Case Number:	Criminal Appeal 238 of 2012
Date Delivered:	19 Sep 2014
Case Class:	Criminal
Court:	Court of Appeal at Kisumu
Case Action:	Judgment
Judge:	John walter Onyango Otieno, Festus Azangalala, Sankale ole Kantai
Citation:	Maurice Juma v Republic [2014] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	H.C.CR.A. NO. 36 OF 2011
Case Outcome:	Appeal dismissed
History County:	Kakamega
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ.A.)

Criminal Appeal No. 238 Of 2012

Between

MAURICE JUMA …..... APPELLANT

AND

REPUBLIC …..... RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Kakamega (Kimaru, J.)

dated 21st June, 2012

in

H.C.CR.A. NO. 36 OF 2011)

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JUDGMENT OF THE COURT

The appellant in this second appeal ***Maurice Juma*** was in the months of September and October 2007 a police officer, deployed as the Officer Commanding Station (OCS) Kapsokwony Police Station. The complainants in different charges that were originally before the Chief Magistrate Kakamega, ***Philip Kiptai Kiptoem*** *(PW1)* and his wife ***Rose Chemos Mosou*** *(PW4)* were doing business in the same town of Kapsokwony. Apparently during that period, a curfew had been declared and was in effect in and around the town. For purposes of this judgment, we shall confine ourselves to events that gave rise to the charges in respect of which the appellant was convicted which were counts 3, 4, and 5. The record shows that the complainants had some problems at the hands of the appellant and his team of police officers at Kapsokwony for some time culminating in the first complainant being arrested together with another and taken to the Resident Magistrate's Court at Sirisia vide Criminal Case No. 377 of 2007 and charged with the offence of failing to comply with curfew restriction order contrary to ***Section 9 (1)*** as read with ***Section 17*** of the Public Order Act Chapter 56 Laws of Kenya in that they failed to comply with curfew order on 4th day of October, 2007. They both pleaded guilty to that charge and were convicted on their own plea. They were placed on probation for that offence for one year. There is evidence that in another court on that same day 5th October, 2007, ***Philip Kiptai Kiptoem*** *(PW1)* was sentenced to serve one day in jail and was to be released at the end of that day. That was Criminal Case No. 378 of 2007 which was in respect of failing to comply with curfew order on 29th September, 2007. One wonders why he was not taken to court earlier for this second offence which allegedly took place on 29th September, 2007, and the charge sheet says he was booked at the police station under OB No. 7/29/9/2007. As he pleaded guilty to that charge, that question will be for another day. What is important though is that although he was ordered for this offence to serve one day jail term which one would expect placed him into the hands of the Prison Department for that whole day, that was not to be.

Right from the time ***P.C. Joseph Githuka*** *(PW5)* was being instructed in the early morning to take the complaint to court, he was also instructed by the appellant to take back the complainant Kiptoem to the station after the court proceedings that day. It is not certain how the appellant knew that Kiptoem would not be awarded custodial sentence. Though PC Githuka acknowledged that the order from the appellant of taking Kiptoem back to the police station was not procedural, nonetheless he obliged and after the two offences were dealt with one in count 1 and the other in count 2, PC Githuka returned Kiptoem back to Kapsokwony Police Station, and immediately informed the appellant that he had returned the complainant back to the police station. The appellant told Githuka not to book the complainant in the book but he would instruct ***Senior Sergent Juma*** to further charge him with the same offence. The complainant stayed in the cells at the police station from 5th October, 2007, to 9th October, 2007, when he was released on police bond which was a cash bail of Ksh.3,000/=. This was paid by his wife Rose Chemos Mosou (PW4) who said she was told by Senior Sgt. Juma of the same police station that the appellant wanted Ksh.10,000/= so as to release the complainant but when Rose later saw the appellant and pleaded with him to release complainant on medical grounds, the appellant told her to get Ksh.3,000/= for cash bail, but later as the complainant was being released Rose was told to sign a receipt that she had been given back Ksh.3,000/= she had paid as cash bail but she never got that money back, though she was asked to and she did sign as evidence of her receipt of that money. The complainant was never told why he was retained in the police cells for that period.

Rose told him that apart from the Ksh.3,000/= already paid as cash bail which was never refunded, he was required to pay Ksh.7,000/= more so as to secure his total release. The complainant felt he had suffered enough at the hands of the appellant. He contacted the then Kenya Anti-Corruption Commission officers and complained to them and one ***Rtd. Col. Mike Kariuki*** of KACC, Rapid Response responded to his complaints by assigning ***Sgt. Selesio Kinyua Mugo*** *(PW10)* to handle his complaint. After several contacts on mobile phone, the complainant and Selesio met at Kimilili township where the complainant, after narrating his story of the demands on him by the appellant, was fitted with a tape recording device mini tape recorder and instructed on how to use the same and to visit the appellant with it already fitted. The recorder had a microphone and a micro cassette fitted on to it. Selesio did a certificate and confirmed it was working. The complainant was then escorted upto near the police station and then left to go to the station alone. He met the appellant, who among other matters discussed told him to add Ksh.3,000/= more to the alleged *"cash bail"* to make it Ksh.6,000/= and gave him forty five (45) minutes to get it. That came out clearly in the tape, a transcript of which was exhibited. The complainant then went back to Selesio who gave him three notes of Shs.1,000/= each in a khaki envelope and that was to be used as a trap. The complainant went back to the appellant with that money and tape. On meeting the appellant, the appellant asked him to give him the money. He gave him the money and the appellant counted the money. At that time appellant's land-line rang and the appellant picked it and spoke to someone. As the appellant was speaking, the complainant got a chance and flashed Selesio. After speaking on land-line, the appellant all of a sudden looked unhappy and ordered complainant to sit down and thereafter ordered him into the cells. At that time Selesio arrived at the appellant's office and the appellant ordered Selesio also into the cells. Police officers arrived and caught Selasio. They removed his pistol and started firing in Selesio's direction. ***IP Aggrey Makomere*** *(PW7)* arrived there and was also manhandled. Police arrested Selesio and Makomere, and seized their firearms as well. Later the Deputy OCS ***IP Samson Otiende*** *(PW3)* who was then in the police canteen got information from one PC driver ***Mangangi*** of the incident and rushed to the station and was ordered by the appellant who had ordered the arrest of Makomere and Selesio to book the officers for creating disturbance at the station and to book the complainant for trying to bribe him *(the appellant)*. As IP Samson booked them, the OCPD *(Mr. Makau)* and GSU in charge arrived at the scene. The OCPD ordered IP Samson to return the personal effects of Makomere and Selesio to them, and IP Samson obliged. The OCPD and GSU in charge then left for Kakamega with the appellant. Later the appellant's clothes were subjected to test to ascertain whether the APQ powder used in treating the

money given as a bribe was present in them. The appellant was thereafter charged with the offences. The three offences in respect of which the appellant was convicted were as we have stated in respect of counts 3, 4 and 5 which were in count 3, 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, of which the particulars were that:

"On the 10th day of October 2007, at Kapsokwony Police Station of Mt. Elgon District within Western Province, being a person employed by a public body to wit, the Kenya Police Force, as an Officer Commanding Kapsokwony Police Station, corruptly solicited for a benefit of Ksh.3,000/= from one Philip Kiptai Kiptoem, as an inducement so as to offer protection to the said Philip Kiptai Kiptoem while conducting business within Kapsokwony Township, a matter in which the said public body was concerned."

The fourth count was that of Receiving 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 2007, in that:

"On the 11th day of October 2007, at Kapsokwony Police Station of Mr. Elgon District, within Western Province, being a person employed by a public body to wit, the Kenya Police Force, as an Officer Commanding Kapsokwony Police Station, corruptly received a benefit of Ksh.3,000/= from one Philip Kiptai Kiptoem, as an inducement not to charge the said Philip Kiptai Kiptoem, with an alleged offence of resisting lawful arrest, a matter in which the said public body was concerned."

The fifth count was that of obstruction contrary to ***Section 66 (1) (a)*** of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 and particulars were that:

"On the 11th day of October 2007, at Kapsokwony Police Station in Mt. Elgon District within Western Province, without justification obstructed Kenya Anti-corruption Commission Investigators namely Selasio Kinyua and Aggrey Magomere from arresting him by threatening to use firearm and placing the said officers in police cells while the said investigators were effecting lawful arrest under the Anti-corruption and Economic Crimes Act."

The appellant denied these charges, together with other two charges in respect of which he was acquitted namely counts 1 and 2. We will mainly summarise his defence in respect of the three counts above in respect of which he was convicted. He denied meeting the complainant on 10th October, 2007, the day it is alleged he solicited Ksh.3,000/= from the complainant. On that day he said he was at his home resting after a long operation at Tuinandet, Imsigon and Kopsiron where there had been massacre and consequential injuries on several people the previous day. On 11th October, 2007, he reported on duty at 2.15 pm and while in his office somebody knocked. He allowed him to go in. He asked him who he was as the appellant was still new at the station. The complainant was the person. On being asked what made him go there the complainant said he wanted to thank the appellant for having ensured he went to court after staying in custody for sometime. The appellant said he needed no thanks for that as he had only carried out what was his duty. Thereafter the complainant told the appellant that he wanted to give him some money in acknowledgement of that gesture from the appellant but although the appellant said it was not necessary, the complainant insisted and the appellant arrested him for attempting to bribe him. He took him to report office where he told the complainant to remove the money he wanted to use as a bribe. Complainant removed Ksh.3,000/= and placed it on the report office desk. He ordered the money to be kept in the armory and he booked the complainant in the O.B. Thereafter, the appellant saw police officers running to the report office and on inquiring, he found out that I***P Otiende*** and other police officers had arrested two people he later came to know as Selesio and Makomere who according to Otiende, had demanded the release of the complainant and Selesio had

been wielding a pistol while making the same demand. The appellant says upon that information, he ran to the office of the OCPD and informed the OCPD of what was going on. The OCPD ***SSP Makau*** together with Deputy OCPD, ***SP Mugambi*** and appellant went to appellant's office. OCPD then told the appellant, PCIO Mr. Mugo had ordered the release of Selesio and Makomere who were KACC officers, but the appellant was not clear on this as all he saw was OCPD talking and was thereafter told he was talking to PCIO who had made the orders. He denied arresting Selesio and putting them in the cells. He denied threatening the two with firearm and denied obstructing the two from arresting him. At 6.00 pm, he went to PCIO's office and PCIO, without giving him a chance to speak, ordered Selesio and Makomere to arrest him while he never committed the offences, he was charged with.

The learned Chief Magistrate *(as she then was)*, after analysing the evidence above acquitted the appellant in respect of the first two counts, but found him guilty and convicted him in respect of the three charges, the subject of this appeal, and after considering mitigating factors sentenced him to a fine of Ksh.50,000/= in default one year imprisonment in respect of third count; Ksh.50,000/= fine in default one year imprisonment in addition to a mandatory sentence of Ksh.6,000/= in default three months imprisonment in respect of count 4 and to a fine of Ksh.50,000/= in default one year imprisonment in respect of the fifth count, sentences to run concurrently.

The appellant felt dissatisfied with that conviction and sentence. He moved to the High Court vide Criminal Appeal No. 36 of 2011 at Kakamega. Kimaru, J. heard the appeal and in a judgment dated 21st June, 2012, but delivered by Chitembwe, J., the learned Judge addressed himself *inter alia* thus:-

"As regard whether the prosecution proved its case against the appellant on the three counts for which he was convicted, this court upon re-evaluating the facts of this case reached the conclusion that indeed the criminal case facing the appellant was proved to the required standard of proof beyond any reasonable doubt. Why this conclusion" The prosecution was able to establish that the appellant, as a person employed by a public body, being the police force, abused his position with a view to inducing the complainant to confer upon him a financial benefit. What was most distressing about the appellant's conduct was that he was prepared to ride roughshod on the complainant's constitutional right to freedom to achieve his objective. The evidence adduced by the prosecution clearly showed that the complainant was illegally detained at Kapsokwony police station for a period of five (5) days on instructions of the appellant so that the appellant could attain his objective of inducing the complainant to confer him a financial benefit under the guise that he would offer protection when the appellant conducted his business and further that he would forebear from charging the complainant with the "serious offence" of resisting arrest. The trial court reached the correct conclusion that the appellant's defence raised no issues which could dent the otherwise strong evidence adduced by the prosecution witnesses against him.

The upshot of the above reasons is that the appeal filed by the appellant lacks merit and is hereby dismissed."

That is the decision that prompted this appeal for the appellant is still dissatisfied with that judgment as well. He has come before us vide Memorandum of Appeal dated 12th September 2013 and filed by his Advocates on the same date in which three grounds are cited. These are:-

"1. That the Judge erred in law by upholding that the appellant was properly convicted and sentenced on charges filed and pleaded to when that was not the case.

