



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 2 OF 2016

PAUL KURIA NGUGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

((Being an appeal arising from conviction and sentence in Nairobi Chief Magistrate's Court Anti-Corruption Case No. 2 of 2016 delivered by L.N Mugambi (Mr.) Senior Principle Magistrate on 3rd June 2016)

JUDGMENT

1. The Appellant herein Paul Kuria Ngugi was charged with three (3) counts of offences under the Anti-Corruption & Economic Crimes Act No. 3 of 2003. The 1st and 2nd counts were on soliciting for a benefit contrary to section 39(3) (a) as read with section 48 (1) while the 3rd count is that of corruptly receiving a benefit contrary to section 39(3)(a) as read with section 48(1) of the said Act. He was however acquitted of count 1 and convicted on counts 2 and 3 wherein he was fined Kshs. 150,000/- in default one year imprisonment and Kshs. 100,000/-in default, one year imprisonment respectively.

2. Particulars in respect of the 1st count are that, on 10th day of October, 2014,at Eastleigh North Location within Nairobi County, being a person employed by a public body to wit, the Ministry of Interior Co-ordination of National Government as a Senior Chief, corruptly solicited a benefit of Kshs.25,000/= from Rhoda Mohamud as an inducement so as to facilitate the said Rodha Mohamud to acquire letter of introduction for her two cousins namely, Moulid Mohamed Noor and Najib Mohamed to enable them be registered as Kenyan Citizens ,a matter relating to the affairs of the said public body. The second count is coached in similar terms but the date of the offence is stated to be 14th day of October, 2014.

3. The third count alleges that on 21st day of October, 2014, accused corruptly received a benefit of Kshs.20,000/= from Rhoda Mohamud as an inducement so as to facilitate the said Rhoda Mohamud to acquire letter of introduction for her two cousins namely Mould Mohamud and Najib Mohamed to enable them to be registered as Kenyan citizens a matter relating to affairs to the said public body.

4. Being aggrieved with the Judgment, he filed this appeal citing the following grounds:

1. That the learned trial magistrate erred in law and in fact by holding that the Appellant 'blinked' his eyes on the 14th day of October 2014 as a sign of corruptly soliciting a bribe or benefit from a complainant RHODA MOHAMUD.

2. That the learned trial Magistrate erred in law and in fact in finding and holding that the Appellant wrote on a piece of paper while no such paper was produced as evidence.

3. That the learned trial magistrate erred in law and fact in finding that by the Appellant sitting upright that was an indication that he was demanding a bribe.

4. That the learned trial magistrate erred in law and fact by not finding that when the Appellant inquired about a date 25th of that month that was an implied demand of a bribe.

5. That the trial Magistrate erred in law and in fact by holding that the Appellant demanded for a ngamia on the 14th October 2014 while no evidence was adduced at all relating to that 'Ngamia'.

6. That the learned trial Magistrate erred in law and fact by considering the evidence that he had dismissed in count 1 as evidence in count 11 and by holding that there 'MUST have' been a demand for a benefit on the 10th October 2014.

7. That the learned trial Magistrate erred in law and in fact by finding that the accused blinked as demand for a

bribe and yet there was no evidence adduced at all relating to the ‘blinking’ allegation.

8. *That the learned Magistrate erred in law and fact by finding that the Appellant was processing and verifying an application for registration that had not been made at all by the alleged complainant Rhoda Mohamud and her cousins Moulid Mohamud Noor and Najib Mohamed who never appeared at all before the Appellant nor produce any document for verification.*

9. *That the learned Magistrate erred in law and fact by holding that the Appellant “could have” influenced the vetting exercise for MOULID MOHAMED NOOR and NAJIB MOHAMMED who never appeared before the vetting panel and who did not possess any document mandatory for registration and who had not registered themselves with the Registrar of Persons as applicants for registration.*

10. *That the learned trial magistrate erred in law by failing to appreciate the registration and vetting process that the alleged complainants MOULID MOHAMED NOOR and NAJIB MOHAMMED had to undergo and by failing to appreciate that the two complainants never appeared before the Appellant; nor did they make any application for registration.*

11. *That the learned trial magistrate erred in fact and law by relying on a video clip of 14th October 2014 that was never shown to the complainant during the hearing and cross examination of the complainant.*

12. *That the learned trial magistrate erred in law and fact by disregarding the Appellant’s defence and evidence and that of his witness (DW1) Mr. Charles Njuguna Muiruri.*

13. *That the learned trial magistrate erred in fact and law by holding that the Appellant was found with the alleged bribe money.*

14. *That the learned trial magistrate erred in fact and law by holding that by the complainant throwing the alleged money on the table it was a sign that the Appellant received the alleged Kshs. 20,000.*

15. *That the learned trial magistrate erred in fact by failing to appreciate the Appellant’s evidence of how he came into contact with the APQ chemical when he was asked to count the cash notes by the police (PW3, PW4, PW5, PW6 and PW7).*

16. *That the learned trial magistrate erred in law and fact by failing to appreciate the evidence that the Appellant was not wearing his coat when the alleged recovery and swapping was done while evidence adduced was to the contrary and the trial magistrate failed to appreciate or accept the evidence of the notes lying on the table in the video clip.*

17. *That the learned trial magistrate erred in law and fact by failing to appreciate the Appellant’s evidence that he was raided by a group of men in civilian and heavily armed Administration Police Officers who forced the Appellant to count the money (notes) and nothing prevented them from recording the recovery which had inconsistencies and that there was a likelihood of tampering with the CID video Players and the magistrate further failed to appreciate PW3’s evidence that the appellant had not handled the money by the time swapping was being done.*

18. *That the learned trial magistrate erred in law and in fact by failing to appreciate the Appellant’s evidence that he never received /handled the alleged money before the police raided her office.*

