REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL (REVISION) CASE NO 8 OF 1979

REPUBLIC.....APPELLANT

VERSUS

GEORGE MUDANYA KAZENGWA.....ACCUSED

JUDGMENT OF THE COURT

The accused, an inspector of weights and measures, took Shs 600 as an inducement not to prosecute a man for hoarding tea, and was charged before the Senior Resident Magistrate with corruption, contrary to section 3 of the Prevention of Corruption Act (which carries with it, so far as first offenders under it are concerned, a maximum penalty of seven years' imprisonment, a fine of Shs 10,000, or both). He pleaded guilty to the charge, was convicted and was sentenced to pay a fine of Shs 5,000 or to serve six months' imprisonment if the fine be not paid, which it was. He was not invited to take the bribe; he asked for it, and he appeared in Court because a trap was laid and he was caught in it.

His counsel, urging in mitigation in the court below, accepted that "corruption is conceived as a serious offence and that the Government would not tolerate" it; but asked, and (with respect) correctly asked, the magistrate to judge the case on its own merits. In support of those merits, he put forward ten main points: (1) the accused had pleaded guilty to the charge; (2) he was before the Court because of a police trap; (3) the amount of the bribe was small, and there was no loss; (4) the accused had six years experience in his job which he would likely lose; (5) his wife was incapable of earning a living; (6) the case had hung over him for about two months; (7) he had taken drink; (8) his age; (9) he was repentant and apologetic; and (10) he was a first offender. Let us deal with each of these in turn.

(1) The accused pleaded guilty, and was entitled to have this borne in mind in his favour, although (of course) he had been caught in a trap. (2) A trap was laid, but the offence had already been resolved upon: *R v Hopley* (1949) 16 EACA 110. (3) The amount of the bribe is perhaps not as important as the fact that it was solicited; that the accused was not given the chance to use the money is hardly a factor in his favour, and the amount is not small. (4) The accused's six years of office should have ensured that he did not seek a bribe in the work which he was paid to do, and this, in any event, needed to be weighed against the fact that this was a bad case in which a man in authority sought to take advantage of his position to prise money from a perfectly innocent man who had done nothing wrong. By what he did, of course, the accused declared his unfitness to continue in his job. (5) His family might well suffer is for consideration; but this was a risk the accused took. (6) The time between arrest and sentence is also for taking into account. (7) Drink was taken; but the offence was not committed on the moment. (8) The accused is a mature man, about thirty years old. (9) Repentance and apology are for taking into account. And (10) the fact of being first offender is also for consideration, but the Act makes some provision for it.

From the foregoing will it be seen that there were some mitigating factors, but that there was not overmuch material upon which counsel for the accused could rely for great leniency; he did his best with what there was. It was not, however, as we see it, enough to support the proposition which he put forward that "It is therefore that any sentence on the accused less than imprisonment would be sufficient in the circumstances." It was not sufficient, and with respect, undue weight was put by the magistrate at least on the likely loss of job. Moreover whilst he said that he accepted that the offence of corruption was very serious, appreciating the prosecutor's view about the offence generally which he endorsed by pointing to it being right for the administration "to stamp out this evil by all means", he did not reflect this in his

award. As we see it, a sentence such as that which was awarded can but help to serve to encourage the commission of the offence.

There has been a miscarriage of justice here by the wrongful exercise of the magistrate's discretion: *Harries v R* (1921) 8 KLR 186. Apart from what we have already said, the sentence awarded is manifestly inadequate upon the facts of the case. We set aside the order for the payment of a fine, which will be repaid, and in its place there will be an order that the accused serve four years' imprisonment.

Order accordingly.

Dated and delivered at Nairobi this 20th day of February 1979.

E. TREVELYAN

JUDGE

J.H.S TODD

JUDGE