Ngugi v Republic (Criminal Appeal 123 of 2020)
[2025] KECA 1569 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1569 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 123 OF 2020

PO KIAGE, WK KORIR & JM NGUGI, JJA

OCTOBER 3, 2025

BETWEEN

PAUL KURIA NGUGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the Judgment of the High Court at Nairobi (Onyiego, J.) dated 5th April, 2019 in HCCRA No. 2 of 2016)

JUDGMENT

1. The appellant, Paul Kuria Ngugi, was a Senior Chief employed in the Ministry of Interior and Coordination of National Government, stationed in Eastleigh North Location, Nairobi County. He was charged before the Anti-Corruption Court with three counts under the *Anti-Corruption and Economic Crimes Act* No. 3 of 2003 **(ACECA).**

2. Count I alleged that on 10th October, 2014, he corruptly solicited Kshs. 25,000 from the complainant, Rhoda Mohamud, as an inducement to facilitate letters of introduction for her cousins, Moulid Mohamed Noor and Najib Mohamed, to be registered as Kenyan citizens.

3. Count II alleged a similar solicitation of Kshs. 25,000 on 14th October, 2014.

4. Count III alleged that on 21st October, 2014, the appellant corruptly received Kshs. 20,000 from the complainant for the same purpose.

5. The prosecution called seven witnesses. PW1, the complainant, testified that she had first approached the appellant on 10th October, 2014 to be issued with introduction letters for her two cousins for purposes of processing National Identity cards as Kenyan citizens. When she explained to the appellant her request, the Appellant told her to avail her cousin's original birth certificates, their School Leaving Certificates and "a camel." On inquiring what he meant by "camel" the appellant allegedly wrote down

on a piece of paper "Kshs 25,000/=". She then left and informed her parents what the appellant was demanding.

6. Dissatisfied, the complainant reported to the Ethics and Anti- Corruption Commission (EACC). Acting on this complaint, EACC officers fitted her with a recording device and gave her treated money to deliver. On 14th October, 2014, she returned to the appellant's office, engaged him on reducing the bribe from Kshs. 25,000 to Kshs. 20,000, and delivered some documents. The interaction was audio-recorded. On 21st October, 2014, she again returned and delivered Kshs. 20,000, which was video-recorded. The money was later recovered from the office table.

7. PW2 to PW7 were EACC officers and other witnesses who participated in surveillance, recording, the trap operation, and recovery of money. Their testimonies corroborated PW1's narrative. The video clip showed the complainant placing money on the table in the appellant's office, with officers stating "wacha atoe mwenyewe" during recovery. Swabs of the appellant's hands later tested positive for APQ powder.

8. In his defence, the appellant denied all charges. He maintained that he was not in the office on 10th October, 2014, an alibi supported by his superior (DW2), leading to his acquittal on count I. Regarding counts II and III, he claimed entrapment, insisting that the complainant planted the money on his table and that he never solicited or received a bribe. He further alleged that his arrest was orchestrated by local community leaders who sought to replace him as senior chief with one of their own.

9. The trial court found the prosecution evidence credible. It acquitted him on count I (solicitation on 10th October, 2025) on account of the alibi but convicted him on counts II and III, imposing fines of Kshs. 150,000 and Kshs. 100,000 respectively, with default sentences of one-year imprisonment on each count.

10. On first appeal, the High Court (Onyiego J.) re-evaluated the record and upheld both conviction and sentence. The learned Judge dismissed arguments on entrapment and insufficiency of evidence, finding that the recordings, testimony of PW1, and corroborative evidence proved the elements of solicitation and receipt of a bribe.

11. Still dissatisfied, the appellant has filed this second appeal. In his Amended Grounds of Appeal, the appellant cites the following grounds:

    1. That the Learned Judge erred in law by not giving the Appellant the benefit of doubt.

    2. That the Learned Judge erred in law in finding that the prosecution had proved its case beyond reasonable doubt.

    3. The Learned Judge erred in law by shifting the burden of proof to the accused.

12. This is a second appeal. Our jurisdiction is, therefore, limited to a consideration of matters of law only by dint of section 361(1) of the Criminal Procedure Code. It is only on rare occasions that we interfere with concurrent findings of fact by the two courts below. For purposes of this section, severity of sentence is defined as a matter of fact. In Samuel Warui Karimi vs. Republic [2016] eKLR, it was held as follows:

    > " This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts

below are shown demonstrably to have acted on wrong principles in making the findings. See Chemangong -vs- R, [1984] KLR 611."

13. The appeal was canvassed by way of written submissions followed by oral highlights. During the plenary hearing of the appeal, Mr. Karanja, learned counsel, appeared for the appellant while Mr. O.J. Omondi, Senior Assistant Director of Public Prosecutions, appeared for the respondent.

14. The appellant, through counsel, argued that his acquittal on count I fatally undermined the credibility of PW1, who was also the key witness on counts II and III. The benefit of doubt on the first count, counsel submitted, should have extended to the subsequent counts, which were a continuation of the same transaction.

15. On solicitation, it was argued that there was no direct evidence of a demand by the appellant. Counsel noted that the prosecution failed to produce the piece of paper allegedly written by the appellant and that PW1 admitted under cross-examination that the appellant did not directly ask for money on 14th October, 2014.

16. Regarding receipt of money, counsel submitted that the video clip only showed money on the table, not in the appellant's possession. PW1 herself admitted that the clip did not show the appellant receiving money. Similarly, PW3 and PW7 admitted they did not capture the crucial moment of recovery. Counsel argued that this gap created doubt, which should have been resolved in favour of the appellant.

17. Counsel further attacked the voice identification in the recording, pointing to background noise and lack of forensic analysis to confirm the voice as that of the appellant. Counsel argued that reliance solely on PW1's identification, who was an interested party, was unsafe.

18. It was also submitted that contradictions among EACC officers on whether swabbing occurred before or after recovery of money created further doubt. These contradictions, counsel maintained, lent credence to the appellant's defence of entrapment.

19. On burden of proof, counsel argued that both courts below improperly filled evidentiary gaps in the prosecution case by inference, thereby shifting the burden onto the appellant.

20. Finally, counsel urged the Court to find that the case was a fabrication, possibly motivated by local community politics, and to quash the conviction, refund the fine, and allow the appeal.

21. For the respondent, it was submitted that both the trial court and the High Court carefully considered and re-evaluated the evidence and made concurrent findings, which should not be disturbed absent a misapprehension or error of principle.

22. The respondent argued that PW1's evidence was cogent and corroborated by EACC officers, the audio and video recordings, and the APQ chemical results. The sequence of events — report to EACC; fitting with a recorder; delivery of treated money; recovery; and swabbing — clearly proved solicitation and receipt.

23. On the acquittal on count I, the respondent submitted that it did not undermine the subsequent counts. The respondent argued that the High Court correctly observed that the conversation of 14th October, 2014 referred to an earlier interaction but not necessarily the 10th October, 2014. The conviction was, therefore, safe.

24. The respondent dismissed the entrapment argument, pointing out that there was no evidence of coercion or trickery by PW1 or EACC officers. The appellant was in control of his office, and money was placed within his reach without resistance.

25. On sentence, the respondent submitted that the fines imposed were far below the statutory maximum under section 48(1) ACECA and were, in fact, lenient.

26. Accordingly, the respondent prayed for dismissal of the appeal and affirmation of the conviction and sentence.

27. From the grounds of appeal, the record, and submissions, the following issues arise for determination:

    1. Whether the appellant was denied the benefit of doubt in view of his acquittal on count I.

    2. Whether the prosecution proved beyond reasonable doubt that the appellant solicited and received a bribe on 14th and 21st October, 2014.

    3. Whether the learned Judge and the trial court improperly shifted the burden of proof to the appellant.

    4. Whether the conviction and sentence were proper in law.

28. The appellant's first argument is that his acquittal on count I fatally undermined the credibility of PW1, whose evidence underpinned counts II and III. He contends that the benefit of doubt extended on the first count ought logically to have carried forward to subsequent counts, rendering the conviction unsafe since the complainant was the main witness in each count.

29. We are unable to agree. The trial court acquitted the appellant on count I on the narrow ground that his alibi was supported by DW2, his superior, who confirmed that the appellant was not in his office on 10th October, 2014. That conclusion did not amount to a wholesale rejection of PW1's testimony, but rather recognition that the date pleaded in count I could not be sustained against the alibi. As the two courts below found, however, the conversation of 14th October, 2014 referred to an earlier interaction in which the appellant had solicited.

30. On counts II and III, however, the prosecution evidence was not undermined. PW1 testified credibly that on 14th October, 2014 she returned to the appellant's office, fitted with an audio-recorder, and bargained the bribe down from Kshs. 25,000 to Kshs. 20,000. On 21st October, 2014, she delivered the money, which was treated, and the entire episode was video-recorded. The learned Magistrate and the High Court correctly found this evidence cogent and mutually reinforcing. The benefit of doubt on count I did not, therefore, translate into doubt on the subsequent counts.

31. The appellant also challenges the sufficiency of the evidence on both solicitation and receipt. He contends that PW1 admitted that the appellant never expressly demanded a bribe on 14th October, 2014; that the alleged note written by him was never produced; and that the video clip did not show him physically receiving the money.

32. We recall that proof of solicitation does not require the use of particular words, but may be inferred from conduct and context. PW1 testified that she bargained down the bribe from Kshs. 25,000 to Kshs. 20,000 in the appellant's presence, and he assented. The audio recording captured this exchange. The absence of the written note, while regrettable, was not fatal given the totality of the evidence.

33. On receipt, while it is true that the video clip shows the money on the table, the crucial fact is that the table was under the appellant's control. His hands tested positive for APQ powder, which could only have been transferred by handling the treated money. PW1's account that she placed the money on the table and that the appellant took it is consistent with the corroborative evidence of the officers. Minor inconsistencies among officers as to whether swabbing preceded or followed recovery do not dislodge the central fact of receipt.

34. Both courts below properly applied the law on circumstantial evidence and entrapment. The appellant was not coerced; he engaged in conversation with PW1, allowed the bargaining, and facilitated the transaction. The evidence, taken as a whole, proved the offences on counts II and III beyond reasonable doubt.

35. The appellant has also suggested, albeit faintly, that the circumstances of his arrest amounted to entrapment. The doctrine of entrapment has received judicial recognition in Kenya. In Mohamed Koriow Nur v Attorney General [2011] eKLR, the High Court stated emphatically:

> "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."

36. That position was significantly softened in later jurisprudence. In Republic v Ahmed Abolfathi Mohamed & Another [2019] eKLR, the Supreme Court suggested that entrapment is not a substantive defence that extinguishes liability, but rather a factor to be considered in determining whether a trial was fair and whether the sentence imposed should be moderated.

37. Even if we were to assume, arguendo, that entrapment operates in Kenya as a complete defence in the manner stated in Koriow Nur, the appellant's case would still fail. Entrapment arises where the State, through its agents, implants in the mind of an otherwise innocent person the idea of committing a crime and then induces its commission in order to secure a conviction. It is not entrapment for the State to provide an opportunity for a person already predisposed to crime to consummate the offence.

38. Here, both the trial court and the High Court made concurrent findings of fact that the appellant had already demanded a bribe of Kshs. 25,000/= on or about 10th October, 2014 and subsequently negotiated the figure down to Kshs. 20,000/= on 14th October, 2014, well before the Ethics and Anti-Corruption Commission (EACC) mounted its trap. The EACC merely facilitated the delivery of the marked currency to confirm what the appellant had already initiated. The trap was accompanied by lawful investigative procedures, including pre-recorded serial numbers, video and audio recording, and forensic swabs.

39. Accordingly, the appellant was not lured into criminality by State agents. He was a public officer who had already set in motion a corrupt scheme. The trap merely confirmed his predisposition and supplied probative evidence of the corrupt solicitation and receipt. Thus, even assuming Koriow Nur to be the correct statement of the law, the appellant's claim of entrapment is unavailing. The appellant had already formed the corrupt intent; the mere fact that investigators arranged a trap to detect or confirm the crime does not amount to entrapment. What is prohibited is manufacturing crime, not the affording of an opportunity to a person already predisposed to commit it. There is, therefore, no factual or legal basis to sustain the argument of entrapment. We, accordingly, hold that this was not a case of entrapment.

40. We emphasize that both the trial court and the High Court, on first appeal, reached concurrent findings of fact that the appellant solicited and received the bribe as charged in counts II and III. As a second appellate court, we are slow to interfere with such concurrent findings unless it is shown that they were based on no evidence, misapprehension of the evidence, or wrong legal principles. No such showing has been made here.

41. The appellant also argues that the courts below impermissibly shifted the burden of proof onto him by making inferences in favour of the prosecution. We are not persuaded. Both courts expressly recognised that the burden lay with the prosecution. The inferences drawn — for example, that reference to an earlier conversation in the 14th October, 2014 recording was not necessarily the discredited 10th October, 2014 encounter — were legitimate judicial evaluations of the evidence, not an improper shifting of burden.

42. Moreover, as we analyzed above, the appellant's defence of entrapment and fabrication was duly considered but found implausible in light of the objective evidence: the recordings, the treated money, and the swabs. No improper shifting of burden occurred.

43. Having found that counts II and III were proved, the conviction was proper. Section 48(1) of ACECA prescribes a penalty of a fine not exceeding Kshs. 1 million or imprisonment for up to 10 years, or both. The appellant was fined a total of Kshs. 250,000, with default custodial sentences of one year each.

44. As the High Court observed, this was lenient relative to the statutory maximum. There is no misdirection in principle, nor illegality in the sentences imposed.

45. For all the foregoing reasons, we find that the appeal lacks merit. Both the conviction and sentence were based on cogent evidence, properly analyzed by the trial court and affirmed on first appeal. No error of law has been demonstrated to warrant interference on this second appeal. Accordingly, the appeal is dismissed in its entirety. The convictions on counts II and III are hereby affirmed. The sentences imposed by the trial court and upheld by the High Court are likewise affirmed.

46. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER, 2025.

P. O. KIAGE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR