REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 2 OF 1977

CHARLES OSGOOD DANDE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the Resident Magistrate's court, Nairobi in Criminal Case No 1960 of 1976)

JUDGMENT

The appellant was charged with, and convicted of, an offence against section 6(1) of the Prevention of Corruption Act. The charge put against him was that he:

... being a public servant, namely a customs officer in the East African Customs and Excise Department, did corruptly accept for himself without consideration or for a consideration which he knew to be inadequate a loan for the sum of Shs 38,685 for the purchase of a car make Peugeot 104 Reg No KJT 483, the said loan accepted by him from Messrs Monaz Clearing and Forwarding Co whom he knew to have been or to be likely to be concerned in matters or transactions with himself as a public servant.

The petition of appeal contains ten grounds of which two, numbers 7 and 8, were abandoned. The other eight were argued under three heads, ie numbers 2, 3, 6 and 9 were argued together; and so too were numbers 4 and 5, and numbers 1 and 10.

Grounds 2, 3, 6 and 9 are, in effect, that the loan, which it must at once be said that the appellant admits having accepted, was a personal one from Mr JP Nazareth; that the magistrate wrongly admitted evidence of a written agreement, the document not having been put in evidence as it should have been; that the magistrate, having found Mr Nazareth to be a discredited witness, looked for and thought that he had found corroboration for it in the prosecution evidence, but it did not amount to corroboration; and that the magistrate made a wrong finding that Mr Nazareth had lent Shs 700,000 to a firm called Inter Air Cargo Co and so would be unable to have loaned anyone so much as Shs 38,000. Mr Nazareth, it is to be said, was associated with the company and also with the company named in that charge sheet.

In urging that the loan came, not from the company but from Mr Nazareth, and that it was not corruptly accepted, we were asked to hold that the two men were friends and not just known to each other, but that is not how we read the evidence. Mr Nazareth said that he first met the appellant in 1967 or 1968 and that he then met him again in Kampala in 1972. When the appellant went to Kampala, and exactly when in

1972 Mr Nazareth went there, we do not know, but Mr Nazareth was not there for long because he left in November of the same year. Mr Nazareth also said that he next saw the appellant in 1974 when he himself was working for a clearing and forwarding agency in Mombasa and the appellant was working "in Customs" there. That they used to meet in bars "by coincidence" is how Mr Nazareth put it. In cross-examination, Mr Nazareth said that he and the appellant were not mutual friends but just friends. We can discover nothing in the record to establish the sort of friendship for which counsel contended, a friendship to support the making of so large an interest free loan as we are here concerned with. There was no bond between the two men to supply a reason for the making of the loan.

Mr Nazareth told the Court that when the appellant came to him for the loan he said he would think about it; later he told the court:

I did make a small loan agreement in writing with him which we both signed. It was a loan from Monaz Co, not from me personally ... in April 1975 I was Chairman of Monaz Co. [The appellant] knew ... Inter Air Cargo owed me personally over Shs 700,000 ... Company was not very well off ... Inter Air Cargo owed me money. I used to use Inter Air Cargo to pay Monaz and Monaz money to pay Inter Air Cargo ... Inter Air Cargo owed me personally money ... The Lakhmindas cheque I credited to Inter Air Cargo Co account. I kept all money of Inter Air Cargo in my account. The money paid to Marshals I regarded as mine. I did not regard it as Inter Air Cargo money. I debited it to Monaz as a debt to me ... This was a friendly loan ... He approached me as a friend. He did not come to me as Chairman of Monaz ... I accepted his promise to pay in two years which is why I lent him the money. It was a personal matter. Nothing to do with my position as Chairman of Monaz ... Monaz was my personal company. The loan was not my personal loan but from Monaz. When [the appellant] asked for loan he did not specify whether from me or Monaz. I told him it was from Monaz.

There is some shifting of ground there, but Mr Nazareth explained why the loan was made from the Monaz Co; he obviously regarded the two companies as available to him to operate as he thought fit; and, so far as the appellant was concerned, it could not matter whether the loan came from one source or another so long as he got it. And there is support for Mr Nazareth's evidence that "I told him it was from Monaz" from the appellant himself. In a statement which he made to the police, an inspector for having charged him with accepting a loan "from Messrs Monaz Clearing and Forwarding Co", he did not say, "Oh no, Mr Nazareth lent it to me", but:

I object to the fact that the loan given to me by the director of Messrs Monaz Clearing and Forwarding Co Ltd (Mr John Peter Nazareth) was based on any favour which he might have sought from me as a public servant.

He also said:

The loan which was given to me was basically friendly which is pending repayment back to Mr John Peter Nazareth who arranged for the loan I was granted.

That certainly speaks of a repayment to Mr Nazareth; but it does not go on to say "who loaned me the money". What it says is "who arranged for the loan I was granted". In such a context as we have here, you do not arrange with yourself. But that is not all. When the appellant made his statutory statement to the Court he said:

He took his time to consider my request and he later approved it on grounds he was not going to give me cash but to make any possible arrangements for me to get the car and then pay him through instalments of Shs 600 every month ... I have no connection between the company and me apart from the loan I took from them.

Nothing could be clearer than that. But by next day the appellant had realised, or was told (and we think that one, or other, of these alternatives must be so), that he had made a most unfortunate admission, and so, asking for, and getting permission to make a further statement, he said, "The loan was given by Nazareth". We have no doubt that the loan was made, that the appellant was told that it was made, and

that he accepted that it was made, by the Monaz Co. It would certainly have been better had the loan agreement been put in evidence or its absence explained; but without relying on it and upon the admissible evidence the magistrate found that the loan was made by the Monaz Co and not by Mr Nazareth; and it was. It may or may not be that Inter Air Cargo Co could have made the loan, and Mr Nazareth may very well have himself been able to make it, but it was made by neither one of them. As for the question of corroboration, we doubt that it can be found where the trial magistrate would have it to be. It is true that Mr Sachania, Messrs Marshalls' representative, said that when Mr Nazareth came about it he said "he was Monaz Clearing and Forwarding Co" and it is also true that the appellant was with Mr Nazareth when the transaction was completed and when he drove the car away; but Mr Nazareth saw Mr Sachania more than once, and the appellant may not have heard a reference to the company. But then, there are the appellant's own words.

Counsel also argued from the standpoint of Mr Nazareth being a wealthy man with no need to corrupt or to seek favours from the appellant or anyone; and that the appellant was too junior an officer to be of any use to him in any event. Mr Mulili, the Chief Collector of Customs, however, described how the appellant might find himself processing applications for Mr Nazareth or his companies. He told the court that the appellant's work was to check forms which members of the public presented to enable them to get their goods imported and that the appellant would check for the correctness of declarations against invoices, and then assess the duty payable. Having checked that the duty was correct, as Mr Mulili put it, "[The appellant] stamps and signs form. Then it is passed to cashier for payment by importer". Unfortunately, however, we do not find his evidence quite as clear or direct as to the work done by the appellant for Mr Nazareth or his companies as we would have liked, and it seems that the appellant was not always doing the same work. Be that as it may, Mr Mulili went on to say:

Once duty paid goods may be released subject to supervision by other officers. Checking of entries occurred in 'Long Room'. [The appellant] worked in 'Long Room' and manifest section. After duty paid forms are taken to manifest section where forms are compared with ship's manifest. This will ensure that all goods on manifest have been accounted for ... Agents present forms on behalf of importers. They obtain clearance after [the appellant] has checked these forms. There are many such agents. One of them is the Monaz Co. They are a busy firm but not the biggest. While [the appellant] was with manifest section and in 'Long Room' Monaz were working as agents at port. So were Inter Air Cargo.

He did not, however, say that the appellant had ever handled their affairs or was shortly likely to do so.

Of course there would be checks and the appellant's work would be subjectto them, but not all that he did would be looked at. Occasional spot-checks would be made, and there would be later checks by the internal checking branch or auditor. So he would have the opportunity, albeit subject to some risk, or favouring someone if he wished to do so.

The loan was for the purchase of "a small car" and, when the appellant asked for it, Mr Nazareth thought it might cost Shs 35,000 to Shs 40,000. He was right enough. The appellant's suggestion about repayment as Mr Nazareth told the Court, was:

I asked how much he would pay per month and his salary. He said he could afford only Shs 600 a month. His salary he said was 1500. I told him I could not afford to give him more than two years period. I agreed on Shs 600 but towards ending of two years whatever balance remained he would have to pay it off by lending or otherwise. He agreed to it.

