



REPUBLIC OF KENYA



**Kinoti v Republic (Appeal E010 of 2023) [2024] KEHC 8354 (KLR)  
(Anti-Corruption and Economic Crimes) (8 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8354 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES**

**APPEAL E010 OF 2023**

**F GIKONYO, J**

**JULY 8, 2024**

**BETWEEN**

**ALEXANDER MATIIRI KINOTI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*((Being an appeal against the conviction and sentence by P. O  
OOKO (SPM) in the Chief Magistrates' Court, at Milimani in  
Anti-Corruption Case No E004 OF 2022 delivered on 7.11.2023))*

**JUDGMENT**

**Receiving a bribe**

1. The appellant was charged and convicted of the offence of Requesting for a bribe contrary to Section 6(1) (a) as read together with Section 18 of the [Bribery Act](#), No 47 of 2016.
2. The appellant was sentenced to a fine of Kshs 100,000 or imprisonment of two years and further barred from holding any public office for a period of two years.
3. Being dissatisfied with the decision of the trial court, the appellant has appealed to this court based on the petition of appeal dated 20/11/2023.
4. The appellant has cited 7 grounds of appeal as follows;
  - i. The learned magistrate erred in law and in fact in convicting the Appellant on the basis of a visual audio recorder wherein the voice and or image of the appellant had not been recognized by an independent credible witness.



- ii. The learned magistrate erred in both law and fact when it ignored and or failed to address the consequence of PW-2 disowning of voice and image recognition certificates and failed to take into account the effect and veracity of the witness's oral testimony that she did not recognize the voice of the appellant in the audio clip.
- iii. The Learned magistrate erred in law and in fact in failing to find that from the said audio clip exhibit P-4 the offence of soliciting for a bribe was not proved to the required threshold as the purpose and/or relevant function for the bribe would not be ascertained from the said recording.
- iv. The learned trial magistrate erred in law and fact in convicting the appellant on mere allegations and presumptions and relying on the testimony of the complainant that she paid the appellant a monthly 'business operational fees' and yet no tangible evidence was adduced to prove the said allegation to the required legal threshold and despite the said complainant having failed to demonstrate to court by way of evidence that she operated a wines and spirit shop.
- v. . The Learned Magistrate erred in law in relying on audio transcripts prepared by PW 5 who was the investigation Officer and hence had direct interest in the matter and therefore the transcripts were unreliable.
- vi. The Learned Magistrate erred both in and in fact when he shifted the burden of proof to the accused when such burden rested with the prosecution at all times.
- vii. The learned magistrate misdirected himself in fact and law by not considering that the evidence relied by the prosecution was irregular and would have been obtained through entrapment

#### **Directions of the court**

5. The appeal was canvassed by way of written submissions. The appellant's submissions are dated 27/03/2024. The respondent's submissions are dated 24/4/2024.

#### **Appellant's submissions**

1. The appellant contends that the audio or visual transcriptions relied on by the court in convicting the appellant were incoherent, not clear, not self-explanatory, and did not bring out the issue of solicitation for a bribe and its purpose clearly and with certainty and could be interpreted in various ways hence fell below the threshold required of the law. The appellant relied on the decision of the Court of Appeal of Uganda In Criminal Appeal No. 009 Of 2018, Kakonge Umar Vs Uganda, Jane Gatwiri Mburugu & Another Vs Republic [2011] eKLR, and Patrick Munguti Nunga V Republic [2013] eKLR.
2. The appellant further argued that, the video and visual recordings were not independently corroborated and hence could not be relied upon on evidence.
3. In addition, the appellant contends that the trial court picked various excerpts from the transcriptions which in itself were not sufficient to prove the offence at hand. The appellant relied on Iimbambuli Vs R 2003, the testimony of PW2(Esther Nyambura Ndegwa) and complainant, the decision of Gideon Abere, John Njeru Kithaka & Another Vs Republic Criminal Appeal No. 436 Of 2007, Abdullah Bin Wendo Vs Rex 20 EACA 166, and Ogeto V Republic [2004] 2KLR.
4. The appellant submitted that the requirements set out to be proved by the prosecution beyond reasonable doubt have not been satisfied. The appellant contends that the decision by the learned trial magistrate was made without the prosecution discharging the requisite burden of proof. The appellant



relied on Michael Waweru Ndegwa V Republic [2016] eKLR and Mary Wanjiku Gichira V Republic Criminal Appeal No. 12 Of 1998.

