REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
APPELLATE SIDE

CRIMINAL APPEAL NO. 1352 OF 1997

(From original conviction and sentence in criminal case No. 1880 of 1995 of the Senior Magistrate's Court at Nairobi: G. Nzioka (Mrs)}

CLAIRE NASIMIYU…….APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGEMENT

The appellant was convicted of the offence of corruption Contrary to Section 3(1) of the Prevention of Corruption Act Cap. 65 Laws of Kenya. It was alleged in the particulars of the charge that being an officer of a public body namely police constable in the Kenya police corruptly received a sum of money to wit Kshs.100/- from Silvanus Masese as an inducement to or otherwise on account of the said Claire Nasimiyu to forbear from charging or otherwise taking action against Silvanus Masese for a traffic offence under the Traffic Act Cap. 403 Laws of Kenya a matter which the said Public body was concerned.

Upon conviction the appellant was sentenced to pay a fine of Kshs.10,000/- in default to serve 12 months imprisonment. Being aggrieved by the conviction the appellant appealed.

The thrust of the appeal is that there were several contradictions that went to the root of the prosecution case. These were not resolved by the learned trial magistrate and that being the case, they should be construed in favour of the appellant.

Further, it is the appellants case that, the learned trial magistrate erred in law in shifting the burden of proof to the appellant which was prejudicial.

The facts presented before the learned trial magistrate were brief. A group of police officers were detailed to go on a mission to crack down corrupt traffic police officers. This group included the three police officers who testified before the learned trial magistrate.

On 17th May, 1995 a number of these police officers were in a motor vehicle (matatu) along Kilgoris – Kisii road. At some stage along this road the motor vehicle in which they were travelling disguised as passengers was stopped by the appellant. She was with two other officers at the scene.

It was at this stage that the appellant is said to have received kshs.100/- from her co-accused, the

driver of the motor vehicle concerned to forbear her from charging the said driver. The offence with which the appellant was to charge the driver was not disclosed in the charge, if in the particulars. At the beginning therefore, the appellant stood on a prejudicial position. However, the prejudice may have been cured when the witnesses addressed the issue of overloading. I say "may" because even the issue of overloading was not proved beyond reasonable doubt. The carrying capacity of the motor vehicle in question was never established by an independent witness.

Its Registration book or Public Service licence was never produced.

In an offence of this nature, the giving and receiving of the inducement are crucial to establish the same. Corroboration is essential hence the consistency of the evidence by the prosecution witness is essential.

Inspector Stanley Cheruiyot saw the appellant check the motor vehicle after the driver had stopped it. The driver and the appellant stood beside the motor vehicle, talked and laughed. The driver then gave the appellant Kshs.100/- This money had been given to the driver by the conductor.

Corporal Benson Chai was in the same mission. He was in the same motor vehicle, he did not see the conductor give the driver any money. He did not even see the driver give the appellant any money. He told the learned trial magistrate that the driver alighted holding something and the driver gave something to the lady police officer. His evidence is more complicated by his answers under cross examination when he said:

> "The driver went out of the motor vehicle and joined the lady officer and I saw the driver give her something. I knew it was money. I suspected it was money. They exchanged money at the rear of the motor vehicle".

Unlike Inspector Cheruiyot, this witness - Chai – did not see the appellant check the motor vehicle he did not see the appellant and the driver talk and laugh and his evidence is not that the giving of the money was **beside** the motor vehicle but at the **rear** (emphasis added).

The evidence of P.C. S. Manori was even more dramatic. This is what he told the learned trial magistrate:

> "The motor vehicle was being driven – (A3) – It was stopped by the 2nd accused lady officer. The driver went out and straight to A2 and gave out kshs.100/- The motor vehicle had excess passengers."

Once again, this witness Manori did not see the appellant check the motor vehicle, talk and laugh with the driver and does not say where in relation to the motor vehicle the money changed hands.

Whatever happened after these crucial facts depend on them (the crucial facts). With these basic contradictions, how was the appellant supposed to make her defence. I have already observed that the carrying capacity in relation to this motor vehicle was never established, PW1 said two passengers were standing, PW2 said he could not tell how many people were standing and PW3 said the vehicles had excess passengers. Once again the question is what offence was the appellant forbearing from charging the driver by receiving kshs.100/- if at all? And most importantly, what evidence is there on record to show that the appellant took and/or made an avert act to show that she was about to charge the driver with any traffic offence leave alone that of carrying excess passengers. I have seen none. With those observations I did not deem it necessary to delve the other discrepancies pointed out in the record.

I would however add that it is true that the learned trial magistrate erred in law in shifting the burden of proof to the appellant when the appellant was called upon to give her defence, it transpired that she had made a statement under charge and caution. This was never produced by the prosecution and the only logical observation is that it is because It was adverse to the prosecution case. If it was not, why conceal it from the court.

The learned trial magistrate allowed the appellant to produce it. Yes, it was fatal to the prosecution case. It alleged that the appellant received Shs.50/- not 100/- as alleged in the charge or by the prosecution witnesses. She denied the charge. And what does the learned trial magistrate say:

> "She merely brought the statement during her defence and never called the officer who made it to produce the same. The same should have been brought to the prosecution attention during their case to be able to confirm the contents thereof or not. I treat it as an afterthought….."

The statement was in the possession of the prosecution. When it was produced in evidence under oath, the appellant was not crossexamined by the prosecutor on the same or the allegation that she never knew where the money came from. And so in the end the evidence adduced before the learned trial magistrate was full of inconsistencies and contradictions. The charge was never proved beyond reasonable doubt and the conviction was most unsafe.

Accordingly, I allow the appeal by quashing the conviction and setting aside the sentence. If the fine was paid the same shall be refunded to the appellant forthwith. Orders accordingly.

Delivered and dated at Nairobi this 6th May, 1999.

A. MBOGHOLI MSAGHA

JUDGE

Mr. O'mirera for the State

Miss Mavisi for the appellant

Judgement delivered.

A. MBOGHOLI MSAGHA

JUDGE