REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 19 OF 2019

DAVIS EDEWA CHEGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from conviction and sentence(SM Shitubi, CM,) dated 29th March 2019 in Anti-Corruption criminal case No 1522 of 2016, Republic v Davis Edewa Chele at Kajiado.)

JUDGMENT

1. The appellant was charged with three counts of corruption. In count 1, he was charged with corruptly soliciting for a benefit contrary to section 39(3) as read with section 48(1) of the Anti-corruption and Economic crimes Act NO. 3 of 2003, (**ACECA).**

2. Particulars were that on diverse dates between the month of July and August 2016, at Export Processing Zone Authority **(EPZA)** in Kitengela, within Kajiado County, being a person employed by Public body to wit, the **EPZA** as a clerk, corruptly solicited for a benefit of Kshs. 1,600,000/- from Hezbon Ngugi Kamande as an inducement so as to assist the said Hezbon Ngugi Kamande secure a tender, a matter relating to affairs of the said public body.

3. In count 2, the appellant was charged with corruptly soliciting for a benefit contrary to section 39(3) as read with 48(1) of the same Act. Particulars being that on the 25th August, 2016, at the **EPZA** in Kitengela, within Kajiado County, being a person employed by a public body, to wit, **EPZA** as a clerk, corruptly solicited for a benefit of Kshs, 300,000/- from Hezbon Ngugi Kamande, as an inducement so as to consider the said Hezbon Ngugi Kamande for a matter relating to the affairs of the said Public body.

4. In count 3, the appellant faced a charge of corruptly receiving a benefit contrary to section 39(3) as read with Section 48(1) the same Act. Particulars were that on the 26th day of August, 2016, at Galaxy Resort in Kitengela Township, within Kajiado County, being a person employed by a public body, to wit, the **EPZA** as a clerk, corruptly received a benefit of Kshs, 100,000 from Hezbon Ngugi Kamande as an inducement so as to consider the said Hezbon Ngugi Kamande for a further award of tenders, a matter relating to the affairs of the said public body.

5. The appellant pleaded not guilty to all counts, and after a trial in which the prosecution called 11 witnesses and the appellant's defence, he was convicted on all the three counts and fined Kshs, 500,000 on each count. In default he was to serve two years in jail for each count.

6. The appellant was aggrieved with both conviction and sentence and lodged an appeal dated 8th April, 2019, raising the following grounds, namely;

> ***1. That the subordinate Court misapprehended the facts and applied wrong principles of law to the prejudice of the appellant.***
>
> ***2. That the subordinate court failed to appreciate that the charges pressed against the appellant were never proved beyond reasonable doubt.***
>
> ***3. That the subordinate court erred in law by shifting the burden of proof to the appellant to his prejudice.***
>
> ***4. That the subordinate court erred by finding that the charges of soliciting were proved beyond reasonable doubt yet there was no cogent evidence to support this theory.***
>
> ***5. That the subordinate court also erred by failing to appreciate that the principles of fair trial as contemplated by article 25(c) and article 50 were violated to the prejudice of the appellant.***

6. That the subordinate court also erred by failing to call witnesses and provide witness statements to the appellant.

7. That the trial court failed to appreciate that there were material contradictions and inconsistencies that ought to have been resolved in favour of the appellant

7. The appellant filed a supplementary petition of appeal dated 28th June, 2019 raising another 21 grounds of appeal as follows:

1. The subordinate court erred in law and fact by convicting the appellant on the basis of a defective charge sheet.

2. The subordinate court erred in law and fact by convicting the appellant on the basis of evidence that was riddled with material contradictions and inconsistences.

3. The subordinate court erred in law and fact by convicting the appellant notwithstanding the fact that crucial witnesses were not called to testify.

4. The subordinate court erred in law and fact by convicting the appellant yet the charges were never proved beyond reasonable doubt.

5. The subordinate court erred in law by shifting the burden of proof to the prejudice of the appellant.

6. The subordinate court erred by placing value on the testimony of PW1 whose testimony was discredited.

7. The subordinate court misapprehended the facts and applied the wrong principles of law.

8. The subordinate court erred by finding that the charges of soliciting were proved beyond reasonable doubt yet there was no cogent evidence to support this theory.

