



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA**

Criminal Appeal 72 of 1998

JONAS AKUNO AKUBASU APPELLANT

-VERSUS-

REPUBLIC RESPONDENT

JUDGMENT

The appellant in this case was charged, tried and convicted of corruption contrary to Section 3(1) of the Prevention of Corruption Act by the Senior Principal Magistrate's court Kakamega. Thereafter he was sentenced to two years imprisonment and it is against both his conviction and the sentence that he lodged an appeal at this court.

When the appeal came up for hearing Mr. Ogada who appeared before me for the appellant submitted that the learned Magistrate erred in convicting his client when the case was not proved to the required standard. Mr. Ogada stated that the prosecution case depended entirely on a trap which the police alleged to have laid against the appellant. According to Mr. Ogada that trap did not succeed. Mr. Ogada went on to say that the prosecution witnesses stated that money was treated with powder before it was given to the appellant so that if he received it powder would remain on his clothes and his hands. According to Mr. Ogada PW5 who arrested the appellant and recovered the money agreed that there was no powder found on the appellant and that the investigating officer had messed up the clothes. Mr. Ogada stated the appellant's clothes which were taken to the Government Chemist indicated that there was no trace of the powder. The second ground argued by Mr. Ogada is that the evidence of the prosecution witness was contradictory. He stated that PW1 had claimed that the appellant had put the money on the trousers pocket but PW2 who was watching claimed that the money was recovered from right trouser pocket. Mr. Ogada pointed out that the left trouser pocket was shown to have been sealed and it did not work. There was another area where Mr. Ogada claimed the evidence was contradictory. He claimed that PW5 had stated that when money was given to the appellant the officers surrounded the appellant and PW6 ordered the appellant to stand up and he PW5 recovered the money. Mr. Ogada stated that PW6 had claimed that when he reached the spot PW5 recovered the money. Mr. Ogada stated that PW6 had claimed that when he reached the spot PW5 was already carrying the money in his hand having recovered earlier from the appellant.

Mr. Ogada also complained that the magistrate did not consider the evidence in its totality when he was preparing his judgment as he never alluded at all to the evidence of the defence witnesses. It was Mr. Ogada's contention that a failure to consider the defence was fatal to the conviction as was stated in the case of Kigotho v R (1967) EA 445 and Okala v R (1967) EA 555 Mr. Oluoch for the State in supporting the conviction and the sentence stated that P1 had described how the appellant had demanded

Shs.20,000/= so as to decide a land dispute in his favour and that he had reported the matter to police who laid a trap at Fina bar. According to Mr. Oluoch PW2 who had no interest in the matter and who was at the bar at the time witnessed the incident and that he along with the appellant were taken to Kisumu where at a dark room the appellant's clothes and hands glittered when shown with a torch. Mr. Oluoch contended that PW5 had said that he saw the appellant and PW1 go out of the bar and PW1 give money to the appellant and the appellant put the money in his pocket. Mr. Oluoch also contended that the particles on the money was seen. As to the report of the Government Chemist Mr. Oluoch admitted that it was negative but that that could not be fatal to the prosecution case. He said that at first the particles were seen at Kisumu when the appellant and witnesses were taken to Kisumu. According to Mr. Oluoch the test carried out later was made too late and that there was interference with appellant's clothes as admitted by PW5. Mr. Oluoch contended that there was a soliciting for money. Payment of the treated money whose serial numbers were noted and that the same were recovered from the appellant. Mr. Oluoch said that PW6 was able to identify the notes from the serial numbers. Mr. Oluoch admitted that there is contradiction between the evidence of PW1 and PW2 as to the pocket to which the money was put and recovered. According to Mr. Oluoch PW2 did not see the money being given to the appellant. He contended that the money could have been transferred from one trouser pocket to another after the receipt of it but before recovery. He submitted that the alleged contradictions in the evidence of the prosecution witnesses were minor and did not affect the conviction. As to the claim that the trial learned magistrate did not consider the evidence of the defence witnesses Mr. Oluoch claimed the Assistant Chief was an accomplice while the other two witnesses did not witness the appellant being given the money and it being recovered from him by police officers. Mr. Oluoch dismissed the defence evidence as being not material to the case and relied in the decision of the former court of Appeal in the cases of Bundala v R (1959) EA 900.

Deciderio v R (1953) EACA 281 and Welji Pettraj v R (1953) BACA 209.

According to Mr. Oluoch the report of the Government Chemist which indicated that there was no trace of the chemicals on the appellant's clothes was not fatal to the prosecution case. He relied in the contention in the case of Malwa Mukima v R (1977) KLR 5.

This being a first appeal the appellant expects and is entitled to this court's re-examination of the evidence adduced afresh and to this court's conclusion giving allowance to the fact that it did not see and did not hear the witnesses who testified.

Turning to the evidence adduced, I note that the prosecution case relied on the evidence of PW1, PW2, PW5 and PW6. The defence relied on the evidence of the appellant and DW1, DW2 and DW3.

The complainant who testified as PW1 told the court that during 1997 he had a land dispute with his brothers which went up to the Chief of the area who is the appellant. He said that on 2nd May 1997 the appellant sent one Alex Omuka and Jotham Makokha his Assistant Chief, DW1 to tell him that the appellant wanted to see him. PW6 went on to say that the two people had seen him at 10.00 a.m. and also later on at 2.00 p.m. when he went to Tosheka bar within Luanda market where the appellant was and he found him. According to PW1 the appellant demanded a sum of Shs.20,000/= so that he could decide the case before him in his favour. PW1 said that after leaving the appellant he went to Luanda Police station where he made a report of the matter but he was directed to go to DCIO Vihiga. PW1 said that on 7th May 1997 police officers went to his place of work and gave him Shs.20,000/= to go and give to the appellant. This witness claimed that the appellant sent DW1 to collect the money but he refused to give to him but he said that he went to Fina bar where he found the appellant and he gave him the money and left. PW1 said that he had noted the serial nos. of two Sshs.500/= notes as AC 7783984 and AC 3698850.

