REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

HIGH COURT ACEC APPEAL NO. E008 OF 2020

HENRY NGUGI NJERU.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from the conviction and sentence in Milimani Chief Magistrate

Court - Ethic & Anti-Corruption Commission Case No 15 of 2017

(Hon. F. Kombo (S.P.M) dated 8th December 2020)

JUDGMENT

1. The appellant was initially charged with three main counts and two alternative charges under the Anti-Corruption and Economic Crimes Act which the trial magistrate renumbered so that the alternative counts became substantive charges. In the resultant charges the appellant was charged with two counts of Abuse of Office contrary to Section 46 as read with Section 48(1) of the Anti-Corruption and Economics Crime Act (ACECA); 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 and one count of failure to record a complaint in the Occurrence Book contrary to Section 50(4) as read with Section 129 of the National Police Service Act.

2. The Appellant pleaded not guilty on all five counts and the matter went to trial. After hearing and evaluating evidence from both sides the trial magistrate acquitting the appellant on all the other counts but found him guilty on count III where he was charged with receiving a bribe contrary to Section 6(1) (a) as read with Section 18 of the Bribery Act, convicted him and sentenced him to a fine of Ksh. 500,000/- in default to imprisonment for a term of 12 months.

3. **Being aggrieved the appellant appealed to this on the following grounds:**

> **"a) The learned trial magistrate erred in law and fact by disregarding the evidence of PW1, PW2 and PW11 that neither PW1 nor PW2 visited the Appellant at Kabete Police Station on 5th November, 2016.**
>
> **b) The learned trial magistrate erred in law and fact by relying on hearsay evidence of PW3 Sgt Omar Abuya.**
>
> **c) The learned trial magistrate erred in law and fact by relying on the unsafe recognition of the appellant by PW5.**
>
> **d) The learned trial magistrate erred in law and fact by contradicting his own ruling of 13th July 2020 by finding that the appellant failed to avail his documentary and oral evidence to the prosecution thereby denying it the opportunity to investigate and verify the alibi.**
>
> **e) The learned trial magistrate erred in law and fact by supposing without any factual basis that the appellants witnesses worked under him and likely to lie on his behalf**
>
> **f) The learned trail magistrate erred in law and fact by finding without any factual and evidential basis that the appellant alibi defence was an afterthought on well-crafted fabrication to mislead the court.**

g) The learned trial magistrate erred in law and fact by finding that the appellant did not call the maker of the defence Exp4.

h) The conviction and sentence in the circumstance of the case was such that a manifest travesty of justice occurred therein.

4. By the appeal, the appellant has urged this court to quash the conviction, set aside the sentence and acquit him of the charges. On 8th June 2021 directions were given that the appeal would proceed by way of written submissions and the same were duly received and highlighted before me on 2nd October 2021.

Appellant's submissions

5. Mr. Gachuba learned counsel for the appellant framed the following nine issues for determination and submitted on each separately. The issues are:-

a) That the charge was defective.

b) That the numbering of the alternative charge in count 1 was an error.

c) The issue of requesting for financial advantage.

d) The identification and recognition of the appellant.

e) Confession.

f) The defence of alibi

g) Untrustworthy prosecution witnesses.

h) Exhibit 4 and 9

i) Whether there was any evidence that the defence witnesses had lied in court.

6. On the first issue, Mr. Gachuba submitted that the offence in this matter was alleged to have been committed before the coming into effect of the Bribery Act. That the charge as originally drafted was rejected by the trial court but upon filing a revision in **Republic** v **Henry Ngugi Njeru [2017] eKLR** Ong'udi J directed that the charge sheet should have been drafted to cater for: i) the repealed section 39 of ACECA which covered the particulars, ii) section 6 of the Bribery Act that covers the offence and, iii) Section 27 of the Bribery Act that directs how matters that commenced prior to the new Act would be conducted. Mr. Gachuba submitted that the prosecution did not draft the charge as directed by Ongudi J in that it failed to mention that the offence was committed under Section 39 of the ACECA. Counsel faulted the trial magistrate for abdicating his duty under section 214 (1) of the Criminal Procedure Code (CPC) for failing to order the prosecution to amend the charge sheet in accordance with Section 134 of the Criminal Procedure Code thereby denying the appellant a fair trial and that the conviction fell afoul of Articles 25(c) and 50(2) (n) (i) of the Constitution.

