REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO 290 A OF 2010

MICHAEL WAWERU NDEGWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against Judgement, sentence and conviction in Criminal case number 6 of 2009, R. vs Michael Ndegwa Waweru at Nyeri, delivered by S. M. Muketi, CM, delivered on 11.11.2010).

JUDGEMENT

This appeal raises three fundamental issues, namely; **(a)** whether the proceedings in the lower court are fatally defective for failure to comply with the provisions of section **200 (3)** of the Criminal Procedure Code**, b)** the interpretation of Section **35** of the Anti-Corruption and Economic Crimes Act (herein after referred to as the Act), and **(c)** whether or not the prosecution proved its case against the appellant to the required standard.

In support of issue number **(a)** above, counsel for the appellant cited a ruling in *Rebecca Mwikali Nabutola vs Republic* where the learned judge stated that the provisions of Section **200 (3)** of the Criminal Procedure Code are mandatory and that the record must as of necessity contain a fact that the succeeding magistrate did inform the accused person of the right to recall or re-hear any witness.

On 28th June 2016, I granted counsel for the DPP **30** days within which to file their submissions and by close of business on **28th July 2016**, no submissions had been filed.

Regarding the first issue, in *P H N v R* this court, cited numerous authorities and held that failure to comply with the provisions of Section **200 (3)** "would in appropriate circumstances render a trial fatally defective."

It is important to reproduce the provisions of Sections 200 (3) & (4) of the Criminal Procedure Code below:-

> *(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of the right.*
>
> *(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may if it is of the opinion that the accused person was materially prejudiced thereby set aside the conviction and may order a new trial."(Emphasis added)*

It is important to emphasize that for the High Court to set aside the conviction under section **200 (4)** cited above, it must form the opinion that the accused person was ***"materially prejudiced."*** It is necessary to appreciate the meaning of the above sections and in particular the phrase ***"materially prejudiced."*** and in so doing I find useful guidance in the words expressed by the U.S. court in *Connecticut Nat'l Bank v. Germain* that is:-

> *"Canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others.... Courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."*

A basic principle of statutory interpretation is that courts should "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.

The modern variant is that statutes should be construed "so as to avoid rendering superfluous" any statutory language: "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant...

The initial magistrate only heard the evidence of **PW1** in chief. Cross-examination of **PW1** and other 8 witnesses were heard by the convicting magistrate. Whereas it was wrong for the court to fail to comply with the provisions of the above section, I have carefully evaluated the evidence of all the **8** witnesses heard by the convicting magistrate and I am satisfied that it did disclose a case against the appellant, hence it cannot be said that the appellant was materially prejudiced by the aforesaid failure.

This Court has previously held that *Section **200** of the Criminal Procedure Code* should be invoked sparingly and only in cases where the ends of justice will be defeated if a succeeding magistrate does not continue a trial commenced by his predecessor. The Court of Appeal in *Joseph Kamau Gichuki v Republic* held as follows:-

> *"This Court has previously held that section **200** of the Criminal Procedure Code should be invoked sparingly and only in cases where the ends of justice will be defeated if a succeeding magistrate does not continue a trial commenced by his predecessor. Some of the considerations to be borne in mind before invoking **section 200** include whether it is convenient to commence the trial de novo, how far the trial had proceeded, availability of witnesses who had already testified, possible loss of memory by the witnesses, the time that had lapsed since the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused."*

In *Nyabuto & Another vs Republic, t*he Court of Appeal stated as follows regarding *section 200(1) (b) of the Criminal Procedure Code*:

> *"…….section 200 aforesaid is a provision of the law which is to be used very sparingly and only in cases where the exigencies of the circumstances, not only are likely but will defeat the ends of justice if a succeeding judge does not, or is not allowed to adopt and continue a criminal trial started by a predecessor owing to the latter becoming unavailable to complete the trial.*

Even though the provisions of section 200 (3) cited above are coughed in mandatory terms, it is important to examine the circumstances of each case, whether or not the accused was material prejudiced and how far the proceedings had proceeded and whether or not the circumstances of the case would warrant a retrial or an absolute acquittal, and utilization of judicial time. As pointed above, the evidence in chief of PW1 was heard by the initial magistrate and when the case came up for further hearing, there was a different magistrate and the case proceeded for cross-examination and re-examination and the new magistrate heard the remaining **8** witnesses and the defence. Whereas, it was totally improper for the magistrate to fail to inform the appellant about rights under Section **200** cited above, I think, the circumstances of this case are such that it cannot be said that the appellant was materially prejudiced.

