Oimeke v Republic (Anti-Corruption and Economic Crimes Appeal E002 of 2023) [2023] KEHC 25984 (KLR) (Anti-Corruption and Economic Crimes) (30 November 2023) (Judgment)

Neutral citation: [2023] KEHC 25984 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

ANTI-CORRUPTION AND ECONOMIC CRIMES

ANTI-CORRUPTION AND ECONOMIC CRIMES APPEAL E002 OF 2023

EN MAINA, J

NOVEMBER 30, 2023

BETWEEN

ROBERT PAVEL OBWOTO OIMEKE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of the chief Magistrate's court at Milimani by Hon. P. Ooko, SPM, in Anti-Corruption Case No. E001 of 2021 on 28th March 2023.)

JUDGMENT

Introduction

1. This is an appeal from the decision of the Senior Principal Magistrate, P. O. Ooko delivered on 28th March, 2023, where the Appellant herein had been charged with two counts of receiving a bribe contrary to Section 6(1)(a) as read with Section 18 of the *Bribery Act* No. 47 of 2016.

2. The Appellant was acquitted of Count 1 and convicted of Count 2: Receiving A Bribe Contrary To Section 6(1)(a) As Read With Section 18 Of The *Bribery Act* No. 47 OF 2016.

3. The particulars are that: On 10th December 2020, within Nairobi City County, in the Republic of Kenya, being a person employed by a public body to wit, the Energy and Petroleum Regulatory Authority as Director General, the Appellant requested for a financial advantage of Kshs. 200,000 from Wycliffe Odhiambo Oyoo with intent that, in consequence, he would authorize the unsealing and opening of Nang'inja filling station based at Oyugis within Homabay County.

4. The Appellant filed the Petition of Appeal dated 6/4/2023 and filed on 11/4/2023 against the entire sentence and conviction where he was sentenced to a fine of Kshs. 1,000,000 or 3 years' imprisonment in default on the charge of receiving a bribe Contrary to Section 18 of the *Bribery Act* No. 47 of 2016.

The Appellant's case

5. The appellant has appealed against the conviction on the grounds that the Trial Magistrate erred in law and in fact in;

    a. Convicting the Appellant on the charge of Receiving a bribe yet the charge was not proven beyond reasonable doubt;

    b. Convicting the appellant when the evidence on record failed to support the charge.

    c. Convicting the appellant despite the ingredients of the offense of Receiving a bribe not being satisfied by the evidence adduced before court.

    d. Convicting the Appellant of the offense of receiving a bribe when the prosecution witnesses themselves confirmed that the Appellant did not receive the money.

    e. Convicting the Appellant of the offense of Receiving a bribe when the transcription confirms that the arresting officers failed to swab the appellant before asking him to touch an envelope which they knew has APQ with a view of contaminating him before the swab.

    f. Convicting the appellant despite the prosecution's failure to call a witness to identify voices in the recording which rendered the conviction unsafe.

    g. Convicting the appellant despite the prosecution failure to produce a certificate in line with section 106B of the *Evidence Act*.

    h. Convicting the Appellant while relying on recanted evidence by the complainant, the owner of the Petrol station.

    i. Convicting the Appellant while relying on insufficient evidence adduced by the prosecution.

    j. Convicting the Appellant by failing to consider the strong defense by the appellant.

    k. Passing a harsh sentence against the Appellant.

6. The Appellant prays that the Appeal be allowed and the conviction and sentence recorded against him be quashed and the sentence set aside.

The Appellant's submissions

7. Learned Counsel for the Appellant, Mr. Mong'eri submitted that the ingredients of the offense of "Receiving a bribe", there has to be solicitation or offer or receipt of gratification, the gratification must have been asked for, offered or paid as a motive or reward for inducing by corrupt or illegal means, and that someone should confer or ask for a favour to render some service. He relied on the definition

provided in the matter of Criminal Appeal No. 12 of 2019 Joseph Charo Dzombo -v- Republic where court stated that:

> " In order to constitute an offense, three things are essential ... solicitation or offer or receipt of a gratification, such a gratification must have been asked for, offered or paid as a motive or rewards 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."