19. *That the learned trial magistrate erred in fact by falling to appreciate the Appellant’s evidence and that of DW1 Charles Njuguna Muiruri that the security situation at Eastleigh was volatile and that the Appellant was a victim of circumstances.*

20. *That the learned trial magistrate erred in law and fact by convicting the Appellant on insufficient evidence in counts 2 and 3.*

21. *That the learned trial magistrate erred in law by giving out a heavy and excessive sentence upon the Appellant especially when there was no overwhelming evidence against the Appellant.*

5. This is a first appeal and this court has a duty to re-evaluate and re-consider the evidence on record as a whole and make its own decision. However, an allowance must be given owing to the fact that the appellate court did not see nor hear any of the witnesses. The Court of Appeal in the case of Okeno v Republic 1972 E.A 32 had this to say:

“The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R., [1957] E.A 570*. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post, [1958]E.A. 424.*”

6. Similarly, in the case if Kiilu and Another vs R (2005) ICLR 17 the court held as follows;

“An appellant of a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh exhaustive examination and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion”

7. The case of the prosecution is premised on the evidence of seven (7) witnesses. **PW1 is Rhoda Mohamud Osman** the complainant herein. She recalled that on 10th October, 2014, she went to Chief's Office at Eastleigh to be issued with introduction letters for her two cousins for purposes of processing National Identity cards as Kenyan citizens. When she explained to the Appellant her request, the Appellant told her to avail her cousin's original birth certificates, their School Leaving Certificates and a camel. On inquiring what he meant by 'camel' the Appellant allegedly wrote down on a piece of paper Kshs 25,000/=. She then left and informed her parents what the Appellant was demanding.

8. Aggrieved by this demand, she proceeded to EACC and made a complaint. At the EACC's offices, she met an officer by the name of Masesi (pw7). After explaining to the officer her predicament and complaint, she was given a video recorder and trained by the said officer on how to use it in recording further conversation between her and the chief. Later, on 14th October 2014, she proceeded to the Appellant's office and bargained with him to take Kshs.20,000/=. That the appellant accepted and told her to take all the documents plus the money. She then returned the recorder to the EACC officers who analyzed the conversation and confirmed the allegation of a bribe demand was real.

9. On 21st October 2014, pw7 prepared Kshs.20,000/= in Kshs.1,000/= shilling denomination for her to take to the Appellant. She in turn signed the inventory (PEXB.3) for the money. They then photocopied it and showed her the photocopy (PEXB.2). Consequently, she was given the Kshs. 20,000/= in an envelope (PEXB.5) to take to the appellant.

10. Subsequently, she was instructed to check where the Appellant would keep the envelope after which she could notify them. She recalled that about five police officers had been assigned to her; Among the instructions given was that, once the Appellant received the money, she could flash them on the officer's phone a mission she effectively executed as directed upon the appellant receiving the money.

11. That immediately the Appellant received the money, the EACC officers assigned to him came in the Appellant's office as she left. Later, she listened to the 1st transcript recorded conversation in the initial video clip taken on 14th October 2014 (PEXB.6) and the 2nd transcript recorded video conversation taken on 21st October 2014(PEXB.7). She then signed the transcript(PEXB.7). She confirmed and identified the female voice on the video that was played in court as hers.

12. **PW2 is Jackline Makena** an investigator with the Ethics & Anti-Corruption Commission recalled that, on 21st October 2014, she was in the office at Integrity Centre when her colleague Daniel Masesi requested her to assist him in preparing a trap operation which he was to conduct touching on a bribe demand. The said colleague further informed her that the Commission had received an allegation that the Appellant who was a chief based at Eastleigh North was demanding Kshs.20,000/= so as to write some recommendation letter favourable to Pw1's cousins who wanted to be registered as Kenyan Citizens.

13. She confirmed that, her colleague Daniel Masesi handed to pw1 Kshs.20,000/=(PEXB.4) genuine money in Kshs 1000/=(PEXB.3) note denomination. She then photocopied the said money and made inventory of the same. She invited PW1 and they both compared the serial number with photocopy of the money. Upon concluding the comparisons, they tallied and appended their signatures on the inventory at the photocopy of the money.

14. She then applied APQ Chemical to the notes, put the notes in a khaki envelope (PEXB.5), handed the money to PW1 and instructed her to retain the envelope after she had handed the money to the Appellant as the same would be used for evidential purposes. However, she told the court that she did not accompany the team to the field as she was left in the office. Later, she was informed by PW7 that the Appellant had received the money after which he recorded her statement.

15. **PW3 is Samuel Mukundi Njiru** a Police Officer seconded to Ethics & Anti-Corruption Commission as an investigator, told the court that on 21st October 2014, he was on duty at Integrity Centre when his colleague PW7 came to him and informed him that he wanted a team of investigators to assist him in conducting an investigation. He stated that, the team comprised of, Francis Wambua (pw4), James Wachira (pw5), Daniel Masesi (pw7) and himself. He confirmed that PW2 treated and photocopied the kshs.20,000/= but did not accompany them for the operation.

16. He further stated that, before they left, they were introduced to PW1 who had lodged a bribery demand report. He also recalled that PW7 introduced an Audio visual recorder (PEXB.1) to PW1 which was tested in his presence and was confirmed to be in good condition. Thereafter, they left Integrity Centre and proceeded to Eastleigh.

17. That on arrival, PW7 informed PW1 to flash his phone as a pre-arranged signal. After Masesi got the pre-arranged signal, he alerted them and swiftly moved to the Appellant's office. They then introduced themselves to him as Officers from EACC and informed him that he was under arrest for the offence of corruption.

18. That they used clean disposable polythene gloves (PEXB.8(b) and clean

cotton balls(PEXB.8(a), swabbed both left and right hands(PEXB.9(a) &(b) of

the Appellant.

19. He explained that swabbing was done by dusting the appellant's hands on the surface and pockets to collect samples since the money was treated with APQ chemical. That later, they were to take them to Government Chemist for examination with samples used to test the same.

20. He further explained that the 2nd envelope confirmed the left hand swab of Paul Ngugi taken on 21st October 2014 which contained the cotton balls used to swab the left hand of the Appellant and Polythene gloves.

21. He informed the court that after he took the swabs, Mr. Francis Wambua recovered Kshs.20,000/= from inside the pocket – right hand side of the Appellant's Grey Coat(PEXB.11). Mr. Francis Wambua then prepared an inventory (PEXB.10) which he signed and the appellant counter signed. After they collected the exhibits, they went with the Appellant to EACC Offices at Integrity Centre. Later, they escorted the appellant to Capital Hill Police Station where he was released on Police bail and later charged

22. PW 4 Francis Wambua and pw5 both investigators with the Ethics & Anti-Corruption who accompanied pw1, pw3 and pw7 to the scene during the said operation, corroborated the testimony of pw1 and pw3 in every respect and account.

23. P.W.6 is **Marion Chege a Government Analyst**. She confirmed that she received a memo form from Police dated 7th November 2014 requesting to determine whether control sample was detected on exhibits it came with. She made a report (PEXB.17) dated 5th December 2014 and signed it after carrying out analysis on exhibits received in memo form which were:- [a] Right hand swab of the accused[b] Left hand swab of accused[c] Empty envelope [d] Envelope containing Kshs.20,000/- in 1000/= Shillings denomination recovered from accused. [e] Envelope containing Grey Coat and [f] Envelope containing APQ Control Sample.

24. She explained that after analyzing the exhibits, her findings were that control sample APQ labeled [f] was found to contain a mixture of anthracine phenophlane and Quinine which was detected in contents of [a] to [e].

25. PW7 is **Daniel Masesi** the lead investigating officer in this case. He recalled that on 14th October 2014 he received a complaint from pw1 over a bribery demand from the Appellant who demanded some benefit as an inducement to issue letters of introduction to two of her cousins i.e. Noor and Mohammed. That for purposes of confirming the allegations, he introduced her to a special video conversation recording gadget (PEXB.1), showed her how to operate the same and when she understood, she tested the same in his presence and his colleague and they all confirmed it was in good working condition.

26. After handing over the device, he secretly escorted her to meet the accused at Eastleigh Chief's Office. On arrival, he advised her to go and have her conversation with the Chief over the issue of issuing letters of introduction to her cousins recorded. PW1 then went to the Appellant's office and engaged him. After recording their conversation, she returned the tape to him for analysis. PW1 was then advised to go home and report to their office on 21st October 2014.

27. While in their offices, he and PW5, played back the recorded conversation dated 14th October, 2014. They were able to establish that a demand of Kshs.20,000/= had been made by the Appellant for purposes of processing letters of introduction to PW1.

28. On 21st October 2014, PW1 went back to their offices as agreed. PW2 showed her Kshs.20,000/= and photocopies(PEXB.2) of currency notes. She was then asked to compare serial numbers of currency notes with photocopies to confirm if they tallied. Apparently the money had been treated with phenolphthalein & Quinine [APQ]. The brown envelope (P EXB.5) contained the cash.

29. After that, his colleagues PW3, PW4, PW5 and himself escorted PW1 to meet the Appellant at his office in Eastleigh. However, before they left the office, he again reminded PW1 on how to use the recording device as she went to deliver trap money to the Appellant.

30. Upon their arrival, he reminded her to alert him after the Appellant received the trap money. They waited outside and after a few minutes, PW1 made a missed call as an alert to his phone. After that, he entered with his colleagues to Appellant's office. They introduced themselves as EACC Officers and their mission. Appellant was then informed that he was under arrest and they needed to carry out preliminary investigations. He then received the recording device from Pw1 who then walked out.

31. That PW3 took left and right hand side swabs (PEXB.9(a) & (b) of the Appellant. He also identified the gloves and cotton balls (PEXB.8(a) & (b). PW4 went ahead and recovered Kshs.20,000/= from the Appellant who had the money in his right inside pocket of his grey coat. He then compared the photocopies with serial numbers of notes recovered and confirmed it was money which was recovered by their officers. He prepared an inventory of recovered cash (PEXB.10) dated 21st October 2014, signed it together with his colleagues who also signed as witnesses.

32. PW4 also prepared inventory of recording of Grey coat and employment card. He signed as a witness and also filmed the proceedings of the arrest using the gadget. Later, they went with the Appellant for purposes of preparing him to appear to court for plea. He also prepared transcript of recorded conversation for 14th October, 2014(PEXB.6) and 21st October 2014 (PEXB.7) respectively.

33. Further, he prepared a swab certificate (PEXB.13) dated 21st October 2014 which was signed also by other colleagues. He also prepared the certificate (PEXB.18) in respect of recording device pursuant to section 106[b] of Evidence Act. He explained that the purpose of the certificate was to confirm that he was competent in the use of special recording device that was used to capture electronic evidence **and conversation resulting in preparation of two transcripts.**

34. He then transferred the recorded conversation to two DVDS, one in respect of conversation on 14th October 2014 (PEXB.19(a) and the other 21st October 2014. (PEXB.19(b). He also prepared the exhibit memo(PEXB.16) in respect of the trap money dated 7th .November 2014 and the grey coat. Later, he received a Government Chemist analysis report (PEXB.17) and prepared an inventory of trap money (PEXB.10) Kshs.20,000/= recovered from Appellant dated 21st October 2014.

