REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL 1069 OF 1976

BERNARD ZAKAYO KILILI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the Senior Resident Magistrate's Court at Nakuru in Criminal Case No 303 of 1976)

JUDGMENT

The appellant appeals from a conviction by a Senior Resident Magistrate on a charge of corruption in office, contrary to section 3(1) of the Prevention of Corruption Act.

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

(2A) For the purposes of subsection (2) of this section, where a person gives, promises or offers any gift, loan, fee, reward, consideration or advantage to another person, knowing or having reasonable cause to believe that his doing so may lead to the doing of an act by that other person which constitutes an offence under subsection (1) of this section, he shall be taken to have acted corruptly.

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 the 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 907) 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] EA 10 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.

Mr Otieno for the appellant relies on *Mukima's* case and if indeed PC Charles Wanyama Khaemba is to be treated as an accomplice, which we do so treat him paying due regard to the recent decision of the Court of Appeal, we must consider whether or not his credit-worthiness was considered by the trial magistrate; and in this regard we refer to *Uganda v Khimchand Kalidas Shah* [1966] EA 30 where it was held, *inter alia,* that the correct approach is for the Court first to decide whether, in the light of all the evidence, it believes the evidence of the accomplice and then to consider whether there is corroboration of him: see the judgment of Spry JA, at page 31.

The trial magistrate did not find PC Charles Wanyama to be an accomplice; and it was argued by Mr Otieno that since the trial magistrate did not find PC Charles Wanyama to be an accomplice he did not therefore apply the case of *Uganda v Khimchand Kalidas Shah;* but there is no doubt that the trial magistrate did find PC Charles Wanyama credit-worthy.

Mr Otieno contended, however, that had the trial magistrate considered PC Charles Wanyama an accomplice, as he should have done on the authority of *Mukima's* case and on the facts, he should have gone deeper and examined more closely PC Charles Wanyama's evidence, comparing what he said in examination-in-chief with what he said in crossexamination, as he did at length with us; and that had the trial magistrate so considered such discrepancies he would not have found PC Charles Wanyama so credit-worthy. We have given careful consideration to all the discrepancies pointed out to us by Mr Otieno in the evidence of PC Charles Wanyama but we are unable to find them material.

Mr Otieno then attacked the portion of the trial magistrate's judgment where it is recoded:

As regards the defence version that on 11th March 1976, in the morning, PC Charles Wanyama telephoned the [appellant's] office three times and that the [appellant] never spoke at all to PC Charles Wanyama does not appear to be the truth and I find the same to be untrue. This is so, upon the [appellant's] own cautionary statement to the police, which was not challenged at all by the defence and was accordingly admitted in evidence.

Mr Otieno's contention here was that the trial magistrate accepted what the appellant said in his cautionary statement which was indeed not challenged by the defence and found that what the appellant had said in his statutory statement was untrue in regard to the alleged telephone calls on 11th March 1976. We quote from the appellant's statutory statement in this regard: "On 11th March 1976, in the morning, he telephoned my office three times. I did not speak to him ...". PC Charles Wanyama in his evidence said in regard to telephoning the appellant on 11th March:

On 11th March 1976 at about 7.30 am I telephoned the [appellant's] house at Tel No 2898, and informed him that I had only Shs 200. The [appellant] told me 'bring the money to him at his office at 3.00 pm that afternoon'.

The appellant in his cautionary statement said:

When I arrived in the office, I can remember the time the same Wanyama rang me and said that he wanted to come and see me. I told him that I was very busy. He asked me if he could come in afternoon and I told him to come I might not be very busy.

Mr Otieno complained that the trial magistrate accepted what he thought he wanted from the statutory statement and what he wanted from the cautionary statement. This we do not find is so at all. The magistrate found, as he was entitled to do upon the evidence, that PC Charles Wanyama had spoken to the appellant on the telephone on 11th March 1976 which the appellant denied or evaded in his statutory statement but admitted in his cautionary statement (which was more in conformity with what PC Charles Wanyama had said in his evidence concerning the telephone call he had made to the appellant personally fixing the time for the intended trap, or handing over of the Shs 200 to the appellant).

We accept upon our consideration of all the evidence given at the trial of the appellant, as did the trial magistrate, that the evidence given by PC Charles Wanyama was true and, though the trial magistrate did not find that he was an accomplice, we are entitled now to see whether or not there is corroboration of his evidence. We find that there is indeed ample corroborative evidence which the trial magistrate believed and which we also believe, making our own assessment of the evidence as a whole and that of Chief Inspector Peter Ndungu Njuguna and Chief Inspector Peter Njuguna Nganga in this regard.

As regards the evidence of Inspector George Munene, who was not the investigating officer, the trial magistrate found upon considering the whole of the evidence in the case that this witness was mistaken in his evidence regarding PC Charles Wanyama already having paid Shs 350 to the appellant and leaving Shs 250 yet to be paid, with which finding we can find no fault.

Upon our own assessment of the evidence given at the trial we have no doubt that the appellant committed the crime with which he was charged and that there was ample corroborative evidence of the evidence of PC Charles Wanyama in the evidence of Chief Inspector Peter Ndungu Njuguna and Chief Inspector Peter Njuguna Nganga taken together with that of Rosemary Wanyama, the appellant's secretary; and the evidence of PC Charles Wanyama's brother and documentary evidence produced in connection with him.

We do not find on the authority of *Mukima's* case, page 5, *ante*, that any of the police officers can be designated accomplices by the application of section 20 of the Penal Code as urged by Mr Otieno; but the point having been raised, and it appearing from the judgment in *Mukima's* case that it was not urged at the hearing of the appeal, we will say a few words about it. We need not go into this in depth. We think the police would not be accomplices, but if we assume that the police officers are to be treated as accomplices for having provided the money, the Shs 200 in marked notes being produced by Chief Inspector Peter Njuguna Nganga, there is yet other corroborative evidence in the case; but even assuming that there is no corroboration in the case at all, upon the law which we have referred to and the facts of the case itself, we think it perfectly safe to act upon the evidence of PC Charles Wanyama even if it can be said that it stands alone.

The appeal against conviction is dismissed. There was no appeal against sentence, which in our view was very light indeed. We have considered the question of enhancement, but the Republic does not seek this and all in all we shall not interfere.

Dated and Delivered at Nairobi this 6th day of April 1977.

E.TRAVELYAN **J.H.S.TODD**

JUDGE **JUDGE**