It is not easy to accept that. In considering the nature, that is the true nature, of the transaction, one begins with the undoubted fact that the amount of the loan was Shs 38,685 and that to pay back this amount in two years would mean that the appellant would have to pay Shs 19,000 a year out of earnings of Shs 18,000 a year. So, "he would have to pay it off by lending or otherwise". But, by then, the car would be two years old and no more than Shs 14,400 would have been paid off, necessitating a new loan of about Shs 23,000 to clear the old one. As a matter of evidence, the appellant's version is a little different. He says that though he was to make repayment at the rate of Shs 600 a month it "was to be completed within two years otherwise he would seize the car". That cannot be right. Less than half the loan only would, by

then, have been paid back. The transaction was distinctly suspicious and not made less so by the use of a customer's cheque to pay for the car and the fact that no repayment was made for over a year, and then not until the appellant had been arrested. Mr Nazareth told the Court below:

Money paid over to Marshalls in July. He asked not to start instalments until September ... [The appellant] paid instalments amounting to Shs 4200 total. This he paid through his wife on 12th July 1976. This was the one and only payment made. He had not been able to pay any of Shs 600 instalments. ... He never paid in September which he had asked permission to do so.

There is no suggestion of the appellant being urged to fulfil his obligations or of the car being sought to be retaken. So much for the facts.

Grounds 4 and 5 are that the ingredients of the offence were not proved and so corruption on the part of the appellant also was not proved. The argument put to us is that, whereas the magistrate found that there was no consideration for the loan, such consideration was there; that as the charge alleged in the alternative that the consideration for the loan was inadequate to the appellant's knowledge, there should have been a finding about it and there was none; and that the provisions of section 7(2) of the Prevention of Corruption Act can be brought into focus only when corruption for the purpose of section 6(1) has already been established, and not before. The argument could have included much of what was put to us about counts 1 and 10.

The basis for the argument concerning consideration is that the decision of Bannerman J in *Joseph Maufi v The Republic (Tanzania)* [1965] EA 708. Two police officers were convicted by the trial magistrate of offences against section 6 of the Act of Tanzania, for getting interest-free loans without lawful consideration, and the appeals were allowed, because what was found was only that the consideration was not enough. We shall set out the magistrate's finding in a moment, but as we shall have to refer to the law, we now set out, first our section 6, and then section 6 of the Tanzanian statute (Cap 400), which has since been repealed. The provisions of section 6 in the Kenyan Act read:

Any person, being a public servant, who corruptly solicits or obtains, or agrees to accept or attempts to obtain, for himself or for any other person, any gift, loan, fee, reward, consideration or advantage whatever, without consideration or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely or about to be, concerned in any matter or transaction with himself as a public servant, or having any connection with his duties or with the duties of any public servant to whom he is subordinate or from any persons whom he knows to be interested in or related to or acting for on behalf of the person so concerned, shall be guilty of a felony...

The Tanzanian section 6 states:

Any person, being a public servant, who solicits, accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable interest or thing without lawful consideration or for a lawful consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely or about to be, concerned in any matter or transaction with himself as a public servant or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to or acting for or on behalf of the person so concerned, or having such a connection, shall be guilty of an offence. ...

There are differences in the two sections; for instance only one of them uses the word "corruptly", and only the other the word "lawful", but they are similar enough, and they become more so when the definitions of "consideration" in the two enactments are taken into account. The Kenyan Act provides:

'consideration' includes valuable consideration of any kind, any discount, commission, rebate, bonus, deduction, or percentage and also employment or services or an agreement to give employment or render services in any capacity.

And the Tanzanian statute provides:

‘consideration’ means any gift, loan, fee, reward or advantage, and includes valuable consideration of any kind, any discount, commission, rebate, bonus, deduction or percentage and also employment or services or an agreement to give employment or render services in any capacity.

We do not doubt that these definitions refer to what Tanzania calls “any valuable interest or thing”, ie what the accused got and not to the consideration given for it, and, having said so much, let us return to discuss the *Joseph Maufi* case.

The trial magistrate expressed himself thus, on page 711:

It is not doubted that these were all loans in a sense and that the accused persons promised in some cases to pay back and, indeed, did pay back in certain cases. The question is nevertheless whether in the circumstances the promise to pay back at the time of the loan was a sufficient consideration moving from the accused persons. I would say that a mere promise to repay the loan though quite adequate in the ordinary law of contract was not sufficient in the present cases.

