IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Platt, Gachuchi JJA &Masime AG JA)

CRIMINAL APPEAL NO 19 OF 1987

BETWEEN

ALEX NJIRI ACHIENG'..... APPELLANT

AND

REPUBLIC..... RESPONDENT

JUDGMENT

(Appeal from a judgment of the High Court at Nairobi, S Amin J)

January 15, 1988, **Platt, Gachuhi JJA & Masime Ag JA** delivered the following Judgment.

The appellant was convicted of corruption, contrary to section 3(1) of the Prevention of Corruption Act (cap 65) and sentenced to six months' imprisonment. His appeal to the High Court was dismissed. The appellant now appeals to this court.

It was found that on April 5, 1984 at Sheria House, Nairobi the appellant who was employed as a Clerical Officer in the Registrar-General's department corruptly received Kshs 100 from the complainant Osman Araru, as an inducement to the appellant to facilitate the change of a partnership to the sole proprietorship of the complainant Osman Araru of the business of the partnership. It was the duty of the appellant to carry out such changes on the relevant forms and fees being paid. The forms had been filled out and fees paid but the forms required which had been filed in relation to this matter, had become lost, and fresh forms had to be filled out. There was still a delay and it was held that the appellant asked for Kshs 500 or thereabouts to carry out the change in the business. After the complainant and the appellant had agreed on the figure of Kshs 100 the complainant reported the matter to the police.

A police trap was arranged with a powdered note and a recording machine. On the day in question the complainant handed over the powdered note and the police officer was listening to the conversation which was recorded on the tape. The appellant was arrested and the sample with the powder was found in his coat pocket. His clothes and sample were sent to the government analyst who, in due course, reported that the powder with anthracene, phenophthalein and quinine had been used, as found in the sample of powder, and that such powder was found in the right hand pocket of the jacket of the appellant; on the Kshs 100 note; and on the swabs of the right and left hands of the appellant. It was clear then that the appellant had received the money which the complainant had given him.

The appellant's defence was to the effect that he had known the complainant before 1984 and at the material time on April 2 1984 the complainant came to him saying that he had tried to transfer the

partnership business. He had filled in forms and handed them in at Counter C which deals with changes of business names. The clerk at Counter C, called Karanja had asked him for Kshs 100. The appellant had been able to locate the file which he took to his office. The appellant tried to investigate whether the fees of Kshs 40 had been paid but he could not find the duplicate receipt. Accordingly either the appellant must make a report to the Attorney-General or make new payment. He agreed to make payment later on that day. Fresh forms were to be filled out and signed by the complainant's partners.

The next morning one of the complainant's partners came to the office and the appellant checked that his signature was all right.

In the afternoon after 3.30 pm the complainant came to the office. It was found that his case was in order. The complainant did not discuss the matter with the appellant and the latter did not ask for any money. On that afternoon the complainant came with photo copies of the forms and the appellant saw the complainant go to the clerk called Shem. In his office the appellant sits with one Mr. Ocholla and then the complainant brought to him the photo-copies of the identity card plus the business name forms.

Having examined these documents the appellant noticed that the counter for payment had been closed. The appellant tried to pay in money together with these documents, but Karanja said that he had closed the receipt book and that he could only accept the money the following day. Two police officers found the appellant at Counter C. They asked him whether he was Shem. He replied that he was Alex. Then a person came and introduced himself as a police officer. He put the money in his pocket and went outside as requested, he had left the documents with Karanja.

The appellant then explained the steps of the investigation. His explanation was that he had the money as part of the registration fee, and the change was to be given back. According to the police the complainant was still talking about the culprit being Shem. Indeed the appellant was to go back to his office in order to get Shem.

During the trial Mr. Ocholla was called. He never heard any conversation so he said, between the complainant and the appellant, nor did he see the arrest of the appellant. Mr. Ocholla therefore did not greatly assist the appellant; nor did he give any assistance to the complainant who had said that Ocholla overheard the arrangement.

The grounds of appeal are set out in detailed points, such as the quality of the complainant's evidence, the possibility of the mistaken identity of the appellant, lack of corroboration, reliance on part of the tape-recording which had been rejected and the attitudes of the lower courts to the procedure of making payment which showed bias, and an approach which failed to take into account the defence. But all this comes down to simple propositions of law that there was no evidence, properly admitted, which corroborated the complainant's story, and that in any event it was a story of one man against the other, so that it would not be safe to act upon the complainant's evidence alone. Both the lower courts had misdirected themselves as to the proper approach towards the evidence and the burden of proof. These are issues justiceable by this court on second appeal, but require a careful review of the evidence.

