



REPUBLIC OF KENYA



**Cheronoh & another v Republic (Criminal Appeal E005 of 2021)
[2022] KEHC 16998 (KLR) (16 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16998 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E005 OF 2021
GWN MACHARIA, J
DECEMBER 16, 2022**

BETWEEN

NORAH CHERONOH 1ST APPELLANT

WILLIAM OTIENO OSEWE 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence in the
Chief Magistrate's Court at Naivasha in EACC Criminal Case No.
2 of 2016 delivered by Hon. K. Bidali (CM) on 1st March 2021)*

JUDGMENT

1. The appellants were charged with five counts of offences in the trial court.
 - i. In count 1, the 1st appellant Norah Cheronoh (hereafter the 1st appellant), was charged with the offence of corruptly soliciting for a benefit contrary to section 39(3) (a) as read with section 48(1) of the *Anti-Corruption and Economic Crimes Act* No. 3 of 2003. The particulars were that on the 8th day of August, 2016, at County Education Office within Narok County, being a person employed by a public body to wit, ministry of education, science and technology of the national government as a clerical officer, corruptly solicited for a benefit of Kshs. 18,000/- from Francis Meriki Kosen as an inducement to facilitate the registration of his private school, a matter relating to the affairs of the said public body.
 - ii. In Count II, the 1st appellant and the 2nd appellant Wiliam Otiemo Osewe (hereafter 2nd appellant), were jointly charged with the offence of corruptly soliciting for a benefit contrary to section 39(3) (a) as read with section 48(1) of the *Anti-Corruption and Economic Crimes Act* No. 3 of 2003. The particulars of the offence were that on the 16th day of November, 2016, at



a garage in Narok town within Narok County, being persons employed by a public body to wit, Ministry of Education, Science and Technology of the National Government, as a clerical officer and quality assurance and standards officer respectively, jointly corruptly solicited for a benefit of kshs. 17,000/- from Francis Meriki Kosen as an inducement to facilitate the registration of his private school, a matter relating to the affairs of the said public body.

- iii. In count III, the 1st appellant was charged with corruptly soliciting for a benefit contrary to section 39(3) (a) as read with section 48 (1) of the [Anti-Corruption and Economic Crimes Act](#) No. 3 of 2003. The particulars were that on the 16th day of November, 2016 at County Education office within Narok county, being a person employed by a public body to wit, ministry of education, science and technology of the national government, as a clerical officer, corruptly solicited for a benefit of Kshs. 15,000/- from Francis Meriki Kosen as an inducement to facilitate the registration of his private school, a matter relating to the affairs of the said public body.
 - iv. In count iv, the 1st appellant, was charged with the offence of corruptly receiving a benefit contrary to section 35 (3) (a) as read with section 48(1) of the [Anti-Corruption and Economic Crimes Act](#) No. 3 of 2003. The particulars were that on the 17th day of November, 2016, at county education office within Narok county, being a person employed by a public body to wit, Ministry of Education, Science and Technology of the National Government, as a clerical officer, corruptly received a benefit of Kshs. 15,000/- Francis Meriki Kosen as an inducement to facilitate the registration of his private school, a matter relating to the affairs of the said public body.
 - v. In count v, both appellants were jointly charged with the offence of abuse of office contrary to section 46 as read with section 48(1) (2) of the [Anti-Corruption and Economic Crimes Act](#) No. 3 of 2003. The particulars were that on the 16th day of November, 2016, at a garage in Narok town within Narok county, the two, being persons employed by a public body to wit, ministry of education, science and technology of the national government, as a clerical officer and quality assurance and standards officer respectively used their office to improperly confer a benefit on themselves by receiving a benefit of Kshs. 15,000/- from Francis Meriki Kosen as an inducement to facilitate the registration of his private school, a matter relating to the affairs of the said public body.
2. The appellants pleaded not guilty to all the charges. Upon trial, the 1st appellant was acquitted of count 1 and found guilty in respect of counts 2, 3, 4 and 5. They were sentenced as follows:
- i. In count 1, the 1st Appellant was sentenced to a fine of Kshs. 36,000/- in default 12 months imprisonment.
 - ii. In count 2, the Appellants were sentenced to a fine of Kshs. 34,000/- each in default 12 months imprisonment.
 - iii. In count 3, the 1st appellant was sentenced to a fine of kshs. 30,000/- in default 6 months imprisonment.
 - iv. In count 4, the 1st appellant was sentenced to a fine of kshs. 30,000/- in default 6 months imprisonment.
 - v. In count 5, both appellants were sentenced to a fine of kshs. 30,000/- each in default 6 months imprisonment.
3. Aggrieved by both their conviction and sentences, the appellants preferred the instant appeal.



