REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI

ACEC APPEAL NO. 5 OF 2019

DUNCAN BUNDUKI MBUNDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Introduction

1. Vide Anti-Corruption Case No. 48/2010, the appellant herein was arraigned before Nairobi Chief Magistrate's Anti-Corruption Court facing four counts. Count one, he was charged with impersonating an investigator contrary to Section 34(1) as read with Section 34(2) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. Particulars are that, on 26th day of October 2010 at Karai High School in Kikuyu Division Central Province, jointly with another not before court, not being investigators with Kenya Anti-Corruption Commission represented themselves to David Mwangi Gitonga as investigators of the said commission allegedly investigating a corruption case against the said David Mwaniki Gitonga.

2. Count two, he was charged with attempts at extortion by threats contrary to Section 300(1) (a) of the penal code. Particulars are that, on 26th day of October 2010 at Karai High School in Kikuyu Division Central Province, jointly with another not before court and with intent to extort a sum of Kshs.50,000/= from David Gitonga Mwangi, threatened to accuse the said David Mwaniki Gitonga, of corruption offences.

3. Regarding count three, he was also charged with impersonating an investigator just like count one save for the particulars which states that; on 2nd day of November 2010, at Sixem Restraurant in Karen within Nairobi area, jointly with others not before court, not being investigators with the Kenya Anti-Corruption Commission represented themselves to Mary Nyambura Mwenda as investigators of the said commission allegedly investigating a corruption case against the said Mary Nyambura Mwenda.

4. Count four, he was again charged with attempts at extortion just as like count 2 herein above save for the particulars' details stating that; on 2nd day of November 2010 at Sixem Restaurant in Karen within Nairobi area, jointly with others not before court, and with intent to extort a sum of Kshs.200,000/= from Mary Nyambura Mwenda threatened to accuse the said Mary Nyambura Mwenda of corruption offences.

5. Having pleaded not guilty, the trial commenced with the prosecution calling 13 witnesses. At the close of the prosecution case, the appellant was put on his defence wherein he gave sworn testimony and called one witness.

6. Upon evaluating the evidence tendered by the prosecution and the defence plus submissions by both counsel, the appellant was convicted of all counts on 5th December 2018. He was subsequently sentenced to one-year imprisonment for each count in respect of counts 1 and 3 and 18 months for each count in respect of counts 2 and 4. Sentences were to run consecutively.

7. Being the first appellate court, this court is duty bound to re-examine, re-analyse and re-evaluate the evidence tendered before the trial court and arrive at its own independent finding and conclusion. However, the court should bear in mind that the trial court had the advantage of hearing and seeing the witnesses hence an opportunity to assess witnesses' demeanour. This principle is well articulated in one of the most frequently referred to decision in the case of **Okeno vs R (1972) EA 32** where the court held that:

> **"The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala vs R – [1957] EA 570. It is not the function of a final 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 conclusion".**

Evidence before the trial court.

8. On 26th October 2010, PW2 one David Mwaniki Gitonga the principal Karai High School was in his office when two men who introduced themselves as Duncan Bundi and Julius Nyamweya claiming to be officers from Kenya Anti-Corruption commission approached him.

9. The two donning their KACC identification badges intimated that they were on a mission investigating embezzlement of school funds through fictious contracts in supply of goods to the school and construction projects.

10. After inspecting books of accounts and school projects, the two asked the principal to call the school suppliers so as to explain why they were not issuing ETR receipts as required. It was at this point that the principal frantically tried to call three of his suppliers to go to the office to meet the 'KACC officers'. Meanwhile, one Bundi Duncan who was later identified as the appellant herein, offered to stop pursuing the matter subject to PW2 paying Kshs.200,000/=.

11. When PW2 expressed inability to raise the money, Bundi made some calls to unknown persons and reduced the demand to Kshs.50,000/= claiming that it was his bosses' last offer in default he could be arrested. Out of the three suppliers called by PW2 as directed by Bundi, only Antony Benson Gitieya (PW6) the proprietor of Bernard Hardware turned up.

12. When PW6 in company of a friend arrived at PW2's office, the two appellants once again identified themselves and started interrogating PW6 on alleged irregular invoices issued in the course of supplying goods to the school. After 30 minutes interrogation, Bundi asked PW2 to request PW6 and his friend to go out. After getting out, Bundi and his friend also left the office for a while. It was at this point that PW6 got back to the office and alerted pw2 that he was familiar with the face of Bundi as he had previously masqueraded as a KRA official and tried to extort money from him in the pretext that his (PW6) driver was ferrying illegal goods. PW6 then warned PW2 that Bundi was a conman and an imposter.

13. After a short while, Bundi again went back to the office and demanded for Kshs.30,000/= as he threatened to take him to Kikuyu Police Station. It was at this point that PW2 promised to send him money via M-pesa which Bundi agreed by giving his cell phone No. 0722******. At 6.00pm, PW2 allegedly sent Kshs.18,000/= through the said number.

14. At 8.00 pm the same day, Bundi called PW2 and told him that he had information from His Deputy and watchman whom he had sacked, that he had been stealing school milk and that he had stolen a school tank. On 28th October 2010, PW2 reported to KACC. Later, on 24th November 2010, he was called by a Mr. Wahenya from KACC who requested him to go to Kilimani Police Station to participate in an identification parade of a suspect. That when he attended the parade, he was able to pick the appellant as the person who went demanding money from him while acting as a KACC official.

15. PW6 Benson Gitieya a supplier to Karai Secondary School corroborated the testimony of PW2 to the extent that he was called by PW2 to go to his office on 26th October 2010. He stated that when he arrived there, he met two men who claimed to be KACC officials and who interrogated him over irregular supplies' invoices. He further confirmed that he recognized one of the conmen as Bundi whom he identified as an imposter having had an extortion encounter with him before as an alleged KRA official.

16. It was his testimony that having shared with PW2 over a demand for money by the two gentlemen, PW2 requested him for Kshs.15,000/= to pay them. That since he did not have the money, he gave him Kshs.3,000/=. On the evening of the same day, PW2 went to his shop and borrowed Kshs.15,000/= which he sent to Bundi and his friend. He was later called and recorded a statement. On cross examination, he admitted that he did not hear the two men demand money from PW2 and that it was PW2 who told him of the bribery demand.

17. Regarding count 3 and 4, Mary Nyambura (PW5) stated that on 2nd November 2010 at 4pm, she was at her restaurant within Karen shopping centre when she received information that her brother Anthony Muiruri (PW3) was downstairs and that he wanted to see her. As she went downstairs, she was intercepted by two men who identified themselves using badges as KACC officials. She was then told that she was under arrest and quickly ushered into a motor vehicle KBJ 572A parked outside there. It was at this point she was told that she was engaged in selling fake cigarettes. By then, her brother (PW3) was also in the same motor vehicle sandwiched between two men.

18. While driving away, one of the two men asked her to give them Kshs.200,000/= to assist her sort out her case. To secure her release, she called her father and informed her what had happened. She gave him the motor vehicle registration number in which she was. She told the court that they were taken around the city until they found themselves at Kabete Police Station where they were put at some room and their tormentors disappeared without returning back.

19. It was at 5.00pm that the OCS Kabete Police Station asked them what they were doing there and after explaining their ordeal, the OCS told them that those people were fake and not police officers. Before being released, Mr. Mwangi from KACC called her demanding to know whether those people who had arrested them were there. They were advised to report to KACC office which they did by recording their statements. On 24th November 2010, she was called at Kilimani Police Station and participated in an identification parade where she identified and picked the appellant as one of the people who arrested and demanded money from her pretending to be KACC officials.

20. PW3 Antony Muiruri Njuguna a brother to PW5 received a call from somebody by the name Mwangi who informed him that his sister (PW5) was in problems. Alarmed by the said information, he proceeded to PW5's place of work. Before reaching PW5, he was confronted by men who claimed to be KACC officials.

21. He was ushered into a Toyota fielder car registration No. KBJ. He was ordered to call his sister which he did. That when his sister Nyambura (PW5) arrived, she too was put in the same car and his phone was then confiscated. After Nyambura arrived, they told PW3 to leave but he refused. He confirmed that they were taken to Kabete Police Station and then abandoned there. He later recorded his statement. He however did not attend any identification parade and only identified the appellant while in the dock as one of the people who arrested them.

22. Although not directly related with any of the four counts, the testimony of PW1 Margaret Makori Mirambo was presented just to show the linkage between the happenings and similarities to what befell PW2 and PW5. According to Margaret (PW1) the Deputy Head Mistress Uthiru Girls, on 27th September 2010, three smartly dressed men approached her while in her office claiming to be officials from KACC.

23. That they then identified themselves using identification badges bearing the names of DB Bundi, Mutahi and Nyamweya. That Bundi asked for a visitor's book which he signed. She told the court that Bundi demanded to know who their suppliers were.

24. She stated that one Bundi claimed to know how the principal wrote cheques to contractors and thereafter contractors shared the money with her and the bursar without any work done. That Bundi left her a telephone number 0722****** to give to the principal who would then call him. When the principal reported to school, she explained to her what had happened. That the principal reported to KACC and later she was summoned to record a statement. She identified the visitor's book that Bundi the appellant herein allegedly signed as a visitor. On 24th November 2010 she attended an identification parade at Kilimani Police Station and identified the appellant as the person who had visited her office.

25. The testimony of PW1 was corroborated by PW11 one Caroline Thunguri the Principal Uthiru Girls who confirmed that PW1 her deputy had received visitors on 26th October 2010 who were on a mission investigating corrupt practices in her school. That using the number left to her Deputy Principal, she called and the recipient promised to call later as he was in a meeting. That the receiver who identified himself as Bundi called her later at 8.00pm and claimed that she had misused school funds from the ministry, CDF and parents' money and therefore offered to assist. She later reported to KACC and had her statement recorded.

26. PW4 Joel Kage conducted identification parade on the appellant on 24th November 2010 wherein PW1, PW2 and PW5 positively identified him as the person who had approached them as an official from KACC and therefore wanted some money to forbear them from prosecution.

27. PW8 Ellyjoy Gacheri a human resource officer from EACC testified and confirmed that the appellant was not one of their staff at the commission as the identification budge allegedly recovered from the appellant was not official as it did not conform to the official budges' specifications.

28. PW12 one Antipas Nyanjwa is the document examiner who examined the known handwriting and specimen signatures against the handwriting in the visitor's book of Uthiru Girls High School on which the appellant allegedly made his remarks as a visitor. He confirmed that the handwriting in the visitor's book as compared with the appellant's handwriting and specimen signature were similar and made by the same hand or author.

29. PW10 Adan Isaac Bagajah a flying squad officer then stationed at Kisii flying squad office received information from their office in Kisumu informing him of a suspicious Toyota Fielder car that was headed towards Kisii. He mobilized his officers and together spotted the motor vehicle parked at some hotel within Kisii Town. They stormed the hotel asking for the owner of the motor vehicle to come forward. As they searched the hotel customers, someone pushed keys under the table but a customer next to him alerted the officers. It was then that the accused was arrested and found to be the owner of the motor vehicle in question.

30. He was taken to Kisii Police Station and while alighting from the motor vehicle, he dropped some documents from his pocket. Upon checking, the officers discovered they were national ID card, KRA badge S/No.05252 bearing the name of Bundi B.D, KRA Pin in the name of David Guama S/No. 52497 and Anti-Corruption badge No. 05252 in the name of Bundi B.D. He identified the appellant in court and the aforesaid documents. That the suspect was later picked by officers from Special Crime Prevention Unit within Nairobi. On cross examination he admitted that he did not book documents that were recovered from the appellant.

31. PW13 the investigating officer CIP Livingstone Wahenya told the court that sometime September 2010, the commission received numerous complaints from members of the public complaining of persons claiming to be KACC officials and extorting money from them. He confirmed receiving a complaint from PW2 on 28th October 2010 regarding a conman claiming to be an official from KACC demanding for a bribe. That a similar report was also received from PW11 principal Uthiru Girls and PW5 one Mary Nyambura.

32. He stated that, on 22nd November 2010 he got information that somebody had been arrested and charged at Kibera Law Courts for being found in possession of government document. It was his evidence that in company of his colleague PW7 Wycliffe Sirengo, he went and arrested the appellant at Nairobi area police station where he was due to collect his driving licence. After arrest, they took possession of the badge recovered from him during his arrest in Kisii.

33. He facilitated recording of statements from witnesses who later attended identification parade and identified the appellant as the assailant. He further confirmed that he took the visitors book from Uthiru Girls where the appellant had allegedly signed together with his known handwriting and specimen signature for analysis to the document examiner.

34. PW7 Wyclif Sirengo merely confirmed that he accompanied PW13 in arresting the appellant.

35. Upon close of the prosecution case, he was put on his defence. He gave an elaborate length sworn testimony explaining on how he was arrested at various stages and tormented while in custody. He stated that on 15th November 2010 he was driving from Nairobi towards Kisii in company of his girlfriend one Syombua when he was arrested at Duka Moja and locked up at Narok Police Station for allegedly being in possession of illegal guns.

36. That he was released and proceeded towards Kisii. On reaching a place known as Keumbu, he was again police officers who again accused him of having a gun illegally. He was arrested and taken to Kisii Police Station where he was booked and later on 16th November 2010 was taken to Migori Police Station. That on 19th November 2010 Chief Inspector Wahenya (PW13) appeared with two officers and

picked him for Nairobi.

37. On reaching Nairobi, he was booked at Buruburu Police Station and later picked

by officers from Crime Prevention Unit who gave him a piece of paper and asked him to list names of all robbers. That on 21st November 2010 he was charged at Kibera Law Courts for impersonation where he was then released on cash bail of Kshs.200,000/=. That on 22nd November 2010 he was again charged at Makadara Law Court with robbery with violence. To his surprise, he charged again with charges similar to the instant case.

38. He denied visiting Uthiru Girls High School nor Karai Secondary School terming the same as a fabrication. He claimed that PW1and her family were well known to him as he was staying near Uthiru Girls and that he used to visit the school.

39. Further, he denied being arrested from a bar within Kisii town nor were any identification documents recovered from him. He claimed that, the documents were planted on him and that the arresting officer did not do any inventory nor record the recovered documents in the OB in Kisii. He accused CIP Wahenya of fabricating this case because he was claiming Syombua as his girlfriend and that he was on a revenge mission.

40. He further claimed that the identification parade was irregularly conducted as he was not given a chance to have his relatives or lawyer attend. He further denied signing the visitors' books at Karai Secondary and that it was not relevant as he had not been charged of any offence relating to his alleged visit to Karai. It was his contention that no gate pass or visitors registers from the two schools were produced as evidence of his alleged visit.

41. DW2 Joel Osero Nyangau merely confirmed that he visited the appellant while in custody at migori and Buru Buru police stations.

42. At the closure of the defence case both counsels made lengthy submissions which I have considered.

43. Upon conviction and sentence as stated elsewhere in this judgment, the appellant filed a petition of appeal dated 6th February 2019 and filed on 28th February 2019 citing the following grounds that:

> **1. That the learned trial magistrate erred in law and in fact by convicting and sentencing the appellant on charges that were not proved to the required standard in law.**
>
> **2. The learned trial magistrate erred in law by lowering the standard of proof in criminal cases thus convicting and sentencing the appellant on flimsy grounds on the basis of doubtful witness testimonies.**
>
> **3. The learned magistrate erred in law and fact in convicting the appellant against the weight of evidence and gave no weight by disregarding the evidence of the appellant.**
>
> **4. The learned magistrate erred in law and fact by convicting and sentencing the appellant when the evidence adduced could not sustain a conviction.**
>
> **5. The learned magistrate erred in law and in fact in failing to find that the prosecution did not prove their case beyond any reasonable doubt.**
>
> **6. The learned magistrate erred in law by denying the accused his right to a benefit of doubt.**
>
> **7. The learned magistrate erred in law and in fact in failing to find that there were reasonable doubts in the evidence tendered by the prosecution which doubts ought to have been resolved in favour of the appellant.**
>
> **8. The learned magistrate erred in law and in fact in giving superficial or no consideration to the evidence tendered by the appellant, while giving undue and disproportionate weight and significance to the evidence tendered by the prosecution contrary to law.**
>
> **9. The learned trial magistrate erred in law and fact in sentencing the appellant harshly and ignoring the mitigation tendered by the appellant.**
>
> **10. The learned trial magistrate erred in law by preferring a custodial sentence while the options of noncustodial sentences presented themselves to him for his consideration.**

Appellant's Submissions

44. During the hearing, Mr. Shadrack Wambui appearing for the appellant relied entirely on the grounds cited in the petition and submissions filed on 30th April 2019. Counsel collapsed the ten grounds of appeal into two.

> **(a) Whether the Hon. court shifted the burden of proof to the appellant.**

(b) Whether or not the prosecution proved its case beyond any reasonable doubt.

45. It was Mr. Wambui's submission that the burden of proof remained constant on the prosecution throughout the trial. In support of this proposition counsel referred the court to the High court decision in **Peter Mwangi Kariuki vs R (2015) eKLR**. Counsel further submitted that an accused should only be convicted on the strength of the prosecution case and not the weaknesses of his defences. To support this proposition, reliance was placed on decision in the case of **Philip Muiruri Ndaruga vs R (2016) eKLR**.

46. Turning on the inadequacy of the prosecution's evidence, Mr. Wambui submitted that the allegation by PW2 that she sent Kshs.18,000/= to the appellant was not proved as no M-Pesa statement nor evidence from Safaricom call logs was produced.

47. It was counsel's further submission that PW6 one Benson Gitieya having not attended the identification parade, his evidence could not be relied on as it was subject to error having met the appellant only once before. Concerning the visitors' book from Uthiru Girls, counsel submitted that it was irrelevant as the complaint was only in respect of the visitors' book for Karai Secondary School which was not produced and that the two schools are far apart for the appellant to have visited one day. Based on the above submissions, Mr. Wambui urged the court to find that the offence in respect of counts 1 and 2 was not proved beyond reasonable doubt.

48. Touching on counts 3 and 4, learned counsel contended that there was no proof that Mary Nyambura (PW5) used to operate a restaurant and that she was at the restaurant at the material time when the appellant is alleged to have arrested her and demanded for money. He further submitted that no effort was made to arrest the owner or prove ownership of the motor vehicle allegedly used by the appellant to ascertain the truthfulness of the complainant's claim. He opined that failure to call the OCS Kabete Police Station where PW5 and PW6 were abandoned was a grave omission by the prosecution.

49. Concerning alleged recovery of KACC identification documents in possession of the appellant, Mr. Wambui submitted that the same was a lie as the arresting officer did not prepare any inventory of the items recovered from the appellant upon arrest nor book them in the OB at Kisii Police Station.

50. Mr. Wambui referred the court to the court proceedings at page 200 where PW13 on cross examination admitted that:

> **"when you arrest and find documents, you prepare an inventory and you first book the suspect in. The entry No. 4 was nine items plus two subjects. When you are handing over you have to indicate in the OB that you are handing over or you prepare handing over notes. I do not know why they did not enter, why they did not record what they found him with in the first OB entry".**

Based on this testimony counsel invited the court to find that there was a probability of frame up.

51. In conclusion, Mr. Wambui invited the court to find that the evidence on record is not sufficient. As regards sentence, he submitted that the appellant is a sick man with a family which depends on him as the sole bread winner and ought to have been given a non-custodial sentence.

Respondent's Submissions

52. In response, M/s Jemima Aluda appearing for the state opposed the appeal relying on her written submissions filed on 16th May 2019. She submitted that the evidence of PW2, PW5 and her brother (PW3) was corroborative.

53. Learned counsel relied on the visitors' book records for Uthiru Girls where the appellant allegedly signed. She further argued that the appellant was fully identified by PW1, PW2 and PW3 during the identification parade.

54. On the allegation that the case was purely a frame up by CIP Wahenya because of a love triangle over M/s Syombua, Mrs. Aluda opined that it was an afterthought as the appellant did not raise the allegation during cross examination.

