**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KIHARA KARIUKI P.C.A, KIAGE &GATEMBU JJA)**

**CRIMINAL APPEAL NO. 106 OF 2012**

**BETWEEN**

**PENINAH KIMUYU.....….APPELLANT**

**AND**

**REPUBLIC…….....RESPONDENT**

(An appeal from the sentence of the High Court of Kenya at Nairobi (Achode. J) dated 22nd February, 2012 in

HCCRA NO. 341 OF 2010)

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**JUDGMENT OF THE COURT**

The appellant appeals to this Court against the judgment of the High Court (L. A. Achode J.) delivered on 22nd February 2012 by which the learned judge upheld the appellant's conviction and sentence by the subordinate (Anti-corruption) court on a charge of receiving a benefit contrary to **Section 39(3) (a)** as read with **48(1)** if the **Anti-corruption** and **Economic Crime Act; No. 3** of **2003**. Her conviction and sentence on two counts of soliciting a benefit contrary to the same provisions were quashed and set aside by the learned judge.

The particulars of the confirmed charge were that;

> **"On the 19th day of October 2016, at Rose Avenue in Kilimani Area within Nairobi Province, being a person employed by a public body, to with Kenya Police Force as a Police Corporal, [the appellant] corruptly received a benefit of KSh.4,000 from Michael Mwangi Nganga as an inducement to hasten the forwarding of an inquiry file that she was investigating to the Officer Commanding Kilimani Police Station, a matter in which the public body is concerned."**

The appellant was arrested in a **'sting'** operation by officers of the Kenya Anti-Corruption Commission (KACC) on the allegation that she had demanded and received the sum of KShs.4,000 from Michael Mwangi Nganga (PW1). There is a dispute in the narrative of PW1 and that of the appellant in her defense as to how the KSh.4,000, which the officers recovered from a laden paper bag the appellate had, came to be in the paper bag. Whereas PW1 stated she gave the money to the appellant who placed it in the bag, it was her contention, that she had placed the paper bag to the side while she bought a scratch- card at a shop and that she was shocked to hear the KACC investigator asking about money. She then saw PW1 point at the bag. She was convinced that PW1 must have placed the money in the bag while she spoke to the shopkeeper. The said money had been treated by the anti-corruption officers and the powder was found on the palms of the appellant's right hand. The possibility of its being there due to a handshake with PW1 or contact with the paper bag was admitted by the investigating officer PC Kailu (PW7) in cross-examination.

As we have already stated, the learned Judge found the charge of receiving proved and affirmed the appellant's conviction. The conviction on the offences of soliciting which were directly connected to the receiving, were quashed with the learned Judge having found as follows;

> **"I have perused the transcript produced in evidence and found that the only connection between the appellant and the offences of solicitation in count 1 and 2 in the question from PW1: 'Do you know the days are moving?' and the appellant's response, 'Yes, the days are moving and you are the answer'. There is no evidence elsewhere in the transcript to show that the appellant solicited KSh.5,000 or KShs. 4,000 from PW1. PW1 himself confirmed this on cross-examination and the learned trial magistrate also made the observation in her analysis of the evidence. After**

**the careful analysis the evidence on record I find that Count 1 and 2 were not proved against the appellant beyond reasonable doubt."**

This finding brings into sharp relief the point of law that we are called upon to determine and which finds expression in the appellant's memorandum of appeal in various formulations: can a person be convicted of an offence of receiving a benefit contrary to **Section 39(3) (c**) of the **Act** if gets acquitted of soliciting that very benefit? Put another way, can one be guilty of receiving if he did not solicit under the provision?

In addressing this issue before us, Mr. Wandugi, the appellant's learned counsel cited to us two decisions of the High Court as purely indicative of the manner in which other judges of that Court have dealt with the issue. In the first, **PAUL KIPCHUMBA KIYAI – VS- REPUBLIC [2013] e KLR**, Ongudi J. answered the question in the negative, stating, inter alia;

**"The charge was that he corruptly RECEIVED and not that he RECEIVED. It was for the prosecution to prove that the money found on the appellant was corruptly received. Having been found not guilty of corruptly soliciting it was pointless convicting him for corruptly receiving. It was misdirection by the learned Magistrate".**

The same Judge decided **PATRICK MUNGUTI NUNGA –VS- REPUBIC** [**2013] e KLR** where, in similar circumstances, she held as follows;

**"Did the appellant demand for this money?**

**The reason why the 1st tape recording was done was to establish if indeed the Appellant had demanded for a benefit. Though PW1 and the officer said there had been a demand, the court found that there was no such demand. What then was the basis of the 3rd count? Did the appellant receive what he had not demanded for? If so, why was PW1 bribing him? …**

**The appellant having been acquitted of the offence of corruptly soliciting for a benefit, then the offence of corruptly receiving a benefit could not stand. My finding is that since the prosecution failed to establish that indeed the appellant had made a demand for a benefit meant that a charge of receiving a benefit could not stand."**

Learned counsel also cited this Court's decision in **ESTHER THEURI WARUIRU & ANOTHER –VS- REPUBLIC Criminal Appeal No. 48** of **2008** (unreported) for the same proposition. Having perused that judgment, we take the view that even though the appeal was allowed on the basis that the appellant's prosecution was null and void for being mounted by the anti- corruption Commission absent the mandatory report to the Attorney - General under **Section 35** of the **Act**, it did raise the very questions we are addressing in this appeal. Said the Court;

**"A point was made by Mr. Monda, Principal State Counsel, which we thought was quite important. The appellants, as stated earlier, faced two counts, the first one of soliciting a bribe; and the second of receiving a bribe. They were acquitted of the first one but were convicted of the second. Evidence was adduced that there was a demand, although the trial court appears not to have accepted it. If indeed there was a receipt of a bribe, was it received with out a demand? If I thas been offered without being demanded, could the appellants be charged alone without the person or persons who offered it? There are certain matters about the appellants' prosecution which needed to be looked at by the Attorney-General's office before the prosecution was undertaken. We do not know whether the Attorney General would have undertaken the prosecution or what steps he would have taken in the matter had report been made to him pursuant to Section 35(1) of the Anti-Corruption and Economic Crimes Act.Perhaps the charges would have been appropriately framed to obviate an acquittal." (our emphasis)**

It seems quite clear to us that **Section 39(3)** of the **Act** does not at all create an offence of strict liability. There is no deeming of criminal culpability from the mere fact of receipt of a benefit, itself an often contentious issue as the facts of this case show. It cannot have been the intention of Parliament and it be surmised from a plain reading of the provision, that once it is shown that an accused person had some money on him, then he must have been bribed. Were that the case, nothing would be easier than for sums of money to be conveniently placed within the possession and control of persons who never demanded, solicited or knew about it and thereby secure their automatic conviction on charges of receiving bribes.

The conduct proscribed by **Section 39(3) (a)** is simple to discern from the provision itself:

**"a) A person is guilty of an offence if the person…**

**b) corruptly receives or solicits or corruptly agrees to receive or solicit a benefit to which this section applies."**

**(our emphasis)**

The receipt must be corrupt to be criminal. It is upon the prosecution to establish every element of the offence and for this particular one it must be shown that where a person did receive a benefit, he did so corruptly. That is why the element of bribery has to be established and the way to go about it, where a person is charged with both a solicitation and receipt in a single transaction must be by a demonstration that what was received had been solicited or demanded and then given as an inducement for the doing or not doing of something in relation to the affairs of the accused person's Principal, in this case the Kenya Police. It must follow that if that essential connection is not made, (or it is merely alleged but not proved) between the receipt and a prior demand or solicitation, the element of corruption in the receipt remains unfulfilled and so there cannot be a valid conviction entered. The situation would be different of course,

where the receiving is not tied to the charge of solicitation which care other evidence of corruption in the receiving would suffice.

Being of that view, we find that Mr. Monda the learned Senior Principal Prosecution Counsel was.correct inconceding the appeal, which we accordingly allowed. The conviction of the appellant is quashed and the sentence set aside.

**Dated and delivered at Nairobi this 11th day of July 2014.**

**P. KIHARA KARIUKI**

**…….**

**PRESIDENT, JUDGE OF APPEAL**

**P. O. KIAGE**

**……...……**

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

**……**

**JUDGE OF APPEAL**

**I certify that this is a true copy of the original.**

**DEPUTY REGISTRAR**