2. The Judge erred in law by upholding that the respondent proved its case against the appellant

beyond all reasonable doubt when that finding was never made by the subordinate court.

3. *The Judge erred in law by failing to re-evaluate the evidence and make a finding that the whole trial was conducted by the Kenya Anti-corruption Commission (KACC) instead of the Republic which is against the law and therefore charges not real existing, null and void."*

In his address to us on the above grounds, Mr. Ombaye, the learned counsel who conducted the appellant's case in the trial court and in the High Court, referred us to the charge sheet and submitted that as the charge sheet indicated the complainant's address as being *"Republic of Kenya thro' KACC,"* that meant that the prosecution was conducted by KACC and that was not proper in law. He referred us to the the provisions of ***Section 35 (1)*** and ***(2)*** of the Anti-corruption Act, and contended that KACC was only to gather evidence and forward it to the Attorney General who would decide whether to prosecute or not. He relied on this Court's judgment in the case of **Nicholas Muriuki Kangangi vs. The Hon. The Attorney General** – *Civil Appeal No. 331 of 2010* for that submission. On the second ground, Mr. Ombaye felt that as the trial court did not enter anywhere in its judgment that the case against the appellant was proved beyond reasonable doubt, the first appellate court had no business making that finding and lastly, Mr. Ombaye submitted, on the first ground of appeal, that the charge sheet was amended to the prejudice of the appellant. He asked us to allow the appeal.

Mr. Abele, the learned Assistant Director of Public Prosecutions, on the other hand opposed the appeal, submitting that the case was not prosecuted by KACC and that KACC was only the complainant as the Republic of Kenya was complainant through KACC but KACC was never named the Prosecutor. Several prosecutors who prosecuted the matter were not employees of the KACC but were normal court prosecutors who at that time were working under the Attorney General. Further Mr. Abele contended that Mr. Ombaye had all the opportunity to raise that complaint at the trial stage and even at the first appellate court but did not raise it. His further submission was that the trial court need not put it in writing that a criminal case is proved beyond reasonable doubt and a conviction suffices to indicate that, and the first appellate court is not limited in its finding to the findings of the trial court. As to the alleged amendments to the charges, Mr. Abele submitted that the substantive charges were not amended and only the numbering of the charges were amended. That had no effect on the charges as the charges as put to the appellant remained the same. He sought dismissal of the appeal.

We have considered this appeal anxiously. In doing so we have considered the record, the evidence therein, exhibits, the judgments of the trial court and of the first appellate court and the law. This is a second appeal as we have stated and thus our jurisdiction, pursuant to the provisions of ***Section 361 (1) (a)*** of the Criminal Procedure Code, is confined to matters of law only unless we are persuaded that the two courts below reached a decision upon perverted evidence or upon no evidence at all.

In our considered view, that the trial court has not put it down in writing that the case is proved beyond any reasonable doubt but has gone ahead to convict cannot be a reason to challenge the judgment at all. The conviction in a criminal case can only be entered after full hearing and on proof beyond reasonable doubt and that a court has reached the verdict of convicting the accused person is in itself proof enough that the court feels the proof against the accused was beyond reasonable doubt and whether that is put down in black and white is neither here nor there. In the matter before us, the learned trial Magistrate has at length shown through proper and detailed analysis and evaluation of the evidence that leaves none with any doubt that she found proof beyond reasonable doubt. The first appellate court had the onerous duty of revisiting the evidence afresh, analysing it, evaluating it and

reaching its own conclusion but always aware that the trial court had the advantage of seeing the demeanor of witnesses and hearing them and therefore giving allowance for that. It did that admirably in our view. It came to an independent conclusion that the proof availed was beyond any reasonable doubt and that cannot in our mind be faulted only on ground that the trial court did not put in writing that proof was beyond any reasonable doubt. The first appellate court was not in law bound to use the same nomenclature. We see no merit in this ground.

On the complaint that the charge sheet was amended such that the six counts were reduced to five only, we again see no cause for complaint as indeed originally six counts were preferred against the appellant. The first count was that of soliciting for a benefit and the amount of money solicited was Ksh.10,000/=. At the close of the prosecution's case, at page 49 of the record, the Chief Magistrate's typed proceedings show that the appellant was acquitted on that count under ***Section 210*** of the Criminal Procedure Code. That left five counts in respect of which the appellant had a case to answer. Somebody renumbered these five counts remaining such that original count 2 became count 1 and count 3 became count 2, count 4 became count 3, count 5 became count 4 and count 6 became count 5, nothing else was done to the substantive charges and they were never amended. That numbering did not in any way prejudice the appellant who was represented by an able counsel. In our view nothing turns on that ground.

The last ground is that the charges were null and void as the trial was conducted by KACC and not by the Republic. This is a complaint that should have been raised earlier by the appellant who was all the way represented at the trial court. It was not raised and Mr. Ombaye's explanation is that he was not aware of that legal provision until recently when he read the case of Nicholas Muriuki Kangangi vs. The Hon. The Attorney General Civil Appeal No. 331 of 2010. We note that in that case, the appellant who was also a police officer and was charged with an offence in similar circumstances to this case raised the complaint immediately he was taken to court. Hear the judgment of the court:-

"On the very first day that he appeared before the Magistrate, the appellant raised various issues under the repealed constitution and under the Act itself and he requested the trial Magistrate to frame a Constitutional question for interpretation by the High Court. The Magistrate (Mrs. Matende) was of the view that there was no valid constitutional issue which she could refer to the High Court for interpretation. The appellant was dissatisfied with the Magistrate's order and through his present counsel, Mr. Kelvin Mogeni, he moved to the High Court and asked that court to exercise its revisionary powers under Section 362 of the Criminal Procedure Code and reverse the order of the Magistrate. Ojwang J. as he then was duly obliged but directed the appellant ….. forthwith and in any case, within 14 days of the date thereof lodge an application to the High Court on the relevant constitutional questions."

The appellant in that case filed the questions as directed and that is what was considered by the High Court and eventually this Court. We have gone into these aspects of that case only to demonstrate that whereas in that case the appellant moved for alleged rights on the very first day of his appearance before the trial court and therefore the matters in the High Court and in this Court proceeded before any evidence was adduced in the trial court, in this case the reverse is the case. The trial has taken place and has been completed; the first appellate court has had the appeal and confirmed the conviction and sentence ordered by the trial court and the matter is now on second appeal. Mr. Ombaye is raising the issue of whether KACC should or should not have prosecuted the case. In any event he is not raising it by way of seeking a constitutional interpretation, neither is he alleging that the trial before the Chief Magistrate was vitiated. All he is saying is that had the first appellate court reanalysed and re-evaluated the evidence it would have discovered that KACC should not have prosecuted the case and thus it should have realised that the charges were null and void. Mr. Ombaye, only refers to a column in the

charge sheet where it is entered *"Republic of Kenya thro' KACC"* as his evidence that KACC prosecuted the case. He does not allege with finality that ***IP Kariuki*** who was the prosecutor on the date appellant first appeared in court and also conducted part of the prosecution, or ***Ip Nyaga*** who was the prosecutor on the date plea was taken and conducted part of prosecution or, ***CIP Kimulwa*** who conducted part of the prosecution or ***CIP Ndirangu*** who also conducted part of the prosecution, were doing so as employees of KACC or were prosecuting on behalf of KACC. There are many occasions when Republic is recorded in the charge sheet as complainant through the individual victim. In this case, it must be accepted that Selesio and Makomere who were manhandled by the appellant were employees of KACC. It cannot also be forgotten that even going by the appellant's evidence, it was OCPD and PCIO who caused his arrest and consequent prosecution. These are not employees of KACC or at least we were not informed that they were. In our view the issue raised by Mr. Ombaye was so serious that had it been properly researched, the court and legal fraternity like in the case of Kangangi above, would have benefited to a large extent. However, we have no basis for considering the issue at length as we see no semblance in the procedure adopted in the two cases by the appellants. In our view, even if we were to accept Mr. Ombaye's assertions, we would see no prejudice suffered by the appellant as even in the Kangangi's case, this Court terminated the proceedings in the trial court but made it clear that the same termination did not bar the prosecution from charging the appellant afresh provided proper procedure was followed.

We think we have said enough to indicate that this appeal cannot stand. It lacks merit and is therefore dismissed.

Dated and Delivered at Kisumu this 19th day of September, 2014.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR