



**Republic v Mwangi & another (Anti-Corruption Case 17 of 2014) [2021] KEMC 3 (KLR)  
(Anti-Corruption and Economic Crimes) (25 August 2021) (Judgment)**

*Republic v Njuguna Mwangi & another [2021] eKLR*

Neutral citation: [2021] KEMC 3 (KLR)

**REPUBLIC OF KENYA  
IN THE ANTI-CORRUPTION MAGISTRATE'S COURT  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
ANTI-CORRUPTION CASE 17 OF 2014  
TN THYAKA, CM  
AUGUST 25, 2021**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**NJUGUNA MWANGI ..... 1<sup>ST</sup> ACCUSED**

**SAMUEL IRUNGU MWANGI ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. The trial in this case commenced before the late Hon Mr. Oduor (C.M). He was transferred to Nakuru High Court Station and thereafter to Kisumu High Court Station before concluding the case. I subsequently took over the conduct of the trial from where the previous trial magistrate had left in strict compliance with the provisions of section 200(3) of the Criminal Procedure Code, Cap 75 Laws of Kenya. With the consent of the accused persons through their respective advocates on record, the prosecution recalled William Kailo Munyao (PW-4) and Jacob Ngwele Muvengei (Pw-5) whose evidence was heard denovo.
2. In the substituted charge sheet admitted before the court on 26<sup>th</sup> August 2016, the accused persons were charged together with three corruption related offences under the provisions of section 39 (3) (a) as read with section 48(1) of the *Anti-Corruption and Economic Crimes Act* No. 3 of 2003 (ACECA). Section 39 was repealed by section 23 of the *Bribery Act*, No. 47 of 2016, which came into force on 13<sup>th</sup> January 2017. Section 6 of the new law created similar offences as the repealed section of ACECA but with stiffer penalties. Consequently, the trial of the accused persons progressed in accordance with the transitional provisions enacted under section 27 of the *Bribery Act* as though the proceedings had been initiated under the provisions of the new Act.



3. Count (I) was disposed-off during the ruling on no case to answer rendered on 27<sup>th</sup> November 2020. Therefore, this judgement is in respect of the other two remaining charges reproduced below:
4. In count (II) Njuguna Mwangi, the 1<sup>st</sup> accused was charged with the offence of corruptly soliciting for a benefit contrary to section 39(3)(a) as read with section 48(1) of Anti- Corruption and Economic Crimes *Act No. 3 of 2003* (ACECA). The particulars of the offence were that on 14<sup>th</sup> August 2014 at Nairobi City County the accused being an elected Member of County Assembly solicited for a benefit of kshs. 280,000/= from Elijah Muendo Mwau and Philip Munywoki Kilonzo as an inducement to influence the Planning Committee of the Nairobi City County Government to arrive at a resolution in favour of stopping the demolition of stalls at Saika Market within Komarock Ward.
5. In count (III) Njuguna Mwangi, the 1<sup>st</sup> accused and Samuel Irungu Mwangi, the 2<sup>nd</sup> accused were jointly charged with the offence of corruptly receiving a benefit contrary to section 39(3)(a) as read with section 48(1) of Anti- Corruption and Economic Crimes *Act No. 3 of 2003* (ACECA). The particulars of the offence were that on 14<sup>th</sup> August 2014 at Nairobi City County, both the accused persons being elected Members of County Assembly (MCA) corruptly received a benefit of ksh. 140,000/= from Elijah Muendo Mwau and Philip Munywoki Kilonzo as an inducement to influence the Planning Committee of the Nairobi City County Government to arrive at a resolution in favour of stopping the demolition of stalls at Saika Market within Komarock Ward.
6. The prosecution case is supported by nine witnesses and exhibit comprising of treated money, audio recording, video recording and a report by the government analyst. The report is in respect of the swabs collected from the treated money and the hands of the accused persons during the arrest. It is not in contention that at the material time the accused persons were elected Members of County Assembly (MCA). In that respect, the 1<sup>st</sup> accused was the representative of Maringo / Hamza ward and a member of the Planning & Housing committee of the Nairobi City County Government. On his part, the 2<sup>nd</sup> accused was the representative of Komarock ward and a member of the Public works and Budget committees of Nairobi City County Government. The complainants Elijah Muendo Mwau (Pw-1) and Philip Munywoki Kilonzo (Pw-2) were business associates dealing in furniture and owners of stalls at Saika Market along Kangundo road. It was the prosecution case that on 14<sup>th</sup> August 2014 during the morning hours, the 1<sup>st</sup> accused met with the complainants at Nairobi City Centre and solicited for kshs. 280,000/= to be delivered on the same day in the afternoon. The money was intended to bribe the Planning committee members investigating the allotment of the complainants' stalls built under power lines. The stalls were under the threat of demolition. Unknown to the 1<sup>st</sup> accused, the complainants on 13<sup>th</sup> August 2014 made a report at the Ethics & Anti-corruption Commission (hereinafter referred to as EACC) and the matter was assigned to Sofia Atieno Nyambu (Pw-9) to investigate. She issued the complainants with devices to record the conversation with the 1<sup>st</sup> accused. After the complainants' morning encounter with the 1<sup>st</sup> accused, the investigating officer retrieved the recording devices and confirmed the demand for a bribe. Subsequently, she marshalled the support of colleagues and executed an operation in the afternoon which led to the arrest of the accused persons together with Moris Gari Otieno (Pw-7) at Ankara restaurant. A sum of kshs. 140,000/= treated with APQ powder issued by EACC to Philip Munywoki Kilonzo (pw-2) was recovered.
7. The accused persons denied the charges. The 1<sup>st</sup> accused contended that the prosecution case was based on entrapment. It was further claimed that the recorded conversations relied upon by the prosecution were altered and or edited.



