Ogada v Republic (Criminal Appeal E003 of 2022)
[2023] KEHC 23085 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEHC 23085 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E003 OF 2022

RE ABURILI, J

SEPTEMBER 28, 2023

BETWEEN

DANIEL OKOTH OGADA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the conviction and sentence by the Hon. P. N. Gesora on the 28.1.2022 in the Chief Magistrate's Court at Kisumu in Criminal Case No.01 of 2017)

JUDGMENT

Introduction

1. The appellant herein Daniel Okoth Ogada who was initially represented by Nelson Ogeto Advocates at the trial court until this appeal was filed on 7th February 2022 did file Notice of intention to act in person on 13th June 2023.

2. He is a prisoner serving at Kibos GK Prisons following his conviction and sentencing on 28th January 2022 for the following offences which are all the same, save for the different amounts of the bribe and different dates:

   Count 1 – Receiving a bribe contrary to Section 6(1) (a) as read with Section 18 (1) (2) of the *Bribery Act*, 2016. In Count 1, the amount of the bribe disclosed is Kshs.90,000 and the date of demanding or receiving the bribe or financial advantage is on 19th June 2017. The same charge in Count 2 discloses the same amount demanded on 20th June 2017. In Count 3, the Appellant is stated to have demanded for Kshs.100,000 on 21st June 2017 while in Court 4, the Appellant is stated to have received Kshs.10,000 genuine and Kshs 19,000 fake currency on 21st June 2017 and in all counts, the purpose for which the financial advantage was demanded or received was for purposes of fast tracking the

processing of payment of Local Purchase Order No. 2720 of Kisumu County Government amounting to Kshs.1,540,000 dated 17th November 2015.

3. The Appellant pleaded not guilty to all the charges preferred against him. After a full trial, the appellant was found guilty, convicted and fined Kshs. 100,000 on each count and in default, to serve twelve (12) months imprisonment on each count.

4. Aggrieved by the conviction and sentence, the appellant filed this appeal setting out the following grounds of appeal:

    a. ***That the learned magistrate erred in law by convicting and sentencing the accused/ appellant on a case that did not meet the evidentiary threshold required in criminal cases.***

    b. ***The learned magistrate erred in law by convicting and sentencing the accused/ appellant on a case premised on illegally obtained evidence.***

    c. ***The learned magistrate erred in law by convicting and sentencing the accused/ appellant on a case whose charges constituted duplicity of counts.***

    d. ***The learned magistrate erred in law by convicting and sentencing the accused/ appellant without giving due regard to his defence.***

    e. ***The learned Judge erred in law by sentencing the accused/appellants to a mandatory sentence contrary to the law.***

5. The appeal was canvassed by way of written submissions. I will first deal with what each party submitted on.

6. The appellant's submissions are contained in his record of appeal dated 23rd June 2022 and filed in court on 30th June 2023 whereas the Respondent's submissions were filed on 13th June 2023.

7. The appellant also filed supplementary written submissions on 13th June 2023 in person. The first submissions were filed by his advocates who were then on record. The appellant's counsel also filed a list of authorities to support the submission. In the initial submissions, the following grounds were advanced:

    i. ***Failure to be accorded a fair hearing.***

8. Citing Article 25(c) of *the Constitution*, it was submitted that the appellant was denied his right to a fair trial as he was the victim of police entrapment whilst at the same being subjected to multiplicity of counts and disregard of his defence that prejudiced his defence and general case.

    ii. ***Presentation of a case constituting multiplicity of counts***

9. It was submitted relying on the case of **BMK v Republic (2020) eKLR** paragraph 26 on what constitutes a multiplicity of counts and how it arises being:

    > "***Multiplicity in a charge sheet arises from charging of a single criminal act on offence as multiple separate counts."*** This may result in violation of the right of an accused person under Article 50(2) (a) of *the Constitution*.

10. Further reliance was placed on **KN v Republic [2018] CRA 67/2016** on curability of multiplicity of charges under Section 382 of the Criminal Procedure Code on appeal and at the trial where it is shown that no prejudice has been occasioned by the multiplicity of charges.

11. It was submitted that despite the prosecution being accorded the opportunity to correct the defects in the charge sheet particularly counts three and four, they did not hence, that the appellant was subjected to possible elements of double jeopardy hence limiting his defence.

iii. ***Reliance on entrapment as a form of illegally obtained evidence and as a defence.***

12. The appellant relied on **Lydia Lubanga vs Inspector General of Police & 4 Others [2016] eKLR** which defined entrapment. Further reliance was placed on **Mohamed Koriow Nur vs Attorney General [2001] eKLR** on the defence of entrapment.

13. It was submitted that the complainant was not an Investigating Officer and that the appellant was lured into the alleged crime of bribery when he had no intent to, through use of secret audio and video recordings, undertaken by the complainant, including the use of chemicals in illegally obtaining the appellant's finger prints from the cash notes that were presented to him.

14. That the illegal and clandestine use of these methods at the scene agitated members of the public who forced the investigators to flee away with the appellant using a parked vehicle outside the crime scene on standby.

15. That therefore the guilt or not of the appellant is immaterial by virtue of the illegal methods used to lure him in order to justify the end, which methods are unorthodox, illegal and a substitute for passive, skillful and scientific investigation methods.

16. The appellant argued that the court must refuse to convict a person who was a victim of entrapment.

iv. ***Failure to consider the appellant's defence during trial.***

17. It was submitted that the trial court did not consider his defence that the complainant who was well known to him owed him money of Kshs.250,000 which the complainant had promised to repay at a later date and which ended up to be the date that the appellant was arrested for the alleged crime of bribery.

18. He relied on **Oketch Okare vs Republic (1965) eKLR** on unilateral reliance on a party's evidentiary position which would amount to an injustice.

v. ***Mitigation and sentence***

19. It was submitted that the appellant was unfairly sentenced on multiple counts contrary to the law and that he should be resentenced to only one count which is a representation of the other three counts.

20. It was submitted in mitigation that while in prison, the appellant has acquired necessary and relevant rehabilitative skills key to enabling him to be a more productive person in society and that he will be more productive given a non-custodial sentence. That the appellant is a husband who was the sole breadwinner for the family and his incarceration has broken his family as his children depend on the mercies of other relatives for daily sustenance. That he has a child with special needs who is deeply fond of the appellant and who is now depressed by the appellant's absence in her life.

21. The appellant in his supplementary submissions filed on 13th June 2023 reiterated what had been submitted earlier on the multiplicity of counts by digging into the evidence as adduced by the complainant and the investigating officer and the translation given about demanding for Kshs.90,000 as allegedly misinterpreted by Ms. Audi the EACC officer on the word NOT and NO. Further, that the evidence of Mr. Mulinge on the amount of the demanded bribe created serious doubts as to the investigative integrity.