Grounds of appeal

4. The Appeal is based on the following grounds:-
 1. That the learned trial magistrate erred in law and fact by failing to find that the evidence adduced in court by the witnesses was contradictory and inconsistent.
 2. That the learned trial magistrate erred in law and fact by overlooking the fact that the evidence relied on was not watertight to justify a conviction.
 3. That the learned trial magistrate erred in law and fact by acquitting the 1st appellant of count 1 then proceeding to sentence her for the same count.
 4. That the learned trial magistrate erred in law and fact upon finding that he had erred on the acquittal of the 1st appellant person of count I offence of soliciting for a benefit contrary to section 39 (3) (a) as read with section 48 (1) of the *anti-corruption and economic crimes act* No. 3 of 2003 Kshs. 18,000/= out to have applied same standard in the offence of receiving bribe since there was no corrupt demand thus receiving was not corruption.
 5. That the learned trial magistrate erred in law and fact by failing to apply section 66(1) and (2) of the *Basic Education Act* therefore misdirecting himself.
 6. That the learned trial magistrate erred in law and fact in imposing harsh and excessive sentences on the appellants.
 7. That the learned trial magistrate erred in law and fact by failing to consider the strong defense and submission by the appellants.
 8. That the learned trial magistrate erred in law and fact by relying on insufficient evidence.

Summary of Evidence

5. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced and the submissions made in the trial court so as to arrive at its own independent conclusion. In so doing, this court is required to always bear in mind that it neither saw nor heard the witnesses as they testified and must therefore give due allowance in that regard. (See *Okeno v Republic* (1972) EA 32).
6. The prosecution called a total of fifteen (15) witnesses whose evidence can be summarized as follows: Sometime in January 2016, PW1, Francis Mosen Meriki, an Early Childhood Education (E.C.E) teacher started a school called Loita Plains Academy. He commenced the process of registering the school in March 2016. PW3, Patrick Sitonik Selempoh and PW10, Gideon Koiye both Curriculum Support Officers in Loita Division Narok South visited the school in March and June 2016 and conducted an assessment. Thereafter, they prepared a report in which they recommended that the school be registered and advised PW1 to go to the District Education Office to obtain a certificate of registration.
7. On August 8, 2016, PW1 went to Narok South Sub-county education office to seek for assistance in the registration of his aforesaid school. He met PW6, Ng'eno Paul who identified himself as the secretary to the director of education. PW6 gave PW1 the 1st appellant's phone number and advised him to go to her for assistance. PW1 proceeded to the district education offices in Narok where he met the 1st appellant. She offered to help him obtain stamps from NEMA, the county government and the



office of the director of education on condition that pw1 gives her Kshs. 18,000/- for the "help". PW1 reported the matter to the chairperson of Kenya Private schools Association PW9, Margaret Koileken who told him not to pay any cash money as he was only required to present two bankers cheques of Kshs. 10,000/- and Kshs. 5,000/- for the County Board and the County government respectively. Margaret escalated the matter to PW2, Alice Mukee, the chairperson of the County Education Board, Narok County. PW2 reported the matter to EACC on September 29, 2015.

8. On November 16, 2016, PW13, Caleb Okoth, an investigator with EACC previously stationed in Nakuru called PW1 to meet him in Narok town where he inducted him on how to operate a recording gadget. PW1 then went to the 1st Appellant's office with the recorder already set. The 1st Appellant called the 2nd Appellant and informed him that PW1 was in the office. Together with the 1st Appellant, PW1 proceeded to meet the 2nd Appellant in his car at Rungu ya Moi Garage within Narok town. At this point the 2nd Appellant reduced the amount that had been demanded in order to assist PW1 to register his school to Kshs. 17,000/=. After negotiation, PW1 offered to give Kshs. 15,000/- to the 1st Appellant which was accepted. Upon parting ways, PW1 went and handed over the recording device to the EACC officer.
9. On November 16, 2016, PW13 requested his colleague PW12, PC Zephania Munene of EACC Nakuru Region Office to treat pre-operation money. PW12 treated Kshs. 18,000/= given to him by PW13 then photocopied the same and made an inventory. On 17th November, 2016, PW1 met PW12 who gave him Kshs. 15,000/= treated notes to take to the Appellants. PW1 took the money to the 1st Appellant in her office. The 1st Appellant confirmed receipt of the same and put the money in a red file on her table. She then received PW1's documents and promised to call him once the documents were ready. She also explained to him how to pay the bankers cheques. All this time, PW12 and PW13 were waiting outside. As such, when PW1 left the 1st Appellant's office, he got in touch with PW13 and told them where the money had been kept. PW1 then returned the recording machine to PW12.
10. PW13 and his colleague went to the 1st Appellant's office immediately and conducted a search. The 1st Appellant confirmed that she had received the money. PW13 compared the serial numbers of the money he recovered and the treated money that PW12 had released and confirmed that they tallied. The 1st Appellant and her colleague PW5, Isaac Weshuki who was also in the office at the time the money was recovered signed the inventory of the Kshs. 15,000 received by the 1st Appellant from PW1.
11. PW8, Malengo Lunani, an investigator with EACC was given the digital audio recorder by PW13 from which he proceeded to make transcripts. The first transcript was a conversation between PW1 and the 1st Appellant recorded on 16th November, 2016; the second was a conversation between PW1 and the Appellants herein; the third was a conversation between the 1st Appellant and PW1 at Narok County Education Offices. The voices were identified by PW1. PW8 confirmed that there was evidence in the transcripts of the Appellants soliciting for a benefit which is not a requirement by the Ministry of Education.
12. PW11, Josiah Kuyoo, a former sub-county director of education in Narok North was asked to identify a voice in an audio recording. He recognized the voice of the 2nd Appellant as they had worked together in Kajiado and in Narok. He also identified the voice of the 1st Appellant in the audio as they had worked together for two years. PW11 signed an audio visual certificate to that effect.
13. PW14, Catherine Mwambi, a registered government analyst confirmed that their analysis established that the 1st Appellant had been in contact with the treated money.
14. During trial, PW4, Jonathan Nyamai, a former County Director of Education in Narok County confirmed that the Appellants worked under his supervision. He stated that the 1st Appellant's duties



- did not include purchasing of bankers cheques. PW7, Magire Joshua, the sub-county director of education in Narok South, testified on the procedure of registering a school. He stated that any payments were supposed to have been done prior to PW1 visiting the County offices for education. He also clarified that there were no cash transactions permitted.
15. The case was investigated by PW15, Lilian Magemu. PW15 stated that on analysis of the recordings, she established that a demand for a bribe was made specifically at page 13 and 14 of the transcript produced as Exhibit 13.
 16. Upon being placed on their defence, both Appellants elected to give sworn testimonies. DW1, the 1st Appellant herein, testified that she resides in Narok County and is a clerical officer at the Ministry of Education in Narok. She stated that PW1 went to her office looking for help and on realization that PW1's documents were not complete, she called a colleague, the 2nd Appellant herein, to help PW1. The 2nd Appellant offered to meet PW1 at "Rungu ya Moi" in town as he was out working in the field. She only offered to help PW1 to buy cheques of Kshs. 10,000/- for the county director's and Kshs. 5,000/- for county education board and Kshs 2000/ for lunches. The next day, PW1 went to the office and told her that the 2nd Appellant had informed him that she could help. PW1 did not have a folder so she offered him one; where she kept the money. She also showed him a sample of a banker's cheque. She took the money from PW1 and put it in a folder which she placed in a drawer. She had planned to buy the bankers cheque during her lunch break. She went out of her way to help as employees are encouraged to do so under Section 66 of the Basic Education Act. Once PW1 left, she was arrested. It was never her intention to benefit from the money and in any case, what she received is exactly what was required in official fees. It was also her testimony that the 2nd Appellant never asked her to collect a bribe and that if the money was for her benefit, she would have put it in her purse.
 17. In cross examination, she acknowledged having discussed the issue of PW1's file while at the garage. She also confirmed that the Ministry of Education does not receive cash from members of the public. Further, she indicated that she had helped other members of public purchase cheques and that the 2nd Appellant directed her to assist PW1. She however stated that the 2nd Appellant did not instruct her to collect any cash for the purchase of a banker's cheque, and that she did so out of her own volition.
 18. DW2, the 2nd Appellant herein, testified that he works for the Ministry of Education Narok County as a quality assurance officer. He stated that on 16th November, 2016, he advised PW1 on how to register a school and pointed out the necessary documents for the procedure, in his official capacity. It was his testimony that he never asked for any money from PW1, neither did he ask PW1 to pay any money for facilitation of the process. During cross examination, he stated that he did not authorize the 1st Appellant to hold any cash. He explained that his words to the effect, "we cannot do for free" as captured in the transcript meant that the Ministry charges fees and cannot register schools for free.

Submissions

19. The appeal was canvassed through written submissions.
20. Foremost, the Appellants contended that the trial magistrate in his judgment dated 4th February, 2020 acquitted the 1st Appellant of count 1 of the offence of soliciting but went ahead and convicted the him of the same count. Counsel for the Appellants submitted this violates the 1st Appellant's right to a fair trial and puts her in a position where she cannot defend herself on a charge she is facing.
21. The Appellants submitted that a charge of soliciting and that of corruptly receiving a benefit are dependent on each other and therefore proving or disproving one consequently affects the other. For that reason, they cited the case of Paul Kipchumba Kiyai v Republic [2013] eKLR to support a



proposition that the trial court ought to have acquitted them on the other counts upon acquitting the 1st Appellant of soliciting on count 1. Additionally, the Appellants faulted the trial Magistrate for convicting them of soliciting for a benefit and corruptly receiving a benefit despite the insufficient evidence adduced by the prosecution in that respect. They argued that the prosecution failed to establish the crucial element of demand for a bribe hence the charge of receiving could not stand. Reliance was placed on the case of Patrick Munguti Nunga v Republic [2013] eKLR. It was also their submission that the prosecution failed to prove the money was recovered from the 1st Appellant. They noted that PW5, PW13 and PW15 confirmed in their testimonies that the money was recovered from a drawer in a file labeled Loita Plains Academy registration.

22. Further, the Appellants asserted that they were convicted for engaging in conduct and activities stipulated that formed part of their duties under Section 66(1) and (2) of the *Basic Education Act*. It was submitted that the 1st Appellant was arrested for performing her clerical officer duties which include helping people with registration of schools, ensuring compliance by the people intending to open schools, counter checking registration forms if they have been well filled, collecting registration forms and bankers cheques of the schools that need to be registered and any other duty that could be required of her. The 2nd Appellant was also performing his quality assurance and standards duties which involved proving or disproving of documents to determine if they meet the required criteria. According to the Appellants therefore, receiving legal money for an official function negates corrupt conduct on their part.
23. The Appellants further faulted the trial magistrate for convicting them on the basis of an audio recording that was not audible. They argued that the audio recording was used to establish demand despite the lack of clarity and use of a language that both Appellants are not conversant with. It was their contention that PW15 stated that he was unable to identify the voices because of the background noise and since Maasai language was to communicate. Further, that PW8 also confirmed that some parts of the conversation were unclear. The Appellant relied on the case of Jane Gatwiri Mburugu & another v Republic [2011] eKLR where the court found that there was insufficient evidence since the recorded conversation was inaudible due to too much noise in the background. Reliance was also placed on Limbambula v Republic [2003] eKLR where the Court of Appeal stated that evidence of voice identification is receivable so long as the person giving the evidence is familiar with it, recognizes it and there is no mistake on what was said and who said it.
24. Lastly, the Appellants submitted that the sentences imposed by the trial court were excessive in light of the fact that the amount allegedly received corruptly was only Kshs. 15,000/-.
25. On the other hand, it was submitted for the Respondent that the evidence by the prosecution witnesses was cogent and consistent hence the conviction on counts 1, 2, 3, 4 and 5 was proper. The learned state counsel recounted the evidence that was tendered by the prosecution and concluded that all the offences were proved beyond any reasonable doubt. The Respondent thus urged that the sentences imposed by the trial court be upheld by this court.

