



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: BOSIRE, O’KUBASU & GITHINJI, JJ.A)**

**CRIMINAL APPEAL NO. 48 OF 2008**

**BETWEEN**

**ESTHER THEURI WARUIRU**

**MARY MBAISI INDUSA ..... APPELLANTS**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Appeal from a Judgment of the High Court of Kenya at Nairobi (Omondi, J) dated 10<sup>th</sup> April, 2008***

***in***

**H. C. CR. A. NO. 590 & 591 OF 2006)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

**Esther Waruiru Theuri (1<sup>st</sup> appellant) and Mary Mbaisi Indusa (2<sup>nd</sup> appellant)** were both Public Health Technicians with the City Council of Nairobi as at the 12<sup>th</sup> October, 2005, and were attached to Makadara Division of the Council. On 14<sup>th</sup> October, 2005 they were both presented before the Chief Magistrate’s Court, at Nairobi, charged with two counts, the first one of soliciting a bribe contrary to **section 39 (3) (a)** as read together with **section 48 (1)** of the **Anti Corruption And Economic Crime Act No. 3 of 2003**, and the second of receiving a bribe contrary to the same provisions as above. After a trial they were both acquitted of the first count but were convicted of the second. Their respective first appeals were dismissed by the High Court, and these are their second and probably, their last appeals.

It is trite law that appeals to this Court from decisions of subordinate courts, are confined to issues of law only (see **section 361 (1)** of the Criminal Procedure Code). This Court may only interfere with the decision of the first appellate court if it is satisfied that the High Court erred in principle or that it acted on no evidence and the error or omission occasioned a failure of justice. (See **Murimi v. Republic [1967] E A 542**). The court has to have fidelity to the concurrent findings of fact of the two courts unless those findings are not based on evidence adduced at the trial.

The main complaint against the appellants’ respective convictions is that **sections 39 (3) (a)** of the Anti-Corruption And Economic Crimes Act, does not create the second count as framed. The particulars of the second count read as follows:

***“On the 12<sup>th</sup> day of October, 2005, at Kush Furniture along Lunga Lunga road, within Nairobi Area, being persons employed by a public body to wit City Council of Nairobi as Public Health Officers, jointly and corruptly received for Kshs. 5,000/= from Sarah Wangui Kariuki as an inducement not to charge her with an offence of failing to comply with a notice contrary to section 115 as read with***

***sections 118 and 119 and punishable under sections 120 and 121 of the Public Health Act Cap 242 Laws of Kenya a matter in which the said public body was concerned.”***

The prosecution case as could be gleaned from the evidence adduced at the trial was as follows. The appellants allegedly visited a workshop at Industrial area, Nairobi, situated along Lunga Lunga road, and noted that it required certain repairs. They issued and served upon one Sarah Wangui Kariuki (PW 1), a Workshop Manager at the workshop, a notice requiring the management to effect the required works within a stipulated period. The workshop which was known as Kush Furniture, had as its Managing Director, one Panchari Velji (PW 2).

At the expiry of the notice both appellants revisited the workshop. There was partial compliance with their notice but PW 1 was of the view that there was full compliance. Some days later the appellants served PW 1 with summons to appear in court on a date which was shown on the summons. The charge the management of the workshop were to answer related to the disputed non-compliance with the aforesaid notice.

The evidence of PW 1 is unclear regarding the date an alleged demand of a bribe by the two appellants was made. PW 1 testified that both appellants demanded a bribe of Kshs.10,000/= apparently on the second visit to the workshop. The 2<sup>nd</sup> visit was on 22<sup>nd</sup> August, 2005, on which date the appellants are said to have demanded the money to enable them write a favourable report about the workshop and at the same time issue a certificate of compliance with the notice we earlier talked about. By 5<sup>th</sup> October, 2005, no money had changed hands. PW 1 was served with summons to attend court and the charge sheet on 3<sup>rd</sup> October, 2005.

The offences which the appellants were charged with were allegedly committed on 12<sup>th</sup> October, 2005. The appellants preferred charges against PW 1's company when they realized that the bribe they had demanded was not forthcoming. PW 1 testified that on 5<sup>th</sup> October, 2005, the appellants increased their demand from Kshs.10,000/= to Kshs.50,000/= as consideration for settling the matter out of court. That demand prompted PW 1 to report the matter to Kenya Anti-Corruption Commission (KACC) on 11<sup>th</sup> October, 2008. A trap was planned for 12<sup>th</sup> October, 2005. PW 1 was fitted with a micro-recorder, and was given Kshs.40,000/=, Kshs.5,000/= of which was genuine and Kshs.35,000/= which was fake. The money was treated with APQ powder. By arrangement the appellants received the money at PW 1's work place. KACC investigators positioned themselves from where they would follow the conversation between the appellants and PW 1. As the money was being paid over KACC investigators pounced on the appellants and arrested them. By then the appellants had the money in their hands but they dropped the money on a table when they saw the investigators. Prior thereto they had noticed that part of the money was fake. Swabs were taken of the appellants' hands by one Waihenya. He did not, however, testify. Nor did Chief Inspector Kidogo who is said to have treated the money with APQ powder. Be that as it may the swabs were handed over to the Government Chemist for analysis by Sgt. Salesio Kinyua Mugo (PW 7), who investigated this case, and who later charged the appellants.

