



**Mbugua v Republic (Anti-Corruption and Economic Crimes
Appeal E002 of 2020) [2022] KEHC 15722 (KLR) (Anti-
Corruption and Economic Crimes) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15722 (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 2020
EN MAINA, J
NOVEMBER 24, 2022**

BETWEEN

LUCY WANJIRU MBUGUA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the Chief Magistrate Court
at Milimani Anti-Corruption Court by Hon. L. Mugambi CM
Presiding delivered on the 8th day of May, 2020 in ACC No. 16 of 2017)*

JUDGMENT

1. The Appellant was jointly with another not a party to this appeal, tried and convicted for the offence of conspiracy to commit an offence of corruption contrary to Section 47A (3) as read with Section 48(1) of the *Anti-Corruption and Economic Crimes Act*.
2. The particulars of the offence were that:

On or about the September 1, 2017 in Nairobi within the Republic of Kenya at an unknown place, being persons employed in the public service, to wit, the Chairperson of the Liquor Licencing Board for Embakasi East sub-county and a clerical officer in the Liquor Licencing Office at Nairobi City County Government, jointly conspired to commit an offence of corruption namely bribery by requesting for a benefit of Kshs 12,000 from Eunice Kathambi Mugambi so as to facilitate the issuance of an authority to apply for liquor licence renewal certificate for her bar known as Base Pub.”



3. The court subsequently, upon hearing the appellant's plea in mitigation, sentenced her to a fine of Kshs400,000 in default to serve one year imprisonment.
4. It is instructive that the trial court also made a finding that the Appellant had in fact committed the acts of receiving a bribe with which she had been charged in respect of Counts II, III and IV but declined to convict her for the offences in view of the fact that she was merely a conduit for her co-accused. Instead of convicting her of the offences the trial court treated the transactions in which the Appellant had requested and received the money as overt acts in furtherance of the offence of conspiracy. It therefore acquitted her of those charges.
5. The Appellant was aggrieved with the conviction and sentence and so she preferred this appeal.
6. The Appeal is premised on grounds as follows:-
 - 1) That the Learned Trial Magistrate erred in his analysis of the facts and evidence and thereby arrived at an erroneous finding in law.
 - 2) That the Learned Trial Magistrate erred in law and fact in holding that the prosecution had proved its case against the accused persons beyond any reasonable doubt.
 - 3) That the Learned Trial Magistrate erred in law and fact in failing to find that the prosecution's case was riddled with grave contradictions incapable of sustaining the charges against the accused persons.
 - 4) That the Learned Trial Magistrate erred in law and fact in failing to consider the cross-examination of the prosecution's witnesses by the Appellant Advocate.
 - 5) That the Learned Trial Magistrate erred in law and fact in failing to consider the plausible defence tendered in court.
 - 6) That the Learned Trial Magistrate erred in law and fact in placing reliance on frivolous evidence by the prosecution witnesses without evidentiary proof thereby arrived at a wrong conclusion in law.
 - 7) That the Learned Trial Magistrate erred in law and fact in placing reliance on the investigating officer who completely failed in conducting proper investigations to sustain the offence.
 - 8) That the Learned Trial Magistrate erred in law and fact in failing to consider the submissions tendered on behalf of the appellant.
 - 9) That the Learned Trial Magistrate erred in law and fact in ignoring binding authorities cited before him on behalf of the appellants and herby arrived at wrong findings in law.
 - 10) That in the whole, the Learned Trial Magistrate decision was grossly wrong and insupportable by the facts law and evidence on record.
7. By this appeal this court is urged to quash the conviction and to set aside the sentence. The Appellant also urged this court to order that the sum of Kshs 400,000 paid as fine be refunded to her.
8. The appeal which is vehemently opposed was canvassed by way of written submissions. Those of the Appellant are dated June 28, 2022 and were filed on even date while those of the Respondent are dated September 21, 2022 but the date of receipt in court is not indicated.
9. Placing reliance on the definition of conspiracy in the *Black's Law Dictionary* 9th Edition, Learned Counsel for the Appellant submitted that the offence of conspiracy was not proved as there was no



