IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Madan, Law & Miller JJA)

CRIMINAL APPEAL NO. 78 OF 1981

BETWEEN

STEPHEN NYAGAH KAMAU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

Madan JA The appellant was a Chief Inspector in the Kenya Police Force in charge of Diani Police Station. He was convicted by the Senior Resident Magistrate, Mombasa, of corruption contrary to Section 3(1) of the Prevention of Corruption Act (Cap 65). His appeal to the High Court was dismissed. He now brings this appeal to this court.

The Particulars of Offence were:

"Stephen Nyagah s/o Kamau: on the 12th day of January, 1980, at Diani Police Station within the Kwale District of the Coast Province, corruptly received from Gulnar Sultan Abdalla Khan the sum of Kshs 1,000 as a reward for the said Stephen Nyagah s/o Kamau, being an officer of a public body, namely a Chief Inspector within the Kenya Police Force, recovering a debt in the sum of Kshs 5,400 which was owed to the said Gulnar Sultan Abdalla Khan, being a matter in which the said public body was concerned."

Section 3(1) reads as follows:

"3(1) Any person who shall by himself, or by or in conjunction with any other person, corruptly solicit or receive, or agree to receive, for himself or for any other person, any gift, loan, fee, reward, consideration or advantage whatever, as an inducement to, or reward for, or otherwise on account of, any member, officer or servant of a public body doing or forbearing to do, or having done or forborne to do, anything in respect of any matter or transaction whatsoever, actual or proposed or likely to take place, in which the public body is concerned shall be guilty of a felony."

"Public body" is defined:

" `public body' includes the Government, any department, service or undertaking of the Government, the Cabinet, the National Assembly and any local or public authority, and any corporation, council, board, commission or other body which has power to act under and for the purposes of any law in force in Kenya relating to local government, the public health or undertakings of public utility or otherwise to

administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any law in force in Kenya;"

The evidence adduced at the trial tells us that the woman Gulnar mentioned in the Particulars of Offence ran Diani Car Hire and Safaris with her husband Sultan. The husband agreed with Mr Muema, the Manager of Kolobus Tours and Safaris, to hire out one of his Diani vehicles for three weeks to a Mr Tornell who was a tourist from Sweden staying with his wife at the Two Fishes Hotel. Mr Muema was to collect a deposit of Kshs 3,000 from Mr Tornell and hand it to Sultan together with the contract book. Mr Muema neither paid the deposit nor delivered the contract book to Sultan.

Gulnar tackled the Tornells on January 10 and asked, them to pay Kshs 8,400 for the hire of the car for three weeks. The Tornells said they had paid Kshs 3,000 to Mr Muema in US Dollars and refused to pay it again. On the following day they showed Gulnar a copy of a telex to their bank in Sweden asking for Kshs 5,400 to be sent to Diani Car Hire and Safaris.

Not having received Kshs 8,400 or Kshs 3,000 from Mr Muema, Gulnar made a report about Mr Muema at Diani Police Station. She was sent to the hotel with two constables who brought Mr Muema with them to the police station where he was put in the cells.

Gulnar went back to the police station in the morning and again in the afternoon of January 12, when she met the appellant for the first time in his office there. He offered to pay her Kshs 3,000, some in German currency and some in Kenya shillings. The money had been brought there on behalf of Mr Muema. Gulnar refused to accept the German currency because Diani Car Hire and Safaris did not have a licence to accept foreign currency.

The appellant asked Gulnar if she had been paid the balance of Kshs 5,400. Gulnar said no. The appellant gave her two constables to go to the hotel to collect the Tornells. They brought the Tornells back with them to the police station. Mr Tornell offered to pay Kshs 5,400 by a cheque drawn on a Swedish bank. The appellant refused to accept it and put him in the cells. He advised Mrs Tornell to go and see another Swedish lady, a Miss Sinnika Halrne about it. Sinnika collected cash in Kenya currency and went to Diani Police Station with Gulnar Mrs Tornell and a friend.

The appellant arrived at the police station from a night patrol. He saw these people waiting there. He went towards his own office and called Gulnar. While he was unlocking his office door he allegedly asked her to give him Kshs 1,000 as he had helped her to recover the balance of the money. Gulnar said she would bring it the next day. The appellant said that that would not do. The appellant then called in the others. Sinnika handed him Kshs 5,400 in Kenya currency. The appellant straight away handed over the entire sum to Gulnar for which she signed a receipt in duplicate one copy being given to Mr Tornell. She kept the other copy herself.

The appellant said goodbye to the Tornells, Sinnika and her friend, and when Gulnar was about to follow them, he stood in front of her and said "Give me that money". Whether because Gulnar was seven months pregnant, very tired and upset or for whatever reason, she gave the appellant Kshs 1,000. He then let her go out to join the others.

On the following day which was a Sunday Gulnar told her father-inlaw Mr Alibhai about having paid the appellant Kshs 1,000. Mr Alibhai went and spoke to ACP. Khan about it.

Mr Muema who had been released in the meantime saw Gulnar on the same day and told her that Kshs 3,000 was lying at Diani Police Station for her, and she should collect it on the next Monday morning. ACP Khan advised her not to do so. At 7.45 am on the morning of Monday January 14, ACP. Khan recorded a conversation which Mr Alibhai had with the appellant on the telephone on the instructions of ACP. Khan, during the course of which Mr Alibhai asked the appellant why he took such "a big slice of the steak", and the appellant asked if the whole lot would not have been lost if he had not helped. Mr Alibhai said even so Kshs 1,000 was too much. The appellant said there was plenty left for Gulnar, and there was another lot at the police station which she could come and collect; this was the Kshs 3,000

which Mr Muema had returned. He did not specifically deny having received Kshs 1,000 from Gulnar as we would have expected him to do if no money had passed between them, and we agree with the learned first appellate judge that corroboration is to be found here of the fact of payment to the appellant of Kshs 1,000 by Gulnar.

ACP Khan then went to Diani Police Station and interviewed the appellant in the presence of the Officer-in-charge South Coast Kenya Police, Supt Gachau. ACP Khan recorded the interview by means of a device in his brief case which could be operated without opening the brief case. The appellant did not know his conversation was being recorded. The appellant denied having stolen any money from Gulnar.

The appellant gave sworn evidence in which also he said he never asked for or received any money from Gulnar.

The two lower courts examined and analysed the evidence carefully and exhaustively. The magistrate decided to believe Gulnar after warning himself that she was an accomplice, and that her evidence was not corroborated. We agree with the learned judge that there was in fact corroboration of Gulnar's evidence by Sinnika and the father-in-law if the magistrate decided to believe these two witnesses which he did. Both courts below came to the conclusion with which we agree that the appellant did ask for and did receive Kshs 1,000 from Gulnar as narrated by her after he had handed over Kshs 5,400 to her. Both lower courts, however, did not remind or warn themselves that there was no corroboration of Gulnar's evidence that the appellant asked her to pay him Kshs 1,000 before the Kshs 5,400 was received and paid over to her. As we have pointed out the magistrate held that Gulnar's evidence was not corroborated. The learned judge confined himself to considering corroboration only in relation to whether Gulnar had an opportunity to pay Kshs 1,000 to the appellant before she came out of his office.

Learned State counsel conceded that Gulnar was a statutory accomplice. He drew our attention to the following passage in the High Court case, *Raphael Joseph Ombere v Republic*, Mombasa Criminal Appeal No 9 of 1979, which was approved by the Court of Appeal in *Zakaria Shillisia Agweyu v Republic*, Criminal appeal No 64 of 1979 (Kisumu):

"Whilst a real accomplice needs corroboration save in exceptional cases, a statutory accomplice simpliciter needs corroboration only in exceptional cases."

In *Dusara and Another* Criminal Appeal No 59 of 1980 (Mombasa), we said:

"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."

An accomplice is an accomplice. A statutory accomplice is no more reliable than an ordinary accomplice, without corroboration, save where the court decides to accept the accomplice's evidence after duly warning itself of the danger of acting upon such evidence alone. The statement in Section 3(2A) that a person who does any of the acts set out in Section 3(2) shall be taken to have acted corruptly is intended to stop any argument about his role. Section 3(2A) does not state, as one would have expected if that was the intention of the legislature, that the evidence of a statutory accomplice need not be corroborated or that it should be treated differently from the evidence of other accomplices.

We do not consider there is any real conflict between *Zakaria* and the later case of *Dusara* save that *Zakaria* was concerned with a statutory accomplice acting under police directions and control, the position not occupied by Gulnar in this case. In our view it is desirable to seek corroboration even in the case of a statutory accomplice without this requirement having effect as a rule of law. We do think, however, that this was an exceptional case in which corroboration was needed of Gulnar's evidence that the appellant allegedly asked her for Kshs 1,000 before the Kshs 5,400 was recovered, it being the material particular in the case necessary to bring it within Section 3(1).

When Sinnika handed the appellant Kshs 5,400, and he in turn handed over the entire sum to Gulnar

straightaway, no offence was committed up to that point. No act or forbearance which might constitute an offence contrary to Section 3(1) had occurred. It could also not have occurred thereafter because the Gulnar-Muema- Tornell transaction was over and closed. It may well have been thereafter that the appellant made the demand for a reward which led Gulnar to giving him Kshs 1,000. The appellant then was not in any position to act or forbear to do, or to perform any such act, there being no transaction whatsoever, existing or likely to take place, in which either Gulnar, or the public body was concerned. Their connections had been legitimately severed. In any event the incident was a civil matter between Gulnar and the Tornells. It is no part of the duties of the police force in Kenya to collect civil debts except in execution proceedings on orders of court. Even if the appellant did assist in collecting Gulnar's debt for her it was not a matter in which the police as a public body was concerned.

In England, a grateful owner whose property is recovered would possibly take a policeman for a quick pint in the nearest pub to express his gratitude; we doubt if any offence would thereby he committed.

We cannot exclude the possibility that Gulnar gave the money voluntarily, as a reward to the appellant for having been instrumental in recovering the debt owing to her, and that she subsequently regretted having done so and tried to get it back pretending it had been extorted from her. That a reward given for past and completed services is not a corrupt transaction seems to us to be borne out by the wording of Section 3(2A) of the Act, which speaks of the giving of a reward, knowing or having reason to believe that it may lead in the future to the doing of a corrupt act.

In our view the appellant was not proved with sufficient degree of certainty to have committed the offence with which he was charged. We allow his appeal quash the conviction and set aside the sentence.

He must be set at liberty.

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

Dated and Delivered at Mombasa this 23rd day of October 1981.

C.B.MADAN

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JUDGE OF APPEAL

E.J.E.LAW

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JUDGE OF APPEAL

C.H.E.MILLER

.....

JUDGE OF APPEAL

I certify that this is a true copy of the

original.

DEPUTY REGISTRAR