PW5 said that in company of other four police officers he went to Luanda on 7th May, 1997 to arrange for a trap of a Chief of the area who had solicited a bribe of Shs.20,000/=. PW5 said that he had seen earlier on two Shs.500/= notes treated with chemicals by I.P, Timothy PW6 and inserted into a bundle of paper. PW5 said that they went to Luanda from Vihiga where he worked and that PW1 was given the bundle. PW5 claimed that he saw PW1 being led by the Assistant Chief DW1 into Tina bar and he followed them. there and sat opposite them. PW5 stated further that the appellant and others were not

aware of his presence, and shortly the appellant was called outside by PW1 and they went and stood near the kitchen. PW5 said he followed them and saw PW1 give the appellant the money in a bundle and appellant put it into his trouser pocket and went back to the bar. PW5 said he followed the appellant and asked him for the money he had been given and the appellant gave him. PW5 said that he thereafter arrested the appellant and they took him to Luanda police station. PW5 claimed that the appellant was later on taken to Kisumu C.I.C. Office where at the dark room he saw particles of the powder used to treat the notes.

PW6 told the court that on 7th May 1997 he treated 2 Shs.500/= notes with powder at Vihiga C.I.D. office and that the serial AC 7783984 and Ac 3698850. PW6 said that he thereafter accompanied other police officers to Luanda who included PW5 where they gave the bundle containing money and paper to PW1 who was to give to the appellant. PW6 claimed that he went to another bar where he remained outside and later on he was called by PW5 who told him that the suspect had received money and that he had recovered it from him. PW6 further told the court that he found the appellant already arrested with other two persons and that PW5 had money.

PW2 said in his testimony that he was at the same bar with the appellant on 7th May 1997 when the appellant went out and came back with another man and that the appellant told him the second man was an Assistant Chief. PW2 further said that the Assistant chief then left and later on came in with another man who bought them drinks PW2 stated that the appellant then called the third man out and they went to the rear part of the bar where they did not stay long. According to PW2 the appellant resurfaced and joined them but some four people shortly came and surrounded them and asked them to stand. PW2 said the appellant was asked to produce the money he had been given and he removed a bundle of money and handed over to one of the men. PW2 also said that they were taken to Kisumu C.I.D. Office where a torch was shone on the money and glittering substance was showing. PW2 also said that the appellant's hands, pocket and clothes had the chemical.

The appellant gave unsworn statement in which he claimed that on 7th May 1997, he was at a bar in Luanda market when people invaded the bar and one of the invaders had money in his hand. According to the appellant the men searched them but they never recovered anything. He went on to say that he and his colleagues were taken to Luanda police post and later on they were sent to Kisumu where a machine failed to detect anything on him. Appellant stated that apart from Shs.50/= which he had nothing was recovered from him.

The assistant chief who was with the appellant at the said bar testified as DW1. He said that on 7th May 1997 he was at Fina bar when unknown people suddenly entered and pulled him and the appellant outside. DW1 claimed that one of the people had something in his left hand and another man said that it was recovered from the appellant. The witness further told the court they were taken to Luanda police station and to Kisumu but he was released on the following day.

DW2 said that on 7th May 1997 when he was at Fina bar suddenly people entered the bar and pulled outside the appellant and Dw1. DW2 said that he saw a man with money in his hands and thereafter photographs were taken and they were taken to Luanda police station.

This witness admitted that he was sitting at a different table from the one occupied by the appellant, DW1 and Okoko. The witness also said he did not hear what the police officers told appellant and his colleagues.

DW3 told the court that on 7th May 1997 he was at Fina bar and the appellant and one Okoko were also there. The witness claimed that some men entered and a struggle ensued and he ran away. The witness said that one of the police officers had a note in Kenyan currency. He also admitted that DW1 was with the appellant in the bar and that he never saw appellant being given money.

I note that the issue of the existence of a land dispute between PW1 and his brothers at the material time as confirmed by both PW3 and PW4 was not challenged. The claim by PW1 that the appellant solicited payment of Shs.20,000/= so that he would decide the case between him and his brothers in his favour has

also not been challenged. PW1 told the court that he paid the money to the appellant at Fina bar and PW5 said that he witnessed the payment. PW5 said that shortly later on he recovered the money from the appellant and PW2 who was with the appellant at the same table witnessed the recovery of the money. This witness was an independent person. PW6 confirmed to the court that the money recovered from appellant contained the two Shs.500/= notes he had treated with chemicals. PW6 identified to the court the notes by the serial numbers.

Both PW2 and PW5 were positive in their testimony that at Kisumu C.I.D. Office where they went after the arrest of the appellant powder particles with which the money had been treated were seen on the notes and the hands of the appellant. The report of the Government Chemist confirms that there was chemical on the money recovered from the appellant but there was trace in the clothes and the cotton swabs table and did not fully follow what was happening. One of them admitted that he did not hear what was said by the policeman to the appellant.

In the result I find that evidence against the appellant was overwhelming. This appeal is therefore dismissed.

B. K. TANUI

JUDGE

2/7/98

Coram: Tanui, J.

N/A for parties

Chesang c/clerk

Judgment delivered.

B. K. TANUI JUDGE