9. The subordinate court also erred by failing to appreciate that the principles of fair trial as contemplated by Article 25 (c) and Article 50 were violated to the prejudice of the appellant.

10. The subordinate court erred in law and fact by failing to appreciate that the rights to:

(a) Fair trial under Article 25(c), 50(1) (2) and (4) had been violated.

(b) Right to protection of the law and full benefit of the law under Article 27(1) of the constitution had been violated.

(c) The right to human dignity and security of the person under Article 28 and 29 of the constitution had been violated.

(d) The right to Fair Administrative Action under Article 47(1) (2) of the constitution had been violated.

(e) The right of access to justice under Article 48 of the constitution were violated.

(f) The subordinate court erred by hiding in technicalities failing to appreciate the broad and purposeful interpretation of the principles and values of the constitution.

(g) The subordinate court erred in law by failing to appreciate the full import of Article 2(5) of the constitution as read with Article 14(1) (e) of the United Nations International Convention of Civil and Political Rights.

11. The subordinate court also erred by failing to appreciate that there were material contradictions and inconsistencies that ought to have been resolved in favour of the appellant.

12. The subordinate court also erred by failing to appreciate that the charges were never proved since the audio MFI 1 was not clear and it was only played to PW1 to the prejudice of the appellant.

13. The subordinate court erred in law and fact by convicting the appellant on the basis of a documented video evidence which was never played and /or produced in court to the appellant's prejudice and he is still a stranger to it.

14. The subordinate court erred in law and fact by convicting on an amount that was not on the charge sheet.

15. The subordinate court failed to analyze and take into account the plausible defence given by the appellant.

16. The subordinate court erred by pronouncing a composite sentence that violates well settled constitutional principles in the preamble, Article 10, 20, 24, 27, 28, 29, 50 of the constitution.

17. The subordinate court failed to appreciate that the changes were never proved beyond reasonable doubt as required by the law.

18. The subordinate court erred in law and fact by convicting whereas material evidence was never produced including the tender number, the minutes that PW1 talks about and even the News Paper advertisement.

19. The subordinate court erred in fact by convicting whereas the court and PW1 puts the appellant at different locations at the same moment of time. The charge sheet places the appellant at Export Processing Zones Authority whereas all material evidence and testimony puts him at Galaxy Hotel.

20. The subordinate court also erred by failing to appreciate that there is a difference between the Opening Committee, Evaluation Committee and Tender Committee in hierarchy, authority, function and duties.

21. The subordinate court erred in law and fact by convicting the appellant on the basis that he sat on the tendering committee.

8. During the hearing of the appeal, Mr. Okerosi, learned counsel for the appellant, abandoned the initial grounds of appeal and relied on the supplementary grounds of appeal. He submitted highlighting their written submissions dated 18th July, 2019, that the prosecution did not prove its case against the appellant beyond reasonable doubt; that the prosecution did not call crucial witnesses to testify and that the appellant was convicted on a defective charge sheet.

9. Counsel contended, referring to page 26 of the record lines 22 – 23, that PW1 told the court that Galaxy Hotel is in Kitengela though the hotel is in Athi River, Machakos County; that the charge sheet states that he was at **EPZA** while the evidence shows that PW1 went to Galaxy Hotel, Kitengela. According to counsel, this was a material contradiction.

10. Mr. Okerosi further submitted that the appellant was forced by EACC officers to touch his cloths which, he argued, was clear from page 46 of PEX 2 (the transcript) line 18; that he was told to sit and cooperate, (page 49 of PEX 2 and that they asked him to touch his cloths by asking him for his identity card which he had to remove from his pocket. According to counsel, three witnesses testified that the money was recovered from the left hand side of the appellant's pocket.

11. He went on to submit that the trial court applied wrong principles of law which were prejudicial to the appellant. He relied on ***Thoya Kitsao alias Katiba v Republic*** [2015] eKLR; ***Willy Muasya v Republic*** [2015] eKLR**,** ***Fredric Miriti v Republic*** [2013] eKLR; ***M.N. v republic*** [2012] eKLR and ***Hassan Jilio Bwanamake & Another v Republic*** [2018] EKLR. He urged the court to allow the appeal, quash the conviction and set aside the sentence.

