



**REPUBLIC OF KENYA**

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

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**CRIMINAL APPEAL NO. 24 OF 2017**

**BONFACE OTIENO ODHIAMBO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal arising from conviction and sentence in Milimani Chief Magistrate's Anti-Corruption Court in Criminal Case No. 09 of 2016 delivered by Hon. K. Bidali, Chief Magistrate, on 14<sup>th</sup> August, 2011)**

**JUDGMENT**

**1. Bonface Odhiambo Otieno**, the appellant was on 19<sup>th</sup> July, 2016 arraigned before Nairobi Chief Magistrate's Anti-Corruption Court to answer to the following charges;

**Count 1 (C1): Corruptly soliciting for a benefit contrary to Section 39 (3) (a) as read with Section 48 (1) of the Anti-Corruption & Economic Crimes Act NO. 3 of 2003.**

The particulars being that the appellant on the 17<sup>th</sup> day of February 2016, at Ruaraka Police Station within Nairobi City County being a person employed by a public body to wit National Police Service, as a Police Corporal, corruptly solicited for a benefit of Kshs.2,000/= from Solomon Mutama as an inducement so as to facilitate release of his employee John Mutiso Nyerere from police custody, a matter relating to the affairs of the said public body.

**Count 2 (C2): Corruptly soliciting for a benefit contrary to Section 39 (3) (a) as read with Section 48 (1) of the Anti-Corruption & Economic Crimes Act NO. 3 of 2003.**

The particulars being that the appellant on the 17<sup>th</sup> day of February 2016, at Ruaraka Police Station within Nairobi City County being a person employed by a public body to wit National Police Service, as a Police Corporal, corruptly solicited for a benefit of Kshs.2,000/= from Solomon Mutama as an inducement so as to facilitate release of his employee John Mutiso Nyerere from police custody, a matter relating to the affairs of the said public body.

2. The appellant pleaded not guilty to both counts and the matter proceeded to full hearing, with the prosecution calling a total of nine (9) witnesses. The appellant was acquitted of C2 under Section 210 Criminal Penal Code and convicted on C1. Upon conviction, he was fined Kshs.100,000/=, in default, 6 months' imprisonment.

3. Being dissatisfied with the judgment, he filed this appeal citing the following grounds;

i. That the learned trial magistrate erred in law and in fact in convicting and sentencing the appellant for the offences charged when there was no sufficient evidence to prove the charge.

ii. That the learned trial magistrate erred in law and in fact in convicting and sentencing the appellant when the weight of the evidence does not support the conviction.

iii. That the learned trial magistrate erred in law and in fact in failing to take into consideration the appellant's evidence exonerating him from the charges levelled against him.

iv. That the learned trial magistrate erred in law and in fact by failing to appreciate the fact that the prosecution witnesses gave contradicting evidence that could not establish the prosecution's case beyond reasonable doubt.

v. That the learned trial magistrate erred in law and in fact by failing to appreciate the fact that the prosecution did not establish all the ingredients of the charges leveled against the appellant.

vi. That the learned trial magistrate erred in law and in fact in convicting and sentencing the appellant whilst failing to note that the prosecution witnesses' testimonies were never corroborating.

vii. That the learned trial magistrate erred in law and in fact in the circumstances of the case by handing down a sentence on charges that could not be sustained in law.

**4. PW1 Solomon Mutama** is a police officer attached to GSU headquarters. He operated a pool table within Ruaraka police station premises. **PW2 Boniface Chevusiono Marava** was his employee and was one of those arrested by the appellant and others on 16<sup>th</sup> February, 2016. The appellant is also a police officer and was attached to Ruaraka police station.

5. It was PW2's evidence that on 16<sup>th</sup> February, 2016 while at work at the pool table, police came and said they were selling bhang and were not paying money and so would be arrested. They were handcuffed and taken to the station where they slept but those who had cash paid and were released. He remained with Mui Jackson and Mutiso. His friend Muteti (PW3) bailed him out by paying for him Kshs.2000/- which was being demanded.