The learned magistrate found that the complainant was a basically truthful, honest and straight-forward witness. She excused the complainant's wayward replies in cross-examination especially as to the identity of either "Shem" or the appellant as the culprit, as being a matter of having difficulty with English. The real situation, it seems, was that the appellant harassed the complainant, due to delays in carrying out the transfer procedure, and the loss of a receipt for payment of fees, one of which, it seemed to the magistrate, showed that the Registrar-General's office was corrupt. She was prepared to act on the uncorroborated evidence of the complainant, and the appellant's story seemed to her unrealistic. It was the normal procedure to pay over to a cashier.

The High Court held that there was clear evidence of a demand of money to do a favour and indeed that sum of money was found in his possession. So there was no question of identity. Secondly, the tape recording was ruled out. Thirdly, the learned magistrate's sweeping generalisation of the Registrar-General's office being corrupt was uncalled for. But on the totality of the evidence, the generalization had

not affected the verdict.

The complainant was a statutory accomplice whose evidence required corroboration. "Ample corroboration" was afforded in the fact that the Kshs 100 note was found in the appellant's pocket. It was questionable conduct to demand money when the fees had been paid. If the sum required to be paid was Kshs 100, as a matter of prudence and system it should have been attached to the forms submitted and not to end up in the appellant's pocket. These matters lent weight to the findings at the trial that the money was paid as an inducement to speed up the process of changing his certificate. On the other hand the appellant's sworn defence did not raise any doubt as to the guilt of the appellant. After reassessing something called the "totality of the evidence" the High Court held that the charge was abundantly proved.

We will first deal with the procedure in the appellant's office. None of it was proved in detail. All that is known is that if an applicant wants to change the name of his business he can fill out application forms, pay fees, and get the change effected. How these fees are to be paid and to whom is not clear. It seems that on February 20, 1984 the complainant approached a certain clerk who was not in court, and was told to fill up forms. The complainant says that he returned on February 23, 1984 and paid Kshs 30 fees and late fee of Kshs 10; Kshs 40 in all and was issued with a receipt. There was a delay. On April 2, 1984 the complainant approached the appellant. The latter called for the file and there was no duplicate receipt. The stories then divide. The complainant says that on April 3, 1984 he had to bargain so that for Kshs 100 he would get the transfer carried out. The appellant says that he offered the complainant the choice of reporting the loss of the money or repaying the fees. There is no evidence what the procedure would be if a duplicate receipt was lost, but it seems that even if the complainant had the original and could claim payment, the absence of the duplicate would mean that the department had not received the money; and the complainant would have to accept the loss and make a further payment first, or prove payment, before the transfer could go through.

That at any rate is what the appellant suggested would be correct. There is nothing to show that he is wrong. Then on April 5 1984 the complainant brought his money and without any further conversation, the appellant tried to get Karanja to receive it, although it was after Karanja had closed his books. The appellant suddenly realized he had been tricked and he thought he might be arrested whereupon he put the money in his pocket.

The complainant says that he told the appellant – "I have brought your thing." He could not recall what the appellant said, but the latter took the money put it in his right pocket. The appellant said all was well and the transfer would go through and the complainant should return the next day. The complainant thanked the appellant and called the police.

Chief Inspector Wilson Njoroge (PW 3) did not describe the arrest.

> "They merely got hold of him, brought him to the car and went to C I D headquarters."

Neither did Inspector John Kang'ethe (PW6). But the appellant was not in his seat as the complainant thought, but somewhere near the enquiryplace which is near the payment counter. The appellant was holding something in his hand; but that was apparently not taken. The appellant's first answers were to the effect that he had the money which was for payment for fees in respect of change of business name. He was at first released. The appellant apparently did not blame Shem.

The police must have had the situation well in hand when the appellant was rearrested. There was the question of Shem and the payment at the payment counter. It is difficult to understand why Shem and Karanja the clerk at the payment counter were not called as witnesses. It is usual for the full procedure to be explained, together with variations of it, especially if the way the appellant handled the money was thought to be improper.

There was the question whether the appellant had tried to pay over the money to Karanja who had refused to receive it. These men were important witnesses. Instead this is one more case where the prosecution

was content to rely on the barest evidence of a verbal battle between the complainant and the accused person, now appellant.

Possibly the evidence of Shem and Karanja was not called, because reliance was placed on the tape recording. That proved inaudible; perhaps it was inadmissible; whatever it was, the tape recording was not relied upon. Chief Inspector Wilson Njoroge was a long way sitting in a car and did not know the appellant and so could not in any event say what had occurred at the counter. (See *Obanda v Rep* Cr App 62 of 1983, where it was explained that the tape recording would only be an *aide memoire* to the police officer, who had heard what passed between the complainant and the accused in that case.)