22. On failure to consider the appellant's defence at the trial, the appellant further submitted that the trial court ignored the letter written by Penina, which exhibit would have shown that the appellant was framed and that the trial court ignored the fact that the complainant had threatened the life of the appellant by sending hitmen one Murefu, to the appellant.

23. Lastly, it was submitted that the evidence of Matilda Atieno who witnessed the complainant asking for financial support from the appellant and even witnessed the complainant receiving Kshs.250,000 from the appellant, was ignored. That the appellant's conviction was based on illegally obtained evidence and that he believed that the complainant was acting out of good will by repaying the loan obtained.

24. The appellant urged that this appeal be allowed, conviction quashed and set aside and he be set at liberty.

The Respondent's submissions

25. On the part of the Respondent State, it was submitted by the Prosecution Counsel on each of the issues framed by the appellant and his advocate then on record. On the assertions that the evidence adduced and relied on to convict the appellant was not sufficient, the Respondent submitted citing the provisions under which the appellant was charged. Counsel also relied on **Gideon Makori Abere vs Republic [2019] eKLR** where the court considered the same provisions herein.

26. It was submitted interpreting the said provision and relying on the evidence adduced by the prosecution that led to the arrest of the appellant, the appellant was performing and was to perform a public function and that on the respective dates stated in the charge sheet, he requested for and agreed to receive and received the money given to the complainant which money was treated by EACC officers hence the offences were proved against him beyond reasonable doubt.

27. On the claim that the evidence relied on to convict the appellant was illegally obtained evidence and amounted to entrapment, it was submitted that the defence of entrapment was inapplicable in this case because the appellant was not trapped to commit the offence as charged as he had already hatched a plan to solicit money from PW1 on the promise that he will release the file for payment. That the EACC officers only came into the picture after the solicitation had taken place.

28. It was submitted that the EACC officers did not induce the appellant to commit the offence as their involvement came after the offence had been committed. Reliance was placed on **Mohamed Koriow Nur vs Republic [2011] eKLR** on what courts ought to consider in the defence of entrapment.

29. Counsel submitted that there was evidence that the appellant solicited for the bribe without the State's involvement and that he would still have requested and received the bribe from PW1 even if PW1 had not reported the matter to EACC.

30. On whether the Counts constituted duplicity of charges, it was submitted that a duplex charge is a charge with charges more than one offence in the same count. He relied on **Pope vs Republic (1960) EA 132, 138 and Cherere vs Republic (1955) 22 EACA 478 and Joseph Njuguna Mwaura & 2 Others vs Republic (2013) eKLR and Ochieng vs Republic**, reproducing the relevant parts which this court will consider in detail, later. Counsel maintained that there was no duplicity of charges in this matter.

31. On allegation that the trial court did not consider the appellant's defence, it was submitted that the trial magistrate in his judgment considered the defence but noted that there was overwhelming evidence by the prosecution witnesses against the defence evidence adduced.

32. On sentence, Section 18 of the *Bribery Act* was reproduced by the Respondent's counsel and a submission made that the fines and default prison sentences imposed were commensurate with the offence, and that it was not harsh or excessive and that neither was it mandatory.

33. Counsel for the State urged the court to dismiss the appeal, sustain the conviction and uphold the sentence imposed.

Analysis and Determination

34. This being a first appeal on both facts and the law, I must analyze, reassess and reevaluate afresh all the evidence adduced before the trial court and draw my own independent conclusion, bearing in mind that this court neither saw nor heard any of the witnesses testify. See **Okeno vs Republic (1972) EA 32 and Kiilu & Another vs Republic (2005) 1KLR 174**. In other words, a first appeal is in a form of a rehearing of the evidence adduced in the lower court, but the appellate court cannot disregard the judgment of the trial court.

35. On appeal, the court must carefully weigh and consider the judgment of the trial court below. See **Pandya vs Republic (1957) EA 336 and Coghlan vs Cumberland (3) (1898) 1 Ch. 704**.

36. Revisiting the evidence adduced before the trial court, the evidence of PW1 the complainant in all the four counts was that on 17th November 2015, he was called by an official from the County Government of Kisumu and asked to supply the Department of Social Services with maize and beans.

37. That on 27th November 2015, another requisition was made by the same department. That PW1 made the deliveries and that he was only paid for the first delivery of 17th November 2015 and was issued with Local Purchase Order for the 2nd delivery then he started following up for payment which was not forthcoming until he was told by one, Paul, a clerk working at the Department of Special Programs that the complainant's file was held by the appellant herein. The complainant testified that since he knew the appellant well, he called the appellant but the appellant demanded for Kshs.100,000 for the complainant to process the payment for the second delivery. That the complainant told the appellant that he had no money and that he would pay after receiving the payment for the delivery of the maize and beans but that the appellant refused.

38. That the complainant tried to reach one Eric Odida who was the appellant's boss but the latter did not respond. That PW1 then decided to report the matter to EACC who arranged for a voice recording and photographing gadget and gave it to the complainant and advised him to go and meet the appellant and record him. The complainant called the appellant and they agreed to meet at Victoria Hotel.

39. The EACC officers escorted the complainant to the said hotel and left him there with the recording device. PW1 called the appellant who went to meet him there and they spoke, while being recorded, with the PW1 saying he had no money but Kshs.50,000 for his children which the appellant declined insisting on Kshs.100,000 so the complainant PW 1, left for EACC offices and handed them the reporting device which was tested.

40. PW1 stated that his conversation with the appellant was in Dholuo hence translation of the conversation was done by an EACC officer conversant with Dholuo language.

41. In the meantime, PW1 went to EACC offices with his son Ernest Majiwa who was a director in the Majiwa enterprises, the company whose name the complainant used to supply the foodstuffs requested and they were taught how to handle money which they were given being Kshs. 10,000 genuine and Kshs.19,000 in fake Kenyan currency of treated money which was also photographed and an inventory signed by the complainant. The money was placed in a khaki envelope which PW 1 took then he

proceeded to Victoria Comfort Hotel with the EACC officers taking position to observe events as they unfolded.

42. PW1 went to the said Hotel then he called the appellant who went there and PW1 continued recording the appellant with the gadget from EACC telling him that he only got Kshs.30,000 which the appellant agreed to receive but demanding that the complainant must clear the balance. As soon as the appellant was handed the money which was in an envelope, the appellant started counting the money upon which PW1 directed the recording gadget at the appellant then he signaled the EACC officer who swung into action and arrested the appellant and recovered the treated money and dusted his hands.

43. The hotel workers did not want that kind of scene in their premises so they told the EACC group to leave and the appellant was led into a vehicle parked outside the Hotel and the appellant was asked about the file in issue to which he responded that it was in the office so they went away and that they returned with the file and the recovered treated money was recorded and an inventory signed. PW 1 was later told that his payment was ready. PW 1 recorded his statement in the matter. The appellant was charged with the offence. The recording of the events were played in court with the trial magistrate observing what was happening right from the time that PW 1 was being inducted by Mr. Mulinge an EACC officer on how to handle the demand as per the recording of the first meeting where words such as ***"what you do to look for that 100. Look for that 100. I return the file. We can meet tomorrow in the morning."*** The recording is available and I will play it as well in this appeal to appreciate what it entails.

44. PW 1 stated that in that meeting as recorded, the appellant had demanded for Kshs.100,000. The trial court noted that PW 1 could be heard saying "I have Kshs.30,000 today; and that the handing over of the money to the appellant, with the appellant counting the money was seen while the EACC officers were equally seen arriving.

45. In cross-examination which was quite intense, PW 1 stated that he knew Wanyama but not Matilda. He admitted knowing Penina Anyango with whom he had worked at Kenya Power. He maintained that the appellant had demanded Kshs.100,000. He stated that he knew and had interacted with the appellant. That in the clip, he meant debts which he had in the bank or for lorries. He stated that after the arrest of the appellant, Penina went to PW 1 and asked that PW 1 forgives the appellant.

46. He denied that Penina went to ask him for her money. He denied meeting the appellant on 17th June 2017. He denied meeting Penina together with the appellant. He also denied paying Oluk any money. He denied knowing or sending one, Mrefu. He stated that he paid all the people he did work with and that he paid Penina some money.

47. He stated that the tender was not advertised as the supply was for Elnino, an emergency fund. He stated that he was a signatory to the account of Majiwa Enterprises where his son and daughter Winnie are directors.

48. In re-examination, he denied doing the tender with others Maryanne or Oluk.

49. PW 2 Ernest Okoth Majiwa, the son to PW 1 and a co-director with Winnie at Majiwa Enterprises testified that his father, PW1 requested to use their company name to supply maize and beans to displaced persons in Ahero and PW 2 conceded upon which supplies were made on 18th December 2015 of 150 bags of maize and 100 bags of beans.

50. That he learnt that some payment was made leaving a balance and that he went with his father to EACC offices. He stated that he saw his father give some cash to the appellant. That he heard PW 1 tell the appellant that PW 1 had less cash and he saw the appellant counting the money then EACC officers arrived and arrested the appellant. That he signed the inventory of the recovered notes.

51. He stated that he was with his father when they supplied the maize at Ahero where they found the appellant. He also stated that his father told him that the appellant had demanded Kshs.90,000 and that on the two occasions that they supplied, the appellant was present at Ahero.

52. PW 3, Dennis Owino Onyango a Government Analyst testified and produced a report and an exhibit memo showing the request received from Emmanuel Kubasu of EACC, of genuine notes of Kshs.10,000 and Kshs.19,400 fake notes in khaki envelopes, all 1000 notes, to ascertain the contents and whether chemical of anthracene and phenolphthalein could be traced on the currency notes and the right and left hand swab.

53. He produced the swabs for both hands showing that the chemicals were found/detected on the money and the hand swabs taken from the appellant.

54. PW 4 PC Emmanuel Kubasu a police officer seconded to EACC testified of receiving information on 20th June 2017 from his colleague Nicodemus Mulinge, to assist investigate a matter and he was introduced to the complainant from whom it was alleged that Kshs.90,000 had been solicited by the appellant so that the latter could fast track the payment for the supply of maize and beans for Elnino victims. He recorded the complainant's statement and taught PW 1 how to use the recording device to capture the conversation with the alleged suspect. He escorted PW 1 to Victoria Hotel where he released the component of the device to PW 1 and later collected it and downloaded the communication from therein and had it translated, before preparing treated money amounting to Kshs.10,000 genuine money and Kshs.19,000 fake money which was recorded and treated and taken to Victoria Hotel with directions to the PW 1 to record his encounter with the appellant, as the witnesses and his colleagues stood strategically at the entrance; and as soon as the appellant walked in and money was handed over to the appellant, one Kidogo, went to where the appellant was, introduced himself to the appellant and arrested him and PW 4 recovered the money and escorted the appellant to EACC offices where they compared the money recovered and the inventory which serial numbers tallied and the inventory was signed.

55. He testified that the appellant told them where the file for payment of the complainant was and that he led them to his Motor vehicle from where he retrieved the file and gave it to the EACC officers whose inventory was done and signed.

56. He identified the requisition for the supplies and they took the suspect into custody.

57. In cross-examination, the witness reiterated his testimony in chief. He stated that the recording shows the language was in Dholuo which he could not understand.

58. PW 5 Chief Inspector Francis Kipchoncho Kidogo seconded to EACC received a report on 20th June 2017 from PW 1 of the appellant demanding for payment of Kshs.90,000 to fast track payment of a tender supply to the County Government of Kisumu of Kshs. 1.4 million, for supply of Maize and beans to the people affected in Ahero Sub-county during the 2015/2016 Financial Year floods. As EACC officers assigned the matter, they inducted the complainant on how to use the device for recording. His colleagues went with the complainant to investigate and returned with the recording where Kshs.90,000 was heard to have been demanded hence on 21st June 2017 they arranged and went for the operation at Victoria Comfort Hotel after assigning duties to each of the officers involved. At about 10.30am, they were signaled by the lead investigator and they went and found the appellant arrested by the investigator team leader.

59. The Hotel management were unhappy with the videotaping hence they demanded that the officers leave which they complied and proceeded to their EACC offices and inventory taken. That the

appellant disclosed where the file was, in his motor vehicle and they proceeded to his car and removed the file which contained the documents related to the complaint in issue as lodged by the complainant.T hat Mulinge prepared an inventory which PW 5 also signed and they escorted the suspect to Kisumu Central Police station.

60. He recalled that before going to the hotel in question, he gave out Kshs.29,000 in currency notes of Kshs.10,000 genuine and Kshs.19,000 fake notes for use in the operation.

61. In cross-examination, PW 5 reiterated his testimony on the complaint received from PW 1. He stated that he did not understand Dholuo and that the complainant's statement also captured Kshs.100,000 but that Kshs.90,000 was as per the initial report lodged in the EACC offices. He stated that the money given was for investigations and they did not have to give what was demanded. On reexamination, he denied that he was the maker of the transcript or that he translated the same.

62. PW 6, Patrick Mbijiwe an EACC Investigator was asked by PC Mulinge to assist in the investigations of the case at hand in the preparation of treated money which was given to the complainant to take to the appellant.