**6. PW3 Abraham Muteti** confirmed that he paid Kshs.2,000/= to the appellant for the release of PW2 on 17<sup>th</sup> February, 2016.

**PW4 John Mutiso Nyerere** was supervising PW1's pool tables. He was on duty when 5 police officers came and arrested him and others. He stated that some of those arrested paid money and were released. It was Bonface Otieno a police officer who was asking for money. His wife came and he paid money for his release on 17<sup>th</sup> February, 2016.

**7. PW1** testified that he received a call from his employee on 16<sup>th</sup> February, 2016 evening informing him of his arrest by police officers from Ruaraka. He went to the scene and made inquiries from Cpl. Otieno (the appellant) who was in-charge of the operation. The appellant informed him that those arrested were thugs and were intimidating people and selling bhang. PW1 went to see the OCS Ruaraka (PW5) but he declined to answer his queries advising him to relocate his business.

8. He went back to the appellant who told him that the said suspects needed to pay Kshs.2,000/= to secure their release. He stated that the Kshs.2,000/= was not cash bail.

9. On 17<sup>th</sup> February, 2016 between 8 am – 11 am, he went back to the appellant who repeated what he had told him the previous day. He went to PW5 who still asked him to relocate his business. At this point, he sought advice through the Ethics and Anti-Corruption Commission (EACC) customer care desk. He was then linked up with the EACC officers who came to Ruaraka and they met. He explained his story and he was inducted on how to use the recorder.

10. He went to Ruaraka Police station and asked for the appellant and was told he was in the canteen. He went there and they had a short conversation and he asked him about the money. The appellant told him, his boss had insisted he pays the money. He asked the appellant for a mobile number which he was given. He then returned to EACC and gave them the recorded conversation. After Mr. Wambua listened to it, he decided to give him treated money for entrapment. He was however, unable to reach the appellant and so returned the treated money.

11. The recorded conversation was played and he was able to identify his voice and that of the appellant. A transcript was prepared and he signed (Exhibit 5) it.

**12. PW5 No. 2123127 CI Amos Ambasa** was the OCS of Ruaraka police station at the time of this incident. His evidence was that on several occasions, he had received complaints from landlords in respect of pool tables constructed next to buildings whereby muggers hid there and terrorized people. He searched and found the owner who happened to be a police officer. The officer told him, he was in need of additional income. The advice PW5 gave him was for him to relocate the business, but he did not.

13. The complaints did not stop and he continued to engage the said officer. The officer even tried to bribe him and he reprimanded him. The attempted bribe was made the same week the suspects were arrested. He instructed the appellant and other officers in "SPIV" team to patrol the areas on 16<sup>th</sup> February, 2016 and he left for home at 6.30pm.

14. The appellant called and informed him that he had arrested 5 – 6 boys who were petty offenders. He instructed that they could be released on cash bail of Kshs.1,000/= - Kshs.2,000= . The next day, he reported on duty and found 3 of the arrested persons released but he was not sure of the terms of release. The rest were given light duties within the station to perform and released thereafter. He was in a meeting until 5 pm that day.

15. It was later that officers from EACC came to his office inquiring about the appellant, who they said had engaged in asking for bribes from PW1. He denied meeting PW1 on 17<sup>th</sup> February, 2016. He explained that upon payment of cash bail, one is issued with a receipt. He also stated that the EACC did not ask for the cash bail receipt.

16. PW7 No. 235368 IP Evans Chea was attached to Ruaraka Police station as Deputy OCS. He was sent to Integrity Centre by the OCS (PW5) in relation to the appellant's case. He said he identified the appellant's voice and telephone numbers on the recording played in court.

**17. PW8 Caleb Okoth Okoth, PW9 Francis Wambua and PW10 Martin Mbuvi** are officers from EACC. They were involved in the

investigations of the complaint against the appellant. He introduced the recording gadget to PW1. After the recording, they listed to the conversation and confirmed that there was a demand for Kshs.1,000/= by PW1. Trap money of Kshs.1,000/= was prepared and PW1 was inducted on how to use the gadget. Their mission was however unsuccessful since the appellant failed to show up to collect the money.