7. On the second issue, Counsel submitted that in **Republic** v **Henry Ngugi Njeru (supra)** the court stated that the offence under Section 39 of ACECA (repealed) and Section 6 of the Bribery Act are one and the same offence. He submitted that the renumbering of the charges by the trial magistrate was done *suo moto* after the prosecution had closed its case in violation of Section 135(1)(3) and section 214 of the Criminal Procedure Code. Counsel cited the case of **Republic v Kajole Angore [2009] eKLR** where the court held that allowing the prosecution to amend the charge sheet after the close of its case went against section 214 of the Criminal Procedure Code and was prejudicial to the accused.

8. On the third issue, Mr. Gachuba submitted that the prosecution did not prove its case beyond reasonable doubt; that D. Exhibit 4 did not support the charge as it showed that PW1 visited the police station on 1st and 3rd November, 2016 and not on the 5th November 2016; that the trial court fell into error in finding that the maker of DEXB 4 was not called as a witness. Counsel submitted that as the document was an entry in the record of the Ethics and Anti-Corruption Commission it was admissible under Sections 38, 68(1)(b)(e) and section 86(1)(c) of the Evidence Act. To support this submission Counsel relied on the case of **Stephen Kariuki Gichinga v Republic [2005] eKLR** where the court considered and used a report whose production had not been objected to and where the defence did not make an application concerning the admission of the report.

9. On the issue of identification and recognition of the appellant Counsel submitted that identification of the appellant by PW5 was unprocedural and unlawful as PW5 and PW11 held a discussion about the audio clip before PW5 identified the voice and that PW5 signed the voice identification certificate after the audio clip was played in the presence of the appellant. In support of this submission Counsel cited the case of **Boniface Otieno Odhiambo v Republic [2018] eKLR** and the case of **Gideon Makori Abere v Republic [2019]** which cases set out the procedure for conducting voice identification.

10. On the fifth issue, Mr. Gachuba submitted that the trial court fell into error in finding that the appellant confessed that the voice in the audio recording was his. Counsel submitted that the admission was inadmissible as it did not comply with section **25A of the Evidence Act** as there was no third party of the appellant's choice present when the admission was made and that PW5 was the appellant's immediate supervisor while PW11 was the investigating officer. Counsel relied on the case of **Rex v Todd (1903) 13 Man LR 364** where the court defined a person in authority and held that confessions made to persons in authority were inadmissible as the accused person has hopes of a

favour on one hand and on the other hand the authority inspires awe. Counsel also cited the case of **Caroline Wanjiku Wanjiru & Another v Republic [2015] eKLR** where the court held that confessions are admissible within the necessary safeguards provided for under section 25 to 32 of the Evidence Act and the Evidence (Out of Court Confessions) Rules 2009. Counsel also relied on the Court of Appeal decision in **Kanini Muli v Republic [2014] eKLR** where it was held that the onus of proving that a statement by an accused person was voluntarily made lay with the prosecution.

11. On the sixth issue, Mr. Gachuba faulted the trial court for rejecting the appellant's alibi defence and stated that the trial court in so doing approbated and reprobated in that on 13th July 2020, the trial court delivered a ruling rejecting the prosecution's application to investigate the appellant's alibi defence on the ground that the Occurrence Book (O.B) (Defence Exh.3) which formed the basis of that alibi was in the prosecution's possession and they had had sufficient opportunity to inspect it and further that the prosecution had placed reliance on that very OB as part of its evidence. Counsel submitted that the trial court therefore contradicted itself in holding that the appellant sprung his defence in the last minute. Counsel asserted that the alibi was not controverted and that the prosecution had relied on the same OB to extract exhibit 13 which contained the whereabouts of the appellant. Counsel argued that the prosecution did not dislodge the appellant's alibi and that the trial court having exercised its discretion under section 309 of the Criminal Procedure Code ought to have given the appellant the benefit of doubt. For this submission Counsel relied on the case of **Kiarie v Republic [1984] KLR** where the Court of Appeal held that the defence of alibi can be raised at any time of the trial.

