



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**CRIMINAL APPEAL NO. 29 OF 2019**

**BERNARD KASYOKA MUNYAO.....APPELLANT**

**VS**

**DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

**(Being an appeal from the conviction and sentence in Milimani Anti-Corruption Case No. 2 of 2018 (Hon. D. Ogoti CM) dated 9<sup>th</sup> October 2019)**

**JUDGMENT**

1. The appellant, Bernard Kasyoki Munyao, was charged with another, Francis Kyalo Mulonzi, with five counts as follows.

**COUNT 1**

**ABUSE OF OFFICE CONTRARY TO SECTION 46 AS READ WITH SECTION 48(1) OF THE ANTI CORRUPTION AND ECONOMIC CRIMES ACT NO 3 OF 2003**

On the 18<sup>th</sup> day of November, 2016 at Amboseli Stage along Gitanga within Nairobi City, being a person employed by a public body to wit National Police Service as deputy sub base Commander Muthangari Traffic police, used your office to improperly confer to yourself a benefit of Kshs 3,000 from Joseph Mukabwa Lirechi the driver of motor vehicle registration number KCA 320Y, in consequence that you would forbear enforcing the National Transport and Safety Authority Act against the said Joseph Mukabwa Lirechi for violating Transport Licensing Board regulations.

**ALTERNATIVE COUNT 1**

**RECEIVING A BRIBE CONTRARY TO SECTION 6(1) (A) AS READ WITH SECTION 18 AS READ WITH SECTION 27 OF THE BRIBERY ACT NO 47 OF 2016**

**PARTICULARS**

**BERNARD KASYOKA MUNYAO** - On the 18<sup>th</sup> day of November 2016 at Amboseli stage along Gitanga Road within Nairobi City, being a person employed by a public body to wit National Police service as deputy Sub base Commander Muthangari Traffic Police, corruptly requested for financial advantage of Kshs 3,000/- from Joseph Mukabwa Lirechi the driver of motor vehicle registration No KCA 320 Y, in consequence that you would forbear enforcing the National Transport and Safety Authority Act against the said Joseph Mukabwa Lirechi for violating Transport Licensing Board regulations.

**COUNT II**

**ABUSE OF OFFICE CONTRARY TO SECTION 46 AS READ WITH SECTION 48(1) OF THE ANTI CORRUPTION AND ECONOMIC CRIMES ACT NO 3 OF 2003.**

**PARTICULARS**

**1 Bernard Kasyoka Munyao**

**2 Francis Kyalo Mulonzi** –On 18<sup>th</sup> November 2016 at Muthangari Traffic Sub base in Dagorreti within Nairobi city, being persons

employed by a public body to wit National Police Service as Deputy Sub base and sub base commander Muthangari Traffic Police respectively, used your offices to improperly confer to yourselves a benefit of Kshs. 3,000 from George Wanyama Mulati an Operation Manager with Compliant Management Company in Muthangari Base Commander's office in consequence that you would forbear enforcing the National Transport and Safety Authority Act against the said George Wanyama Mulati's driver namely Joseph Mukabwa Lirechi for violating Transport Licensing Board regulations.

**ALTERNATIVE COUNT II**

**RECEIVING A BRIBE CONTRARY TO SECTION 6(1)(A) AS READ WITH SECTION 18 AS READ WITH SECTION 27 OF THE BRIBERY ACT NO 47 OF 2016.**

**PARTICULARS**

**1 BERNARD KASYOKA MUNYAO**

2 **FRANCIS KYALO MULONZI** –On 18<sup>th</sup> November 2016 at Muthangari Traffic Sub base in Dagorreti within Nairobi city, being persons employed by a public body to wit National Police Service as Deputy Sub base and sub base commander Muthangari Traffic Police respectively, corruptly jointly requested for financial advantage of Kshs. 3,000 from George Wanyama Mulati an Operations Manager with Compliant Management Company in Muthangari Base Commander's office in consequence that you would forbear enforcing the National Transport and Safety Authority Act against the said George Wanyama Mulati's driver namely Joseph Mukabwa Lirechi for violating Transport Licensing Board regulations.

2. Count III charged the appellant's co-accused, Francis Kyalo Mulonzi, with the offence of bribery while the alternative to Count III charged both accused persons with bribery as follows:

**ALTERNATIVE COUNT III**

**RECEIVING A BRIBE CONTRARY TO SECTION 6(1)(A) AS READ WITH SECTION 18 AS READ WITH SECTION 27 OF THE BRIBERY ACT NO 47 OF 2016.**

**PARTICULARS**

**1 BERNARD KASYOKA MUNYAO**

2 **FRANCIS KYALO MULONZI** –On 18<sup>th</sup> November 2016 at Muthangari Traffic Sub base Sub Base Commander's office, being a person employed by a public body to wit National Police Service as the Sub- base commander Muthangari Traffic Police, corruptly requested for financial advantage of Kshs. 15,000 from George Wanyama Mulati an Operations Manager with Compliant Management Company in Muthangari Base Commander's office in consequence that you would forbear enforcing the National Transport and Safety Authority Act against Joseph Mukabwa Lirechi for violating Transport Licensing Board regulations.

3. Count IV and V, as well as the alternative counts to these counts were directed solely at the appellant as follows:

**COUNT IV**

**ABUSE OF OFFICE CONTRARY TO SECTION 46 AS READ WITH SECTION 48(1) OF THE ANTI CORRUPTION AND ECONOMIC CRIMES ACT NO 3 OF 2003.**

**PARTICULARS**

**BERNARD KASYOKA MUNYAO**

On 18<sup>th</sup> November 2016 at Muthangari Canteen in Nairobi city, being a person employed by a public body to wit National Police Service as Deputy Sub base Commander Muthangari Traffic Traffic Police, used your office to improperly confer to yourself a benefit of Kshs. 3,000 from George Wanyama Mulati an Operations Manager with Compliant Management Company through an M-pesa Agent by the name Jedidah Wambui Wangechi, in consequence that you would forbear enforcing the National Transport and Safety Authority Act against the said George Wanyama Mulati's driver namely Joseph Mukabwa Lirechi for violating Transport Licensing Board regulations

**ALTERNATIVE COUNT IV**

**RECEIVING A BRIBE CONTRARY TO SECTION 6(1)(A) AS READ WITH SECTION 18 AS READ WITH SECTION 27 OF THE BRIBERY ACT NO 47 OF 2016.**

**PARTICULARS**

**1 BERNARD KASYOKA MUNYAO**

On 18<sup>th</sup> November 2016 at Muthangari Traffic Sub- base Commander's office being a person employed by a public body to wit National Police Service as the Deputy Sub- base commander Muthangari Traffic Police corruptly received financial advantage of Kshs. 3,000 from George Wanyama Mulati an Operations Manager with Compliant Management Company through an M-pesa Agent by the name Jedidah Wambui Wangechi in consequence that you would forbear enforcing the National Transport and Safety Authority Act against the said George Wanyama Mulati's driver namely Joseph Mukabwa Lirechi for violating Transport Licensing Board regulations.

#### **COUNT V**

#### **ABUSE OF OFFICE CONTRARY TO SECTION 46 AS READ WITH SECTION 48(1) OF THE ANTI CORRUPTION AND ECONOMIC CRIMES ACT NO 3 OF 2003.**

#### **BERNARD KASYOKA MUNYAO**

On 18<sup>th</sup> November 2016 at Muthangari Traffic Sub- base Commander's office being a person employed by a public body namely Kenya Police Service as the Deputy Sub- base commander used your office by improperly agreeing to confer to yourself a benefit of Kshs. 3,000 from George Wanyama Mulati an Operations Manager with Compliant Management Company through an M-pesa Agent by the name Jedidah Wambui Wangechi in consequence that you would forbear enforcing the National Transport and Safety Authority Act against the said George Wanyama Mulati's driver namely Joseph Mukabwa Lirechi for violating Transport Licensing Board regulations.

#### **ALTERNATIVE COUNT V**

#### **RECEIVING A BRIBE CONTRARY TO SECTION 6(1)(a) AS READ WITH SECTION 18 AS READ WITH SECTION 27 OF THE BRIBERY ACT NO 47 OF 2016.**

#### **PARTICULARS**

#### **1 BERNARD KASYOKA MUNYAO**

On 18<sup>th</sup> November 2016 at the Muthangari Traffic Sub-Base Commander's office being a person employed by a public body to wit National Police Service as the Deputy Sub-base commander Muthangari Traffic Police corruptly agreed to receive financial advantage of Kshs. 3,000 from George Wanyama Mulati an Operations Manager with Compliant Management Company through an M-pesa Agent by the name Jedidah Wambui Wangechi in consequence that you would forbear enforcing the National Transport and Safety Authority Act against the said George Wanyama Mulati's driver namely Joseph Mukabwa Lirechi for violating Transport Licensing Board regulations.

4. The appellant and his co-accused pleaded not guilty to all the charges. After a full trial before the Chief Magistrate's Court, the appellant was found guilty of the offence of receiving a bribe contrary to section 6(1) as read with section 18 as read with section 27 of the Bribery Act No. 47 of 2016 and the main counts in count IV and count V and was sentenced on each of the three counts to a fine of Kenya shillings Seven Hundred Thousand (Kshs.700,000/-) and in default to a term of imprisonment for 2 years, the sentences to run concurrently. He was acquitted of the charges in all the other counts.

5. Dissatisfied with both his conviction and sentence, the appellant has filed the present appeal in which he raised 19 grounds of appeal in the Petition of Appeal dated 18<sup>th</sup> October 2019. However, at the hearing of the appeal, the appellant's Counsel, Mr. Kivuva, indicated that the appellant had reduced the 19 grounds of appeal to 5 as follows:

*i. The learned trial magistrate failed to evaluate the evidence tendered before the court in a judicious manner before arriving at his judgment.*

*ii. The learned trial magistrate failed to appreciate the charges and the scope of the law before arriving at his judgment.*

*iii. The learned trial magistrate failed to consider the defence raised by the appellant and his witnesses when analyzing the evidence in his judgment and thereby arrived at the wrong conclusion.*

*iv. The learned trial magistrate passed a harsh sentence based on the wrong principle of law.*

*v. The learned trial magistrate shifted the burden of proof to the accused person while making wrong presumptions before arriving at his judgment.*

6. At the hearing of the appeal, the appellant was represented by Mr. Kivuva and Mr. Malanga while Ms. Nyauncho appeared for the State. Both parties made oral submissions on the 5 grounds of appeal which I shall set out and consider later in this judgment.

7. Since this is a first appeal, however, I am under a duty, as was held in the case of **Okeno v Republic (1972) EA 32**, to consider the evidence adduced before the trial court and reach my own conclusion. In doing so, I am duty bound to bear in mind that I have neither seen nor heard the witnesses, which the trial court had the advantage of doing.

8. The evidence presented before the trial court was as follows. PW1, Joseph Mukabwa Lirechi (Lirechi), a public service vehicle driver,

was on 18<sup>th</sup> November 2016 driving an Isuzu minibus KCA 320Y headed to Kawangare from Nairobi. At the Amboseli stage on Gitanga Road, he was stopped by the appellant, Inspector Munyao of Muthangari Police Station. Inspector Munyao told him that he had contravened the route, but Lirechi told the appellant that his vehicle plied between Ngong, Utawala, Kawangware, Kibera and Kenyatta, but the appellant did not want to understand. He asked Lirechi for Kshs. 3000/-, which he did not have, and the appellant did not explain what it was for. The appellant then ordered all the passengers to alight and directed Lirechi to park on the side of the road. The appellant then called one Cpl. Onyango (PW5), who escorted Lirechi to Muthangari Police station. Cpl. Onyango informed Lirechi that the appellant was the 'boss, and that Lirechi needed to give the Kshs.3000/- in order to be released. At the Police Station, Cpl. Onyango took the key to the vehicle, but not Lirechi's licence.

9. Lirechi then called their Manager, Mr. George Wanyama Mulati (PW2), and explained to him what had happened. When Wanyama arrived at about 10:30 a.m. they went to the traffic office where they found the appellant, IP Munyao, Mr. Mulonzi (the appellant's co-accused) and other police officers. After Wanyama greeted the officers, Lirechi was asked to leave the office. After about 10 to 15 minutes, as he headed to the yard, the appellant called him and gave him the car key, and he thought that the appellant had agreed with his Manager. As he was about to open the vehicle, however, the appellant asked him to return the key, and he gave it back to him. Lirechi heard Wanyama say that he was going to the bank to withdraw money.

10. When Wanyama took a long time returning to the Police Station, the appellant asked Lirechi why he had taken long, and whether he had given Lirechi money. Lirechi then called Wanyama who said he was coming back, and he returned about 4:00 p.m. He parked his vehicle and talked briefly to IP Mulonzi, then they were joined by the appellant. Thereafter, Lirechi was called to join them, and they all headed to the canteen at the Police Station. Lirechi heard the appellant tell the woman at the canteen to give Lirechi the car key while showing her three fingers. The woman gave Lirechi the key for the vehicle and as he left he met Wanyama who told him they could leave, so Lirechi knew that Wanyama and the appellant had solved the problem.

11. On 12<sup>th</sup> December 2016, Lirechi was called by Wanyama and asked to go to his office at Tumaini House where he met two people who recorded his statement about what had happened on 18<sup>th</sup> November 2016 at Amboseli stage. Lirechi identified the appellant and his co-accused in court.

12. In cross-examination by Mr. Kivuva, Lirechi stated that when the appellant called him, he had a TLB licence, though he did not have it in court. The TLB licence allowed him to go to several places, though he conceded that it was an offence to go to an unauthorized route.

13. Lirechi further conceded that the police do require deposit of cash bail in order to go to court. He however denied that the money paid by Wanyama was for cash bail. He did not tell the Officer Commanding Station (OCS) that he was asked for a bribe. It was his testimony that the appellant had initially given him the key of the vehicle, but later at 4.00 p.m., the appellant had asked the woman at the canteen to give him the key while raising his right hand showing three fingers. The woman did not speak to him or ask anything but she gave him the key to the vehicle.

14. In re-examination, Lirechi stated that when the appellant stopped him and asked for money, he understood him to be asking for a bribe. He was given the key of the vehicle back the first time by the appellant, and the second time by the woman at the canteen.

15. George Wanyama Mulati, PW2 was, at the material time, working in Compliant Management Company Limited, a public service transport company. Their vehicle, KCA 320Y was arrested along Gitanga road and taken to Muthangari Police station. The driver of the vehicle, Lirechi, had called him in the morning of 18<sup>th</sup> November 2016 and informed him about the arrest of the vehicle on the grounds that his TLB licence did not allow him to operate on Gitanga road. Lirechi had also informed him that they could secure the release of the vehicle by giving a certain amount of money indicated by the arresting officer to facilitate the release of the vehicle.

16. Wanyama had spoken to one of his superiors who had told him to report the matter to the Ethics and Anti-corruption Commission (EACC). He had gone to EACC and reported the matter, and had been directed to an EACC officer, John (PW11) Mr. Nyagara whom he informed that his driver had told him that their vehicle had been arrested and taken to Muthangari Police Station and the driver had been asked for Kshs.3000/- by the arresting officer. Wanyama had been given an audio recording device, a Sony, silver in colour (P Exhibit 1).

17. He had proceeded to Muthangari Police Station and on arrival had gone to the traffic inquiries office where he found several police officers. He had inquired about their vehicle and what it had been detained for and had been informed that it was operating on a wrong route contrary to its TLB licence. He was not shown any occurrence book (OB) entry at the station. Wanyama had called the driver and the conductor and they had produced their PSV licences. He also asked the driver what he was told by the arresting officer and the driver said he had been arrested because of operating on a wrong route. Wanyama then asked Lirechi to go back to the vehicle and he asked the police officers why the driver could not be taken to court.

18. Wanyama was then referred to the appellant's co-accused whom he pleaded with to release the vehicle, to no avail. According to Wanyama, he was then asked to pay a cash bail for the driver to go to court on the following Monday as that day was a Friday. He was asked for Kshs. 3000/- which he thought was a cash bail for release of the vehicle, though he did not recall the issue of cash bail being mentioned by the officer. He then informed the officers that he was going to look for money and then went back to the EACC and handed over the recording gadget to the EACC officer who had given it to him.

19. After Nyagara had listened to the gadget, he called him to an office and another officer (PW8, Joy Kawira) gave him Kshs Kshs.3000/ which she informed him had had a chemical applied to it. He appended his signature to photocopies of the Kshs 3000 notes (Serial Nos. EJ8147999 DY8565840, and DS9468462.) The money was then put in a ½ brown envelope which he signed.

20. Wanyama then left EACC with two officers whom Nyagara introduced as Mr. Mukundi (PW7) and Mr. Musi (PW5) and proceeded to Muthangari Police Station around 3:00 to 4:00pm. He had instructions to hand over the money to the officer in charge. At the Station he looked for the appellant's co-accused and found him busy, and he was directed to the appellant. He informed the appellant that he wanted to

see him about the release of the vehicle, and the appellant told Wanyama to follow him towards the police canteen. He did not tell Wanyama why they were going to the police canteen.

21. At the canteen, the appellant told Wanyama to hand over the money to the Mpesa agent there, which he did. According to Wanyama, the money was to facilitate the release of the vehicle. He then called Nyagara and informed him that he had handed over the money as instructed, and Nyagara asked him to demand the money back. He was however informed by the agent that she had deposited the money to a number and she could not get it back. Nyagara and the other officers then went to the police canteen to demand the money back. Wanyama directed them to the canteen and told them that he had handed over the money to an Mpesa agent, whom he pointed out. The Mpesa agent had given him the key to the vehicle and he left with Lirechi who went to get their vehicle.

22. The audio recording of the conversation at the Police Station, running to 28 minutes, was played to the court and PW2 confirmed that it was a true reflection of the recording. It was his testimony that he recognised his voice and that of IP Mulonzi and the appellant. A second audio recording confirming the witness had reached the police station and called one of the suspects, running to 40 seconds, was also played to the court. Wanyama confirmed that it was a true reflection of his conversation with the 2<sup>nd</sup> accused. Transcripts of the two audio recordings were also placed before the court.

23. In cross-examination by Mr. Kivuva, Wanyama stated that the officers did not ask him about the TLB. Lirechi had not told him what the Kshs 3000/- was for. He stated that he had gone straight to EACC after Lirechi called him as he thought the money was a bribe. He had reported at the EACC that in his opinion the money demanded was a bribe. He confirmed that he had known the appellant for more than 10 years, and denied that he had differed with him.

24. Jedidah Wambui Wangechi (PW3) worked as an attendant at the Mpesa shop at Muthangari Police Station canteen. The agency number was 466385 Makacomms. On 18<sup>th</sup> November 2016, a stranger had gone to the agency and wanted to make a deposit. She had deposited the money, which was Kshs 3,000 in Kshs 1,000 denominations, then had asked him for his ID, which he did not produce, so she reversed transaction. The name that came up when he made the deposit was Elijah Ochieng.

25. After she made the deposit, officers from EACC had asked her for the money. They had then called her to the office of the Officer Commanding Station (OCS) where she made a statement. She confirmed that her name and signature were on the photocopies of the notes (P. Exhibit 4(a),(b) and (c) and the inventory of swabs dated 18<sup>th</sup> November 2016 also had her name, ID number and signature. She knew the appellant and his co-accused as officers from Muthangari Police Station.

26. Dennis Owino Onyango (PW4), a government analyst, had carried out an analysis of the Kshs 3000/-, the right and left hand swabs of Jedidah Wambui Wangechi (PW3) and a brown ½ cut khaki envelope, as well as an envelope containing controlled APQ chemical sample. He indicated in his report (P. Exhibit 12) that the Kenya shilling notes that he had examined were serial numbers EJ8147999, DY8565840 and DS9468462. His analysis had established that the notes and the other exhibits all contained the controlled Anthracin Phelphthalene and Quinine (APQ).

27. No. 66130 Police Constable George Onyango (PW5, Onyango), then attached to Muthangari Traffic Patrol Base was on 18<sup>th</sup> November 2016 on traffic duty along James Gichuru road junction while his superior, the appellant, was at the Amboseli junction, both controlling traffic. The appellant called him at about 8.00 a.m. and asked him to join him at the Amboseli junction. When Onyango got there, he found that the appellant had stopped motor vehicle KCA 320Y, a minibus belonging to Compliant Sacco services on the basis that it had contravened its normal route, which was a traffic offence.

28. The appellant ordered the passengers to alight and instructed Onyango to escort the vehicle to Muthangari Police Station for further action. Onyango got into the bus and instructed the driver to drive to the station. At the station, he instructed the driver to park the vehicle at the yard, then he took the key and kept it in a box in the office. He booked the vehicle in the Detained Vehicle Register (DVR) showing the traffic offence against the driver. He then instructed the driver to wait for his superiors to issue further instructions.

29. Onyango then left the Station and travelled up country and returned on 4<sup>th</sup> January 2017 when he was called by CIP Mulonzi and informed that he had guests at the police station office. The guests were officers from EACC. They interrogated him about the events of 18<sup>th</sup> November 2016 and he recorded a statement. Later, on September 5, 2017 Nyagara from EACC went to the station and informed him that they were investigating an anti-corruption case against the appellant and CIP Mulonzi. They wanted him to listen to an audio recording to see whether he could recognize the voices. When they played the recording, he could recognise some voices, but not others. He could recognise the voice of CIP Mulonzi, one Cpl. Rapambo and that of the appellant. He had worked with the appellant for about 1 to 2 years.

30. PW6, Alex Kinyanjui (Kinyanjui), a digital forensic analyst with EACC had analysed a Techno J8 mobile phone as well as Techno C5-S, both in respect of the same case. The Tech J8 had been seized from Francis Mulonzi, while the Tecno C5-S had been seized from the appellant. His instructions were to extract call logs, SMS and contacts, and to locate communication to mobile numbers 0790232257, 0722372802 and 0722864006. His examination of the Techno C5S from Bernard Kasyoka Munyao EMEI 353202070276113 showed that 0790232257 was saved on the mobile as IP Munyao, and incoming call lists had 5 entries from the said number between 16<sup>th</sup> November 2016 and 18<sup>th</sup> November 2016. There were also 5 outgoing calls for the same period. There were also missed calls on the line, two of them on 18<sup>th</sup> November 2016. An analysis of 0722864006 saved as Bernard Munyao showed one entry on 18<sup>th</sup> November 2016 and 9 outgoing calls from 17<sup>th</sup> November 2016 to 24<sup>th</sup> November 2016. The digital forensic examination report and exhibit memos in respect of these phones were produced as exhibits 14, 16 and 17. The phones and reports had been returned to Nyagara, the investigating officer.

31. Ditim Wanyeche Juma Musi (PW7) was an investigator with EACC whose duties included carrying out investigation on corruption by planning and executing sting and trap operations. He was also the custodian of electronic gadgets and other investigative equipment at the EACC. On 18<sup>th</sup> November 2016, while at the office, he was requested by Nyagara to assist him in an investigation into a complaint relating to a matatu in which initial investigations had established a solicitation for Kshs.3000/- by a police officer at Muthangari Police Station. Nyagara had formed an investigating team including Musi, Joy Kawira (PW8), Samuel Mukundi (PW9) and himself as investigators.

32. Nyagara had requested Joy Kawira in Musi's presence to treat Kshs.3000/- with APQ chemical, a process PW7 witnessed. After confirming the serial numbers, Nyagara had instructed Wanyama (PW2) on how to treat the money, and had handed over the money. Musi had also witnessed his colleague, Mukundi, inducting Wanyama on how to operate a tape recorder, a Sony digital tape recorder for audio only (P. exhibit 1). They had gone to Muthangari Police station, but before arrival, Wanyama had, in their hearing, made a call to one of the accused persons while on a loudspeaker, and the suspect confirmed that he was in the office. Nyagara and Mukundi had followed Wanyama, who was in his vehicle, on foot. Musi drove into the station and saw the 2<sup>nd</sup> accused standing with Wanyama outside the Station building. After a while, he was informed by Nyagara by phone that the 2<sup>nd</sup> accused had directed Wanyama to meet with the appellant. Musi then saw Wanyama in the parking yard standing with the appellant, then the two walked towards the police canteen not far from the building.

33. Musi was informed by Nyagara that the appellant had instructed Wanyama to deposit Kshs. 3000/- with an Mpesa agent in the police canteen. Musi, Nyagara and Mukundi followed Wanyama into the police canteen where they met him at the door, and he informed them that he had already deposited the money with the Mpesa agent, Jedidah Wambui Wangechi (PW3) under the instructions of the appellant into the appellant's telephone number. Wanyama also told them that the appellant had walked to his office through a rear door at the canteen, which Musi had seen.

34. According to Musi, Wanyama had informed Nyagara that as Nyagara had instructed him not to deposit the money in the Mpesa account, he had asked Jedidah to reverse the transaction. They had gone to the agent, Jedidah who, on being questioned, stated that the appellant had requested her to receive Kshs.3000/- and deposit it in his telephone number. Musi, who had carried a video camera with him, had taken video clips as Nyagara questioned the Mpesa agent. The agent had confirmed that the appellant had instructed her to receive Kshs.3000/- from Wanyama, that he had gone to her with another man whom he told to give her Kshs.3000/- to deposit into his account.

35. Nyagara had asked for the Kshs.3000/- back and Jedidah had reached for it in the counter. Nyagara had put on gloves and received the money from her in denomination of Kshs.1000/-. He had then informed Jedidah that the money had been photocopied and treated and he would like them to compare the serial numbers of the recovered money with the copies, which tallied. Nyagara had prepared an inventory of the currency recovered which they signed, with Jedidah as the third witness. They then went to the office building at the Police Station and sought the assistance of the OCS who tried to reach the appellant and his co-accused on the phone, then he informed Musi and his colleagues that the two were engaged on duty outside the Police Station. However, while they were waiting for the OCS at the Station, Musi had seen the appellant drive off in a Probox vehicle and had managed to film the rear of the vehicle.

36. The OCS had called Jedidah to his office and Musi took swabs of both of her hands after putting on polythene gloves. He placed the swabs in envelopes for purposes of APQ analysis at the Government Chemist. Musi identified the swabs and the envelopes in which they had been placed (P. Exhibit 19B). He also prepared an inventory dated 18<sup>th</sup> November 2016 (P. Exhibit 11) of the swabs of the left and right hands of Jedidah Wambui Wangechi. Jedidah had confirmed that the swabs were from her hands by signing the inventory.

37. In March 2017, Musi had transferred the video clips from the camera into his official computer and saved them in a DVD. He had also prepared a certificate (P. Exhibit 20) under section 106B of the Evidence Act. The video was played in court, with the trial magistrate noting that it showed a woman behind a grill, and that Kshs.1000/- notes are also seen. The woman states in Kiswahili that some people had come and asked her to deposit money in Mpesa. The video further captures the comparison of the notes with their photocopies. The woman is asked her name and she responds that she is Jedidah Wambui. The clip also shows a Probox car moving away, as does a second clip. Musi further produced a transcript of a conversation between Wanyama, the appellant and Jedidah. It was his testimony that the appellant had gone to Jedidah and requested her to accept money from Wanyama to put in the appellant's Mpesa account.

38. Joy Kawira (PW8) an investigator with EACC had been asked by Nyagara on 18<sup>th</sup> November 2016 to treat some Kshs.3000/- which was to be used in an operation. She had photographed the money then treated it with APQ chemical and made an inventory of it. She had shown Wanyama the photocopy of the money to confirm the serial numbers and had asked him to sign the inventory, which he had done. She had also signed the inventory and they had both signed the photocopies of the money. The money had been handed over to Wanyama and he had been instructed to hand over the money when it was demanded. She identified the money and its photocopy, the inventory of the money dated 18<sup>th</sup> November 2016 and the ½ cut brown envelope in which she had placed the money and which both she and Wanyama signed on 18<sup>th</sup> November 2016.

39. PW9, Samuel Mukundi Njiru, also an investigator with EACC, was on duty on 18<sup>th</sup> November 2016 when he was requested by Nyagara to assist in an investigation. Nyagara introduced him to Wanyama, whom they interviewed together Mukundi recorded Wanyama's statement regarding the demand for Kshs. 3000/- in order for their vehicle to be released. Mukundi then prepared an audio digital recorder (P. Exhibit 1), tested it and confirmed that it was in good working condition. He had introduced it to Wanyama and demonstrated to him how to operate it. He also instructed Wanyama to capture the conversation between him and the alleged police officer (who was demanding a bribe) in order to assist in establishing whether his allegations were true or false.

40. Mukundi and Nyagara had followed Wanyama to Muthangari Police Station but had remained outside as Wanyama went to the office where he met the two officers, among others. Wanyama had recorded the conversation with them then had left the office and returned the recorder to Mukundi. They had listened to the conversation and Wanyama had identified two of the voices in the recorder as those of the appellant and his co-accused. Mukundi had heard one of the voices say that Wanyama should have taken Kshs.15,000/-, while another asked for Kshs.3000/- for *wanyama choma* over the weekend.

41. Mukundi confirmed that Kawira had been instructed to assist in processing Kshs. 3000/- in denomination of Kshs.1000/- for the operation. He further testified with regard to the steps she had taken of photocopying, preparing an inventory, treating the money with APQ chemical, and placing it in a ½ khaki envelope which she and Wanyama signed.

42. Mukundi had accompanied Nyagara and Musi to the Police Station while Wanyama had driven in his vehicle. Wanyama had made a phone call while in the EACC vehicle to ensure that the suspects were present, and Mukundi had recorded the conversation in the gadget which he then fitted on Wanyama. He and Nyagara had followed Wanyama to Muthangari Police Station on foot. Mukundi had seen Wanyama speak to one officer, then they were joined by another in the uniform of an Inspector of Police. After a short conversation,

Wanyama and the Inspector had walked towards the police canteen. Mukundi was present when Nyagara received a call from Wanyama inquiring if he could deposit the Kshs. 3000/- for the operation at an Mpesa account of an officer whom he later learnt was the appellant, and Nyagara had given Wanyama the go-ahead. Shortly thereafter, Mukundi and Nyagara had gone to the canteen and had met Wanyama at the door of the canteen and Wanyama had informed them that he had handed over the money to the woman at the counter, Jedidah Wangechi. Jedidah had retrieved the money and had handed it over to Nyagara, and they had compared the serial numbers with those of the photocopies of the money, and they tallied. They had then gone to the office of the OCS Muthangari Police Station and had briefed him and requested him to call the two officers who had driven out of the station, but the officers said they could not return immediately as they were engaged on duty.

43. Mukundi further confirmed the evidence of Musi that he had taken swabs of Jedidah's hands and parked each swab in a different envelope and labeled it. Mukundi had then recorded Jedidah's statement in the presence of the OCS, Nyagara and Musi. Her statement was to the effect that an Inspector of Police had instructed a man he was with, Wanyama, to deposit Kshs.3000/- to his the appellant's account. An inventory of the Kshs.3000/- recovered from Jedidah had been done, and Mukundi had signed it as the 4<sup>th</sup> witness.

44. No. 73528 PC Quinto Odeke (PW10), a police officer seconded to Safaricom Ltd's Security Department, Liaison Office, had received court orders from the Chief Magistrate's Court, all of which were produced in evidence, relating to orders issued to Mr. Nyagara John of EACC to obtain information in respect of Till No. Mpesa Agent No. 466385 for the period 1<sup>st</sup> October 2016 to 1<sup>st</sup> February 2017 which he produced as P. Exhibit 24. A second order required Safaricom Ltd to give the said John Nyagara information in respect of mobile numbers 07190232257 and 0722372802 (P. Exhibit 25). A third order required that Safaricom supplies information in respect of 0722864006 and 0724393279 (P. Exhibit 26).

45. In relation to Till Number No. 466385 (P. Exhibit 24), Odeke testified that the Mpesa Agent is Makacomms, Emali Electronic Shop, Emali Bus Park. In relation to mobile number 0790232257, a deposit initiated by subscriber No. 0790232257 under the name of Elijah Ochieng of Kshs .3000/- was made on 18<sup>th</sup> November 2016 at about 15:40 hours. There was a reversal on the same date involving 0790232257 at about 15:42 hours, initiated through Till No. 466385. His further testimony was that 0790232257 is registered under the name of Elijah Onyango Ochieng, ID No. 32823203. 0722372802 was registered under Francis Kyalo Mulonzi, ID No. 13208914.

46. Odeke noted that on 8<sup>th</sup> October 2016 at about 13:52 hours the subscriber of 0722372802 received Kshs.10,000/- from 0790232257 registered in Elijah Ochieng's name, which meant that Francis Mulonzi received money from the number registered under Elijah Ochieng. Mobile number 0722864006 was registered in the name of the appellant, ID No. 11359099, as was number 0724393279 On 15<sup>th</sup> November 2016 at about 13:05 hours, the appellant had received Kshs.500/- from Elijah Ochieng, mobile No. 0790232257. Various entries identified by Odeke showed deposits of funds at the agent registered at Makacomms Emali, including deposits of Kshs. 2000/- and Kshs. 1500/- which showed previous transactions by the appellant with the Mpesa agent.

47. The investigating officer (PW 11) John Otieno Nyagara essentially summarised the results of the investigation and the evidence of the other prosecution witnesses. On 18<sup>th</sup> November 2016, he had been assigned the complaint by Wanyama regarding the alleged demand for Kshs 3,000 by a traffic police officer attached to Muthangari Police Station in order to release their vehicle detained at the Station yard for contravening TLB. He had interviewed Wanyama and recorded his statement. He had then requested Mukundi to induct Wanyama on the use of a recording gadget and he, Mukundi and Musi had then gone back to the Muthangari Police Station with Wanyama. He further repeated the evidence regarding the recording of the conversation between Wanyama and the appellant and other officers regarding the release of the detained motor vehicle; the voices demanding Kshs.15,000/- and Kshs. 3000/-, and the identification of the appellant's and his co-accused's voices in the recording by Wanyama. He also testified with regard to the treatment of the money by Kawira, the return to the police station with Musi and Mukundi.

48. At the station, Nyagara had called Wanyama who had informed him that the appellant's co-accused had referred him to the appellant, who had the case. Nyagara had seen the appellant join Wanyama and the 2<sup>nd</sup> accused at the car park, then all of them had walked to the canteen. Shortly thereafter, Wanyama had called Nyagara asking if he could deposit the money in the appellant's Mpesa account at the canteen, and Wanyama had told him that he could do so but to watch where the money would be placed by the attendant. Nyagara, Musi and Mukundi had then walked to the canteen where they met Wanyama walking out, and he informed them that he had deposited the money with the Mpesa agent attendant.

49. Nyagara echoed the evidence from Wanyama, Musi and Mukundi relating to the recovery of the money from Jedidah and the confirmation that it was the same notes that had been treated by Kawira; the taking of swabs of Jedidah's hands, and the taking of Jedidah's statement by Mukundi. Nyagara produced the Kshs.3000/- with serial numbers DY8565840, EJ8147999 and DS9468462 (P. Exhibit 4(a), (b) and (c).) He had thereafter sought the assistance of the OCS Muthangari Police Station to instruct the appellant and his co-accused to return to the police station, but they had said they could not as they were on duty, though Musi had taken videos of the two driving out of the station. Nyagara had seen the appellant drive off in his Toyota Probox.

50. Nyagara had prepared DVDs of the two recordings by Wanyama, though they had realised that the conversation of Wanyama and the police officers regarding the money had not been recorded. He had made and printed transcripts of what had been recorded which he produced in evidence (P. Exhibit 8 and 9).

51. Nyagara further testified with regard to the statements taken from the appellant and his co-accused. With regard to the appellant's co-accused, he had reported to the EACC on 22<sup>nd</sup> November 2016 and Nyagara had played back the conversation recorded by Wanyama, and he had identified his voice. He had also handed over his mobile phone, a Techno J8, which was taken to the forensic lab for extraction of data by Kinyanjui. Nyagara had examined the data extraction report and from the analysis that he carried out from this report, he had found that the phone that received the money through the Mpesa agent at Muthangari Police Station, 0790232257, had communicated with the appellant's co-accused's line, and was identified as Q. Inspector Munyao. Nyagara had also found in the report calls from 0722864006 also identified as Q. Munyao (P. Exhibit 18).

52. The appellant had gone to the EACC offices on 24<sup>th</sup> November 2016. Nyagara had played the recording back to him and had taken his mobile Tecno C5-S. He had also prepared an exhibit memo form that accompanied the phone to the forensic lab for extraction of conversation data and text messages. After examination and extraction, a report (P. Exhibit 18) was handed over to Nyagara. On examination, he found that No. 0790232257 had communicated with the appellant's number 0722864006, in the name of Bernard Munyao. No. 0790232257 was registered in the said Bernard Munyao's number 0722864006's phone book as Inspector Munyao. The appellant's other number 0724393279 also appeared as Kasyoka Munyao.

53. Nyagara had also, on 8<sup>th</sup> May 2017, obtained summons to inspect Mpesa accounts for Till No. 466385, as well as to inspect the accounts of 0722864006 and 0724393297. He also got a warrant to inspect the account of 0790232257 and 0722372870 (P. Exhibit 25, 26 and 24). He had received the Mpesa transactions of all the numbers from Safaricom. On analysis, he had realized that Till No. 466385 was now coming with results as Till Code No. 410249 account holder Makacomms Emali Electronic shop, Emali Bus Park. He also found that No. 0790232257 in the name Elijah Ochieng had received Kshs. 3000/- on 18<sup>th</sup> November 2016 at about 15:40:52 (Page 133 of P. Exhibit 27). The transaction was reversed at about 15:42:05.

54. On closer examination, he realized that the appellant's number, 0790232257 was in the name of Elijah Ochieng and that it was being used to transact at the till at Muthangari Police Station and was also transacting with the appellant's other number, 0722864006. He had also, on checking Till No. 466385, found that the number belonged to the appellant and that the appellant and his co-accused together deposited money at the till at Muthangari Police Station.

55. Nyagara further noted from his analysis of the extracts that the appellant had transacted a total of Kshs.2,300,000/- in one year. He had requested the appellant to go to the EACC office to shed light on the deposits as it was above the average earnings of an inspector of police. The appellant had indicated that he had businesses that assisted him in running the Mpesa accounts and had admitted that he knew mobile number 0790232257 which he stated belonged to his employee in his taxi/car hire business. The appellant had further explained that other transactions from that number to his number were in relation to money paid for car hire. According to Nyagara, mobile number 0790232257 in the name of Elijah Ochieng was actually that of the appellant.

56. Nyagara placed in evidence the exhibit memo to accompany exhibits to the Government Chemist at Kenyatta National Hospital for analysis. These were the cash Kshs.3000/-, the swabs of the left and right hands of Jedidah Wambui, the brown ½ cut envelope and the APQ sample (Exhibit memo P. Exhibit 13). He had received a report from the Government Analyst on 10<sup>th</sup> January 2017 which confirmed that Jedidah had touched the trap money Kshs.3000/- (P. Exhibit 12) according to the Government Analyst Report.

57. Nyagara also confirmed the evidence of George Onyango (PW5) that Onyango had identified the voice of the appellant in the recording taken by Wanyama at the Muthangari Police Station when Nyagara played it back for him. Onyango was the police constable attached to the traffic office at Muthangari Police Station who had, on the instructions of the appellant, escorted Wanyama's motor vehicle KCA 320Y Isuzu matatu to Muthangari Police Station parking yard.

58. When placed on his defence, the appellant gave sworn testimony and called 3 witnesses. He stated that he was a police officer in the National Police Service. On 18<sup>th</sup> November 2016, he was stationed at the Muthangari Police Station performing traffic duties which included ensuring free flow of traffic and supervision of his juniors. He was reporting to Chief Inspector Mulonzi and the OCS. He further stated that when a vehicle has been detained they would take it to Muthangari Police Station and book it in the Detained Vehicles Register (DVR) and then decide on further action, which actions rested on the OCS. That when a vehicle was arrested, it would be taken to the Police Station to give the accused person police bail, which would be given by the OCS. Sometimes, one would be given a notice to attend court.

59. On 18<sup>th</sup> November 2016, he was doing traffic management and supervision at Amboseli on Gitanga road. He had stopped a vehicle registration number KCA 320Y, an Isuzu matatu belonging to NMDA Sacco company between 6.30 to 7.00 a.m. He had checked the windscreen and found that the insurance and inspection stickers were valid. The TLB was designated from Ngong to Kawangware and not Kawangware-Gitanga-Town, so the vehicle had contravened the route. He had informed the driver and had called PC George Onyango (PW 5) who was at the Gitanga junction and asked him to take the motor vehicle to the station to get the bond to attend court. He had further instructed Onyango to ensure the conductor had refunded the passengers' money as they had detained the vehicle so that the driver would be taken to court the following day.

60. The appellant denied that he had demanded a bribe of Kshs.3000/-. He had worked for over 24 years and had never engaged in corruption. He maintained that the vehicle was taken to the Station and registered in the DVR, and from there, it was beyond his responsibility and was the responsibility of the OCS.

61. The appellant stated that he had gone back to the station at about 10.00 a.m. and had met Wanyama outside the station, and had told him to go and get a police bond. He confirmed that he had heard the conversation in the audio recorder played in court but his testimony was that his *'voice never asked for a bribe.'*

62. According to the appellant, at about 4.00 p.m. or 3:30 p.m., he had found a plumber, whom he had requested to repair his house, at the main entrance. He had gone to the far end of the parking yard with the plumber, then driven to the junction of James Gichuru. He denied that he had seen Wanyama on the material day.

63. With regard to the mobile telephone lines, his testimony was that the mobile numbers registered in his name were 0724393279 and 0722864006. He had never used mobile line number 0790232257, nor did he know the owner. He denied that he had stepped in the police canteen on the material day. According to the appellant, Wanyama had complained because the appellant had refused to take a bribe. He further denied that the voices on the recording played to him at the EACC offices were either his or that of his co-accused.

64. The appellant confirmed in cross-examination that he had listened to the recording with Nyagara. He further confirmed that George Onyango was a colleague at Muthangari Police Station. He had been introduced to Wanyama at 11:00 a.m. at the traffic office in the Police

Station by his co-accused. He could not recall the discussions in the traffic office as they were mixed and Onyango was requesting for a police bond. He further confirmed that Jedidah was an Mpesa attendant at Muthangari Police Station canteen. He denied that his voice was in the recording produced in court, or any knowledge of an Elijah Onyango Ochieng or the mobile number 079023257. In re-examination, he asserted that his statement was taken under threat or duress.

65. Dennis Mark Mataro (DW3), a resident of Kawangware, testified that on 16<sup>th</sup> November 2018 (sic) on his way to Gikomba where he worked, the vehicle he was in was stopped by a traffic police officer whom he knew by appearance. He had known him when he worked at Shauri Moyo as the officer in-charge, California police post. The officer had stopped the vehicle and asked for the vehicle to be parked beside the road and passengers to alight and take another matatu. The officer had also directed that the matatu be taken to the Police Station. DW3 and others had asked to be refunded their fare, and the officer had directed that this should be done. It was Mataro's evidence that he heard the driver state in the Kamba language that "*This Mkamba is stupid. He does not take money.*"

66. DW3 had not seen the said officer for a while until February of 2019 when he met him and the officer told him what had been happening to him and that he would need him. They had exchanged telephone numbers, which was why he had come to testify.

67. Boniface Mutua Musyoka (DW4), stated that he was a plumber staying in Kayole. He had been called by his uncle and informed that there was someone in need of his services. His uncle had given him the customer's number. The customer's name was Munyao. The said Munyao told Musyoka that he had plumbing problems he needed fixed. He had gone to meet the person on 18<sup>th</sup> November 2016 at Muthangari Police Station so that they could go to buy materials. He had arrived at the Muthangari Police Station at 3:00 p.m. They had left and gone to James Gichuru road where they found heavy traffic and Musyoka left to buy the items at Kawangware, leaving the officer at James Gichuru where there was a heavy traffic jam.

68. After considering the evidence of the 11 prosecution witnesses and the 4 defence witnesses, the trial court convicted the appellant on 3 counts and acquitted his co-accused giving rise to the present appeal.

### **Analysis and Determination**

69. As indicated earlier, the appellant challenged his conviction on five grounds which I have set out earlier in this judgment. Counsel for the appellant and the State made oral submissions on the said grounds, which I now turn to address.

### **Failure to evaluate the evidence and to consider the defence**

70. The appellant argued, first, that the trial court had failed to evaluate the evidence judiciously and, secondly, that it had failed to consider the defence, thus arriving at the wrong conclusion. With regard to evaluation of the evidence which the appellant's Counsel linked with the manner of framing of the charge sheet, Mr. Kivuva submitted that the critical words of the first charge against the appellant were '*improperly to confer to yourself a benefit of Kshs 3,000...*' Counsel argued that the word 'confer' is defined by the Cambridge Online Dictionary as to '*grant a benefit or right*'. In his view, the word as used in the charge sheet implies that the appellant conferred a benefit on himself, but the word 'confer' implies a third party granting or conferring the right. In his view, the manner in which the charge sheet was framed violated the right of the accused to know the charges facing him so that he could defend himself.

71. It was the appellant's Counsel's submission, secondly, that the appellant was charged with conferring on himself a benefit of Kshs 3,000. His submission was that the evidence does not show that the appellant requested for Kshs 3,000 from any of the 11 witnesses tendered by the prosecution in order to forebear from enforcing the National Transport and Safety Authority (NTSA) Act. Counsel noted that according to PW1, Joseph Mukabwa Lirechi, the driver alleged to have been stopped by the appellant, the appellant had asked for Kshs 3,000/- which the witness did not have, and had not explained what the Kshs 3,000 was for. He had also stated that the police do receive cash bail, though in his understanding the demand was for a bribe. Mr. Kivuva submitted that the demand for a bribe must be explicit and unequivocal and leave no room for doubt. Counsel relied for this submission on the decision of Mbogholi Msagha J in the case of **Geoffrey Ombogo vs Republic (2014) eKLR**. It was his submission that there is no evidence from Lirechi, the first person who came into contact with the appellant that the appellant was intending to stop prosecution. His submission was that when he failed to raise the cash bail, the appellant enforced the provisions of the NTSA Act by ordering the vehicle to be taken to the police station for action.

72. Mr. Kivuva further submitted that PW2, George Wanyama Mulati was allegedly called by Lirechi when Lirechi's vehicle was impounded. He observed that in his evidence, Wanyama had stated that the officer asked for cash bail, and that he was asked to hand over the amount to the 2<sup>nd</sup> accused, who was discharged by the court. He further observed that the court had noted that from the video recording, a voice was heard saying that one should be taken to court. It was also his submission that Wanyama had stated that when he was called by the driver, he was not told what the Kshs 3000 was for and he went straight to the offices of the Ethics and Anti-corruption Commission (EACC).

73. Counsel further noted that Wanyama had stated in his evidence that the police were carrying out their normal duties, and that the accused persons did not ask him to give them Kshs 3,000, that his understanding was that they were asking for cash bail. According to Mr. Kivuva, all the evidence showed that the appellant stopped the vehicle and asked for cash bond to take Lirechi to court. When the vehicle was taken to Muthangari Police Station, the same bond was asked for. In his view, the trial court failed to analyse this evidence.

74. It was further argued on behalf of the appellant that the trial court failed, in analyzing count 1, to mention the appellant's evidence in the judgment. The submission therefore was that the appellant was not accorded a fair hearing under Article 50 as the court did not state whether it disbelieved his evidence. Mr. Kivuva submitted that the appellant's evidence was supported by DW3, Dennis Mataro who was in the vehicle, and who testified that he heard Lirechi state that the appellant does not take bribes. According to Mr. Kivuva, Lirechi had then hatched a plan to have the appellant charged with the offences and called Wanyama who went to EACC, a fact which Mr. Kivuva submitted showed a clearly hatched plan.

75. In submissions in reply, Ms. Nyauncho argued that the prosecution had proved beyond reasonable doubt that the appellant corruptly asked for a bribe of Kshs 3,000 from Wanyama, and was also able to prove that the appellant improperly conferred to himself Kshs 3,000 and also improperly agreed to receive a financial advantage of Kshs 3,000 from Wanyama. She noted that the prosecution had, through the evidence of the 11 witnesses, proved its case against the appellant.

76. I have considered the oral and documentary evidence before the trial court and the judgment of the court. The evidence indicates that the appellant, an Inspector of Police attached to Muthangari Police Station, was on traffic duty at the Amboseli stage on Gitanga Road on the material day. He had stopped the vehicle driven by PW1, Lirechi, whose Manager was PW2, Wanyama. He had informed PW1 that he had contravened the TLB route, had asked him to drop all the passengers, and had asked Onyango, PW5, to take the vehicle to the Muthangari Police Station. According to PW1, the appellant had asked for Kshs 3,000 to release the vehicle, without telling him what the money was for.

77. PW1 had called his Manager, PW2, and informed him what had happened. PW2 had gone to the EACC and had been fitted with a recording device. He had returned to the Station and recorded the conversation with the officers, which was played back in court, and a transcript of which was also produced in evidence.

78. Thereafter, PW2 had returned to the EACC where he was given treated money which he returned with to the Muthangari Police Station. The evidence indicates that he met the appellant's co-accused, who directed him to the appellant as the person 'who had the case'. The appellant had walked with PW2 to the police canteen where there was an Mpesa agent, and had directed him to deposit the Kshs 3000 with the attendant. The evidence of PW1, who had been asked to follow PW2 to the canteen, was that the appellant had asked the Mpesa attendant, Jedidah, PW3, to give back the key of the matatu, while holding out 3 fingers. Indeed, the key had been given to PW1, and he had left, knowing that PW2 and the appellant had sorted out the issue.

79. Ms. Nyauncho submitted, and the evidence bears her out, that the Kshs 3,000 was demanded by the appellant so that he could forbear from charging Lirechi for the offence he had allegedly committed of contravening TLB regulations. The conversation recorded by the device revealed the appellant informing PW2 that if the matter went to court, the fine for the offence would be Kshs 10,000. The appellant's voice in the recording was identified by PW5, Onyango, the appellant's colleague who had been instructed by the appellant to escort the vehicle to the Muthangari Police Station.

80. In further bolstering the prosecution evidence that the Kshs 3,000 was intended as a bribe and not cash bail as the appellant argued, it had been deposited, not with the police cash office at the Muthangari Police Station, but with the Mpesa agent in the police canteen. The Kshs 3000 in Kshs 1000 denominations, which were produced in court as exhibit No 4 (a) (b) and (c), were deposited at the Mpesa agent and received by PW3, Jedidah. She had deposited the money in mobile number 0790 232257, then had reversed the transaction and upon the notes being demanded back by Nyagara, PW11, had handed them back. The notes tallied with the serial numbers on the photocopies of the notes taken by Kawira, PW8, who had treated the notes with APQ chemical.

81. An analysis of swabs of PW3's hands also revealed that she had touched the notes, which the evidence of PW2, 7 and 11 also confirms. In her own testimony, though she was evasive in giving evidence as the record of the trial court indicates, PW3 testified that it was the appellant who had gone with another person to the Mpesa agent and asked her to take a deposit into Mpesa from the man, though he did not produce his documents as was the normal procedure. Mpesa phone extracts produced in court following court orders obtained by PW11 and extraction of information by PW6 (Alex Kinyanjui) proved that the money was deposited in that phone number, which was linked with the appellant and was saved in his phone as 'Q Munyao,' the same line had sent money to the appellant's phone number.

82. From the evidence therefore, the appellant stopped the vehicle at the Amboseli stage and allegedly demanded Kshs 3,000 for contravention of TLB regulations. He was placed at the Muthangari Police Station and in the office where the demand for Kshs 3000 was made, and his voice was positively identified by his colleague. He directed PW2 to deposit the money in a mobile number at an Mpesa agent. He directed the attendant at the Mpesa agent to give PW1 the key of the vehicle registration number No. KCA 320Y. Taken together, the evidence clearly does not support the appellant's contention before the trial court that the money was for cash bail, and that there was an intention to take the driver of the vehicle to court. As stated by Msagha J in **Geoffrey Ombogo v Republic** (supra) the conduct of the appellant in this matter was '*explicit and unequivocal*'.

83. The appellant complains that the trial court did not give him a fair hearing as it did not consider his defence. I note that his defence consisted of an assertion that the money was for cash bail and was not a bribe. In the judgment, the trial court, on the authority of the decision in **Harry Amwai Etemesi -Vs- R (1997) eKLR**, held that when the appellant's co-accused asked the appellant to enable PW2 to go and pay the cash bail for appearance in court the following day and the appellant led PW2 to the police canteen where the Kshs.3000/- was received by PW3 after the appellant showed her 3 fingers, a rebuttable presumption was raised that the appellant had received the money. An onus was therefore placed on him to show that the Mpesa agent was the cash office, or that he was not the one who had been asked to enable PW2 pay the cash bail. The court found that the appellant had not discharged this onus, and concluded therefore that he had received the money as a bribe.

84. I find therefore, that the trial court did consider the appellant's defence. What it did not make reference to is the evidence, such as it was, of DW3 and DW4, Mataro and Musyoka. The extent of Mataro's evidence was to suggest that PW1 and PW2 had conspired to lodge the complaint against the appellant, which, if it had been the case, should have emerged during the cross-examination of the two witnesses. Musyoka's evidence that he had gone with the appellant to buy plumbing items did not also displace the evidence of at least six prosecution witnesses, PW1, 2, 3, 4, 7, 9 and 11 who placed the appellant at the police canteen at the time the Kshs 3,000 was deposited with PW3, the Mpesa agent attendant.

85. The trial court also considered the issue of the telephone number 0790232257 to which, according to PW3, the money was deposited, and the name in which it was registered emerged as Elijah Ochieng. The trial court observed that PW 11 had produced evidenced relating the line to the appellant; that evidence from the forensic examiner PW 6 indicated that the number was in communication with a mobile number belonging to the appellant, and that even the appellant's co-accused CIP Mulonzi, had indicated that when he had requested for some money from the appellant, the appellant had sent him the money using the said telephone number. Efforts to trace the said Elijah O. Ochieng

had been in vain.

86. I am satisfied therefore that this ground of appeal must fail.

**Failure to appreciate the charges and the scope of the law before arriving at his judgment.**

87. In his submissions on this ground, Learned Counsel, Mr. Kivuva, noted that the charge sheet against the appellant had 5 main charges and 5 alternative counts. He further observed that the appellant was convicted on counts I, IV and V. According to Mr. Kivuva, on count I, the appellant was convicted on the alternative charge, which was under the Bribery Act, No 47 of 2016, whose date of commencement is 13<sup>th</sup> October 2017. It was his submission that from the charge sheet, the crimes with which the appellant was charged were allegedly committed on 18<sup>th</sup> November 2016 when the Bribery Act was not in force. Mr. Kivuva's submission therefore was that the appellant's conviction was wrong from the word go.

88. Mr. Kivuva further observed that all the charges relate to one transaction, and offences arising from one transaction should be charged in the same count. He observed that count IV refers to use of office to confer a benefit of Kshs 3,000, while count V refers to agreeing to confer to oneself a benefit. Mr. Kivuva drew an analogy with the offence of murder and assault, his submission being that one cannot confer a benefit on oneself and agree to confer a benefit on oneself. Counsel relied for this submission on section 63 of the Interpretation and General Provisions Act and the decision in the Ugandan Supreme Court case of **Wamulu Christine vs Uganda** (neither authority nor citation supplied by the appellant's counsel) and the Tanzanian case of **Joseph Mpema vs Republic 1984 TZHC**. His submission was that the court should find that count IV and V refer to the same charge and accordingly, the appellant's right to a fair hearing was violated. Reference in this regard was also made to the Australian case of **Krug v The Queen 1985 2 SCR 255** and **Keinapple vs The Queen 1975 1 SCR 729** (the Keinapple principle) for the submission that there was a mistake which the court did not appreciate, and it refused to take into account the defence and the submissions which the appellant had raised in the defence before the trial court.

89. Mr. Kivuva noted that the appellant had been convicted on counts IV and V with regard to how the money was deposited in an Mpesa account and how the key of the vehicle were received. He observed that PW3 stated that Wanyama, PW2, was the one who deposited the money in the account of 0790232257. He further noted that she stated that the name indicated for this Mpesa account was Elijah Ochieng. She had also confirmed in her evidence that she did not have the key of the vehicle and that the appellant was not present and did not go to the canteen the whole day. Mr. Kivuva further submitted that Lirechi and Wanyama had tried to show that the key of the vehicle were with Jedidah, and that it is from her that they collected the key, a fact which she denied as she was not part of the plan hatched by the two against the appellant. According to Mr. Kivuva, those facts combined show that the court did not appreciate the counts with which the appellant was charged. I observe that the submissions by Mr. Kivuva on the facts do not quite accord with the evidence on record.

90. In her submissions in reply, Ms. Nyuncho submitted that counts IV and V have distinct particulars and should remain as two separate counts. It was her position that they comply with section 134 of the Criminal Procedure Code which provides for the manner of drafting proper charge sheets.

91. With regard to the contention that the appellant was charged under the Bribery Act which came into force in January 2017, after the offence had been committed, Ms. Nyauncho referred the court to the decision of Ong'udi J in **Republic vs Henry Ngugi Njeru (2017)eKLR**. Her submission was that the court in that case had considered section 27(2) of the Bribery Act which is specific that such offences which were committed, investigated, and instituted before the commencement of the Bribery Act ought to be treated or continued with the necessary modification as if they were instituted under the Bribery Act.

92. I have considered the submissions of the parties with respect to the charges and the judgment of the trial court. I note that in his judgment, the trial Magistrate found that the accused had been charged in five main counts, all under the Anti-corruption and Economic Crimes Act. The accused also faced alternative counts, all under the Bribery Act, 2017. The trial court noted that the only difference between the counts is that they are brought under different legal regimes. He expressed the view that as public officers, the appellant and his co-accused should have been charged under ACECA, not the Bribery Act, though he was of the view that public officers could also be charged under the Bribery Act. He did not, however, find anything wrong in the manner in which the charges had been lodged against the appellant and his co-accused.

93. From the submissions of Counsel for the appellant, their challenge in respect to the counts with which the appellant was charged is two-fold. First, that he was charged under the Bribery Act which was not in force at the time the offence he was charged with was committed, and secondly, that he faced a multiplicity of charges which violated his rights under Article 50.

94. With respect to the first challenge, I note that the Bribery Act, No. 47 of 2016 came into force on 13<sup>th</sup> January 2017. Section 27 of the Act provides that:

***(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.***

95. The respondent has referred to the decision of Ong'udi J in **Republic v Henry Ngugi Njeru [2017] eKLR**. I have read and considered this decision, which is persuasive authority. I note that the High Court, in revising the decision of the trial court, stated that:

***12. The Hon. Chief Magistrate may have been right in his decision to some extent but not wholly. If his line of thinking was adopted the charge would have been under the Bribery Act but the particulars in the charge sheet would show that the offence***

*was committed under the regime of the repealed law. This would cause challenges.”*

96. The Court also found that section 27(2) of the Bribery Act had made provision for offences investigated and charged under section 39 of ACECA, which was repealed by the Bribery Act.

97. It seems to me, then, that the charges against the appellant cannot be properly challenged on the basis of the statute under which they were brought. I note that the charge sheet is dated 7<sup>th</sup> February 2017, which is a date after the commencement of the Bribery Act. While the investigations had commenced prior to the commencement of the Act, the charges against the appellant were instituted after the Act came into force. I am therefore unable to find a basis for challenging the conviction with respect to the statutes under which the charges were lodged.

98. The second challenge relates to the multiplicity of charges against the appellant. Counsel for the appellant argued before this court and in written submissions before the trial court that the multiplicity of charges violated the appellant’s right to a fair hearing. Reliance is placed in this regard on the decision of Ngenye-Macharia J in **Rebecca Mwikali Nabutola & 2 others v Republic [2016] eKLR**.

99. In that decision, the court considered the provisions of section 134 and 135 of the Criminal Procedure Code which provide as follows:

**134. Offence to be specified in charge or information with necessary particulars** *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 reasonable information as to the nature of the offence charged.*

**135. Joinder of counts in a charge or information**

**(1)** *Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character.*

**(2)** *Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count.*

**(3)** *Where, before trial, or at any stage of a trial, the court is of the opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence in the same charge or information, or that for any other reason it is desirable to direct that the person be tried separately for any one or more offences charged in a charge or information, the court may order a separate trial of any count or counts of that charge or information.*

100. The Court also cited section 136 of the Criminal Procedure Code, which is not relevant for present purposes. Its conclusion was as follows:

*“The question for determination is whether any of the above provisions have been violated in the manner the charge sheet is drafted. The Black’s Law Dictionary, 9th Edition at page 578, defines duplicity as: ‘the charging of the same offence in more than one count of an indictment or, the pleading of two or more distinct grounds of complaint or defence for the same issue.’*

*In the case of Omboga vs Republic [1983] KLR 340, it was held that;*

*“injustice will be occasioned where evidence is called relating to many separate counts all contained in one count because the accused cannot possibly know what offence exactly he is charged with.’*

*Looking at the charge sheet there are 11 counts of specific offences each with particulars describing the alleged contravention of the law. None of the counts as drafted contain more than one offence as to make it difficult for the appellants to understand the nature of charges against them.*

*The charges against the appellant arose from the same set of facts concerning expenditure of public funds for an event in which all the appellants were in some way allegedly involved. On the face of it, I find that the charges as drafted are not bad in law for either duplicity or joinder of counts.”(Emphasis added)*

101. Having considered the charges in the present case, I find that though the appellant faced different counts under two statutes relating to different offences, they arose from the same set of facts, the solicitation of a bribe by a public officer, to forebear from charging the complainant’s driver for infraction of TLB regulations. The charge sheet was not drafted in such a manner as to make it difficult for the appellant to understand the charges facing him. I accordingly find no basis for challenging the trial and conviction on this ground.

**Whether the Trial Court passed a harsh sentence based on the wrong principle of law.**

102. In this regard, Mr. Kivuva observed that the appellant had been sentenced to two years’ imprisonment on each count, the sentences to run concurrently. In the alternative, he was sentenced to a fine of Kshs 700,000 on each count, an aggregate of Kshs 2.1 million. According to Mr. Kivuva, the subject amount listed in the charge sheet is Kshs 3,000, which amount was produced in court as evidence. In further submissions on this issue on behalf of the appellant, Learned Counsel, Mr. Malanga, submitted that the court did not follow the correct principles applicable in sentencing to arrive at the sentence it did. He observed that the court had observed that the appellant knew that there were plea bargaining principles and should not have taken the court through a trial. His submission was that the court considered the

appellant guilty and had gone through the motions of a trial. It was his submission therefore that the court should interfere with the court's exercise of discretion.

103. Another factor that the trial court relied on to inform his sentence, according to Mr. Malanga, was that the accused was arrested very early and released very late. His submission was that it was not the appellant's function to release the vehicle. Even if it was released a month later, he was not the one who released it.

104. With regard to the amount of Kshs 3000, Mr. Malanga's submission was that it was never shown that any money was lost; that this was trap money, and the appellant expected the court to take the amount in consideration in arriving at the sentence. His submission was that the sentence was extremely harsh, and he urged the court to interfere with the discretion exercised in arriving at it. Reliance was placed for this submission on the Supreme Court decision in **Francis Karioko Muruatetu & Anor v Attorney General (2017)eKLR**, Counsel for the appellant submitting that the decision was to the effect that the court has power to exercise discretion, which must be exercised in a judicious manner.

105. In submissions in reply, Ms. Nyauncho urged the court not to interfere with the sentence. Her submission was that the maximum sentence for the offence under section 6(1) (a) of the Bribery Act is a maximum fine of Kshs 5 million and there is also a term of imprisonment for 10 years. The offence of abuse of office contrary to section 46 of the ACECA carried a maximum sentence of a fine of Kshs 1 million and imprisonment for a term of 10 years. It was her submission that the fine of Kshs 700,000 imposed on the appellant is lenient compared to what the two Acts provide for. According to Ms. Nyauncho, corruption on our roads is rampant and it calls for a deterrent sentence. She urged the court to uphold the sentence imposed by the trial court and dismiss the appeal in its entirety.

106. To the respondent's submission that the sentence was not severe and is deterrent, Mr. Kivuva submitted that the reason for sentencing, according to the principles of sentencing in **Arthur Muya Muriuki v Republic [2015] eKLR**, is not deterrence but to adequately punish and protect the community from the offender. His submission was that similar offences attracted a fine of Kshs 20,000-30,000. In his view, given that the appellant is a public servant, that no money was lost and he did not receive the money and that when the Mpesa transaction was reversed, he did not go to ask PW3 why it was reversed. There were therefore no aggravating circumstances to lead to such a severe sentence.

107. While he agreed that corruption is a vice, Mr. Kivuva was of the view that the court has a responsibility to pass a sentence that matches the offence. The vehicle was not arrested for an offence that involved injury or damage to property but for an economic crime against the NTSA regulations. Mr. Kivuva submitted therefore that the sentence meted out against the appellant was unreasonable, unjustified and against the principles on sentencing enacted by the judiciary.

108. I have considered the submissions of the parties on the sentence meted out on the appellant. In his decision in **Arthur Muya Muriuki v Republic (Supra)** Mativo J observed that the principles of sentencing under the common law as set out in **Regina vs MA {2004}145A** were:

- i. To ensure that the offender is adequately punished;*
- ii. To prevent crime by deterring the offender and other persons from committing similar offences;*
- iii. To protect the community from the offender;*
- iv. To promote the rehabilitation of the offender;*
- v. To make the offender accountable for his or her actions;*
- vi. To denounce the conduct of the offender*
- vii. To recognize the harm done to the victim of the crime and the community.*

109. The appellant's Counsel concedes that corruption is a serious offence. It has been recognized as contributing significantly to the poverty and under-development of the country. When committed by public officers such as the appellant who have the responsibility of ensuring safety on our roads, it endangers the lives of all road users. While the amount of the bribe, in the view of the appellant, is small, the submissions of his Counsel shows that they fail to recognize the insidious nature of corruption on our roads: from a person who contravenes TLB regulations Kshs 3,000; from another with a defective vehicle another small amount; from one who has overloaded a public service vehicle yet another small amount. The cumulative effect of such conduct, however, is to spread what Ngaah J in **Stephen Mburu Ndiba v Ethics & Anti-Corruption Commission & another [2015] eKLR** noted was the *"...cancerous effect corruption has to the wellbeing of any country and in particular to its economy and considering how much we can achieve as a nation without corruption..."*

110. In the circumstances of this case, I take the view that the sentence imposed is in accord with the principles of sentencing set out above, given the nature and effect of corruption. However, I note that the appellant was convicted in respect of two offences arising from the same transaction, bribery and abuse of office. Though charged in three counts, I believe that a fine of Kshs 700,000 in respect of each offence is appropriate in the circumstances. I therefore reduce the aggregate fine to Kshs 1,400,000, in default the appellant to serve a term of 2 years' imprisonment as imposed by the trial court.

#### **Whether the trial court shifted the burden of proof to the appellant**

111. The appellant argues that the trial court shifted the burden of proof to him and thereby arrived at the wrong decision. Mr. Kivuva

argued that, as was determined in the case of **Nguku v Republic (1985)eKLR**, the burden of proof in a criminal case always lies on the prosecution, and never shifts to the accused. His contention was that in this case, however, the trial court had observed that the appellant and DW2 had stated that the Officer Commanding Station (OCS) had legal authority to take the vehicle to court, but the appellant did not demonstrate that the matter was brought to the attention of the OCS and the OCS had refused to sign the charge sheet. According to Mr. Kivuva, the OCS was a prosecution witness and was mentioned by all the prosecution's witnesses, yet he was not called to testify.

112. His submission was that the court had shifted the burden to the appellant and had reached a wrong conclusion. He further submitted that failure to call a crucial witness raises a presumption that the evidence he would have tendered was adverse to the prosecution case, and his conclusion was that failure to call the OCS raises the presumption that the OCS evidence was adverse.

113. In her submissions in reply, Ms. Nyauncho submitted that there was no Occurrence Book record entered to show that there were intentions of investigating the alleged offence, nor was there a draft charge sheet prepared to show that there was an intention of taking the appellant to court. She further submitted that there was no evidence tendered to show that the OCS refused to sign the charge sheet as alleged by the appellant.

114. It was her submission, however, that failure to call the OCS did not weaken the prosecution case. The respondent's position was that the evidence against the appellant was overwhelming and was sufficient to prove the case against him. Ms. Nyauncho reiterated that the offence was committed in the full watch of PW 1 as well as PW 7 and PW 9, the EACC officers who accompanied PW2. The officers had stayed in a position where they could see everything that was going on and even recorded the events by use of a video.

115. It is correct, as argued by Counsel for the appellant, on the authority of **Nguku v Republic** (supra) that in a criminal prosecution, apart from certain limited circumstances, the burden lies on the prosecution to prove its case. It is also correct that failure to call a crucial witness may lead to the drawing of an adverse inference that the evidence that he may have adduced would have been adverse to the prosecution case.

116. Given the evidence in this case, however, I am not satisfied that there was a failure to call a witness whose evidence was crucial, and failure to call whom would require the drawing of an adverse inference against the prosecution. In **Bukenya & Others vs Uganda [1972] E.A 349** it was held that the court may draw an adverse inference against the prosecution for failure to call certain crucial witnesses. Such an inference, however, would only be drawn where, as was observed in **Daniel Muhia Gicheru vs R Cr. App. No. 90 of 2007 (UR)**, the evidence tendered by the prosecution is *'barely adequate'*.

117. The appellant's defence was that the Kshs 3000 was cash bail, to be paid to secure the attendance of the driver of the vehicle to attend court. If I understand the appellant's Counsel's arguments correctly, the OCS should have been called to tell the court whether or not there had been a charge sheet prepared to be presented in court against PW1. In the face of all the evidence against the appellant, including the evidence that the Kshs 3000 was paid into a mobile number belonging to the appellant at an Mpesa agent as opposed to the cash office of the Police Station, it is difficult to draw an adverse inference from the failure to call the OCS to testify with regard to a charge sheet where there is nothing to indicate that such a document was even in contemplation by the appellant. In my view, the trial court also did not err in observing that the appellant could have produced evidence of a charge sheet, and that the OCS refused to sign it.

118. Accordingly, save for the reduction in the amount of the fine imposed on the appellant, the appeal against conviction fails and is dismissed. The conviction is upheld but the sentence is reduced to a fine of Kshs 1,400,000, in default the appellant to serve a term of 2 years' imprisonment as imposed by the trial court.

**Dated Delivered and Signed at Nairobi this 13<sup>th</sup> day of February 2020.**

**MUMBI NGUGI**

**JUDGE**