18. The appellant elected to give a sworn statement in his defence. He testified that he was a police officer in the rank of corporal and was attached to Ruaraka Police station and was in charge of operations (SPIV). On 16<sup>th</sup> February, 2016 he reported on duty at 8 am as the duty officer and he met the OCS (PW5) for briefing. They discussed matters of security in their jurisdiction. They in particular, addressed the issue of young men harassing people and hiding in the pool table premises.

19. He referred to an old man who had complained of the pool at Lucky Summer estate. The owner had been chased away with the help of the chief. This owner was a police officer from GSU Headquarters and he was feared. He was aware of all these complaints as he was in-charge operations. A raid was planned for 16<sup>th</sup> February, 2016 and was carried out at 6.30pm where 5 out of the probable 12 people were arrested.

20. On their way to the station, they met PW1 who was connected to the complaint of pool tables. PW1 wanted to be assisted and pestered him. He asked him to relocate as per PW5's instruction. He even offered the appellant Kshs.5,000/= which he rejected and still sent him to the OCS.

21. While at the station, he heard an exchange of words between the OCS (PW5) and PW1. He produced OB No. 56 (DEExhibit 1a) to show the people arrested; OB No. 54 – 63 showing that no one was released by midnight (DEExhibit 1 – 2); OB No. 25 of 17<sup>th</sup> February, 2016 showing release of many at 1600hrs (DEExhibit 4d). He checked out on 17<sup>th</sup> February, 2016 at 8 am and left for his house but he returned to the station to brief his officers at 4 pm.

22. He stated that on instructions of the OCS (PW5) he had told PW1 to pay cash bail of Shs.2,000/=. PW1 was not happy and he issued him with threats. He denied speaking to PW1 on 17<sup>th</sup> February, 2016. He also denied knowledge of the audio recording. He said the officers from EACC did not check the cash bail book and it was thereafter not available as it had been taken by the auditors. He blamed PW1 for his woes. He denied asking for Shs.2,000/= bribe.

23. He called one witness **DW2 No. 81571 CPL Fasili Wanja** who was attached to Ruaraka police station. DW2 said he reported on duty on 17<sup>th</sup> February, 2016 at 8 am (DEExhibit 1e) taking over from the appellant. He said DEExhibit 1d (entry No. 25) was signed by the duty officer. At 4 pm, the appellant came and released 43 prisoners under the instructions of the OCS (PW5).

24. The counsels appearing and agreed to file written submissions. When the appeal came for hearing, **Mr. Juma** for the appellant submitted that the case of solicitation was not proved to the required standard. He outlined the ingredients in respect of this offence to be;

- i. Express/explicit demand;
- ii. Accused must be acting in his capacity as a public servant; and
- iii. The demand is not legally due.

25. He contended that from the evidence of PW1, PW5 and PW6 the money in issue was legally due as it was for release of prisoner on cash bail. That DW2 to whom the appellant handed over, confirmed it.

26. On identification, he submitted that the appellant was not identified. That the instructions to PW7 for identification were prejudicial.

27. Counsel submitted that though the appellant gave a sworn defence and called DW2, who confirmed that the Shs.2,000/= was cash bail the learned trial Magistrate never considered this defence. That any negotiation of the cash bail confirmed PW5's instructions on the cash bail of between Shs.1,000/= - Shs.2,000/=.

28. He argued that PW1 was hitting back at the OCS (PW5) and the appellant for evicting him from the pool premises. He also submitted that Section 35 (1) ACECA had not been complied with and the prosecution was therefore fatal. He referred to the case of **Patrick Munguti Nunga –vs- Republic 2013 eKLR**.

29. **Mrs. Aluda** for the State opposed the appeal. She submitted that the Director of Public Prosecution (DPP) was well represented in this matter right from the time of plea taking. There was therefore no need for consent she said.

