



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**ACEC CRIMINAL APPEAL NO. 9 OF 2017**

**JANE WANGUI KIMANI .... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(Being an appeal against the judgment by Hon. L. N. Mugambi Chief Magistrate on 3<sup>rd</sup> February 2017)**

**JUDGMENT**

**1. JANE WANGUI KIMANI** “the appellant” was charged and convicted before the Nairobi Chief Magistrate’s Anti-Corruption court for the following offences:

**Count 1: 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.** Particulars being that the appellant on the 24<sup>th</sup> day of March 2014, at Ruai Assistant Commissioner’s office within Nairobi county, being a person employed by a public body, to wit, Ministry of Internal and Coordination of National government as a senior clerical officer, corruptly solicited for a benefit of ksh.8000/= from one Rose Wanjiku Kibe, as an inducement so as to release to her a liquor licence a matter relating to the affairs of the said public body.

**Count 2: Corruptly solicited for a benefit contrary to section 39(3) as read with section 48(1) of the Anti-Corruption and Economics Crimes Act No. 3 of 2003.** Particulars being that the appellant on the 27<sup>th</sup> day of March 2014, at Ruai Assistant Commissioner’s office within Nairobi county being a person employed by a public body to with, the Ministry of Interior and coordination of national government as a senior clerical officer, corruptly solicited for a benefit of ksh.7000/= from one Rose Wanjiku Kibe as an inducement so as to release to her a liquor license a matter relating to the affairs of the said public body.

**Count 3 – Corruptly receiving 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.** Particulars being that the appellant on the 27<sup>th</sup> day of March 2014, at Ruai Assistant Commissioner’s officer within Nairobi county, being a person employed by a public body, to wit, the Ministry of Interior and Coordination of National government, as a senior clerical officer corruptly received a benefit of Ksh.7000/= from one Rose Wanjiku Kibe, as an inducement so as to release to her a liquor licence, a matter relating to the affairs of the public body.

2. She was fined Ksh.50,000/= in default six (6) months imprisonment on count 1, and Ksh.60,000/= in default six (6) months imprisonment each on count 2 and count 3.

3. Being aggrieved she filed this appeal against the said judgment, raising the following grounds:

- i. The honourable magistrate erred in law and fact by convicting her against the weight of evidence adduced by the prosecution.
- ii. The honourable magistrate erred in law and facts in convicting her relying on contradictory evidence by the prosecution.
- iii. The honourable magistrate erred in law and fact in wholly disregarding the documentary evidence adduced by the appellant.
- iv. The honourable magistrate erred in law and fact by failing to consider that at the time the alleged offence was committed the complainant never met the appellant.
- v. The honourable magistrate erred in law and fact by failing to address himself to the appellant’s evidence in defence.

vi. The honourable magistrate erred in law and fact by delivering a judgment that was against the weight of the evidence, submissions and the law.

4. The prosecution's case was premised on the evidence of eight witnesses while the appellant gave a sworn defence without calling any witness **PW1 Rose Wanjiku Kibe** was the manager of Senate bar in Kayole Saika in 2014. In January 2014 she went to the District Commissioner's offices at Ruai with documents for purposes of applying for a liquor licence. She paid Ksh.50,000/= for it in March 2014 at Jogoo road KCB branch.

5. She went to the District Commissioner's office Ruai and found the appellant whom she gave the deposit slip. She was issued with a receipt by Nacada serial no. 118432 (Exb. 6b). The appellant asked her to wait for 2 – 3 weeks for the licence to mature.

6. She explained that she went to check on her licence on 24<sup>th</sup> March 2014 when the appellant told her it was ready, but she had to part with Ksh.8000/= for the elders tea. She called one of her partners by the name of Anthony Kuria for advice and he advised her to report to the Ethics and Anti-Corruption Commission (EACC) which she did, the next day. After her statement was recorded she was advised to meet the EACC officers at Ruai town on 26<sup>th</sup> March 2014.

