REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 56 OF 2018

BETWEEN

PAUL NDUVE……..……...…….……..APPELLANT

VERSUS

REPUBLIC……...…..…….……RESPONDENT

(From original conviction and sentence in Machakos Chief Magistrate's Court EACC Case No 1 of 2014, Hon. A. Lorot, SPM)

REPUBLIC.....PROSECUTOR

VERSUS

PAUL NDUVE.....ACCUSED

JUDGEMENT

1. The appellant herein, **Paul Nduve,** was charged with three (III) counts of corruptly soliciting and receiving a benefit contrary to the ***Anti-Corruption and Economical Crime Act (ACECA)***.

2. In count I, the Appellant was charged with the corruptly soliciting for a benefit contrary to Section 39(3) (a) as read with Section 48(1) of the ***Anti-Corruption and Economic Crime Act***, No. 3 of 2003. Particulars for the count being that on the 6th day of February, 2014, at Wakaela Secondary School, within Machakos County, the Appellant being a person employed by the Public body, to wit, the ministry of Education, as the principal, Wakaela Secondary School, corruptly solicited for a benefit of Kshs. 10,000/= from **Susan Wanjiku Wanyoike**, as an inducement so as to facilitate release of a cheque in respect of payment for supply of two computers, a printer, computer accessories and stationary, supplied to the said Wakaela Secondary School by the said **Susan Wanjiku Wanyoike**, a matter related to the affairs of the said public body.

3. In Count II, he 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 Crime Act***, No. 3 of 2003, the particulars being that on the 11th day of February, 2014, at Wakaela Secondary School, within Machakos County, the Appellant being a person employed by the Public body, to wit, the ministry of Education, as the principal, Wakaela Secondary School, corruptly solicited for a benefit of Kshs. 10,000/= from ***Susan Wanjiku Wanyoike***, as an inducement so as to facilitate release of a cheque in respect of payment for supply of two computers, a printer, computer accessories and stationary, supplied to the said Wakaela Secondary School by the said ***Susan Wanjiku Wanyoike***, a matter related to the affairs of the said public body.

4. In Count III, the appellant faced the charge of corruptly receiving a benefit contrary to Section 39(3) (a) as read with Section 48(1) of the ***Anti-Corruption and Economic Crime Act***, No. 3 of 2003, the particulars being that on the 11th day of February, 2014, at Wakaela Secondary School, within Machakos County, the Appellant being a person employed by the Public body, to wit, the ministry of Education, as the principal, Wakaela Secondary School, corruptly received a benefit of Kshs. 10,000/= from **Susan Wanjiku Wanyoike**, as an inducement so as to facilitate release of a cheque in respect of payment for supply of two computers, a printer, computer accessories and stationary, supplied to the said Wakaela Secondary School by the said **Susan Wanjiku Wanyoike**, a matter related to the affairs of the said public body.

5. After hearing the evidence in the case, the Learned Trial Magistrate found the appellant guilty, convicted him accordingly and on 5th June, 2018 sentenced him to serve 3 years for each count.

6. In support of its case the prosecution called 10 witnesses.

7. In summary, PW1, **Hezbon Ngethe Njeru**, the proprietor of Hesbon Business Systems, a business run jointly with his wife, **Susan Wanjiku**, in December, 2012 travelled from Nairobi to Wakaela Secondary School in Mwala and purchased 2 tender forms for the supply of general stationeries and computers and accessories. He then submitted the tender with his quotation and was later called by the Principal, **Rev. Musembi**, who informed him that he had won the tender for the supply of computer and stationary worth Kshs 315,745/=. The following day he went to the school and received the LPO's drawn by the said Principal after which he supplied the goods as ordered then raised invoices for the same. According to PW1, upon receiving a call from the new Principal, the appellant herein, he went for his payment but was informed to carry for the appellant Kshs 30,000/- as kickback. Upon his arrival at the school he was whisked into the appellant's office by the secretary and the appellant confirmed that the supplies were good and serviceable and showed PW1 a cheque of Kshs 104,000/- but the appellant demanded for the said Kshs 30,000.00. When PW1 declined to comply, he was chased out which he did after picking his cheque for banking. After that PW1 reported the matter to the School's BOG and on the day of his appearance before the Board on 1st February, 2014, the appellant sought a lift from him and while in PW1's car, the appellant gave him a cheque No. 000288 for Kshs 50,000.00 dated 14th January, 2014 drawn in the name of Hezbon Enterprises instead of Hesbon Enterprises while informing PW1 that he was a fool for not bribing him and insisted that PW1 must pay him Kshs 30,000.00 bribe. When PW1 noticed that the cheque was improperly drawn he attempted to contact the appellant but the appellant declined to receive his call. However, when the appellant was called by PW1's wife he agreed to make good a cheque of Kshs 60,000.00 upon being paid Kshs 10,000.00. PW1 then reported the matter to the Ethics and Anticorruption Commission. According to PW1, the sum of Kshs 215,745/- still remained unpaid and that he never gave the appellant the said Kshs 10,000.00.