30. On the evidence, she submitted that there was sufficient evidence as adduced by PW1, PW2 and PW5. That from the transcripts the money was not for cash bail but a bribe. That PW3 had given the appellant a bribe and no receipt was issued. That the instructions by PW5 were not followed. She argued that PW7 had worked with the appellant for 4 years and was not directed on who to identify.

31. It was her submission that there was no bad blood between PW1 and the appellant. Further, that no receipts were issued and none was availed.

32. This is a first appeal and this court is enjoined to re-evaluate the evidence and arrive at its own conclusion. The court should also give an allowance for the fact that it did not see nor hear the witnesses. The Court of Appeal in the case of **Ajode –vs- Republic [2004] 2 KLR 81**, held thus;

**“3. In law, it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witness and make allowance for that.”**

In *Kiilu & Another –vs- Republic* [2005] 1 KLR 174, it was held;

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

**3. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts’ findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”**

Lastly, in *Patrick Munguti & Another –vs- Republic* [2005] 2 KLR 162 it was held;

**“3. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. It is not the function of first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own conclusions.”**

33. In light of the above authorities, I have carefully considered the evidence on record, the grounds of appeal, submissions by both counsels and the authorities cited. I find the issues falling for determination to be as follows;

- i. Whether non-compliance with Section 35 ACECA is fatal.
- ii. Whether the prosecution adduced sufficient evidence to support a conviction.

**Issue No. (i) Whether non-compliance with Section 35 ACECA is fatal.**

34. Mr. Juma for the appellant submitted that there was no compliance with Section 35 (1) of ACECA. Mrs. Aluda for the State on the other hand, submitted that the presence of the prosecuting counsel throughout the proceedings confirmed consent. Section 35 (1) of ACECA provides;

**“(1) Following an investigation the Commission shall report to the Director of Public Prosecutions on the results of the investigation.**

**(2) The Commission’s report shall include any recommendation the Commission may have that a person be prosecuted for corruption or economic crime.”**

Mr. Juma relied on the case of *Patrick Munguti Nunga (supra)* to support his submission. This is a case that was decided when the prosecution was still being conducted by police officers.

35. The present case was commenced in the year 2016 when the charging and prosecution of criminal cases was entirely done by the DPP. Section 35 of ACECA calls upon the EACC to present to the DPP its report on the outcome of the investigations. It nowhere states that the DPP is to give his consent before commencement of any charges in respect of anti-corruption and economic crimes.

36. The mandatory consent was provided under Section 12 of the repealed Prevention of Corruption Act Cap 65 Laws of Kenya. Under said provision, the prosecution had a duty to obtain a written consent from the Attorney General to commence a prosecution.

37. There is no such provision in the ACECA. There is also no requirement that the report made under Section 35 (1) of the ACECA be filed in court during the hearing. I am persuaded by the finding by *Ngaah J.* in the case of *Stephen Mburu Ndiba –vs- Ethics and Anti-Corruption Commission and Director of Public Prosecution Nyeri High Court Misc. Criminal Application No. 20 of 2014.*

**Issue No. (ii) Whether the prosecution adduced sufficient evidence to support a conviction.**

38. The appellant was charged with two (2) counts of soliciting for a benefit. He was convicted of count 1 and acquitted of count 2. He is said to have solicited for Kshs.2,000/= from *PW1 Solomon Mutama* as an inducement for release of his employee *PW2 Boniface Chevusiono Marava*. The ACECA does not define the word solicit. I would define soliciting as asking, begging, seeking or trying to obtain something from someone, for a favour or service not due to be offered by the one seeking.

39. The prosecution had the duty to establish before the court that the appellant was asking or seeking for money in order to render some service to or for PW1 which service the appellant had to render freely.

From the evidence on record, it is not disputed that there were persons who were arrested in connection with some pool games. PW1’s employee *PW2 Boniface Chevusiono Marava* was one of those arrested.

