REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO 826 OF 1978

GEORGE IGOGO MUNYINYI .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence by EO O'kubasu Esq at the Senior Resident Magistrate's Court, Kiambu, in Criminal Case No 61 of 1978)

JUDGMENT

The appellant, George Igogo Munyinyi, was charged with corruption in office, contrary to section 3(1) of the Prevention of Corruption Act, in that he on 20th January 1978 at Kiambu township in the Kiambu district, being a member of the Public body, namely a tax clerk in the Income Tax Department of the Republic of Kenya, corruptly received the sum of Shs 900 from James Wairia Kamau, as a reward for "forbearing to reduce" the income tax of James Wairia Kamau for the year 1976, a matter in which the public body was concerned.

Prior to the trial of the appellant before the Senior Resident Magistrate, a consent to prosecute (as required) was presented to the Court and filed when the appellant was charged and pleaded "Not Guilty". The consen to prosecute is in the following terms:

> In exercise of the powers conferred upon the Attorney-General by section 12 of the Prevention of Corruption Act, chapter 65 of the Laws of Kenya, and delegated to me by Legal Notice 338 of 1963, I hereby consent to the prosecution of: George Igogo Munyinyi for the offence of corruption, contrary to section 3(1) of the aforesaid Act, based on the following facts: George Igogo Munyinyi: On 20th January 1978 at Kiambu township in Kiambu district of the Central Province, being a member of a public body, namely a tax clerk in the Income Tax Department of the Republic of Kenya, corruptly received the sum of Kshs 900 from James Wairia Kamau, as a reward for forbearing to reduce the income tax of the said James Wairia Kamau for the year 1976, a matter in which the said public body was concerned.
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> Dated at Nyeri 3rd April 1978.
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> J E Gicheru
>
> Ag Senior State Counsel

Mr SM Otieno who appeared for the appellant at this appeal took five grounds of appeal. The first one reads:

> That the trial magistrate erred in law and misdirected himself in holding that [James Wairia Kamu] was not an accomplice and that such error and misdirection prejudiced the appellant and caused a miscarriage of justice.

Mr Otieno argued that the Senior Resident Magistrate had entered a conviction against the appellant without taking into account the amendment to the Prevention of Corruption Act brought about by the Prevention of Corruption (Amendment) Act 1967, which amended the principal Act by inserting a new subsection in section 3 immediately after subsection (2).

As this Court said in *Kilili v The Republic* [1977] Kenya LR 80, 81:

> In a very recent decision given by the Court of Appeal in *Josphat Mulwa Mukima v The Republic*, page 5, *ante*, it was held that the intention or motive of the giver of a bribe is, since the amendment, irrelevant and the mere giving of the bribe leading to the doing of the act by the receiver has to be taken to have been done corruptly, whatever the motive of the giver. The Court instanced the giver being an agent of justice and acting under the instructions of the police, but nonetheless an accomplice in crime. We think that, were it not for section 3(2A) so interpreted, an agent provocateur (as described in *Habib Kara Vesta v R* (1934) 1 EACA 191 and also in *R v Hasham Jiwa* (1949) 16 EACA 90) or an agent of justice as mentioned by the Court of Appeal would not generally speaking, even with the subsection upon the statute book, need corroboration save in exceptional cases. The reason for the requirement of corroboration is that where one has an accomplice he may be a person whose worth as a witness is in doubt, ie a person likely to swear falsely to shift blame from himself, because he is a participant in the crime, he is an immoral person likely to disregard the sanctity of the oath, and he is a man giving evidence under promise, or in expectation of pardon: *R v Asumani Logoni s/o Muza* (1943) 10 EACA 92. In the case of a man going to the police and thereafter acting under their instructions he cannot believe that he is likely to be prosecuted for acting as a good citizen should. There is no question of the shifting of blame and there is no reason to suppose a disregard for the sanctity of the oath. In other words, an agent provocateur or agent of justice is not ordinarily an immoral person needing corroboration. In any event, although it was said in *Morjaria v The Republic* [1972] EA10 that there must be an exceptional case before, with due warning, the Court can properly and safely act on an accomplice's uncorroborated testimony, this decision, we venture to say, does not quite apply to cases concerning agents provocateurs. We do not know what was argued in *Mukima's* case; the judgment gives no indication that a case was put up for accepting the complainant's evidence alone. There are of course, degrees of complicity (*R v Wanjerwa* (1944)) 11 EACA 93) and it must be, as we think, that a notional or statutory manufactured accomplice must ordinarily be an accomplice in the lowest possible degree. We observe that in interpreting the provisions of subsection (2A) the Court of Appeal interpreted words such as "gives" restrictively and, with the greatest respect, we entirely agree with that view.