12. Mr. Njeru, learned Assistant Deputy Prosecution counsel, opposed the appeal, supported the conviction and sentence. Mr. Njeru argued that the prosecution proved its case beyond reasonable doubt.

13. On whether the charge sheet was defective, Mr. Njeru submitted that it was not. He argued that the defence was relying on a minor variance on dates which was not fatal. He contended that the demand for a bribe began at **EPZA** and the appellant received the money at Galaxy Hotel. He also submitted that the number of witnesses the prosecution should call is at its discretion and that section 143 of the Evidence Act is clear on that.

14. Counsel argued that the evidence adduced by the prosecution was sufficient. According to Mr. Njeru, the appellant was caught read handed receiving a bribe and the money was recovered from him. He argued that if there were any inconsistencies, they were not material and did not go to the root of the case. In counsel's view, the totality of the prosecution evidence weighed against that of the defence outweighed the defence evidence.

15. Mr. Njeru submitted that the trial court evaluated the evidence and was satisfied that the offences had been committed. On sentence, learned counsel contended that the sentences were lawful and not excessive. He urged the court to dismiss the appeal, uphold conviction and affirm the sentences.

16. I have considered this appeal; submissions and the authorities relied on. I have also considered the record of the trial court and the impugned judgment. This being a first appeal, it is the duty of this court, as the first appellate court, to reanalyze, reevaluate and reconsider the evidence afresh and make its own conclusion on it. The court should however bear in mind that it did not see the witnesses testify and give due allowance for that. **(See** ***Okeno v Republic*** [1972] EA 32)

17. In ***Kiilu v Republic,*** [2005]1 KLR 174, the Court of Appeal held that:

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."

18. In ***victor Owich Mbogo v Republic,*** criminal appeal No. 152 of 2015 [2020] eKLR, the Court of Appeal again stated that:

"It is the duty of the first appellate court to reevaluate the evidence afresh and reach its own conclusion bearing in mind that unlike the trial court, the appellate court did not have the benefit of hearing or seeing the witnesses testify."

19. And in ***Garpat v State of Haryana (2010) 12 SCC59***, The Supreme Court of India underscored this duty, stating:

"***The first appellate court and the High court while dealing with an appeal is entitled and obliged as well to scan through and if need be re-appreciate the entire evidence and arrive at a conclusion one way or the other."***

20. PW1, Hezbon Ngugi Kamande, testified that in June, 2016 he applied for a tender at the **EPZA** and leant that his company was in a favourable position. On 18th July, 2016, the appellant called and informed him that he had won the tender and should collect the letter awarding him the tender. He went **EPZA** the following day and met the appellant who told him that the letter was not ready. The appellant further told him that he was required to pay Kshs. 1.6 million to get the letter communicating the award of the tender. He was asked to go and think about it.

21. Later in August, he got a call from a person who identified himself as Geoffrey or George, also an employee of EPZA asking him what he had decided about the amount of Kshs. 1.6 million. PW1 told him that he would not respond to him until he had talked to the appellant. Later the appellant called and asked him to deliver the money that afternoon otherwise the tender would be awarded to another bidder.

22. PW1 testified that he went to Ethics and Anti-Corruption Commission (**EACC**) and reported the matter; that his statement was taken and he was given a gadget record the conversation between him and the appellant. He was instructed to go back to **EPZA** and establish whether indeed the appellant wanted the money. He went to meet the appellant but he was told that the appellant was in a meeting at Galaxy Hotel, Kitengela and was asked to go there.

23. PW1 met the appellant who asked for the money. The witness told him that he did not have the money and that he wanted to confirm whether the tender was still available. The appellant told him that the tender had already been awarded to another bidder but that they still had upcoming projects and needed Kshs. 300,000 for developing a good relationship for future tenders in the upcoming projects. They agreed to meet the following day. All this time PW1 was recording the conversation.