40. On the 16<sup>th</sup> February, 2016 PW1 met the appellant and the OCS (PW5). At page 9 lines 2 – 8, PW1 states as follows;

**“I went to Corporal Otieno who said the suspects need to pay Kshs.2000/= to secure their release. The Kshs.2,000/= was not cash bail. On 17.2.2016 I went back to Corporal Otieno between 8 – 11 am. I asked about the whereabouts of my customers and employees. Some of the customers had been released. But my employee Marava was still in custody. I asked Corporal Otieno who said he was instructed by the OCS to release the suspects after paying Kshs.2,000/=.**

41. While under cross examination at page 12 lines 3 – 11, he states as follows:

**“I was told Otieno was in charge of the operations. I saw the OCS and I talked to him. He said the employees would be charged and referred me to Otieno. I met the OCS on the 16.2.2016. He had asked me to give Kshs.2000/= for each accused person and it was not cash bail. On the 16.2.2016, I did not raise the money, 5 of my customers were arrested one was my employee. On 17.2.2016 others were released and they told me they had been asked to pay a bribe of Kshs.2000/= to Otieno. I consulted two of those released. Mutiso was released on 17<sup>th</sup> morning. Mutiso said his wife paid Kshs.2000/=. I never got to see any cash bail receipts.”**

42. From the above extracts, it is not clear as to who asked PW1 to pay Kshs.2,000/=. Was it the OCS (PW5) or the appellant? PW1 has in his evidence indicated that he again came to the Ruaraka Police Station on 17<sup>th</sup> February, 2016 and was there between 8 am – 11 am rotating between PW5’s office and the appellant’s. It’s after the frustration that he engaged the EACC officers.

43. The appellant and DW2 maintained that the former left the Ruaraka Police Station for his house (outside the police lines) at 8.15 am until 4 pm when he came back to the station.

**44. PW6 No. 78979 PC Japheth Muthini** testified that on 17<sup>th</sup> February, 2016 morning, the appellant handed over to the next senior officer and left until evening. **DW2 No. 81571 CPL Fasili Wanja** said it is him who took over from the appellant on 17<sup>th</sup> February, 2018 8 am. The appellant was not seen again until 4 pm. Even when PW1 came frantically looking for the appellant during the day, he could not get him at the station.

45. The big question is at what time did PW1 record a conversation between himself and the appellant? Why was he frantically looking for the appellant even after he had been told he was not around? PW1 is a police officer and he knows the procedures well. If he was told by the OCS (PW5) and/or the appellant that he should pay shs.2,000/= what stopped him from paying the money at the office and demand for an official receipt? The manner in which he was running around shows that he was not genuinely looking for help but was out to fix someone.

46. It should not have skipped the court’s mind that there were security issues raised in the area with respect to the kind of business PW1 was running. This is clear from the evidence of PW5 and the appellant.

47. PW2 is an employee of PW1 in the pool business and is the one for whom the appellant is said to have sought a bribe. It was his evidence that a policeman had come to the cells and announced that those with Kshs.2,000/= bribe would be released. In cross-examination at page 14 lines 4 – 9, he states as follows;

**“The police officer who told us to pay Kshs.2000/= is not in court. When I was released, I realized the money was being paid at the OB office. The accused was not there at the time. I was released at 2.00 pm. In my statement, I indicated I was released in the evening. When I was removed from the cells, I saw my friend Muteti pay the policewoman. I can recognize the officers.”**

48. The person who allegedly paid the bribe on behalf of PW2 is Muteti (PW3) and he states at page 15 lines 3 – 6;

**“At 4 pm, I raised Kshs.2000/=. I met Otieno and we went to a small room where I paid Kshs.2000/-. Bonface was released and we went home. I had arrived at around 5.00 pm and I met Otieno. He immediately released Bonface.”**

Page 15 line 10

**“I gave the money to Otieno. He is the accused before the court.”**

49. PW3 insisted it is the appellant who demanded for the money and he paid him shs.2000/=. The beneficiary of the payment (PW2) said it was another police officer who demanded for the money. Secondly, he saw PW3 pay the money to a police woman. By all means, the policewoman paid was not the appellant herein. PW2 also said he was released at around midday when the money was paid. He was categorical that the person that money was paid to was not in court.

50. On the other hand, PW3 said PW2 was released after 5 pm and he left the station at 6 pm. PW4 who had also been arrested and released on 17<sup>th</sup> February, 2016 stated this at page 16 lines 5 – 7

**“The Corporal asked for money. I know him. He was Boniface Otieno. He was among the arresting officers.”**

Page 16 lines 9 – 13

**“I was released from the cells and one of the policemen demanded for cash. I paid and I was released, I then told Muteti that Boniface was in the cells. Later, he was released. I then got a call from Mbuvi from EACC and on Thursday we met and I recorded a statement. Corporal Otieno is the accused (identified).”**

In cross examination, this witness states as follows at page 16 lines 17 – 19

**“I did not hear police ask for Kshs.2,000/=. But my wife paid Kshs.2,000/= to secure my release. She paid to policeman in my presence. One officer called me from the cells and another took the money.”**

51. As can be gleaned from PW4’s testimony, he tried as much as he could to connect the appellant with the taking of bribes. However, his own evidence in cross-examination did not support him. It’s clear from his evidence in cross-examination that the money was not paid to or taken by the appellant.

52. The whole idea of presenting PW2, PW3 and PW4 as witnesses was to show that the appellant was seriously engaged in taking bribes of shs.2,000/= from suspects on 16<sup>th</sup> and 17<sup>th</sup> February, 2016. The witnesses have contradicted themselves and each other in what they have told the court concerning the Kshs.2,000/=. I think that is why the EACC could not charge the appellant with the offence of receiving a benefit.

53. I now move to the issue of the recording and the transcript which was heavily relied on by the trial court. PW1 told the court that he was at Ruaraka Police Station from 8 am – 11 am when he decided to contact the EACC officers. Later he came back to the station and had a recorded conversation with the appellant. He does not indicate the time, but says he found him at the canteen. A transcript of the conversation was produced as Exhibit 5 after the recording had been played. It was on the basis of this recorded conversation that PW1 was given the treated money which never reached the supposed to be recipient.

54. As I mentioned above, it’s not clear at what particular time this conversation was recorded. PW8 – PW10 did not in their evidence state the time they received the report and when they were doing all these other things. Time is of essence for the following reasons;

i. PW6 No. 78979 PC Japheth Muthini stated that the appellant reported off duty on 17<sup>th</sup> February, 2016 at 8 am and left the police lines at 8.15 am for his house which is not within.

ii. DW2 No. 81571 CPL Fasili Wanja who took over duty from the appellant gave similar testimony.

iii. PW2 Boniface Chevusiono Marava who was the supposed to be the beneficiary of the inducement said the money for his release was paid on 17<sup>th</sup> February, 2016 at around midday and he was immediately released. The issue is whether PW2 was still in the cells when all this was on going.

55. It is therefore important to know when the reported conversation took place. A police canteen is a public place where there is usually a lot of movement. Where in particular was this done?

56. PW7 who was the deputy OCS Ruaraka Police Station and the one who allegedly identified the appellant’s voice on the recorded conversation. What were the instructions given to him? Here again, I turn to the evidence. This is what the witness stated at page 23 lines 1 – 6;

**“On 16.3.2016 at 12.00 hours, I was called by CIP Ambasa who told me to go to EACC Integrity and meet Mr. Mbuvi. I met him at 3.00 pm and he told me about the investigations concerning Corporal Otieno. They placed me on audio where I heard a communication and telephone numbers given. I knew the numbers belonged to Corporal Otieno. I also recognized the voice of Corporal Otieno and PC Muthini” (Emphasis mine)**

Page 23 lines 8 – 9;

**“I did not know the number off-head but when I checked my phone book, I confirmed the number.”**

57. In further cross-examination, he states as follows at page 24 lines 2 – 5;

**“Mr. Ambasa asked me to meet Mr. Mbuvi over an allegation which was under investigations. I knew I was going to listen to a complaint against Corporal Otieno. Mbuvi asked me to listen to an audio.” (Emphasis mine)**

Page 24 lines 7 – 8;

**“The phone number belonged to Corporal Otieno. I wrote the numbers and confirmed from my phone. The number belonged to Corporal Otieno.” (Emphasis mine)**

Page 24 lines 10 – 11;

**“The one who gave the numbers was Corporal Otieno. The numbers assisted me identify the voice. I did not know the other**

**voice.”** (*Emphasis mine*)

58. Voice identification like any other form of identification must be clear from any error, form of manipulation for the court to rely on it. In visual identification at an identification parade the witness must never be allowed to see the suspect before he/she proceeds to the parade. The witness should never be given hints on who the suspect is and how to identify them before the parade.

59. In my view, the same standards apply to the kind of identification PW7 was undertaking. From his evidence, it is clear that he was properly briefed by the OCS (PW5) and the lead investigator (PW10) on why he had been called to the Integrity Centre and the person who was under investigation. After being briefed, PW10 told him he was going to listen to an audio recorder.

60. To my mind, that already gave him a hint on what he was expected to say. It appears that when he heard the telephone numbers in the audio recorder, he noted them down, consulted his phone and found that the number belonged to the appellant. In cross-examination, he says **“The numbers assisted me identify the voice.”** What about if the mobile number belonged to somebody else, what could have been his reaction? Could he have been able to identify the voice as belonging to the appellant? No one knows.

61. In his evidence in-chief at page 23 lines 4 – 6, he says, when the audio was played, he heard communication and telephone numbers given. He recognized the voice of the appellant and PC Muthini and he signed a certificate confirming the two officers’ voices. In cross examination, he states at page 24 line 11 that he did not identify the other voice which voice then had he identified as PC Muthini’s and why had he signed a certificate to that effect as stated?

62. What happened in this voice identification was like parading a suspect before a witness before he/she appears at the actual identification parade to make the selection.

63. The appellant gave a sworn defence and called one witness (DW2). Certified copies of the OB were produced by the defence, OB NO. 56/16/2/2016 showed receipt of five (5) prisoners at 1930 hours, two of whom were released vide OB No. 25/17/2/2016. It is not clear how and when the other three (3) were released. The OCS (PW5) should have explained that.

64. Considering the totality of the evidence before the court, the following have clearly come out;

- i. Security concerns had arisen in areas under the jurisdiction of Ruaraka Police Station.
- ii. The pool games contributed to this.
- iii. PW1 was one of the proprietors of the business and being a police officer expected special treatment from his colleagues.
- iv. When the “special” treatment was not forthcoming, he embarked on a revenge mission with the support of PW3 whose evidence contradicted itself and that of PW2.
- v. The OCS (PW5) gave instructions concerning the release of the suspects which the appellant as his junior had to obey. PW5 ought to have been properly interrogated in this case.
- vi. The procedure adopted in the identification of the voices in the audio video was flawed and caused an injustice to the appellant.

65. The prosecution always has a duty in criminal cases to prove its case beyond reasonable doubt. I have made mention of several instances and/or circumstances in this case which taken together with the defence case and the evidence of PW1 – PW6 puts both the prosecution case and the defence case on the same pedestal.

66. I will wind up with what *Mativo J.* stated in the case of *Michael Waweru Ndegwa –vs- Republic [2016] eKLR* which I entirely agree with;

**“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 be 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.”**

67. My finding is that the prosecution did not discharge its duty of proving its case beyond reasonable doubt.

68. In conclusion, I find merit in the appeal which I allow. The conviction is quashed and the sentence set aside. Any fine paid to be refunded to the appellant forthwith.

Orders accordingly.

**Dated, signed and delivered in open court at Nairobi this 4th day of May, 2018.**

**HEDWIG I. ONG’UDI**

**HIGH COURT JUDGE**