorney General to prosecute her and the prosecution was in total violation of the mandatory procedure as provided under Section 35 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.*

The case presenting itself before the court was that PW1 who was an accused person in Principal Magistrate's Court Chuka Criminal Case No. 356/2009 was at Chuka Law Courts for his case on 15/6/2009 but did not hear his name being called. After the court session the appellant (a court clerk) told him his case was serious and she could talk to the magistrate to place him on probation if she was given Shs.20,000/=. She asked him to report the next day. He came and a Ruling was delivered. His defence was heard on 9/7/2009. Judgment was to be delivered on 29/7/2009. On 9/7/2009 PW1 made a report to KACC about the demand by appellant. He met KACC officers on 14/7/2009 at Chuka police station. He was fitted with a recorder for purposes of recording the conversation between him and appellant. They met and he recorded the conversation. He produced a piece of paper where the appellant had written her name (EXB.4).

This recording was not clear and he had to go for another one. He was later given treated money EXB.7(a-g) with which he went to trap the appellant. The appellant called him and they met at Sky Limit Cafe behind the petrol station. She received the Shs.7,000/= as they climbed the stairs. The appellant was then arrested with the money. Those who arrested her were PW1, PW4, PW8. The money was recovered and her hands were swabbed. Some documents and exhibits were taken to the Government Analyst and Document Examiner (PW6 & PW9) for examination. The reports were positive.

The appellant in her sworn defence denied the charges saying she was arrested in town as she did her shopping. She had known PW1 as one of the accused persons who used to come to the court. Mr. Ithiga for the appellant made oral submissions stressing on two major issues i.e.

1. Charge was defective for want of particulars.

2. Non compliance with Section 35(1) and (2) of the anti Corruption and Economic Crime Act was fatal.

3. The evidence on the scene of incident was different from what the charge sheet stated.

The State opposed the appeal stating through learned state counsel Mr. Wanyonyi that the charge was proper and failure to indicate serial numbers and denominations was not fatal. And that since the issue of consent under Section 35(1)(2) of the Act had not been raised in the court below it could not be raised on appeal.

This being a first appeal this court is enjoined to consider and re-evaluate the evidence adduced and arrive at its own conclusion. I also bear in mind that I did not hear nor see the witnesses. In the case of ***MWANGI VS REPUBLIC [2004] 2 KLR 28*** the Court of Appeal said the following:-

> **1. An appellant on a fist 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 conclusion.**
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> **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 findings and conclusion; 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.**
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> **5. The manner in which the appellant's 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 analyzed the evidence adduced. That analysis of evidence must be seen to have been undertaken than simply stated.**

I have evaluated the evidence on record. I have equally considered the submissions and authorities cited by both the State and Mr. Ithiga for the appellant. The issue of the charge sheet is found in ground 1 and 2. The record is clear that the serial numbers and denominations of the trap money was not indicated in the charge sheet. In dealing with this issue I am guided in this by the case of

> **1. WAHOME VS REPUBLIC [1969] EA 580**
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> **2. MEDARDO VS REPUBLIC [2004] 2 KLR 433**
>
> **3. NYABUTO & ANOTHER VS REPUBLIC [2009] KLR 409**

In the present case the witnesses testified on the way they prepared for their sting operation. The treated money was Shs.15,000/= but it is Shs.7,000/= that was allegedly given to the appellant. Photocopies of the notes and their serial numbers were kept. And the evidence is also clear on where the alleged receipt of the money took place. Inspite of the small omissions, I do find that the appellant well understood the case facing her and she was not prejudiced at all. No injustice was caused to her in this regard. She understood well the charge she was facing.

I will consolidate grounds 3 – 11 and deal with the issue of whether the charge was proved beyond reasonable doubt. There is no dispute that the appellant was working as a court clerk at Chuka law Courts. It is also not disputed that PW1 was an accused person in Chuka Criminal Case No. 356/2009. Its a fact that judgment was delivered in that case on 31/7/2009 and PW1 was convicted and sentenced.

And the reason if any that made PW1 go to the appellant was because his name had not been called out on 15/6/2009. He was asked to come back the next day which he did and a Ruling was delivered and a date for defence hearing was given. He gave his evidence on 9/7/2009 and judgment was slated for 29/7/2009. He reported to KACC of the demand for Shs.20,000/=. The charge sheet must have been prepared based on what PW1 told the officers. In the 1st count the charge sheet shows she demanded 20,000/= on 9/7/2009. In the 2nd count the charge sheet shows she demanded for Shs.10,000/= on 14/7/2009. In his own evidence there is nowhere indicated that on 14/7/2009 the appellant demanded for Shs.10,000/= from him. Besides his word of mouth there is no evidence that any demand of Shs.20,000/= was made on 9/7/2009.

The learned trial Magistrate found the appellant not guilty of 1st and 2nd counts which were charges of corruptly soliciting for a benefit. She found that the complaints had no basis and the recordings of 14/7/2009 could not be relied on as there was no proper voice identification.