As was correctly held in the case of *Ndegwa –vs- Republic the provision of Section 200 of the Criminal Procedure Code ought to be used very sparingly; and only in cases where the exigencies of the circumstances are not only likely but will defeat the ends of justice if a succeeding magistrate is not allowed to adopt or continue a criminal trial started by a predecessor.*

On the second issue, **Mr. Gori** cited the Court of Appeal decision in *Nicholas Muriuki Kangangai vs The Hon. Attorney General* where the court terminated proceedings that had been instituted without complying with the provisions of section **35 (1)** and **(2)** of the act which made it mandatory for the KACC to make and a submit a report to the Hon. Attorney General.

I am fully alive that the said decision was rendered by the court of appeal and as Duffus VP succinctly put it in the case of *Dodhia vs. National & Grindlays Bank Limited and Another.*

> *"The adherence to the principle of judicial precedent or stare decisis is of utmost importance in the administration of justice……., it provides a degree of certainty as to what is the law of the country and is a basis on which individuals can regulate their behaviour and transactions as between themselves and also with the State. There can be no doubt that the principle of judicial precedent must be strictly adhered to by the High Courts of each of the States and that these courts must regard themselves as bound by the decision of the Court of Appeal on any question of law, just as in the former days the Court of Appeal was bound by a decision of the Privy Council, or in England as the Court of Appeal or the High Courts are bound by the decisions of the House of Lords, and of course, similarly the magistrates courts or any other inferior court in each State are bound on questions of law by the decisions of the Court of Appeal and subject to these decisions also to the decisions of the High Court in the particular State."*

A similar position was taken by the Supreme Court in *Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others* when it held that:

> *"Adherence to precedent should be the rule and not the exception....the labour of judges would be increased almost to breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."*

However there are circumstances under which a Court may decline to follow a decision which would otherwise be binding on it and these are **(a)** where there are conflicting previous decisions of the court; or **(b),** where the previous decision is inconsistent with a decision of another court whose decision is binding on the court which is considering the issue; or **(c)** where the previous decision was given *per incuriam*.

As a general rule though not exhaustive the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness or some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. See *Lalitmohan Mansukhlal Bhatt vs. Prataprai Luxmichand and Another***.**

The cornerstone of the argument advanced by counsel for the appellant, as far as I understand him, is that the appellant was charged without the requisite recommendation for such prosecution by the then Kenya Anti-Corruption Commission (KACC) to the Attorney General who only could give his consent to prosecute after considering the investigation report by the KACC. In the absence of such a report or a recommendation by the KACC and without the consent to prosecute by the Attorney General, it is the counsels opinion that the trial was illegal, fundamentally flawed and an abuse of the criminal process and in particular, it is in contravention of **section 35** of the **Anti-Corruption** and **Economic Crimes Act, 2003.** As mentioned above, counsel heavily relied on the above cited Court of Appeal decision in, *Nicholas Muriuki Kangangi vs The Hon. Attorney General* in which **section 35** of the **ACECA** was considered alongside **sections 36** and **37** of the Act.

One of the issues in that appeal was that under **section 35(1)** and **(2)** of the KACC was mandatorily

required to make and submit a report of its investigations to the Attorney General with a recommendation to prosecute or not to prosecute the appellant of corruption offences or an economic crime. The appellant contended that without this report the purported prosecution by KACC through the Police was null and void.

In its decision the Court of Appeal agreed with the appellant and concluded that, bearing these particular provisions in mind, prosecution of any person for corruption and economic crimes under the Act must be preceded by a report by the KACC to the Attorney General of the former's investigations into those offences with recommendations to the latter to prosecute or not to prosecute.

