IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Miller & Potter JJA)

CRIMINAL APPEAL NO. 92 OF 1981

BETWEEN

MUTONYI .....1ST APPELLANT

KAMANDE.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

Potter JA The two appellants Mutonyi and Kamande were each convicted by the Senior Resident Magistrate, Nairobi, on two counts of corruption, one of soliciting and one of receiving, contrary to Section 3(1) of the Prevention of Corruption Act (Cap 65). Another accused with them (the second accused) was acquitted at the trial. A fourth accused named Wilson who was convicted with the two appellants was acquitted on appeal to the High Court. All four accuseds were police officers, and members of the crew of a 999 police car. The first appellant, Mutonyi, was an Inspector of Police and the commander of the car. The other three accused were constables. The fourth accused, Wilson, was the driver of the car. The two appellants come before us on second appeal.

The evidence of the complainant, Mr Joseph Odiawo, an employee of Barclays Bank, was that on January 30, 1980, he ran into the back of Mr Oloo's car in Haile Selassie Avenue, Nairobi. Before Mr Odiawo and Mr Oloo had left the scene of the accident, the complainant had acknowledged in writing that the accident had occurred due to his negligence, and had agreed to meet the cost of repairs to Mr Oloo's car.

The two appellants and Wilson, the driver, arrived at the scene in their police car. Mutonyi accused the complainant of being drunk, which he denied. The complainant was then taken into the police car where in the absence of Mutonyi, Kamande began interrogating him, saying that it was a very serious accident. Kamande asked the complainant for cases of beer, and then for Kshs 1,200.

The complainant's vehicle was towed away, and he was allowed to go to his office. Kamande called there at 5 pm. Kamande asked "Have you got the money now?" The complainant made an excuse, and Kamande took him out to Mutonyi, who was sitting in the police car with Wilson. The complainant was told to get into the car, which he did. He was driven around. Mutonyi asked him whether he had the money with him. The complainant did not have it. On promising to find the money, the complainant was told to go back to his office but to expect to meet them on the following day.

The complainant next saw these officers when all three of them came to his office on February 6. The

complainant was taken to their car where, upon being asked by Mutonyi when he would be ready with the money, the complainant said that he would bring the money at 2 pm that day. On his return to the office the complainant telephoned the CID who called him over to their Headquarters, where he was told to report as and when the appellants and Wilson came to him.

On February 13, Kamande and Wilson called the complainant from his office at 11 am, and took him to their police car, in which Mutonyi and the second appellant were sitting. This was the first time that the complainant had seen the second accused. The complainant entered the car. Wilson asked him to produce Kshs 400. Mutonyi told him to meet them at 2.15 pm that day at the General Post Office with Kshs 400. The complainant agreed and went back to his office where, after telephoning, he went to CID Headquarters. He was there given Kshs 400 in Kshs 100 notes in an envelope. A police officer gave evidence that the four notes had been chemically treated with "APQ" (anthracene, phenolphthalein and quinine) and their serial numbers recorded. Five CID officers drove the complainant up the Provincial Commissioner's office where they parked their car. The complainant got out of the car and went to the GPO bus stop. The appellants, the second accused and Wilson came there in the police car. The complainant got in and the car was driven away by Wilson. Mutonyi was in the front passenger seat. Kamande and the second accused were in the back seat. The complainant sat next to Kamande in the back seat. Upon being asked for the money by Wilson, the complainant handed Kshs 400 to Kamande. Mutonyi then instructed Wilson to drop the complainant at his office. Four CID officers described in evidence how they tried to chase the appellants' car after the complainant entered it, but lost sight of it. They then laid an ambush at Kilimani Police Station, where the appellants were due to report off duty during the afternoon. Three officers were on foot, and two remained in their car. When the appellants' police car arrived, the CID officers gave chase both on foot and in their car. Mutonyi and the accused were arrested in the car. Kamande and Wilson ran away.

Mutonyi was searched and Kshs 225 in notes were found on his person. Those notes did not include any of the four Kshs 100 notes which the complainant had been given by Chief Inspector Mburugu of CID.

Notes to the value of Kshs 295 were found between the two front seats of the appellants' car. They included one of the Kshs 100 notes which Chief Inspector Mburugu had handed to the complainant after recording the numbers.

There was also evidence purporting to show that a shirt belonging to Kamande, the Kshs 100 note supplied by the CID to the complainant and found in the car, and Mutonyi's hands (when tested on February 13) were contaminated by "APQ" powder.

The appellant Mutonyi made an unsworn statement in his defence, in which he gave an account of attending the accident on January 30, 1980, and of his movements on February 15, the day on which he was arrested. While on patrol on that day, he said, the appellant Kamande asked if they could pass by the General Post Office "where there was someone with an urgent matter with an abstract report and he wanted to help him to be processed". They picked up the complainant, who talked with the driver Wilson in the Luo language, which Mutonyi said he did not understand and then dropped the complainant off. It was argued by his advocate on his behalf that no trace of "APQ" powder was found on his uniform, or on the swabs taken from his hands or on the money taken from his person. No reference was made in his defence to the evidence of the testing of his hands by Superintendent Kariuki on February 13, when the witness found fluorescent specks on his hands.