55. As relates to non-production of Safaricom M-pesa statement or call logs, counsel urged the court to find that the charges before court were not about receipt of money but attempts to extort. Referring to the legality of the sentence, she asserted that the same is legal and within the law.

Determination

56. I have considered the petition herein, grounds of appeal, proceedings before the lower court and submissions by counsel. Issues for determination are:

(1) Whether the appellant did present himself as KACC official to the complainants.

(2) Whether he demanded for a bribe from the complainants.

(3) Whether prosecution proved their case beyond reasonable doubt.

57. The appellant is basically facing two offences namely; impersonation under Section 34(2) of the Anti-Corruption and Economic Crimes Act (ACECA) and, attempts to extort contrary to section 300 (1) (a) of the penal code.

58. For better understanding, I wish to reproduce the two provisions as hereunder:

Section 34 of the ACECA provides:

> Impersonating investigator
>
> > **(1) no person other than an investigator shall represent himself to be or act as an investigator.**
> >
> > **(2) a person who contravenes this Section is guilty of an offence and is liable on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three years or both.**

Section 300(1) of the penal code provides and defines attempts at extortion as follows: Any person who with intent to extort or gain anything from any person –

> **(a) accuses or threatens to accuse any person of committing any felony or misdemeanour, or of offering or making any solicitation or threat to any person as an inducement to commit or permit the commission of any felony or misdemeanour; or**
>
> **(b) threatens that any person shall be accused by any other person of any felony or misdemeanour or of any such act;**
>
> **(c) …….**

59. From the wording of Section 34 (1) of ACECA being the offence of impersonation, it is clear that no person who is not an official of the EACC then KACC should represent himself as an officer from that organisation.

60. According to PW2 David Gitonga, he was approached by some two men whom he did know before claiming to be officers from KACC. Those people introduced themselves and claimed that PW2 Karai Secondary School principal had engaged in corrupt deals in supplies and construction projects in the school. PW2 claimed that he identified those people as it was day time and that it took over four hours with them as they demanded for a bribe to forbear him from prosecution. He further confirmed that he called one of the school supplies (PW6) who was equally interrogated on irregular invoices.

61. PW6 corroborated PW2's testimony to the extent that he saw the two men among them the appellant whom he recognised as an imposter having been a victim of his extortionist approach previously when he (appellant) presented to his driver as a KRA official claiming that his (PW6) motor vehicle was carrying illegal goods.

62. The trial court found that the evidence of PW2 was well corroborated by the evidence of PW6. It is trite law that the burden proof against an accused person shall and always lies upon the prosecution. It is incumbent upon the prosecution to prove that indeed the appellant did visit Karai Secondaryschool and made a demand of Kshs50,000/= from PW2 as he presented himself as an official from KACC.

63. In the case of **Miller vs Minister of Pensions (1947) 2 ALL EA 372** the court stated as follows:

> **"proof beyond reasonable doubt does not mean proof beyond shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice".**

64. Although the appellant denied visiting Karai Secondary School and that no identification parade was properly conducted, the evidence of PW2 and PW6 is consistent to the extent that the appellant visited PW2's school on the material day. Besides, the credibility of the parade conducted by PW12 one Nyanjwa was not shaken as the appellant signed the parade forms confirming that the parade was properly conducted.

65. I have looked at the parade forms which bear the appellant's signature. I have no doubt the parade was properly conducted with the necessary number of parade members involved and the requisite cautions administered. PW2, PW12 and PW13 confirmed that the appellant did attend the parade and positively picked the appellant. Given the time spent in PW2's office during broad day light and even had the audacity to inspect projects, there was sufficient time for interaction hence no possibility of error in identification.

66. It was not necessary for PW6 to attend the identification parade as he knew the appellant before hence his parade attendance could not be of any probative value. I have no doubt that the appellant was on 26th October 2010 at the PW2's school and his alibi defence is just but a creation of his own imagination. Did he present himself as a KACC official? Both PW2 and PW6 corroborated each other to that extent that the appellant had identification badges bearing the names of KACC.

67. Although the badges produced in court may not necessarily be the exact ones allegedly recovered from the appellant, the fact remains that the appellant was at Karai Secondary School and had identified himself as an official from KACC a fact that PW8 human resource KACC disapproved by saying that the appellant was not their employee a reality not disputed by the appellant.

68. Did he demand for money? PW2 said the appellant demanded for Kshs.200,000/= to forbear him from prosecution. He kept reducing the amount up to Kshs.30,000/=. Eventually Kshs.18,000/= was borrowed by PW2 from PW6 and was sent via M-pesa. Although no M-pesa statement or Safaricom log calls were produced, the evidence at Karai Secondary School where the demand was made still remains intact. PW6 confirmed that PW2 frantically pleaded with him as a school supplier to lend him some money to give to the appellant and his friend who had threatened to arrest him. From the chain of events and the nature of the conversation that ensued for over four hours, and further given the conduct of the appellant at the material time where he misrepresented himself as an official from KACC, it leaves no doubt in my

mind that the mission was to extort money from PW2 using threats of prosecution on allegations of fictitious claims of corruption. The appellant inspected projects and books of accounts. The witnesses had ample time for positive identification. The claim that non production of M-pesa statement was a big blow to the prosecution case is not entirely correct. Production of such statement would have fortified a claim of a receipt of money through corrupt means. Since the offence is not about receipt of money, the evidence in support of extortion is sufficient.

69. The trial magistrate adequately addressed the issue at page 370 of his judgment where he stated that:

> **"the fact that PW2 did not produce the mobile data to show he sent Kshs.18,000/= or that he did not produce the visitor's book at Karai High School cannot negate an otherwise proved fact. If anything, such evidence by the prosecution would only have served as additional evidence the purpose being fortifying an otherwise proved fact. Consequently, the fact that such evidence was not tendered by the prosecution is accordingly not fatal. It would have been so had evidence tendered not been suffiicient".**

70. In criminal proceedings just like any other case, there is no proof of a case 100%. What matters is the sufficiency of evidence to prove that beyond any reasonable doubt an offence was committed. Proof beyond reasonable doubt is not synonymous to measurement with mathematical precision at 100% watertight. Were this to happen, society will plunge into anarchy as substantive justice will have no room to breathe in.

71. Regarding whether the evidence of PW1 the Deputy Principal of Uthiru Girls where the appellant allegedly represented himself as a KACC officer and signed visitor's book but no charges of impersonation were preferred is relevant, the same cannot be used independently to prove an offence committed outside uthiru girls to which pw1 and pw11 were not privy to. The prosecution did not state why the appellant was not charged with this offence in the first place. I do not find their evidence material in proving the charges at hand.

72. **Accordingly, it is my finding that the appellant with another not before court did impersonate KACC officials in attempt to extort money from PW2 in the pretext of forbearing him from prosecution a fact he knew to be false. To that extent, the conviction in respect of counts 1 and 2 is upheld**.

73. I will now turn to counts 3 and 4. Pw5 explained how she was arrested by the appellant who claimed to be KACC official on the pretext that she was dealing in illegal and fake cigarettes business. She picked the appellant in the identification parade. Unfortunately, pw3 her brother with whom they were arrested did not attend any identification parade. Pw3 merely identified him in court when giving evidence.

74. It is trite that dock identification is not sufficient mode of identification especially where no reasonable explanation is given as to why such a witness could not attend an identification parade. It would be a dangerous practice to allow and encourage dock identification where circumstances are not favourable for its adoption. In this case, pw3 had no reason not to attend the ID parade. I will therefore discard his testimony as mere hearsay evidence.

75. Having eliminated the evidence of PW3, I am left with the evidence of PW5 alone which is not corroborated by any other evidence. The recovery of identification cards in the possession of the appellant is quite doubtful. The officer (PW10) who allegedly recovered KACC identification cards did not take out any inventory of the items found in possession of the appellant upon arrest. This was a serious omission which even PW13 admitted in his testimony on cross examination.

76. From the OB records Kisii Police Station, the appellant was not booked in with any identification badges. The emergency of the documents at the point of his release casts a lot of doubt as to how and when the identification badges were recovered from the appellant if any. In any event, none of the witnesses was in a position to ascertain whether the badges purportedly recovered from the appellant were the same ones used to impersonate as KACC officials when the appellant visited them. Whether they were recovered or not, it is not so material as the case could still be proved and stand even without recovery.

