



REPUBLIC OF KENYA



**Njuguna v Republic (Anti-Corruption and Economic Crimes Appeal 5 of 2022)
[2023] KEHC 18339 (KLR) (Anti-Corruption and Economic Crimes) (12 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18339 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES APPEAL 5 OF 2022**

PM NYAUNDI, J

MAY 12, 2023

BETWEEN

PETER NDICHU NJUGUNA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the part judgment delivered by Hon. P.O. Ooko Senior Principal Magistrate on 22nd September 2022 in Milimani Anti-Corruption Case No. 8 of 2022)

JUDGMENT

1. The Appellant was charged with two counts under the *Bribery Act*. Count 1 was receiving a bribe contrary to section 6(1) (a) as read with Section 18 of the *Bribery Act*. The particulars of the offence were that on January 3, 2019 within Babadogo area, Nairobi City County, the appellant who is a person employed by a public body to wit the Nairobi City Water & Sewerage Company requested a financial advantage of Kshs 500,000/= from Antony Waweru Kinyanjui with the intent that, in consequence, the appellant would forbear charging him for an illegal water connection.
2. Count 2 was agreeing to receive a bribe contrary to section 6(1)(a) as read with section 18 of the *Bribery Act*. The particulars of the offence are similar to the one in count 1 save that on January 4, 2019, the appellant agreed to receive a financial advantage of Kshs 300,000/= from Nicholas Kinyanjui Nduati.
3. On September 22, 2022, the Hon Magistrate delivered his ruling acquitting the appellant on count 1 and convicting the appellant on count 2. The appellant was thereby sentenced to pay a fine of Kshs 300,000/= and in default to serve two years imprisonment.



4. Aggrieved with the trial court's judgment on the conviction in terms of count 2, the appellant filed his Petition of Appeal dated October 6, 2022. The grounds of Appeal are as follows:-
- a. The learned magistrate erred in law and in fact and convicted the appellant on agreeing to receive a bribe of Kshs 300,000 where no evidence was adduced to support the allegation.
 - b. The learned magistrate erred in law and in fact and convicted the appellant of agreeing to receive a bribe of Kshs 300,000 when there was no evidence adduced as to who exactly agreed to receive the alleged said bribe between him and the alleged accomplice.
 - c. The learned magistrate erred in law and in fact in not appreciating the fact that no evidence was adduced that the accused requested and/or agreed to receive a bribe of Kshs 300,000 from the complainant.
 - d. The learned magistrate erred in law and in fact in not finding that no evidence was adduced to illustrate the alleged nexus of the request for Kshs 500,000 bribe or at all and the agreement to receive Kshs 300,000 or at all.
 - e. The learned magistrate erred in law and in fact and ignored the testimony of the appellant that he turned down the offer of Kshs 100,000 offered by the complainant.
 - f. The learned magistrate erred in law and in fact and concluded that the appellant must have demanded Kshs 3000,000 from the conversation in the audio-visual clips which was actually not proved from the said audio-visual clips.
 - g. The learned magistrate fell into error when he relied on uncorroborated evidence from the audio-visual clips to convict the appellant.
 - h. The learned magistrate fell into error by concluding that the conversations in the audio-visual clips amounted to an agreement to receive a bribe of Kshs 300,000 or at all.
 - i. The learned magistrate fell into error by not finding that the complainant never lodged any complaint regarding the alleged request and/or agreement to receive Kshs 300,000.
 - j. The learned magistrate fell into error by finding that the prosecution had proved the offence of agreement to receive a bribe beyond any reasonable doubt.
 - k. The learned magistrate erred in ignoring the evidence adduced by the appellant.
 - l. The learned magistrate fell into error by relying on hearsay evidence.
5. The appellant prayed that the conviction in count 2 be set aside, for the appellant to be acquitted, and for the fine of Kshs 300,000/= already paid be refunded.



Submissions

6. Parties were directed to canvass the appeal by way of written submission.
7. Mr Kibatia learned counsel for the appellant submitted that the reason the trial court acquitted the appellant on count 1 is that although it was alleged that the appellant allegedly requested for the financial advantage of Kshs 500,000 from PW2 Antony Waweru, the said complainant never lodged a complaint save for the one lodged by his father Nicholas Kinyanjui. Therefore, an offence could not be maintained without a complainant or without the complainant's testimony being corroborated. Counsel argued that if count 1 was not proved, there is no way count 2 would have been sustained as the two offences were a continuum of events.
8. Counsel further submitted that most of PW1 Nicholus Kinyanjui Nduati's testimony was hearsay as he relied wholly on the telephone conversation of PW2 and the appellant. Counsel submitted that the testimonies on PW1 and PW2 were contradictory. He argued that nowhere in the entire evidence is indicated that the appellant ever demanded Kshs 300,000/= from either PW1 or PW2. According to counsel, if the claim is that the said sum of Kshs 500,000/= was negotiated downwards to Kshs 300,000, then the said evidence is hinged on the hearsay evidence of PW2 which was not corroborated.
9. Counsel submitted that in the audio and visual clips submitted as evidence, the appellant never requested for Kshs 300,000. Even the Kshs 100,000/= offered was declined. Counsel also submitted that if the learned magistrate was not persuaded that the appellant had requested for a financial advantage of Kshs 500,000/= from PW2, then the learned magistrate needed direct evidence that the appellant demanded/requested Kshs 300,000/= and there is no such evidence.
10. According to counsel, from the evidence and the appellant's testimony, PW1 is the one who wanted to bribe the appellant with Kshs 100,000. But the appellant declined the bribe. To buttress his claim, counsel relied on the case of Criminal Appeal No 12 of 2018 Joshua Amokol vs Republic.
11. Mr Owiti learned Principal Prosecution Counsel submitted that for the court to convict of the offences charged, the prosecution needed to prove that the appellant requested and agreed to receive a financial advantage and that the appellant intended in consequence that he would perform a relevant function or activity improperly.
12. Mr Owiti submitted that it was proved that the appellant was an employee of Nairobi Water and Sewerage Company Ltd. On the condition of the agreement to receive a financial advantage, counsel submitted that from the audio recording, the appellant declined PW1 and PW2's effort to bargain downwards and insisted on Kshs 300,000. On the last condition of intention to improperly perform a function, counsel submitted that having found the illegal water connection, the appellant was expected as a meter reader to take appropriate action against PW2 and PW2 for the illegality. However, the appellant forbore PW1 for the illegal connection, thereby improperly performing his functions as a public meter reader.
13. On the issue of the fate of count 2 upon acquittal of count 1, counsel submitted the trial court held that there was no evidence in support of count 1. According to the learned magistrate, count 2 was supported by testimony of PW1 and PW2, and the audio and visual recording. Therefore, the acquittal of count 1 has no effect on count 2.
14. Counsel further submitted that the appellant's claim that the conviction on count 2 was based on hearsay evidence is without a legal basis since the appellant had an opportunity to cross-examine them. On the claim of the contradictory testimonies by PW1 and PW2, the counsel submitted that both PW1 and PW2 were present in the room when the recording was being done. He argued that any



contradictions in the testimonies were neither material nor substantial as to be fatal to the prosecution's case. To buttress his claim, counsel cited the case of *MTG vs Republic*.

15. Counsel submitted that the prosecution proved its case beyond reasonable doubt and the sentence was legal, reasonable, and not harsh.

Analysis and Determination

16. I have considered the record of the trial court, the appellant's grounds of appeal, as well as the respective submissions of the parties.

17. As the first appellate court, I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis and will draw my own conclusions. I am alive to the fact I neither saw nor heard any of the witnesses and so cannot comment on their demeanor. I am guided on the duties of a first appellate court by the Court of Appeal decision of *Kiilu & Another V R* (2005) 1 KLR 174 where the court held thus:-

“an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions.

It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

18. The appellant has challenged his conviction and sentence on the basis that the prosecution did not establish its case against him, for various reasons. First, that after his acquittal on count 1, there was no link and basis to convict on count 2 and sufficiency of the evidence. That is, the evidence relied on by the trial court was hearsay and contradictory.

19. The chronology of events is as follows: On January 31, 2019, the appellant proceeded to Nicholas Nduati's (PW1) home to read his water meter as was his role and duty as an employee of the Nairobi Water and Sewerage Company Ltd. According to him, PW1's water meter had been constant for more than a year despite the premises being classified as a high consumer house since it had double plots with storey buildings. It was thus not normal for the premises to consume a standing charge of Kshs 407/= . After investigations, the appellant noted that there was a bypass that caused the water supply not to pass through the meter box. According to the appellant, this was an illegal connection. Therefore, he disconnected the same. The appellant issued Anthony Waweru (PW2) with a disconnection order to pass it to his father PW1. He gave PW2 his contacts and left the premises.

20. According to PW1 he received a call from his son PW2 stating the occurrence at their premises. PW2 testified that he called his father in the presence of the appellant. The appellant then informed PW1 about the illegal water connection. Upon PW1's cross examination, he testified that the appellant had agreed to discuss with him how they could sort out the challenge. In response, PW1 informed the appellant that he should discuss the issue with his son PW2. PW2 further informed PW1 during the phone conversation that the appellant had requested Kshs 500,000 as a bribe and upon negotiation the appellant agreed to settle at Kshs 300,000. Money that PW1 was to pay him. PW1 added that he approached the Ethics and Anti-corruption Commission (EACC) the following day where he reported



the events. PW1 was given Kshs 100,000 that was treated, a video recorder and an audio recorder. These were to be used to trap the appellant.

21. PW2 testified that after the appellant left the premises, they kept in touch via phone calls and he later informed the appellant that his father PW1 had agreed to meet him at the premises on January 4, 2019. According to PW2, the appellant insisted that PW1 should have the bribe money in hand during their meeting.
22. On January 4, 2019, the appellant arrived at the premises and proceeded to PW1's office. The EACC officers, one of them was Mr Nyakundi (PW8) also in the premises, some upstairs and others around the compound. In the office, PW1 had placed the recording devices on the table. PW2 ushered the appellant to the office where he had a meeting with PW1. According to PW1's testimony, the appellant refused the Kshs 100,000 because he stated that there were other colleagues handling the issue of illegal disconnection that would also want to receive their cut. The appellant was adamant and insisted to be paid Kshs 300,000. PW2 testified that they agreed to meet at a place called 'Lucky Summer'. PW1 later withdrew Kshs 200,000 from his personal bank account. This was to be added to the treated money.
23. At Lucky Summer, the EACC officers were present. The appellant kept on changing the meeting points. PW2 testified that he spoke to one of the appellants accomplices who directed them to an open field. While PW1 and PW2 were waiting for the appellant, Mr Nyakundi from EACC contacted them stating that two people detected them and run and they were unable to catch them. This is when PW1, PW2 and Mr Nyakundi went to the Nairobi Water and Sewerage department in Kariobangi to confirm whether the appellant was an employee there. This was confirmed.
24. PW2 testified that later that day, the appellant's accomplice contacted him asking for reasons why they called the police to arrest them.
25. According to the appellant, PW1 attempted to bribe him with Kshs 100,000 however, he refused. The appellant testified that "I confirm that what was captured in the video clip is accurate...I was expected to receive a financial advantage of Kshs 300,000 from PW1. Even in the transcripts of those video clips the same does not capture wherein I stated specifically demanded for the said sum from PW1."
26. The transcript from the audio recording captured that:-

PW1: But three hundred thousand like this my brother. You can't try and help me my brother?

Appellant: Now if we talk like that, I told them your son came and we talked and agreed on this.

PW1: mmh

Appellant: So we agreed we connect

PW1:mmh there is no problem I have not refused to give you the three hundred thousand shillings mmh

...

PW1: Why are we not agreeing

Appellant: I do not have a problem agreeing with you

PW1: I have brought you one hundred thousand shillings please agree to take you know I am like your father...

Appellant: Now I must call them first, I cant make a decision on my own.



PW1: Why call them, cant you go and talk to them?

Appellant: You see they are people I might do something...

PW1: Mmh

Appellant: I do the opposite and the rest will think I have gone against them and you know people have different thoughts

PW1:-Mmh

Appellant: He can tell you that most of them we do not speak the same language.

PW1: but you can ask them we come over we talk

Appellant: mmh I call its better I call them we talk

PW1: call them we talk

Appellant: I call him so that I can tell him what we have said.

27. On September 22, 2022, the trial court delivered its judgment. In respect to count 1, the court held that:

“ Although it was alleged that the accused person equally requested for a financial advantage of Kshs 500,000 from PW2 on January 3, 2019 as particularized in count 1 herein, I am concurrence with the defence counsel’s submission that this count was not proved to the required standards. I say so based on the following reasons. First and foremost, despite having being particularized as the complainant in respect to this count, PW2 confirmed that he personally never lodged the complaint save as the one lodged by his father...I therefore do not fathom as to how this complaint could be maintained without PW-2 formerly lodging any such complaint in the first instance. Secondly, the evidence tendered by PW2 in support of this complaint as rightly submitted by the defence counsel was not equally corroborated at all i.e. either by video evidence and/or transcriptions of the same tendered as exhibits herein. The furthest this matter went in this regard was a feeble and an inadmissible hearsay evidence tendered by PW1 in which he essentially and wholly relied on what PW-2 had told him via cell phone as to how this offence was allegedly committed by the accused.”

28. With regards to count 2 the trial court held that the defence had proved to the required standard the second count preferred against the appellant.

29. From the foregoing the following are the issues for determination.

a. Does the acquittal of count 1 affect the conviction in count 2? Were the two a continuum of events?

b. Whether count two on ‘agreeing to receive a bribe’ was proven to the required standards?

Does the acquittal of count 1 affect the conviction in count 2? Were the two a continuum of events?

30. The particulars of count 1 was that on January 3, 2019 the appellant agreed to receive a bribe of Kshs 500,000 from Antony Waweru (PW2). The particulars of count2 are that on January 4, 2019 the appellant agreed to receive a bribe of Kshs 300,000 from Nicholas Kinyanjui Nduati. It is uncontroverted that the both these counts emanated from the appellant proceeding to PW1’s home and allegedly finding an illegal disconnection. The appellant and PW2 met on January 3, 2019. The trial magistrate held that the evidence to support count 1 was not corroborated. Therefore, it can never



be said conclusively that the appellant agreed to receive a bribe from PW2. However, the appellant in his testimony and in the transcriptions of the audio recording agree that indeed the issue of being bribed with Kshs 300,000 arose on November 4, 2019. Even if the appellant was not charged with count 1, count 2 could have been able to stand on its own. Whether the Kshs 500,000 was negotiated to Kshs 300,000 is here nor there. The transcription shows that the discussion between the appellant and PW1 was on whether the appellant should receive Kshs 100,000 or Kshs 300,000 due to the illegal water connection. I therefore do not agree with the appellant's counsel submission that count 2 is a continuum of the events in count1 therefore, if the appellant was acquitted in count 1, he cannot be convicted on count2. Count 2 and the particulars of the said count can stand by itself.

Whether count two on 'agreeing to receive a bribe' was proven to the required standards?

31. The argument brought forth by the appellant's counsel is that PW1 is the one who offered the appellant a bribe which he refused. The appellant maintained that nowhere can it be said that he directly stated that he wanted a bribe of Kshs 300,000.
32. The case of *Paul Mwangi vs Republic CA* (2010) sets out the ingredients of the offence of soliciting and receiving a bribe as follows:

“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.”

33. The appellant was charged under Section 6(1)(a) of the [Bribery Act](#) which states that:
 - (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;”
34. The evidence presented before the trial court which I have set out above in brief shows that the appellant was a public officer. The evidence shows that the appellant after noticing an illegal connection at PW1's premises, disconnected the water supply and further issued PW2 with a disconnection order. The appellant testified that “...we never required to summon him after our said findings on the ground. We were only required to summon him after our said findings on the ground.” Whatever happened between the appellant and PW2 and whether the appellant requested for a Kshs 500,000 bribe is uncorroborated.
35. However, the appellant agreed that indeed on 4th January he returned to PW1's premises where he had a meeting in an office with PW1. It must be noted from this that instead of PW1 to be summoned to the Nairobi Water and Sewerage offices to explain the illegal water connection, the appellant is the one who was summoned to PW1's premises. I do not understand why the appellant had to return to the premises. He had already disconnected the water, according to him, he had taken pictures of the illegal water connection, and he had issued PW2 with the disconnection order. His work at PW1's premises was done. The rest of the discussion on the alleged illegal water connection was to take place in the Nairobi Water offices.
36. According to the appellant, he did not understand why he PW1 requested him to return to the premises. The appellant has worked as a meter reader at Nairobi Water for several years. He is therefore



required to know the processes whenever there is an illegal water connection. The appellant act of aloofness raises questions. The appellant further testified that PW1 requested him to tear the disconnection order in exchange of Kshs 100,000 which he refused.

37. The contention brought by the appellant is that he did not request for Kshs 300,000 as bribe and it was PW1 who insisted on issuing him with Kshs 100,000 as a bribe. The transcription of the meeting is as follows:-

PW1: But three hundred thousand like this my brother. You can't try and help me my brother?

Appellant: Now if we talk like that, I told them your son came and we talked and agreed on this.

PW1: mmh

Appellant: So we agreed we connect

PW1:mmh there is no problem I have not refused to give you the three hundred thousand shillings mmh

38. From the above it can be noted that PW1 is responding saying that Ksh 300,000 is a high amount. It is also evident that the appellant spoke to PW2 prior to the meeting and agreed on the said Kshs 300,000 that PW1 sees as a high amount to pay. The appellant then states, 'so we agree we connect'. Since this meeting was due to the disconnection of the water supply, connecting from a Reasonable stand point would imply connecting the disconnected water. PW1 then states that he has not refused to give the Kshs 300,000. The appellant might not have uttered the words 'Kshs 300,000' but clearly this is a negotiation on what to pay for a reconnection of the water supply. That is why the appellant returned to PW1's premises, instead of PW1 going to the Nairobi Water offices.
39. From the case of *Paul Mwangi vs Republic (Supra)*, the first essential of an offence is that there must have been solicitation or offer or receipt of a gratification. In the transcript, the appellant states, "Now if we talk like that, I told them your son came and we talked and agreed on this." Clearly the appellant was soliciting for a bribe. Black's Law Dictionary, 2nd Edition defines soliciting as "To seek or to plead, to entreat and ask."
40. Section 6(1) of the *Bribery Act* stated that a person commits the offence of receiving a bribe if the person requests, agrees to receive or receives a financial or other advantages. In this case, in response to PW1 saying that Kshs 300,000 is a steep amount, the appellant responds and states that this is what he agreed with PW2.
41. In the case of *Paul Mwangi vs Republic (supra)*, such gratification must have been asked for, offered or paid as a motive or reward for inducing by corrupt or illegal means. Further to this Section 6(1) of the *Bribery Act* states that "in consequence, a relevant function or activity should be performed improperly whether by that person receiving the bribe or by another person." From the transcript, the appellant says, "So we agreed we connect" It can be seen that a negotiation was taking place and upon agreement, there will be reconnection of the water supply. Since the water supply had been disconnected and a disconnection order issued, PW1 was required to go to Nairobi Water offices and follow the due process for re-connection. The appellant had disconnected the water and had the upper hand when it comes to reconnection. PW1 was desperate since the premises included other houses that were suffering due to lack of water supply. The appellant might not have uttered the word 'Kshs 300,000' but he definitely agreed to negotiate on a bribe.
42. The trial court, in my view, properly convicted the appellant as charged.



43. I therefore find no merit in this appeal. It is hereby dismissed and the conviction and sentence upheld.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF MAY, 2023.

P M NYAUNDI

JUDGE

IN THE PRESENCE OF:-

Court Assistant D Karani

.....for Appellant

.....for Respondent