This did not commend itself to Bannerman J who referred to the definition of consideration in the Act (we have set it out and stated to what we thing it refers) and he rejected it as, to use his words, it made no sense if applied to section 6. He then sought a definition, found “nothing in the section which makes it necessary or desirable to give the word ‘consideration’ any other than its ordinary legal one” and utilised the definition enunciated in the well-known case of *Currie v Misa* (1875) LR 10 Exch 153. He went on to say that as a promise to repay a loan constitutes consideration “in the sense that it creates a right to sue”, the magistrate was wrong to say that “a mere promise to repay the loan though quite adequate in the ordinary law of contract was not sufficient in the present cases”. With complete respect, whilst, as we have said, we do not believe the statutory definition to be applicable, one must look at the issue from the standpoint of the person getting the loan and one must ask what he is giving for it in return. Every transaction for a loan has a promise to repay either given expressly or imported by implication, and if the promise to repay is consideration for the purposes of the subsection, then we do not see how a charge can ever be laid that an accused person has accepted a loan without consideration. Such an interpretation must cut down the scope of the section. Discussing the Indian provision (the genesis of the two sections 6) which we shall later be setting out, Sir Hari Singh Gour on page 912 of his *Penal Law of India* (1928) says:

... the acceptance of a present is forbidden, because though ostensibly taken for no consideration, it is in reality a bid for an official favour, the refusal of which after acceptance of the present may not always be possible.

Looking at the reality of the transaction appeals to us. The question to be answered as we see it, is “What did the borrower give to get the loan?” If we apply that to the facts before us, the appellant gave no consideration whatever for the loan. In case, however, we are wrong, and it is to be said that there was consideration for the loan, then it was certainly inadequate and the appellant knew that it was. On the charge as drawn, there are two situations and only one was dealt with in the court below. We have now dealt with the other. In doing so, we have had in mind two judgments of the Court of Appeal, both emanating from Tanzania, and both concerning interest-free loans charged as having been obtained for considerations known to be inadequate to the borrowers, ie *Haining v The Republic* [1970] EA 620 and *Ramadhani v The Republic* [1974] EA 81. We think we are right to say that the *Joseph Maufi* case was not referred to the Court in either appeal; at all events the reports do not mention that it was. Now we turn to consider section 7(2) of the Act.

It is right that we should at once point out that the magistrate did not utilise section 7(2) so that it is not essential that we deal with it. But as we are, with respect, unable to accept counsel’s interpretation, and we know of no decision upon the subsection, we will say something about it. It reads:

Where in any proceedings under subsection (1) of section 6 of this Act, it is proved that any person solicited, accepted or obtained, or agreed to accept or attempted to obtain, any gift, loan, fee, reward, consideration or advantage whatever in any of the circumstances set out in that subsection, then such gift,

loan, fee, reward, consideration or advantage whatever shall be deemed to have been solicited, accepted or obtained or agreed to be accepted or attempted to be obtained corruptly, unless the contrary is proved.

Its concern, then, relates only to the ingredient of corruption. The prosecution must prove the accused person's guilt under section 6(1) as in any other crime, but if it proves all the element relative to the accused charged in it, leaving aside the question of corruption, then the accused's advantage is deemed to have been got or sought corruptly unless the contrary is proved We think that it says no more.

Grounds 1 and 10 are that the charge as laid is multiple and that the magistrate's findings were against the weight of the evidence. Exception is taken to the words "without consideration or for a consideration which he knew to be inadequate", and "whom he knew to have been or to be likely to be concerned". Where you have an enactment which constitutes an offence and it states the offence to be the doing of any one of the different acts in the alternative, the acts stated in the alternative in the enactment may also be stated in the alternative in the count charging the offence: that is provided in section 137 of the Criminal Procedure Code; but subject, so far as we know, to a lone exception, a count should not charge an accused person with having committed two or more separate offences. How many offences then were put against the appellant in the single count which he faced? We think there were four. Let us now look to the Indian provision; it is section 165 of the Penal Code. It reads:

Whoever, being a public servant, accepts or obtains, or agrees to accept or attempts to obtain, for himself, or for any other person, any valuable thing without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted, or about to be transacted by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, shall be punished ...