35. He explained that the 1st part of video clip is 21st October 2014 was taken by PW1 while the 2nd part was taken by him. That the 1st part of the clip showed the conversation which they had with Appellant when PW1 went to deliver the bribe of Kshs.20,000/= as earlier agreed.

36. He also explained that the 2nd clip which he captured during the arrest was made by him as the investigating officer together with his

colleagues; PW3, PW4 & pw5.

37. After close of the prosecution case, the Appellant was put on his defence. He elected to give a sworn statement with one witness to call. He told the court that on the material day, PW1 went to his office inquiring to know how one could acquire Kenya National Identification Card. He allegedly explained to her that three requirements that are to be met especially by Kenya Somalis who live along the border i.e. applicant should have birth certificate, should personally appear before his office, School Leaving Certificate, Parents Identification Cards i.e. both parents and if deceased death certificate.

38. That he advised her to avail them and then take them to the sub-county registrar of persons. After that she would be given the form with a place to attach the picture of applicant, finger prints and other details. He also produced a letter dated 26th May 2014 reference KAM/D/ADM/CON/1/8 VOL.1[71] containing guidelines of the Government issued by the Deputy County Commissioner George Natemembea for Borders & Cosmopolitan areas where vetting Committees exist.

39. He also explained that the letter (DEXB.1) dated 25th May 2015 showed a form(DEXB.2)given to an applicant by sub-county Registrar of Persons to take to the respective Chief for identification as a Kenyan citizen. He further stated that they have a Vetting Committee and at the Locational level which sits and vets potential applicants. He told the court that no single person can influence the decision of the Vetting Committee, the applicant cannot be cleared if he/she has not produced the required documents, he cannot be cleared if he had not appeared in person before the Committee and the committee cannot deliberate on a person who has not been sent to them by Registrar of persons.

40. He recalled that when PW1 went to his office on 10th October 2014, she did not introduce herself then and that after he gave her the requirements, she said she was going to look for her cousins. However, her cousins never appeared that day or any other day. On 14th October 2014, PW1 went back again and said she had not obtained the documents from the school i.e. leaving certificates.

41. He denied asking PW1 for money nor demanding Kshs.25,000/= from her and neither did PW1 say that she would give him Kshs.25,000/=. Apparently, Pw1 did not tell him her name but on 14th October 2014, he asked her and she said her name was Marion.

42. That on 10th October 2014 when it is alleged he asked her for money, he was not in the office as on that day, he was demolishing illegal gangs hide outs in Eastleigh where he was able to flush out one suspect – Dalus who had set up improvised explosive that had exploded three days ago injuring many people. He produced a letter of commendation from his immediate boss Assistant County Commissioner, dated 14th October 2014 – ref No. EAS/ADM/CON/2/7[67]. Thus he denied ever meeting with PW1 on 14th October 2014.

43. He said that after he finished with PW1 on 14th October 2014, she left only to reappear on 21st October 2014 around 11.30am to his office and found him serving other people. Apparently, she refused to wait as she found him busy with another case. PW1 then told him that she thought she would find her cousins at his office and she then pretended to be making a call to her cousins as he finished with the case he was handling.

44. PW1 then instructed him to wait and made it to appear as if they were not in agreement and placed the money on the table and made out of his office. As he stood up to follow her to know why she was leaving the money behind; at the door, he met two armed Administration Police and four men. They told him that some money was left with him and they said they wanted to count it because they wanted to know how much it was. That they counted it and it came to Kshs.20,000/=.

45. That immediately he touched the money is when PW7 introduced himself as an officer from EACC. PW4 came to where he was and started swabbing him. By that time, he had hanged a coat in his office as they said the money was not enough. He then took the coat and tried to search. PW7 then told him “*usitoe wacha atoe mwenyewe*”. He contended that he only removed his money and that he never put that money in his jacket i.e. right inside pocket as claimed.

46. He explained that from where he was seated and where PW1 was, they were separated by two tables that were joined, about two metres. He denied ever receiving any money from PW1 as she left it at the table. He contended that he only touched that money while counting the same. He also denied that swabbing was ever done on his coat. That all along, he did not know he was being recorded or filmed. He also denied that any money was ever found inside his jacket pocket and contended that nothing could have stopped them from photographing or filming the money being inside or being retrieved from his pocket.

47. He also contended that the film video shown to court did not show him having that money as the recording of 14th October 2014 does not show him anywhere and that there is no where he asked PW1 for any cash. In reference to the video clip dated 21st October 2014, he explained that the money that was on the table is the money that was in issue and that nowhere does it show him demanding money.

48. He attributed the charges he is facing to political pressure with Somalis in

Eastleigh pressing to have their own as Chief. He explained that during that time, there was a security operation by GSU in which several youths were arrested under his guidance. That more than 50 young Somalis were taken to court which forced the Somalia Community under the leadership of Majority Leader in National Government to hold a baraza at Eastleigh High School. That the majority leader promised they would do whatever possible to have their own as a chief. He termed the charges he is facing as a Scheme that was hatched to remove him from that office.

49. D.W.2 **Charles Njuguna Muiruri** formerly working at Kamukunji as a Senior Assistant County Commissioner for Eastleigh confirmed that the Appellant was a Senior Chief serving under him then and that he had known him for the entire duration he was in Kamukunji.

50. He confirmed that on 10th October 2014 he had assigned the appellant a task in demolishing illegal structures posing security challenges within his area. He stated that on that day the appellant did not report to his office. That upon completion of that task, he deemed it fit to do a commendation letter for the Chief. To that effect he wrote a letter (DEXB.4) and copied the same to the Deputy County Commission for Kamukunji where he prayed that the Appellant be promoted to next grade of Senior Chief 1 because he deserved it on merit. He described the appellant as an honest and hardworking person with high morals and integrity. He termed the arrest as asset up instigated by Somali community and their leaders who wanted one of their own as an administrator in Eastleigh.

51. He explained that Eastleigh is a unique area and is termed a boarder District. He corroborated Appellant's testimony that they had Vetting Committee before one acquires Identification Card. That upon attaining 18 years, one gets a vetting form before applying for Identification Card which is generated from Registrar of Persons.

52. He contended that he was shocked when he heard the Appellant had been arrested and that he read more into this issue than it appeared. He believed that Appellant was a victim of circumstances.

Submissions

Appellants Submissions

53. During the hearing, the Appellant's counsel Mr. Nyaberi of Omwoyo Momanyi Gichuki and co. Advocates relied on their written submissions dated 28th March 2017 and filed on 5th March 2018. Learned counsel broke down grounds of appeal

in terms of issues for determination as follows;

- a. Whether consent to prosecute the Appellant was obtained.**
- b. Whether Documents that were to be submitted for approval of application were never submitted.**
- c. Whether the Appellant made a demand for a bribe.**
- d. Whether the alleged Persons to be registered by the Appellant existed.**
- e. Whether the Appellant received the said sums (bribe).**
- f. Whether the Appellant handled of the money that was alleged to be a bribe.**
- g. What evidence was relied on to convict the Appellant.**

54. Mr. Nyaberi submitted that the operation done on 14th and 21st October 2014 was a set up as the Appellant had not solicited, benefitted nor received any money. On the allegation that the Appellant had blinked as a sign of demanding or soliciting of a benefit, he submitted that the same was farfetched and unfounded as no evidence was adduced to support this fact. Counsel expressed himself that prosecution did not prove existence of mens rea an essential requirement in criminal prosecution. To support his position counsel referred the court to the case of **Mohammed Koriow Nur vs A. G(2011) eKLR.**

55. Counsel further opined that it was never established anywhere that eye blinking or jotting down on a piece of paper amounts to soliciting or requesting for a benefit. He stated that there was no proof of explicit or unequivocal demand of a bribe. In support of this position counsel referred the court to the case of **Geoffrey Ombogo Makworo vs Republic (2015) eKLR.** Mr. Nyaberi asserted that, the Appellant's defence was never challenged in cross examination nor considered in the judgment. Counsel contended that the Appellant demonstrated that he was an honest and hardworking civil servant and placed his character on the line for challenge by the prosecution who failed to challenge his integrity.

56. Learned Counsel questioned why the alleged cousins to the complainant for whom she was pursuing recommendation letters were not called as witnesses. He further wondered why the complainant never produced the necessary documentation to prove that indeed there was such a registration exercise and a demand for the bribe made.

57. Regarding receiving a bribe, Mr. Nyaberi contended that there was no proof of receiving the same as the appellant did not touch the money abandoned on his table by the complainant. That he came into contact with the money when the officers forced him to count the same and sign the inventory. Lastly, Mr. Nyaberi raised concern that consent to prosecute the appellant was not secured from the DPP and the Appellant's sentencing on count two without first being convicted was irregular and illegal.

Respondents Submissions

58. M/S Aluda for the Respondent opposed the instant Appeal relying on her written submissions filed on the 30th April 2018; She also

compressed the grounds of appeal as hereunder;

a) Whether or not there was proof beyond reasonable doubt.

On this ground counsel submitted that the Appellant had been charged with both solicitation and reception of benefits so as to influence the vetting process contrary to section 39(3) (a) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act. Counsel submitted that the elements of the crime for the second count as per section 39(3) (a) are:- Corruptly, solicits a benefit. The same element applies on the third count.

59. Counsel submitted that the Act does not define the adverb 'corruptly' but it defines the noun corruption to mean among others, an offence under any of the provisions of section 39 to 44, 46 and 47. Counsel further submitted that the word soliciting is not defined under the Act but the Concise Oxford English Dictionary defines Soliciting 'as to ask for or try to obtain something from someone. According to M/s Aluda, to constitute the crime of solicitation of a bribe, it is not necessary that the act be actually consummated or that the defendant profit by it.

60. Counsel thus submitted that the main ingredients of the offence are that the accused must be acting in any capacity, whether in public or private sector or employed by or acts on behalf of another person, that he must be shown to have obtained or attempted to obtain from any person gratification other than legal remuneration, that the gratification should be as a motive or reward for doing or forbearing to do; in the case of his official function, favour or disfavor to any person. According to counsel, the gravamen of the offence is acceptance of or the obtaining or even the attempt to obtain illegal gratification as a motive or reward for inducing a public servant for corrupt or illegal means.

61. On whether or not the magistrate used evidence he had earlier excluded in Count 1 as the basis for conviction in Count 2, counsel submitted that, while the magistrate noted that indication of a prior meeting, he also proceeded to acquit the Appellant on the first count as the Appellant had pleaded alibi and that he never went to his office but spent the whole day demolishing a public toilet that had become a hideout for criminals.

62. On whether the sentence that the magistrate imposed on the accused was excessive, Counsel submitted that the overwhelming evidence is not a measure of evidence in law and that our laws instead require proof beyond reasonable doubt. It was thus counsel's submission that the trial court imposed a penalty of Kshs. 250,000 on the Appellant after determining that the evidence on record reached the threshold of proof beyond reasonable doubt; that the said sentence was legal as it fell within the threshold of section 48(1) of the Anti-Corruption and Economic Crimes Act.

Determination

63. I have carefully examined the grounds of appeal herein, submissions by both counsel and original record from the trial court. Although the petition of appeal referred to as the 'memorandum of appeal' has listed 21 grounds, I will compress them down as hereunder"

(a) Whether consent from the DPP to prosecute the appellant was necessary before prosecution commenced

(b) Whether the appellant made a demand or solicited for a bribe from the complainant

(c) Whether the appellant did receive a bribe from the complainant.

(d) Whether the appellant was properly convicted on count 2 based on the evidence already excluded in count 1 to which he was acquitted

(e) Whether the sentence imposed was illegal or excessive

Consent to prosecute

64. It is the appellant's contention that before recommending for his prosecution, the DPP ought to have issued consent which was not in this case. M/s Aluda for the state opposed that argument stating that, under Section 35 of the Ant-Corruption and Economic Crimes Act (ACECA), the Ethics and Anti-Corruption Commission (EACC) is only empowered to recommend prosecution to the DPP who then in exercise of his mandate under Article 157 of the Constitution would prefer prosecution.

65. Section 35 of the ACECA provides:

Sub-Section (1) **following an investigation the commission shall report to the director of public prosecutions of the investigation".**

Sub-Section (2) **The commission's report shall include any recommendation the commission may have that a person be prosecuted for corruption or economic crime".**

66. Pursuant to Article 157 of the Constitution, the DPP has wide powers to recommend prosecution or discontinue prosecution of any person either personally or through delegated authority to his subordinate staff acting under his instructions. The DPP is under no obligation to seek consent or direction from any authority or person when executing his constitutional mandate. Unlike the repealed Section 12 of the

prevention of corruption Act Chapter 65 Laws of Kenya which required Attorney General to give consent before prosecution, section 35 of ACECA does not provide for consent from anybody save for a recommendation to prosecute to the DPP by EACC. Under the current legal regime, consent to prosecute is not a mandatory requirement.

67. The issue of consent was aptly addressed by the court of appeal in the case of **Susan Mboo Ng'ang'a vs the AG (sued for and on behalf of the Chief Magistrate's court, Nyeri Law Courts) DPP and EACC in Civil Appeal No. NYR 33/2015** where the court held:

“It would appear to us that the provisions of Section 12 of the prevention of corruption Act were not retained in Section 35 of the Anti-Corruption and Economic Crimes Act”.

68. Similar position was held in **Beatrice W. Muita vs Republic (2017) eKLR** where the court stated that:

“Section 35(1) and (2) of ACECA do not make provision for compulsory issuance of consent by the DPP for prosecution as was the case in the repealed Prevention of Corruption Act”.

It is therefore safe to say that, the issue of consent is not a ground which can be sustained in this appeal hence the same is dismissed.

Whether the appellant made a demand or solicited for a bribe

69. The appellant was charged with corruptly soliciting for 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 in respect of Count 1 where he allegedly solicited Kshs.25,000/= and Count 2 in which he allegedly solicited Kshs.20,000/=. According to the learned magistrate, the demand of Kshs.25,000/= on 10th October 2014 was not supported with cogent and well corroborated evidence hence acquitted him. He however, found solicitation of Kshs.25, 000/= on 14th October 2014 proven beyond reasonable doubt hence convicted him.

70. Prior to the enactment of Bribery Act No. 47/16 which repealed Section 39 of the Anti-Corruption and Economic Crimes Act, Section 39 (3) (a) provided that:

“A person is guilty of an offence if the person corruptly receives or solicits or corruptly agrees to receive or solicits a benefit to which this section applies”.

Section 39(1) went further to provide:

“This section applies with respect to a benefit that is an inducement or reward for, or otherwise on account of an agent:

(a) doing or not doing something in relation to the affairs or business of agent's principal or

(b) Showing favour or disfavor to anything, including any person or proposal in relation to the affairs or business of agent's principal.

71. From the above cited provision, what is relevant in the instant case is whether the appellant ever sought an inducement or benefit or reward for purposes of doing something in this case issuing a recommendation letter to the complainant in order to assist her two cousins process national ID cards.

72. Although the Act does not define the word solicit, the simple interpretation of it can be derived from concise oxford English dictionary 12th Edition as:

“ask for or try to obtain (something) from someone – ask (someone for something.....”

73. Was the appellant acting in a position of agent in relation to the affairs of the principal. An agent is defined under Section 38 of the ACECA as – a person who is in any capacity whether in public or private sector employed by or acts on behalf of another person. Equally, the same provision defines who a principal is as:

“a person, whether in the public or private sector, who employs an agent or for whom or on whose behalf an agent act.

74. In the instant case, it is not in dispute that the appellant was at the material time working as a Chief Eastleigh a position which falls under the public service in this case Ministry of Interior as the principal. From the testimony of the PW1, on 10th October 2014, she went to the appellant's office to seek a recommendation letter to enable her two cousins (Kenyans of Somali origin) process national ID cards. From the appellant's defence, he confirmed that his office together with the Vetting Committee established by the ministry of interior had the mandate to vet applicants seeking to be issued with National Identity Cards and that his office had a role to play.

75. According to the vetting guidelines produced as D.Exh No.3 by the appellant, the area Assistant Chiefs and Chiefs were personally liable

for identification of persons residing in their area (guideline No.1). They are also responsible for compiling a list of all applicants for identity cards in their areas and forward the same to the DC's (guideline No. II(ii)). This is indeed a noble role bestowed upon Assistant Chiefs and Chiefs non-execution of which would render somebody miss out an ID. It is a role which can be abused by demand of a bribe in order to facilitate the process.

76. Did the appellant solicit for money (Kshs.25,000/=) on 10th October 2014? According to PW1, she went to the Chief seeking assistance in confirming and recommending her cousins as Kenyan nationals for purposes of getting national ID Card. After the Chief had explained to her on the relevant documents to provide to kick start the process, he allegedly added what she referred as "Ngamia" (camel) followed by a note on a piece of paper as Kshs.25,000/= which she understood to mean a bribe. The appellant vehemently raised an alibi defence indicating that on 10th October 2014, he did not step into his office as he was busy demolishing illegal structures hence could not have met with the complainant that day.

77. This version of evidence was supported by DW2 (D.C) who allegedly directed the demolition work to be done and that the Chief who was in charge of the exercise did not go to the office that day. According to the learned Magistrate, the alibi defence was not adequately challenged and on a benefit of doubt acquitted him of Count 1.

78. Having examined the testimony of the complainant and the appellant, the meeting of 10th April 2014 at the Chief's office is contested. The alibi defence given was not challenged. It is the word of the complainant against that of the appellant. It is trite law that an accused person who puts forth an alibi defence does not assume the burden to prove it. **See Kiarie vs Republic [1984] KLR**. There is no corroborating evidence on the part of the prosecution case to prove beyond reasonable doubt that a demand of 25,000/= was indeed made on 10th October 2014.

79. I am therefore in agreement with the learned Magistrate that the alibi defence was not adequately challenged by prosecution and on a benefit of doubt, the honorable magistrate properly exercised his mind in acquitting the Appellant under Section 215 of the CPC. The offence was therefore not proved beyond reasonable doubt.

80. Concerning count 2 for soliciting Kshs.25,000/=, it is the complainant's evidence that, she was asked to submit documents for processing ID cards for her cousins accompanied with a camel worth 25,000/=. That she reported to her parents who advised her to report to EACC. Following that advice, she reported to EACC in particular to pw7 who organized to fit her with a recording device to tape record the bribery conversation before taking action. That on 14th October 2014, she proceeded to the Chief's office while fitted with a tape recorder (PEX.1). On that day, she engaged the Chief (appellant) on a discussion to reduce the amount from Kshs.25,000/= to Kshs.20,000/= which the Chief agreed by signs as well as writing on a piece of paper.

81. After recording the conversation, she returned back to the officers (MF5 and 7) who were following her secretly. After analyzing the tape which was translated into a CD (PEX.19 (a)), they were satisfied that indeed there was a demand for a bribe hence organized for a trap which they successfully executed on 21st October 2014 by arresting the appellant after receiving Ksh.20,000/= as an inducement to render public services to the complainant.

82. On 21st October 2014, the complainant was again fitted with a tape recorder and given Kshs.20,000/= which was also photocopied and proceeded to Chief's office where she delivered the money. PW4, PW5 and PW7 who were trailing her managed to arrest the Chief. They allegedly recovered the money from his coat on the right hand pocket, dusted his hands and coat and later forwarded them to government chemist analyst (PW6) who confirmed that indeed the coat (exhibit) and the left and right finger prints of the accused were contaminated with APQ chemical implying that he had touched and therefore received the treated money.

83. The appellant denied making any specific demand for a bribe and that the tape clips of 14th October 2014 and 21st October 2014 did not confirm the demand nor does it show him receiving the money or the same money being recovered from his coat pocket. After viewing the tape clips for 14th October 2014 and that of 21st October 2014 and the respective transcripts, the learned magistrate was satisfied that the appellant did make a demand for a bribe of Kshs.25,000/= and indeed did receive the Kshs.20,000/=.

84. I have had the advantage of watching both tapes and making reference to the respective transcripts. The conversation of 14th October 2014 in which the bribe was allegedly reduced, commenced with the complainant stating that she was back as agreed. In that clip, it is audible with the chief/Appellant asking pw1 for the leaving and birth certificate. Again, the chief is appearing receiving a document handed over by pw1. The complainant is heard promising to provide the documents. The complainant is again heard pleading with the Chief to reduce for her. That remark is then followed with by the Chief saying "**na tunasema kuta ziko na masikio**". The Chief is then seen giving a piece of paper and a pen to the complainant who then writes and seeks confirmation by uttering the words "**twenty**". The respondent then responds by saying "**mmm**" which was interpreted to mean acceptance.

85. On 21st October 2014, pw1 accompanied with PW3, 4,5 and 7 managed to trap the appellant after pw1 submitted the Kshs.20,000/= to him.

86. From the visual clip played in court, the complainant is heard stating that "**nimerudi**". After passing the money to the appellant, she immediately excused herself and left apparently to signal the EACC officers who were waiting outside. Upon bouncing on him, they recovered Kshs.20,000/= which had been treated with APQ chemical. From the clip the money is seen on the table with an officer holding the appellant's coat and another saying "**waja atoe mwenyewe**". The money can be seen on the table with photocopies being compared.

87. Although the demand for Kshs.25,000/= on 10th October 2014 was not proved to the required degree, the conversation of 14th October 2014 in which the complainant is heard saying that "Hello. nilirudi saa tisa nikaambiwa ulitoka" implied that there was a previous meeting between the two. Secondly, the remark by PW1 pleading for reduction of the amount demanded from Kshs.25,000/= to Kshs.20,000/= also implies a previous demand of Kshs.25,000/= which the complainant could not meet. The request to reduce the amount initiated by PW1 and

subsequent nodding of the head by the appellant implying acceptance and later passing a piece of paper and a pen to which PW1 wrote and sought confirmation of Kshs.20,000/= to which the appellant does respond by saying “mmm” will mean some form of communication. This communication is corroborated by the actual remittance of Kshs.20,000/= on 21st October 2014 which had been treated and passed to the appellant and subsequent recovery by PW3, PW4, PW5 and PW7.

88. From the chain of events, prosecution evidence irresistibly points a guilty finger towards the appellant. It is clear that this was not a frame up anchored on tribalism and or politics as alleged by the appellant and his witness DM2. The evidence is so consistent and well corroborated. The response and reaction of the appellant in even cautioning the complainant to be aware that even walls have ears cannot be anything other than fear that their communication was hinged on an illegal business and that nobody was supposed to hear it.

89. The allegation that the appellant never uttered any words demanding the same is not itself a ground because his conduct and response to the complaint is explicitly clear and unequivocal that the appellant did engage in a soliciting exercise thereby demanding for a bribe to enable him render public duty in recommending the complainant's cousins in acquiring an ID.

90. PW1, PW3, PW4, PW5 and PW7 had no known grudge before against the appellant. They had no reason to frame him up. The allegation that the money was found on the table and not his jacket is not correct as the jacket was found contaminated with APQ chemical used to treat the money. Although the tape does not clearly show him putting the money in his coat, the money was promptly recovered and is seen lying on the table as the appellant is being ordered to remove the money from the coat by himself.

91. I do not think the money was planted on the appellant. The evidence contained in the tapes' conversation of 14th October 2014 and 21st October 2014 plus the testimony of PW1, PW3, PW4, PW5, PW6 and PW7 is sufficient enough to prove that the appellant indeed did solicit and received the money an act that contravened Sections 39 (3) (a) as read with Section 48 (1) of ACECA. Failure to call the complainant's alleged cousins and production of the documents allegedly required to process registration is immaterial as their testimony could not really be of any substantial evidential value as they did not participate in the process leading to the demand and subsequent payment of the bribe. I do not see any adverse effect to be inferred on the prosecution's case by not calling the two cousins.

92. The argument that the learned magistrate relied on extraneous considerations unknown in law to convict e.g the blinking of the eyes by the applicant signaling acceptance of the reduced figure of the bribe demanded from Kshs.25,000 to Kshs.20, 000 was just but affair and reasonable comment as it was anon verbal mode of communication which the appellant adopted during the conversation perhaps being aware of the consequences of the transaction he was engaged in.

93. The remarks that the appellant blinked his eye as assign of being in agreement with pw1's suggestion and followed by closed lips and then sitting upright can only make sense when properly contextualized in relation to the nature of the subject at hand. In this case blinking an eye after a suggestion to accept a figure of 20, 000 is by itself a mode of communication which cannot be ignored in the circumstances. The applicant was playing it safe and being extra careful hence playing dumb business. There was nothing wrong in the magistrate making reference to appellant's behavior during negotiation with pw1 while on secret video camera.

94. It is my conviction that the trial court properly analyzed the law, facts of the case and arrived at a proper verdict. The previous good conduct claimed by the accused and supported by his senior the D.C (DW2) that the appellant is a person of good character is not itself full proof of innocence. People can hide their bad character from their bosses yet in darkness do worse things. Even some Bishops and pastors who claim be holier than thou have at times fallen on the wayside. It is human to commit a mistake. The appellant may have been a good man but this time round he slipped and he cannot escape liability.

95. Having held that the appellant did demand and received t Kshs.20,000/= grounds b and c which are intertwined have been determined.

Whether the appellant was properly convicted on Count 2 based on evidence already excluded in count one.

96. The learned magistrate acquitted the appellant on count 1 where he was alleged to have demanded Kshs.25,000/= on 10th October 2014 on grounds that there was sufficient alibi defence tendered by the appellant that he was not in the office on the material day. This court agreed with the honourable trial court as such.

97. However, the trial court went further to find at page 21 of his judgment that there was evidence of soliciting Kshs.25,000/= on a day prior to 14th October 2014. He did not specifically refer to a demand of Kshs 25,000 on 10th October 2014 to which he had acquitted him. The inference drawn by the trial court in concluding that there was prior communication or meeting before 14th October 2014 was as a result of the words used by pw1 in their conversation on 14th October 2014 i.e “**nilirudi saa tisa nikaambia ulitoka**”. Apparently the Magistrate was laying a foundation to prove continued solicitation of money on the 14th October 2014. He however clarified that position in page 13 of his Judgment by saying that, the complainants remarks that “nilirudi saa tisa nikaambia umetoka” was indicative of a previous meeting having been held between the two and not necessarily 10th October 2014.

98. Indeed the conversation of 14th October 2014 suggests evidence of a previous meeting where initial demand was made and continued to 14th October 2014 where further negotiations over reduction from Kshs.25,000/= to Kshs.20,000/= continued. Solicitation in this case was not a one touch event but a continued event. However, reference to solicitation of Kshs.25,000/= previously does not affect a finding on solicitation or demand of a bribe on 14th October 2014 which was confirmed by the tape recording and evidence of PW1 herself. I do not see any serious anomaly to occasion any miscarriage of justice on the prosecution case. To that extent that ground fails.

99. Regarding failure to prove mens rea by the prosecution, prosecution only needed to prove the act of soliciting and receiving a bribe. Once that is proved, mens rea becomes an automatic inference because nobody demands for a bribe without knowledge that he is intentionally committing a wrong or a crime which is punishable by law. The intention to commit a crime is manifested or actualized by the fulfillment of the act of committing a wrong which in this case has sufficiently been proven. For those reasons that ground fails.

Whether the sentence imposed was legal

100. The appellant claimed that the sentence imposed of Kshs.250,000/= was excessive. However, Section 48 (1) of ACECA provides for penalty of 1 million in default 10 years. Kshs.250,000/= cannot be said to be excessive. For those reasons that ground cannot hold any water as there was neither misdirection nor illegality committed.

101. In a nutshell, I do not find any merit in the appeal herein. Accordingly, the appeal is dismissed and the conviction and sentence thereof upheld. Right of appeal 14 days.

DATED, DELIVERED AND SIGNED, AT NAIROBI ON THIS 5TH DAY OF APRIL, 2019.

J.N. ONYIEGO

(JUDGE)