63. He prepared the inventory of the said money and photocopies which were signed and so did the complainant sign before treating it with ABQ powder and inserting it in a blue envelope and handed it to the complainant and instructed him not to take out the money until it is demanded by the suspect. He listed the serial numbers of the genuine currency notes only stating that fake notes had no serial numbers. He produced as exhibits the inventory of the genuine and fake notes which was signed.

64. In cross-examination, he stated that his job was to treat the money and that he did not listen to the audio.

65. PW 7 Eric Omondi Adida testified that he used to work for the County Government of Kisumu as a staff supervisor in 2017 but that he had since left employment. He recalled that in May 2015 he was in the office and that he was requested to bail out the appellant who had been arrested on allegations that he had solicited for Kshs.100,000. He stated that he knew Majiwa Enterprises who had supplied maize and beans during the flood season, 160 bags for beans and 100 bags for maize valued at Kshs.1.5 million which money had not been paid for a while.

66. A clip was played, and he recognized the content and stated that he could see the appellant Dan whom he identified and recognized as his colleague by his features and physical appearance.

67. He also stated that he knew the appellant's voice and he could hear his voice in the clip. That he had known him for three years and identified him in the dock. He produced a certificate of voice identification as P. Exhibit 14.

68. In cross-examination, the witness reiterated his testimony and stated that he was a Luo and that he listened to the clip well. He stated that when he was summoned to EACC offices he listened to the clip which was played to him in Luo and that he said Dan demanded for Kshs.100,000 and that in his statement he had stated that Dan reduced the sum demanded to Kshs.90,000 to be shared among his bosses.

69. PW 8 Mercy Atieno Dudi a Data Analyst with EACC testified and produced the translation into Dholuo, of the video and audio clip as a transcript from Luo to English and Kiswahili, in a conversation between Petr, PW1 herein and Dan the appellant herein at Comfort Hotel in Kisumu on 21st June 2017. She confirmed that the contents and the translated script were the same. She stated that there was demand for Kshs.90,000 then Kshs.100,000 in lines 15 and 6 respectively. That at page 9 the words **"Hata sasa 90,000"** and page 13 line 11 were **"Nipe 100 nikupe form nitumie watu wa Equity."**

70. She made and signed a translation certification on 12th July 2017 which she produced as P. Exhibit 14 translation and P. Exhibit 15 certificate respectively.

71. In cross-examination, PW 8 confirmed that she translated the recording from Dholuo to Kiswahili and English and that there was demand for Kshs.100,000 in the form of **'100'** not **'100,000.'** That then there is **"leta (Kshs.90,000) in Kiswahili in the clip and that it was saying "90,000 that you have said"**, with the appellant requesting for Kshs.90,000

72. In re-examination, she reiterated that the payment request was of Kshs.90,000

73. PW 9 PC Nichodemus Mulinge the Investigating Officer testified and produced several exhibits. He was the lead investigator in this case having been assigned the case by his boss Mr. Ben Mureithi, so he involved his other colleagues to assist in the investigations, had the appellant recorded on his demands for the bribe of Kshs.100,000 but settled for Kshs.90,000, organized for the clips transcripted and translated from Dholuo by PW 8, money treated for the purpose and going to Victoria Hotel where PW 9 and his colleagues sat strategically as they waited for PW 1 to meet the appellant and for a signal (scratch on his head) from PW 1 upon which they saw what transpired as the appellant walked in, spoke to PW 1 and PW 1 handed the appellant the money before PW 9 and his colleagues Kidogo, Kubasu and Njiru moved in and arrested the appellant and informed him of the offence of receiving a bribe.

74. Due to hostilities at the hotel, they left for EACC offices and were led by the appellant to his car where he had kept the file relevant to the payment for the supplied foodstuff. Inventories were done and signed then PW 9 called Eric Adida the Chief Administrator at the County Government of Kisumu, who was the incharge of the appellant and they played for him the clip and he recognized the voice and image of the appellant and he signed the certificate of voice and image detailing how he had worked with the appellant.

75. PW 9 converted the conversation into a CD which he produced as P. Exhibit 19. The appellant was charged with the offences subject of this appeal.

76. In cross-examination, PW 9 reiterated his testimony in chief adding that the appellant was initially demanding for Kshs.100,000 which was reduced to Kshs.90,000. He denied meeting Penina. He stated that the transcript at page 7 talked of the complainant saying about a debt he was to pay.

77. Placed on his defence, the appellant testified on oath as DW 1 and stated that he previously worked as an Administrative officer at Kisumu County Government in Disaster Management and that he knew the charges that he was facing. He stated that he knew PW 1 since 2013 and was his friend for long and they shared a lot including borrowing money. He stated that the complainant did not apply for the tender but that he had an arrangement with Penina who would finance the supply and they would use the company of PW 1's children to supply. That goods were supplied in the name of Majiwa Enterprises.

78. He denied soliciting from the complainant any money. He denied asking for Kshs.100,000 or Kshs.90,000 as per the clip played in court. He stated that on 16th June 2017 he met the complainant at Railways. That he had also met Israel Olik who told DW 1 that PW 1 had paid him some money and told him not to tell Penina, then DW 1 called Penina and told her that payments had been made. That he went and found one file in the finance office, they went to the County Attorney who advised that they study the file and that Penina called PW 1 and they met on 16th June 2017 at Railways but Peter – PW 1 denied having been paid. That DW 1 had files in his car. Later PW 1 called and they met at Village Inn Kondele and PW 1 told DW 1 of the money PW 1 had borrowed from DW 1 but the latter told PW 1 that the account was in his Children's name and (sic) would pay Penina.

79. That they were to meet the following day, and PW 1 told DW 1 that one of the Directors was in Nairobi. That he wanted to do a memo in the file and PW 1 gave him an envelope containing money and DW 1 was arrested. He stated that he had given PW 1 Kshs.250,000 and that PW 1 had refunded half. He stated that PW 1 was doing the projects with Matilda. He stated that he was arrested on false allegations.

80. On cross -examination, the appellant stated that on 19th June 2017 he was in the Hotel. He denied stepping in any office and admitted that in his defence, he had not stated where he was on the 20th and 21st June 2017.

81. He stated that the complainant was his friend and he traced DW 1 as he had used Penina's money. That Penina told DW 1 that PW 1 owed her money. DW 1 stated that Peter owed him Kshs.120,000 plus interest although he denied reporting him anywhere. He stated that Matilda saw him give Peter, PW 1 the money.