8. The Appellant submitted that PW7, who was the investigation officer had testified that there was no data from the appellant's and complainant's phones to prove communication between them. PW3 had testified that he had used an application from a cyber to communicate with the Appellant but that information was never extracted by PW7 who is a Forensic Analyst and Investigation Officer with the EACC. The audio recording produced before the court did not have the Appellant soliciting for a bribe. Solicitation was thus not proven. He relied on the finding in Patrick Mungutu Nunga v Republic [2013] eKLR Cr. Appeal No. 123/2011 where the court stated that:-

> " The element of demanding bribe is very material in such cases. It is not just about getting a recorder and calling the complainant to identify the voices."

9. The Appellant contends that as per the testimony of PW8, the EACC Officers had asked the Appellant to touch the treated envelope and money before one James Wachira swabbed his hands for APQ chemical which deliberately contaminated his hands. No prior swabs had been done. PW13 also confirmed that the Appellant was asked to touch the envelope with money which was treated before his hands were swabbed. The Appellant's receipt of the money was also not proven.

10. On the issue of identification of the voice on the recording, the Appellant testified that no witness was called to identify the voice, and the court relied solely on the evidence of the Complainant without it being corroborated. He relied on the finding in ACEC Cr. Appeal No. 19 of 2018, Gideon Makori Abebe -v- Republic where the Court held that:

> " Where voice identification is in doubt, then there is no corroboration to the evidence of the complainant."

11. The Appellant submitted that the trial court erred in allowing evidence without compliance with Section 106 B of the *Evidence Act*.PW7 testified that he did not prepare a certificate under Section 106B (4) of the *Evidence Act* yet the result was a soft copy, and which also applies to a CD recording. PW13 also confirmed that he did not have a certificate confirming that the gadgets had been tested and were in a good working condition. The Appellant submitted that exhibit 10, lacked a manufacturer's certificate, procurement documents, and KEB certification. PW13 also failed to prepare an inventory showing that the gadget was handed over to Simba. The testing recording was not produced and neither was the certificate, creating doubt on the credibility of the audio recording relied upon by the prosecution.

12. The Appellant further submitted that for a conviction to stand, the prosecution has to prove guilt of an accused person beyond reasonable doubt. The trial court had thus erred by convicting the Appellant based on the prosecution's flawed and tainted evidence, having failed to prove solicitation and receipt

of the bribe. He relied on the finding in Gideon Makori Abere v Republic (supra) where the court held that:

> " Offenses related to corruption attract grave consequences including loss of Employment and even loss of future opportunities for employment. Reliance on uncorroborated evidence tainted with suspicion and doubt would be an affront to the well-known principles of criminal law regarding the burden of proof and the responsibility of the prosecution to discharge the same."

13. On the issue of excessive sentence, the Appellant submitted that the conviction of a fine of Kshs. 1,000,000 or three year imprisonment was excessive for a charge of Receiving a bribe of Kshs 200,000 considering that the Appellant was a first time offender. The Appellant thus prays that if this court upholds the conviction, it reconsiders the sentence passed against the Appellant and reduce the same to a reasonable sentence in line with the sentencing policy guidelines.

14. The Appellant relied on the following cases:Criminal Appeal No. 12 of 2019 Joseph Charo Dzombo -v- Republic.Patrick Mungutu Nunga -v Republic (2013) Eklr Cr. Appeal No. 123/2011ACEC Cr. Appeal No. 19 of 2018, Gideon Makori Abebe -v- RepublicCriminal Appeal No. 150 of 2012 Paul Kipchumba Kiyai -v- RepublicCriminal Case No. 6 of 2008 Republic -v- Barisa Wayu Mataguda

The Respondent's Submissions

15. The Learned Counsel for the Respondent, Ms. Kaniu, submitted that contrary to the submissions made by the Appellant, he was charged with the Offense of "Receiving a bribe" contrary to Section 6(1)(a) of the *Bribery Act* No 47 of 2016 and not "Soliciting a benefit" contrary to Section 39 of the *Anti-Corruption and Economic Crimes Act*, 2003; which position has since been repealed.

16. Section 6(1)(a) of the *Bribery Act* provides as follows:

> " A person commits the offense of receiving a bribe if, 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 a bribe or by another person."

17. The respondent explains that the Appellant was convicted of receiving financial advantage from PW3 so as to approve the reopening of a filing station which had been closed for selling adulterated fuel. Section 6(1)(a) of the *Bribery Act* provides for three distinct an independent offense, which are:

    a. Requesting a financial or other advantage;

    b. Agreeing to receive a financial or other advantage; and

    c. Receiving a financial or other advantage.

18. It is the Respondent's submission that soliciting does not have to be proved for the offense of receiving a bribe to succeed. It is possible for a person to receive a bribe without soliciting or requesting for it. To prove receipt, the prosecution produced audio-visual recording as well as a transcript of the Appellant receiving the bribe amount in an A4 envelope, which was recovered from his office drawer. The prosecution also demonstrated receipt of the bribe by the Appellant through swabs taken of his hands which confirmed the presence of APQ Powder which had been applied to the Kshs. 200,000 operation money as well as the envelope which contained the bribe money.

19. The Respondent further submitted that the relevant function to be undertaken by the Appellant is enumerated under Section 7(1) of the *Bribery Act* which provides as follows:

> "For the purposes of this Act, a function or activity shall be construed to be a relevant function or 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."

20. The Respondent further submitted that the Appellant was the Director General of the Energy and Petroleum Regulatory Authority (EPRA), a creature of statute, established under Section 9 of the *Energy Act*, 2019 thus he was a public officer by dint of Article 260 of *the Constitution* of Kenya, 2010 and Section 7 of the *Bribery Act*. He proceeded to give approval for the reopening of Nyanginja filling station through P. Exhibit 20, which was corroborated by the evidence of PW3. They thus submit that a wholesome review of the evidence adduced in the lower court was sufficient to prove all the requisite ingredients of the offense of receiving a bribe as captured on Count II of the Charge sheet, and that the conviction was merited.

21. On the issue of contamination of the swab and the APQ results, the Respondent submitted that the allegations that EACC officers asked the Appellant to touch the envelope before taking swabs is misleading and false. The facts proved through the audio-visual footage is that the Appellant came into contact with the envelope prior to the arresting officer entering his office and demanding he retrieve the same from where he had stored it. The Appellant had asked PW3 to hand over the envelope, after which he had proceeded to receive it and place it in his office desk drawer. The envelope was in the Appellant's possession prior to being requested by the EACC officers to hand it over during the search of his office. The Government analyst report produced as P. EXH. 43 confirmed the presence of APQ on the hands of the Appellant. The Respondent thus submitted that the Appellant has not established contamination and the evidence of APQ in his hands remains conclusive and unchallenged evidence.

22. On the issue of identification of the voice in the recording, the Respondent clarifies that the recording was audio-visual and not audio, the Appellant's voice is captured and he was properly identified by PW3 on 10th December 2010 at EACC Offices, for the purpose of transcription and to confirm the authenticity of the recording. PW13 testified that he had carried out the transcription of the recorded conversation in the presence of PW3 and produced the same as P. Exh 19 and P. Exh 44 respectively. The video recording under P. Exh. 23(a) is clear and PW3 was able to point out the persons captured and positively identified the image of the Appellant in the audio-visual recording. It was thus not necessary

to call an independent witness to confirm the image and voice of the Appellant. It was sufficient that PW3 identified the Appellant.

23. On the question of compliance with Section 106B of the *Evidence Act* in relation to the audio-visual recording, the Respondent submitted that the recording was properly authenticated by PW6 who produced the certificate as P.Exh 25. The Respondent contended that the Appellant's conviction was based on the evidence of PW3 and PW6 regarding the recorded conversation and not the evidence of PW7 as alluded to by the Appellant.

24. The Respondent submitted that there is no requirement under the *evidence Act* that an audio-visual recording device ought to be accompanied by a manufacturer's certificate, procurement documents and a KEBS Certificate as stated by the Appellant. A certificate under Section 106B of the *Evidence Act* was duly produced in evidence and the recordings were properly admitted into evidence. The Appellant was identified on the audio-visual recording by PW2, PW3, and PW5 who had all interacted with him prior to the trial. The Appellant's face and voice was clear throughout the conversation with PW3 as recorded.