24. The witness went to back to the EACC where the recording was analyzed. The EACC officers gave him Kshs, 100,000 in a Khaki envelope. The following day, he went to meet the appellant at Galaxy Hotel with officers following. He met the appellant who asked him whether he had brought the money. He handed over the envelope containing Kshs. 100,000 and told the appellant that the rest of the money was in the car. As the appellant was putting the money in his pockets, EACC officers arrested him.

25. In cross-examination, he told the court that it was the appellant who solicited for Kshs. 1.6 million and that this amount was mentioned on phone but was not in the recordings.

26. PW2, Joseph Oduor Anzetse, a project Engineer second to **EPZA** from the Ministry of Transport, testified that on 25th July, 2016 he had a meeting with the tender evaluation committee to evaluate bids for tender NO. 27/215 – 2016. Charwins Ltd and Kent Investment were technically qualified. They finally recommended that the tender be awarded to Charwin's Ltd. In cross-examination, the witness told the court that Kent Investments had an arithmetical error of 15%.

27. PW3 Shee Bakari, an EACC investigator, testified that on 26th August, 2016 he was informed by Joseph Lengo that there was an operation they were to conduct. He was given Kshs. 100,000 in 1,000 denominations and instructed to photocopy and then treat them. He photocopied the money and prepared an inventory which he signed and PW1 also signed. He then packed the treated money in an A4 Khaki envelope which PW1 signed and instructed him not to touch the money until PW1 requested or demanded it.

28. PW4, Paul Martin Sao also an investigator with the EACC, testified that on 26th August, 2016 he was approached by a colleague to assist investigate a case of soliciting for a benefit at the **EPZA**. He was introduced to PW1 who was given a recording device and shown how to operate it. PW1 later came back to their office and on analyzing the recording, a demand for Kshs. 300,000 was established.

29. Mr. Menjo then formed a team of investigators to conduct the operation. This included; Caleb Okoth, Bernard Juma, Amos Yiankaso, Joy Kawira and himself. The money, Kshs, 100,000, was photocopied and treated and given to PW1 in an envelope with instructions to only hand over the money on demand.

30. They proceeded to Galaxy Resort Kitengela where the appellant and PW1 had agreed to meet and strategically positioned themselves. PW1 handed over the money to the appellant and when he started counting it, they moved in and arrested him. They recovered the money; swabbed his hands and labeled the swabs which were to confirm if the appellant had touched the money. They arrested him, recovered the trouser he was wearing and escorted him to their offices where he was booked. The swabs were taken for analysis. In cross-examination, the witness testified that the initial report was that the appellant had demanded Kshs. 1.6 million but they agreed Kshs. 300,000.

31. PW5 Mechack Kimeu Sammy, the General Manager, Operations and Investor Support at **EPZA**, testified that on 26th June, 2016, he was with colleagues at the evaluation committee at Galaxy Resort. At about 4 P.M, the supervisor of Galaxy Resort went to their room and informed them that one of their colleagues was being interrogated by EACC officers. Being the Chairman of the committee, he went to find out what was happening. One of the EACC officers informed him that they were interrogating the appellant on allegations of soliciting for a bribe. He called the CEO and informed him what had happened. Later EACC officer went to the office and recorded his statement.

32. PW6 Caleb Okoth, an investigator with the EACC, testified that Mr. Lengo informed him that there was a case of soliciting for a bribe at EPZA and recording had already been done. They accompanied PW1 to Galaxy Resort and took strategic positions as PW1 met the appellant. He saw PW1 hand over the money to the appellant and moved and arrested him after introducing themselves to him. They recovered the money from the appellant's trousers' pockets. In cross-examination, the witness told the court that he saw the appellant receive the money.

33. PW7 - Amos Yiankaso also an investigator with the EACC, testified that on 26th August, 2016 he proceeded to Kitengela in the company of colleagues to conduct an operation over soliciting of a bribe. They moved and arrested the appellant at Galaxy Resort after he received the

money. They conducted a search on the appellant and recovered his identity card, KCB visa card and laptop and escorted him to their offices. In cross-examination, he told the court that he witnessed recovery of the money.