77. As stated above, the evidence of PW5 has been left bare. It is word of PW6 against that of the appellant. Corroboration is key and the cornerstone in discharging the burden of proof in criminal proceedings especially where identification is in question.

78. In the case of **Kariuki Nguru and 7 others vs R Cr. Appeal No. 6/2001(UR)** the court held that:

> **"the law on identification is well settled, and this court has from time and time said that the evidence holding to identification must be scrutinised and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error".**

79. Similar position applies in the case of **Roria vs R (1967) EA 583** where the court stated that:

> **"a conviction vesting entirely on identity invariably causes some degree of uneasiness... that danger is, of course, greater when the only evidence against the accused person is identification by one witness and though one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that it is safe to act on such identification".**

80. From the evidence on record, the trial court did not address the issue of warning itself of the dangers of convicting on the evidence of a single witness. This is because he had the opportunity to assess the demeanour of the witness (PW5). Having convicted on the understanding that the evidence of PW3 corroborated PW6's evidence, he would not have remembered to caution himself.

81. Since this court cannot caution itself of the dangers of convicting based on the evidence of a single witness having not had the advantage of assessing the witnesses' demeanour, I will hold that the evidence of PW5 cannot stand on its own convict the appellant on counts 3 and 4. The evidence of Makori although expressing similarities in circumstances in the commission of an offence it cannot independently be used to prove the offence in respect of counts 3 and 4. It was a grave omission on the part of the investigating officer not to have called upon PW3 to attend identification parade.

82. For the above reasons, it is my finding that the trial court did misdirect itself and erroneously in finding that there was sufficient evidence against the appellant in respect of counts 3 and 4. Accordingly, the conviction in respect of counts 3 and 4 is quashed and the sentence set aside. The conviction in respect of Counts 1 and II is upheld.

83. Regarding sentence, the appellant was sentenced to serve one year imprisonment for count 1, and 18 months for count 2. Section 34 (1) ACECA for impersonation provides a sentence of Kshs.300,000/= in default 3 years imprisonment or both. For extortion the sentence is that of misdemeanour.

84. According to Mr. Wambui, the appellant is a sick man and the sole bread winner to his family who should have been given noncustodial sentence. Sentence is generally an issue of discretion of the trial magistrate and this court can only interfere if proved that the court relied on irrelevant factor or acted on a wrong principle. Ordinarily, and as a matter of practice, where an offence is punishable by fine, the court should exercise discretion in imposing fine as the first option unless the court specifies good reasons why that option could not be viable in the interest of justice(**seeBoniface Okerosi Misera another vs Republic Anti-Corruption Criminal Appeal No.5 of 2018 as consolidated with Criminal Appeal no 6 of 2018)**.

85. Although the magistrate did not address his mind on the aspect of fine as an option and why he did not find it viable, I am persuaded from the previous criminal record of the appellant that he has been convicted twice on related charges hence imposition of fine will not serve the interest of justice vis a vis deterrence aspect as an object for punishment. For those reasons, I will not consider anon custodial sentence.

86. However, the offences the appellant stands convicted in respect of counts 1and 2, arose out of a common transaction. The offence of impersonation is what gave rise to attempts to extort offences that were committed at the same time and in the course of a common transaction out of the same chain of events as envisioned under section 14 of the CPC. I will therefore find that the sentence of one-year imprisonment in respect of count 1 and 18 months in respect of count 2 shall run concurrently.

87. In view of the above holding, the appeal is allowed to the extent that the conviction in respect of counts 3 and 4 is quashed and the sentence of 1yr and 18 months respectively set aside. The appeal against conviction in respect of counts 1and 2 is disallowed and the conviction thereof upheld and the sentence imposed of 1 yr in respect of count 1 and 18 months to run concurrently from the date of sentence imposed instead of running consecutively. The deputy registrar to facilitate the amendment of the committal warrant to reflect the sentences as pronounced by this court.

Right of appeal 14days.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF JULY, 2019.

J.N. ONYIEGO

JUDGE