This above was cited with approval by a different bench of the Court of Appeal in *Esther Theuri Waruiru & Another Versus Republic* where the court went further to compare Section **12** of the repealed Prevention of Corruption Act which required the consent of the Attorney-General before any prosecution under that Act. Section **35** of the **Anti**-Corruption & Economic Crimes Act requires investigation reports to be made to the Attorney-General. The Court held that the two provisions are, in effect, similar and for this reason it concluded:-

> *"That power (that is, the Attorney General's power under Section 12 of the Prevention of Corruption Act, Cap 65) appears to have been retained when the Anti-Corruption and Economic Crimes Act was enacted. The powers of KACC to prosecute any person or group of persons was subject to the direction of the Attorney-General, hence the requirement under Section 35 of that Act, which a report of any investigation be made to the Attorney General with certain recommendations."*

Section **12** of the repealed Prevention of Corruption Act which the Court referred to stated:-

> "*A prosecution for an offence under this Act shall not be instituted except by or with the written consent of the Attorney General: Provided that a person charged with such an offence may be arrested, or a warrant for his arrest may be issued and executed, and he may be remanded in custody or on bail, notwithstanding that the consent of the Attorney General to the institution of a prosecution for the offence has not been obtained, but no further or other proceedings shall be taken until that consent has been obtained."*

Justice Ngaah in the case of *Stephen Mburu Ndiba v Ethics & Anti-Corruption Commission & another* where a similar argument was advanced as in the present case discussed the above provisions in detail and because of the similarity with the case before me and the authoritative manner in which the learned judge analyzed the law and interpreted it, I find it necessary to reproduce here below excerpts of the said judgment. The learned judged stated:-

> *"The legislature was categorical in this provision that a prosecution under the **Prevention of Corruption Act, Chapter 65** must be preceded by a written consent from the Attorney General; its intention is very clear from the outset and there is no doubt that any prosecution without such a written consent would have been fatal. There is no similar provision in the **Anti-Corruption Act**. **Section 35** of the **Act** which the Court of Appeal compared with **Section 12** of the **Prevention of Corruption Act** has nothing to do with the consent to prosecute any offence under the **Anti-Corruption & Economic Crimes Act, 2003** but only deals with reports to the Director of Public Prosecutions on the investigations undertaken by the Anti-Corruption Commission. Such reports shall include information on the outcome of the investigations and any action taken upon it, which in my view includes but not limited to arresting and charging suspects pursuant to **Section 32** of the Anti-Corruption Act.*
>
> *It must also be noted that there was no provision in the Prevention of Corruption Act similar to **section 32** of the **Anti-Corruption & Economic Crimes Act, 2003** and I would opine that the existence of that provision in the current anti-corruption legislation is an additional reason against any attempted analogy between **Section 12** of the **Prevention of Corruption Act, Chapter 65** and **Section 35** of the **Anti- Corruption Act**; in the context of the current anti-corruption legal regime*

there is no comparison between the two either in form, substance or in effect.

*One thing that is also clear from the judgment of the Court of Appeal is that the Court never made any reference at all to **section 32** of the **Anti-Corruption Act**; neither was there any discussion of the constitutional provisions of **articles 157(6) (b)** and **157(12)** on the exercise of powers to prosecute by the other persons or authorities such as the Anti-Corruption Commission. It could be that these provisions were not brought to the attention of the learned judges since, in any event, Mr Monda for the state conceded the appeal; I am of the humble view that had these provisions been urged the learned judges would not have interpreted **section 35(1)** of the Anti-Corruption & Economic Crimes Act in isolation and would have probably come to a different conclusion. The Court would certainly not have declared that the powers of the Attorney General in **Section 12** of the repealed **Prevention of Corruption Act, Chapter 65** were retained in **Section 35** of the **Anti-Corruption & Economic Crimes Act, 2003** law because as noted such a declaration would be inconsistent with the provisions of **section 32** of the of the **Anti-Corruption & Economic Crimes Act, 2003** which clothe the Director and investigators of the Commission with powers not only to investigate and arrest but also to charge. Such express provision was never found in the **Prevention of Corruption Act, Chapter 65** and it could not have been included in the law that succeeded that Act for cosmetic or superfluous purposes. Much as this court is bound by the decisions of the Court of Appeal by virtue of the doctrine of stare decisis, its decision in **Esther Theuri Waruiru & Another Versus Republic (ibid)** can be distinguished and validly be departed from for the reasons I have given.*

*I am also convinced that provisions such as **articles 157(6)(b), 157(12)** of the Constitution and **section 32** of the **Anti-Corruption Act** have deliberately been included in the current legal regime because prosecution, for instance of offences such those related to corruption is not and shouldn't be an alien concept to any anti-corruption authority; considering the cancerous effect corruption has to the wellbeing of any country and in particular to its economy and considering how much we can achieve as a nation without corruption, it should not surprise anyone that a body established and appropriately equipped to eradicate this vice has powers to prosecute those in our society who find this vice palatable."*

In the case of *R.* v. *Nor. Elec. Co,* McRuer C.J.H.C. stated:-

> *".....The doctrine of stare decisis is one long recognized as a principle of our law. Sir Frederick Pollock, in his First Book of Jurisprudence, 6th ed., p. 321: "The decisions of an ordinary superior court are binding on all courts of inferior rank within the same jurisdiction, and though not absolutely binding on courts of co-ordinate authority nor on the court itself, will be followed in the absence of strong reason to the contrary…". (Emphasis added).*

In my opinion, I think that *"strong reason to the contrary"* does not mean a strong argumentative reason appealing to the particular judge, but something that may indicate that the prior decision was "*given without consideration of a statute or some authority that ought to have been followed*." I do not think *"strong reason to the contrary"* is to be construed according to the flexibility of the mind of the particular judge.

As judge Ngaah pointed out in the above cited judgment, one thing that is also clear from the judgment of the Court of Appeal is that the Court never made any reference at all to **section 32** of the **Anti-Corruption Act**; neither was there any discussion of the constitutional provisions of **articles 157(6) (b)** and **157(12)** on the exercise of powers to prosecute by the other persons or authorities such as the Anti-Corruption Commission. It could be that these provisions were not brought to the attention of the learned judges. For this reason, I find that there is a possibility that the decision cited by counsel for the appellant was rendered without consideration to the above provisions.

The third issue is whether or not the prosecution proved its case to the required standard. The appellant was charged with two counts of soliciting a benefit contrary to Section **39 (3) (a)** as read with Section **48 (1)** of the Anti-Corruption and Economic Crimes act and two counts of receiving a benefit contrary to

Section **39 (3) (a)** as read with Section **48** of the Act.

This being a first appeal, it is incumbent upon this court to re-analyse and re-evaluate the evidence adduced before the trial court and come up its own conclusions while at the same time bearing in mind that this court did not have the advantage of seeing the witnesses testify.

PW1 Elizabeth Wangui Kangethe testified that she took application forms for consent of the Land Control Board for various parcels of land, but later they were directed to the appellant who asked for Ksh. 30,000/= so that he could take the forms to the Land Control Board, and later when they went to see him as a family he told them that he could not help them without money and asked them to go outside and decide. While outside they were able to raise Ksh. 20,000/= and informed him so. He told them to come back on 3rd April 2009. They went to the Kenya Anti-corruption officers, was shown how to operate a recorder and she recorded a conversation with the appellant stating that unless they take Ksh. 10,000/= he would not listen to them. The officers listened to the tape and gave her marked money in a envelope, the appellant is said to have received the cash, counted and pocketed it. At that point the officers emerged, but upon noticing them, the appellant removed the envelope from his pocket and threw it away.

PW2 David Koine Wathigo testified that the appellant had asked for Ksh. 35,000/= which he reduced to Ksh. 30,000/=, that they raised the money, gave the appellant Ksh. 20,000/=, then they were to raise Ksh. 10,000/=, that he was present when PW1 gave the appellant the Ksh. 10,000/= in an envelope which he and put in his pocket, then they went in for him to get the forms, but shortly he threw the envelope and the police took it.

PW3 PC Ali Guyo, seconded to Kenya Anti-Corruption Commission, prepared Ksh. 10,000/= for the operation and took an inventory of the serial numbers.

PW4 William Kailo Munyoli, a government analyst's evidence was that a mixture used to mark the exhibits was also detected in the pocket of the black coat belonging to the appellant while **PW5 George Muigai Kiongo** said he could not identify the voice in the tape.

PW7 Cpl Sophia Nyaramo fitted the device on the complainants' back, trailed the complainant with her colleague and witnessed the recovery of the money.

PW7 IP Wainaina Muturi, listened to the tape and confirmed that there was an element of soliciting. His evidence and that of **PW8** collaborated the testimony of the above witnesses while **PW9** was the investigating officer. He produced all the exhibits

In his sworn defence, the appellant denied that he solicited for a bribe, but that he received Ksh. 1,000/= from Kangethe. As at time he was arrested he had received Ksh. 20,100/= meant to pay for medical bills for a brother in law who had been admitted at Kijabe Hospital. He produced a medical bill dated 3rd April 2009, the same day he was arrested. Upon cross-examination, he denied he was the one in the tape. The appellant called one witness whose evidence in my is of little significance to charges against the appellant.

After analysing the evidence, the learned Magistrate found that the prosecution had proved its case beyond reasonable doubts in both counts and convicted the accused as charged in both counts and sentenced him as follows:-

Count 1:*Fined Ksh. 50,000/= in default 12 months and in addition the mandatory sentence of Ksh. 60,000/= in default twelve (12) months.*

Count 2: *Fined Ksh. 50,000/= in default 12 months and in addition the mandatory sentence of Ksh. 40,000/= in default nine (9) months.*

Count 3: *Fined Ksh. 50,000/= in default 12 months and in addition the mandatory sentence of Ksh. 20,000/= in default three (3) months.*

Count 2: *Fined Ksh. 50,000/= in default 12 months and in addition the mandatory sentence of Ksh. 20,000/= in default three (3) months*

It is in necessary now to examine the ingredients of the offence and as I do so I wish to point out that the legal burden of proof in criminal cases never leaves the prosecution's backyard.

The word *"soliciting"* is not defined under the Act. The *Concise Oxford English Dictionary* defines Soliciting *"as to ask for or try to obtain something from someone"*. The *Merriam-Webster* on line dictionary offers the following definition:- *"to ask for (something, such as money or help) from people, companies, etc., to ask (a person or group) for money, help, etc."*

In *State v. Wallace i*t was held that "*solicitation means the asking, enticing, or requesting of another to commit a crime of bribery*." To constitute the crime of solicitation of a bribe, it is not necessary that the act be actually consummated or that the defendant profit by it. It is sufficient if a bribe was actually solicited.

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

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. Such 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 a*uthoritatively states that to secure a conviction, it must be shown that the accused *'solicited'* a benefit not legally due. The term soliciting implies that the accused took initiative to ask for the bribe and that he actively allowed himself to be corrupted. The crime is consummated by the mere fact of soliciting a bribe. It is enough that there was soliciting. Even if the person solicits a bribe then changes his mind and decides to do his duty without taking a bribe, the crime is nevertheless consummated though the change of heart might mitigate his punishment. Thirdly the benefit solicited must be any gift, loan, fee, reward, appointment, service, favour, forbearance, promise, or other consideration or advantage. It is implicit in the wording of the section that the promise, gift or present must be something that is not legally due. It should be remembered that the crime is committed by the mere fact any of the foregoing was solicited. Further, the prosecution must show the purpose for which the item, favour or promise was solicited.

The gist of the offence is that it is corruption to ask for any benefit not legally due in order to do one's appointed duty. It's always against the public interest to secure a benefit by corruption. The public servant is paid a salary to perform his appointed duties. He is therefore bound by law to discharge those duties without seeking further or other emoluments.

In *Cooper vs Slade* the court held that the offence does not require dishonesty and a person acts *'corruptly'* if they do any act which the law forbids as tending to corrupt. In *R vs Harvey.* the court upheld *Cooper vs Slade* and found that dishonesty was irrelevant and corruption was to be construed as deliberately offering favours intending that they should operate on the mind of the offeree to encourage him/her to enter into a corruption bargain.

Turning to this case, did the appellant ask for Ksh. 30,000/= from PW1?. I find no difficulty in answering this question in the affirmative. First the there is evidence that the government analyst detected traces of the chemical used to treat the money in his pockets. There is evidence that he received and counted the

money and put the envelope in his pocket. He threw it away after he noticed the presence of the police. His assertion that he was collecting money for medical bills is in my view unsupported by credible evidence in the circumstances. He did not dispute or rebut evidence that he met PW1 & PW2 on the instances referred to in their testimony. I find that evidence offered sufficiently proved the offences of soliciting and receiving a bribe.

Benefit is defined in Section 2 (1) of the Act as follows:- "benefit" *means any gift, loan, fee, reward, appointment, service, favour, forbearance, promise, or other consideration or advantage.* The essential ingredients of the offence are that the accused must have received a benefit as defined above, that it must have been received corruptly as an inducement to bring about some given results in a particular matter, that the benefit must not be legally due or payable.

Defining the essential ingredients of an offence of this nature, the High Court of Uganda in the case of *Uganda vs Odech Ensio* stated as follows:-

> *i. the accused must have been an officer of a public body at the time of the offence;*
>
> *ii. the accused must have received a gratification at the material time; and*
>
> *iii.the act in paragraph (b) must have been done corruptly as an inducement to bring about some given results in a matter concerning that public body*

The above quotation expresses the correct legal position on the necessary ingredients and I find that count two and four was proved to the required standard.

On sentence I stand guided by the general principles the court adopts in appeal relating to sentence as stated by Nicholas J in the South African case of *R vs Rabie* where the learned judge stated that *"In every appeal against sentence, whether imposed by a magistrate or a judge, the court hearing the appeal-*

> *a. Should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial court;'' and*
>
> *b. Should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judiciously and properly exercised"*
>
> *The test for (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.*

The appellant was sentenced as follows:-

> ***Count 1:****Fined Ksh. 50,000/= in default 12 months and in addition the mandatory sentence of Ksh. 60,000/= in default twelve (12) months.*
>
> ***Count 2:*** *Fined Ksh. 50,000/= in default 12 months and in addition the mandatory sentence of Ksh. 40,000/= in default nine (9) months.*
>
> ***Count 3:*** *Fined Ksh. 50,000/= in default 12 months and in addition the mandatory sentence of Ksh. 20,000/= in default three (3) months.*
>
> ***Count 2:*** *Fined Ksh. 50,000/= in default 12 months and in addition the mandatory sentence of Ksh. 20,000/= in default three (3) months*

48 Penalty for offence under this part

> *(1) A person convicted of an offence under this part shall be liable to-*

(a) a fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both; and

(b) an additional mandatory fine if, as a result of the conduct that constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss.

(2) The mandatory fine referred to in subsection (1) (b) shall be determined as follows-

(a) the mandatory fine shall be equal to two times the amount of the benefit described in subsection (1) (b);

(b) if the conduct that constituted the offence resulted in both a benefit and loss described in subsection (1) (b), the mandatory fine shall be equal to two times the sum of the amount of the benefit and amount of the loss.

I have carefully considered the above section and the sentence imposed and I am persuaded that the sentence is in accordance with the said section, that it is not vitiated by irregularity or misdirection nor is it disturbingly inappropriate.

In conclusion, this appeal fails, the same is dismissed. I up hold both the conviction and sentence.

Right of appeal 14 days

Signed, Delivered and Dated at Nyeri this **14th** day of **September** 2016

John M. Mativo

Judge