5. The appellant submitted that a mere mention of figures in a conversation is not enough to allude to a corrupt intent. The said intent had to be brought out expressly through evidence. The fact that the appellant did not challenge the said audio and video transcriptions during the hearing did not lessen the burden of the prosecution to strictly prove the case. The appellant relied on Peninah Kimuyu Vs Republic [2014] eKLR.
6. The appellant submitted that the audio and video transcript presented in the trial had been prepared by pw5 who was the investigation officer in the matter. The appellant contends that the transcript would therefore not be reliable as they were prepared by a person who was directly interested in the matter and specifically to pin the appellant.
7. The appellant submitted that the trial magistrate shifted the burden of proof to the appellant to discharge. The appellant relied on Gachanja V Republic [2001] KLR 425.
8. The appellant submitted that through the totality of the evidence, as produced before the trial court, it was clear that the complainant had been converted as a state agent by the police through persistent, consistent, continuous cajoling and insistent extraction of words from the appellant with a view of entrapping him. The appellant relied on Mohammed Karion Nur V AG, Pet No. 181 of 2010.
9. The appellant also saw contradictions and inconsistencies in the witnesses' accounts.
10. The appellant asked this court to allow the appeal; quash the conviction and set aside the sentence.

#### **Respondent's submissions**

11. The respondents was of a different view that, the audio-video recording was properly admitted in evidence in accordance with section 160B(2) of the *Evidence Act*.
12. The prosecution produced both DVD (Prosecution Exhibit Number 7) and the first transcript (prosecutions exhibit number 4) in which there was a conversation of the appellant demanding a bribe of Kshs. 2000 which was reduced to Kshs. 1800.
13. And, that, the image and voice of the appellant in the recording was positively identified by the complainant to be that of the appellant without any element of delusion or mistaken identity. They relied on the case of Limbambula vs. R [2003] eKLR which held that: -  

‘Normally, evidence of voice identification is receivable and admissible in evidence and can, depending on the circumstances carry as much weight as visual identification. In receiving such evidence, it would be necessary to ensure that it is the accused person’s voice, the witness was familiar with it, recognized it and conditions obtaining at the time it was made were such that there was not mistake to it that which was said and who said it.’
14. According to the respondents, all elements of the offence of receiving a bribe (Gideon Makori Abero vs. R [2019] eKLR) were proved beyond reasonable doubt through credible evidence by PW1 and other prosecution witnesses. PW1 knew the appellant well- he was their area assistant chief. There is also evidence that later, he closed down her business.
15. The respondent beseeched the court to uphold the conviction and sentence.



## ANALYSIS AND DETERMINATION

16. This being a first appeal, the duty of the court is to analyze and re-evaluate afresh the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify – See *Okeno –V- Republic (1972) EA 32* and *Kiilu & Another –Vs- Republic (2005) 1KLR 174*.

### Issue for determination

17. One traditional issue borne out of the grounds of appeal, the record of the lower court, and the submissions by the respective advocates for the parties is: -
- i. Whether the prosecution proved its case beyond reasonable doubt.

### Whether the prosecution proved its case beyond reasonable doubt.

18. The appellant and another were charged with three counts.
19. The two were acquitted of Count I & III of the charge. But, the appellant was convicted and sentenced for count II.
20. This appeal, therefor, relates to Count II: Receiving a bribe contrary to Section 6(1)(a) as read with Section 18 of the *Bribery Act*. No. 47 of 2016.
21. The particulars were that on 25/01/2021 at Muthurwa sub-chief's office in Nairobi city county within the republic of Kenya, being a person employed by public service to wit, the ministry of interior and coordination of national government, as an assistant chief II, requested a bribe of Kshs. 2,000.00 from Linah Ngereza Asiyo with intent that in consequence, he would allow her to operate a wines and spirit shop at Muthurwa Market without a licence.

### Elements of offence

22. The offence of Receiving a bribe is established in section 6 of the Ant-*Bribery Act* as follows: -

Receiving a bribe

6(1) A person commits the offence of receiving a bribe if —

- a. the person requests, agrees to receive or receives a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly whether by that person receiving the bribe or by another person
  - b. the recipient of the bribe requests for, agrees to receive or accepts a financial or other advantage and the request, agreement or acceptance itself constitutes the improper performance by the recipient of a bribe of a relevant function or activity.
  - c. in anticipation of or as a consequence of a person requesting for, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly by that person, or by another person at the recipients' request, assent or acquiescence
- (2) For purposes of subsection (1)(a) and (c) it shall not matter—
- (a) if the recipient requests for, agrees to receive or receives or intends to request for, agree to receive or to accept the advantage directly or through a third party; or
  - (b) if the advantage is or is intended to be for the benefit of the recipient or another person.



- (3) For purpose of subsection (1) it shall not matter whether —
- (a) the recipient is performing the function or activity;
  - (b) the person giving the bribe knows or believes that the performance of the function or activity is improper; or
  - (c) where a person other than the recipient is performing the function or activity, whether that person knows or believes that the performance of the function or activity is improper.
23. Judicial interpretation has it that, the essential elements of the offence of receiving a bribe under section 6 of the *Anti-Bribery Act* are;
- i. requests, agrees to receive or receives a financial or other advantage;
  - ii. the intention is that a relevant function or activity should be performed improperly by the person or another person; and
  - iii. the function or activity must be of a public nature or of such a nature carried out by a public officer (*Gideon Makori Abere vs. R* [2019] eKLR).

This courts adds that, financial or other advantage include forbearance, and ‘performed improperly’ includes deliberate omissions or inaction.

#### **What the evidence says**

25. PW1 was categorical that, the appellant had visited her place of business on 25.1.2021 and demanded a bribe of Kshs. 5000 in order to sweet-talk his boss to allow her to continue with her wine and spirits business at Muthurwa Market without an official license. She told him that she did not have the money. So he left.
26. The appellant went back later the same day and demanded for Kshs. 2000 from her. She told him that she does not have the money unless she borrows. He issued threats of pulling down her structures if she does not pay the said sum of money. He ordered her to take the money to him in cash.
27. According to her, she has been paying a sum of Kshs. 500 on 1<sup>st</sup> and 15<sup>th</sup> day of every month as ‘operational license fee’ to the appellant who is the area assistant chief and well known to her. And, if you do not pay the ‘operational license fee’ to the appellant, your goods are impounded and are only returned to you upon paying between Kshs. 10,000-15000. She operated the business for four years without an official license on that basis.
28. When the appellant came back and demanded for Kshs. 2000, she felt it was too much and decided to report the matter to EACC on the same day. Since it was late, EACC asked her to go back the following day.
29. On 26.1.2021, EACC provided her with recording device with which she went to the office of the accused in furtherance of their conversation on the bribe of Kshs. 2000 and recorded the conversation wherein the bribe money was reduced and agreed at Kshs. 1800.
30. She went back to EACC and was given treated money in the sum of Kshs. 2000 to take to the appellant pursuant to their agreement. She arrived at the office of the appellant, but before she could give him the money, the appellant had seen the EAC officers accompanying her, and so he suspected danger and fled.
31. The DVD was produced (exhibit 7) and the transcript (exhibit 4) which bear the image and voice of the appellant. The recording was done in furtherance of an earlier conversation between the appellant



and the complainant at the complainant's place of business in which the appellant demanded a sum of Kshs. 2000 to enable the appellant sweet-talk his boss to allow her to continue with her business. The appellant confirmed that, he visited the complainant's place of business on 25.1.21, albeit he stated that, the visit was to enforce the 'bar closure' directive issued after a complaint by Imam Mohammed about the noise emitted by the bars which were at close proximity to the mosque. This defense is an afterthought because the evidence show that he did not close the business on 25.1.2021 when he visited the complainant's business premises; he called the complainant after he realized EACC officers and warned her of the games she was trying to play; and, three days' later after he had escaped EACC's dragnet, came and locked her business down. Telephone communication data and record were produced.

32. The trial court did not appreciate these pieces of evidence and their relevance to the case. Instead, it discarded the evidence of PW1 on the initial demand of a sum of Kshs. 5000 by the appellant on the basis that it was not captured in the recording. The evidence was that the recording was done after the initial solicitation and it is inconceivable to expect the initial solicitation to have been captured in a recording done subsequent thereto. This evidence and the other on the initial request for a sum of Kshs. 2000 forms the chain of conversations and events in furtherance of which the recording was done. It is important foundational evidence which was cogent and robust. It ought not to have been dismissed by the trial court in the manner it did.
33. Evidence of voice recognition is key in this case. Its admissibility and reliance by a court is stated in the case of *Limbambula vs. R* [2003] eKLR that: -  

'Normally, evidence of voice identification is receivable and admissible in evidence and can, depending on the circumstances carry as much weight as visual identification. In receiving such evidence, it would be necessary to ensure that it is the accused person's voice, the witness was familiar with it, recognized it and conditions obtaining at the time it was made were such that there was not mistake to it that which was said and who said it.'
34. The complainant knew the appellant well and interacted with him one on one for a considerable period of time. She was familiar with his voice. She stated that she had run the wine and spirit shop at Muthurwa for four years. She recognized and identified the voice of the appellant in the audio-visual recording which was played in court. He was demanding for a sum of Kshs. 2000 from her. There was no element of mistaken identity that the voice belonged to the appellant with whom she had interacted with for a considerable period of time.
35. The complainant stated that the said sum of money was a bribe to the appellant, an assistant chief, in order to permit her to continue doing the wine and spirit business within Muthurwa Market.
36. The appellant also recognized his own voice in the recording and admitted having demanded a sum of Kshs. 2000, except, he stated in his defense that the money was for a 'different narrative' other than a bribe. The 'different narrative' was not explained. The prosecution proved it was a bribe.
37. The audio-visual recordings and the first transcript, therefore, corroborate evidence by the complainant, and prove that the appellant demanded a sum of Kshs. 2000 from the complainant as a bribe- the intention was for the appellant, who was the area assistant chief, to cover and enable her to carry out her wine and spirits business without a license. One of the major duties of the office of the chief and assistant chief is to maintain and enforce law and order. He acted contrary to his office and oath of office in receiving a bribe.
38. The complainant was also consistent that she has been paying 'operational license fee' to the appellant to continue operating the wine and spirit without a license. It was clear that, in the four years she



operated, she was not officially licensed, but, continued to operate the wine and spirit on the basis of the 'operational license fee' paid to the appellant of a sum of Kshs. 500 on 1<sup>st</sup> and 15<sup>th</sup> day of each month. Such practice is corrupt and abuse of office by a public servant, which must be bludgeoned and suppressed by law whenever it raises its ugly head.

39. The other prosecution witnesses corroborated the evidence by the complainant in material respects. The investigators stitched together the various pieces of evidence and established beyond reasonable doubt that the appellant demanded for a bribe from the complainant. The recordings and transcripts were produced and admitted accordingly with the relevant certificates. They also corroborated the evidence by the complainant in material and pointed respects.
40. In sum, contrary to the submissions by the appellant, the prosecution proved its case against him beyond reasonable doubt, that the appellant committed the commission of the offense of receiving a bribe. More specifically, that; i) he requested for and agreed to receive a financial or other advantage from the complainant; ii) with the intention of protecting the complainant to continue trading in wines and spirits without a license- thus, performed improperly the relevant function of his office and the government; and iii) which function was of a public nature or of such a nature carried out by a public officer (Gideon Makori Abero vs. R [2019] e KLR).
41. The appeal, therefore, fails in totality and is dismissed.
42. Orders accordingly.
43. Right of appeal explained.

DATED, SIGNED, AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 8<sup>TH</sup> DAY OF JULY, 2024.

**HON. F. GIKONYO M**

**JUDGE**

**In the Presence of:**

C/A: Raymond

Ongeri for Appellant - Present

Ms. Ndombi for Respondent – Present

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