We pause there to consider how KACC was expected to handle complaints made to it or investigations carried out by them of alleged acts of bribery or economic crimes. The Anti-Corruption And Economic Crimes Act, (Act No. 3 of 2003) mandated KACC to investigate the commission of crimes under the Act. Its officers did not have any prosecutorial powers, and therefore, by **section 35 (1)** of the Act it was required to report to the Attorney- General on the results of its investigations. The section provides thus:

***“35 (1) Following an investigation the Commission shall report to the Attorney-General on the results of the investigation.***

***(2) The Commission's report shall include any recommendation the Commission may have that a person be prosecuted for corruption or economic crime.”***

In view of the above provision it is clear that PW 7's power was limited to conducting investigations and making recommendations to the Attorney-General on, among other things, the prosecution of the person

or persons under investigation. No evidence was adduced at the trial to show that a report was made to the Attorney-General, and if so, what recommendations were made to him. We do not also have on record the action which the Attorney-General may have recommended be taken against the appellants. In view of the apparent non compliance with **section 35** of the Anti-Corruption and Economic Crimes Act what effect would such non-compliance have on the appellants' conviction?

The law as it stood on 12<sup>th</sup> October, 2005, reposed power on the Attorney-General to direct and control all prosecutions. The need to make reports to the Attorney-General meant that it was his duty to authorize prosecutions on corruption cases if the interest of the country and the interests of justice so demanded.

Under the Prevention of Corruption Act, Cap 65 of the Laws of Kenya, since repealed, the consent of the Attorney-General was required for all prosecutions under the Act. The consent was not cosmetic; nor was it as a matter of course. It was a matter of policy. Section 12 of the Prevention of Corruption Act, provided as follows:

***“12. A prosecution for an offence under this Act shall not be instituted except by or with the written consent of the Attorney-General.”***

The power to give the consent was vested in the Attorney-General, himself except where the amounts involved or the value of the gift etc did not exceed Kshs.10,000/= when the power could be delegated to officers under the Attorney-General. **Section 12**, above had a proviso that a person could be arrested for any offence under the Act, but the prosecution could not be proceeded with before the Attorney General gave his written consent.

We earlier stated that the consent was not required as a matter of course. As at the time when the Prevention of Corruption Act was in operation the Attorney General had overall control of criminal prosecutions. He could sanction a prosecution, he could take over a prosecution which had been undertaken by any other authority, and he could terminate any such prosecution. It is the Attorney General, as a general rule, who would know what the public policy on any given prosecution is, and whether or not the prosecution would or would not be for the public good. In coming to a decision one way or the other the Attorney General was exercising discretionary powers.

That power appears to have been retained when the Anti-Corruption and Economic Crimes Act was enacted. The powers of KACC to prosecute any person or group of persons was subject to direction of the Attorney-General, hence the requirement under **section 35** of the Act, that a report of any investigation be made to the Attorney General with certain recommendations. Compliance with **section 35**, above, is not optional. It is obligatory, for reasons which we have endeavoured to give. In exercising his discretion the Attorney-General is required to act with reason as under **section 37 (4)** of the Anti-Corruption and Economic Crimes Act, he too is expected to make an annual report to the National Assembly which report must include where applicable, reasons for not accepting recommendations made by KACC to him under **section 35**, above.

In the case of ***Nicholas Muriuki Kangangi vs Attorney General Civil Appeal No. 331 of 2010*** this Court held that non-compliance with **section 35** above is fatal to any prosecution. The Court, as material, stated as follows:

***“Mr. Obiri, the State Counsel who represented the Republic before us submitted that whether a report was made or not made to the Attorney-General was as it were, a matter between the Attorney-General and KACC. That cannot be right. The procedure is set down in the Statute which creates KACC; KACC cannot ignore that procedure and say it is a matter between it and the Attorney General. As a creature of Statute it must comply with the provisions of its creator. If it fails to do so, it is acting ultra vires and any such action is null and void.”***

We have dwelt on this issue at considerable length because it is a matter which fundamentally affects the powers of KACC and the way it or its successor is expected to act in matters relating to corruption and economic crimes. What Parliament intended has to be given effect and it is the duty of the courts to

enforce the law.

Besides, on the merits of the appeal, the main complaint by the appellants is that there was variance between the particulars of the charge and the evidence. We earlier set out the particulars of the second count, which, *inter alia*, alleged that a bribe was received as an inducement not to charge PW 1, with an offence of failing to comply with a notice. The evidence which was adduced by both PW1 and Velji (PW 2) was that Kush Furniture had already been charged and summons issued to it for its director to attend court to answer certain charges. There was no intention of charging either PW 1 or Velji (PW 2) with any offence. As rightly pointed out by Mr. Wandugi for both appellants, there was no good reason disclosed by evidence for receiving anything as a bribe.

There is also the fact that the officer who allegedly treated the money and the one who swabbed the hands of the appellants did not testify. It is also clear from the evidence that an inventory of the money allegedly given to the appellant was not signed by the complainant. Those are links in a chain which are missing to complete the chain of events linking the appellants to the money they allegedly received and the reason therefor.

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 without a demand? If it had 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 a 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.

We are satisfied that Mr. Monda, quite properly conceded this appeal, with the result that we allow the appellants' respective appeals, quash their respective convictions for the offence of receiving a bribe contrary to **section 39 (3) (a)** as read with **section 48** of the Anti-Corruption And Economic Crimes Act, 2003, and set aside the fines imposed on them. Any fines already paid shall be refunded to them. It is so ordered.

***Dated and delivered at Nairobi this 9<sup>th</sup> day of December, 2011.***

**S. E. O. BOSIRE**

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**JUDGE OF APPEAL**

**E. O. O'KUBASU**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**