34. PW8 Fanuel Odede Kindande, the CEO of **EPZA** testified that on 26th August, 2016 at about 4 pm he received a call from PW5 informing him that the appellant, a staff member, had been arrested by officers from the EACC for soliciting a bribe. Later on 8th September, 2016, two officers from the EACC visited his office and played the video and audio recordings of the incident and he was able to identify the appellant on the recordings and the video which showed him holding some cash.

35. PW9 Catherine Serah Murambi, a government analysist working with the Government Chemist, Nairobi, testified that on 30th August, 2016 she received exhibits accompanied by an exhibit memo from No. 2016008, Joy Kawira. These were; a right hand swab packed in a khaki envelope of the appellant who was the suspect, a pair of blue trousers swabbed from the appellant; a khaki envelope containing treated money; cash Kshs. 100,000 in Kshs 1000 denominations, APQ chemical powder and cut khaki envelop. She was requested to ascertain whether the contents of the control sample APQ could be detected on any of the exhibits. She swab/dusted each note checking for evidence of APQ. The notes were then collected by the officers.

36. The witness analyzed the samples and found APQ powder on the right hand swab; left hand swab; envelope containing money; Kshs. 100,000 notes; the trouser right hand pocket and right back pocket. She made the report on 13th September, 2016 signed and sealed it. She produced it as an exhibit.

37. PW10 -Juma Bernard Angwenyi, an investigator with the EACC, testified that on 26th August, 2016 he was in the team of investigators that was to conduct an operation at Kitengela. PW1 handed over the money to the appellant which the appellant received. He recovered the money from the appellant; prepared on inventory which he signed and was also signed by the other investigators and the appellant. He produced the inventory as PEX 2. In cross-examination, the witness told the court that the demand was for Kshs. 1.6 million but that they could not prepare a trap for that amount. They prepared one for Kshs. 100,000. He pointed out that the demand appears at page 45 sentence 13, page 46 sentence 6 of the transcript.

38. PW11 Joseph Kiliko Lengo also an investigator with the EACC, testified that on 24th August, 2016 he was assigned the case following a report of corruption made by PW1. He commenced investigations by recording PW1's statement and assembled a team of investigators. They gave PW1 a gadget for self-recording the conversation between him and the appellant to enable them determine whether there was a demand. On 25th August, 2016 PW1 was shown how to use the gadget and upon reviewing the recordings, they established that there was a demand for Kshs. 300,000. They then prepared for the operation and treated Kshs. 100,000 which was given to PW1; took photocopies of the genuine notes and placed it in an envelope. The money was handed over to the appellant; the appellant was searched and the treated money recovered. An inventory was prepared and signed. The appellant's trouser was also recovered as an Exhibit. The appellant was escorted to their offices and later charged. He produced the exhibits in court.

39. When put on his defence, the appellant testified on oath that on 25th August, 2016 he was at Galaxy Resort in Kitengela doing pre-qualification of suppliers. At about 3 pm PW1 called and told him he wanted to talk to him. He gave him the direction to where he was. When PW1 arrived, he told him that he wanted to know the outcome of his bid. The appellant told him that he was not successful and that letters had been dispatched a month earlier. He informed PW1 that he had not won the tender because he had quoted Kshs. 3 million more while the tender sum was Kshs. 20,300,000.

40. PW1 wanted to see the manager of the department which had floated the tender but he told him that the manager would come in shortly. PW1 told him that someone had called and told him that if he gave Kshs. 300,000 he would win the tender. He told the appellant that the person was either a Mr. Geoffrey or George. At that moment, the manager, Mr. Solgwa, came in and the appellant made introduction. PW1 walked away and sat a distance from where they were and later left.

41. He testified that on 26th August, 2016, PW1 went back without prior arrangement, saying he had come back to see Mr. Solgwa. The appellant told him that Mr. Solgwa had left for Mombasa. PW1 then threw an envelope to him and asked him to confirm. When he looked at the envelope, he noticed that it had money. PW1 then walked away saying the cheque was in the car.

42. As he insisted that PW1 takes his envelop, EACC officers pounced on him, asked him to sit down and produce his identity card. They introduced themselves and showed him photocopies of the money he had. He was asked to produce all the money he had in his pockets. He produced documents that were in his pockets and they swabbed his fingers. They led him to his room at the hotel and searched the room and all his documents. They then demanded the trouser he was wearing. He changed and gave them the trouser. He was driven to the EACC headquarters where his fingers were swabbed. He was later charged.

43. After considering the evidence, the trial court was satisfied that the prosecution had proved its case beyond reasonable doubt, convicted and sentenced the appellant.

44. On whether the appellant demanded Kshs. 1.6 million the trial court concluded that according to the audio conversation, the appellant met PW1 on 25th August, 2016 and the discussion was why he had failed to pay as agreed and that someone else had paid more and won the tender.

45. According to the trial court, this was a clear indication that the conversation was a follow up on a demand that had not been met. The court further stated that when PW1 complained about the amount, the appellant gave instances where Chinese were paying more which meant the demanded sum was far less. The court was therefore satisfied that the demand for Kshs. 1.6 million had been made.

46. Regarding count 2, the trial court concluded that the appellant demanded Kshs. 300,000 from PW1 to facilitate repairing his relationship with the tender committee because he had failed to deliver in the first instance. According to the trial court it was the appellant's view that

the payment would put PW1 in a favourable position in future tenders. The trial court was satisfied that count 2 had been proved.

47. Finally, on whether the appellant received a benefit of Kshs. 100,000, the trial court concluded that it was the case given that the audio and video recordings captured the exchange of money between PW1 and the appellant. It was these findings triggered this appeal.

48. As is the duty of this court, I have reevaluated and reconsidered the evidence on record from both the prosecution and the appellant. The appellant has raised a number of grounds in attacking the trial court's decision. However in my view, the main issues that arise are, first; whether the charge is defective and, second; whether the prosecution proved its case beyond reasonable doubt.

49. The appellant's counsel submitted that the charge was defective; that it stated that the offence took place at **EPZA**, although the evidence was that it was at Galaxy Resort at Kitengela yet Galaxy is in Athi River, Machakos County. He also argued that these were contradictions.

50. I have perused the charge sheet as drafted. I am unable to find any evidence to suggest that any of the charges as framed was defective. The charges are premised on legal provisions creating the offences. The particulars of the offences are also clear and support the charges. That is, they are sufficiently clear, understandable and disclose offences known to law. They thus comply with both sections 134 and 137 of the Criminal Procedure Code. The appellant's counsel merely alleged that the charges were defective without showing how this was so. This argument fails.

51. Regarding the submission that there were contradictions on where the offences were committed, I do not find any such contradictions either. The charges in counts 1 and 2 state that the demand was made at the **EPZA** while count 3 states that the benefit was received at Galaxy Resort in Kitengela. The evidence on record supports the charges ad drafted. Whether **EPZA** is in Kitengela within Kajiado County or Athi River in Machakos County, is not a material contradiction that would materially affect the prosecution's case. **EPZA** is known and the fact that the appellant worked at **EPZA** was in in dispute. I do not therefore find merit in this argument.

52. The next question is whether the prosecution proved its case beyond reasonable doubt. The appellant argued that the prosecution did not prove the case against him beyond reasonable doubt. The prosecution on its part argued that it proved its case to the required standard.

53. The appellant faced three counts. First, that he demanded a benefit of Kshs. 1.6 million from PW1 on diverse dates. The trial court believed the prosecution's case and concluded that he indeed demanded that money. Did the prosecution prove this charge beyond reasonable doubt?

54. PW1 testified that he applied for a tender at the **EPZA** in 2016 and later leant that his company was in a favourable position; that on 18th July, 2016, the appellant called and informed him that he had won the tender and asked him to collect the letter notifying him about the tender. He went to **EPZA** the following day and met the appellant who told him that the letter was not ready. The appellant informed him that he was required to pay Kshs. 1.6 million in order to get the letter and was asked to go and think about it.

55. According to PW1, sometime in August, he received a call from an employee of **EPZA** who identified himself either as Geoffrey or George, asking him what he had decided about the amount of Kshs. 1.6 million. PW1 told the caller that he would not respond to him until he had talked to the appellant. He stated that later the same month, the appellant called and asked him to deliver the money that afternoon otherwise the tender would be awarded to someone else. PW1 went to EACC and reported the matter. He was given a recording devise to record the conversation. He used the devise to record the conversation between him and the appellant over the demand of bribes.

56. The appellant denied that he had demanded Kshs. 1.6 million from PW1. The rest of the prosecution witnesses were clear that they never heard the demand for Kshs. 1.6 million in the recordings.

57. I have carefully perused the evidence on record and the transcript of the recordings produced in court as PEX2. There is no recording of appellant demanding Kshs. 1.6 million from the appellant. What I gather from the recording is the appellant mentioning one point six several times, pushing the appellant to mention the money. Which the appellant did not do. My understanding of the offence of soliciting, the demand should have been from the appellant.

58. It is a principle of law in criminal justice, that the prosecution must prove the charge it has laid against an accused beyond reasonable doubt. There should never be doubt in the mind of the court that the accused committed the offence he is charged with. This has been stated in many decisions.

59. In ***Stephen Nguli Mulili v Republic*** [2014] eKLR, the Court of Appeal observed:

> ***"[I]t is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP V WOOLMINGTON, (1935) UKHL 1 where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See FESTUS MUKATI MURWA V R, [2013] eKLR."***

60. In ***Miller v Ministry of Pensions,*** [1947] 2 All E R 372, ***Lord Denning*** stated on proof beyond reasonable doubt:

> ***"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."***

61. And in ***Bakare v State (***1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria, amplified on that phrase, thus:

> ***"Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability".*** (emphasis)

62. The above decisions point to one fundamental point of law, that the prosecution's evidence should prove its case against the accused beyond reasonable doubt and courts should not entertain any doubt about the accused's guilt. That is, the evidence must be explicitly clear that the accused committed the offence he has been charged with.

63. The prosecution's evidence on count one did not prove that the appellant demanded a bribe or benefit of Kshs. 1.6 million from PW1. The evidence about that the appellant made the demand is that of PW1 only, saying that there was such a demand. The appellant denied that he made the demand. PW1's evidence, in my respectful view, did not discharge the evidential burden placed on the prosecution. for that reason, the trial court fell into error in assuming that the conversation must have been a follow up on the demand for Kshs, 1.6 million. I, therefore find and hold, that the prosecution did not prove count one as required by law.

64. Having resolved the first count, the next question is whether the prosecution proved the second count of soliciting a benefit of Kshs. 300,000/-. In that count, the appellant was charged with corruptly soliciting for a benefit of Kshs 300, 000 contrary to section 39(3) as read with 48(1) of the **ACECA**. Particulars stated that on the 25th August, 2016, being a person employed by a public body, namely **EPZA** as a clerk, corruptly solicited for a benefit of Kshs, 300,000/- PW1 as an inducement so as to consider him for future tenders in that public organization. The appellant denied that count too.

65. PW1 testified that the appellant demanded that money after he lost on the tender he had submitted the bid for. According to PW1, the appellant told him that the tender had already been awarded to another bidder but that they still had upcoming projects and wanted Kshs. 300,000 for developing a good working relationship with those responsible for awarding tenders for future tenders in the upcoming projects. He told the court that this demand was recorded in the conversation he had with the appellant.

66. This evidence was supported by that of PW4, an investigator with the EACC, who testified that PW1 was given a recording device and shown how to operate it and record the conversation. When he later came back, the recording was analyzed and a demand for Kshs. 300,000 established leading to the appellant's arrest. The appellant denied that he demanded the benefit as alleged.

67. I have re considered the evidence and analysed it myself. I have in particular carefully gone through the transcript of the conversation between the appellant and PW1 produced as PEX2. The transcript contains conversation that confirms that indeed there was discussion between the appellant and PW1 over the initial tender that PW1 had submitted a bid for. The appellant informed him that the tender had already been given to another bidder.

68. The appellant informed PW1 that there were other tenders in the near future and he should give that amount to put him in a good relationship with the committee responsible so that he could be considered favourably when those tenders are advertised. I am therefore satisfied that the prosecution proved this count that the appellant solicited for a benefit of Kshs. 300,000. The trial court arrived at the correct conclusion and I see no reason to fault it on this count.

69. The final issue is whether the prosecution proved count 3, that of corruptly receiving a benefit of Kshs. 100,000. In that count, the appellant was accused of corruptly receiving a benefit contrary to section 39(3) as read with Section 48(1) of the Act. It was alleged that on the 26th day of August, 2016, at Galaxy Resort in Kitengela Township, within Kajiado County, being a person employed by the **EPZA,** a public body**,** he corruptly received a benefit of Kshs, 100,000 from PW1 as an inducement so as to consider the PW1 for award of tenders in that public body.

70. PW1 testified that received treated money from the **EACC** officers and handed it over to the appellant at Galaxy Resort Kitengela on 26th August 2018, and as the appellant counted the money, he was arrested by officers from the **EACC** and the money recovered from him.

71. The appellant denied the charge and testified that on that day, PW1 went to him at Galaxy without prior appointment and told him that he wanted to see Mr. Solgwa. He told him that Mr. Solgwa had left for Mombasa. PW1 then threw an envelope to him, asked him to confirm and left saying the cheque was in the car. When he checked the envelope, he noticed that it had money.

72. As he insisted that PW1 takes his envelope, EACC officers pounced on him, asked him to sit down and asked for his identity card. They showed him photocopies of the money he had and asked him to produce all the money he had in his pockets. He produced documents that were in his pockets. They swabbed his fingers, searched his room at the hotel. They demanded the trouser he was wearing, took him away and later charged him.

73. PW3 testified that he was given Kshs. 100,000 in 1,000 denominations and instructed to photocopy and then treat them. Which he did. He also prepared an inventory which he and PW1 signed. He packed the treated money in an envelope and gave it to PW1 and instructed PW1 not to touch the money until the appellant requested for it.

74. PW3, PW4, PW6, PW7, PW9, PW10 and PW11 all testified that they participated in the operation and arrested the appellant after he had received the treated money and recovered the money from him. They also testified that they witnessed the appellant receive the money that was why they moved to arrest him.

75. PW8, the CEO of **EPZA** testified that on 26th August, 2016 he was informed by PW5 about the appellant's arrested by officers from the EACC and the reason for the arrest. Two of the officers later went to his office and played the video and audio recordings of the incident. He was able to identify the appellant holding some cash.

76. PW9, the analyst confirmed that she received exhibits, including a right hand swab, a pair of blue trousers swabbed from the appellant; an envelope containing treated money; cash Kshs. 100,000 in Kshs 1000 denominations and APQ chemical powder. She was to ascertain whether the contents of the control sample APQ were on any of the exhibits. She analyzed the samples and found APQ powder on the right hand swab; left hand swab; envelope containing the money; on Kshs. 100,000 notes; on the trousers' right hand pocket and right back pocket.

77. The appellant did not deny that the money was recovered from him but that he had not solicited for it. From the evidence, it is clear that the appellant had a discussion on money and was expecting PW1 to give money. He received the money and was arrested with it. His argument that he was not expecting PW1 was not true. The transcript showed that he had had much to talk about over the money and the future tenders and was keen on PW1 having a good working relationship with his team.

78. For the above reasons, I am satisfied that the prosecution proved that the appellant received a benefit and was arrested with the treated money. The trial court arrived at the right decision and I see no reason to interfere with that finding.

79. In the end, having considerer the appeal, submissions and the evidence, counts two and three were proved. Consequently, the appeal on count one succeeds and the appellant is hereby acquitted on that count and the sentence set aside. Any fine paid in that regard, should be refunded to the depositor.

80. As regards counts two and three, I find that the prosecution proved the two counts beyond reasonable doubt. I dismiss the appeal in so far as the two counts are concerned, uphold conviction and affirm the sentence.

81. Orders accordingly,

Dated, signed and delivered at Kajiado this 27th day of April, 2020.

E.C. MWITA

JUDGE