Analysis and determination

26. The court has carefully considered the Memorandum and Record of Appeal as well as the parties' respective submissions. The issues that arise for determination are:
 - i. Whether the trial magistrate erred by sentencing the 1st Appellant on count 1 after acquitting her of the charge?
 - ii. Whether the prosecution proved the offences that the Appellants were charged with under Section 39(3) (a) of the ACECA?



- iii. Whether offence of abuse of office was proved beyond reasonable doubt?
- iv. Whether the sentences were excessive?

Whether the trial magistrate erred by sentencing the 1st Appellant on count 1 after acquitting her of the charge.

27. In the judgment of the trial court, the learned magistrate held as follows in respect of count 1:

“For the reasons stated, I find that there are doubts on whether the 1st accused solicited for a benefit from PW1 on the 8th August 2016. The testimony of PW1 is not corroborated. I shall exercise the doubts in favour of the accused person and acquit her under Section 215 of the Criminal Procedure Code in respect of count 1.”

28. Despite holding as above, the record shows that the learned magistrate went ahead and sentenced the 1st Appellant to pay a fine of Kshs. 36,000/- in default 12 months imprisonment in respect of the same count 1 for which she was acquitted.

29. Section 215 of the Criminal Procedure Code provides that:

“Decision

The court having heard both the complainant and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to law, or shall acquit him.”

30. The above provision is clear that a trial court can only impose a sentence on an accused upon a finding of guilt and/or conviction. I therefore find that the trial magistrate erred by imposing a sentence for an offence for which the 1st Appellant has been acquitted. In the premises, the sentence meted out on the 1st Appellant in respect of count 1 is hereby set aside.

Whether the prosecution proved the offences that the Appellants were charged with under Section 39(3) (a) of the ACECA.

31. The offences of soliciting for and receiving a benefit for which the Appellants were convicted and sentenced were both created under Section 39(3) (a) of the Anti-Corruption & Economic Crimes Act. No.3 of 2003 which was repealed by the [Bribery Act](#) No. 27 of 2016. The said Section 39 of the ACECA provided that:

“ 39. Bribery involving agents

- (1) This section applies with respect to a benefit that is an inducement or reward for, or otherwise on account of, an agent-
 - a. doing or not doing something in relation to the affairs or business of the agent's principal; or
 - b. showing or not showing favour or disfavour to anything, including to any person or proposal, in relation to the affairs or business of the agent's principal.



- (2) For the purposes of subsection (1)(b), a benefit, the receipt or expectation of which would tend to influence an agent to show favour or disfavour, shall be deemed to be an inducement or reward for showing such favour or disfavour.
- (3) A person is guilty of an offence if the person-
 - a. corruptly receives or solicits, or corruptly agrees to receive or solicit, a benefit to which this section applies; or
 - b. corruptly gives or offers, or corruptly agrees to give or offer, a benefit to which this section applies.” (emphasis mine)

32. From the above, it is clear that for a charge to be based on the provisions of Section 39(3) (a) above, the prosecution must prove beyond any reasonable doubt that:

- i. The accused was an agent within the meaning of the ACECA when the offence was committed.
- ii. There was a solicitation of a benefit, inducement or reward.
- iii. In case of receiving, proof that the accused received a particular benefit, inducement or reward.
- iv. The solicitation or the receipt of the benefit, inducement or reward by the accused was intended to influence the accused to do or not do something; or to show favour or disfavour to any person in a matter relating to the affairs or business of the accused’s principal.

33. Were the Appellants herein agents within the meaning of the ACECA? Section 38(1) of the Act defines an “agent” as a person who, in any capacity, and whether in public or private sector, is employed by or acts on behalf of another person. “Principal” on the other hand is defined as a person, whether in the public or private sector, who employs an agent or for whom or on whose behalf an agent acts.

34. It is not disputed that the Appellants were employees of the Ministry of Education at the material time. The 1st Appellant was a clerical officer while the 2nd Appellant was a Quality Assurance Officer and both of them were based in Narok County. The Appellants were therefore agents of their principal, the Ministry of Education, Narok County for purposes of Section 38 of the ACECA.

a. Whether the prosecution proved counts 2 and 3 which relate to corrupt solicitation of a benefit.