25. The Respondent further submitted that the recording was uncontested at Defense stage and the Appellant cannot seek to have it expunged at the appeal stage. The recording was played in court before being admitted as evidence in the presence of the Appellant who did not object. P. Exh. 25 indicated that the recording device, P. Exh.10 was serviced and in good condition. The Appellant did not demonstrate that it was not in good working condition at the time of recording the conversation between the Appellant and PW3 during trial.

26. The Respondent submitted that it discharged its burden of proof against the Appellant for the offense of receiving a bribe which rightly resulted in a conviction.

27. As regards that claim that the sentence was excessive, the Respondent submitted that as per Section 18(1)(a) of the *Evidence Act*, the maximum sentence provided is a fine of Kshs. 5 million or imprisonment of ten (10) years. The Appellant was fined Kshs. 1 million and in default, three years' imprisonment which falls within the statutory provisions.

28. The Respondent urged this court to be persuaded by the general principles to be applied in an appeal against sentencing as laid out in the South African case of s v Rabie [1975] 4 SA 855 (A) where the Court stated that:

> "In every appeal against sentence, whether imposed by a Magistrate or judge, the Court hearing the Appeal,
>
> a. Should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court; and
>
> b. Should be careful not to erode such discretion hence the principle that sentence should only be altered if the discretion has not been judiciously or properly exercised."

29. It was the Respondent's submission that the test under clause (b) in the quoted case above is whether the sentence is vitiated by irregularity or misdirection or disturbingly inappropriate. The Appellant has not demonstrated any error in the sentencing that would justify interference with the trial court's

sentence. They relied on the decision on the matter of Wanjama v Republic [1971] KLR 493 where it was stated that:

> " An appellate Court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material fact, took into account some immaterial factor, acted in a wrong principle or the sentence is manifestly excessive in the circumstances of the case."

30. The Respondent submitted that the sentence meted by the trial court was just, reasonable and in conformity with the *Bribery Act* and it should be upheld.

31. The Respondent asked the Court to find the Appeal without merit and dismiss it in its entirety.

32. The respondent relied on the following decided cases in their submissions:Libambula v Republic [2003] eKLRS -v- Rabie [1975] 4 SA 855 (A)Wanjama v Republic [1971] KLR 493

The Issues for determination

i. Whether solicitation is an ingredient for the offense of "Receiving a bribe".

ii. Whether the APQ test was compromised.

iii. Whether the audio-visual recording is admissible as per Section 106 of the Evidence.

iv. Whether the Appellant was properly convicted.

v. Whether the sentence given by the trial court was excessive.

vi. Who should bear the cost of the Appeal.

Analysis and Determination

33. As the first appellate court, I have re-considered and evaluated the evidence before the trial court so as to arrive at my own conclusion while bearing in mind that I did not see or hear the witnesses who gave evidence. My findings are as follows: -

Issue (i) - Whether solicitation is an ingredient for the offense of Receiving Bribe.

34. The Appellant contends that the ingredients of the offense of Receiving a bribe were not proved as there was no evidence adduced in the trial court that the Appellant solicited for or received a bribe. He claims that there was no evidence on his phone or that of PW3 alluding to any communication where he had solicited for a bribe. PW3 testified that he had communicated with the Appellant through an application called "signal call private messenger application" downloaded at a cybercafé on which the Appellant called him and asked for a bribe of Kshs. 500,000 before he could authorize the re-opening of the Petrol Station. The application deleted the text messages exchanged but he managed to take screen shots. The Appellant had later agreed to a bribe of Kshs. 200,000 and made several calls through the application to give PW3 instructions on how to deliver the money. The Appellant submitted that the application was never adduced in court nor the communication therein.

35. The Respondent contends that the offense of Receiving a bribe does not require solicitation to be proved so long as the accused had received the bribe.

