



**Njoroge v Republic (Anti-Corruption and Economic Crimes Appeal E007 of 2020)  
[2023] KEHC 20900 (KLR) (Anti-Corruption and Economic Crimes) (20 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20900 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
ANTI-CORRUPTION AND ECONOMIC CRIMES APPEAL E007 OF 2020**

**EN MAINA, J**

**JULY 20, 2023**

**BETWEEN**

**JOHN NJOROGE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence in Milimani Chief Magistrates  
ACC No. 5 of 2013 by the Judgement delivered on 20th May 2020 [Hon. L. Mugambi])*

**JUDGMENT**

1. The Appellant is a former Member of Parliament for Kasarani Constituency. He was charged with three counts of corruption offences in Milimani Chief Magistrate's ACC Case No. 5 of 2013. The offences are said to have arisen in regard to the construction of a tuition block at Baba Ndogo Secondary School in Ruaka. By a Judgment delivered on May 29, 2020, the trial court convicted the Appellant on two and acquitted him on one Count. He was subsequently sentenced to a fine of Kshs. 650,000 on each count in default to serve one-year imprisonment on each count. The default sentences were to run consecutively.
2. It is noteworthy that initially the Appellant had been acquitted of the charges following the withdrawal of the complaint by the maker of the report under Section 204 of the Criminal Procedure Code. The acquittal was however reversed by the High Court following a successful Petition by the Director of Public Prosecutions in Constitutional Petition No. 21 of 2015. The High court after allowing the Petition directed that the matter be tried before a Magistrate other than Hon. P Ndwiga SPM following which the case was heard by the Hon. Mugambi, Chief Magistrate (as he then was).



## The Charges

3. The Appellant was tried, convicted and sentenced for the following offences:

Count I: Corruptly Soliciting for a benefit contrary to Section 39(3) (a) as read with Section 48 of the Anti-Corruption Act. The particulars are that on the July 3, 2013 at Continental House parking yard, within Nairobi County, being a person employed by a public body to wit, Public Service Commission corruptly solicited for a benefit kshs.100, 000/= from Abdirahman Mohammed Abdullahi as an inducement so as to facilitate the payment of kshs.3, 342,716.77 being the Constituency Development Fund payment for completion of Baba Dog Secondary School tuition block, a matter relating to the affairs of the said public body.

Count III: Corruptly receiving a benefit contrary to Section 39(3) (a) as read with Section 48(1) of the Anti-Corruption Act. The particulars are that on the July 3, 2013 at Continental House parking yard, within Nairobi County, being a person employed by a public body to wit, Public Service Commission corruptly received a benefit of Kshs.100, 000/= from Abdirahman Mohammed Abdullahi as an inducement so as to facilitate the payment of kshs.3, 342,716.77 being the Constituency Development Fund payment for completion of Baba Dog Secondary School tuition block, a matter relating to the affairs of the said public body.

4. Aggrieved by both the conviction and sentence, the Appellant preferred the present appeal, raising the following grounds of appeal in his Petition of Appeal dated December 12, 2020:-

- 1) That the Hon L. Mugambi erred in law and in fact when convicting the appellant when there was no evidence to support the convictions.
2. That the Judgment of the court is not supported by the evidence and indeed the decision is wholly against the weight of the evidence.
3. That the learned Trial Magistrate erred in convicting the appellant on the charge of corruptly soliciting a benefit and despite the complete want of evidence to support the charge and or the allegations made.
4. That the court erred in failing to consider or to consider adequately the absence of any evidence showing that the appellant corruptly solicited a benefit.
5. That the Learned Hon L. Mugambi erred in law and in fact in failing to have regard to the fact that a charge of corruptly soliciting a benefit could not be maintained by the evidence of a single witness
6. That Learned Trial Magistrate erred in law and in fact in shifting the burden of proof to the appellant contrary to *the constitution* and the law.
7. That the Learned Trial Magistrate erred in law and in fact in failing to evaluate the evidence on record fully and the finding that the prosecution had proven the case to the required standards is not borne by the evidence.
8. The Learned Trial Magistrate erred in law and in fact in failing to find that the evidence of the prosecution's witnesses was inconsistent, incredible and unreliable to convict the appellant.



9. That in particular the Learned Trial Magistrate erred in law and in fact in failing to consider adequately or at all the fact that the Appellant never made the promises alleged a fact that was demonstrated by the transcript and as a consequence the charges ought to have failed.
  10. That the Learned Trial Magistrate erred in law and infact in failing to consider or to consider adequately, the full input of the complainant's affidavit on record that he did not wish to continue with the case.
  11. That having regard to the totality of evidence, it is clear that none of the charges was proved to the required standards and as a consequence all the findings and entire judgment cannot be sustained and ought to be quashed.
  12. That the sentence imposed by the court is harsh, oppressive and manifestly excessive.”
5. The Appeal was canvassed by way of written submissions, with the Appellant and Respondent relying on their written submissions dated April 28, 2023 and November 15, 2022 respectively.
  6. As the first appellate court, this court's duty is to reconsider and evaluate the evidence before the trial court afresh so as to come to its own independent conclusion albeit bearing in mind that it did not have the advantage of observing the demeanour of the witnesses as it did not hear or see them giving evidence (See Okeno vs. Republic [1972] EA 32 and Mark Oiruri Mose vs. R [2013] eKLR.)

### **The Prosecution's case**

7. The Prosecution called a total of 8 witnesses who testified as follows: - PW1 David Kiboko Wanyoike an Electrical Engineer working as a District works officer in the Ministry of Lands, Housing and Urban Development testified how Ramagon Construction Limited won a tender No. DWO/Kasarani/CDF/3/2012-2013 for the construction of a tuition block at Baba Ndogo Secondary School in Ruaraka at a sum of Kshs. 11,819,972/=; That he was the project supervisor and his role was to design, to document and to supervise the project. He confirmed that he wrote forwarding letters to the CDF Manager (PW2) in respect of the payments for the project. He contended that the accused had no role in the payment as payment was the responsibility of the Constituency Development Fund (CDF).
8. PW2 Douglas Pashet Ntaine, stated that he was the Fund Account Manager for the CDF Committee and was responsible for general administration duties. He testified that the project giving rise to this case was in Baba Ndogo in Kasarani Constituency; that the Appellant called him to find out the status of the payments for the contract. He stated that he explained the reasons for the delay in detail to the Appellant. PW2 identified the voices in the recording of a conversation he had had with the Appellant on July 3, 2013. He explained the procedure for payment, which he stated begun with an application through the CDF office, which application would be forwarded to the Project Manager, then to the CDF Account Manager and lastly to the CDF Committee who would visit the project before approving payment.
9. PW3 William Kairo Munyoki a Government Analyst testified that he received and analysed items which the investigating Officer (PW8) delivered to the Government Chemist through the exhibit memo form produced as (PEXh 6). The exhibits were an envelope containing treated notes amounting to Kshs.100,000/=, some swabs taken from the Appellant's right hand and a swab taken from the Appellants left side inner coat pocket. After his analysis, he prepared a report to the effect that there was presence of Anthlacin Phenoplane and Quinine (APQ) powder in all the items including the swabs taken from the right and left hands of the Appellant and a swab taken from the left side inner pocket of his coat.



10. PW4 CPL Daniel Hamisi stated that he was a Police Officer attached to the Safaricom Law Enforcement Liaison Office. He produced a report to the effect that mobile number xxxxxxxxxx belonged to the Appellant while mobile number xxxxxxxxxx belonged to Ntaire Nkere of ID No. xxxxxxxx. He testified that he extracted data in respect of a communication between the Appellant and Natainee Nkere for the period between July 3, 2013 and July 6, 2013. His reports were produced as prosecution exhibits 16 and 17 respectively. It was his testimony that the Appellant and Natainee Nkere communicated during the period in issue.
11. PW5 Wycliffe Sirengo an investigator with Ethics and Anti-Corruption Commission testified that he accompanied Abdulahim Mohammed, who had reported to the Commission that the Appellant had demanded a bribe of Kshs. 100,000 from him, to Continental House. He stated that at the Continental Hotel he saw a man get into the complainant's vehicle where the two of them had agreed to meet and that he together with another investigator by the name Francis Wambua went to the complainant's vehicle and arrested the Appellant. He also stated that the treated money was recovered from the Appellant's inner left side coat pocket.
12. PW6 Abdullahi Mohammed, a project manager with Ramagon Construction testified that the construction of the tuition block was completed on May 31, 2013 and a certificate of completion was issued (PEXh 4); that by the time they completed the construction, only one payment was left to be paid; that he was advised to talk to the Appellant who was then the Member of Parliament for that area so that the balance could be paid; that the Appellant asked for Kshs.200,000/= to facilitate the payment, which sum they (PW6 and the Appellant) negotiated downwards to Kshs.100,000/=. He to facilitate the expeditious payment of the last instalment. He stated that he then decided to report the matter to the Ethics and Anti-Corruption Commission (EACC) and was given a tape recorder (PEXh 21). He testified that he met the Appellant on July 2, 2013 to firm up their agreement, and that he recorded their conversation using the recorder; that he then went to the EACC where he met the investigators who gave him treated money which he was go give to the appellant; that on July 3, 2013 they met at a parking lot between Continental House and Harambee Sacco Plaza where he handed the treated money to the Appellant whereupon the Appellant was arrested. PW6 identified the transcript of the recorded conversation between him and the Appellant as the one marked PEXh 24.
13. PW7 Sophia Nyambu also an Investigator with the EACC testified that she treated the notes in the sum of Kshs.100,000/= that were used in the operation. She stated that she then made photocopies of those notes. She retained the photocopies which she later compared with those recovered from the Appellant and they matched. She produced the notes recovered from the Appellant as (PEXh 7B (1-100)) and the photocopies she had retained as (PEXh 20(1-10)). She also produced an inventory (PEXh 23), and an envelope in which they were kept (PEXh 10B).
14. PW8 Charles Samiji, the Investigating Officer in the case, testified that on July 1, 2013 Abdullahi Mohammed (PW6) filed a report with the EACC; that PW6 alleged that the Appellant, the Member of Parliament for Kasarani Constituency had asked him for a bribe of Kshs. 100,000 to facilitate a payment due to his company Ramagon Construction for the construction of a tuition block at Baba Ndogo Secondary School; That to ascertain the solicitation, he gave PW6 a recorder (PEXh 22) and that on followed him and saw the Appellant entering PW6's vehicle at the parking lot of Continental Hotel; That thereafter PW6 reported back to the EACC and Sophia Nyambu (PW7), an investigator with the EACC, prepared treated money which were given to PW6; That the Appellant received the treated notes amounting to Kshs. 100,000 from PW6, leading to his arrest; That the appellant was arrested in PW6's vehicle. He testified that the Appellant's hands were swabbed and that an analysis of the swab confirmed that the Appellant had received the money. He stated that the EACC officers also took a swab of the left inner pocket of the coat the Appellant was wearing at the time and the same



was also analysed and it gave a positive result. PW8 further testified that the data of the Appellant's phone (PEXB15) was retrieved from Safaricom and the same confirmed that he, (the Appellant) had indeed been in communication with the complainant. He was therefore subsequently charged with these offences.

### **Defence case**

15. The Appellant made an unsworn statement and called two other witnesses.
16. The Appellant stated that the project the subject of the case was in Ruaraka and not in Kasarani Constituency where he was the Member of Parliament (MP); that his role as MP was confined to convening the public meeting to elect CDF Committee members and to preside over public hearings of proposals from the public; that he had no role in the payments as this was the mandate of the CDF Committee; that he did not know PW6 and that from the transcript of the recordings, it was PW6 who led him to speak words concerning the impugned payment; That PW6 set him up for the arrest which took place in Parliament grounds; that PW6 had withdrawn his complaint against him; that there was no consent from the Director of Public Prosecutions to prosecute him; that he had not committed any act of soliciting as he was not a signatory to the account; that the case had tainted his career as a politician and that in his long career, he had never been arrested for any crime or stolen from anyone.
17. DW1 Susan Wanjiku Njenga, a CDF Committee member testified that the area MP and District Commissioner were ex officio members of the CDF Committee; that they had no influence over the tenders or the payments; that upon the split of Kasarani Constituency into three constituencies - Kasarani Ruaraka and Roysambu, Baba Ndogo Secondary School fell in Ruaraka Constituency.
18. DW2 John Mweri Kahoro, the Office Constituency Manager testified that the appellant was not a signatory to the CDF documents and played no role in approving payments; that Baba Ndogo Secondary School was not in the Appellant's constituency and was therefore outside his knowledge and further that the Appellant did not participate in the project the subject of this case.

### **Submissions of the Appellant**

19. The Appellant relied on his Learned Counsel's submissions dated April 28, 2023, where Counsel submitted that the prosecution did not prove the Appellant's guilt beyond reasonable doubt; that the complainant (PW6) had sworn an affidavit on January 17, 2014 seeking to withdraw the complaint against the Appellant, which was allowed, but that the acquittal was reversed and the case reinstated by the High Court; that PW2 in his testimony stated that the recording was not clear but the voice sounded like that of the accused; that PW4 the law enforcement officer at Safaricom did not produce any certificate to prove his training; that during cross examination PW5 stated that he was involved in the arrest but investigations were done by Samji (PW8) and that he did not assist him in comparing the currency notes. Further that whereas PW6 insinuated that he was following up on the unpaid instalment he did not adduce evidence to show that the money was being withheld. To support the above submissions Learned Counsel placed reliance on the case of Republic v Silas Magongo Onzere alias Fredrick Namema [2017] eKLR.
20. Counsel for the Appellant also submitted that there was no evidence to support the charge of soliciting a bribe; that PW7 confirmed there was no signature in the documents supplied to the defence; that the defence objected to the production of the initial report (OB number 41834), (PMFI 29). That the prosecution admitted the report was computer generated and thus there was a requirement for a certificate under Section 106(B)(4) of the *Evidence Act* which certificate was not produced. Counsel cited the case of MNN v NENK [2017] eKLR and added that it was the complainant (PW6) who



entrapped the Appellant into asking for the bribe and that the police forced the Appellant to put the money in his pocket.

21. Counsel also contended that Counts I and II were the same offence and were meant to subject the Appellant to suffering the sentence twice; That the complainant alleged that the payment was for Kshs.2 million while the charge sheet read Kshs. 3,342,716.17; that the ingredients of soliciting a bribe were not proved as the Appellant did not demand any money from PW6.
22. Further, that the fact that the complainant made an application to withdraw the charges raises serious doubt as to the existence of the offence. Counsel cited the case of Dennis Wanjohi Kagiri v Republic [2016] eKLR, and submitted that the charges ought to have been quashed because the circumstances of the case raised a doubt as to whether an offence was committed while the complainant's application to withdraw the complaint also raised reasonable doubt.
23. Counsel also submitted that the sentence meted by the trial court was harsh; that the appellant was convicted on Counts 1 and 3 but was acquitted on count 2 but during sentencing, he was sentenced on count I and II and sentenced to pay a fine of Kshs. 650,000 on each count or to one-year imprisonment on each count. Counsel asserted that the court was not clear in its judgment and sentence as to which counts the Appellant was convicted and fined for. For this Counsel relied on the case of Dan Kang'ara Mburu v Republic [2019] eKLR.

### **Submissions of the Respondent**

24. The Respondent relied on its written submissions dated November 15, 2022. Learned Counsel for the Respondent submitted that the prosecution called a total of eight witnesses; that the trial court analyzed the testimonies of the witnesses and the documentary evidence adduced; that the prosecution discharged its burden of proof; that the evidence adduced by the prosecution was consistent, credible and reliable and that it proved that a tender was awarded to the complainant for construction of a tuition block at Baba Ndogo Secondary School; that PW1 confirmed that the first and second instalments of the payment due for the project had been paid and what was pending was the third and final instalment of about Kshs.3,200,000; that a recording of the Appellant asking for the bribe was played in court; that a transcription of the recording was made and produced in court and that the Appellant was arrested minutes after receiving the bribe and that accordingly all the ingredients of the offences of corruptly soliciting and receiving were proved. Counsel submitted that the evidence was consistent, water tight and well corroborated; that the voice recorder, the transcription, the treated money all proved that the respondent as a public officer solicited and received Kshs.100,000/- and this court should uphold the conviction and sentence of the trial Magistrate and dismiss this appeal in its entirety.

### **Issues for determination**

25. As the first appellate court my role is to reconsider and evaluate the evidence in the trial court and make my own independent findings while keeping in mind that I did not see or hear the witnesses give evidence. The issues that arise for determination are in my view: -
  1. Whether the prosecution proved the charges of soliciting and receiving a bribe beyond reasonable doubt.
  2. What is the effect of the withdrawal of the complaint by PW6.
  3. Whether the sentence imposed by the trial court was harsh.



## Analysis and determination

Issue 1: Whether the prosecution proved the charges of soliciting and receiving a bribe beyond reasonable doubt.

26. Section 39 (3) (a) of the Anti-Corruption & Economic Crimes Act (ACECA) under which the Appellant was charged and convicted stated as follows: -

“A person is guilty of an offence if the person-

- a) Corruptly receives or corruptly agrees to receive or solicit a benefit to which this section applies.”

27. The offence is in the category of offences whose heading is: ‘Bribery involving agents’. In order for an inducement, benefit or reward to be considered as having offended the provisions of Section 39, it must be proved that the purpose of the said benefit, inducement or reward, solicited or received was to influence or make the agent to do or not do something relating to the affairs of agent’s principal; or, show favor or disfavor to anything, including any person or proposal in relation to the affairs or business of agent’s principal”. Section 38 of the Anti-Corruption and Economic Crimes Acts (ACECA) defines an agent to mean a person who in any capacity and whether in public or private sector is employed by or acts on behalf of another person. “Principal” on the other hand is the person who employs an agent or for whom or whose benefits the agents acts.

28. It is however instructive that by the time the Appellant was convicted, the above section had been repealed by Section 23 of the [Bribery Act](#), which states:-

The [Anti-Corruption and Economic Crimes Act](#), 2003 (No. 3 of 2003) is amended by deleting Section 39.

29. After the repeal the offence of receiving a bribe is now provided for in the following manner under Section 6 of the [Bribery Act](#):-

6. Receiving a bribe

(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.”

30. Section 27 (1) and (2) of the *Bribery Act* however provides that all pending offences of bribery commenced under the *Anti-Corruption and Economic Crimes Act* are to proceed under the *Anti-Corruption and Economic Crimes Act*. The Section states:-

“ 27. Pending bribery cases

- (1) This section applies with respect to bribery offences or suspected bribery offences under the *Anti-corruption and Economic Crimes Act*, 2003.
- (2) Any investigation or prosecution or court proceedings instituted before the commencement of the Act based on an offence under the *Anti-Corruption and Economic Crimes Act*, 2003 shall be continued under the *Anti-Corruption and Economic Crimes Act*, 2003.”

It is for reason of the above provision that the Appellant was tried and convicted under the *Anti-Corruption and Economic Crimes Act*.

31. The elements of the offence of soliciting and receiving a bribe were enunciated in the case of Paul Mwangi Gathogo vs Republic, 2015 eKLR where the court stated:-

“The main ingredients of the offence are 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 gratification other than legal remuneration, that gratification should be as a motive or reward for doing or forbearing to do, in exercise of his official functions, a favour or disfavour to any person”.

32. In this case the star witness, PW6 testified that the Appellant asked him for a bribe of Kshs. 200,000/= which they negotiated downwards to Kshs. 100,000/= to facilitate the expeditious payment of the last instalment for the project he was undertaking. That upon reporting the solicitation to the Ethics and Anti-Corruption Commission (EACC) he was given a tape recorder (PEXh 21) which he used to record his conversation with the Appellant at their subsequent meeting of 2<sup>nd</sup> July, 2013, (produced as PEXh 24). He also testified that on 3<sup>rd</sup> July 2013, the Ethics and Anti-Corruption

Commission Investigator PW7, gave him treated money which he gave to the Appellant; that the Appellant received the money and that the same was recovered from the Appellant during the arrest.



The government examiner PW3 testified that he did an analysis at the government chemist and found there was presence of Anthracine Phenoplane and Quinine (APQ) powder, the substance used to treat the notes, on the money retrieved from the Appellant, on the Appellant's right and left hand swabs and on the khaki envelope recovered from PW6. There was also evidence that the left inner pocket of the black coat worn by the Appellant at the time of his arrest also had traces of the APQ. There was also evidence of the transcript of the recorded conversation between PW6 and the Appellant (PEXh 24) wherein the Appellant asked for the bribe.

33. To succeed the prosecution was required to prove beyond reasonable doubt that the Appellant was acting in any capacity whether in public or private sector, that he solicited for a benefit or reward for the purpose of influencing the payment of the last instalment by the CDF for the construction of the tuition block at Baba Ndogo Secondary School and that he in fact received the bribe.
34. It is my finding that there was evidence beyond peradventure that the appellant was a member of Parliament and hence an agent of the National Assembly, under which the CDF was administered. It is also my finding that he solicited and received a bribe of Kshs. 100,000 from PW6. Indeed, in his defence the Appellant did not deny receiving treated money, but alleged that it is PW6 who entrapped him. It is my finding that the defence of entrapment does not apply as the Appellant had already asked (solicited) for the bribe from the complainant and even negotiated the amount before the Ethics and Anti-Corruption Commission investigators moved in. The Ethics and Anti-Corruption Commission officers acted upon the complaint made by PW6 several days prior to the commencement of the investigations. "Entrapment" occurs when as was defined in the case of Mohamed Koriow Nur vs Attorney General (2011) eKLR:-

"Entrapment occurs when (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engage in criminal activity or pursuant to a bonafide inquiry, and (b) although having such a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and include the commission of an offence ....."

35. The trial court considered the defence of entrapment extensively and distinguished the rare circumstances where an accused person may rely on it and held that there was a clear indication that what occurred between the Appellant and PW6 was a continuing discussion and it was apparent that by the time the EACC entered into the matter but was not a conversation from the point the report was made.
36. I agree with the above finding of the trial court. From the prosecution's evidence, the Appellant solicited the bribe of Kshs. 100,000, leading to the filing of the complaint by PW6. The transcript from the audio-recordings captured the Appellant's voice asking whether PW6 had brought him the money and subsequently him confirming that the amount was "one hundred". Clearly neither Ethics and Anti-Corruption Commission nor PW6 provided an opportunity to the Appellant to solicit for the bribe. The allegation that the Appellant was entrapped is therefore unfounded and it is my finding that both the offences of soliciting and receiving a bribe were proved beyond reasonable doubt.
37. It is of course immaterial that the payments for CDF projects was not the mandate of the Appellant as Section 50(a) of the [Anti-Corruption and Economic Crimes Act](#) states:

50. Impossibility, no intention, etc., not a defence

In a prosecution of an offence under this Part that involves a benefit that is an inducement or reward for doing an act or making an omission, it shall not be a defence—



- (a) that the act or omission was not within a person's power or that the person did not intend to do the act or make the omission; or....”

Issue 2: What was the effect of the withdrawal of the charges by PW6 under Section 204 of the Criminal Procedure code.

38. The issue of whether PW6 could properly withdraw the complaint he had made to the EACC against the Appellant was extensively dealt with by Lenaola J, as he then was, in the case of Director of Public Prosecutions v Nairobi Chief Magistrates court Petition No. 21 of 2015 (seems to be unreported). In that case the Hon. Judge came to the conclusion that the Director of Public Prosecutions was the complainant on behalf of the state and that to exclude the Director of Public Prosecutions from interpretation of the word complainant would be the circumstances of this and other cases, detrimental to the ends of Justice. He then went ahead to conclude that Mohamed Abdullahi (PW6) could not properly withdraw the charges against the Appellant and remitted the case back to the Chief Magistrates Court for hearing by a Magistrate other than the one who had allowed the withdrawal.
39. I fully associate myself with the above finding of Lenaola J, as he then was, and also the observation of Achode J, she then was in the case of Republic v Ethics and Anti-Corruption Commission and 2 others exparte Stephen Sanga Barawa [2017] eKLR that:-

“.....The Director of Public Prosecution is not obliged to withdraw a case merely because the Applicant who is one of the witnesses had a change of heart, if the Director of Public Prosecution was of the view that investigations that sprung from his complaint had yielded a sustainable case....”

40. As to whether the Director of Public Prosecutions could compel PW6 to testify against his wish my finding is that as PW6 was a competent witness under Section 125(1) of the Evidence Act he also became a compellable witness under Section 128 of the same Act and it would have been afoul of him not to attend court to testify – see Section 140 and 152 of the Criminal Procedure Code.

Whether the sentence imposed by the trial court was harsh

41. Upon conviction on Counts 1 and 3, the appellant was sentenced to a fine of Kshs. 650,000/= or in default to serve one-year imprisonment on each count, which sentences were to run consecutively. The penalty for the offences under the repealed Section 39(3) of the Anti-Corruption and Economic Crimes Act was provided for under Section 48 of the Anti-Corruption and Economic Crimes Act which states:-

“ 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 one 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.”



42. It is trite that sentencing is a matter of discretion of the trial court, which the appellate court will seldom interfere with unless the sentence is manifestly excessive or where the court took into account or overlooked some material factor. This as stated by the Court of Appeal in the case of Bernard Kimani Gacheru vs. Republic [2002] eKLR:-

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

43. The sentence of a fine of Kshs. 650,000 was within the maximum fine of Kshs one million shillings prescribed under Section 48 (1)(a) and the alternative custodial sentence of one-year imprisonment was also within the ten year term provided for. It is my finding therefore that the sentence was not only lawful but that it was not extensive. The trial Magistrate took into account all the factors that were material and relevant to sentencing and I am not persuaded that the sentence should be disturbed. The appeal on the sentence must therefore also fail.

44. As for the submission that the judgment and sentence of the trial magistrate was not clear on the offences for which the Appellant was convicted and sentenced, my finding is that in the judgment the learned magistrate was very clear that the Appellant was convicted on Counts 1 and 3. I therefore conclude that the reference to Count II in the sentence was an error curable under Section 382 of the Criminal Procedure Code.

45. The upshot is that the Appellant’s appeal is dismissed in its entirety for lack of merit.

**Signed, dated and delivered virtually on this 20<sup>th</sup> day of July 2023.**

**E N MAINA**

**JUDGE**

