REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO 206 A OF 2010

PAUL MWANGI GATHONGO…….…….APPELLANT

VERSUS

REPUBLIC…….....……..……..……RESPONDENT

(Appeal against Judgement, sentence and conviction in Criminal case number 9 of 2008, R. vs Paul Mwangi Gathongo at Nyeri, delivered by S. M. Muketi, CM, delivered on 27.7.2010).

JUDGEMENT

Paul Mwangi Gathongo (hereinafter referred to as the appellant) was charged with the offence of soliciting a benefit contrary to Section **39 (3) (a)** as read with Section **48 (1)** of the Anti-Corruption and Economic Crimes Act[1](herein after referred to as the Act) at the Chief Magistrates court at Nyeri on 30.12.2008.

The particulars of the offence were that on 19th day of December 2008 at Kirogo Health Centre Murang'a within Central Province, being a person employed by a public body, to wit, Ministry of Public Health and Sanitation as a Clinical Officer, corruptly solicited for a benefit of **Ksh. 1,000/=** from **Joyce Muthoni Waitherero** as an inducement to fill a P3 form in respect of the said **Joyce Muthoni Waitherero,** a matter in which the said public body was concerned.

The appellant faced a second count of receiving a reward contrary to Section **39 (3) (a)** as read with Section **48 (1)** of the Act[2] It was alleged that on the 23rd day of December 2008 at Kirongo Health Centre Murang'a within Central Province being a person employed by a public body to wit Ministry of Public Health and Sanitation as a Clinical Officer, corruptly received a benefit of Ksh. 1,000/= from **Joyce Muthoni Waitherero**as a reward for filing a **P3 form** in respect of the said **Joyce Muthoni Waitherero**, a matter in which the public body was concerned.

Even though none of the counsels mentioned this, it is important for me to mention that the two count the appellant was charged with are created by the same section, i.e. Section 39 (3) (a) cited above, and that they are premised on the same particulars and substantially if not wholly the same evidence offered by the same witnesses. This court finds it absolutely necessary to address its mind to the question whether or not the appellant was subjected to *"double jeopardy"* and if so what are the implications. Further, it is also important for the court to address its mind to the well grounded principle of *"same evidence rule"* that is can an accused person be punished twice which punishment or conviction is based on the same evidence, same facts. If so what are the implications to the conviction. If not, are their exceptions to the same "*evidence rule"* and does this case fall under the exceptions. I will address these illuminating issues of law

later in this judgement.

This being a first appeal, it is incumbent upon this court to re-analyse and re-evaluate the evidence adduced before the trial court and come up its own conclusions while at the same time bearing in mind that this court did not have the advantage of seeing the witnesses testify. *(See Kiilu & another vs Republic,*[3]*Okeno v. R*[4] *and Dinkerrai Ramkrishan Pandya vs. Republic*[5]*).*

In other words, the first appellate court must itself weigh conflicting evidence and draw its own conclusions.[6] It is the function of a first appellate court 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, if should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses**.**[7]

PW1Joyce Muthoni Waitherero who was a victim of assault reported the incident to the police who gave her a note to proceed for treatment at Kirogo Health Centre where she was treated. On 19.12.08 she took her witnesses to the police to record statements. She was issued with a P3 form to be completed by a Doctor as required in such cases. She took the P3 to Karogo Bealth Centre and met the appellant at the office who told her he fills the P3 with Kshs.1,000/=. She did not have the money, she informed her uncle who sought to talk to the appellant on phone to get an explanation why the money was required but was not able to talk to the complainant because he was not willing to talk to people he did not know, so she went away. Her uncle went to the Kenya Anti-corruption Commission and reported. He came with officers from Anti-corruption Commission who gave her a recording device and showed her how to use it. She was fitted with the device. She went with her uncle on 23.12.08 and met the appellant; she had switched on the device. She recorded the conversation and took it to the officers who listened and confirmed he was demanding Ksh. 1,000/=. The officers gave her Ksh. 1,000/= which was treated, they noted the serial numbers and had taken a copies of the same. The Ksh. 1,000/= was given to her in an envelope. She went with her uncle and found the appellant had filled the P3 form, she asked if he could reduce the amount and he declined, she removed the Ksh. 1,000/- and gave him and in return he gave her the P3 form. Her uncle telephoned the officers and they came and entered the office. The money was recovered from the appellants' drawer.

The tape was also played in court and she recognized the voices. She identified the tape in court and the money she had been given by the officers and the P3 form. She also signed to confirm the money was recovered from the appellant and she identified her signature in court.

On cross-examination the witness said the appellant had mentioned to her filing the P3 form entails going to court to give evidence.

PW2 No. 60527 Snr Sgt Robert Karani an investigator at KACC, recalled that that PW1 was given a recording device to record he conversation with the appellant. They retrieved the Ksh. 1,000/= from the complainant and played back the tape. He made an inventory which was signed. They arrested the appellant. He identified the money in court and produced the exhibits. He also identified the appellant in court. On cross-examination he said the appellant showed him where the money was.

PW3 Dr. Emphantus Maree a Doctor at Muranga District Hospital testified that the officers investigating this case visited him and informed him that they were investigating an officer who was under him. They played the tape to him and he heard a voice resembling the appellants.' He confirmed that P3 forms are filled at the district hospital or at the health centre where there is a clinical officer and that at the district hospital the client pays Ksh, 500/= while at the health centre level there was a directive by the ministry of health that a client above 5 years old pays Ksh. 20/= and that they had advised the clinical officers to refer clients to the District Hospital. Upon payment of the Ksh. 20/= the payee is issued with a receipt and the P3 is filled. He identified the appellant in court.

PW4 Simon Sunguti, a government analyst working in Nairobi analysed the exhibits referred to in his evidence to confirm if the controlled sample would be detected in the exhibits marked A to E and confirmed that they were detected. He produced the report marked exhibit **18.**

PW 5 No. 61226 Sgt Eunice Njeri, a police officer seconded to **KACC** as an investigator confirmed that they interviewed **PW1** and introduced her to a recorder and instructed her how to operate it. They listened to the tape after she recorded and established a bribe demand. She gave her treated money, she checked the copies and confirmed they tallied, then she signed the inventory. She instructed her on how to handle the money. They had arranged that the reporter signals as soon as the appellant receives the money. That Samuel Murage received the signal and they proceeded to the appellants office. The money was recovered from the upper drawer; they swabbed the drawer and the appellants' hands. She signed the inventory that was prepared. She produced the exhibits 4, 5,6, & 7.

On cross-examination she confirmed that before the incidence there was a demand and that the appellant showed where the money was.

PW 6 No. P.C. Patrick Mbijiwe testified that he was asked by Samuel Murage to prepare 1,000/= in 100/= denominations in APQ powder. He photocopied the notes, 10 of them. He signed the photocopy, he took Eunice Njeri through the serial numbers and she confirmed with the inventory. She handed the same to her and she signed at page 2 of the inventory.

PW 7 No. 82139 P.C. Samuel Murage the investigating officer confirmed that he interviewed the reporter and instructed PW6 to treat Ksh. 1,000/= by applying the APQ chemical, which he did and handed over to PW5 and himself, PW5 and PW2 proceeded to Muranga. He introduced PW1 to the recording device, and recorded a statement, she signed on the cassette and he put a certificate tape recorder (Exhibit 4). He identified the microphone (exhibit 5) in court, the first visit was made but the suspect was not in the office, he entered a certificate to that effect. The next attempt was successful and the demand for Ksh. 1,000/= was made and PW1 agreed to look for the money and lastly a another certificate was prepared and PW1 was given the cash to take to the suspect and this time PW1 and the appellant had a conversation, was given the P3 and PW1 handed over the cash to the appellant, they received the signal, entered the office and arrested the appellant. His both hands were swabbed for the APQ chemical and PW2 recovered the 1,000/= from the right side upper drawer. PW2 prepared the inventory, he witnessed in respect of the money (Ex. 11). He identified the appellant in court. They also recovered the other exhibits referred to in his evidence and escorted the appellant to the police station. He prepared the exhibits. He went to Muranga District Hospital to get voice identification. He played the cassettes to PW3 who also confirmed that the appellant was required to refer P3form cases to the District Hospital and that he did not have a receipt book. The witness produced exhibits 1, 8, 15, 16, 17, 20 (a) & (b) and 21 (a) & (b) in court.

At the close of the prosecution case, the trial Magistrate found that the accused had a case to answer and put him on his defence. The accused elected to give sworn defence. He denied that he solicited for a bribe of Ksh. 1,000/=, and that the money was to cater for transport from Kangema court, that the tape was not audible. He insisted no swabs were recovered from his office and that a voice confirmation certificate was not produced.

After analysing the evidence, the learned Magistrate found that the prosecution had proved its case beyond reasonable doubts in both counts and convicted the accused as charged in both counts and sentenced him as follows:- ***Count 1:****Fined Ksh. 20,000/= in default 12 months and in addition the mandatory sentence of Ksh. 2,000/= in default six (6) months.* ***Count 2:*** *Fined Ksh. 20,000/= in default 12 months and in addition the mandatory sentence of Ksh. 2,000/= in default six (6) months.*

By a petition of appeal filed on 2nd August 2010, the appellant appealed against the said conviction and sentence and advanced **5** grounds of appeal summarized below, namely:-

a. *That the charges were fatally defective since the word "corruptly" were omitted, hence the appellant was convicted of unknown offences.*
b. *That the evidence was insufficient, contradictory and uncorroborated.*
c. *The magistrate did not evaluate and or consider the submissions made by the defence counsel.*
d. *That the magistrate shifted the burden of prove to the appellant.*
e. *That a vital witness was not called.*

Counsel for the appellant **Mr. Njuguna Kimani** submitted that the appellant was convicted on a non-existent charge and cited the case of *Thoya vs Republic**[8]*** where Waki J (as he then was) held that *'conviction cannot ensue for an offence which is not preferred and is not cognate."* Counsel invited the court to look at Section **39 (3) (1)** of the Act and held that the omission to use the word *"corruptly"* was incurable under the provisions Section **382** of the Criminal Procedure Code.[9] Counsel lamented that it was laughable a conviction was arrived at based on the evidence which had glaring omissions, gaps and was not clear and that the alleged offence was reported by another person other than the complainant.

Counsel also cited inconsistencies on the dates and that a crucial witness, the person who reported to the police and who was present at the time the money was given was not called as a witness. Counsel submitted that an adverse inference ought to be drawn on account of failure to call the said witness and cited the case of *Nguku vs Republic*[10] where it was held *inter alia* that *"where a party fails to produce certain evidence, a presumption arises that the evidence, if produced, would be unfavourable to that party; this presumption is not confined to oral testimony but can also apply to evidence of tape recording which is withheld."*

Counsel also cited the case of *Juma Ngodia vs Republic**[11]*** where the officer who conducted an identification parade was not called as a witness and the court held that failure to call a vital witness without satisfactory explanation creates a risk of the court assuming that the evidence could have been unfavourable to the prosecution had it been produced. I will comment on these authorities later.

Counsel for the appellant further submitted that voice identification was not proper and that there was no voice confirmation certificate and that submissions made in the lower court were not considered and that no reason was offered as to why the defence was rejected.

Counsel further submitted that Section **169** of the Criminal Procedure code[12] was not complied with and that the court shifted the burden of prove to the appellant. Finally counsel submitted that the sentence dos not conform to the law and urged the court to allow the appeal, quash the conviction and set aside the sentence.

Miss Kitoto for the state opposed the appeal, and argued that the alleged defect in the charge sheet (if any) is not fatal and is curable under the Criminal Procedure Code,[13]that the evidence adduced was sufficient, and that the alleged inconsistency at page **37** of the proceedings is a typing error and cannot be a ground for acquittal, that the alleged vital witness was a relative and failure to call him was not fatal. On the tape, she submitted that PW1 identified the voice and that was sufficient, and that the schedule was marked and produced and that at no time was the burden of prove shifted to the appellant and urged the court to dismiss the appeal.

I now address ground number **one** of the appeal, namely whether the charge sheet is defective for failure to use the word ***"corruptly."*** I proposed to examine each count separately. I will start with count one. This calls for close examination of Section **39 (3) (a)** of the Act which provides as follows:-

39 (3) *A person is guilty of an offence if the person-*

> *(a) Corruptly receives **or** solicits, **or** corruptly agrees to receive **or** solicit, a benefit to which this section applies;*

According to *dictionary.com*[14] the word **'or'** is used to connect words, phrases, clauses representing alternatives, it's used in correlation such as *either or*. The *Longman Dictionary of Contemporary English**[15]*** defines *"or"* as:-

> *"Conjunction used between two things or before the last in a list of possibilities, things that people can choose from, either…… or……,*

The *New Choice English Dictionary**[16]*** defines **"or"** as follows:-

'Conjunction denoting an alternative, the last in a series of choices'

Conjunction is defined in the same dictionary as *"a word connecting words, clauses or sentences…"*

The *Oxford Advanced Learner's Dictionary of Current English*[17] defines *'OR'* as a word *"used to introduce another possibility"*

The *Concise Oxford English Dictionary defines****[18]*****"or"** as a *'conjunction used to link alternatives.'* The same dictionary defines the word *'conjunction'* as *a word used to connect clauses or sentences or to coordinate words in the same clause.*