36. PW7 testified that he carried out a digital forensic examination and confirmed that through the application called Signal Private Messages there were calls between 9/12/2020 and 10/12/2020 and messages between 2/12/2020 and 10/12/2020 between the two numbers 0722799109 and

0728080664. Data was not available on the application as it had self-destructive message capability. While communication between the Appellant and PW3 was established, the exact messages and /or instructions were not proven.

37. Section 6 of the *Bribery Act* provides as follows:

> "(1) A person commits the offence of receiving a 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.
>
> (3) For purpose of subsection (1) it shall not matter whether-
>
> (a) the recipient is performing the function or activity;
>
> (b) the person giving the bribe knows or believes that the performance of the function or activity is improper; or
>
> (c) where a person other than the recipient is performing the function or activity, whether that person knows or believes that the performance of the function or activity is improper."

38. The accused need not have solicited for a bribe. Accepting to receive, actually receiving, or intending to request for a bribe so as to give favour to the giver of the bribe is sufficient for the offense of receiving a bribe. I find that evidence of solicitation is not necessary for the offense of receiving a bribe, and the lack of evidence of solicitation does not absolve the Appellant of the offense.

Issue (ii) Whether the APQ test was compromised.

39. The Appellant contends that the APQ test was contaminated because the Appellant was asked to touch the envelope and money that was treated before the EACC officer swabbed his hands for the APQ chemicals.

40. The Respondents submitted that the Appellant had touched the envelope and even placed it in his office drawer before the arresting officers entered his office.

41. Being a first appeal, this Court is tasked with the responsibility to re-look at the evidence adduced at the trial Court.

42. PW3 testified that the Appellant took the treated noted in an envelope and placed it in his drawer before he texted the EACC officers alerting them to enter the Appellant's office.

43. PW8 testified that when they went into the Appellant's office, his colleague requested him to produce the money he had received from PW3 and he, the appellant retrieved the same from his left hand side and placed it on the table. He confirmed that the officers never swabbed the accused's fingers prior to asking him to produce the envelope with the treated money.

44. PW9 testified that when he and his colleague Ikua entered the Appellant's office, they introduced themselves as EACC investigators, informed the Appellant that he was under arrest for receiving bribe, and Mr. Ikua requested the Appellant to produce the money that he had received from PW3. The Appellant had then opened his drawer, produced the treated money taken from PW3 and placed it on the table. Mr. Ikua then conducted swabs on the accused person and put the samples in an envelope.

45. I find the Appellant's assertion that he touched the envelope containing the treated money only after being instructed by EACC investigators to be misleading. The Appellant has not controverted the evidence that this money was in his drawer or attempted to explain how the money got into his drawers.

46. Whether or not the investigators had asked him to retrieve the money from his drawer, his hands would have still been contaminated the first time he held the envelope to store it in his drawer. I find that the APQ test was not compromised.

Issue (iii) -Whether the audio-visual recording is admissible as per Section 106B of the Evidence.

47. The Applicant contends that the audio-visual recording adduced in evidence was not admissible as it lacked manufacturer's certification by the person that prepared it, lack of evidence that the recording device was in good working condition, lack of a manufacturer's certificate, procurement documents, and KEB certification in contravention to Section 106B of the *Evidence Act*.

48. The Respondent submitted that a certificate in compliance with Section 106B was produced as P.Ex.25. Further, that the recording was clear, identified by all the prosecution witnesses present in the scene, and that the quoted section did not require any certification by the manufacturer, KEBS or any procurement documents.

49. The provision in contention, Section 106B of the *Evidence Act* provides as follows:

> "(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.
>
> (2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—

a. the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;

b. during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

c. throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

d. the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of subsection (2) was regularly performed by computers, whether—

SUBPARA a.

by combination of computers operating in succession over that period; or

SUBPARA b.

by different computers operating in succession over that period; or

SUBPARA c.

in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

a. identifying the electronic record containing the statement and describing the manner in which it was produced;

b. giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

c. dealing with any matters to which conditions mentioned in subsection (2) relate; and

d. purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate),shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

(5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment, whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities."