8. PW2, **Susan Wanjiku Wanyoike**, PW1's wife testified that in December, 2012, they won a tender at Wakaela Secondary School for the supply of two computers and accessories worth Kshs 315,745/- which they did in 2013 but by the time the then Principal, **Rev. Titus Musembi**, was being transferred from the school in January, 2013, they had not been paid. However, in March, 2013, they received part payment of Kshs 100,000/- by cheque from the new Principal, the appellant. When the Principal issued a cheque for Kshs 50,000.00 in the wrong name, PW2 called the appellant who informed her that her husband, PW1, was not cooperative hence he withheld Kshs 30,000/=. The appellant however suggested that if he was given Kshs 10,000/- he would rectify the cheque and pay Kshs 60,000/=. PW1 then went back to the school and the appellant drew a cheque for Kshs 60,000/=. On 7th February, 2014, PW2, reported the matter to one **Francis Kamwara**, PW9, who recorded her statement and showed him how to use a video recorder which was verified to be in perfect working condition. She was then taken to **Wambua** who showed her a sum of Kshs 10,000/- in Kshs 1,000/- notes which was handed over to her and was asked not to touch the sae as the same was treated. In the company of two officers from the EACC, she proceeded to Machakos and called the appellant who instructed her to proceed to Masii but along the way the appellant asked her to return to Machakos, put the money in an envelope and leave it in Kiosk No. 20 at Machakos Bus Station. However, the officer accompanying her told her to postpone the operation to another day. On 11th February, 2014, PW1 proceeded to the said school in the company of the EACC Officers and she switched the recorder on, entered the appellant's office after being directed by the secretary, introduced herself and informed the appellant the purpose of her visit. According to her, one of the said officers, **Francis Kamwela**, posed as her driver. In the appellant's office, PW2 handed to the appellant the bad cheque for Kshs 50,000/- for replacement with the one for Kshs 60,000/=. After handing the treated Kshs 10,000.00 to the appellant, the appellant gave her back Kshs 2,000/= ostensibly as her transport and facilitated the signing of the new cheque. PW1 then walked out accompanied by the appellant to the car where one of the EACC Officers, **Francis Kamwela**, called his colleagues and they proceeded to the appellant's office where he was arrested. PW2 then handed over the tape to the said officer. Upon the arrest of the appellant, the tape was replayed and the conversation recorded. According to PW2, the appellant, in a phone conversation and when she met him demanded 10% of the tender value and complained that PW1 was not ready to pay. She however admitted that there are many other **Mrs Hesbons** and she had no certificate from a voice expert confirming the voice to be hers. According to her, she was not the one who took the videos.

9. **Titus Mwenda Musembi**, PW3, testified that during his tenure Wakaela Secondary School, there was tender for the supply of computer accessories and he signed an LPO for the same to Hesbon Business Systems who won the tender and thereafter supplied the goods. However, during his tenure the supplier was not paid. He confirmed that the appellant was the incoming Principal who replaced him and to whom he handed over in January, 2013. He stated that he was appointed as the acting Principal since the appellant was on leave. According to him the tender process went through the tender committee.

10. PW4, **Stephen Kyalo Mutuku**, a lab technician at Wakaela Secondary School. On 11th February, 2014 during lunch time he was in school checking desks when three people entered the office and ordered the appellant to produce the money he had received. The appellant complied and placed the money on the table and a lady officer rubbed the appellant's palms with cotton wool, filled an inventory of the recovered items and PW4 who witnessed the appellant producing the money signed after reading the inventory. After that the officer said the appellant was under arrest and they left with him.

11. PW5, **W. J Nditi**, an investigator with the EACC testified that on 6th February, 2015, PW9 requested him to investigate the matter. On 7th February, 2014, he accompanied PW2 and the said PW9 to Wakaela Secondary School. PW2 had reported that the appellant had solicited from her Kshs 10,000/= bribe on 6th February, 2014 as an inducement to enable him release payment. PW2 was then shown how to operate the recorder. On 11th February 2014 PW5 in the company of PW9, **Sophie Nyambu**, PW8 and PW2 gave treated Kshs 10,000/= to PW2 together with the recording gadget and explained to her how to use it and they then proceeded to the said school. Once at the school, Sophie and PW5 remained at the gate while PW9 went with PW2. After a while, PW9 called PW5 and PW8 and they arrested the appellant in a room which was not the appellant's office but which they were informed was part of the laboratory. Upon being requested to produce the money he received from PW2, the appellant produced Kshs 8,000/= from his left pocket whose serial numbers tallied with their photocopies. After that PW9 prepared an inventory which was signed by all those present PW5 confirmed that he listened to the transcription of the tape recording through an intelligent system.

12. PW6, Nelly Maureen Papa, a government analyst testified that she received 6 items from PW9 and was to ascertain whether the contents of the controlled sample of APQ powder could be detected in any of the exhibits i.e. a khaki envelope containing the trap money, a khaki envelope containing the left hand sab of the appellant, a khaki envelope containing the right hand swab of the appellant and the khaki envelope containing the envelop that carried the trap money. After analysing the items, PW6 found that the powder which was a mixture of Anthracene, Phenopthlali and Quinine was detected in all the said item.

13. PW7, **Francis Wambua Munyao**, an investigator with EACC was on 7th February, 2014 in his office at Integrity Centre, Nairobi when PW9 gave him Kshs 10,000/= in Kshs 1,000/= denominations and requested him to prepare the money for a trap operation. He also introduced PW2 as the complainant. For the purposes of preparing the money, PW7 made an inventory with all the Serial Numbers listed and also photocopied the said notes and he and PW2 compared the serial numbers in the photocopy and in the inventory and PW2 countersigned on the photocopies. PW7 then encased both his hands in clean disposable gloves and applied a special chemical just for investigations, by the name APQ on the said notes after which he disposed of the gloves and inserted a new pair and carefully inserted the money inside the half cut envelope and gave it to PW2 who signed on top of the envelope and PW7 countersigned the same on 7th February, 2014.

14. PW8, **Sophia Nyambu**, an investigator with EACC was on 11th February, 2014 on duty at Integrity Centre, Nairobi when PW9 told her he had a report and wanted her to team up with him in an investigation in Mwala, Machakos County. In the company of **Juma Musi**, PW2 and PW9 they proceeded to Mwala after being briefed about the subject of investigations. On arrival at Wakaela Secondary School, PW2 and PW9 went into the compound while PW8 and the said **Juma Musi** remained outside the compound awaiting for instructions from PW9. After about an hour, PW9 called her into the compound and she relayed the information to **Juma Musi**. They then entered the school compound, met PW9 who directed them to the appellant who had already received the money in the company of one **Kyalo**. After introducing themselves and explaining the purpose of their presence through **Juma Musi**, the appellant was asked to produce the money PW2 had given him as a bribe and the appellant got the money from his left trouser pocket and handed it to **Juma Musi**, who had a hearing aid and overheard the appellant and PW2 talk of the money. According to PW8, they recovered Kshs 8,000/= from the appellant's trouser and inventory to that effect was prepared by PW9 and she signed it. It was her evidence that she wore disposable polythene gloves and swabbed both hands of the appellant and placed both swabs in different envelopes and marked the same. They also recovered Kshs 2,000/= from PW2 as well as a cheque and a forwarding letter of the said cheque. According to her no video was taken.

15. **Francis Kamwara**, who testified as PW9, stated that on 7th February, 2914 PW2, accompanied by her husband, PW1, went to his office and lodged a complainant of a demand of bribery by the appellant in order to facilitate payment to them of the sum due to their firm in respect of goods tendered and supplied by them to Wakaela Secondary School. PW9 informed PW2 that there was a need for a recorded conversation and introduced her to a mobile video recorder and inducted her on how to operate it. PW9 then took Kshs 10,000.00 and requested PW7 to prepare it for operation which PW7 did and handed over the same to PW2. In the company of PW5, they escorted PW2 to Machakos to meet the appellant but that day the operation aborted after the appellant gave instructions that the money be deposited at a kiosk. On 11th February, 2014 PW2 was once again given the said money and reminded how to operate the recorder and together with PW5, PW8 and PW9 they proceeded to Wakaela Secondary School and while PW5 and PW8 remained at the gate, PW9 drove PW2 into the school and PW2 entered the office while PW9 remained at the parking. After 30 minutes a gentleman walked to where he was parked and introduced himself as the Principal of the School and sought to know if he was the one who had driven PW2 to the School which PW9 confirmed. 30 minutes later, PW9 saw PW2 and the appellant walking towards him with PW2 signalling to PW9 that she had already given out the money and PW9 alerted his colleagues, PW5 and PW8 who joined him. PW9 then showed them the appellant who was talking to another members of staff, PW4.

16. They then approached the appellant, introduced themselves as EACC officers and informed him that he was under arrest for receiving a bribe. He was asked to produce the money he had received from PW2 which he removed from his left front trouser pocket and PW5 recovered the same amounting to Kshs 8,000/= explaining that he had given PW2 Kshs 2,000/= which they later recovered Kshs 2,000/= from PW2. They then compared the serial numbers of the cash with the photocopies made by PW7 and prepared an inventory of the 8 notes which inventory was signed by all of them as well as the appellant. Apart from the said Kshs 2,000/= they also recovered the cheque bearing two signatures and the letter on the letterhead of the School to the Chairman BOG requesting the Chairman to endorse the cheque with his signature from PW2.

17. According to PW9 he prepared an exhibit memo forwarding the samples for analysis and requested the Government Chemist to ascertain if the APQ powder could be detected and later obtained a report which confirmed that it was found in all the exhibits. With the help of PW2, PW9 prepared a transcript of the video recorded conversation between PW2 and the appellant which was signed by PW2 and PW9. PW9 also downloaded the video clips from the gadget to a DVD and prepared a certificate under section 106D of the ***Evidence Act***.

18. Upon being placed on his defence, the appellant testified that he was the head teacher at Wakaela Secondary School, Mwala Subcounty, Wamunyu. According to him on 6th February, 2014 in the evening he was in his house charging his phone and upon coming from picking a brush he found a missed call on his phone between 9.00 pm and 10.00 pm but could not identify the number. He nevertheless decided to return the call which was received by a lady who identified herself as PW1's wife, a supplier to the school. Upon inquiring from her what she wanted, the said person said that they were in some financial difficulties as their business was not doing well and would be happy to collect Kshs 60,000/= from the school and was ready to do so on 7th February, 2014. The appellant informed her that since he would not be available, she could collect the cheque from the clerk. He was however to ensure that the cheque was drawn and signed by one of the signatories **Madam Margaret Mbindyo**, a member of the BOG. Upon collecting the cheque, she was to pass by Masii High School where the appellant was meeting and he would then sign his part after which the cheque would be taken to **Mr Kimeu**, the Chairman of the Board to sign. The secretary was to draft the letter to the chairman explaining the payment.

19. It was his evidence that the same caller called him on 7th February, 2014 when he was at Masii High School, the same caller called him informing him that she would come but despite waiting for her the whole day, she never turned up till 11th February, 2014 at around 1.00pm when the appellant was attending to some parents that a lady entered and introduced herself as the wife of PW1. She had a cheque for Kshs 50,000/= drawn by the School but which could not go through the account. The appellant then instructed the account clerk to prepare to give her the cheque which she was given but before that was done, the appellant realised that **Mrs Mbindyo** had not signed. He then instructed a worker to take the cheque to her and sign which was done after which she signed a dispatch booklet and collected the cheque together with a letter to the chairman after which the appellant escorted her outside the office where he saw a dark-blue vehicle with a driver whom he greeted after which the lady left and he went back to the office to proceed with other duties.

20. After about 10 minutes, he saw the same vehicle get into the compound through the gate and PW5 and PW8 disembarked from the vehicle, went where he was outside his office, identified themselves as officers from EACC and showed their badges and informed him that he was under arrest for receiving Kshs 10,000/= from PW2, PW1's wife an allegation which he denied. According to the appellant he never

dealt with PW2 and only heard her voice on 6th February, 2014 and saw her on 11th February, 2014 though he had met PW1 severally.

21. According to the appellant, the money payable to PW1 was to come from the Tuition Account and he had been paid Kshs 100,000/- in March, 2013. In his evidence there were other suppliers who were owed by the school and that he was not personally responsible for drawing cheques, a responsibility that lay with the Bursar/Accounts Clerk, **Mr Mutuku**.

22. According to the appellant when he reported to the school, members of the Board expressed their view that they wanted the then acting Principal, **Mr Musembi**, to be elevated to the Principal. After the handing over, PW1 entered and sought to be paid promptly since he had been promised by the former acting Principal that he would be paid the full amount due of Kshs 315,745/-. However, the appellant informed PW1 that they would consider all the pending bills and decide on the payment. After narrating an incident in the School wherein the School was attacked and a member of staff fatally injured without any culprits being brought to book, the appellant repeated that there was no friendliness between him and the Board which had always insisted that his stay at the School depended on performance. He also disclosed that PW1 instructed lawyers to demand for his money but the appellant reminded him that since they had paid Kshs 100,000/= they could not pay the balance due to conditions prevailing then but would endeavour to do better in 2014.

23. It was his evidence that when he saw the video recording, there was nowhere he made a demand for bribe where he was alleged to have received the amount. Though he saw some hand raising some money, he was never captured receiving or soliciting for a bribe and he never received any money from the complainant and none was recovered from him. According to him, his trouser was the same he wore to the cells the same day. He denied that the one produced in court was his trouser. As regards the transcript, he stated that there was nowhere captured that he had solicited a bribe or received any.

24. The appellant denied that his hands were swabbed for chemicals.

25. In cross-examination, he admitted that the School issued a cheque of Kshs 50,000/= to PW1 but the same was wrongly drawn and a replacement cheque for Kshs 60,000/= issued increasing the amount by Kshs 60,000/= since PW2 asked for additional amount saying that she had spent money on fuel and taxi. According to him the said sum was authorised by the Chairman. He however denied that he demanded any money from PW2 and insisted that no money was recovered from his pockets. He could not however recall signing the inventory which was prepared by the investigation officer.

26. In his judgement, the learned trial magistrate found, relied on **Paul Mwangi Gathongo vs. Republic [2015] eKLR** in which **Mativo, J** cited **Blockburger vs. United States (284 US 299)** in which it was held that:

> **"The test to be applied is whether there are two statutory offences or only one and whether each requires proof of a fact which the other does not."**

27. Accordingly, he found that apart from the dates, the facts constituting the first and second counts were the same and proceeded to consider the two counts as one count. While citing section 39(3) of the ***Anti-Corruption and Economic Crimes Act***, the learned trial magistrate relied on **Michael Waweru Ndegwa vs. Republic [2017] eKLR** as setting out the ingredients of the offence of corruptly soliciting a benefit. He also relied on the definition of the word *"solicited"* in the ***Concise English Dictionary*** and *"benefit"* as defined in section 2 of the ACECA as well as **State vs. Wallace**. He based his decision on the holding in ***Githongo Case*** that to constitute a crime of solicitation of a bribe, it is not necessary that the act be actually consummated or that the accused person benefits from it and that it is sufficient if a bribe was actually solicited for.

28. According to the learned trial magistrate, based on the evidence adduced as well as the recovery of the Kshs 8,000/= there was evidence of solicitation. Since the appellant was employed by TSC, the court found that the second element of the offence was similarly proved. As regards the third element of gratification, he found that the appellant was duty bound to release the cheque and to pay any amount due to suppliers. Accordingly, he found that the prosecution proved beyond reasonable doubt that the appellant corruptly solicited for a benefit of Kshs 10,000/=.

29. As regards the issue whether the appellant corruptly received a benefit, reliance was placed on **Uganda vs. Odech Ensio** cited in the ***Githongo Case***, the court found that based on the evidence adduced the evidence that the appellant received the money was watertight that he handled the same. Accordingly, the trial court convicted the appellant on all the three counts as charged and proceeded to sentence him to three years' imprisonment in count 1, 3 years' imprisonment in count II and three years' imprisonment in Count III. While the sentences in counts II and III were to run concurrently, he directed that all sentences were to run consecutively so that the appellant would serve 6 years in actual sentence.

30. In this appeal, the appellant has raised the following grounds:

> **1) The Learned Trial Magistrate erred in law and in fact when he found the Respondent had proved the case to the required standard and/or beyond reasonable doubt.**
>
> **2) The learned Trial Magistrate erred in law when he totally ignored the Appellant's defence on issues of law and evidence thereby arriving at an erroneous determination thereby wrongly convicting the Appellant.**
>
> **3) The Learned Trial Magistrate erred in failing to apply and/or ignored relevant and pertinent judicial comparables, precedents, trends and definitions regarding to similar judicial decisions pertaining to similar charges preferred by the Respondent against the Appellant.**
>
> **4) The Learned Trial Magistrate erred in law when he concluded that the PW-2 Susan Wanjiru Wanyoike was a competent**

complainant when the said finding was not based on any evidence and/or any statute.

5) The Learned Trial Magistrate misapprehended the evidence pertaining to the provisions of Section 39 (3) (a) as read with Section 48 (1) of the Anti-Corruption and Economic Crimes Act, Number 3 of 2003 and as a direct consequence wrongly convicted the Appellant.

6) The Learned Trial Magistrate further misapprehends the evidence when he found that there was mention of money solicited when the evidence on record did not support such finding.

7) The Learned Trial Magistrate erred in law and in fact when he determined that the Appellant as a Principal of Wakaela Secondary School was duly bound to rectify any defective cheques issued on behalf of the school when the said finding was neither based on law or any fact.

8) The Learned Trial Magistrate erred in law in believing that the treated bait money had been recovered from the Appellant when such believe was not based on the evidence adduced during the trial.

9) The Learned Trial Magistrate erred in law and in fact when he concluded that the Appellant as a Principal of Wakaela Secondary School was duty bound to make payments of any amount owed by the said school to supplier when the said determination was nether factual or based on evidence statute.

10) The Learned Trial Magistrate erred in law when he concluded that the prosecution had proved the case to the required standard and that is beyond reasonable doubt that the Appellant had corruptly solicited for benefit when the said conclusion was neither based on the evidence adduced.

11) The Learned Trial Magistrate erred in law when he determined that the Appellant had wrongfully and unlawfully received gratification at the material time when such finding was neither based on evidence or fact.

12) The Learned Magistrate erred in law when he disregarded the Appellants defence and mitigation thereby passing sentence that was in ordinarily harsh and unconscionable sentence in view of ordinary circumstances and against the spirit of the statute.

31. On behalf of the appellant it was submitted that pursuant to the Provisions of the ***Criminal Procedure Act*** the burden of proof in respect of ant corruption matters has been established as beyond reasonable doubt. The prosecution consistently failed to meet the said threshold and the said case ought to have been dismissed in *limine*. Evidence on record, it was submitted, will suffice to demonstrate that the Complainant did not at all lay a basis to the complaint lodged on behalf of her husband the purported supplier of the goods alleged to have been delivered to Wakaela Secondary School. It was submitted that the Applicant maintained all through the trial that PW-2 was not a Complainant pursuant to the terms envisaged in the Criminal Procedure to the extent that she did not have any nexus to the Appellant. It was therefore the prerogative of the Prosecution to establish a link between the said witnesses the alleged supplies and the Appellant who maintained through the trial that Certificate of Registration ought to have been produced to establish the nature of the offended enterprise. The Certificate would have demonstrated if the enterprise was a proprietor as envisaged in the ***Registration of Businesses Act*** and therefore a trade name and/or the same was a Company Limited by shares or Guarantee and as such an autonomous entity with the right to sue and be sued. The Appellant submitted that the institution was not bound to pay PW-2 mainly because she had supplied nothing. The Learned Magistrate therefore erred when he refused to interrogate the nexus between the parties before coming to a conclusion that the PW-2 retained a mandate to complain against any person let alone the Appellant.

32. According to the appellant, the evidence on record is clear that the Appellant did not award the alleged LPO to PW-2 or PW-1 for that matter. Evidence was clear that the said alleged LPO had been awarded by the Appellant's predecessor who interestingly testified against the Appellant as PW-3. It was submitted that the Learned Magistrate failed to appreciate that it was indeed PW-3 who was known to both PW-1 and PW-2 a connection that ought to have raised a red flag.

33. It was submitted that the Appellant gave his Defence under oath and categorically denied any wrong doing or harbouring the motive to engage in a corrupt deed. He testified that as a new principal in the school he was not received by PW-3 with any fun fare. His testimony was clear that the hostility was so ripe that as a result thereof a life was lost. It was unfortunate that the Learned Magistrate failed to appreciate the Appellant's Defence instead concluding that the Appellant was culpable notwithstanding all the discrepancies established in the prosecution case.