Considering the above definitions which are unanimous that the word *"or"* is used to *introduce another possibility or alternative*, I am persuaded beyond doubt that the use of the word *"or"* in Section **39 (3) (a**) falls under the above definitions. The operative words in Section **39 (3) (a)** are "*corruptly receives "**or"** solicits."* To my mind these are two words joined by the word **"or"** and that the word **"or"** has been used to introduce another possibility that is an alternative to the first word. Thus, with regard to count one, the charge sheet can contain either of the two possibilities that is *"corruptly receives or solicits"*. Both of them need not appear in the charge sheet. On this basis, I find that the charge sheet as drawn in count one is proper.

As for count two, I am of the view that it was necessary to include the word *"corruptly" i*n the charge sheet. The wording of the section is *"Corruptly receives" **or** ....., **or** "corruptly agrees to receive" **or** ....., a benefit to which this section applies;* The wording here is so clear that it requires no explanation. I opt to say no more on this.

Having agreed with the appellants counsel on this point, I now proceed to determine whether such an omission is fatal or curable. In this connection, it's paramount to bear in mind the provisions of Section **382** of the Criminal Procedure Code which provides:-

> *"Subject to the provisions hereinbefore contained, no finding, sentence, or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission, or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgement or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice:*
>
> *Provided that in determining whether an error, or omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings"*

Also relevant to the issue at hand are the clear provisions of Section **134** of the Criminal Procedure Code which provides that:-

> *"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving information as to the nature of the offence charged."*

I have diligently searched the entire record and I find that no objection to the charge sheet was raised at all through-out the proceedings. Discussing the above proviso, **Rudd J** in the case of **Mwasya vs Republic**[19]stated that *"as regards the proviso to this section, no objection to the charge has been raised at all to this very moment by the appellant. On the other hand if the appellant in the said case had objected to the charge at any proper time in the lower court the charge could have been amended to fall within the proper provisions."*

I find nothing to show that the charge sheet as drawn with regard to count two was in incurably defective or prejudicial to the appellant. In my view count two as drawn discloses an offence under section **39(3)**

(a) of the Act. As pointed out below it was not necessary to use the word *"corruptly"* (and even assuming it was) I strongly hold the view that failure to use the word *"corruptly"* is an error that can be cured by an amendment. Thus, even if the said omission constituted a defect, such an omission is not in the opinion of this court fatal nor can it be said to have occasioned injustice. My position in this regard is fortified by the holding in the case of **Seidi vs Republic**[20] where the state counsel conceded in court that the charge sheet as framed was defective. The court held that the defects in the charge sheet had occasioned no failure of justice and were curable.

A similar position was held in the case of **Mwasya vs Republic**[21] where the court authoritatively held that the charge was defective, but not of such an irregularity or error as had occasioned a failure of justice under section **382** Criminal Procedure Code.

In **Avone vs Uganda**, the court held that where the mis-descriptions in the charge sheet had not prejudiced the appellant, the convictions ought to be allowed to stand.

I am fully alive to the fact that it is an established position that where a charge sheet does not allege an essential ingredient of [22]the offence, then it is defective. In the case of **Sigilani vs Republic**[23] it was held that the principle of the law governing charge sheets is that an accused person should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.

This court takes the view that from the onset, the appellant knew the charge facing him. The particulars were carefully spelt out and the appellant has not demonstrated that he suffered any prejudice as a result of the charge sheet. He fully participated in the trial and the trial process was fair.[24] The charge sheet outlines the essential ingredients and particulars of the offence in count two and the evidence adduced was geared to establishing the said offence and the defence offered was clearly a direct response of the allegations made against the appellant, thus he fully understood the nature of the offence and the evidence against him. Thus where no prejudice is alleged to have been suffered or demonstrated, or the charge sheet is out rightly defective or ambiguous the court will be reluctant to pronounce the same as defective. Accordingly, I find no merit in ground number **one** of appeal and I hereby dismiss it.

I turn to ground number **5**, namely; failure by the prosecution to call a crucial witness, namely the relative who reported the complaint first to the Anti-Corruption Commission and who was present when the bribe was allegedly given. Section **143** of the Evidence Act[25]provides as follows:-

> *"No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact"*

In *Julius Kalewa Mutunga vs Republic*[26] the Court of Appeal held as follows:-

> *"…As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive"*

The Court of Appeal reiterated the above position in the case *Alex Lichodo vs Republic*.[27] Perhaps the leading authority on this issue is the case of *Bukenya & Others vs Uganda*[28]where the East African Court of Appeal held that:-

i. *the prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.*
ii. *The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.*
iii. *Where the evidence called barely is adequate the court may infer that the evidence of uncalled*

witness would have tended to be adverse to the prosecution.

But in the same vein the court was categorical to state that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly it will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case. My re-evaluation and analysis of the evidence submitted in the lower court concludes that this is not a proper case for the court to make an adverse inference because as concluded below, the evidence tendered was sufficient to prove the facts in issue.

I hasten to support my above conclusion by reiterating that it should be made clear that the rule in *Jones vs Dunkel*[29] which outlines the circumstances under which an adverse inference may be drawn where a witness is not called is grounded on common sense. The prosecution has discretion to assess the importance that the testimony of a witness would play, or would likely have played in relation to the issue concerned. Nonetheless, I should outline what I apprehend to be the basic jurisprudence that has developed in relation to the rule and that has governed the way I approach the issue at hand.

The unexplained failure by a party to give evidence or call a witness or tender certain documents may, in appropriate circumstances lead to an inference that the uncalled evidence would not have assisted the party's case. The failure to call a witness or tender documents can allow evidence that might have been contradicted by such witness or document to be more readily accepted. Further, where an inference is open from the facts proved, the absence of the witness or documents may be taken into account as a circumstance in favour of the drawing of the inference. But the absence of a witness or document cannot be used to make up any deficiency in the evidence. Thus it cannot be used to support an inference that is not otherwise sustained by the evidence. The rule cannot fill gaps in the evidence or convert conjecture and suspicion to inference.[30]

Whether the failure to call a witness or tender a document gives rise to an inference depends upon a number of circumstances. In *Fabre vs Arenales*[31] Mahoney J (Priestly and Sheller JJA agreeing) said that the significance to be attributed to the fact that a witness did not give evidence depends in the end upon whether, in the circumstances, it is to be inferred that the reason why the witness was not called was because the party expected to call him feared to do so. There are circumstances in which it has been recognized that such an inference is not available or, if available, is of little significance. The foregoing position was cited with approval by Miler JA in *Hewett vs Medical Board of Western Australia*[32] and also the same position has authoritatively been stated by Heydon J D in *Cross on Evidence*.[33]

The rule only applies where a party is required to explain or contradict something. What a party is required to explain or contradict depends on the issues in the case as thrown in the pleadings or by the course of the evidence in the case. No inference can be drawn unless evidence is given of facts requiring an answer. This position was upheld in the following cases, namely; *Schellenberg vs Tunnel Holdings*, [34] *Ronchi vs Portland Smelter Services Ltd*[35] and *Hesse Blind Roller Company Pty Ltd vs Hamitovski*[36] and its also reiterated in *Cross on Evidence*.[37]

When no challenge is made to the evidence of witnesses who are called, the principle in *Jones vs Dunkel* cannot be applied to make an inference in respect of other witnesses who could have been called to give the same evidence.[38] A look at the record shows that PW1"s evidence is largely unchallenged, and even counsel for the appellant said *"other than the evidence of PW1, the rest of the evidence is shabbolic."* The witness who was not called was to give the same evidence or corroborate PW1's testimony whose evidence has not been said to have gaps which needed further clarification. As explained in *Cross on Evidence*,[39] the rule does not require a party to give merely cumulative evidence.

In order for the principle to apply, the evidence of the missing witness must be such as would have elucidated a matter.[40]The appropriate inference to draw is a question of fact to be answered by reference to all the circumstances of the case.

The authorities cited by counsel for the appellant on this issue can easily be distinguished in that *Nguku*

vs Republic[41]relates to evidence of tape recording which was withheld while in *Juma Ngodia vs Republic**[42]*** the officer who conducted an identification parade was not called as a witness. He was a vital witness and no satisfactory explanation was offered. The missing witnesses in the two cases cited were of such a nature that the evidence tendered without them was inadequate unlike the present case. I therefore find that ground number **5** of the appeal has no merit and I dismiss it.

On the alleged variance of dates referred to by the appellants counsel, I stand guided by the decision of the Court of Appeal in the case of *Jeremiah Mulei Kimeu vs Republic*[43]where it was held that the court will only intervene if such variance was material to the circumstances of the case. I have looked at the alleged dates and the context in which they were stated in the evidence and taking all the evidence in to account I find that the alleged inconsistencies if any are not material to the circumstances of the case.

Counsel for the appellant submitted that the learned Magistrate did not comply with the provisions of Section 169 of the Criminal Procedure Code.[44] I agree. Section **169 (2) & (3)** of the Criminal Procedure Code[45] provides as follows:-

> **(2)** *In the case of a conviction, the judgement shall specify the offence of which, and the section of the Penal Code or other law under which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.*
>
> ***(3)*** *In the case of an acquittal, the judgement shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty.*

In the judgement that the learned Magistrate stated:- *"…… It is on the basis of the foregoing that the court finds the accused person guilty as charged in both counts and convict him on both counts"* There is no mention of the section of the law under which the appellant was convicted or the offence in question.

Clearly, Section **169 (2)** of the Criminal Procedure Code cited above provides that the trial court ought to specify in the judgement the offence of which, and the section of the Penal Code or other law which, the accused person is convicted and the prescribed punishment to which the accused is sentenced. I note that the learned Magistrate did not comply with the above section, even though I hold the view that the said omission is not fatal, in my view it is a requirement under the said section that ought to be complied with.

I propose to combine grounds **2, 3, 4,** together. This calls for a close examination of the evidence and the ingredients of the offence and as I do so I wish to point out that the legal burden of proof in criminal cases never leaves the prosecution's backyard as was held by **Viscount Sankey L.C.** in the celebrated case of **Woolmington vs. DPP.**[46]

The word *"soliciting"* is not defined under the Act. The *Concise Oxford English Dictionary**[47]*** defines Soliciting *"as to ask for or try to obtain something from someone"*. The *Merriam-Webster*[48] on line dictionary offers the following definition:- *"to ask for (something, such as money or help) from people, companies, etc., to ask (a person or group) for money, help, etc."*

In *State v. Wallace*,[49]it was held that "*solicitation means the asking, enticing, or requesting of another to commit a crime of bribery*." To constitute the crime of solicitation of a bribe, it is not necessary that the act be actually consummated or that the defendant profit by it. It is sufficient if a bribe was actually solicited.

The main ingredients of the offence are that the accused must be acting in any capacity, whether in public or private sector, or employed by or acts on behalf of another person, that he must be shown to have obtained or attempted to obtain from any person gratification other than legal remuneration, that the gratification should be as a motive or reward for doing or forbearing to do, in the exercise of his official function, favour or disfavour to any person. The gravamen of the offence is acceptance of or the obtaining or even the attempt to obtain illegal gratification as a motive or reward for inducing a public servant for corrupt or illegal means. The receipt of gratification as a motive or reward will complete the offence.

In order to constitute an offence three things are essential; in the first place, there must have been solicitation or offer or receipt of a gratification. Such gratification must have been asked for, offered or paid as a motive or reward for inducing by corrupt or illegal means, and secondly that someone should be acting in the public or private or employed or acts for and on behalf of another person, or confer a favour or ask for a favour to render some service.

Carlson Anyangwe in his book *"Criminal Law in Cameroon, Specific Offences"*[50]authoritatively states that to secure a conviction, it must be shown that the accused *'solicited'* a benefit not legally due. The term soliciting implies that the accused took initiative to ask for the bribe and that he actively allowed himself to be corrupted. The crime is consummated by the mere fact of soliciting a bribe. It is enough that there was soliciting. Even if the person solicits a bribe then changes his mind and decides to do his duty without taking a bribe, the crime is nevertheless consummated though the change of heart might mitigate his punishment. Thirdly the benefit solicited must be any gift, loan, fee, reward, appointment, service, favour, forbearance, promise, or other consideration or advantage. It is implicit in the wording of the section that the promise, gift or present must be something that is not legally due. It should be remembered that the crime is committed by the mere fact any of the foregoing was solicited. Further, the prosecution must show the purpose for which the item, favour or promise was solicited.[51]

The gist of the offence is that it is corruption to ask for any benefit not legally due in order to do one's appointed duty. It's always against the public interest to secure a benefit by corruption. The public servant is paid a salary to perform his appointed duties. He is therefore bound by law to discharge those duties without seeking further or other emoluments.

In *Cooper vs Slade*[52] the court held that the offence does not require dishonesty and a person acts *'corruptly'* if they do any act which the law forbids as tending to corrupt. In *R vs Harvey*,***[53]*** the court upheld the *Cooper vs Slade****[54]***and found that dishonesty was irrelevant and corruption was to be construed as deliberately offering favours intending that they should operate on the mind of the offeree to encourage him/her to enter into a corruption bargain.

Turning to this case, did the appellant ask for Ksh. 1,000/= from PW1?. I find no difficulty in answering this question in the affirmative. First the appellant does not deny asking for the money. He denies that it was a bribe. He explains that it was to cover costs in the event of being required to attend court. Was that a genuine and innocent explanation or an excuse to cover the act. I am persuaded that the said explanation was not genuine. First criminal trials are prosecuted by the state. The state takes the responsibility of ensuring that the witnesses attend court and even meets their subsistence/travelling expenses. The complainant attends as a state witness. It is not the responsibility of the complainant to facilitate witnesses to attend court and it has never been the case.

Secondly, PW1 testified of a first attempt to get the P3 and during the first encounter she was asked to give Ksh. 1,000/= prompting her to call a relative who was keen to find out what the money was for an attempts to get an explanation over the phone was unsuccessful. Next came the visit when the first tape recording was made and the amount was solicited again. It was not legally due nor was it payable. As stated earlier, the mere act of soliciting is enough and to me this was sufficiently proved. Even without the recorded testimony, the oral evidence of PW1 taken together with all the other witnesses is in my view consistent and cogent enough to establish the act of soliciting. Thus, since the recorded evidence was not the only available evidence offered by the prosecution, I find that even if we were to exclude it, the remaining evidence sufficiently established the act of soliciting.

I now turn to count two, that is receiving a reward contrary to section **39 (3) (a)** as read with Section 48 (1) of the Act. As pointed out earlier, one thing that cannot escape anyone's attention is the fact that both counts the appellant was charged with fall under the same section i.e. contravening section 39 (3) (a) of the Act. The question that follows is does the said section create more than one offences? Alternatively, can an accused person be charged with two counts arising from the same set of facts and circumstances? Was the accused subjected to double jeopardy. It is trite law that the *double jeopardy rule* protects an accused person against ***(a)*** *retrial after an acquittal,* ***(b)*** *retrial after a conviction,* ***(c)*** *retrial after certain mistrials and* ***(d)*** *multiple punishments.*

The above scenario raises the question whether Parliament indented an accused person to be punished twice for the same conduct based on the same set of facts and supported by the same evidence. This brings into sharp focus *'the same evidence rule'* enunciated in the case of *Blockburger vs United States**[55]* where it was held that *"the test to be applied is whether there are two statutory offences or only one and whether each requires prove of a fact which the other does not." Justice Sutherland,* writing a unanimous decision of the court deciding the issue whether or not the defendant had been subjected to double jeopardy reasoned as follows:-

"Each of the offences created requires proof of a different element. The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offences or only one is whether each provision requires proof of an additional fact

I am clear in my mind that parliament deliberately created more than one offences under one section. To me both offences require prove of additional facts separate from each other. It is possible for a person to corruptly receive without soliciting especially where the inducement comes from the giver. Such a giver will be committing an offence under Section 39 (3) (b). It's also possible for someone to solicit and he does not receive especially if the giver declines to give. It's also possible for someone to solicit and corruptly agree to receive. All these situations require prove of additional facts.

The next question is whether the appellant received a benefit. Benefit is defined in Section 2 (1) of the Act as follows:- "benefit" *means any gift, loan, fee, reward, appointment, service, favour, forbearance, promise, or other consideration or advantage.*

The appellant admitted receiving Ksh. 1,000/= but explained that it was meant to cater for costs in the event of attending court. I have already expressed my findings on the said defence. The essential ingredients of the offence are that the accused must have received a benefit as defined above, that it must have been received corruptly as an inducement to bring about some given results in a particular matter, that the benefit must not be legally due or payable. PW3 confirmed that the appellant did not have a receipt book and from his evidence, it's clear that the amount in question was not legally due and as already stated above, it's not the responsibility of a complainant in criminal trials to finance prosecution witnesses and it was not even clear when and if the matter would end up in court and whether the appellant would be the one to attend court because such documents can also be produced by any other competent officer if the person who prepared it is not available. The justification offered by the appellant is not convincing at all.

Defining the essential ingredients of an offence of this nature, the High Court of Uganda in the case of *Uganda vs Odech Ensio*[56] stated as follows:-

i. *the accused must have been an officer of a public body at the time of the offence;*
ii. *the accused must have received a gratification at the material time; and*
iii. *the act in paragraph (b) must have been done corruptly as an inducement to bring about some given results in a matter concerning that public body*

The above quotation expresses the correct legal position on the necessary ingredients and I find that count two was proved to the required standard. Thus, grounds 2, 3 & 4 of the appeal are unsuccessful.

On sentence I stand guided by the general principles the court adopts in appeal relating to sentence as stated by Nicholas J in the South African case of *R vs Rabie*[57] where the learned judge stated that *"In every appeal against sentence, whether imposed by a magistrate or a judge, the court hearing the appeal-*

a. *Should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial court;'' and*
b. *Should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judiciously and properly exercised"*

The test for (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.

As stated earlier, the appellant was fined Ksh. 20,000/=count one in default 12 months and in addition the mandatory sentence of Ksh. 2,000/= in default six (6) months. Also, for count two he was fined Ksh. 20,000/= in default 12 months and in addition the mandatory sentence of Ksh. 2,000/= in default six (6) months. Applying the test whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate as held in the above case, it is necessary to examine Section 48 of the Act which provides as follows:-

48 Penalty for offence under this part

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

(a) a fine not exceeding on million shillings, or to imprisonment for a term not exceeding ten years, or to both; and

(b) an additional mandatory fine if, as a result of the conduct that constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss.

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

(a) the mandatory fine shall be equal to two times the amount of the benefit described in subsection (1) (b);

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

I have carefully considered the above section and the sentence imposed and I am persuaded that the sentence is in accordance with the said section, that it is not vitiated by irregularity or misdirection nor is it disturbingly inappropriate

In conclusion, this appeal fails, the same is dismissed. I up hold both the conviction and sentence.

Right of appeal 14 days

Dated at Nairobi this **30th** day of **November** 2015

John M. Mativo

Judge

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[1] Cap 65, Laws of Kenya (Act No. 3 of 2003)

[2] Ibid

[3] {2005} KLR 174

[4] Infra note 8

[5] Supra note 2

[6]Shantilal M. Ruwala V. R (1957) E.A. 570

[7]see Peters V.Sunday Post (1958) E.A. 424

[8] Criminal Appeal No. 170 of 1998

[9] Cap 75, Laws of Kenya

[10]{1985} KLR 412

[11] {1982-88} KAR 454

[12] Supra

[13] Supra

[14] Therasus.com

[15] Third Edition, Longman, www.longmam.com

[16] Published by Peter Haddock Limited, Bridlington, England, 1997

[17] 6th Edition, Oxford University Press

[18] Eleventh Edition, Oxford University Press

[19] Infra note 8

[20] {1969} EA 280

[21] {1967} EA 345

[22] See Yosefu and Another vs Uganda {1960} EA 236

[23] {2004}2KLR 480

[24] See Fappyton Mutuku Ngui vs Republic CA Cr app no. 32 of 2013-Kiahar Kariuki, Maraga & J. Mohammed

[25]Cap 80, Laws of Kenya

[26] Criminal Appeal No. 31 of 2005

[27] Criminal Appeal No. 11 of 2015-Visram A, Karanja W, and Mwilu P. JJJA.

[28] {1972}E.A.549

[29] {1859} HCA 8; {1859}101 CLR 298, 308, 312

[30] See Schellenberg vs Hesse Tunnel Holdings Pty Ltd {P2000} HCA 18

[31] {1992} 27 NSWLR 437, 449-450

[32] {2004} WASCA 170

[33] 7th Edition, Page 1215

[34] Cubillo (No. 2) 355

[35] {2005} VSCA 83

[36] {2006} VSCA 121 28

[37] Supra at page 1215

[38] See Cross on Evidence, Supra.

[39] Supra

[40]See Payne vs Parker, 202 Cubillo)No. 2) 360

[41]{1985} KLR 412

[42] {1982-88} KAR 454

[43]Criminal Appeal No. 37 of 2013, Waki JA, Mwera JA, and Murgor JA

[44] Supra

[45] Ibid

[46] {1935} A.C 462 at page 481

[47] Supra

[48] http://www.merriam-webster.com/dictionary/solicit

[49] 214 A.2d 886, 889 (Del. Super. Ct. 1963),

[50] Publisher, Langaa Research & Publishing Common Initiative Group, 2011 at page 46

[51] See Abraham Mbo vs The People {1975}Criminal Appeal No. CASWP/3c/75

[52] {1858} 6 HL Cas 746

[53] {1999}Crm LR 70, ca

[54] Supra

[55] 284 U.S. 229, 304 {1932}

[56]Criminal Appeal No. 28 of 2004, E.S. Lugayizi J

[57] {1975} {4} SA 855 {A} at 857 D-F