It was also submitted that there was no corroboration of the complainant's evidence against Mutonyi, and that it would be unsafe to convict him in the absence of such corroboration.

The appellant Kamande made an unsworn statement from the dock in which he denied the charges. He was at the scene of the accident on January 30, 1980, but did not talk with the complainant. While on patrol on February 13, he said, the car commander Mutonyi instructed the car to pass near the General Post Office. At the GPO "a man stopped us and he entered our car. We dropped him to go and collect the police abstract form."

Kamande did not refer to the evidence that he ran away from the police car at Kilimani Police Station. It was submitted by his advocate that there was no evidence that Kamande received any money from the complainant, or that the shirt said to have been contaminated by "APQ" powder was worn by him on February 13, or that he had been identified as one of the members of the car crew who ran away. As in the case of the first appellant, it was submitted that the evidence of the complainant against Kamande was not corroborated, and that a conviction would be unsafe.

The learned magistrate stated in his judgment that he had no doubt about the truthfulness of the complainant. He did not agree with the submission that there was no corroboration of the evidence of the complainant. He did not, however, consider whether there was any rule of law or of practice requiring corroboration of the complainant's evidence in a corruption case.

In *Dusara and Khimji v Republic*, Criminal Appeal No 59 of 1980 (unreported) this court said:

> "Mr Sharma cited a number of Indian authorities which show that the Supreme Court of India insists on independent and reliable corroboration in corruption cases. We agree that corroboration is desirable and should be sought of the complainant's evidence in corruption cases in Kenya but we do not agree that the necessity for corroboration has effect as a rule of law. We think that a court, if it carefully directs itself as to the desirability for corroboration and the danger inherent in convicting upon the uncorroborated evidence of a single witness, may nevertheless convict on such uncorroborated evidence if it is certain of the truth and reliability of that evidence."

The magistrate referred to five pieces of evidence independent of that of the complainant as affording corroboration of his evidence.

Briefly they are that:

1. The complainant was picked up by appointment by the patrol car at the GPO on February 13, fourteen days after the accident.
2. A marked Kshs 100 note was found in the patrol car on February 13.
3. Kamande and Wilson ran away from the police car at Kilimani Police Station, when approached by the CID officers in plain clothes.
4. One of Kamande's uniform shirts taken on February 13, was found to be contaminated by "APQ" powder.
5. Fluorescent specks were found on Mutonyi's hands on February 13.

The magistrate did not say which pieces of evidence implicated which accused. He appears to have overlooked an important element in the definition of corroboration, which is that it "affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it". See *Republic v Manilal Ishwerlal Purohit* (1942) 9 EACA 58, 61.

The appellants Mutonyi and Kamande were not present or represented at the hearing of their appeal to the High Court, but they both filed grounds of appeal.

In a short judgment, the grounds on which the High Court dismissed the appeals of the two appellants before us were stated as follows:

> "The learned trial magistrate went into the facts with care and prepared a lengthy judgment in which he set the evidence out in detail with his reasons for believing that the complainant's evidence was true and corroborated. Nor did he overlook the discrepancies which the evidence threw up. There was evidence upon which he could properly have convicted the appellants Onoka (Mutonyi) and Jackson (Kamande) as he did . … upon our assessment, the magistrate was right to find as he did that Onoka and Jackson acting in concert solicited the bribe receiving it through Jackson who was given it but not Onoka."

We do not have the benefit of any critical analysis by the High Court of the items of supposed corroborative evidence. The fact that the complainant was picked up by appointment by the appellants' patrol car on February 13, some fourteen days after the accident, is significant in itself, but it is not clear whether it connects either of the appellants with the offences charged. It appears from the defence evidence that any member of the crew of the patrol car could ask for the car to go to a particular place in Nairobi for some purpose of his own, at least at a convenient time on the patrol. Mutonyi said it was Kamande who asked for the car to go to the GPO to pick someone up. Kamande said that it was Mutonyi who ordered that the car go to the GPO to pick up a man. It is not clear whether Mutonyi admits recognising the complainant as the man who was picked up, because he is recorded in his unsworn statement as saying:

> "we went and picked up the complainant whom I did not know."

He later says –

> "Then later we dropped that man on the way".

The complainant did not say that he spoke to Mutonyi in the car. The driver, Wilson, told him to give them the money. He handed the Kshs 400 to Kamande, who was next to him in the back seat. Of course, if Mutonyi was saying that he did not know who the passenger was, he was claiming to have a very short memory, because CID officers and the complainant gave evidence that the complainant was the man who entered the appellants' patrol car.