It was further argued by Mr Otieno in this appeal, as he had argued in *Kilili v The Republic* [1977] Kenya LR 80, that if James Wairia Kamau is to be treated as an accomplice (and we do so treat him), paying regard to the decision in *Josphat Mulwa Mukima v The Republic* [1977] Kenya LR 5, we must consider whether or not his creditworthiness was considered by the trial magistrate. In this regard we refer to *Uganda v Khimchand Kalidas Shah* [1966] EA 30, where it was held, *inter alia*, that the correct approach was for the Court first to decide whether, in the light of all the evidence of the accomplice and then to cosnider whether there was corroboration of that evidence; see the judgment of Spry JA, at page 31.

The trial magistrate did not find that James Wairia Kamau was an accomplice and it was Mr Otieno's argument (as we understand it) that, since the magistrate had not found James Wairia Kamau to be an accomplice, he did not apply the case of *Uganda v Khimchand Kalidas Shah* as he should have done; but the trial magistrate did find James Wairia Kamau creditworthy. Arising out of this, Mr Otieno argued that the magistrate was in error since he should have found the witness was dishonest in that part of his evidence which related to his employment of an accountant in respect of his tax matters; but reading his judgment we do not think that this did or could have affected his assessment. With this point in mind, we arrive at the same assessment as the magistrate in regard to this witness.

It is also true that the magistrate did not find as he should have found, in accordance with *Josphat Mulwa Mukima v The Republic* [1977] Kenya LR 5, that James Wairia Kamau was a statutory accomplice; but, had he done so, we cannot see that it would have made any difference to him. He believed that James Wairia Kamau had told him the substantial truth and was worth of being believed; and he would either have found that the witness did not need corroboration, or that he was corroborated by the tape recorded conversation. It is very likely that the former would be the case; but whichever it is, for our part, we think that it was quite safe for the magistrate to have relied upon the evidence of James Wairia Kamau as on our reading of the record we would be prepared to rely on that witness without looking for corroboration. The witness went to police, he put himself in their hands, he did what they asked of him and (for all that was argued before us) there was no real reason for him to have falsified a case against the appellant because of being persuaded to withdraw his objection to an earlier year's assessment and to include his directors' fees. In any case, the tape-recorded statement supports James Wairia Kamau and points to the rejection of the defence case. There is no mention of an accountant in the tape-recorded statement for all that was put to us. If the accountant Heho was to have received Shs 1000, as was the defence case, something would have been said about the shortfall of Shs 100, and there was nothing so said. There was therefore corroboration of the witness's evidence in any event. There are two references to Shs 900 in the taperecorded conversation, the second of which is "*J.* Those are nine hundred, as agreed. *M.* Thank you" which is in accordance with the prosecution case.

We will now deal with ground 3, which reads:

> That the trial magistrate misdirected himself in law by inferring that help in reducing tax for 1976 constituted soliciting a bribe without considering the conversation on tape about the appellant having a competent person and without taking into account the effect of the whole conversation on tape and further misdirected himself in speculating on what the appellant and [James Wairia Kamau] should have spoken and on what [James Wairia Kamau] could have understood when referring to terms used in income tax matters.

The magistrate was perfectly in order in finding, as he did, that the appellant's object was to lead James Wairia Kamau to believe that he would in some way help James Wairia Kamau to have his income tax for 1976 reduced, and to this end he took the Shs 900.

According to James Wairia Kamau, he did not go along with the scheme as initiated and suggested by the appellant. Assuming, however, that he indicated that he would and in fact did (although we do not believe this to be so), he went to the police and he assumed the role of an agent provocateur; see *R v Hashim Jiwa* (1949) 16 EACA 90. In arriving at this conclusion we do not overlook the conversation which was tape-recorded and we do not think that it can be validly said that the magistrate arrived at any wrong conclusions about that tape-recorded conversation.

Ground 4 reads:

> That the trial magistrate erred in law and misdirected himself in failing to hold that [James Wairia Kamau] was unreliable in his evidence and could have had malice against the appellant for making [James Wairia Kamau] withdraw objections to 1975 tax and for investigating director's fee paid to [James Wairia Kamau]; further misdirecting himself in considering in isolation evidence of [James Wairia Kamau, Heho and the second defence witness] and the recorded conversation between [James Wairia Kamau] and the appellant and that such error and misdirection prejudiced the appellant.

We have already considered the matters raised in this ground of appeal and we would merely add that nothing in the case leads us to believe that simply because the appellant persuaded James Wairia Kamau to withdraw his objections to the 1975 tax assessment (which he did), he should go to the length of falsifying a case of so serious a nature against the appellant. He did not do so. And our earlier quotation of the acceptance of the Shs 900 as recorded in the tape-recorded conversation, we think, supports this.

Grounds 5 reads " That the trial magistrate erred in law and misdirected himself in rejecting the defence

case as an afterthought". This ground, we think, with respect is quite lacking in substance. Whatever the magistrate said, the transcript of the tape recording is in evidence and, in any event, we do not think that anything more was meant by the word "afterthought" than that the defence was thought up.

Now to deal with ground 2, which reads:

> That the trial magistrate misdirected himself in law in failing to consider that the charge laid was in effect contrary to the requirements of the law.

This is not really so. It is perfectly true that the charge refers to: "for bearing to reduce the income tax of the said James Wairia Kamau for the year 1976" but it is clear that this was a misuse of the English language, the case against the appellant being that the money was received "as a reward to reduce the tax …"

The appellant was never in the slightest doubt about the case he was to meet and the point was not taken until after the defence case was closed, following the calling of evidence. The appellant was represented by counsel throughout the hearing of the case in the court below; but his counsel, as we have said, did not raise the question until after the defence case was closed, following the calling of evidence, when it was too late to take the point that a failure of justice could have (or had) occurred, because it is obvious from the record that one had so occurred.

By section 382 of the Criminal Procedure Code no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial unless such error, omission or irregularity has in fact occasioned a failure of justice; and, by the proviso to section 382 of the Criminal Procedure Code, in determining whether any error, omission or irregularity has occasioned a failure of justice the Court should have regard to the question of whether the objection could and should have been raised at an earlier stage in the proceedings. We think that an objection could and should have been raised earlier, but was not so done. The appellant and his counsel appeared in Court to defend the case and defend it they did. Had they any doubt about what they were to defend they would certainly have asked the magistrate right at the start to seek clarification from the prosecution or have asked the prosecution themselves.

Making our own assessment of the recorded word, the appellant's conviction was inevitable.

The appeal of the appellant against conviction is dismissed and, although the prayers in the petition of appeal be allowed and that the conviction be quashed and the sentence set aside, Mr Otieno specifically said that he was not appealing against sentence; so, in dismissing the appeal against conviction, we confirm the sentence of three years' imprisonment passed upon the appellant.

Appeal dismissed.

Dated and delivered at Nairobi this 8th day of March 1979.

E.TREVELYAN

JUDGE.

J.H.S TODD

JUDGE.