On page 911 of his book, Sir Hari Singh Gour says:

A charge under this section should run thus: I (name and office of magistrate, etc) hereby charge you (name of accused) as follows: 'That you – being a public servant in the ... Department of Government accepted (or obtained or agreed to accept or attempted to obtain) for yourself (or for any other person) a valuable thing, to wit – without consideration (or for a consideration which you knew to be inadequate), from ... a person whom you knew to have been (or to be likely to be) concerned in any proceeding or business transacted in (or to be transacted) or from ... whom he knew to be interested in (or related to the person so concerned by you as public servant), and you thereby committed an offence ...

The editors of *Ratanlal and Dhirajlal Thakore's Law of Crimes* (1953) state the charge (we leave the introductory part out) in this way:

That you, being a public servant in the ... Department, accepted (or obtained, etc) for yourself or for ... a valuable thing, viz ..., without consideration (or for consideration which you knew to be inadequate) from ..., whom you knew to have been concerned in a proceeding (or business transacted by you), viz ... [whom you knew to be interested in, or related to, the person so concerned], and thereby committed an offence ...

The two forms of charge are not precisely the same and in one part are different, but both show that the section provides a whole series of offences. But more to the point, both forms of charge show that a transaction without consideration is one offence and that a transaction without consideration is one offence and that a transaction for a consideration which the accused knows to be inadequate is another offence. They also show that there is one situation if there is a dealing with a person known to have been concerned in a proceeding or business transacted, and that there is another situation if there is a likelihood of a transaction. So we have four charges in the one count in this case. There is, as we believe, some support for this in regard to consideration in that the *Joseph Maufi* case charged only no lawful consideration and the *Haining* and *Ramadhani* cases only charged inadequate consideration. Indeed in the *Joseph Maufi* case [1965] EA 708, 710, we have the following:

In order to sustain a conviction under section 6 of the said Ordinance (cap 400) the following ingredients of the offence must be proved: (a) ... (b) ... (c) ... (d) ... That he gave for it either (1) no lawful consideration or (2) lawful consideration which was known to him to be inadequate. As regards (d) the prosecution must allege in the charge one or other alternative averment on which they rely to prove the offence and must prove that particular averment.

As for the matter of transactions and possible transactions we think the multiplicity becomes very pronounced if the words of section 6(1) are reframed thus: “from any person whom he knows to have been concerned in any proceeding or business transacted with himself, from any person whom he knows to be concerned in any proceeding or business being transacted with himself or from any person whom he knows to be likely or about to be concerned in any proceeding or business transacted with himself”.

State counsel who appeared in the court below was, as would appear from the record, appreciative of the fact that he was taking a risk, for when the argument about duplicity was before the Court, he said, “I have considered preferring two counts, one alternative but this would require the consent of the Attorney-General who is absent”. On the authority of *Cherere s/o Gukuli v R* (1955) EACA 478 where two or more offences are charged in the alternative in one count, the count is bad, the defect being not merely formal, but substantial, for where an accused is so charged, he does not know exactly with what he is charged, and if he is convicted, he does not know exactly of what he has been convicted.. The charge, as laid, is then, incurably bad.

But then, can it be said that what was put against the appellant, treated as one offence, was made out? It was not proved that the appellant had been concerned in a matter or transaction with the Monaz Co, but only that he might have been; it was not established that, when he got the loan, the appellant was actually concerned in such a matter or transaction; and it is to be doubted if it can be said that it was established that the appellant was likely or about to be concerned in a matter or transaction with the Monaz Co. It is certainly true that the Monaz Co is said to have had many matters or transactions with the Customs authority in the past, and they might well be expected to have many more in the future, but we are doubtful that this could be enough for the prosecution’s purpose. The acceptance of an advantage must, for the purpose of section 6(1), be related to a matter or transaction which has occurred, which is occurring or which is likely or about to occur, and one or other of these matters or transactions must be established. Looking generally into the future seems not to be enough. Here, of course, what was charged was “matters or transactions” not related to any prospective matter or transaction. The appeal has to be allowed. We quash the conviction of the appellant and set his sentence aside.

Appeal allowed.

Dated and Delivered at Nairobi this 5th day of April 1977.

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

JUDGE **JUDGE**