1. In Count 2, the 1st and 2nd Appellants jointly faced a charge of corruptly soliciting for a benefit of Kshs. 17,000/- from PW1 on 16th November, 2016. In count 3, the 1st Appellant was accused of corruptly soliciting for a benefit of Kshs. 15,000/- from PW1 on the same 16th November, 2016.
2. In Michael Waweru Ndegwa v Republic [2016] eKLR, Mativo J. pronounced himself as follows regarding the offence of soliciting for a benefit:

“Carlson Anyangwe in his book “Criminal Law in Cameroon, Specific Offences” 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.

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."

37. PW1 testified that on 16th November, 2016 after being introduced to an audio recording device by PW13 an investigator with the EACC, he went to the 1st Appellant's office and reminded her that he was there to seek assistance for registration of his school. The 1st Appellant made a call then they proceeded to town where they met the 2nd Appellant in his car at Rungu ya Moi. The 1st Appellant explained to the 2nd Appellant what PW1 needed then PW1 handed his documents to the 2nd Appellant. The 2nd Appellant pointed out that the forms were full of errors and needed to be reprinted as they did not have the school's stamp and the assessment by the District Education Officer was shallow. It was PW1's testimony that the Appellants promised to assist him if he gave them Kshs. 17,000/= instead of Kshs. 18,000/- which had allegedly been demanded at earlier date.
38. It was PW1's testimony that he told the 2nd Appellant that he did not have that amount and the 2nd Appellant told him to speak to the 1st Appellant outside the car. After negotiation with the 1st Appellant, he offered her Kshs. 15,000/- which was accepted. He used the device to record the conversation between him and the Appellants and after parting ways, he handed over the recording device to PW13.
39. PW1's evidence was corroborated by that of PW13, an investigator with the EACC, who testified that he introduced PW1 to a recording device on 16th November, 2016 and inducted him on how to operate it. PW1 brought back the gadget later on. He listened to and analyzed the recording whereupon he established that a demand had been made Kshs. 17,000/- and later reduced to Kshs. 15,000/-.
40. PW1's testimony was further corroborated by the Transcript from the audio recording of 16th November, 2016 which was produced by PW8 as exhibit 12.
41. This court has had an opportunity to peruse the transcript which contains a conversation between PW1 and the Appellants herein over the registration of his school. The Appellants demanded for facilitation fess in order to assist PW1 to complete the process. The relevant portions in this court's view are from page 8 of the exhibit which clearly show that there was a first demand of Kshs. 17,000/- which both Appellants agreed to then later on, the 1st Appellant asked PW1 to go with Kshs. 15,000/- so that the 2nd Appellant can start working on PW1's file.
42. PW11, a former sub-county director of education in Narok North was able to identify the Appellants' voices in the audio recording as he was familiar with them, having worked with two in different capacities. An audio visual certificate signed by PW11 to that effect was tendered in evidence as exhibit 16. Further, PW7, the sub-county director of education in Narok South was categorical that any requisite payments were supposed to have been done prior to PW1 visiting the County offices for education since no cash transactions were permitted.



43. In view of the foregoing, this court finds that the prosecution proved beyond any reasonable doubt the 1st and 2nd Appellants solicited for a benefit of Kshs. 17,000/- from PW1 on 16th November, 2016. The court is also satisfied that the prosecution established to the required standard that the 1st Appellant solicited for a benefit of Kshs. 15,000/- from PW1 on 16th November, 2016. The Appellants' conviction on counts 2 and 3 was therefore safe and I will not be interfered with it.

b. Whether the prosecution proved that the 1st Appellant corruptly received a benefit of Kshs. 15,000/- from PW1 on 17th November 2016

44. In *Peninah Kimuyu v Republic* [2014] eKLR, the Court of Appeal when discussing the offence of corruptly receiving a benefit stated that:

“It seems quite clear to us that Section 39(3) of the Act does not at all create an offence of strict liability. There is no deeming of criminal culpability from the mere fact of receipt of a benefit, itself an often contentious issue as the facts of this case show. It cannot have been the intention of Parliament and it be surmised from a plain reading of the provision, that once it is shown that an accused person had some money on him, then he must have been bribed. Were that the case, nothing would be easier than for sums of money to be conveniently placed within the possession and control of persons who never demanded, solicited or knew about it and thereby secure their automatic conviction on charges of receiving bribes.

