IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, O'KUBASU & NYAMU, JJ.A.)

CRIMINAL APPEAL NO. 442 OF 2010

BETWEEN

ELIZABETH CHELANGAT.....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Khaminwa, J.) dated 13th September, 2010

in

H.C.CR.A. NO. 140 OF 2006)
****

JUDGMENT OF THE COURT

The appellant, ***ELIZABETH CHELANGAT*** was arraigned before the Chief Magistrate's Court at Nairobi on *21st May, 2006* in *Anti Corruption Case No. 72 of 2006* charged with soliciting for a benefit contrary to ***section 39(3)(a)*** as read with ***section 48(1)*** of the *Anti Corruption and Economic Crimes Act No. 3 of 2003*. The particulars of the offence were as follows:-

"ELIZABETH CHELANGAT LOMACHAR: On the 18th day of August, 2006, at City Hall, within Nairobi Area, being a person employed by a public body to wit City Council of Nairobi, as a city Askari, in Inspectorate Department, corruptly solicited for a benefit of Kshs.20,000/= from Geoffrey Maina Chege as an inducement to facilitate the release of his motor vehicle registration No. KRK 121 a Mitsubishi Colt which she had detained at City Hall parking yard for contravening the city by laws, a matter in which the said public body was concerned."

The appellant denied the charge and her trial commenced on *24th November, 2006* before Mrs. M.W. Wachira (Ag. Chief Magistrate). The prosecution case was that on *18th August, 2006* ***Godfrey Miani Chege*** (PW1) received information that his vehicle registration number KRK 121 had been detained at the City Hall parking yard for contravening the City Council by-laws. On receiving this information, Chege proceeded to the City Hall parking yard where he found the appellant and her colleague one, Muhenji. The two were employees of Nairobi City Council. Chege inquired whether his vehicle could be released but the appellant informed him that he would be charged with a serious offence attracting a fine of Kshs.40,000/= but that she would release the vehicle if Chege paid her K.Shs.20,000/=. The appellant

who had driven with Chege in the Council vehicle for about two hours informed Chege that she would release him to go and look for the money. While Chege was at the bank in a bid to withdraw the money, he thought of reporting the incident to the ***Kenya Anti Corruption Commission*** (KACC). Upon making the report at KACC he was fitted with recording equipment and given appropriate instructions. He was then accompanied by KACC officers one of whom posed as Chege's wife. Chege then met the appellant and proceeded to discuss the issue of the detained vehicle and how the appellant would release it if given the money. KACC officers had given some 10,000/= to Chege to hand over to the appellant. As Chege was about to give the money to the appellant's colleague (***Muhenji***), one of the officers from KACC ***Pc Patrick Mbijiwe*** (PW8) entered the room and found the appellant, Chege and others. The appellant was then arrested and later charged.

When put to her defence, the appellant stated that she knew nothing about this case. In fact her defence by way of unsworn statement was as follows:-

"I am the accused herein. In regard to this case, I deny because I don't know the complainant and she doesn't know me. I didn't solicit for a benefit. The recording was not audible in court. My voice was not identified. I know nothing about the case. The case is a make up against me."

The learned trial magistrate considered the evidence tendered by the prosecution and the defence put forth by the appellant, and in the end came to the conclusion that the prosecution had proved the case against the appellant beyond any reasonable doubt. She convicted her, and fined her Shs.20,000/= in default three (3) months imprisonment.

In the course of her judgment delivered on *5th February, 2006* the learned trial magistrate said:

"On the first issue of soliciting a person solicit *(sic)* ***when he does an act or an instance of requesting or otherwise inciting another to commit a crime. From the evidence of PW1, the accused spoke to PW1 and informed him she would release his M/V if he gave her Kshs.40,000/=. They negotiated the sum downwards and accused told him to raise Kshs.20,000/=. Herein is the instance of accused seeking to obtain something which is a benefit, so as to release his M/V without being charged for contravening the City by-laws. A benefit is defined under Section 2(1) of the Anti Corruption and Economic Crimes Act as*** *"any gift, loan, fee, reward, appointment, service, favour, forbearance, promise or other consideration or advantage."* ***Money falls within the definition of a benefit."***

The learned magistrate then considered the issue of admissibility of electronic evidence citing the case of ***OBANDA V. R.*** [1983] KLR 507 and concluded her judgment thus:-

"The requirements of admissibility of voice identity have been satisfied by the evidence of PW2 and PW6. I therefore find that electronic evidence produced herein is sufficient corroboration to evidence of PW1. I find the prosecution has proved the case beyond reasonable doubt. I find the accused guilty of the offence as charged and convict her under section 215 of the Criminal Procedure Code."

Being dissatisfied by both conviction and sentence, the appellant filed an appeal to the High Court. The appeal was placed before Khaminwa, J. for consideration, who found no merit in the appeal. In dismissing the appellant's appeal Khaminwa, J. in her judgment delivered on *13th September, 2010* stated:-

"It is clear that there were no material contradiction or contradictions that would or discrepancies and inconsistencies that would affect the judgment and so as to result in miscarriage of justice in this case.

The state did not pursue seriously the opposition of appeal save to say that the court being of first instance has power to re-evaluate the evidence and come up with its own judgment.

I find no merit in this appeal and I dismiss the same."

Still dissatisfied by the foregoing judgment of the superior court, the appellant now comes to this Court

by way of second and final appeal.

Through her lawyer the appellant filed a Memorandum of Appeal setting out the following grounds:-

"1. The superior court erred in law in not dispensing its duty as the first appellate (sic) of re-evaluating the evidence on record and reaching its own conclusion.

2. The superior court while making its judgment failed to adequately and/or properly consider the defence submissions on the legal issues and the decided cases cited before it.

3. The superior court erred in law in:-

(a) Failing to appreciate the criteria set in law that the identification of a voice in audio tape recordings must be done by independent witness(es).

(b) Failing to appreciate that the audio tape recording was inaudible of the material and the relevant pages/part and notes to this effect are on record.

4. The superior court erred in failing to appreciate the meaning and essence (in law) of material contradictions and therefore arrived at a wrong decision.

5. The superior court erred in failing to consider the evidence in totality, proceedings to consider it in isolation, not striking a balance and therefore deciding it totally against the weight of evidence."

This is the appeal that came up for hearing before us on *5th April, 2011* when Mr. A.O. Nyandieka, appeared for the appellant, while Mr. V.S. Monda, (Senior State Counsel) appeared for the State.

The thrust of Mr. Nyandieka's submission was that the first appellate court (Khaminwa, J.) failed to discharge its duty of re-evaluating the evidence and drawing its own conclusions. Mr. Nyandieka went on to submit that in view of its failure to discharge its duty that court did not consider the contradictions in the evidence of the prosecution witnesses.

Mr. Nyandieka faulted the trial court in that the transcript was not admissible in evidence and that even if it was, the voices were inaudible and that there was no clear identification of the appellant's voice. Finally, Mr. Nyandieka was of the view that since there were many weaknesses in the prosecution case this could not pass the test of proof beyond reasonable doubt and hence the appellant should have been given the benefit of doubt.

On his part, Mr. Monda conceded the appeal on the ground that the learned judge of the superior court did not fully scrutinize the evidence and come to her own conclusion. It was his submission that both courts below never considered the defence of the appellant.

At the outset, we wish to state that we are in agreement with both Mr. Monda and Mr. Nyandieka in their submissions to the effect that the first appellate court failed in its duty of re-evaluating the evidence, anaylsing it and coming to its own conclusion. In her very short judgment, the learned judge of the superior court merely set out the grounds of appeal and then concluded that she found no merit in the appeal.

In ***PATRICK AND ANOTHER V. R.*** [2005] 2 KLR 162 at p. 166 this Court said:-

In OKENO V. R. [1972] EA 32 at p. 36 the predecessor of this Court stated:-

*"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (**PANDYA V. R.** [1957] EA 336) and to the Appellate Court's own decision on the evidence. The first Appellate Court must itself weigh conflicting evidence and draw its own conclusions. (**SHANTILEL M. RUWAL V. R.** [1957] EA 570). It is not the function of a first appellate*

court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions, it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see ***PETERS V. SUNDAY POST*** *[1958] EA 424."*

It was Mr. Nyandieka's submission that since the first appellate court did not discharge its duty then it follows that the appeal should be allowed. When we asked him the consequences of our accepting his submission on that score, Mr. Nyandieka hesitated to answer.