7. They met as agreed and she was taken through the motions of recording a conversation with the appellant on a gadget and how to handle trap money. She identified the Sony audio recorder as EXB1. She said she was also given ksh.8000/= (treated money) inside a half khaki envelop EXB2 which money was to be given to the appellant.

8. The Ksh.8000/= was in denominations of ksh.1000/= which had been photocopied (EXB3). She went to the District Commissioners office as instructed but she did not find the appellant. She called her and she informed her that she was in a meeting and was not coming back to the office until the next day. She informed the EACC officers, and they once again met and the assignment was reorganized for the next day.

9. On 27<sup>th</sup> March 2014 PW1 met the officers at Ruai town and she was once again taken through the procedure of the previous day. She was accompanied by one officer to the District Commissioner's office but he remained behind as she entered the appellant's office. She found her alone in the office. After greetings she flipped her bag and pressed the green button on the gadget. She told the appellant that she had not managed to get the ksh.8000/= and the appellant asked her what she had and she was told it was ksh.7000/=. The response was that people liked complaining a lot. She opened her bag and handed her the Ksh.7000/=. She confirmed the amount which she placed in a drawer on her desk and she gave PW1 the licence.

10. The licence was serial No. 92280 in the names of Anthony Kuria & Timothy Chege the owners of Senate pub. Upon being issued with the licence she was given a counter book to sign to confirm receipt. A copy of the counter book was produced as EXB 6c. After doing all this she beeped Hillary of EACC (PW8) who came together with other EACC officers and they introduced themselves. They searched the office and recovered the Ksh.7000/= in a drawer. She opened her bag and removed the remaining ksh.1000/= and gadget which she handed over to PW8. She signed an inventory of the recovered Ksh.7000/= (EXB7).

11. The witness identified the original transcript of the recorded conversation together with the translated transcript, (EXB 8a & b). The recording was played in court and she confirmed that to have been the conversation between her and the appellant. She also identified the two voices to be hers and the appellant's.

**12. PW2 Samuel Mutisya Muindi** is an employee of the national government in the position of assistant county commissioner Njiru sub-county and based in Ruai. Among his duties is the maintenance of bars and orders. On 27<sup>th</sup> March 2018 he was informed by EACC officers of the arrest of the appellant. She was later brought to his office and an audio clip played to him. He was also shown some currency notes the officers had. When the clip played he was able to recognize the appellant's voice as he had worked with her for two years and they had interacted quite often. He told the court that he is conversant with the liquor licensing applications process.

13. He explained that after the licence fee is paid to the bank, one is supposed to be issued with the licence. The licence may be issued immediately once the conditions are fulfilled. Upon being signed the licence ought to be issued immediately. On being shown the licence in issue (EXB 6a) he said it should have been issued immediately. It is dated 6<sup>th</sup> March 2014 but was issued to the owner on 27<sup>th</sup> March 2014, three weeks after the date of issue.

14. In cross examination he said the issuance of a liquor licence is the mandate of the liquor licensing committee chaired by the District Commissioner (D.C). In the absence of the D.C, PW2 would sign the licence as was the case in this matter. He also confirmed that he was the appellant's immediate boss. The witness confirmed signing the licence (EXB6a) on 6<sup>th</sup> March 2014 but stamping it on 27<sup>th</sup> March 2014 when it was collected.

**15. PW3 PC (W) Rachael Nzaro, PW4 No. 83756 (W) Caren Kiplagat, PW5 Patrick Mbijiwe, PW7 No. Corporal James Wachira and PW8 No. 79583 PC Hillary Chepkwony** are EACC officers. They are all investigators and they worked on this matter as a team under the leadership of PW8. Their evidence is similar and I will only outline the evidence of PW8. He testified that on 25<sup>th</sup> March 2014 he received instructions over this matter from his in charge **Inspector Fredrick Mwangi**, who instructed him to investigate PW1's claim which he did.

16. The witness interviewed PW1, and recorded her statement. She claimed that the appellant a senior clerical officer at Ruai assistant county commissioner's office was demanding a benefit of ksh.8000/= to release her liquor licence. He advised her to return the next day for an operation to be carried out. She came as instructed and PW3 treated the trap money Ksh8000/= with APQ powder (EXH17). The money was photocopied (EXB3) and an inventory prepared (EXB5).

17. The money used in the operation was ksh.7000/= (Exb4a-g) plus the half cut envelop which carried the money (EXB2). Pw5 introduced PW1 to the audio digital gadget (EXB1) and showed her how to operate it for purposes of recording her conversation with the appellant.

They met PW1 the next day for the operation but found when the appellant was not in her office. They rescheduled the exercise for the next day (27<sup>th</sup> march 2014).

18. The operation was successful and they moved to the office swiftly after being beeped by PW1. They introduced themselves and so did the appellant. PW4 searched the office of the appellant and found the trap money (Ksh.7000/=) in her top drawer. An inventory (EXB 7) was prepared, and signed by all present. He produced a certified copy of the licence no. 92250 (EXB 6a) permit receipt serial no. 118432 (Exb 6b), certified copy of a counter book (EXB 6c), inventory of counter book recovery (EXB 12). They then took the appellant to PW2's office, where the video was played. PW2 identified the appellant's voice.

19. PW5 is the officer who took swabs of the appellant's hands using clear polythene gloves and cotton balls. Each swab was placed in a separate envelop and handed over to the investigating officer (PW8). An exhibit Memo (EXB19) was prepared by PW8 and was forwarded to the government chemist together with the exhibits. PW7 did the translation of the recorded conversation as some words were in Kikuyu language.

20. PW6 **Marion Chege** is a government analyst, who examined the exhibits forwarded to the office by PW8. They were to determine whether the exhibits contained the control sample of APQ powder. The same was detected in the Ksh.7000/= (EXB 4b-g), A5 khaki envelop (EXB 15), half khaki envelop (EXB2), right hand cotton swab (EXB11(a)) and left hand cotton swab EXB11(b). He prepared a report which he produced as EXB13.

21. When placed on her defence the appellant gave a sworn statement of defence. She said she is a senior clerical officer working at the deputy county commissioner's office, Njiru sub-county. Her duty was to give all secretarial support to the Njiru alcoholic drinks regulatory committee. This included receiving applications from persons applying for alcoholic licences; preparation of minutes for the committee; typing all the names of applicants for respective licences applied for; writing licences for successful applicants for the chair's signature, among others. She would also seal and issue signed cheques.

22. She confirmed that the chair of their licensing committee was the deputy county commissioner (PW2). She explained that on application of a licence one went to the Nacada office Njiru sub-county to get a form for which he/she paid shs.1000/=. The form would then be returned to her. Thereafter she would prepare a list of applicants, types of licences applied for, location of premises and forward the list to the government printer for gazettelement and stating when the next siting would be.

23. Other requirements would be inspections, provision of hygiene certificate and public health letter. After compliance the applicant would be asked to go and pay for the licence at the bank (KCB or Cooperative bank Nacada Account). Upon confirmation of payment she would issue the applicant with a Nacada receipt and write a licence for the chair person's signature.

24. She said she met PW1 on 6<sup>th</sup> February 2014 at the Njiru sub county office. The said PW1 had wanted a general alcoholic drink licence. It was not possible to assist her because the committee had met on 16<sup>th</sup> January 2014. Since she was insisting, the appellant took her to the chairman and asked if she could be included in the list of 16<sup>th</sup> January 2014. The chair was of the view that all committee members had to be involved.

25. The members gave the green light for her to apply, for her fate to be decided. The licence she wanted was for Senate pub. She paid the ksh.1000/= at the bank and was issued with the Nacada receipt on the same day of 6<sup>th</sup> February 2014. Inspection was to be done but the three (3) non-civil servant members declined to do it, unless they were paid their sitting allowance. PW1 agreed to pay the allowances. Each had to be paid Kshs.2,500/= as sitting allowance and shs.1500/= as travelling allowance.

26. She continues to state that the inspection was done, and PW1 also complied with the other requirements and paid the Kshs.50,000/= fees on 6<sup>th</sup> March 2014. The licence was issued to her the same day and she promised to bring the money for the non-civil servant committee members, which was Ksh.8000/=. She next called her on 26<sup>th</sup> March 2014 saying the expiry date on the licence issued had an error, as it read 21<sup>st</sup> January 2014 instead of 31<sup>st</sup> January 2015. She asked her to see her the next day since she was not in the office. When PW1 came in the morning the person signing the licences was not in. They agreed that the appellant calls her once the licence had been rectified.

27. She did as agreed and PW1 came and picked the licence and paid ksh.7000/= instead of ksh.8000/= since she argued that, that was all she had. It was then that EACC officers came to her office and told her she was under arrest. She was taken to the office of the assistant county commissioner in Njiru sub-county.

28. A recording was given to him to listen and he said he knew her as an officer working there and confirmed that the voice was hers. She too listened to the recording and confirmed that the conversation took place. She stated that she issued PW1 with a receipt for Ksh.7000/=:, and retained a copy but could not access the office, to get it. She further referred to the transcript of the recording (EXB 16) and said what she had stated had been referred to in the conversation including the part of correction of the date.

29. She produced a copy of the minutes (DEX B1) of 16<sup>th</sup> January 2014 where it was indicated that the next meeting would be on 16<sup>th</sup> April 2014. She also produced a list of the applicants who had submitted their applications (DEXB 2). She availed to the court the rates payable as sitting and transport allowance (DEXB 3) plus the receipt for ksh.1000/= paid as licence application fees dated 6<sup>th</sup> February 2014 (DEXB 4). The exhibits were produced by a clerk from the office of the assistant county commissioner's office Njiru.

30. When the appeal came for directions the counsel appearing agreed to file written submissions which were highlighted on the date of hearing. Mr. Ambani for the appellant submitted that there was no single evidence adduced to show that the appellant was a public officer to whom section 39(3) of the Anti-corruption and Economic Crimes Act is applicable. Further that it was not clear where the offence took place, when one considered the evidence and the charge sheet.

31. He further argued that there was no evidence of the accused soliciting for any benefit. He said that though a transcript was produced in court the audio recorder itself was never produced and this was fatal as was found by the Court of Appeal in the case of ***Nguku –vs- Republic (1985) eKLR***. He further stated that upon listening to the audio recording and reading the original and translated transcript of the recorded conversation in EXB8a and 8b he does not find any demand for shs.8000/= being made by the appellant.

32. He submitted that there were material contradictions, in the transcript itself and that receipts were issued for the money received. He quoted at length what ***Mativo J*** said in the case of ***Paul Mwangi Gathongo –vs- Republic (2015) eKLR***.

He therefore argued that in the absence of evidence to prove soliciting of benefit then any amounts so received cannot be termed as a bribe.

33. Mr. Ambani submitted that appellant gave a detailed defence which was ignored by the trial court.

Finally he contended that section 35(1) (2) of the ACECA was not complied with which was fatal to the prosecution case. He cited the case of ***Patrick Munguti Nunga –vs- Republic (20013) eKLR*** where this court allowed an appeal on that ground.

34. **Mrs. Aluda** for the State opposed the appeal. She submitted that it had been shown that the appellant was a public officer. She referred to the appellant's own evidence. She also said it was clear that the office where the offence took place was at Ruai. On the evidence of making demands she also referred to the evidence of PW1 which was confirmed by that of PW5 and the transcript evidence. She referred to the evidence of PW1's boss (PW2). which she submitted was not shaken. The swabs from the appellants' hands confirmed she handled the money.

35. On section 35 of ACECA Mrs. Aluda contended that the presence of the state counsel in court illustrates the DPP's consent and there was no need of any further consent. That section 35 ACECA was about a report being filed on the investigations and not seeking consent to prosecute. She asked the court to dismiss the entire appeal.

36. This being a first appeal this court has a duty to consider the evidence on record afresh, reevaluate it and arrive at its own conclusion. In doing so, the court must remember that unlike the lower court it did not have the advantage of hearing and seeing the witnesses. The court of Appeal in the case of ***Patrick & Another –vs- Republic (2005) 2KLR 162*** stated thus on the duty of the first appeal court:

**“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. It is not the function of first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions.”**

37. The said court further in the case of ***Muthoko & Another –vs- Republic 2008 KLR 297*** held:

**“It was the duty of a first appellate court to analyze the evidence and come to its own independent conclusion bearing in mind that it did not hear or see the witnesses and making allowance for that.”**

38. I have carefully considered the evidence on record together with the grounds of appeal. I have equally considered the submissions by both counsels. I find the main issue for determination to be whether there was sufficient evidence to sustain a conviction in this matter. This issue takes into account all the grounds raised.

39. Mr. Ambani submitted that it was not clear where the offence took place. The charge sheet shows that the offence was committed at Ruai assistant county commissioner's office within Nairobi County. This is the same evidence that was given by the prosecution witnesses. The appellant in her testimony brought in another angle saying she worked at the deputy county commissioners' office, Njiru/sub-county that she used to give secretariat support to the Njiru alcoholic drinks regulatory committee.

40. She further confirmed that the assistant county commissioner was her immediate boss. The assistant county commissioner testified here as PW2 (Samuel Mutisya Muindi). He indicated clearly that he works as assistant county commissioner Njiru sub county and was based in Ruai. That is the same place the appellant was working from. It means that though the appellant belonged to Njiru sub county the office operated from Ruai. None of the witnesses said the incident occurred in Njiru sub county. My finding is that the place of incident as stated in the charge sheet is supported by the evidence adduced.

41. It was also submitted that it was not proved that the appellant was a public officer. Who then is a public officer?

Under section 2 of ACECA a public officer is defined as:

**“An officer, employee or member of a public body, including one that is unpaid, part-time or temporary.”**

Under Article 260 of the Constitution defines a public office as follows:

**“An office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the consolidate fund or directly out of money provided by parliament.”**

42. To answer this question one only needs to refer to the evidence of PW2 and the appellant herself, plus the two definitions above. PW2 is an employee of the national government and works as an assistant county commissioner for Njiru sub-county. He was the immediate boss of

the appellant. On the other hand the appellant said she was a senior clerical officer working at the deputy county commissioners' office, Njiru sub county. She lived in Jogoo road government quarters estate.

Being an employee of the Ministry of interior and coordination of national government (a public body) she was seconded to NACADA (a public agency)

43. There is no doubt that the appellant fits the description of or public officer in all ways. Her principal was the employer while she took the position of an agent. I find that the prosecution proved that the appellant is a public officer.

44. From the totality of the evidence, the following are undisputed facts:

- i. The appellant and PW1 were not new to each other.
- ii. The two of them were in the appellant's office on 27<sup>th</sup> march 2014 during working hours.
- iii. During their encounter the appellant asked for and received from PW1 ksh.7000/=. The said money was recovered from her office by the EACC officer
- iv. PW1 was among those who had applied for an alcoholic drinks licence on behalf of Senate Pub.
- v. That the appellant handled this money in question as is confirmed by the evidence of several witnesses. The hand swabs also confirmed it.

45. The issue for determination would then be why the appellant was receiving the said money. According to PW1 the money was to facilitate the release of the liquor licence to her and that it was tea for the elders. On the other hand the appellant stated that the money was payment of sitting allowances for three (3) non-civil servants in the liquor licensing committee. That PW1 had been told about it and she had agreed to pay, since she had made her application late when the sitting of 16<sup>th</sup> January 2014 had been done. In fact according to the appellant PW1's application had been made on 6<sup>th</sup> February 2014, and allowed.

46. The appellant produced minutes for the committee meeting of 16<sup>th</sup> January 2014 (DEXB 1). The next meeting was scheduled for 16<sup>th</sup> April 2014. The receipt issued by the appellant for payment of Ksh.50,000/= and dated 6<sup>th</sup> March shows that this was in respect of approved minutes no. 54/1/14 of 16<sup>th</sup> January 2014 (EXB 6b). I have checked through the said minutes in DEXB 1 and I have failed to trace anything like **Min no. 54/1/14**. The first minute at page 1 is **Min no. 56/1/14**. It follows that Min no. 54/1/14 is not part of the minutes, of the meeting held on 16<sup>th</sup> January 2014.