12. On whether the prosecution witnesses were trustworthy, it was Counsel's submission that the trial court failed to weigh the integrity and reliability of PW2, PW5 and PW11. He submitted that PW2 had a pending criminal case at Thika Law Courts, that PW5 was incompetent as he did not understand police procedures on identification and that PW11 was malicious and contemptuous of the court in relying on a forged investigation diary. Counsel cited the case of **Kinuthia v Republic [2003] KLR 55** where the Court of Appeal found that a witness should not raise suspicion about his trustworthiness in the mind of the court or he would be deemed unreliable making it unsafe to accept his evidence.

13. On the eighth issue, Counsel faulted the trial court for impugning the appellant's reference to prosecution exhibits 3 and 9 while cross-examining the prosecution witnesses and contended that it went against the appellant's right to adduce and challenge evidence as guaranteed by Article 50(2)(k) of the Constitution.

14. On the last issue, Mr. Gachuba submitted that the finding of the trial court that the appellant's witnesses were likely to lie because they worked under the appellant was based on speculation but not on any facts. Counsel submitted that the appellant could not rely on any other witness save those that were with him on the specified days and therefore his alibi was solid and should have been believed.

Respondent's submissions

15. The appeal is vehemently opposed. Prosecution Counsel Ms. Ndombi conducted the Respondent's case. On ground one she submitted that the trial court did not disregard the evidence of PW1, PW2 and PW11 as their evidence was summarised in its judgement. On the second ground of appeal counsel relied on the case of **Kinyatti vs Republc [1984] eKLR** where the court laid down the principles of hearsay evidence. She submitted that based on the principles in that case, the evidence of PW5 that he received a complaint on the appellant's demand for Ksh. 50,000/- bribe and he was able to identify the voice of the appellant from the recorded audio clip was not hearsay.

16. On the issue of recognition of the appellant, Ms. Ndombi submitted that the appellant was known to PW5 as an officer working under him and that PW5 was able to recognize the appellant's voice from the recorded audio conversation and hence the evidence of recognition was free from error. She relied on the case of **Boniface Otieno Odhiambo vs Republic [2018] eKLR** where it was stated that the principles of voice identification were similar to those of any other form of identification.

17. On whether the charge was defective, Ms Ndombi submitted that the particulars of the charges were very clear and that therefore it could not be said that the appellant did not know the offence he was charged with and that Section 134 of the Criminal Procedure Code was not offended in any way. On the issue of renumbering of the charges by the trial magistrate Counsel contended that although it was done *suo moto* it did not prejudice the appellant.

18. On whether the court contradicted itself, Ms Ndombi submitted that the record clearly indicated that the appellant raised the issue of alibi after he was put on his defence and when he went ahead to tender unsworn evidence denying the prosecution an opportunity to clarify the defence of alibi. Counsel argued that in evaluating the evidence in its totality the trial court was correct in finding that the defence of alibi was an afterthought. On the issue of D exhibit 3, Ms Ndombi contended that the court was right in rejecting the same as the rules of evidence are clear that documents must be produced by the maker. In conclusion, Miss Ndombi submitted that the prosecution had discharged its burden of proof, that the evidence of the prosecution witnesses was consistent, the witnesses were trustworthy and that the issue of confession did not materially arise in the judgment.

Analysis and determination

19. Being the first appellate court, this court has a duty to re-evaluate the evidence in the court below so as to arrive at its own conclusion. In doing so, it must bear in mind that it has neither seen nor heard the witnesses as did the trial court. – (**see Okeno v Republic (1972) EA 32** and **Mwangi v Republic [2004] KLR)**.

20. The following issues arise for determination:-

a) Whether the charge sheet as drafted and as renumbered by the trial magistrate was defective.

b) Whether the appellant's defence of alibi was properly considered.

c) Whether the case against the appellant was proved beyond reasonable doubt.