34. According to the appellant, the complainant is a person who lodges a complaint. Typically, it is a term used in the context of criminal law to refer to a person who alleges that another committed a criminal act against him/her. Section 2 of the ***Criminal Procedure Code*** defines a complainant as; - an allegation that some person known or unknown has committed or is guilty of an offence." In this regard, the appellant relied on **High Court of Kenya at Kajiado Criminal Misc. No. 1 of 2015 - In The Matter of Criminal Procedure Code Cap 75 and in the Matter of the Constitution of Kenya and in the Matter of Criminal Case No. 1067 of 2014 at Resident Magistrate's Court at Loitokkitok – Republic vs. Faith Wangoi.**

35. According to the appellant, from the record, at no place has money been mentioned by the Appellant. If therefore money was not sought, indeed not mentioned at all how could the Learned Magistrate conclude that the Appellant had solicited money for an act? Reliance was placed on the decision of **Mativo, J**. in the case of **Michael Waweru Ndengwa-vs- Republic [2016] eKLR** that:

"In order to constitute an offence, the following are essential ingredients; in the first place, there must have been solicitation or offer or receipt of a gratification must have been asked for, offered or paid as a motive or reward for inducing by corrupt or illegal means and secondly, that someone should be acting in the public or private or employed or acts for and on behalf of

another person, or confer a favour or ask for a favour to render some service. Carlson Anyangwe in his book "Criminal Law in Cameroon, Specific Offences authoritatively states that to secure a conviction, it must be shown that the accused 'solicited' a benefit not legally due."

36. It was submitted that the issues raised by the prosecution failed to isolate the offences as correctly pointed out in the afore referred decision. The Appellant did not have the inclination to solicit for gain, the evidence adduced did not show otherwise. The motive was absent and what emerged from the prosecution case was some kind of vengeance.

37. According to the appellant, the evidence on record is that the mentioned institution Wakaela Secondary School like any other institution had an established system of making payments to creditors and suppliers. Testimony was given to the effect that the school bursar was usually the author of any cheque leaves. Upon upending the name of the Drawee the bursar would forward the cheque leave to 3 signatories who had been mandated by the Board of Governors of the mentioned institutions. The Appellant was merely one signatory thereof. He neither unilaterally approved nor authorized such payment and neither did he solely execute the cheque leaves. The Appellant in view of the foregoing humbly submits that if a error was done in capturing the name of the drawee, then the same was a genuinely error that the Learned Magistrate ought to have flagged down. The evidence on record was that in his humility the Appellant ventured to have the error rectified. However, since PW-1 and PW-2 were hell bend on inflicting vengeance, it was irrelevant that the institution did not have enough funds at the time of pressed payment as the evidence would show.

38. To the appellant, the conclusion arrived at by the Learned Magistrate in respect of the purported bait money was neither based on evidence nor law. The allegation by the prosecution witnesses to the effect that some bait money had been recovered from the Appellant was not based on the evidence on record. In one instance the evidence of PW-2 was to the effect that Kshs. 10,000/- had thereby been handed to the Appellant. Yet the investigating officer testifies that only Kshs. 8,000/- was recovered from the Appellant.

39. It was asserted that the Honourable Court is a court of evidence, a court of procedure and indeed a court of law. The burden towards the standard of prove is pegged at a certain strict threshold mainly because the ensuing consequence is lawfully curtailing the liberty of an individual as enshrined in the Constitution. The evidence on recovery has to be water tight. The Appellant submitted that the evidence thereof was flippant, unreliable and weak. PW-1, PW-2 and PW-3 having decided for ulterior motives to frame the Appellant had to go through with the conceived plan. Hence the lack of explanation in respect of how the amount was recovered. The lack of strict evidence as to whom was present save for the perpetrators of the charade during the recovery of the alleged bait money. It begs the query that if the amount was recovered from a trouser which was produced as evidence and yet the Appellant was brought to court in a trouser (which origin was not explained) then who was the owner of the trouser produced? And where did the Appellant get a trouser from?

40. It was further submitted that it is trite law that entrapment is a complete defence and it does not matter that the evidence against the person is overwhelming or that his guilt was undisputed. The Court must refuse to convict an entrapped person not because his conduct falls outside the proscription of the statute but because even if his guilt is admitted, the methods and manner employed on behalf of the state to bring about the evidence cannot be countenanced. In this respect the appellant relied on **Mohamed Koriow Nur vs. The Attorney General [2011] eKLR.**

41. According to the appellant, in view of the foregoing and in the totality of the proceedings it was really unfortunate when the trial court failed to note that the proceedings had been pending for 4 years during which period the Appellant remained interdicted. The period within which the trial had taken was sufficient punishment in view of the evidence adduced and the defence tendered. Indeed, the Appellant had humbly implored the trial court if it must convict then do consider a non-custodial sentence including ordering for payment of bail.

42. This court was urged to deem the instant appeal as a case where reversal of sentence is warranted and do proceed to reverse the same. In the alternative the superior court do order for a non-custodial sentence or find that the Appellant has been sufficiently punished.

43. In opposing the appeal, the Respondent through its prosecution counsel, **Ms Mogoi**, submits that from the evidence on record, it is not disputed that PW1 was one of the suppliers of Wakaela Secondary School and that he had supplied some items and that payment was pending. From the evidence of PW2 and the Appellant, it is clear that for payment to be done, they require the signature of the Appellant, the BOG chairman and another BOG member and that it was not a one man's activity. In the instant case, the Appellant was charged with soliciting for a bribe on two different occasions from PW2 and receiving the same bribe of Kshs. 10,000.00.

44. According to the learned prosecution counsel, since the report was made to the EACC and PW9 took up the investigations and organized everything pertaining to the case up to the time of the arrest of the Appellant, it was her view that his evidence was very crucial in this matter as it formed the basis of the arrest of the Appellant. Accordingly, it was submitted that in view of the foregoing and the active role PW9 took in the matter, the trial Court erred by insisting that the Appellant proceed in person for the hearing of PW9 yet he had indicated that his advocate was held in a different matter in a different court. It was submitted that the trial Court seemed to have an open bias towards the Appellant from the time he failed to appear in court despite the Appellant's advocate having sent another counsel to hold his brief and explained to the court that the Appellant was unwell, the trial court went ahead to issue warrants of arrest against the Appellant not giving him a benefit of doubt that he could been ailing and giving him an opportunity to avail medical evidence. Even when the Appellant appeared in court during the mention with medical evidence, the trial court indicated that the medical evidence seemed suspicious without stating the reasons for such finding.

45. It was submitted that when the matter came up for hearing and the Appellant informed the trial court that his advocate was held up in another court, the court insisted on the Appellant proceeding in person despite the fact that the Application for the adjournment had not been objected to by the prosecution. The Court again took issues with the fact that the Appellant had not attended court on the day they had indicated he was unwell and despite the advocate having had someone hold his brief, the court took it that the advocate also did not attend court.

46. It was submitted that an EACC matter is very different from the other cases. The investigating officer plays a key role in the matter from the start and it is only fair and just that an accused person if given an opportunity to prosecute his case in a just manner especially if he has an

advocate on record. In this matter, the Appellant did not cross-examine PW9 since he probably was not ready to proceed with the matter in person so the evidence of PW9 went unchallenged.

47. The foregoing notwithstanding, it was submitted that there was evidence from PW1 that the Appellant was demanding for a bribe of 10% to facilitate the release of their cheque, when PW2 made a follow up, the same demand was again made. They later negotiated and agreed on Kshs. 10,000.00. Since PW2 was alone when the demand was made, her evidence of the demand was corroborated with the transcript and the video recording since she had been shown how to use it.

48. It was submitted that for the charge of soliciting to stand, there should be clear evidence of the demand. There should be evidence of the Appellant demanding for a bribe. From the evidence on record, it was the evidence of PW2 that the Appellant demanded for a bribe of Kshs. 10,000 and even complained about PW1 to the effect that he was not cooperative. Though it is not clear whether the demand was for him alone or was to be shared since the decision to pay involved other BOG members, the fact remains that it was the Appellant who made the demand for a bribe. What is missing from the evidence of record, were the exact words of the demands made since not even PW5 who was listening to the conversation between PW2 and the Appellant could tell them to the court.

49. It was the evidence of PW2, PW3, PW5, PW8 and PW9 that the money was recovered from the Appellant's left trouser pocket. Though there was a slight contradiction between PW3 who stated that the Appellant placed the money on the table and he did not see where he retrieved it from, the other witnesses testified that the money was recovered from the left pocket of the Appellant's trouser and was handed over to PW9. Though the Appellant denied in his defence of having received the money from PW2 and that his hands were swabbed, it was the evidence of PW6 that the APQ chemical was detected in all the items that had been forwarded to the government chemist meaning that indeed the Appellant came into contact with the trap money.

50. It was submitted that the Appellant's defence was a mere denial that did not even explain how he came into contact with the APQ powder on his hands and trouser. His defence pointed to his problem with the BOG but did not implicate the EACC officers hence they had no reason at all to want to fix him or give false testimony against him. They did not have an interest in the running of the school or PW1's business hence they had no reason to give false testimony.

51. It was appreciated that though PW2 had been warned against touching the money, she touched it when she received Kshs, 2,000 from the Appellant. However, the foregoing did not interfere with the prosecution's case since the Appellant did not point out to the possibility of having come into contact with PW2 after she touched the money. This did not change the fact that the Appellant received the treated money.

52. It was therefore submitted that the prosecution's evidence was consistent safe for the few contradictions that do not really have great impact on the case. The evidence on record is direct, clear and without any doubt whatsoever that the appellants committed the offences charged with.

53. In the foregoing premises the Respondent urged this Court to uphold the conviction of the Lower Court and confirm the sentence.

Determination

54. I have considered the submissions made on behalf of the parties herein. It was conceded by the learned prosecution counsel that the learned trial magistrate erred in declining to grant the appellant's application for adjournment on the day that the investigating officer testified and proceeded to hear the matter in the absence of counsel for the appellant when the application for adjournment was not opposed. It was however submitted that notwithstanding the foregoing there was sufficient evidence to warrant the conviction. In fact according to the learned prosecution counsel, the manner in which the proceedings were conducted by the learned trial magistrate manifested bias against the appellant.

55. Article 50(1) of the Constitution provides that:

> ***Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.***

56. It is therefore imperative that an accused person be accorded a fair public hearing before not only an independent tribunal or body but the body conducting the trial must also be impartial. It is trite law that not only should there be impartiality on the part of the court or the tribunal, but the tribunal must also be seen to be impartial. **Trevelyan, J** in **Shilenje vs. The Republic [1980] KLR 132**, held that:

> **"On pages 612 and 613 of Woodroffe, we have:**
>
> ***"…This clause deals with the case in which the High Court is satisfied that a fair and impartial inquiry cannot in fact be had; but such cases are rare, for to move a case from one magistrate to another on grounds personal to him is tantamount to a severe censure of such officer and the very clearest grounds must exist before the High Court will interfere…A more ordinary class of case is that in which, the High Court is not of itself of opinion that affair and impartial inquiry cannot be had yet a party has reasonable grounds for the apprehension that he will not have affair trial which is another matter. It is not sufficient that justice is done; but it must also appear to have been done. The law in such a case has regard not so much to the motive which might be supposed to bias a judge as to susceptibilities of the litigant parties. One important object is to clear away everything which might engender suspicion or distrust of the tribunal and thus to promote the feeling of confidence in the administration of justice which is essential to social order and security… The question in such cases is not whether there is actual bias…but whether there is reasonable…ground for suspecting bias…and whether incidents may have happened which, though they might be susceptible to explanation and may have happened without there being any real bias in the mind of the judge, are nevertheless such as are calculated to create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial."***

57. It is recognized that "*It is essential that the public have absolute confidence in the integrity and impartiality of our system of criminal justice. This requires that public officials not only in fact properly discharge their responsibilities but also that such officials avoid, as much as possible, the appearance of impropriety*." **(People vs. Rhodes (1974)** 12 Cal. 3d 180, **185 [115 Cal. Rptr. 235, 524 P.2d 363])**.

58. A miscarriage of justice was discussed in the case of **Zahira Habibullah Sheikh & Another vs. State of Gujarat & Others AIR 2006 SC 1367** where the Supreme Court of India stated:-

> **"It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted…Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, the condemnation should be rendered only after the trial in which the hearing is a real one, not a sham or mere farce and pretense…The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice."**

59. In this case, the application for adjournment was made on the basis that the appellant's advocate was in another court. There was no evidence that the adjournment would have prejudiced the prosecution case since a ruling on the application was made without hearing the prosecution thereon. After PW9, a crucial prosecution witness testified, and produced numerous documents as exhibits, the appellant stated he had no question for him. As rightly submitted by **Miss Mogoi**, it would seem that the appellant was clearly handicapped in the conduct of his case in the absence of his counsel. He in fact stated that he was unable to respond to certain applications by the prosecution.

60. In the premises, I cannot say that the appellant was subjected to a fair hearing as required under Article 50 of the Constitution.

61. What is the course available to the Court in such circumstances? In other words, should the Court order a retrial? The Court of Appeal in the case of **Ahmed Sumar vs. R (1964) EALR 483** offered the following guidance:

> **"...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered..."**

62. The Court of Appeal likewise had the following to say in the case of **Samuel Wahini Ngugi vs. R [2012] eKLR**: -

> **"The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:**
>
> **'It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered…In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person'**
>
> **That decision was echoed in the case of Lolimo Ekimat vs. R, Criminal Appeal No. 151 of 2004(unreported) when this Court stated as follows:**
>
> **'…the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it.'"**

63. In **Muiruri –vs- Republic (2003), KLR, 552** and **Mwangi –vs- Republic (1983) KLR 522** and **Fatehali Maji vs. Republic (1966) EA, 343** the view expressed was that: -

> **"Although some factors may be considered, such as illegalities or defects in the original trial, the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of the admissible or potentially admissible evidence a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for a retrial should only be made where the interests of justice requires it."**

64. **Makhandia J.** (as he then was) in the case of **Issa Abdi Mohammed vs. Republic [2006] eKLR** opined that: -

> **"An order for retrial would have been most appropriate in the circumstances of this case. To do so however, in the circumstances of this case would cause irreparable prejudice to the appellant since the prosecution may have become wiser and would wish to plug the loopholes already alluded to in this judgment. In the result there is only one channel left to this court and that is to allow the appeal, quash the conviction and set aside the sentence. The appellant may be set at liberty**

forthwith unless otherwise held on a lawful warrant."

65. In this case, at the conclusion of PW9's evidence, the prosecution applied for and was granted the prayer for the release of the video recording mobile lookalike gadget with the court noting that the same is "a recording device in use elsewhere". In those circumstances, it is my view that no useful purpose would be served by a retrial.

66. I allow this appeal, set aside his conviction and quash the sentence meted against him. I direct that he be set free forthwith unless otherwise lawfully held.

67. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 1st day of October, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Mr Musungu for Mr Mutinda Kimeu for the Appellant

Miss Mogoi for the Respondent

CA Geoffrey