47. According to the appellant the committee members were called on the afternoon of 6<sup>th</sup> February 2014 to deliberate on the application by PW1. They turned up and discussed the issue of inspection of the Senate pub. All members save for the non-civil servants agreed to undertake the exercise. The non-civil servants wanted to be paid their sitting and travelling allowances (Ksh.2500/= and Ksh.1500/= per person per sitting. The total per person was therefore ksh.4000/=. For three (3) people would be Ksh.12000/= and not ksh.8000/=: as claimed by the appellant.

48. If indeed the approval of PW1's application was lawfully and legally done, there could have been minutes to that effect and there are no such minutes. Secondly the total sum in allowances as per the approved rates (DEXB3) would have been as follows:

Sitting allowance	-	2500/=
Lunch	-	1000/=
Travelling allowance for non-civil servants	-	1000/=
per person	-	4500 x 3

**Total for 3 Persons - Kshs.13500/=**

49. There are three (3) sets of figures here; as per the appellants evidence it is ksh.12000/=: as per the payment schedule she produced as (DEXB 3) it is Ksh.13500/=: and as per what the non-civil servants allegedly asked for it is Ksh.8000/=: It is obvious that not all these figures can be correct and/or referring to the same thing. Besides there being no minutes for 6<sup>th</sup> February 2014 there is no committee member who was called by the appellant to support her evidence, on this issue of demand by the non-civil servant committee members.

50. Finally on this point, I have perused PW1's evidence in cross examination. There is no question she was asked in relation to her having made her application late; a special sitting having been arranged for her on 6<sup>th</sup> February 2014; having met the committee members or having agreed to pay the non-civil servants their allowances of ksh.8000/=: Had the appellant's defence been true on this aspect there is nothing that would have stopped her counsel from cross examining PW1 on the same.

51. Based on the above analysis I have come to the conclusion that there was no arrangement of any nature for the three non-civil servants to be paid allowances by the PW1 as alluded to by the appellant.

In her evidence PW1 stated that after she paid ksh.50000/= for the licence the appellant asked her to check on her for the licence after 2 – 3 weeks. She therefore went back on 24<sup>th</sup> March 2014 and that's when the appellant told her the licence was ready but she wanted ksh.8000/= for the elders tea. When she informed Anthony Kuria her employer of the new development, she was advised to report to the EACC, which she did the next day. It's then that the journey with EACC started.

52. She said she missed the appellant in her office on 26<sup>th</sup> March 2014 but met her on 27<sup>th</sup> March 2014. Their conversation was recorded, as instructed by the EACC officers. The recorded conversation was played for PW2 in the appellant's presence and was again replayed in the court. In her defence she confirmed that the conversation as recorded took place. It is this conversation that is said to have amounted to an inducement. I wish to state here that contrary to Mr. Ambani's submission the audio recorder silver in colour was produced as EXB 1.

53. It is true that the licence in respect of Senate pub (EXB 6a) was issued on the 6<sup>th</sup> March 2014 when the fee of ksh.50000/= was paid. It was signed by the deputy county commissioner (PW2) who also stamped (counter signing) for the correction of the date of expiry from 31.1.2014 to 31.1.2015. This was done on the same date of issue.

The appellant's evidence was that she issued the licence on 6<sup>th</sup> March 2014 and released it to PW1 on the same day. That she next met PW1 on 27<sup>th</sup> March 2014 when she came to have an error on the expiry date rectified.

54. This cannot be true following the evidence given by PW1 and PW2. PW2 testified that the licence was collected on 27<sup>th</sup> March 2014, and he stamped it himself. It was also PW1's evidence that she collected the licence on 27<sup>th</sup> March 2014.

My finding is that the appellant issued the licence on 6<sup>th</sup> March 2014 but only released it to PW1 on 27<sup>th</sup> March 2014.

55. The next issue is to determine why the licence was released on 27<sup>th</sup> March 2014 and not on 6<sup>th</sup> March 2014. It is all about the money that was being demanded. The appellant does not deny making the demands as explained by PW1 and as per the recorded conversation. If it is true that she had released the licence to PW1 on 6<sup>th</sup> March 2014 why would she ask for the elders sitting allowances on 27<sup>th</sup> March 2014 after the fact? PW1 had brought herself to that office on 27<sup>th</sup> March 2014, to collect her licence.

56. The particulars in C1 and C2 explaining the inducement attributed to the appellant are in the following words

**“as an inducement so as to release to her a liquor licence, a matter relating to the said public.”**

From the evidence on record and the narrative above it is clear that there was nothing like non civil servants members sitting allowance payable by PW1. In any event any such payment would be illegal, as these are payments made by government and not by individuals. The above analysis confirms that:

i. The Ksh.7000/= received by the appellant was never receipted as claimed. A receipt is an official document and had it been issued the copy in the office would have been presented by DW2 who produced several documents from the said office.

ii. The licence was issued on 6<sup>th</sup> March 2014 and ought to have been released on the same day since PW1 was present. The release of the same after three (3) weeks and after receipt of Ksh.7000/= confirms that the Ksh.7000/= was not money owing but was a bribe for the sole purpose of releasing the licence.

57. It was the appellant's duty to issue and release licences to applicants. As a public officer she was duly paid to do this work, and was not expected to unlawfully pay herself again through such demands. The case of Mwangi Gathongo –vs- Republic (2015) eKLR is up to point on this.

58. I find that the appellant solicited for ksh.8000/= and later agreed to receive Kshs.7000/= from PW1 for her benefit which was not legally due to her, for purposes of releasing a licence which was her appointed duty to perform.

I find all the counts proved.

59. Mr. Ambani raised issue with non-compliance with Section 35 of the ACECA. The said Section provides:

**“(1) Following an investigation the commission shall report to the Director of Public Prosecution on the results of the investigations.**

**2. The commission's report shall include any recommendation the commission may have that a person be prosecuted for corruption or economic crimes.”**

60. First and foremost there is no indication that this issue was ever raised before the trial court. Counsel cited the case of Patrick Munguti Nunga –vs- Republic (2013) where this court in reference to the case of Esther Waruiru & Mary Mbaisi Indusa –vs- Republic Court of Appeal Criminal Appeal No. 48/08 (Nairobi) found that there had been failure to comply with section 35 of the ACECA and allowed the appeal.

61. This case can be distinguished from the Patrick Munguti case. The repealed Prevention of Corruption Act under section 12 made provision for a mandatory consent from the Attorney General before one could be charged with an offence under the Act. The consent was

to enable the police to proceed to charge. However, in the present scenario the DPP is the one preferring the charges which are prosecuted by state counsels. To whom then does he give the consent or recommendations? Further the DPP has power to receive complaints, investigate them and charge persons. (See Article 157(6) of the Constitution. He would not be expected to give any consent in such a scenario.

62. All that the section states is that a report with recommendations is forwarded to the DPP, who then acts. If the appellant had wanted to be provided with that report or confirm its existence she should have sought for it before the trial court. I entirely agree with the sentiments expressed on this matter by *Ngaah & Mativo JJ* in the cases of *Stephen Mburu Ndiba –vs- EACC & Another 2015 eKLR* and *Michael Waweru Ndegwa –vs- Republic* respectively.

63. therefore find that the failure to produce the report under section 35 of the ACECA in the circumstances of this case was not fatal.

64. The sentences passed against the appellant are within the limits provided for under section 48 of the ACECA. I find no reason to make me interfere with judgment.

65. I find the appeal to lack in merit and its dismissed. The conviction and sentence are upheld.

Orders accordingly.

**Signed, dated and delivered this 20<sup>th</sup> day of March 2018 at Nairobi.**

**HEDWIG I. ONG’UDI**

**HIGH COURT JUDGE**