21. On the first issue, the initial charge was drafted under **Section 39 (3)(a)(repealed) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act. The particulars of the offence were that on 5th November 2016 at Kabete, within Kiambu County, being a person employed by a public body, to wit, the National Police Service as the Divisional Criminal Investigating Officer (DCIO) – Kabete corruptly solicited for a benefit of Ksh. 50,000/- from James Wachaga Kamau as an inducement so as to release a camera make Canon which he had seized from the said James Wachaga Kamau and detained in his office at Kabete Police Division, a matter relating to the affairs of the said public body.** The charge was however rejected by the court on the ground that it failed to comply with the law as the appellant was arraigned after the commencement of the Bribery Act which had repealed Section 39 of the Anti-Corruption and Economic Crimes Act. The prosecution sought revision of that ruling in this court and Ong'udi J gave the following directions on how the charges were to be framed:

> ***"9. There is no dispute that corruptly soliciting a benefit was an offence under the repealed Section 39 of Anti-Corruption & Economic Crimes Act. Receiving a bribe upon requests is similarly an offence, under the Bribery Act. The two are one and the same offence, and cannot be said to have been introduced under the Bribery Act. Section 27 (2) of the Bribery Act is specific that such offences which were committed, investigated and instituted before the commencement of the Bribery Act ought to be treated or continued with necessary modifications as if they were instituted under the new Act.***

14. As stated earlier the offence stated in the 1st & 2nd counts of the charge sheet is clearly set out in the repealed section 39 of Anti-Corruption & Economic Crimes Act and section 6 of the Bribery Act. My view is that the charge sheet must be crafted in such a way so as to cater for:

(i) the repealed section 39 (ACECA) since that is what covers the particulars: (ii) section 6 of the (Bribery Act) since that is what covers the offence; (iii) finally section 27(2) of the (Bribery Act) as that is the provision that directs on how matters investigated and/or prosecuted and court proceedings commenced prior to the new Act would be conducted.

15. Once this is done then the respondent should be arraigned in court to answer to the appropriate charges. Otherwise charging him under either section 39 (repealed) of ACECA only or under section 6 of the Bribery Act only would cause challenges." (see Republic Vs Henry Ngugi Njeru) (supra)

22. Despite the directions issued by the court, the prosecution drafted the new charge sheet without making any reference to the Anti-Corruption and Economic Crimes Act. The charge as it is stated:-

> ***"Receiving a bribe contrary to Section 6(1) (a) as read with section 18 as read with Section 27 of the Bribery Act No. 47 of 2016***
>
> ***Particulars: On 5th November 2016 at Kabete, within Kiambu County, being a person employed by a public body, to wit, the National Police Service as the Divisional Criminal Investigating Officer (DCIO) – Kabete, requested for a financial advantage of Ksh. 50,000/- from James Wachaga Kamau as a benefit so as to release a camera make canon [S/No. DS1262291] which he had seized from the said James Wachaga Kamau and detained in his office at Kabete Police Division, a matter relating to the affairs of the said public body."***

23. It is the appellant's submission that the charge is defective for failing to adhere to the directions given by Ong'udi J. My finding however is that that is not a correct position in law.

Section 27 (2) of the Bribery Act provides

> ***27. Pending bribery cases***
> ***(1) This section applies with respect to bribery offences or suspected bribery offences under the Anti-corruption and Economic Crimes Act 2003.***
>
> ***(2) Any investigation or prosecution or court proceedings instituted before the commencement of the Act based on an offence under the Anti-Corruption and Economic Crimes Act, 2003 shall be continued under the Anti-Corruption and Economic Crimes Act, 2003.***

It follows therefore that bribery offences that were either being investigated or prosecuted under the repealed Section 39 of ACECA continued to be offences in the Bribery Act and the same could be prosecuted as if no amendment had taken place.

24. A similar issue as the one raised in this case arose in **Republic v Juma Kalume Kalama [2018] eKLR** where an offence was alleged to have been committed before Section 39 of the Anti-Corruption and Economic Crimes Act was repealed but the accused was arraigned after the commencement of the Bribery Act. In directing how the charge sheet should be drafted the court stated:-

> ***"21. What is the import of this saving or transitional clause? This provision is meant to breathe life into the previously commenced investigation or prosecution or court proceedings instituted under the repealed law and to midwife or ensure smooth delivery or transition of such investigation or prosecution or proceedings commenced or instituted during the lifetime of ACECA to the repealing or new Act. It is trite that no one should be charged of an offence that did not exist at the time it is alleged to***

have been committed. (See Geoffrey Kirinya Igweta vs Republic (Supra). However, in this case the offence of bribery was and is inexistence both under the repealed law and current law save for the penalty which is stiffer under the Bribery Act than the one provided under the ACECA.

22. I have had the opportunity to look at the decision of my sister J. Ongudi's reasoning in the case of Republic vs Henry Ngugi Njeru (2017) where the chief magistrate in Milimani Anti-Corruption court was said to have rejected and refused to admit a charge sheet in similar circumstances and the prosecution applied for revision....

23. However, I do not agree that both Section 39 (3) (b) and Section 6 of the Bribery Act should appear at the same time for that will amount to duplicity of charges. Instead the charge should reflect a statement of the offence referring to Section 39 (3) (b) as read with Section 48(1) (now repealed) as read together with section 27(2) of the Bribery Act no 47 of 2016. By indicating both Section 39 (3) (b) of ACECA and 27 (2) of Bribery Act the charges would have been modified to suit the requirement of Section 27 (2) of the Bribery Act. The statement of the offence and particulars must reflect the operative section of the offence and the time when the offence was committed hence the particulars of the offence and the penalty then applicable.

24....

25. In the circumstances, the necessary modification would in my considered view be, the inclusion of the word "repealed" as read with section 27(2) of the bribery Act after the statement of the offence under ACECA...."

25. In the present case, the offence for which the appellant was convicted occurred on 5th November 2016 but he was arraigned on 24th August 2017 after the commencement of the Bribery Act. The offence of bribery was not a new offence as it existed under the Anti-Corruption and Economic Crimes Act. In my view Section 27 (2) of the Bribery Act was intended to ensure that persons who were being investigated or prosecuted with offences of bribery under Section 39 of ACECA did not get away simply by virtue of the amendment. The investigations were to continue under the ACECA and the prosecution/charges would continue under the Act as if no amendment had taken place. This was also the view of Mumbi J, as she then was, in the case of **Bernard Kasyoka Munyao v Director of Public Prosecutions [2020] eKLR** where she held that:

"97. It seems to me, then, that the charges against the appellant cannot be properly challenged on the basis of the statute under which they were brought. I note that the charge sheet is dated 7th February 2017, which is a date after the commencement of the Bribery Act. While the investigations had commenced prior to the commencement of the Act, the charges against the appellant were instituted after the Act came into force. I am therefore unable to find a basis for challenging the conviction with respect to the statutes under which the charges were lodged."

26. It is my finding therefore that the charge sheet as drafted was not defective and this ground must fail.

27. The appellant further faulted the trial magistrate for renumbering the charge sheet *suo moto* and after the close of the prosecution's case. It is the appellant's contention that the renumbering offended Section 135(1)(3) and section 214(1)(i) of the Criminal Procedure Code. In support of his submission learned Counsel for the appellant cited the case of **Republic v Kajole Angore (supra)** where the court stated:

"The situation, subsisting here is that prosecution had already closed its case – which does not fit in with what is envisaged by section 214 Criminal Procedure Code. I think that provision clearly focused on amendment before close of prosecution case to avoid creating opportunities for prosecution to patch up its case so that the evidence fits with the charge, to the prejudice of the accused. To have allowed the prosecution to amend the charge after the close of the case, went against the grain of section 214 CPC and accused was prejudiced."

28. Section 135 of the Criminal Procedure Code states:

(1) Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character.

(2) ...

(3) Where, before trial, or at any stage of a trial, the court is of the opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence in the same charge or information, or that for any other reason it is desirable to direct that the person be tried separately for any one or more offences charged in a charge or information, the court may order a separate trial of any count or counts of that charge or information.