Coming to the 3rd count the learned trial magistrate relied on the evidence of a small note the appellant gave to PW1 on 9/7/2009. I have seen the so called note which was produced as EXB.4. It is not what one would call a note. It is a tiny piece of paper with the name YVONNE written on it. The learned trial magistrate believed PW1 when he stated that the name was written for him for ease of reference. However when acquitting her of count 1 this is what she said at page 54 lines 12 – 15

> **"From the evidence on record, the complainant testified that on 9/7/2009 he approached the accused to find out about his case and accused demanded Shs.20,000/= stating he was charged with same offence. That statement alone does not amount to soliciting".**

If she did not believe PW1 on this, its not shown how she believed him on the issue of the small piece of paper. Did the name (even if she wrote it) portray a demand for money? It is also true that the evidence shows that the trap money was allegedly given to the appellant at Sky Limit Cafe and not Chuka Law Courts as stated in the charge sheet (Ground 7). There is no legal requirement that the serial numbers and denominations must be indicated in the particulars of the charge sheet. The question the Court will normally ask itself is whether the failure to give the serial numbers and denominations and the omission to state in the charge sheet the correct scene of incident caused any prejudice or injustice to the appellant.

PW1 and the KACC referred to telephone conversations between PW1 and the appellant. There was no phone (handset) produced therein to establish that. There is nothing that prevented the KACC from obtaining a printout of this communication from whichever Service Provider. The appellant denied any such communication. What did the prosecution have to show for such communication? Was there any one who was called to confirm seeing PW1 and appellant together at Chuka Law Courts for these alleged meetings between them? The

answer is “NO”.

On 15/6/2009 the main problem was PW1 not having heard his name in Court. He came the next day and his Ruling was delivered and his matter proceeded quite well. So what would the appellant have been following PW1 for? She was not the one writing the Judgment. The learned trial magistrate in her judgment appears to have relied so much on the receipt of this trapped money and the swabbing of the hands of the appellant to convict her. Mere receipt of money in itself is not an offence. What was to be proved was the fact of “corruptly receiving money as a benefit”.

And before evidence on receiving is adduced there has to be a basis laid for the corrupt soliciting or demanding. The learned trial magistrate found that soliciting had not been proved. The demeanor of PW1 also comes into play. This is a person who had a criminal case pending before the same court. The record shows he was convicted and sentenced in the said criminal case. His own evidence and the tape recording did not support his allegations in count 1 and count 2.

Then I come to the critical question. If the prosecution failed to establish the charges of corruptly soliciting for a benefit, could the charge of corruptly receiving a benefit stand? Did she receive a benefit she had not demanded for? And if she had not demanded for it why was PW1 giving it to her? We go back to his position as an accused person. With the shifting of goal posts on exactly what was demanded of him, I find that he should not have been relied on by KACC officers to spring into a sting operation before establishing the truth of the demand.

In the case of ***KIILU & ANOTHER VS REPUBLIC [2005] 1 KLR 175*** the Court of Appeal had this to say;

> **“The witness upon whose evidence it is proposed to rely should not make an impression in the mind of the court that he is not a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”**

The untruthfulness in PW1's evidence is the reason that made him report the appellant to the KACC office. Was it 20,000, 15,000, 10,000 or 7,000 that had been asked for? PW7 had been asked by C.I. Fredrick Mwangi (PW8) to prepare for him Shs.15,000/= he intended to use in an operation in Chuka.

Finally on this evidence on the 3rd count I do find that there is evidence that the appellant was in possession having received the money from PW1 but the evidence of corruptly receiving the same is completely missing. As I earlier indicated, receiving money in itself does not disclose any offence. It is the corruption and beneficial part in it that is an offence and its the duty of the prosecution to prove it.

Though Mr. Wanyonyi defended the prosecution on non compliance with Section 35(1) and (2) of the Anti-Corruption and Economic Crime Act, the position in law is clear. Section 35(1) and (2) require KACC to make and submit a report of its investigations to the Attorney General with recommendation as to whether the suspect should or should not be prosecuted for corruption or an economic crime. There is no evidence that this provision of the law which is mandatory was ever complied with

Ref:

> **1. NICHOLAS MWANIKI KANGANGI VS ATTORNEY GENERAL CRIMINAL APPEAL NO. 331/10 COURT OF APPEAL NAIROBI**
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> **2. ESTHER THEURI WARUIRU & ANOTHER VS REPUBLIC CRIMINAL APPEAL NO. 48/08 COURT OF APPEAL NAIROBI**

In both cases the Court of Appeal held that non compliance with Section 35(1) and (2) of the Anti-Corruption Economic and Crime Act was fatal to the prosecution case. The prosecution did not comply with the said provision.

With the foregoing, its clear that the appeal has merit. I therefore allow it and quash the conviction. The sentence is set aside. Any fine paid shall be refunded to the appellant.

Orders accordingly.

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

H.I. ONG’UDI

J U D G E

In the presence of:-

Ms. Ing'ahizu for State

Mr. Ithiga for Appellant

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