82. DW 2 Matilda A. Owuor testified that she met Peter at Village Inn Kondele and that she was arrested at Comfort Inn Hotel. She testified that PW 1 was her friend after they met at a social joint and that in 2014 he told her of a contract he had gotten with the County Government of Kisumu to clear water ways so she borrowed for him the money so that he could do the job and that they were to be co-signatories in Equity Bank Kisumu Branch Account No. 0290263445732 for the period of the contract.

83. That she met Peter at Kibuye area, they went for lunch and the appellant joined them and he gave Peter Kshs.250,000 which he counted and confirmed and that she gave Peter Kshs.150,000 and he gave her Kshs.250,000. She stated that she did not follow up to know whether Peter had paid the appellant. She denied doing any other work with Peter.

84. The Appellant closed his case on 5th October 2021 after saying he had one witness who was out of the country and prayed for judgment date.

85. In his judgment which is impugned herein, the trial magistrate found that the prosecution had proved all the 4 counts against the accused/appellant herein beyond reasonable doubt and convicted him of the 4 counts of bribery and after mitigation, he sentenced the appellant by fining him Kshs.100,000 on each count in default, the appellant was to serve twelve (12) months imprisonment on each count.

86. That is the judgment which is subject of this appeal.

DETERMINATION

87. I have considered the evidence adduced for the prosecution and the defence in the trial court, the grounds of appeal and the parties respective written submissions in support of and against the appeal herein, as per the issues that the appellant framed for determination and the authorities relied on.

88. The main issue is whether the prosecution proved all the charges against the appellant herein beyond reasonable doubt to warrant or sustain a conviction and whether the sentence imposed was manifestly excessive or mandatory.

89. The appellant argued that he was not accorded a fair hearing and fair trial, that he was subjected to police entrapment which was his defence but which was not considered, that the charges were fatally defective for duplicity; that the evidence relied on to convict him was illegally obtained and that the mandatory sentence imposed was harsh and excessive.

90. The Respondent through the ODPP maintained that the evidence adduced was sufficient to sustain the conviction of the appellant, that the charges were not duplex, that the defence of entrapment raised

by the appellant was not available to him in this case, that the sentence imposed was not mandatory and neither was it harsh or excessive.

91. I will determine the issues as raised by the appellant as questions in no particular order, commencing with the ground that the charge sheet was fatally defective for duplicity. It was contended by the appellant that counts one, two and three were the same hence he ought not to have been convicted on all counts 1, 2, and 3.

92. Section 134 of the Criminal Procedure Code provides that:

> "**every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

93. On duplicity of charges, the Court of Appeal in **Joseph Mwaura & 2 Others vs Republic (2013) eKLR** explained and laid to rest the reasons why charging an accused person with robbery with violence under Section 295 and 296(2) of the Penal Code would amount to a duplex charge. Following its earlier decisions in **Simon Materu Munialu vs Republic (2007) eKLR and Joseph Onyango Owuor & Cliff Ochieng Oduor vs Republic (2010) eKLR**, the court stated that:

> "***Indeed, as pointed out in Joseph Onyango Owuor & Cliff Ochieng Oduor v R (Supra) the standard form of a charge, contained in the Second Schedule of the Criminal Procedure Code sets out the charge of robbery with violence under one provision of law, and that is section 296. We reiterate what has been stated by this Court in various cases before us: the offence of robbery with violence ought to be charged under section 296 (2) of the Penal Code. This is the section that provides the ingredients of the offence which are either the offender is armed with a dangerous weapon, is in the company of others or if he uses any personal violence to any person.***
>
> **The offence of robbery with violence is totally different from the offence defined under section 295 of the Penal Code, which provide that any person who steals anything, and at, or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or to property in order to steal. It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296 (2) as this would amount to a duplex charge."**

94. Under Section 137 of the Criminal Procedure Code, the following provisions shall apply to all charges and information, and notwithstanding any rule of law or practice, a charge or information shall subject to this Code, not be open to objection in respect of its form or contents if it is framed in accordance with this Code:-

(a) -

(i) ***Mode in which offences are to be charged.—a count of a charge or information shall commence with a statement of the offence charged, called the statement of offence;***

(ii) ***the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment***

creating the offence; CAP. 75 Criminal Procedure Code [Rev. 2012] [Issue 1] C44 - 50

(iii) ***after the statement of the offence, particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary: Provided that where any rule of law or any Act limits the particulars of an offence which are required to be given in a charge or information, nothing in this paragraph shall require more particulars to be given than those so required;***

(iv) ***the forms set out in the Second Schedule or forms conforming thereto as nearly as may be shall be used in cases to which they are applicable; and in other cases forms to the same effect or conforming thereto as nearly as may be shall be used, the statement of offence and the particulars of offence being varied according to the circumstances of each case;***

(v) ***where a charge or information contains more than one count, the counts shall be numbered consecutively.***

95. Section 6 of the *Bribery Act* provides that:

1. ***A person commits the offence of receiving a Receiving a bribe. bribe if –***

   a. ***the person requests, agrees to receive or receives a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly whether by that person receiving the bribe or by another person;***

   b. ***the recipient of the bribe requests for, agrees to receive or accepts a financial or other advantage and the request, agreement or acceptance itself constitutes the improper performance by the recipient of a bribe of a relevant function or activity.***

   c. ***in anticipation of or as a consequence of a person requesting for, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly by that person, or by another person at the recipients' request, assent or acquiescence.;***

2. ***For purposes of subsection (1) (a) and (c) it shall not matter—***

   a. ***if the recipient requests for, agrees to receive or receives or intends to request for, agree to receive or to accept the advantage directly or through a third party; or***

   b. ***if the advantage is or is intended to be for the benefit of the recipient or another person.***

96. In **Paul Mwangi vs Republic [2010] eKLR**, Mativo J stated as follows concerning the ingredients of the offence of soliciting and receiving a bribe:

> " ***The word "soliciting" is not defined under the Act. The Concise Oxford English Dictionary[47] defines Soliciting "as to ask for or try to obtain something from someone". The Merriam-Webster[48] on line dictionary offers the following***

definition:- "to ask for (something, such as money or help) from people, companies, etc., to ask (a person or group) for money, help, etc."

In State v. Wallace,[49]it was held that "solicitation means the asking, enticing, or requesting of another to commit a crime of bribery." To constitute the crime of solicitation of a bribe, it is not necessary that the act be actually consummated or that the defendant profit by it. It is sufficient if a bribe was actually solicited.

The main ingredients of the offence 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 the gratification should be as a motive or reward for doing or forbearing to do, in the exercise of his official function, favour or disfavour 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 for inducing a public servant for corrupt or illegal means. The receipt of 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 favour or ask for a favour to render some service.

Carlson Anyangwe in his book "Criminal Law in Cameroon, Specific Offences"[50]authoritatively states that to secure a conviction, it must be shown that the accused 'solicited' a benefit not legally due. The term soliciting implies that the accused took initiative to ask for the bribe and that he actively allowed himself to be corrupted. The crime is consummated by the mere fact of soliciting a bribe. It is enough that there was soliciting. Even if the person solicits a bribe then changes his mind and decides to do his duty without taking a bribe, the crime is nevertheless consummated though the change of heart might mitigate his punishment. Thirdly the benefit solicited must be any gift, loan, fee, reward, appointment, service, favour, forbearance, promise, or other consideration or advantage. It is implicit in the wording of the section that the promise, gift or present must be something that is not legally due. It should be remembered that the crime is committed by the mere fact any of the foregoing was solicited. Further, the prosecution must show the purpose for which the item, favour or promise was solicited.[51]

The gist of the offence is that it is corruption to ask for any benefit not legally due in order to do one's appointed duty. It's always against the public interest to secure a benefit by corruption. The public servant is paid a salary to perform his appointed duties. He is therefore bound by law to discharge those duties without seeking further or other emoluments.

In Cooper vs Slade[52] the court held that the offence does not require dishonesty and a person acts 'corruptly' if they do any act which the law forbids as tending to corrupt. In R vs Harvey,[53] the court upheld the Cooper vs Slade[54]and found that dishonesty was irrelevant and corruption was to be construed as deliberately

offering favours intending that they should operate on the mind of the offeree to encourage him/her to enter into a corruption bargain..."[emphasis added].

97. The Respondent submits that all the elements of the offence of bribery were proved while the appellant denies ever asking for any bribe or receiving a bribe and says that the complainant was taking to him his borrowed money when he was arrested and accused of receiving a bribe.

98. Under Section 7 of the *Bribery Act*, (1) For the purposes of this Act, a function or Function or activity to which activity shall be construed to be a relevant function or a bribe relates. activity if -:-

a. ***it includes-***

i. ***any function of a public nature,***

ii. ***any function carried out by a State officer or public officer, pursuant to his or her duties,***

iii. ***any function carried out by a foreign public official, pursuant to his or her duties;***

iv. ***any activity connected with a business;***

v. ***any activity performed in the course of a person's employment, and***

vi. ***any activity performed by or on behalf of a body of persons whether corporate or otherwise.***

b. ***it meets one or more of the following conditions –***

i. ***that the person performing the function or activity is expected to perform it in good faith;***

ii. ***that the person performing the function or activity is expected to perform it impartially; and***

iii. ***that the person performing the function or activity is in a position of trust by virtue of performing it.***

99. The evidence presented in support of the four counts show that on 19th June 2017, 20th June 2017 and 21st June 2017 as stated in counts 1-3, the appellant on each of those occasions had requested for and expected to be given Kshs.100,000 which he reduced to Kshs.9,000 in order for him to fast track the process of paying to the complainant of a Local Purchase Order No. 2720 dated 17th November 2015 which was produced as an exhibit for amount of Kshs.1,540,000 due from Kisumu County Government for the supply of maize and beans to the department of Special Programmes to provide food for persons displaced in Ahero during the flooding.

100. In count 4, the appellant no doubt received Kshs.10,000 genuine currency and Kshs.19,000 fake currency and the signed inventory was produced as an exhibit.

101. In **Peter Mburi Wanza vs Republic [2016] eKLR**, it was noted that the duplex rule charges prohibits the prosecution from charging an accused person with commission of two or more offences in a single charge. The purpose is to ensure that the accused person knows with clarity the offence he is alleged to have committed to enable him prepare adequately to answer it, and to focus the trial court itself in terms of evidence, relevance and efficiency. **(See Julius Maina Ndirangu vs Republic (2001) eKLR and Daniel Njuguna Wairumu vs Republic (2010) eKLR.**

102. The legal consequences of a duplex charge was considered in **Anthony Kilonzo Mutuku vs Republic (2019) eKLR** citing the Court of Appeal decision in **Mahero vs Republic (2000) 2 KLR 496** citing the English case of **Ministry of Agriculture Fishes and Food vs Nuun Conm & Coal (1987) Ltd (1990) LR 268** where it was stated that the question of duplicity is one of fact and degree and that the purpose of the rule is to enable the accused to know the case he had to meet. Odunga J then added thus:

> " In the case of **Omboga vs Republic (1983) KLR 340**, it was held that:
>
> > " **"Injustice will be occasioned where evidence is called relating to many separate counts all contained in one count because the accused cannot possible know what offence exactly he is charged with."**

103. The learned Judge continued:

> " ***I agree with the decision in Alistide Brilliant Nkoumondo vs Republic (2016) eKLR that:***
>
> > " ***"It is the view of this court that the rationale for the principle of duplicity is that when a charge is duplex, and an accused person goes through a trial, the fairness of the process is fundamentally compromised. The obvious reason to this is that it would not be clear to him/her what the exact charges do confront him or her. In the end, he/she may not be in position to prepare himself/herself for a proper defence. This may not only be prejudicial but ultimately amounts to a failure of injustice."***

104. from the decisions above, iam satisfied that on each of the named dates that he demanded for such bribe, the demand constituted an offence on its own until he finally received the treated money. Accordingly, I find no substance in the claim that the charges in counts 1,2, and 3 were duplex. I further find that no prejudice was occasioned to the appellant by the bringing of the three counts of bribery against him as he understood the charges very well.

105. I will then determine whether the evidence led by the prosecution proved the offences with which the appellant was charged, beyond reasonable doubt and whether his defence was considered.

106. The appellant challenges his conviction and sentence on the basis of sufficiency of the evidence adduced against him and that his defence of entrapment was not considered.

107. He argues that the letter written by Penina clearly shows that the complainant owed her money but that the complainant was on a revenge mission and had warned him of consequences for informing Penina that the complainant has been paid his.

108. Further that the defence evidence of Matilda that PW 1 owed the appellant money was not considered.

109. From the onset, the judgment of the trial court did consider the defence proffered by the appellant before reaching the decision that he did. However, he did not sufficiently refer to that evidence. At page 3-4 of the Judgment, the trial court set out the evidence adduced by the appellant and his witness Matilda Owuor, only in summary. Nonetheless, this being a first appellate court, iam inclined to consider and assess that evidence in detail

110. I have considered the defence proffered by the appellant. He denied requesting for any money as charged. However, from the audio clips played in court and the translations thereto, which evidence I have reviewed in this appeal, I am satisfied that there was demand for Kshs.100,000 which the appellant

later on reduced to Kshs.90,000 in order for him to fast track the processing of payment in favour of the appellant which payment had been outstanding since 2015.

111. In my view, that evidence was watertight and consistent. The appellant's submissions, that the trial court should have considered the letter written by Penina, showing that he must have been framed by the complainant is not cogent evidence to displace the prosecutions' evidence because Penina was never called as a witness. Moreover, the letter written by Penina Anyango Orege on 30th June 2017 was done after the appellant was charged with the offences herein thereby lending credence to the complainant's evidence that after the appellant was arrested, Peninna went to see him asking that they help the appellant and in cross-examination, the Complainant stated that following the arrest of the Appellant, Penina went to see the complainant and requested him to withdraw charges against the appellant.

112. Furthermore, the appellant in his defence tended to blame the complainant for framing him with the offence because the complainant owed the appellant money which he had not refunded and that the complainant pretended to be taking the said money to the appellant at which point the appellant found himself entrapped.

113. Contrary to that assertion, the letter written by Penina as contained in the EACC Duplicate Investigations file produced as an exhibit shows that Penina claimed that she funded the complainant 100% for the supply of the maize and beans and that the complainant served as Penina's assistant during delivery because she was not prequalified for the supplies and so it would cause difficulties in processing the payments. She also claims that the supplies were made in the name of AGPO Company registered in the name of his son and daughter so she accepted for the sake of fast tracking the payments.

114. She refers to invoices and delivery notes attached to her said letter which documents are totally different from those found in the file found with the appellant by the investigators on the date of his arrest on 21st June 2017.

115. For example, the proforma invoice No. 007 dated 18th December 2015 for Kshs.1,480,000 for supply of 90kgs dry beans at Kshs.9,000 per bag and 90kgs dry maize at Kshs.4,000 per bag was signed by Samuel Okon and it was issued by Ossenffeld Kenya Limited of P. O. Box 99163 Mombasa with a given telephone number whereas the one recovered from the appellant's car in the file is invoice No. 012 issued by Majiwa enterprises of Kisumu, the same quantities and amounts per quantity but the totals are Kshs.1,540,000 and not Kshs.1,480,000 as per Penina's document.

116. In addition, the Majiwa Enterprises Invoice No. 12 was received and signed for by Daniel O. Ogada not Samuel Okon.

117. Furthermore, in Penina's document, it is proforma invoice containing an additional Kshs.100,000 yet the totals are still much less than the total cost of the maize and beans only, combined in the invoice No. 012 as produced in evidence by the prosecution.

118. The delivery note by Penina shows that the invoice was No. 006 yet the proforma invoice is No. 007 and again, the person receiving the maize and beans is Samuel Okon unlike the document produced by the prosecution from the file found in possession of the appellant which shows that it was the appellant who received the consignment.

119. The glaring discrepancies in the letter written by Penina attaching the proforma invoice and delivery notes which are not part of what the investigators recovered from the appellant clearly show that Penina is an impostor in this case whose intention was to obstruct justice and help let the appellant off the hook by all means.

120. Regrettably, her letter does not help the appellant as it brings to the fore what appears to be machinations intended to let the appellant off the hook. She is claiming that the complainant owed her money yet the appellant claims that the complainant owed him money and was taking to him the balance on the date when the appellant was arrested..

121. Peninna concludes her letter by letting the cat out of the bag as follows:-

> " ***I hereby categorically as the sole supplier of the food items in question that I never in any circumstances played any part in what Mr. Peter Owera did to Dan. "I would be grateful for any assistance which can get Dan out of these allegations levelled against him."***

122. The question I must pose as I answer the issue of whether the defence was considered by the trial court is, was Kshs.250,000 or Kshs.1,480,000 just some kind of pocket money advanced to the complainant without any accountability document of acknowledgment as alleged by DW2 Matilda? Secondly, was supply worth Ksh.1,480,000 in the name of Penina or a company associated with Peter and if Penina was the one funding the supply 100% as alleged, then where is the Memorandum of Understanding for sharing of the proceeds? Is Kshs.1,480,000 some sort of breakfast money to be entrusted to someone and expect it back without any acknowledgment that you are part of that deal?

123. I highly doubt that line of defence by the appellant is capable of belief by any court of law, in view of the glaring disparities and factual inconsistencies.

124. I must emphasize that the defence was not obliged to tender any evidence in defence but where the appellant elects to give evidence, such evidence must be credible for the court to believe it.

125. I find that the defence evidence did not in any way displace the prosecution's water light evidence adduced. I find no evidence of malice or framing of the appellant by PW 1.

126. On whether the defence of entrapment should have been considered and if so, whether it has any merit, the appellant submitted that the evidence that led to his arrest, charge and conviction was illegally obtained and that he was entrapped hence the conviction should be quashed and sentence set aside.

127. The Respondent submitted that the defence of entrapment is inapplicable to this case as the appellant was not trapped into committing the offence because he had already hatched the plan to solicit money from PW 1 on the promise that he would release the file for payment. That the EACC officers only came into the picture after the solicitation had taken place. Further, that none of the witnesses, PW 1 and PW 4 expected the appellant to demand as he did and that EACC officers did not induce the commission of the offence.

128. I have considered the terse submissions by the appellant and his counsel then on record. Entrapment is a defence used when an accused person alleges that he never would have committed a crime if a law enforcement officer had not inspired, incited, persuaded and lured him. It is one of the methods of controlling law enforcement procedures in which agents improperly induce the commission of a crime. It is where the agents of the state predispose the accused to engage in criminal activity.

129. Was that the case in the instant appeal? For the appellant to avail himself the defence of entrapment, he must establish two essential elements. First, is that it is premised on the theory that the EACC could not have initiated the criminal design, implant in an innocent persons' mind the disposition to commit a criminal act and then induce commission of the crime so that the Government may prosecute **(See Jacobson vs USA, 503 US 540, 548 (1992)**. A valid entrapment defence has two related elements

(1) Government inducement of the crime and (2) the suspect's lack of predisposition to engage in the criminal conduct.

130. Even if inducement has been shown, a finding of predisposition is fatal to an entrapment defence. This is because predisposition inquiry focuses upon whether the accused was an unwary innocent or instead an unwary criminal who readily availed himself of the opportunity to perpetrate the crime. See **Mathews vs USA 485 at 63 (1988)**.

131. In this case, the evidence as adduced by PW 1 was that having supplied maize and beans to the County Government of Kisumu as requisitioned in 2015 for the assistance to be given to the victims of Floods displacement, and as evidenced by the Local Purchase Order (LPO) and the Delivery Note, the person who received the food consignment of maize and beans was the appellant herein. There were two deliveries. Payment was made for the 1st delivery. For the second delivery, subject of these proceedings, it took too long to pay for the delivery, despite the complainant supplier making requests.

132. The complainant went to inquire severally and when he met Paul a clerk, the latter informed him that the file was with the appellant at Special Programmes and that payment was ready.

133. Because PW 1 knew the appellant well, he called him and the appellant told PW 1 that the appellant had the file but that the complainant had to part with Kshs.100,000 which the appellant's boss needed. PW 1 told the appellant that he had no money but that if payment is made, he would give out the money demanded. The appellant declined that option. The complainant tried to reach out the boss, Mr. Eric Odida but the latter was non-responsive. That is when the complainant decided to report to the EACC.

134. Up to that point, I have no difficulty in finding that the appellant had the predisposition to commit the crime of bribery by demanding for upfront payment of Kshs.100,000 prior to the payment of supply of maize and beans being made to the complainant despite the complainant offering to pay the demanded money after receiving the payment from the County Government.

135. The appellant used the position of his boss in demanding for the bribe. The appellant was employed as a public servant and was performing a public function when he made the demand for a bribe as quid proquo and as determined to receive the bribe before he could process the payment and this is further supported by the evidence that he was now walking around with the file containing invoices and delivery notes for the complainant such that the complainant would not have the opportunity to be paid by anyone else in the office as the file was not available for reference.

136. The question is, if the appellant was simply going to collect his debt from the complainant when he was allegedly entrapped, what would a government official be doing with a file for payment of suppliers outside his office and carrying it in his car as if he was a judge or judicial officer carrying a court file home to go and write a judgment? In my view, the file was the bait meant to attract the demanded bribe from the complainant so that no one else accesses the file and processes the payment before the bribe was paid to the appellant.

137. There is absolutely no evidence that the complainant or EACC officers induced the appellant to demand or to give the bribe. From the evidence adduced, it was already a precondition that the appellant had set for the payment of the supplies that the bribe must first be paid upfront. The PW 1 only reported the incident to the EACC who came in only after the demand for the bribe had been made (See **Mohamed Koriow Nur vs Republic (2011) eKLR** – Warsame J.

138. The EACC had to investigate and gather evidence of the alleged demand and hence they gave the complainant a recording device to gather more information on the alleged demand for a bribe. After

gathering information, they had to lay a trap to nab the appellant who was ready to receive the bribe which he had demanded.

139. For the above reasons, I find and hold that the defence of entrapment is not available to the appellant herein and is dismissed.

140. I hasten to add that if in the circumstances of this case, the courts were to accept that defence as claimed by the appellant in the circumstances that prevailed in this case, then no single person would ever be accused of bribery or corruption since corruption and or bribery is never committed in the full view of the public. It is an offence committed clandestinely and persons who demand for bribes act secrecy just like defilers and rapists. When they are exposed, or unless they are found ready handed, they will never admit that they were involved in such offences.

141. On whether the sentence imposed was mandatory, therefore harsh and excessive, the appellant submitted that he should have been convicted on only count one which is a representative of the other counts and that he was unfairly sentenced on a multiplicity of counts contrary to the law.

142. That he has been rehabilitated in prison, has a family which is now broken, his children are needy and one of them has a special need. Not much information was divulged on how many children he has. In his mitigation before the trial court, the appellant stated that he was remorseful and that he was an orphan.

143. Sentencing is in the discretion of the trial court and as exemplified in Section 18 of the *Bribery Act* which is the penalty section, there is no Mandatory Penalty or sentence. The punishment is either a fine not exceeding five million Kenya Shillings or to both a fine and imprisonment for a term not exceeding ten years. There is additional mandatory penalty if there was a quantifiable loss suffered or the person convicted received a quantifiable benefit, which additional punishment is a fine not exceeding five million shilling.

144. The appellant was fined Kshs.100,000 on each count and in default, to serve twelve (12) months on each count defaulted.

145. However, the trial court did not state whether the sentences were to run consecutively or concurrently. Unlike concurrent sentences which are served simultaneously, consecutive sentences follow one another and adds as opposed to combine to the duration of one's sentence. Courts have discretion to decide whether the sentences imposed will be served consecutively or concurrently.

146. Before I determine whether the sentences are to run concurrently or consecutively, it is important to highlight that the penalty imposed was lenient considering that the appellant was a first offender. The upper limit is five Million Kenya Shillings fine and ten (10) years imprisonment or both. The appellant, a public officer had no right to whatsoever demand for a bribe before or after offering a public service to a member of the public.

147. I therefore find that the punishment meted out was lenient and I would not interfere with the same. I uphold the sentence imposed.

148. On whether the sentences imposed should have run consecutively or concurrently, albeit the appellant never raised any issue on the omission by the trial magistrate to state so, Section 14(2) of the Criminal Procedure Code allows a trial magistrate to direct a sentence to run concurrently or consecutively depending on the circumstances under which the offences were committed.

149. The determinants are whether the offences were committed in a chain of events constituting a common transaction. In **Nathan vs Republic (1965) EA 77, the Court of Appeal** held that:-

> "***If a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose, or by relation of cause and effects as to constitute one transaction, then the offence constituted by these series of acts are committed in the course of the same transaction."***

150. In the instant case, the act by the appellant of soliciting for a bribe in respect of counts 1, 2 and 3 and receiving a bribe in count 3 all constituted a chain or series of events which constitutes a common transaction hence they attract a concurrent sentence. The offences in question cannot be separated despite taking place on different days. What is material is the criminal predisposition and continuity of action and purpose.

151. To the above extent, therefore, the trial court should have ordered for the sentences to run concurrently.

152. In addition, the 'trap' money was not lost. It was recovered hence the appellant did not derive any quantifiable benefit from the demand for a bribe and receiving of the trap money.

153. The mandatory penalty would therefore not apply and the trial court rightly so, did not impose the mandatory penalty.

154. In the end, I find and hold as follows:

1. ***The appeal against conviction is found to be devoid of any merit. It is dismissed. The conviction of the appellant is upheld.***
2. ***The appeal against the sentence imposed in dismissed and the sentenced meted out is upheld.***
3. ***The default sentence imposed of twelve (12) months imprisonment on each count 1, 2, 3 and 4 where the fine was not paid shall run concurrently, to be calculated from the date of Judgment on 28^{tb} January 2022.***
4. ***That the Deputy Registrar shall cause to be drawn an amended and substituted committal warrant to be issued and served upon the prisons at Kibos Maximum Security Prison where the appellant is held for compliance.***
5. ***That as the appellant has already served the twelve (12) months concurrent sentence, unless otherwise lawfully held, he is hereby set at liberty forthwith.***

155. Signal to issue.

156. I so order. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF SEPTEMBER, 2023

R.E. ABURILI

JUDGE