Section 214(1) (i) of the CPC provides:

(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that—

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

29. It is clear from the record of the trial court that the trial magistrate acting suo moto in his ruling dated 15th November 2019 renumbered the counts on the charge sheet on the basis that the alternative counts as originally drafted were not cognate to the principal charges. **The issue is whether that renumbering amounted to amending the charges and whether the appellant suffered any prejudice**. My reading of section 214 of the Criminal Procedure Code tells me that an amendment to a charge goes not just to the form but to the substance of the charge. Section 137 of the Criminal Procedure Code provides the rules for framing charges and provides in subsection (a) (v) that ***where a charge or information contains more than one count, the counts shall be numbered consecutively.*** It is my finding that the renumbering of the charges by the trial court did not in any way add or subtract or in any manner affect the form or substance of the charges. The elements and substance of the charges remained the same despite the renumbering. My so saying finds support in the Court of Appeal case of **Josphat Karanja Muna -vs- Republic [2009] eKLR** where the court stated that:-

> ***"That the spirit of section 214 is to afford an accused person opportunity to recall and cross-examine witnesses where the amendments would introduce fresh element or ingredient into the offence with which an accused person is charged. It certainly was not meant to be invoked every time an amendment is made even if such an amendment is only to introduce a correction of name or of a word. Here the name Ben Chege Gikonyo was amended to read Ben Cheche Gikonyo. We do not accept that the noncompliance with the provisions of section 214 of the Criminal Procedure Code resulted into injustice to the appellant."***

30. In the instant case, the renumbering of the charges did not go to the substance or form of the charge (count III) and it did not introduce any new element or ingredient to the offence as would have necessitated the court to call upon the appellant to plead to it. When the appellant was arraigned in court, he pleaded to all the counts in the charge sheet including this one. It is also instructive that the renumbering was done by the trial court acting suo moto and it did not give the prosecution an unfair advantage. It is my finding that the appellant was not prejudiced by this exercise of discretion by the trial magistrate. I therefore find that this ground has no merit and it also fails.

31. On whether the prosecution proved its case to the standard required Section 6(1)(a) 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;……"***

32. In the case of **Michael Waweru Ndegwa v Republic [2016] eKLR** in discussing the elements of this offence the court stated:-

> ***"In State v. Wallace 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.***
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> ***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...***
>
> ***In order to constitute an offence the following are essential ingredients; 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 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."***

33. In the instant case James Wachaga Kamau (PW1) and his father Henry Kamau Wachaga (PW2) gave evidence of their encounter with the appellant upon the confiscation of the latter's camera by officers working under the appellant. There was no dispute that indeed the camera was confiscated and placed in the custody of the appellant. It was also not contested that the appellant was the officer who had the mandate to release it or not to release it. Audio recordings were tendered of conversations that took place between the two witnesses and the appellant and there is no doubt in my mind that the same involved the parting with money in exchange for the camera. This in my view amounted to asking for a bribe. From the wording of Section 6(a) of the Bribery Act it is immaterial that the bribe was not received. The fact of requesting for it is sufficient to amount to an offence. Agreeing to receive a bribe is also an offence whether one receives it or not. The wording of the Section is such that there are three distinct offences **"requesting, "agreeing to receive"** and **"receiving"** a financial or other advantage so as to perform ones function improperly as the appellant did in this case. It is my finding that in this case there was water fight evidence both oral and electronic not only of "requesting" but also of "agreeing to receive" the bribe in exchange for the camera.

34. The Appellant whilst conceding that he confiscated a camera belonging to the complainant vehemently denied that he solicited for a