50. The prosecution presented as P. Ex.28, a Certificate under Section 106B(4) of the *Evidence Act* which provided details as to the identity and position of the person that prepared the certificate, their qualifications, date of extraction of CCTV footage, how the footage was identified and extracted and confirmation that the person that prepared the certificate had lawful control of the gadget used to record the footage and that it was in good working condition at the time of retrieval, and the flash disk where the footage was stored was sealed and handed over to the EACC investigator.

51. The Court of Appeal in County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] eKLR while discussing the application of Section 106 (B) observed that:

> " Section 106B of the *Evidence Act* states that electronic evidence of a computer recording or output is admissible in evidence as an original document "if the conditions mentioned in this section are satisfied in relation to the information and computer. . . In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B (2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced".

52. In the case of Republic vs Barisa Wayu Matuguda [2011] eKLR the court observed that:

> ". . . any information stored in a computer. . . which is then printed or copied. . . shall be treated just like documentary evidence and will be admissible as evidence without the production of the original. However, section 106B also provides that such electronic evidence will only be admissible if the conditions laid out in that provision are satisfied. "This provision makes it abundantly clear that for electronic evidence to be deemed admissible it must be accompanied by a certificate in terms of section 106B (4). Such certificate must in terms of S.106B (4) (d) be signed by a person holding a responsible

position with respect to the management of the device.... Without the required certificate this CD is inadmissible as evidence."

53. I agree with the Respondent that Section 106B of the *Evidence Act* does not require a person adducing electronic evidence to produce the Manufacturer's certificate, procurement documents and KEBS certificate.

54. I am satisfied that the certificate produced as P. Exh. 28 is in compliance with Section 106B of the *Evidence Act* and as such, the audio-visual recording was properly admitted as evidence.

Issue (iv) - Whether the Appellant was properly convicted

55. The Appellant has averred that he was wrongfully convicted based on the grounds that the ingredients of the offense of receiving a bribe were not met and that the evidence relied on was wrongfully admitted.

56. As analyzed above, I have not found merit in any of the assertions put forward by the Appellant and as such, I find that he was rightfully convicted of the offense of receiving a bribe.

Issue (v) - Whether the sentence given by the trial court was excessive.

57. The Appellant has urged this court, that in the event that it finds that the conviction in the trial court was proper, it should find that the sentence was excessive as the Appellant was condemned to pay a sum of Kshs. 1,000,000 or serve imprisonment of three years for an alleged bribe of Kshs. 200,000.

58. The Respondents submitted that the sentence passed by the trial court was well within statutory limits and that this court should not interfere with the sentence unless it finds that the one passed by the trial court was unreasonable or based on wrong facts.

59. Section 18 of the *Bribery Act* provides:

> " An individual found guilty of an offence under section 5, 6, or 13 —
>
> (a) shall be liable on conviction, to imprisonment for a term not exceeding ten years, or to a fine not exceeding five million shillings, or both; and
>
> (b) may be liable to an additional mandatory fine if, as a result of the conduct constituting the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss."

60. Receiving a bribe is an offense under Section 6 of the *Bribery Act* which provides for a maximum of ten years in prison and Kshs. 5 million fine.

61. In the case of Republic v Jagani & Another [2001] KLR 590 Hon. Justice Hayanga observed in part that: -

> " This court must be satisfied that there exists to a sufficient extent circumstances entitling it to vary order or decision of the court below. Is it shown that it acted upon a wrong principle? Over looked material factors or that sentence was too excessive in the circumstances."

62. In the matter of AOO & 6 Others case -v- Attorney General & Another (2017) eKLR, the court stated

> " Imposition of sentences is a judicial function to be performed by sentencing courts. The function of sentencing courts is to impose a sentence upon each offender that is appropriate

to the offense and the offender. Review of sentences imposed by sentencing courts is a judicial function to be performed by appellate courts."

63. The sentence imposed against the Appellant was within the law and was not excessive. It is therefore upheld.

64. The upshot is that the appeal is dismissed in its entirety.

Dated, Signed and Delivered virtually this 30th day of November 2023

E.N. MAINA

JUDGE

In the presence of:

Ms Rotich for Mong'eri for the Appellant

No appearance for the Respondent

Court Assistant – Raymond