



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO.343 OF 2011

JOHN NJENGA KINUTHIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence contained in the judgment of Hon. Lucy Nyambura (Principal Magistrate) in the Chief Magistrates' Court – Anti Corruption Court at Milimani Criminal Case No. 39 of 2010 delivered on 7th November 2010)

JUDGMENT

Background

The Appellant, John Njenga Kinuthia was charged with three counts of offences under the Anti-Corruption and Economic Crimes Act as follows:

Count I; 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. It was alleged under this Count that the Appellant on 3rd September 2010, at Petman Hotel in Nairobi within Nairobi Province, being a person acting for a public body, namely, the City Council of Nairobi as the Councilor for Kitisuru Ward, corruptly solicited for a benefit of Ksh. 650,000/- from John Mbau Irad, as an inducement to release the renewal of leasehold for LR No. 209/4361/12/13 situated in Shauri Moyo, Nairobi, the property of Gikomora Cooperative Society Limited, in a matter which the said public body was concerned.

Count II: Corruptly soliciting for a benefit contrary to Section 39(3) as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act. The particulars are that on 21st September 2010, at City Hall in Nairobi, within Nairobi, the Appellant, being a person acting for a public body, namely, the City Council of Nairobi as the Councilor for Kitisuru Ward, corruptly solicited for a benefit of Ksh. 650,000/- from John Mbau Irad, as an inducement to release the renewal of leasehold for LR No. 209/4361/12/13 situated in Shauri Moyo, Nairobi, the property of Gikomora Cooperative Society Limited, in a matter which the said public body was concerned.

Count III: Corruptly receiving a benefit contrary to Section 39(1)(3)(a) as read with Section 48(c) of the Anti-Corruption and Economic Crimes Act, under which it was alleged that the Appellant on 5th October 2010, at Total Petrol Station, along Kimathi Street in Nairobi within Nairobi Province, being a person acting for a public body, namely, the City Council of Nairobi as the Councilor for Kitisuru Ward, corruptly received a benefit of Ksh. 110,000/- from John Mbau Irad, as an inducement to release the renewal of leasehold for LR No. 209/4361/12/13 situated in

ShauriMoyo, Nairobi, the property of Gikomora Cooperative Society Limited, in a matter which the said public body was concerned.

The Appeal

The prosecution called eleven (11) witnesses in support of its case. The Appellant gave a sworn testimony in his defence and did not call any witness. After considering the evidence, the trial Court convicted the Appellant on all the three counts as charged. Consequently, the Appellant was sentenced to pay a fine of Ksh. 350,000/- on each Count I and Count II, in default of which the Appellant was to serve 12 months imprisonment for each count. On Count III, he was sentenced to pay a fine of Ksh. 100,000/- and in default, to serve twelve months' imprisonment. In addition, and pursuant to the provisions of Section 48(1)(b) of the Anti-Corruption and Economic Crimes Act, the Appellant was sentenced to the mandatory sentence of a fine of Ksh. 220,000/- and in default twelve months' imprisonment.

Dissatisfied with the trial Court's findings, the Appellant appealed against both the conviction and sentence, relying on the following three grounds of appeal:

- a. **The trial Magistrate erred in failing to find that without the recorded conversations and the transcript, the remaining evidence did not establish any offence**
- b. **The trial Magistrate erred in failing to find that the contradictions on the recovery of the motor vehicle and the trap money were crucial to the case and ought to be resolved in his favour.**
- c. **The trial Magistrate erred in failing to find there was no specific evidence adduced with regard to Counts I, II, and III on the fact that the Appellant was a public officer and a Councillor of Kitisuru Ward of the City Council of Nairobi, and further that the charge was inconsistent with the particulars.**

Both the Appellant and the Respondent relied on their respective written submissions. The Appeal was opposed through the written submissions dated and filed on 11th May 2010 by Felicitus Ngetich, Prosecution Counsel. It was submitted on behalf of the Respondent that the prosecution had sufficiently proven its case through the testimonies of PW1, PW2 and PW3 that the Appellant had demanded Ksh. 650,000/-. This was further buttressed by the demand for Ksh. 150,000/- from the complainants as the application fee, contrary to the legal application fee of Ksh. 15,000/-. It was submitted further that the treated money was recovered from the Appellant in his vehicle as confirmed by swabs taken by the Government Chemist. With respect to the recorded conversations, it was submitted that the recorded evidence was not admissible in court since no certificate of voice identification was produced and none of the witnesses were familiar with the voice of the Appellant. Thus, the Magistrate rightly relied on other evidence. Responding to the alleged contradictions on the particulars of the Appellant's motor vehicle registration number, the Respondent submitted that this issue was sufficiently resolved by the trial court as an error that was not fatal to the prosecution case. Furthermore, the Appellant had in his own defence alluded to an agreement that he would be given a bribe upon renewal of the lease that was to be passed on to the City Council officials to fast-track the renewal process. The prosecution urged this court to confirm the trial court's finding on both the conviction and sentence.

The Evidence

The events leading to the arrest and trial of the Appellant commenced with a request for the renewal of a leasehold in respect of LR No. 209/4361/12/13 situated in Shauri Moyo, Nairobi. The property is owned by Gikomora Cooperative Society Limited. PW1, PW2 and PW3 were the complainants and officials of Gikomora Cooperative Society Limited. PW1, John Mbau Irad was the then treasurer while PW2 held the position of Chairman of the society. PW3, Samuel was the Secretary since 1992 till 2010. The three produced the minutes of the meeting of the Society in which they were elected officials of the Society.

PW1, PW2 and PW3 testified that the Society sought a loan from the bank to facilitate the purchase of a property. As the Society's officials, they presented the title of the leasehold owned by the Society. Since the lease had expired, the complainants were advised to have the lease renewed. In pursuit of the renewal,

PW1, PW2 and PW3 went to City Hall where they met one Jacinta Nyawira who told them that she would introduce them to someone who would assist them in the process. The complainants were introduced to one Wambugu who in turn introduced them to the Appellant. PW1, PW2 and PW3 met with the Appellant who promised that he would assist them. At the first meeting, the Appellant asked them to bring the application forms and Ksh. 150,000/- being the application fee. According to the testimonies of PW1, PW2 and PW3, the Appellant was willing to assist them because of his friendship with Jacinta Nyawira. The complainants handed over the Ksh. 150,000/- to Wambugu who deposited the money into the Appellant's account.

Thereafter, PW1, PW2 and PW3 met with the Appellant. The Appellant informed them that the Councillors had requested for Ksh. 650,000/- to facilitate the process, which money was to be shared among various officials of the City Council of Nairobi. The complainants informed the Appellant that they needed to consult with the members of the Society. At this point, they decided to report the matter to the now defunct Kenya Anti-Corruption Commission (hereinafter the Commission). At the Commission's offices, they were directed on how they would record the conversations with the Appellant, to ascertain the demand for a benefit. PW1 was fitted with a recording device on the day they were to meet with the Appellant. When the meeting took place, the Appellant renewed the demand for Ksh. 650,000/- and told them that the renewal process would not go through if that money was not paid. The complainants promised to look for the money. They went back to the Commission offices where the conversation was played back to them.

The Commission officials prepared the complainants to entrap the Appellant in a subsequent meeting when they were to hand over the money requested. PW4, Rose Karen Githinji, an investigator at the Commission treated the money that would be used to in entrapping the Appellant. The money was prepared in two batches, Ksh. 110,000/- in genuine currency notes, while Ksh. 40,000/- were fake currency notes. On the day the complainants were to meet with the Appellant, PW1 was fitted with a recording device. PW2 was given the treated money in an envelope and instructed on when to hand it over. PW8, Charles Samji and PW9, Corporal Wycliffe Sirengo both of whom were investigators at the Commission, accompanied the complainants in the Commission vehicle on 5th October 2010 when they went to meet with the Appellant to hand over the money. They alighted at a strategic point from where they could watch the complainants when they eventually met with the Appellant. The complainants met with the Appellant at City Hall. After a short conversation with PW1, the Appellant requested the complainants to accompany him to his office, but they declined, on the advice of the Commission officials. The complainants got into the Appellant's motor vehicle. The lease documents were brought and handed over to PW1 who ascertained the documents and directed PW2 to hand over the money. Once the money had been handed over, PW1 signaled to the Commission officials who came and blocked the Appellant's car. The Appellant was arrested and the money was recovered in his car.

The Appellant denied committing the offences alleged. In his sworn testimony in court, he admitted that the three complainants approached him on 3rd September 2010 upon being referred to him by a certain lady, seeking his assistance in renewing their lease for a parcel of land in Nairobi. He requested them for the title deed and started the process which was finalized when the extension of the leasehold was granted. He denied that he solicited for any money. He then recounted events leading to his arrest, when he had met the three complainants to hand over the renewed lease. The lease was brought to the complainants who were in the Appellant's vehicle. At this juncture, they were intercepted by persons who claimed to be officials from the Commission. He denied that any money was recovered from him, thus his refusal to sign an inventory prepared by the Commission officials.

Analysis and determination

This being a first appeal, this court is enjoined to reexamine the evidence and reach its own independent conclusion. The Appellant challenged the trial court's decision for failing to find that there was no evidence to show that he was a public officer as charged. He also challenged that the charge was inconsistent with the particulars.

According to the Anti-Corruption and Economic Crimes Act (now repealed), under Section 2, a public

officer is an employee or member of a public body, including one that is unpaid, part-time or temporary. A public body includes the Government, the National Assembly or the Parliamentary Service, a local authority, any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law; or a corporation, the whole or a controlling majority of the shares of which are owned by a person or entity that is a public body.

The issue of the Appellant's position as a public officer did not arise during the proceedings and was not disputed. PW1, PW2, PW3 all referred to him as the Councillor based at the City Council of Nairobi. PW5, John Balongo Bongi, the legal officer who was then attached to the conveyancing section in the City Council of Nairobi testified that the Appellant was well known to him as a Councillor with the City Council of Nairobi. PW7, Omar Abdi Farah, who was at the material time serving as the Deputy Clerk at the Council confirmed that the lease in this case was dispatched from the Mayor's office and collected by the Appellant on 28th September 2010. He confirmed this from the dispatch register an extract of which was produced in court. The Appellant himself stated in his sworn statement He stated that he was a Councillor for Kitisuru Ward in Nairobi. This is not an issue and the Appellant cannot now deny what he himself acknowledged..

On the issue of the inconsistency of the charges to the particulars, the Appellant was charged with three counts of offences. All the three counts of offences arose under Section 39(3)(a) of the Anti-Corruption and Economic Crimes Act. From the particulars, the Appellants solicited for a benefit on two different occasions, constituting the first and second counts. In the third count, the Appellant was charged with actually receiving a benefit. The charges as framed meet the minimum requirements set out under the Criminal Procedure Code.

The Appellant faulted the trial Court for failing to find that the prosecution evidence was insufficient to prove the charges alleged in the absence of the evidence of the recorded conversations and the transcript. There is no dispute that the certain conversations were recorded by the Commission.

PW9 produced in court two sets of recorded conversations which were played in court. They also produced the transcribed copies of the recorded conversations which had also been translated from the *Kikuyu* language into English. The first conversation was recorded as having taken place on 21st September 2010 inside motor vehicle registration no. KAX 685Z outside Equity House along Kimathi Street, Nairobi. The second conversation was recorded on 5th October 2010, similarly inside motor vehicle registration no. KAX 685Z outside Equity House along Kimathi Street, Nairobi. The trial court found the recorded conversations inadmissible on the ground that the voice of the Appellant was not identified by a person who was familiar with it. Thus, it fell short of the required threshold. According to the Appellant, the rest of the evidence does not prove the charges levelled against him.

From the evidence of PW1, PW2 and PW3, they met with the Appellant regarding the renewal of their lease. PW1 testified that on 27th May 2010, the Appellant requested for Ksh. 650,000 to facilitate the process of renewing the lease. This money was to be shared among the mayor, town clerk, deputy town clerk, valuer and legal officer. This demand prompted them to report to the Commission. On 21st September 2010, they went to the Commission where a recording device was fitted on PW1. Subsequently, they met with the Appellant in his motor vehicle where he demanded for the money which they promised to bring on 5th October 2010. PW2 corroborated PW1's account in material respects. However, according to him, the Appellant made the first demand for Ksh. 650,000/ on 3rd September. In an earlier meeting, the Appellant had asked them to pay the application fee of Ksh. 150,000/- for the renewal of the lease which was deposited into the Appellant's bank account. PW2 stated that they reported to the Commission on 15th October 2010. They reported back to the Commission again on 21st September 2010 when they were shown how to record a conversation. They then went to meet with the Appellant, who demanded for the Ksh. Ksh. 650,000/-. This conversation was recorded. A further meeting took place on 5th October 2010. At this meeting, the Appellant handed over the lease and he was given the money by PW2. This conversation was also recorded. This account was corroborated by PW3.

It is therefore, not disputed that the complainants met with the Appellant. Firstly, on 27th May 2010 when the Appellant asked for Ksh. 150,000. Later the Appellant met with the complainant and asked for Ksh. 650,000/- which prompted them to report to the Commission. Again on 21st September 2010 when the Appellant demanded for Ksh. 650,000/-. Finally, they met with the Appellant on 5th October 2010 when the Appellant was arrested. The Appellant admitted that he met with the complainants.

The Appellant seeks to distance himself from any demand for money. From the account already highlighted above, this is not true. Even without the evidence of the recorded conversation, the testimonies of PW1, PW2 and PW3 prove the fact that the Appellant did make a demand for Ksh. 650,000/-. This was supported by PW9 who interviewed the complainants when they reported to him. This demand was the basis for setting up of the trap by PW9 together with other officials of the Commission. The Appellant's own statement is consistent with these facts and contrary to his defence of innocence. His testimony in this respect reads: ***'I did not ask for money from them. They were to buy me tea after the lease was extended on friendly basis.'*** Cumulatively, I am satisfied that from the witness accounts that the Appellant did indeed solicit for a benefit in contravention of the law. Furthermore, his conduct in this regard is consistent with the earlier demand for Ksh. 150,000/- as application fee for the renewal of the lease. From the evidence of PW1, PW2 and PW3, the money was given to one Wambugu and deposited in the Appellant's personal bank account. This being fee payable for the provision of public services, it ought to have been paid to the City Council of Nairobi. The amount requested was over and above the legal payable fee of Ksh. 15,000/-. PW2 even gave a detailed account of how the Appellant indicated that the money was to be shared among the mayor, town clerk, deputy town clerk, valuer and legal officer.

The Appellant seemingly took advantage of the complainants by representing that he could facilitate the process of renewal of a lease. He made them to believe that the renewal process went through as a result of his intervention. Yet this account is not supported by the evidence of PW5, John Balongo Bongi, who was the legal officer attached to the conveyancing section at the City Council of Nairobi. He that confirmed that he had signed the lease documents which he said he had prepared upon being satisfied that the supporting documentation to the application for renewal was proper. He confirmed that the application fee required is Ksh. 15,000/- payable at the City Council cash office. In his evidence, the process was genuinely carried out. PW5 produced in court the minutes for the extension of lease dated 4th April 1997. However, I must observe that as at this date, 4th April 1997, no application for renewal of the lease had been made. The complainants stated that they initiated the process of renewal in the year 2010. This anomaly may be confirmed by the statement of PW5 in his testimony which reads in part as follows:

“For the document to be prepared, one pays Ksh. 15,000/- to the Council for preparation of the document. It is paid at the cash office. That was the only money required to be paid. The document was brought to me by the Clerk (Kiongo) for signing. I did not meet John Njenga Kinuthia. The documents are genuinely done. The council minutes for extension of lease are here in court dated 4.4.1997....There was a request for Ksh. 650,000/- by our office for preparation of those documents. I knew accused person. He was a counsellor with City Council of Nairobi...”

However, in cross-examination, he maintained that the extension of the lease was properly done. There was further evidence that the Appellant was involved in committing the offence. **PW7 Omar Abdi Farah**, who was then the Deputy Clerk at the Council identified the extension of lease documents in court. He confirmed that he signed the extension documents which were accompanied by a forwarding internal memo dated 23rd August 2010 from the Director of Legal Affairs addressed to him for the seal and his signature. Also accompanying the documents were minutes dated 5th February 1997 approving the extension of the lease. PW7 approved the memo and forwarded the documents for signing and approval by the Town Clerk who was the custodian of the seal. PW7 confirmed further that in this case, the leases were dispatched from the Mayor's office and collected by the Appellant on 28th September 2010. This was against the ordinary practice, since documents were supposed to be sent to the legal department for the forwarding letter. I note that PW7 differed with PW6's account on the date of the minutes for the approval of the extension of the lease. Further, by this time, no application for the

extension of the lease had been made. However, the testimony of **PW6**, Thomas Waweru Githuku, who was at the time of testifying a valuer with the City Council of Nairobi made reference to the minutes of 4th April 1997 documenting the approval for the extension. Since PW6 was not working at the Council, he could not elaborate on the process of extension. Nevertheless, PW7's evidence goes to confirm the Appellant's direct involvement in the extension process. He flouted the normal procedure by personally collecting the lease extension which ought to have dispatched through the legal department. PW7 also confirmed that there was no financial gain in sealing the leases.

From the prosecution evidence, the Appellant was arrested with the money that had been treated for his entrapment. This happened in his personal car. PW1, PW2 and PW3 testified that they were all inside the Appellant's car when the Commission officials intercepted them. PW1 had received the lease extension and directed PW2 to hand over the money to the Appellant as they had promised. According to the three of them, the Appellant received the money which was handed over to him by PW2. He complained that the money was not enough.

However, the Appellant has challenged that it was not proved that he was in possession of the money. It was on this basis that he refused to sign the inventory. The Appellant also highlighted some contradictions in the prosecution testimony. He pointed out in the written submissions made on his behalf that while PW8 stated that the complainants had been dropped at the All Saints Cathedral from where they had walked to the Nairobi City Council offices, he stated in cross-examination, that the complainants alighted at the Holy Family Basilica while PW3 indicated All Saints Cathedral. This is a minor discrepancy which does not affect the thrust of the prosecution's case.

Another contradiction highlighted was with regard to the identity of the motor vehicle from which the treated money was recovered. PW8 referred to a motor vehicle registration number KAZ 687Z Subaru while PW9 stated that he saw motor vehicle KAZ 685Z, and later described the vehicle KAZ 685 as the vehicle from which swabs were taken. Furthermore, the photographs allegedly taken by PW8 and PW9 of the accused on top of the motor vehicle were not produced. It was further alleged in the Appellant's submissions that more contradictions emerged with regard to the signing of the inventory in that it was clear from the witnesses that PW1, PW8 and PW9 did not sign the inventory at the scene, yet PW8 stated in his testimony that the inventory was signed at the scene.

These contradictions related to the issue as to whether or not it was proved that the Appellant was linked to the treated money. PW1, PW3 and PW3 stated that they were given money at the Commission offices before being accompanied by PW8 and PW9 to meet the Appellant. The money was a total of Ksh. 150,000/ which was in two batches: Ksh. 110,000/ comprising of genuine Ksh. 1,000 currency notes and Ksh. 40,000/- of fake Ksh. 1,000 currency notes. PW2 who was carrying the money was instructed to hand over the money and remain with the envelope. PW2 stated that he gave out the money as instructed and remained with the envelope which was produced in court.

However, there is the issue of the identity of the motor vehicle from which the money was recovered and dusting done. PW11, Catherine Serah Murambi, attached to the Government Chemist in Nairobi carried out an analysis to establish whether the APQ powder used to treat the money could be detected from swabs taken of the Appellant's hands, swabs taken from the front seats of motor vehicle KAX 865Z Subaru; currency notes and the envelope which had contained the treated money. In her analysis, PW11 found that all the exhibits presented to her contained the APQ. She produced the report of her analysis in court.

The main contention is with regard to the identity of the motor vehicle. None of PW1, PW2 or PW3 gave a description of the motor vehicle registration number. PW9 stated that on the material date, he saw the Appellant's motor vehicle KAZ 685Z. He reiterated during cross-examination that the Appellant was driving motor vehicle registration number KAZ 685Z but stated that he received a report of the swab from motor vehicle KAX 685Z Subaru. In re-examination, stated that the reference to motor vehicle registration number was an oversight, and restated that the motor vehicle was a blue Subaru registration no. KAZ 685Z. PW11 who carried out the analysis of samples taken from the Appellant's car stated that she analysed samples taken from the seats of the car registration no. KAX 865Z Subaru. PW8 who

accompanied PW9 in arresting the Appellant described the Appellant's motor vehicle as KAZ 687Z, Subaru.

It appears that the description of the motor vehicle registration number as KAX emanated from PW9 and passed on to PW11 who carried out the analysis. Ordinarily, the mis-description of the Appellant's car would be material as taken in isolation, it would mean that the swabs taken were of another vehicle that was not intercepted. However, I find that the discrepancy in this case can be cured. From the accounts given by the complainants herein, the interception by the Commission officials (PW8 and PW9) was immediate.

It was a continuous chain of events from the time they met with the Appellants, got into his car and handed over the money. Even the Appellant in his defence testimony stated that the complainants approached him in his car KAZ 685Z. The Appellant did not deny that he met with the complainants in his car and that the lease was delivered to them. He only denied receiving any money. Thus, were this court to disregard the swabs taken from the car seats of the motor vehicle, there was other evidence connecting the Appellant to the money. PW2 testified that he handed over the money to the Appellant. I am persuaded by the truthfulness of this account because the envelope which contained the money was retained by PW2 and was one of the exhibits subjected to analysis. Furthermore, swabs were also taken of the Appellant's right and left hands. The analysis of these swabs turned positive. If no money had exchanged hands, then such tests would not have been positive.

Furthermore, besides treating the money that would be used to entrap the Appellant, PW4 also made copies of the currency notes. They were counter signed by PW4 and PW2. An inventory of the money was also prepared. When the money was recovered, a recovery inventory was also prepared. The serial numbers on the copies made and the money eventually recovered matched. Thus taken cumulatively, there is no doubt that the prosecution firmly established that possession of the treated money had indeed passed to the Appellant. The chain of events was not broken as to create any doubt regarding the movement of the monies to the Appellant. The failure by the Appellant to sign the inventory in my view does not render the evidence on the recoveries inconclusive. I therefore find that the Appellant was properly convicted of the offences as charged.

Finally on the sentence, the Appellant urged this court to consider that the mandatory sentence was not called for since the complainant had not suffered any loss, given that the lease which was the subject issue was renewed as initially sought. **Section 39 (3)(a)** under which the Appellant was charged provides:

“A person commits an offence if the person corruptly receives or solicits or corruptly agrees to receive or solicit, a benefit to which this section applies.”

Section 39 applies to the conduct of an agent in relation to the affairs or business of the agent's principal. In this case, the Appellant represented himself as capable of assisting the complainants in the renewal of lease, a service offered by the City Council of Nairobi. He corruptly solicited for a benefit on the promise of facilitating a service offered by the City Council of Nairobi. The penalty prescribed by **Section 48** is a fine not exceeding one million shillings, or imprisonment for a term not exceeding ten years, or to both; and an additional mandatory fine if, as a result of the conduct that constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss. The determination of the mandatory sentence is guided by the amount of benefit received and/or loss suffered as a result of the conduct of the guilty person.

In this case, the Appellant solicited for a benefit and subsequently received some money which was used as an entrapment to arrest him. This money was received by the Appellant but was soon thereafter, recovered in full by the Commission officials. In my view, this amount of money that was used as an entrapment and eventually recovered does not amount to actual quantifiable benefit made or loss incurred. I also take note of the fact that the Appellant caused the complainants to pay Ksh. 150,000/- as the application fee while in fact the legally chargeable fee was Ksh. 15,000/-. The said money was deposited into his account. This shows that the Appellant illegally benefited himself by making a misrepresentation to the complainants. However, was not the subject of any of the charges against the accused and cannot,

therefore, be part of the conviction.

The conduct of the Appellant meets the elements of the offence as prescribed under Section 39. Even though the money was recovered, the Appellant, nevertheless, corruptly received a benefit, in furtherance to his earlier soliciting for the money. Therefore I uphold the conviction of the Appellant on all counts as charged.

I observe further that the trial Magistrate did not indicate on how the sentences should run. Sentencing is an exercise of judicial discretion and appellate courts will not interfere with a trial courts finding unless it is found the court acted on a wrong principle of the law or considered irrelevant factors or the sentence meted is excessive considering the circumstances of the case. (See **Ng'ang'a v Republic (1981) KLR 530**). I am of the view that in the circumstances, the sentences ought to have been prescribed to run consecutively. Further to my observations above, the mandatory additional sentence under Section 48(1) was not appropriate in this case. I note that, the Appellant was sentenced in the year 2010, thus, by the date of this Judgment, he may have already either paid the fine or served the respective imprisonment terms in default of payment. Therefore, I uphold the conviction and the sentences in all counts. The mandatory sentence prescribed under count III is set aside because, in fact, no money under that count was lost. It was money used for a trap and it was recovered. The Appellant is entitled to claim a refund of Ksh. 220,000/- if any had been paid. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23rd DAY OF JULY 2015

G.W.NGENYE -MACHARIA

JUDGE

In the presence of:

Mr. Achoki holding brief for Mr. Kanyi for appellant

Miss Ngetich for the Respondent