bribe in order to release it. He stated that his aim was to investigate the matter with a view to charging the owner of the camera but he did not complete the investigations due to obstruction by the Ethics and Anti-Corruption Commission. He stated that he was not in his office on 5th November, 2016 as he had gone for an operation in Nyeri and that he did not go back until 6th November 2016. To prove this he produced an extract of a work ticket NO. PO 38000. He also denied that he asked for money from PW1 and PW2 on 8th November 2016 and contended that he was not in his office. To support his alibi in addition to producing the work ticket he called three witnesses namely PC Driver Josphat Kipkosei Korir (DW2) who testified that he was the one who drove him (the appellant) to Nyeri on 5th November, 2016 and who also stated that the two of them left for Nyeri at around 7.00 AM and they did not return until the next day. PC Korir (DW2) further stated that on 8th November 2016 at around 8.00 AM he met the appellant in his office briefly but after that the appellant left for a meeting at Mangise. The second witness PC Victor Idia Juma (DW3) testified that he met the appellant in Chaka Nyeri on the evening of 5th November 2016 and that they parted ways on 6th November 2016at around 9AM. He stated that the appellant, PC Korir and PC Kemungaria spent that night in his house at Kiganjo Police College. The third witness, PC Leviticus Karungari (DW4), gave evidence that he was in the team that went to Nyeri with the appellant on 5th November 2016. He stated that they left the station together and that they arrived in Nyeri at around midday. He stated that he was in charge of the records at the police station and that none of those records showed the appellant had received visitors in his office on 5th November 2016. Regarding 8th November, 2016 DW4 stated that the appellant left the station between 7.30am and 8.00am to attend a meeting at the District Commissioner's office and did not go back until 4pm and that upon returning to the staton he immediately left for Subaru Kenya.

35. I have carefully weighed the appellant's evidence against the evidence of James Wachaga Kamau (PW1) and his father Henry Kamau Wachaga (PW2) whose evidence I find was corroborated by Amos Sergon Teben (PW5) the Chief Criminal Investigations Officer (CCIO) and the appellant's boss at the time. PW5 testified that on 8th November 2016 he received a complaint from PW1 and PW2 who had been taken to his offices by officers of the Ethics and Anti-Corruption Commission and that upon listening to an audio recording that had been taken by the complainants he recognized the voice as that of the appellant. He stated that he did this in his office at around 5.30 pm and that the appellant who was present admitted that was his voice. PW5 stated that he used to communicate with the appellant frequently and he therefore knew his voice well. It is my finding that the evidence of PW5 corroborated that of PW1 and PW2 hence rendering it credible and reliable. This is as opposed to the evidence of DW2, DW3, and DW4 who were all officers working under the appellant and who could have done anything to save him from going to jail. It is instructive that the appellant's unsworn evidence could not be tested through cross examination. PW1 and PW2 were however put through rigorous cross examination by Counsel for the appellant but their evidence remained unshaken. The work ticket produced by DW2 was not annexed to the Record of Appeal and so I did not have the benefit of seeing it. Be that as it may a work ticket is a document within its maker's (in this case DW2) and the appellant's possession and control and hence easily liable to manipulation and it cannot therefore be relied upon to discredit the testimonies of independent witnesses such as PW5 and the officers from the Ethics and Anti-corruption Commission (PW4). PW1 and PW2's evidence that they met the appellant in his office on 5th November 2016 was corroborated by NO. 66315 Sergeant Omar Abuyu (PW3) who was the appellant's deputy. Nothing in the evidence suggests that the prosecution witnesses PW1, PW2, PW3, PW4, PW5 had any reason to lie against the appellant. PW4, the officer from EACC testified that he did not even know the appellant prior to the occurrence. As for PW3 and PW5 they were the appellant's colleagues and they worked closely with him and there was no suggestion from the appellant that they had any reason to lie against him. I therefore, find the prosecution's evidence was truthful, credible and reliable and that the same dislodged the alibi defence mounted by the appellant. I further find that more weight was added to the evidence of the prosecution witnesses by the Appellant's admission to PW5 that the voice in the audio recording was his. While this admission may not have amounted to a confession such as is envisaged by **Section 25A of Evidence Act** I find that the admission was sufficiently corroborated by the testimonies of PW1, PW2 and PW5, which evidence was cogent and credible, as to warrant this court to consider it (the admission) in upholding the finding that the case against the appellant was proved beyond reasonable doubt. (See the case of **Republic Vs Ahmed Abolfathi Mohammed & another Supreme Court Petition No. 39 of 2018 [2019] eKLR.**

36. In the upshot it is my finding that the alibi mounted by the appellant paled in the face of the strong, cogent and credible evidence tendered by the prosecution and that the charge against the appellant was proved beyond reasonable doubt.

37. Accordingly I find no merit in this appeal and the same is dismissed. The conviction and the sentence imposed by the trial court are upheld.

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 25TH DAY OF NOVEMBER 2021

E. N. MAINA

JUDGE