45. The court went on to state that:

The receipt must be corrupt to be criminal. It is upon the prosecution to establish every element of the offence and for this particular one it must be shown that where a person did receive a benefit, he did so corruptly. That is why the element of bribery has to be established and the way to go about it, where a person is charged with both a solicitation and receipt in a single transaction must be by a demonstration that what was received had been solicited or 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, in this case the Kenya Police. It must follow that if that essential connection is not made, (or it is merely alleged but not proved) between the receipt and a prior demand or solicitation, the element of corruption in the receipt remains unfulfilled and so there cannot be a valid conviction entered. The situation would be different of course, where the receiving is not tied to the charge of solicitation which are other evidence of corruption in the receiving would suffice.” (emphasis mine)

46. In this case, the evidence on record shows that the 1st Appellant solicited for a benefit of Kshs. 15,000/- from PW1 and subsequently received a similar amount which was used as an entrapment to arrest her on 17th November, 2016.

47. PW12, an officer from EACC testified that he treated Kshs. 18,000/-, photocopied them and made an inventory of the same. On 17th November, 2016, PW12 gave PW1 Kshs. 15,000/= treated notes to take to the Appellants. PW1 took the money to the 1st Appellant in her office and had the audio recording device set for purposes of recording the conversation. The 1st Appellant confirmed receipt of the same and put the money in a red file on her table. She then received PW1's documents and promised to call him once the documents were ready. PW12 and PW13 stormed the 1st Appellant's office immediately after and conducted a search. The 1st Appellant confirmed that she had received the money. PW13 compared the serial numbers of the money he recovered and the treated money that PW12 had released



and confirmed that they tallied. PW14, a registered government analyst confirmed that their analysis established that the 1st Appellant had been in contact with the treated money.

48. The 1st Appellant did not deny that the said sum of money was recovered from her. She however denied soliciting for it and testified that she took the money from PW1 to help him buy a banker's cheque during her lunch break. In the court's view however, considering the conversation that the 1st Appellant had with PW1 on 16th November, 2016 at Rungu ya Mawe where she asked PW1 to take to her Kshs. 15,000/- and the uncontroverted fact that all transactions were cashless, the only logical conclusion was that the money was corruptly received.
49. In the premises, the court is satisfied that the prosecution proved that the 1st Appellant corruptly received a benefit of Kshs. 15,000/- from PW1 on 17th November, 2016. Her conviction for count 4 was therefore safe and is hereby upheld.

Whether offence of abuse of office was proved beyond reasonable doubt

50. Section 46 of the ACECA provides for the offence of abuse of office as follows:

“ 46. Abuse of office

A person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence.”

51. From the analysis hereinabove, this court has no doubt that the 1st and 2nd Appellants used their offices as clerk and quality assurance office respectively at the Ministry of Education, Narok County, to corruptly confer a benefit on themselves. Accordingly, the court finds that their conviction for the offence was sound and is therefore affirmed.

Whether the sentences were excessive

52. The sentences for all the offences for which Appellants were convicted are prescribed under Section 48 of the ACECA which states as follows:-

“(1) A person convicted of an offence under this Part shall be liable to:-

- a. A fine not exceeding one million shillings or imprisonment for a term not exceeding ten years, or to both, and
- b. An additional mandatory fine, if as a result of the conduct that constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss.

(2) The mandatory fine referred to in subsection (1)(b) shall be determined as follows—

- a. the mandatory fine shall be equal to two times the amount of the benefit or loss described in subsection (1)(b);
- b. if the conduct that constituted the offence resulted in both a benefit and loss described in subsection (1)(b), the mandatory fine shall be equal to two times the sum of the amount of the benefit and the amount of the loss.”



53. In this court's view, the sentences imposed by learned trial magistrate on counts 2, 3, 4 and 5 were very lenient given the circumstances under which the offences were committed. The sentences were lawful though and are hereby affirmed.

Conclusion

54. The Appellants' appeal partly succeeds. The sentence in count 1 is hereby set aside and any fine paid in that regard is hereby ordered to be refunded to the depositor. The Appellants' conviction and sentences on account of counts 2, 3, 4 and 5 are hereby upheld and appeal on these counts is dismissed in its entirety. It is so ordered.

DATED AND DELIVERED AT NAIVASHA THIS 16TH DECEMBER, 2022.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

- 1.Mr. Mong'eri for the Appellants.
- 2.Ms. Kirenge for the Respondents.