Kamande claimed an equally short memory. According to his unsworn statement the police car was stopped by a man he did not know, whom "we dropped on the way near the Nairobi Area for him to go and collect the police abstract form". Kamande said nothing more about that incident. It was not suggested by the prosecution or found by the magistrate that this incident implicated the second accused or the fourth accused, the driver, Wilson.

There is a similar difficulty in accepting that the evidence that a marked Kshs 100 note was found between the front seats of the appellants' patrol car when it was searched on February 13, is evidence implicating any particular member of the crew of the car.

Then there is the evidence that Kamande ran away from the police car at Kilimani Police Station when the CID officers approached. We are satisfied on the evidence that Kamande did run away, but we are not satisfied that this evidence should carry any weight. In his unsworn statement Mutonyi described the CID officers as "a gang of civilians pointing pistols at us." In considering the evidence about the accused Wilson running away, the High Court expressed the view that "the evidence about it left something to be desired." This we take to mean that, in the circumstances, the running away was not a definite indication of a guilty mind.

Then there was the evidence regarding the first appellant's hands and the second appellant's shirt. These were matters of forensic science, to be proved by expert evidence. The prosecution evidence given on these matters was so unsatisfactory that we do not think that we should place any reliance upon it.

Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurements and the like.

Section 48 of the Evidence Act (Cap 80) provides that where, *inter alia*, the court has to form an opinion upon a point "of science or art, or as to identity or genuineness of handwriting or finger or other impressions", opinions on that point are admissible if made by persons "specially skilled" in such matters.

In Cross on Evidence 5th edition at p 446, the following passage from the judgment of President Cooper in *Davie v Edinburgh Magistrates* [1933] SC 34, 40, is set out as stating the functions of expert witnesses:

> "Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts put in evidence."

So, an expert witness who hopes to carry weight in a court of law, must, before giving his expert opinion:

1. Establish by evidence that he is specially skilled in his science or art.
2. Instruct the court in the criteria of his science or art, so that the court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.
3. Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness.

Judged by this standard, the expert evidence was most unsatisfactory. Superintendent Kariuki (PW 4) said he was attached to the Scenes of Crime Section at CID Headquarters, Nairobi. He made no attempt to prove that he was specially skilled in the forensic use of "APQ" powder, or to instruct the court in the relevant scientific criteria. Having said in evidence that he was instructed to examine Mutonyi and another accused for the presence of "APQ" powder, he continued:

> "I examined them with alleviated radiation in a dark non-contaminated room. I examined them separately. I found fluorescent specks on the hands of accused 1 (Mutonyi) and took swabs from his both hands and packed them separately in plastic bags."

On this evidence the magistrate was not provided with the means of judging for himself the significance of the presence on Mutonyi's hands of fluorescent specks. Furthermore, as the Government analyst reported in writing (Exhibit 21) that the swabs taken from Mutonyi's hands showed no sign of the presence of "APQ" powder, the magistrate was left with no means of judging whether the positive evidence of the presence of fluorescent specks on the hands is more compelling than the negative evidence of the absence of contamination of the swabs taken from the hands at the same examination.

Again, in the case of the appellant Kamande's blue police shirt, it was the same witness Superintendent Kariuki who contented himself with saying that he collected a number of items including items of clothing and uniform from another officer including the shirt, which he took to the Government analyst. He collected the report of the Government analyst, which was admitted as Exhibit 21. The report stated that the shirt showed traces of "APQ" powder. The shirt was found wet in a basin in a bathroom which Kamande shared with another police officer. There were three pairs of shorts as well as the shirt in the basin. The shirt and one pair of shorts bore Kamande's force number. The other two pairs of shorts bore force numbers which were different from each other and from Kamande's number. Although there was some confusion over the force numbers, we have no doubt that the contaminated shirt was the property of Kamande. It was not however conclusively proved that he was wearing that shirt on February 13, 1980, when the contaminated money was said to have been handed to him.

We have come to the conclusion that it would not be fair to either appellant to treat any of the so called corroborative evidence as implicating him. The evidence relating to the complainant being picked up by the appellants' car on February 13 and the finding of the marked Kshs 100 note in that car soon afterwards, is however of some value as confirming part of the complainant's story.

However, upon our own assessment of the evidence of the complainant and of the other evidence we are satisfied that, had the courts below directed themselves correctly as to the matter of corroboration, they could not have failed to have found the appellants guilty of the offences charged.

Accordingly, the appeal of each of the appellants against conviction is dismissed. This court has no jurisdiction to entertain an appeal against sentence in this case.

We would respectfully draw the attention of the prison authorities to the statement of the appellant Kamande in his Grounds of Appeal that he suffers from heart disease.

As **Madan** and **Miller JJA** agree, it is so ordered.

Dated and delivered at Nairobi this 222nd day of January, 1982.

C.B MADAN .....

JUDGE OF APPEAL

C.H. E.MILLER

.....

JUDGE OF APPEAL

K.D POTTER

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR