



**Omondi v Republic (Anti-Corruption and Economic Crimes Appeal 2 of 2022)
[2023] KEHC 356 (KLR) (Anti-Corruption and Economic Crimes) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 356 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES APPEAL 2 OF 2022
EN MAINA, J
JANUARY 26, 2023**

BETWEEN

JAMES AMBUSO OMONDI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against the Judgment, conviction and sentence in
Milimani Anti-Corruption Case No. 5 of 2019 Republic v James
Omondi Ambuso (Hon. E. Nyutu SPM) delivered on 1st February 2022)*

JUDGMENT

1. The Appellant is a former employee of the Water Resources Management Authority. At the material time he held the position of Finance and Administration Manager. He was charged with 9 counts of corruption offences contrary to the provisions of Sections 39(3) (a) of the [Anti-Corruption and Economic Crimes Act](#) as read with Section 27(2) of the [Bribery Act](#) and Section 48(1) of the [Anti-Corruption and Economic Crimes Act](#) and Section 46 as read with Section 48 of the [Anti-Corruption and Economic Crimes Act](#).
2. At the end of the trial, the Appellant was acquitted in Counts 3,6,7,8 and 9 and convicted in Counts 1, 2, 4 and 5 and. He was sentenced to a fine of 1 million in each count in default 3 years imprisonment, and mandatory fines of Kshs. 890,000 in Counts 1 and 2 and Kshs. 930,000/- in Counts 4 and 5 in default 3 years' imprisonment on each count. The sentences were ordered to run consecutively.



3. The Appellant, aggrieved with the judgment of the court preferred this appeal against the conviction and sentence through a Petition of Appeal dated 14th February 2022. The grounds of Appeal are:-

- a. That the Hon. Trial Magistrate erred in law and fact in arriving at her judgment, conviction and sentence by ignoring and failing to take into consideration very cogent and exculpatory evidence, which militated against the conviction.
- b. That the Hon. Trial Magistrate erred in law and fact in arriving at her Judgment, Conviction and Sentence by giving total reliance on unsubstantiated, unproved and contradictory evidence which could not prove the salient ingredients necessary to prove an offence of soliciting and receiving a Benefit.
- c. That the Honourable Trial Magistrate totally contradicted herself in her judgment. Having found as a fact that the accused had no powers to allocate funds and resources to Regional offices of the Water Resources Management Authority and secondly that the accused had no powers and indeed could not and did not transfer or punish any officer, the basis or consideration for the claim of solicitation and receipt of the benefit as per the charge sheet had collapsed and therefore Counts 1 & 2, 4 & 5 on which the Accused was convicted could not be proved and stand. To buttress this fact, the Hon. Magistrate ignored the fact that no action has been taken or considered against the alleged benefit providers and givers, if at all a crime in which they were involved had been committed.
- d. That the Honourable trial Magistrate erred in fact and in law in giving a sentence and fine against the provisions of the law by ordering payment equivalent to 4 times the benefit received instead of double the benefit received by pegging the alleged benefit to the counts of the charge sheet and not the actual benefit claimed to have been received thereby arriving at a manifestly wrong sentence.
- e. That the conviction and sentencing of the accused was therefore manifestly wrong and erroneous as the prosecution had failed to prove the charges brought against the accused on the legal standard of beyond reasonable doubt.”

4. The charges against which the Appellant was convicted are:Count 1: Corruptly soliciting for a benefit contrary to Section 39(3) (a) of the *Anti-Corruption and Economic Crimes Act* as read with section 27(2) of the *Bribery Act* and Section 48 of the *Anti-Corruption and Economic Crimes Act*

The particulars of the offence are that James Ambuso Omondi, between 14th May, 2012 and 11th February, 2013 in Nairobi County within the Republic of Kenya, being a person employed by a public body to wit, the Water Resources Management Authority, as the Finance and Administration Manager corruptly solicited for a benefit of cash amounting to Ksh 445,000/- from Geoffrey Moria as an inducement so as to facilitate continuous disbursement of operation and development funds to the Water Resources Authority Mombasa Regional Office, a matter relating to the affairs of the said public body.



Count 2: Corruptly receiving a benefit contrary to Section 39(3) (a) of the [Anti-Corruption and Economic Crimes Act](#) as read with section 27(2) of the [Bribery Act](#) and Section 48 of the [Anti-Corruption and Economic Crimes Act](#)

The particulars are that James Ambuso Omondi, between 14th May, 2012 and 11th February 2013 in Nairobi County within the Republic of Kenya, being a person employed by a public body to wit, the Water Resources Management Authority, as the Finance and Administration Manager corruptly received a benefit of cash amounting to Kshs 445,000/- from Geoffrey Mworira through Patrick Ngemi Masaku as an inducement so as to facilitate continuous disbursement of operation and development funds to the Water Resources Authority Mombasa Regional Office a matter relating to the affairs of the said public body.

Count 4: Corruptly soliciting a benefit contrary to Section 39(3) (a) of the [Anti-Corruption and Economic Crimes Act](#) as read with section 27(2) of the [Bribery Act](#) and Section 48 of the [Anti-Corruption and Economic Crimes Act](#)

James Ambuso Omondi, between 12th January, 2012 and 20th April, 2013 in Nairobi County within the Republic of Kenya, being a person employed by a public body to wit, the Water Resources Management Authority, as the Finance and Administration Manager corruptly solicited for a benefit of cash amounting to Ksh. 465,000/- from Boniface Mbeu Mwaniki as an inducement so as to facilitate the continuous disbursement of operation and development funds to the Water Resources Authority Tana Catchment Area a matter relating to the affairs of the said public body.

Count 5: Corruptly receiving a benefit contrary to Section 39(3) (a) of the [Anti-Corruption and Economic Crimes Act](#) as read with section 27(2) of the [Bribery Act](#) and Section 48 of the [Anti-Corruption and Economic Crimes Act](#)

The particulars are that James Ambuso Omondi, between 12 January, 2012 and 20th April, 2013. in Nairobi County within the Republic of Kenya, being a person employed by a public body to wit, the Water Resources Management Authority, as the Finance and Administration Manager corruptly received a benefit of cash amounting to Ksh 465,000/- from Boniface Mbeu Mwaniki as an inducement so as to facilitate continuous disbursement of operation and development funds to the Water Resources Authority Tana Catchment Area a matter relating to the affairs of the said public body.

Submissions of the Appellant

5. The Appellant relied on the written submissions dated 27th June 2022.
6. On the first ground of appeal, the Appellant submits that the trial court ignored and failed to take into account cogent and exculpatory evidence; that PW1 testified that the Appellant corruptly solicited for money in January 2012 while the charge sheet indicates the dates of the offence as between 14th May 2012 and 11th February 2013; That no evidence was produced on the solicitation as testified by PW16 and that PW3 did not give the dates when the solicitation occurred. Further that PW 15 did not produce call logs as proof of the solicitation and as such the charge was premised on mere suspicion. Counsel submitted that the defence witnesses explained that the transactions were harambee, loans, funeral and support for a sick relative.
7. The Appellant contends further that the prosecution's case that the amounts were deducted from the staff per diem allowances was not proven. That DW3, DW7 and DW5 testified that they did not contribute any allowances towards the payment of bribes to the Appellant and that there was no staff meeting in that respect; That, the reason for the solicitation of bribes as per the charge sheet was an inducement for the Appellant to continue disbursing funds to the regional office, which was



- improbable as the role was outside the Appellant’s mandate but that of the CEO, PW9. Counsel urged further, that the trial court having dismissed the allegation that the bribes were an inducement not to transfer or sack witnesses as it was not the Appellant’s job description it ought to have acquitted him.
8. The Appellant submitted that in regard to Count 2, the Kshs. 445,000 was received from Patrick Masaku (PW4) and not corruptly received from PW1. That this amount included Kshs, 40,000 hospital bills and allowances; further that payment of allowances via Mpesa was permitted.
 9. The Appellant contends further that the charges of “soliciting” and “receiving” a bribe are connected and as such, if the court acquits the Appellant on one, the other must collapse and that the prosecution failed to establish that the Appellant made a demand for a benefit and as such both the charges for soliciting and receiving must collapse. Counsel for the Appellant relied on two authorities to support his submissions: - *Patrick Munguti Nunga v Republic* [2013] eKLR and *Peninah Kimuyu v Republic* [2014] eKLR.
 10. On the sentences, Counsel contended that the trial court erred in sentencing the Appellant to a fine equivalent to four times the benefit received instead of double the benefit received as provided in the repealed Section 39(3) of the *Anti-Corruption and Economic Crimes Act* as read with the *Bribery Act*; that the offences took place before the enactment of the *Bribery Act*, 2013; that the Applicable law was the *Anti-corruption and Economic Crimes Act* and that the Appellant was entitled to the least prescribed punishment in the event of conflict between the two laws. Also that a fine equivalent to double the amount lost ought to have been Kshs 890,000 for Counts 1 and 2 and Kshs. 930,000 for Counts 4 and 5 respectively while the court imposed a fine of Kshs 1,780,000 and 1,860,000 respectively. Counsel urged this court to allow the appeal, quash the conviction and set aside the sentences.

Submissions of the Respondent

11. The Respondent opposed through the submissions dated 24th August 2022. Learned Counsel for the Respondent submitted that the trial court took into account all the evidence adduced before arriving at its final decision; That PW1 was the sub- regional coordinator based at the Mombasa office and that the Appellant through a tele-conversation demanded for money from him; that, there were various amounts that were sent to the Appellant between January 2012 - September, 2012. PW4 an accountant at Warma was in the year 2012 working at the Mombasa sub-region office under PW1 and the prosecution tendered an mpesa statement (exhibit number 18) in which PW4 was able to identify various sums totaling to Kshs.445,000/= which were sent to the Appellant between 14th May 2012 to 11th February, 2013 and the evidence with respect to count 1 was not therefore at variance with the charge sheet.

Further that the Appellant was properly convicted on counts IV and V for Soliciting and receiving a sum of Kshs.465,000/- from PW3-Boniface Mbeu Mwaniki who worked in Embu as a Regional Manager at Embu. His evidence during trial was that he sent money to the Appellant via mpesa and that he would sometimes give him cash. This was the condition the Appellant had given to PW3 that once the funds from the WARMA headquarters were disbursed, they would also send him money. Counsel contended that PW3 was able to identify several mpesa transactions through which he had sent to the Appellant all totaling to Kshs.465,000/=. Counsel stated that the evidence of PW3 was further corroborated by that of PW10 an employee of WARMA based at the Lower Tana region whose evidence was that PW3 would request him for money to be sent to the headquarters so that they could get adequate funding.

12. On the third ground of appeal which is that the Learned Trial Magistrate contradicted herself in her judgment, Counsel submitted that the trial court thoroughly analyzed both the prosecution and



defense cases after making a summary thereof and thereafter analyzed each and every count before determining the issues. Counsel contended that it was a well-thought-out judgment and hence does not warrant interference by this Court.

Analysis and determination

13. As the first appellate court, its duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its independent conclusions, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses firsthand. (See *Okeno v Republic* [1972] EA 32.)
14. The Appellant was convicted on Counts 1, 2, 4 and 5, which are the charges of corruptly soliciting and receiving a benefit contrary to Section 39(3) (a) (repealed) of the *Anti-Corruption and Economic Crimes Act* (repealed) as read with Section 27(2) of the *Bribery Act* and Section 48 of the *Anti-Corruption and Economic Crimes Act*.
15. Section 39 of the *Anti-Corruption and Economic Crimes Act* though repealed was saved by Section 27(2) of the *Bribery Act*. in so far as it applied to pending bribery cases. Section 27(2) of the *Bribery Act* states:-

“ 27

- (2). Any investigation or prosecution or court proceedings instituted before the commencement of this Act based on an offence under this Act shall, with the necessary modifications, be treated or continued as if they were instituted under this Act.”

16. In the case *Paul Mwangi Gathongo v Republic* [2015] eKLR Mativo, J denied the ingredients of the offence of soliciting and receiving as follows: -

“The main ingredients of the offence (soliciting and receiving a bribe) are that the accused must be acting in any capacity, whether in public or private sector or employed by or acts on behalf of another person, that he must be shown to have obtained or attempted to obtain from any person gratification other than legal remuneration, that gratification should be as a motive or reward for doing or forbearing to do, in the exercise of his official function, favor or disfavor to any person. The gravamen of the offence is acceptance of or the obtaining or even the attempt to obtain illegal gratification as a motive or reward will complete the offence.

In order to constitute an offence three things are essential; in the first place, there must have been solicitation or offer or receipt of a gratification. Such gratification must have been asked for, offered or paid as a motive or reward for inducing by corrupt or illegal means, and secondly that someone should be acting in the public or private or employed or acts for and on behalf of another person, or confer a favor or ask for a favor to render some service.”

17. In convicting the Appellant on Count 1 on soliciting a bribe, the trial court relied on circumstantial evidence being the Appellant’s Mpesa statement (phone number 0722xxx387) – (PEXh 8) the timing of the payment to the appellant and the disbursements to the stations, to hold that the testimony of PW4 that the accused solicited for the bribe verbally was sufficiently corroborated. The court also found that the accused failed to explain why he received the amounts of Kshs.445,000 subject of Count One in his Mpesa on the stipulated dates. The court applied the same reasoning to Count Four and held that the testimonies of PW10, PW11 and PEXh 18 sufficiently corroborated the evidence of PW3 and as such the prosecution passed the test of circumstantial evidence.



18. It is trite that the legal threshold to sustain a conviction against an accused person based on circumstantial evidence is that such evidence must exclude any hypothesis or circumstances which would weaken or destroy the inference of guilt. In the case of *Sawe vs Republic* [2003] KLR 364, the Court of Appeal while citing the case of *Rex vs. Kipkering Arap Koske* [1949] 16 EACA 135, held that:

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shifts to the party accused.”

19. I have carefully evaluated the prosecution’s evidence and the defence adduced at the trial. The Mpesa Statement (PEXh.18) of the appellant’s registered phone number shows that he received a sum total of Kshs 445,000 from Patrick Masaku (PW4), an accountant at WARMA, between the period of 14th May 2012 and 11th February 2013, which amount is the subject of Counts 1 and 2.

20. Similarly, from the Mpesa statement (PEXh 18), the appellant received a sum total of Kshs 465,000 from Boniface Mbeu Mwaniki (PW 3) between the period 12th January 2012 and 20th April 2013 the subject of Counts 4 and 5.

21. The then Section 39(3) of the *Anti-Corruption and Economic Crimes Act* under which the Appellant was charged and which was saved by Section 27(2) of the *Bribery Act* reproduced above stated: -

“ 39. Bribery involving agents

.....

(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

(b) corruptly gives or offers, or corruptly agrees to give or offer, a benefit to which this section applies.”

22. When placed on his defence, the Appellant admitted receiving the funds but explained that the Mpesa payments were for various purposes including his official allowances, contributions for hospital bills and funeral expenses amongst other things. He called a number of witnesses who testified as much. However, this defense was not credible enough to rebut the prosecution case that the payments were bribes. A close evaluation of the dates of payments reveals that these Mpesa payments were paid to the Appellant by accountants of WARMA either a day or two before or after the dates of disbursement of the WARMA development funds to the respective offices. The Appellant did not produce documents to prove that the monies sent to him were allowances, funeral expenses or hospital bills which he ought to have done as these were facts within his special knowledge. On the other hand, PW3 and PW4 were emphatic, and this court believed them, that they sent the monies to the Appellant when he demanded that they do so, so that he could sent the disbursements due to them.

23. It is my finding that there was evidence beyond reasonable doubt that the Appellant corruptly received the bribe so as to disburse the funds due to the entities to which PW3 and PW4 were attached. The two



- witnesses were in my finding truthful and reliable as the Appellant himself admitted that he received those funds. They were not the persons charged with paying the Appellant's allowances or hospital bills and the funds they sent to his Mpesa could not have been anything but bribes.
24. Counsel for the Appellant raised an issue concerning the variance between the charge and the evidence in regard to the dates the offence is alleged to have been committed. It is my finding however that that contradiction is curable under Section 214(2) and 382 of the *Criminal Procedure Code* as no prejudice is alleged to have been occasioned to the Appellant.
25. Counsel for the Appellant also argued that the Appellant could not have asked or received a bribe in order to perform a task which was not within his power to perform; that it was not his responsibility to disburse funds to the region. It is instructive however that that argument cannot hold in view of the provisions of Section 50 of the *Anti-corruption and Economic Crimes Act* which states: -
- “ 50. Impossibility, no intention, etc., not a defence In a prosecution of an offence under this Part that involves a benefit that is an inducement or reward for doing an act or making an omission, it shall not be a defence—
- (a) that the act or omission was not within a person's power or that the person did not intend to do the act or make the omission; or
- (b) that the act or omission did not occur.”
26. The upshot is that the two charges of receiving a bribe to wit Count Three and Five were proved beyond reasonable doubt and the trial court was not in error and the conviction is safe and is upheld.
27. On the charges of soliciting a bribe, to wit, Counts one and Four it is my finding that the same were not proved beyond reasonable doubt given that there was no evidence of the Appellant asking for the benefit. What we have is the word of the prosecution witnesses against that of the Appellant. The fact of him receiving the monies, per se, is not in my view sufficient evidence to prove that it was him who made the request for the money. For the foregoing reasons, I would acquit the Appellant on the charges for soliciting bribes Counts One and Four. The conviction on the two counts are quashed and sentences set aside.
28. On the sentences in Counts Two and Five the trial court sentenced the Appellant to a fine of Kshs.1,000,000/- in each count in default 3 years imprisonment and a mandatory fine of Kshs. 890,000 in Count Two and Kshs. 930,000 in Count Five in default 3 years' imprisonment on each count and an order that the sentences were to run consecutively. These sentences are within the statutory limits of Section 48 of the *Anti-Corruption and Economic Crimes Act* and are not excessive or illegal as to warrant this court to interfere. The sentences are hereby upheld.
29. The upshot is that the appeal partially succeeds, with the conviction and sentences in Counts One and Four quashed and set aside while the conviction and sentences in Counts Two and Five are upheld.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 26TH DAY OF JANUARY, 2023.

E N MAINA

JUDGE