Apart from the Chief Inspector who did not hear what had passed between the complainant and the appellant the other police officers stationed around the building could not do so either. So after a great attempt, which in the circumstances of this case was not objectionable (see *Wanyama v Republic* [1975] EA 123) the police trap failed. Apart from the failure to demonstrate that the appellant was corrupt, the non-acceptance of the tape recording did not permit the magistrate to rely on Chief Inspector Wilson's statement in the tape that the accusation was against Alex and not Shem. The tape being an *aide memoire*, that fact had to come from the Chief Inspector's evidence in the first place. He had to be able to identify the voices.

We are rather mystified at the description of the trial producing ample evidence, the totality of which assured proof of the appellant's guilt. It would seem that the prosecution ought to be warned that if the barest evidence is put forward, one result may well be that if important witnesses are not called, an adverse inference may be drawn. (See *Bukenya v Republic* [1972] EA 550, 551).

Secondly, it may lead the court into speculation. There are several examples in this case. It is "normal" for applicants to pay fees to a cashier if there is one in an office. But that does not usually mean that other clerks cannot try to see that fees are paid in on behalf of applicants. At any rate no procedure was proved against such an attempt. Secondly it is true that delays, lost files and lost receipts can easily lead to bribery; but they are also susceptible of innocent explanation.

Thirdly it may be that money can be left with application papers. It is also true that if there is delay in payment the money must not be lost. It may be better sometimes to protect it than lose it. It may be better still to put it away in a locked drawer until payment, if there is one. It all depends on the circumstances. Here the appellant was found near the paying in counter with something in his hands. He could not pay over the money. He must not lose it. So he put it in his pocket and he was about to be arrested.

Of course the judge is partly right that a clerk does not usually put fees paid to his department in his pocket. But it may depend on the circumstances. All these matters are equivocal and required the courts below to bear in mind the complainant's case with the defence.

Apart from the speculations as to what the appellant ought to have done after 3.30 pm on April 5, 1984, it was the complainant's word against the appellant's word. The complainant is to be treated as an agent provocateur.

He was a police informer and spy; but as has been said before, as he was "an agent for justice" his evidence did not require corroboration (see *R v Hashan Jiwa,* (1949) 16 EACA 90).

Of course, if a spy is involved in a police trap, and the trap is successful, the evidence of what occurred at the time the trap is sprung will provide evidence *aliunde* of the accused person's complicity. If the trap fails, and all that the court has is the evidence of the police informer. In all cases depending on the evidence of a single witness, the court must be on guard that the prosecution has discharged the burden of proof. It is especially so where the complainant himself commits an offence to induce the accused to commit an offence.

It is not clear to us how useful the phrase "a statutory accomplice" really is, and we leave that for the discussion another time. But what is certain is that if a spy introduces an element of self-interest or

revenge into his police spying, the courts must be especially careful, which in practical terms will entail looking for credible evidence with corroboration if possible. That is why it was pointed out in *R v Vasanjee Liladhar Dossani*, (1946) 13 EACA 150 at page 151 that:-

> "In the first place the money used was not supplied by the police; it was the personal money of Taladia, the agent provocateur. The effect of that is that in a trial which depends … upon the evidence of the agent the possibility of his having a direct personal interest in securing a conviction cannot be excluded."

The inference is that the evidence of an agent provocateur with a direct personal interest would be suspect. In this case, the High Court held that the complainant would have no motive or reason to lie. One might be revenge for the lost fees, and the exaggeration of the appellant's calling for further fees into a bribe. If this charge is held, the complainant would probably not be required to pay any further fees.

If the lower courts had realized the equivocal nature of the evidence, the lack of supporting evidence which could have been called and was not, and the failure of the police trap to ascertain what was said at the time the money was handed over, as well as the failure of Ocholla to bear out the complainant as to the agreement on April 3, 1984, they may well have come to a different conclusion. We think that the conviction of the appellant was not proved beyond reasonable doubt.

Accordingly we quash the conviction and set aside the sentence. The appellant is to be set at liberty forthwith unless held for any other lawful reason.

Dated and delivered at Nairobi this 15th day of January , 1988

H.G. PLATT

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JUDGE OF APPEAL

J.M. GACHUCHI

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JUDGE OF APPEAL

J.R.O. MASIME

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AG. JUDGE OF APPEAL