- evidence of an agreement, intent, consent or a combination of the three. Counsel submitted that so long as a design rests in intention only, it is not indictable; that their proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in furtherance of an apparent criminal purpose in common between them.
10. Counsel stated that all the 11 prosecution witnesses failed to prove that the 1st and 2nd accused conspired to ask for a bribe; that PW1 and PW2 testified that at no time did the Appellant ask for money from them as a bribe and that she was merely assisting them with the licence renewal process.
 11. Counsel argued that given the evidence adduced the charge sheet was fatally defective for charging an offence not disclosed by evidence. To support this submission Counsel relied on Section 214(1) of the *Criminal Procedure Code* and stated that a charge is defective where: -
 - “(a) It does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or
 - (b) it does not, for such reasons, accord with the evidence given at the trial; or
 - (c) it gives a mis-description of the alleged offence in its particular.”
 12. Counsel further argued that there was no evidence that the Appellant had an intention to benefit in any way from a bribe requested by the co-accused; that it is important to note that the charge would fail given that charges against the 1st accused on requesting a bribe had collapsed. Counsel rehashed the evidence of PW1, PW2, PW4, PW5, PW6, PW7, PW8 and PW10 and submitted that the trial magistrate erred in finding the Appellant guilty on the charge of conspiracy.
 13. Relying on the case of *Esther Theuri Waruiru & another v Republic* [2011] eKLR Counsel argued that the prosecution did not prove its case beyond reasonable doubt. Counsel asserted that a receipt must be corrupt for an offence to be committed; that the prosecution is required to prove every element of the offence; that where a person is accused with soliciting and receiving a bribe in one single transaction it must be proved that what was received was demanded and then given as an inducement for the doing or not doing of something in relation to the affairs of the accused person’s principal. Counsel reiterated that the above element was not proved beyond reasonable doubt and urged this court to acquit the Appellant.
 14. Counsel offered a plea in mitigation that the Appellant had worked for the Nairobi City County since 1990 and had been a faithful and hardworking civil servant for the past 32 years. Counsel stated that all the Appellant’s benefits for which she worked so hard are at stake and this court should allow the appeal in order to save her livelihood and the retirement benefits.
 15. Counsel pointed out that he wished also to rely on the case of *Peninah Kimuyu v Republic* [2014] eKLR.
 16. On her part Learned Prosecution Counsel submitted on each ground separately but on the whole her argument was that the prosecution had proved the case against the Appellant beyond reasonable doubt; that the appeal lacks merit and that it should be dismissed.

Issue for determination

17. The issue for determination in this appeal is whether the conviction of the Appellant for the offence of conspiracy to commit an offence of Conspiracy contrary to Section 47A (3) as read with Section



48(1) of the [Anti-Corruption and Economic Crimes Act](#). is safe; whether the charge was proved beyond reasonable doubt.

Analysis and determination

18. As the first Appellate court I have, as is my duty, reconsidered and evaluated the evidence adduced in the trial court so as to arrive at my own independent conclusion while bearing in mind that I did not see or hear the witnesses myself, and made provision for that.
19. Section 47A(3) states that “a person who conspires with another to commit an offence of corruption or economic crimes is guilty of an offence.” The section does not define the word conspiracy. However it is defined in the [Black’s Law Dictionary](#), Tenth Edition, page 375 as:-

“An agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement’s objective, and (in most states) action or conduct that furthers the agreement; a combination for an unlawful purpose.

A conspiracy ends when the unlawful act has been committed or (in some states) when the agreement has been abandoned. A conspiracy does not automatically end if the conspiracy’s object is defeated.”
20. In [Archibold: Writing on Criminal Pleadings, Evidence and Practice](#), 1999 3rd Edn at page 2589 it is stated:-

“The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons.... so long as a design rests in intention only, it is not indictable; there must be agreement..... Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.” (Emphasis mine).
21. In the case of *Republic Vs Gokaldas Karia & Another* [1949] 16 EACA 116 it was held that: -

“Certainly there was no direct evidence of an agreement, but how rarely is conspiracy proved by such evidence. As (Counsel) pertinently observed, conspirators do not normally meet together and execute a deed setting out the details of their common unlawful purpose. It is common place to say that an agreement to conspire may be deduced from any acts which raise presumption of common plan.”
22. I am satisfied that in the instant case conspiracy between the Appellant and her co-accused can be deduced from the overt act which the Appellant committed in order to aid her co-accused in the solicitation and receipt of the bribe. It is my finding that those overt acts were proved beyond reasonable doubt. There was proof that the Appellant was instrumental in asking for the bribe which although was not being paid to her but to her co-accused was an inducement to perform a duty which her co-accused was by law required to perform. It was also proved beyond reasonable doubt that the Appellant met with PW2 and that she received the money albeit that it was treated. The prosecution also adduced evidence which proved beyond reasonable doubt that there was communication between the Appellant and her co-accused in respect of the sum demanded before and up until she received the money. Indeed, the Ethics and Anti-Corruption Commission officers pounced on her as she and PW2 were leaving the room to go to an Mpesa shop where she (the Appellant) would send the money to her co-accused. I am satisfied that the overt acts give rise to a presumption of a common plan. The



Appellant was therefore as guilty of the offence as was her co-accused and I am satisfied that she was properly convicted for it.

23. Counsel for the Appellant did not submit on the sentence although this court was urged to set it aside. The sentence is however within the law and there would be no justification to interfere with it.
24. In the upshot my finding is that the appeal has no merit and it is dismissed.
25. On the issue of costs this being a criminal appeal for which no special circumstances obtain I shall not make any order for costs.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 24TH DAY OF NOVEMBER, 2022.

E N MAINA

JUDGE