Yes, we agree that the learned judge failed in her duty of re-evaluating the evidence but where would that lead us? We have set out briefly the prosecution case as presented before the learned trial magistrate. This was a case in which the complainant's vehicle was detained by the City Council enforcement officers otherwise known as *"Council Askaris"*. The appellant was one of the officers – the other was one, Muhenji. The complainant, ***Chege,*** (PW1) testified before the trial magistrate how the appellant forced him in the City Council vehicle and took him around the City for about two hours and in the end she asked for Shs.20,000/= after she had informed Chege that he would face an offence which upon conviction he would be fined 40,000/=. Chege thought of securing the release of his car and hence chose to go and get the money as demanded by the appellant. While at the bank, Chege changed his mind and instead of withdrawing some money and take it to the appellant, he went to report to the Kenya Anti-Corruption Commission. From KACC, Chege was fitted with recording device and given some Kshs.10,000/= by KACC officials who also accompanied him to where the appellant was. As the money was just about to be given to the appellant, the officers burst into the office and arrested the appellant.

The learned trial magistrate evaluated the prosecution evidence and was satisfied that the appellant had indeed solicited for a benefit in the form of **Shs.20,000/=** from the complainant for her (appellant) to release the complainant's detained vehicle.

It was submitted that as the recording equipment from KACC was inaudible then the transcript was inadmissible in evidence, hence the prosecution case fell short of the required standard. It would appear that there is a misconception that in a case of this nature, an accused's conviction would be based on the transcript. In ***OBANDA V. R.*** [1983] KLR 567 at pp. 518-19 this Court said:-

"The paraphernalia of tape recorder, cassette, transcript and translation amount to no more than an *aide memoire* ***for a witness as a notebook does for police officers. R. v. Mills [1962] 3 ALL ER 298 (CCA); R v. Rose (1962) 3 ALL ER 298 (CCA)."***

In the present case, the trial magistrate believed the evidence of the complainant ***Chege*** (PW1) and his daughter ***Jane Mugechi Maina*** (PW2). In her evidence in chief, Jane stated inter alia:-

"I went to City Hall and found my father and he introduced me to Elizabeth that accused in the dock. She told my dad to pay KShs.15,000/=. My dad told me he can't afford the money. My dad told Elizabeth he was going to look for the money."

From the foregoing it can be concluded that the evidence of Chege was corroborated by that of his daughter Jane.

Section 39(3) (a) of the Anti-Corruption and Economic Crimes Act under which the appellant was charged provides:-

"(3) A person is guilty of an offence if the person –

(a) *corruptly receives or solicits, or corruptly agrees to receive or solicit, a benefit to which this section applies; or****"***

Section 48(1) which is the penalty section of the Act provides:-

"48. (1) A person convicted of an offence under this Part shall be liable to-

(a) a fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both; and

(b) an additional mandatory fine if, as a result of the conduct that constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss."

Hence the appellant was charged with soliciting and upon conviction sentenced to pay a fine of **Shs.20,000/=** in default to serve three months in prison. The learned trial magistrate was satisfied that on the evidence tendered by the prosecution the appellant had solicited for **Shs.20,000/=** from the complainant for her to release the complainant's vehicle which the appellant and her colleague had detained.

We are satisfied that had the learned judge of the superior court re-evaluated the evidence she would have come to the same conclusion as did the trial magistrate that there was sufficient evidence on which the appellant was convicted. Although the learned judge of the superior court did not carefully re-evaluate the evidence, she nevertheless came to the conclusion that there was no material contradiction in the prosecution evidence to warrant her interfering with the findings of the trial court. Hence in a way we have concurrent findings of the two courts below. We reject any contention that where it is shown that a first appellate court has failed to discharge its duty as set out in the ***OKENO case***, an appellant must be acquitted irrespective of the evidence on record. Even in the ***OKENO case*** itself the first appellate court had failed to discharge its obligation, but ***OKENO's*** appeal was still dismissed after the final Court held that if the first appeal court had done its duty, it would have nevertheless confirmed the conviction.

On our own consideration of the entire case, we are satisfied that the appellant was convicted on very sound evidence of the complainant, his daughter and the officers from KACC who were rather overzealous in arresting the appellant, and in their zeal burst into the office too early before the appellant had taken the money. But it must be remembered that the appellant was charged with soliciting and not receiving. The evidence of soliciting, was, in our view, overwhelming.

As regards the sentence, all we can say is that the appellant was lucky to escape with a mere fine of ***Shs.20,000/=***and in default three months imprisonment.

For all the foregoing reasons, we find no merit in this appeal and we order that it be and is hereby dismissed in its entirety.

Dated and delivered at NAIROBI this 6th day of May, 2011.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

.....

JUDGE OF APPEAL

J.G. NYAMU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR