

POLICE 5

THE KENYA POLICE

POLICE CASE NO..021/14/2013..

O.B. No.....18/25/01/2013.....

DATE TO COURT31/01/2013
COURT FILE NO.....ACC.1/2013..

CHARGE SHEET

Christian names in full or name FREDRICK	Surname or Father's Name NDONYE	Identity certificate no. 22197451	Sex MALE	Nationality or Tribe KENYAN	Apparent Aged ADULT	ADDRESS (include District and Location where applicable) MACHAKOS
CHARGE UNIT 1	CORRUPTLY SOLICITING FOR A BENEFIT CONTRARY TO SECTION 39(3) (a) AS READ WITH SECTION 48 OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT No. 3 OF 2003.					
PARTICULARS OFFENCE (e.g. Second Schedule of (C))	<p>FREDRICK NDONYE On the 19th day of June, 2012, at the Mombasa Law Courts within Mombasa County of Coast province, being a person employed by a public body, to wit, the Judiciary, as a Court Clerk, corruptly solicited for a benefit of Kshs.5,000/= from JACKIE MUCA BWIRE, as an inducement to provide her with regular updates in relation Miscellaneous application No. 46 of 2012, a matter relating to the affairs of the said public body.</p> <p>[FOR COUNT TWO SEE OVERLEAF]</p>					
Accused arrested	Date of Arrest	Without or with Warrant	Date Apprehension Report to Court	Bond or Bail and Amount	Is Application made for Summons to Issue	
	25.1.2013	W/OUT		On cash bail of Kshs.10,000/=		
Handed or returned to						
Complainant and Address	REPUBLIC OF KENYA THRO' EACC					
Witnesses ..	1. JACKIE MUCA BWIRE			6.		
	2. OTHERS TO BE STATED			7.		
	3.			8.		
	4.			9.		
	5.			10.		
Offence					
Part and					
 ANTI CORRUPTION COURT, MOMBASA..... if fine paid					

I Certify this a true copy of the Original.

PORT

Other in Charge Police Station

Snr Resident Magistrate
Mariakani

4th June, 2013

COUNT II

CORRUPTLY SOLICITING FOR A BENEFIT CONTRARY TO SECTION 39(3) (a) AS READ WITH SECTION 48 OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT NO. 3 OF 2003.

PARTICULARS

FREDRICK NDONYE: On the 16th day of July, 2012, at the Mombasa Law Courts within Mombasa County of Coast Province, being a person employed by a public body, to wit, the Judiciary, as a Court Clerk, corruptly solicited for a benefit of Kshs.2,000/= from JACKIE MUCA BWIRE, as an inducement to provide her with regular updates in relation to Miscellaneous Application No. 46 of 2012, a matter relating to the affairs of the said public body.

Officer in charge Port Police Station.

Sign

REPUBLIC OF KENYA
IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT
AT MARIAKANI
CORRUPTION CASE NO. 1 OF 2013

REPUBLIC ----- PROSECUTOR

=VERSUS=

FREDRICK NDONYE ----- ACCUSED

JUDGMENT:-

Fredrick Ndonye, the accused in this matter is charged with the offence of corruptly soliciting for a benefit contrary to section 39(3) as read with section 48 of the Anti – Corruption and Economic Crimes Act No. 3 of 2003.

Particulars are that on 19/6/2012 at the Mombasa Law Courts within Mombasa County, being a person employed by a public body, to wit, the Judiciary, as a court clerk, corruptly solicited for a benefit of Ksh.5,000/- from the complainant as an inducement to provide her with regular updates in relation to Miscellaneous Application No. 46 of 2012, a matter relating to the affairs of the said Public body.

He is also faced with a second charge of corruptly soliciting for a benefit contrary to section 39(3)(a) as read with section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

It is the prosecution's case that on 16/7/2012 at Mombasa Law Courts within Mombasa county, being a person employed by a public body, to wit, the Judiciary, as a court clerk, corruptly solicited for a benefit of ksh.2,000/- from the complainant as an inducement to provide her with regular updates in relation to Miscellaneous Application No. 46 of 2012, a matter relating to the affairs of the said public body.

The matter initially proceeded before my predecessors and directions were taken on 13/6/2014 pursuant to the provisions of section 200 of the Criminal Procedure Code. It was decided that the matter begins afresh.

The complainant testified that in the month of April, 2012, she received a miscellaneous application NO. 46 of 2012 in her postal address.

She was the defendant in the matter and she went to file a replying affidavit at the Civil Registry at Mombasa Law Courts.

She was informed that the file could not be traced and required more time to be retrieved.

The accused person referred her to the archives but still the file could not be traced. She was told to go back to the civil registry.

The file was later traced in the afternoon and she realized that a break in order had already been issued yet it had not been served upon her.

She decided to make another application to stay the order which was under a

certificate of urgency and the earlier orders were stayed. Hearing of the application was then scheduled for 2.5.2012.

The application could not proceed as an adjournment was sought and a new date was set for 16/5/2012.

The respondent did not appear in court on that date and her application was therefore allowed.

She went back to court on 30/5/2012 to find out the position and met the accused person who informed her that the file could not be traced. She went back home.

On 31/5/2012, the accused called her with information that the respondents had filed another application.

She rushed to Mombasa Law Courts and found the accused with the file. He informed her that she needed to have a friend to prevent the file from getting lost.

She was allowed to make a copy of the application and was told that she needed to pay some money to have the file secured.

The accused offered himself as a friend and told her to pay kshs.50,0000/-. He later told her to raise ksh.5,000/- to protect the file.

At that point in time, the complainant decided to involve the ethics and Anti-Corruption Commission and the Registrar of the Judiciary.

At the Ethics and Anti-corruption Commission, she was told there was need for

evidence of soliciting.

She was introduced to a recording device with which she went to meet the accused person.

The accused took her to an empty court room and she switched on the recording device.

The conversation was about money and he expected that she had kshs.5,000/-. She informed him that she did not have any money but promised to get back to him.

She returned the recorder to the Ethics and Anti-corruption officers and they told her to return on 25/6/2012.

On that date the cassette was re-played and she was asked to record her statement.

On 16/7/2012, she was told about an operation and was given two kshs.1,000 notes which had been photocopied. She appended her signature on the photocopies.

She was also given the original notes in an envelope, a micro-cassette and a recording device.

She then proceeded to the law courts with the officers and she went to seek the accused person.

When the accused saw her, he went to meet her and she switched on the recorder.

She informed him she had managed to get kshs.2,000 and he told her to follow him. He then took the money and told her to wait for him.

She went back to the Ethics and Anti-corruption offices. She was informed that a search was being conducted on the accused person and she later wrote her statement.

PW2 testified that the accused person is known to him and they had worked together for a period of about 2 years.

On 16/7/2012, three gentlemen went to the registry and introduced themselves as police officers.

They said they wanted to conduct a search on the accused person who had received ksh.2,000. He referred them to his immediate supervisor.

A search was conducted on the accused person and nothing was recovered.

A similar version was given by PW3, Anne Wangari Njaga who was an executive assistant based at Mombasa Law Courts at the time.

The Government Analyst took the witness stand as PW4. He received an exhibit memo form dated 16/7/2012 which was signed by the person who took possession of the exhibits.

He received an envelope containing swabs taken from a mobile phone belonging to the accused person and also his left and right hand swab.

There was also an envelope containing a white shirt recovered from the accused, an envelope and control sample APQ.

His duty was to ascertain whether APQ could be detected on the samples. His

finding was that no APQ could be detected on the samples save for the envelope. He produced the report of his findings in evidence.

The trap money was prepared and handed over to the complainant by PW5. He made photocopies, an inventory and handed it over to the complainant.

The version by PW6 was that he was in the office on 16/7/2012 when he was requested to assist in conducting a trap operation.

The complainant was given a recording device and the trap money which had been treated with APQ.

They were later alerted that the suspect had taken the money.

He took swabs from the suspect and prepared a swab certificate which he produced in evidence.

They searched the accused person and did not recover the trap money. He also took possession of the shirt the accused was wearing on that day and handed it over to the main investigator.

The main investigator testified as PW7. His evidence was that he inducted the complainant on how to use the tape recorder that had a micro-cassette.

He entered a certificate to the effect that the machine was in good working condition.

The complainant went and obtained a recording and returned the device to him.

On 16/7/2012, he requested his colleague to treat ksh.2,000 with APQ and inducted the complainant on the operation of the recording device.

He left the office with the complainant in the company of other police officers and proceeded to Mombasa Law Courts.

The complainant later called him and said the suspect had taken the ksh.2,000.

They apprehended the suspect and conducted a search but they did not recover any money.

He forwarded the exhibits to the Government analyst together with the exhibit memo form, recorded statements and forwarded the file to the Director of Public Prosecution.

At the close of the prosecutions case, the accused person was placed on his defence. He opted to give sworn evidence.

He denied having solicited for or received any money from the complainant.

His version was that he was serving many people in his line of duty and the complainant was entitled to access her file.

He stated that there is no complaint that had been raised by the complainant herein that her file could not be traced and no money was recovered from him.

His contention was that the complainant was a bitter litigant after she had lost a case in court.

I have considered the evidence adduced by the prosecution witnesses and the defence by the accused person in this matter.

There are questions we will need to pose to be able to determine the issues at hand.

In respect of the first charge, the issues are;

- (1) Whether on 19/6/2012 the accused corruptly solicited from the complainant a benefit of ksh.5,000.
- (2) Whether the soliciting was made at Mombasa Law Courts.
- (3) Whether at the time of soliciting, the accused was employed in the Judiciary as a court clerk.
- (4) Whether the benefit was an inducement to provide her with regular updates in relation to Miscellaneous Application No. 46 of 2012.

On the second charge the issues for determination are whether;

- (i) On 16/7/2012 the accused corruptly solicited from the complainant a benefit of ksh.2,000.
- (ii) Whether the corrupt soliciting was made at Mombasa Law Courts
- (iii) At the time of soliciting the accused was employed in the Judiciary as a court clerk.
- (iv) The benefit was an inducement to provide the complainant with regular

updates in relation to Miscellaneous Application No. 46 of 2012.

We will therefore venture on a journey to determine whether the answers to these questions are in the affirmative or otherwise.

I am minded that in a criminal case, the duty is always upon the prosecution to prove its case against an accused person beyond any reasonable doubt.

In the case of **WOOLMINGTON -VS- DPP(1935) UKH1**, the court stated that;
“..... one golden thread is always to be seen that it is the duty of the prosecution to prove a prisoner's guilt. No matter what the charge, the prosecution must prove the guilt of the prisoner. No attempt to whittle it down can be entertained”.

The evidence by the complainant was that the accused person had solicited from her a benefit of ksh.5,000 on 19/6/2012 and ksh. 2,000 on 16/7/2012.

The complainant had been provided with audio recording devices on both dates and they were played in court.

The audio recordings did not ascertain whether it was the accused person's voice and the nature of the communication whether he was soliciting for a benefit from the complainant.

In the case of **OBANDA -VS- REPUBLIC (1983) KLR 567**, it was held that;
“..... the paraphernalia of a tape recorder, cassette, transcript and translation amount to no more than an aide memoir for a witness as a notebook does for

police officers”.

A similar finding had been made in the earlier English cases of **R -VS- MILLS (1962) 3 ALLER 298** and **R -VS- ROSE (1962) 3 ALL ER.**

The complainant was with the accused when the offences were allegedly committed and there is no other prosecution witnesses who testified to corroborate the version by the complainant.

PW2, PW3, PW6 and PW7 were all present when the accused person was apprehended.

The trap money which was allegedly handed over to him by the complainant was not recovered from him.

The money had been treated with APQ Chemical but the Government Analyst who testified as PW4 stated that no traces of the chemical were found on the swab that had been taken from the accused persons hands and mobile phone.

Probably if the swab had been positive, then an inference could have been made that the issue made complete a set of facts after having solicited for a benefit from the complainant.

My take on the matter after applying my mind to the evidence and the law, is such that I find there are many untied and loose ends in the prosecution's case.

The answers to the questions set out earlier are in the negative and it would not be

safe to convict the accused person on either of the two charges.

I find that the prosecution has not proved its case against the accused person beyond any reasonable doubt in respect of the first and second charge and I acquit him of the offences charged under **section 215** of Criminal Procedure Code.

The accused person is set at liberty forthwith unless otherwise lawfully held. The security deposited in court to be released to the depositor.

Hon Nathan S. Lutta – SPM
18/8/2015

Judgment read and signed by me Nathan Shiundu – Senior Principal Magistrate
this 18/8/2015 in the Open Court.

Coram:

Ms. Nyangena – Prosecuting for the state

Court Clerk – Christine

Ms. Oyier – Present holding brief for Mr. Kadima for the accused.

Accused – Present

