REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 21 OF 2018

GODWIN MUSUNGU KITUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the judgment, conviction and sentence by Hon. R. Odenyo, Senior Principal Magistrate in Migori Chief Magistrate's Anti-Corruption Case No. 1 of 2016 delivered on 05/06/2017)

JUDGMENT

1. The Appellant herein, **Godwin Musungu Kitui,** was employed as a Police Constable in 1997 and at the time of the alleged offence he was attached at Ntimaru Police Station undertaking general duties. He was arrested on 30/03/2016 and charged with two counts under the **Anti-Corruption and Economic Crimes Act No. 3 of 2003** as follows: -

Count I:

CORRUPTLY SOLICITING A BENEFIT CONTRARY TO SECTION 39 (3) (a) AS READ WITH SECTION 48 (1) OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT NO. 3 OF 2003.

On the 30th day of March 2016 at Ntimaru Police Station within Migori County, Kuria East Sub-County being person employed by a public body to wit, National Police Service as Police Constable and attached to Crime Section, corruptly solicited a benefit of Kshs. 20,000/= from Samson Babera Mwera, as an inducement so as not to charge the said Samson Babera Mwera with an alleged offence of impersonating a medical practitioner, a matter related to the affairs of the said public body.

Count II:

CORRUPTLY RECEIVING A BENEFIT CONTRARY TO SECTION 39 (3) (a) AS READ WITH SECTION 48 (1) OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT NO. 3 OF 2003.

On the 30th day of March 2016 at Ntimaru Police Station within Migori County, Kuria East Sub-County being person employed by a public body to wit, National Police Service as Police Constable and attached to Crime Section, corruptly received a benefit of Kshs. 20,000/= from Samson Babera Mwera, as an inducement so as not to charge the said Samson Babera Mwera with an alleged offence of impersonating a medical practitioner, a matter related to the affairs of the said public body.

2. The Appellant denied the offences and he was tried and found guilty on both counts, convicted and sentenced to a fine of Kshs. 30,000/= on each count and in default to serve six months imprisonment. The Appellant was represented by the firm of Messrs. Mudeyi & Company Advocates.

3. Dissatisfied with the convictions and sentences, the Appellant lodged an appeal through Messrs. Oguttu, Ochwangi, Ochwal & Company Advocates where he challenged the convictions and sentences on 13 grounds.

4. Directions were taken and the appeal was heard by way of written submissions on the part of the Appellant. The State made an oral response. In urging this Court to allow the appeal, the Appellant *inter alia* submitted that the offences were not proved, that the main culprit was not arrested and charged, that the evidence of the recovered notes did not tally with what was in the Inventory and that the electronic evidence fell short of attaining the required legal bar. He also referred to several decisions. The State opposed the appeal and contended that there was ample evidence on which the convictions were founded.

5. As this is the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to

revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that. To that end I have gone through the proceedings and judgment of the trial court as well as the Record of Appeal, the submissions and the decisions referred to by the parties. The evidence was captured *in extenso* in the judgment under appeal and I hereby adopt the same herein by way of reference.

6. The prosecution called a total of seven witnesses. **Samson Babera Mwera** testified as **PW1** and he was the complainant. **Michael Ojow Mwitage** testified as **PW2.** He was a Public Health Officer based at Ntimaru Division in Kuria East Sub-County. **No. 231260 CIP Roselyne Chebosho** was attached at Ntimaru Police Station as the OCS. She testified as **PW3. PW4** was one **Steven Yatich**, a Report Analyst at the Ethics and Anti-Corruption Commission (hereinafter referred to as '**the Commission'**). A Government Analyst who produced a Report on behalf of his colleague testified as **PW5**. He was one **Moses Kimani**. The Commission's South Nyanza Regional Manager one **Emmanuel Arunga** testified as **PW6** and the investigating officer one **Charles Samiji** who was also attached to the Commission's South Nyanza Regional office testified as **PW7**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court.

7. On whether the Appellant solicited for a benefit in the form of a bribe from PW1, it was strenuously submitted that no such evidence was tendered and that it was PW3 who had indeed solicited. PW1 narrated his encounter with PW3 and alleged that PW3 had asked him for a bribe of Kshs. 20,000/= so as not to charge him and that is why he reported the matter to the Commission. The Commission agents then organized for the trap so as to arrest the culprit. They travelled from Kisii to Ntimaru and severally met PW1. PW6 and PW7 stated that they first wanted to ascertain the truth of the allegation by PW1 and that is why they gave him the mobile-like recording device (hereinafter referred to as '**the device'**). In the words of PW6 ***'…We received a report but we had to confirm whether the report was genuine…****'*

8. At the end of the whole ordeal there was no evidence which was gathered through the device in support of the allegation that PW3 solicited for the bribe from PW1. Again, in the words of PW6 ***'….PW1 recorded a conversation with the OCS but there was no demand. [A video clip is replayed in court] It only shows the OCS walking. There is no conversation…'***

9. The evidence on solicitation by PW3 was hence that one of PW1. It was uncorroborated. PW3 denied soliciting and explained that she had referred PW1's case to the Appellant as the investigating officer and never asked the Appellant to seek for a bribe from PW1. That, if the Appellant solicited as alleged then that was on his own frolic and not on the invitation of PW3. Whereas there may have been some discussion between PW1 and PW3 on the alleged bribe that fact is not strictly proved in evidence. Being a criminal matter, the legal burden of proof always remain with the prosecution and the standard of proof is proof beyond any reasonable doubt. What comes to play are instead allegations and counter-allegations by PW1 and PW3 on the issue. That was the reason why PW3 could not be treated as an accomplice. The contention that it was PW3 who solicited for a bribe from PW1 was therefore not proved and that submission fails.

10. As to whether the Appellant solicited for the bribe from PW1, heavy reliance was placed on the device. The Appellant submitted that the electronic evidence from the device was not adduced in accordance with the law and as such it ought to be disregarded. I have previously dealt with the issue of electronic evidence in the **High Court of Kenya at Bungoma Election Petition No. 4 of 2017 Levi Simiyu Makali vs. Koyi John Waluke & 2 Others (2018) eKLR** and since I still hold that position I hereby reiterate what I stated therein: -

> **87.The admissibility of electronic evidence is provided for in Sections 106A to 106I of the Evidence Act, Cap. 80 of the Laws of Kenya. Section 106B (1) states as follows: -**
>
> > ***Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible. "***
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> **88. Section 106B (2) gives the attendant conditions as follows: -**
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> > ***(a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer.***
> >
> > ***(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;***
> >
> > ***(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content: and***
> >
> > ***(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities."***
>
> **89. Where a party wishes to rely on electronic evidence under the foregone provisions, the one who undertook the actual work of processing that electronic evidence must prepare a Certificate whose contents are provided for in Section 106B (4) as follows: -**
>
> > **(a) identifying the electronic record containing the statement and describing the manner in which it was produced;**

(b) giving such particular of any device involved in the production of that electronic record as may be appropriate for the purposes of showing that the electronic record was produced by a computer.

(c) dealing with any matters to which conditions mentioned in sub-section (2) relate; and

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge of the person stating it.

91. The need to strictly comply with the law when dealing with electronic evidence in this era of technological advancement cannot be overemphasized. I take judicial notice of the fact that through technology one can easily come up with anything 'real' be it a still or live photograph or a video more so even a fictious one. It is just that easy. That is why for such evidence to be admissible the Certificate must strictly pass the test laid in the law.

11. There was a Certificate prepared by PW7 under **Section 106(B)** of the **Evidence Act** in this case. I have gone through the Certificate and I am satisfied that the same meets the conditions set out in law. I hereby accept the evidence adduced through the device and the translation thereof as admissible evidence. As to the probative value of the said evidence, I must revisit the body of evidence on record.

12. PW1 narrated how he dealt with the Appellant who was the investigating officer. PW1's evidence was corroborated by the electronic evidence. A perusal of the translation reveals a conversation between PW1 and the Appellant. It is so clear that the Appellant, as the investigating officer, solicited for a bribe of Kshs. 20,000/= so as to forego charging PW1 with an offence. PW1 ensured that the aspect of soliciting by the Appellant was well captured by taking time and negotiating for a lower figure but the Appellant was adamant on the figure of Kshs. 20,000/=. The conversation is as clear as daylight. The Appellant's defense that he knew nothing about the solicitation can only be seen as utterly untruthful. There is ample evidence to the contrary. The offence of corruptly soliciting a benefit was hence proved.

13. On the charge of receiving a benefit in the form of a bribe, there is evidence that PW7 gave PW1 treated money in the denomination of Kshs. 1,000/=. They were 15 notes. The instructions given to PW1 was to ensure that he passed over the said money to the Appellant who had solicited the bribe. The money was eventually recovered in the trouser pocket of the Appellant. There is the evidence of PW1, PW3, PW4, PW5, PW6 and PW7 to that effect. PW5 confirmed that traces of the special liquid used to treat the money was found in the Appellant's trousers. There was also the evidence of the inventory that was taken on the arrest of the Appellant.

14. The inventory was challenged to the effect that it contained different serial numbers of the notes allegedly recovered from the Appellant and the ones given to PW1. The contention narrowed down to one note with serial number **DB 8085764** which was captured as serial number **DB 88085764** in the inventory. I have seen the inventory and the copy of the note. It is true the copy of the note has a different serial number from the one listed in the inventory. The difference is one digit 8. I have confirmed that all the other copies of the notes bear serial numbers with 7 digits save the one issue which has 8 digits. Looking at the two serial numbers **DB 8085764** and **DB 88085764** I can infer a genuine error on the part of PW7 in recording the serial numbers. It is possible for one to repeat a digit when recording many digits and that possibility cannot be said to be remote in this case. PW7 seemed to have realized the error in the Exhibit Memo Form and he corrected it by inserting the correct 7 digit serial number against the 8 digit serial number and countersigned. The error can therefore be safely cured by the application of **Section 382** of the **Criminal Procedure Code**.

15. For argument sake, even if I consider the foregone analogue as wrong, which is not, there is still the question as to how the rest of the 14 notes which were rightly captured in the inventory found their way to the pocket of the Appellant's trouser. The said notes were recovered on the Appellant at the time of arrest. The evidence is further amplified by the device and the translation where the Appellant confirmed that he had received Kshs. 15,000/= from PW1 which amount was to be added up with the cash bail of Kshs. 5,000/= which PW1 had earlier on paid making it a total of Kshs. 20,000/= as demanded.

16. There was another argument on the time of the recovery of the trap money. According to the inventory it was 11.25am and according to the Exhibit Memo Form it was indicated as 11.35am. The difference was 10 minutes and that difference can as well be safely cured by the application of **Section 382** of the **Criminal Procedure Code**. I do not find the argument that the inventory was prepared before the recovery to be holding. All the witnesses who witnessed the recovery confirmed that the inventory was prepared in their presence.

17. The totality of the evidence is that the Appellant received the solicited bribe and was rightly found guilty of the second count.

18. The Appellant also submitted that there were contradictions and inconsistencies on the record such that the evidence could not be relied upon. I must state that I have carefully addressed my mind on the record and noted some minor discrepancies. I believe I have adequately reconciled the discrepancies which in any event were of a minor nature and cannot be said to have adversely affected the final finding of the trial court. In so finding, I echo the words of the Learned Judge in **R -vs- Pius Nyamweya Momanyi, Kisii HCRA No. 265 of 2009 (UR)** when he stated thus: -

...It is trite law that minor discrepancies and contradictions should not affect a conviction.

In any event the provisions of **Section 382** of the **Criminal Procedure Code Cap. 75 of the Laws of Kenya** safely come into play.

19. As I come to the end of this judgment I must apologize to the parties for the late delivery of this judgment which was caused by several challenges beyond my control and my involvement in a Multi-Judge Bench matter at the High Court in Mombasa.

20. This Court now finds that none of the grounds of appeal put forth and supported by the submissions is successful. The decision of the

trial court is hereby affirmed and the appeal is accordingly dismissed.

DELIVERED, DATED and SIGNED at MIGORI this 14th day of February 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Oguttu Mboya Counsel instructed by the firm of Messrs. Oguttu, Ochwangi, Ochwal & Company Advocates for Appellant.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyn Nyauke – Court Assistant