## The prosecution case

8. A brief summary of the facts as is evincible from the evidence is that, on 11<sup>th</sup> August 2014 at about noon Philip Munywoki kilonzo (Pw-2) was at his work place at Saika Market in Komarock Ward when a team from Nairobi City County Assembly arrived on board a Nissan motor vehicle. He recognized the 1<sup>st</sup> accused who was amongst the team. The 1<sup>st</sup> accused introduced himself as a member of a committee and stated that 'Kenya Power' had complained about the stalls built under power lines. Pw-2 gave evidence that the team was on a mission to investigate the complaint raised by 'Kenya Power'. Before the team left, they referred Philip (PW-2) to the 1<sup>st</sup> accused for assistance. It is the evidence of Pw-2 that the 1<sup>st</sup> accused gave out his cell phone number. In turn, Pw-2 informed Elijah Muendo Mwau (Pw-1) about the incident and shared the 1<sup>st</sup> accused cell-phone number. Philip (Pw-2) added that Elijah (PW-1) called and met the 1<sup>st</sup> accused on the same day in the evening.
9. Elijah (Pw-1) confirmed that on 11<sup>th</sup> August 2014 he was at his rural home (Ukambani) when Philip (Pw-2) called to inform him about the visit by the Members of County Assembly. On cross-examination by the prosecution counsel Pw-1 admitted that he met with the 1<sup>st</sup> accused before reporting this matter to EACC. Pw-1 admitted that he initiated the decision to lodge a report with EACC. The complainants were apprehensive that their stalls will be repossessed or demolished and claimed they were asked for a bribe in order to be assisted. The formal report was recorded under entry no 46766 at EACC Offices before the matter was assigned to Sophia Anyango Nyambu (Pw-9) to investigate. She initially met the complainants on the same day of reporting and advised them to return on the following day.
10. Come 14<sup>th</sup> August 2014 in the morning, the complainants met with Sofia (PW-9) at EACC offices and were issued with an audio recorder and a video recorder. The investigator also instructed the complainants on how to operate the recording devices. At the trial, Philip (Pw-2) was referred to a certificate produced as exhibit no.3 confirming that he was issued with the video recording device while Elijah (Pw-1) was issue with the audio recording device. The certificate indicates that therecording devices were tested by Sophia (PW-9) and found to be in a good working condition.
11. Thereafter, the complainants left EACC offices and met with the 1<sup>st</sup> accused at Ankara Hotel near City Hall. It was the evidence of Philip (Pw-2) that the 1<sup>st</sup> accused said he was meeting the PC at Nyayo House and suggested that they should talk while heading there. The complainants led evidence that along the way from Ankara Hotel towards Nyayo House the 1<sup>st</sup> accused asked for kshs. 300,000/= which was bargained and settled at kshs. 280,000/=. According to Philip (Pw-2) the money was to be given to the Minister for Planning and to be shared amongst the County Assembly Members. Further, the money was to be delivered on the same day in the afternoon. The conversation amongst the 1<sup>st</sup> accused and the complainants was successfully captured by the recording devices. It is worthy to note here that, Sophia (Pw-9) secretly kept a close watch on the complainants as they met the 1<sup>st</sup> accused at Ankara Hotel and as they walked together towards Nyayo House.
12. Soon after the encounter with the 1<sup>st</sup> accused, the complainants went back to EACC offices and returned the recording devices to Sophia (PW-9). In preparation for the afternoon meeting with the 1<sup>st</sup> accused, Sophia introduced the complainants to her colleagues James Ikua wachira (Pw-6) and Senior Sergeant Richard Mbithi (Pw-8) who were to assist in the next phase of the investigations. Sergeant Richard Mbithi (Pw-8) treated kshs 140,000/= in denomination of kshs. 1,000/= notes (old notes) with APQ powder. The treated money was secured in an A5 envelope produced as p. exhibit 6(a) and kept in an A4 envelope produced as p. exhibit no 6(b). Pw-8 also made Photostat copies of the treated notes and prepared an inventory listing the notes serial numbers before handing over the treated money



- to Philip (PW-2). Both the photocopies of the notes and the inventory were dully witnessed and signed by the investigator and the complainants.
13. On the same day at about 2:00pm, the complainants were re-issued with the recording devices used in the morning. The complainants left Integrity Centre on a mission to deliver the treated money to the 1<sup>st</sup> accused while accompanied by EACC investigators namely; Sophia (Pw-9), Wachira(Pw-6), Sgt Richard Mbithi (Pw-8), Ditim Wanyenje Juma Musi (pw-3), Rodgers Akaki and Jackline Makena. On arrival at the scene at Ankara Hotel, the EACC investigators positioned themselves at strategic points as the complainants proceeded to meet the 1<sup>st</sup> accused and the 2<sup>nd</sup> accused. Philip Kilonzo (Pw-2) gave evidence that after a brief conversation he passed the envelope containing the treated money to the 1<sup>st</sup> accused and simultaneously signaled the EACC investigators by scratching his head. The EACC detectives quickly swung into action and arrested the accused persons together with Moris Gari Otieno (Pw-7). It is the common evidence of the complainants' that Gari (Pw-7) had just joined the table moments before the arrest. After the incident, the complainants returned the recording devices to Sophia (PW-9). Philip Kilonzo (Pw-2) evidence that his recording device did not work during the second encounter is supported by the investigating officer. Luckily, Elijah Muendo (PW-1) was able to record the conversation using the gadget hidden in his pocket. On 1<sup>st</sup> September 2014, Sophia (Pw-9) recalled the complainants to EACC office to record further statements. She also played the audio and video recording of the conversation amongst the complainants and the 1<sup>st</sup> accused held on 14<sup>th</sup> August 2014 for the purpose of transcription. At the end of the transcription Elijah (Pw-1) and Philip (Pw-2) signed certificates confirming the identification of voices. The certificates appear on the transcripts produced as exhibit no.7 & 9. During the trial, a video clip (exhibit no.8) for the recorded conversation was played and both complainants were able to recognize the 1<sup>st</sup> accused. However, the complainants disputed the recording devices shown to them by the prosecution counsel.
  14. In the course of testifying, Elijah Muendo (Pw-1) was adjudged a hostile witness after he recanted his statement recorded on 1<sup>st</sup> September 2014. Pw-1 claimed that he spoke in Kiswahili but the statement was recorded in English. That, after signing the statement he was assisted by a friend to interpret the document and discovered its contents were at variance with his verbal narration.
  15. Ditim Wanyenje Juma Musi was Pw-3. On 14<sup>th</sup> August 2014 at around noon he was requested by Sophia (Pw-9) to accompany her during the operation to arrest the accused persons. He was assigned the role of recording the inventory for the recovered exhibits. Pw-3 stood at the entrance of Ankara Food Court and was able to watch the complainants take a table next to the door leading to the washroom. Moments later he saw the accused persons join the complainants at the same table. He also saw Gari Otieno (Pw-7) visit the table occupied by the complainants and the accused persons. When PW-3 arrived at the table mentioned above, he found James Wachira (Pw-6) had already recovered the treated ksh 140,000/=. The witness explained that he was unable to complete the inventories for the recovered exhibits at the scene due to the commotion caused by the arrival of other politicians, thus necessitating moving the exhibits and the suspects to Integrity Centre where he completed the inventories. Pw-3 produced in evidence the inventory dated 14<sup>th</sup> August 2014 listing the treated money, hand swabs of the accused persons, hand swabs of Moris Gari Otieno (Pw-7), envelopes and a plain pieces of paper recovered at the scene. The inventory was produced as p. exhibit no. 12. The team of EACC investigators and Gari (Pw-7) signed the inventory. In the end, PW-3 handed over the inventory and the recovered exhibits to the investigating officer, Sophia (Pw-9).
  16. James Wachira (Pw-6) was the arresting officer. On 14<sup>th</sup> August 2014 during the operation he sat inside Ankara Food Court and watched the accused persons as they arrived and joined the complainants at a table. He also noticed Moris Gari Otieno (Pw-7) when he visited the table where the complainants and the accused persons were meeting. He observed Philip Kilonzo (PW-2) hand over a khaki envelope to



the 2<sup>nd</sup> accused who in turn passed the same to the 1<sup>st</sup> accused. Acting on the signal received from Philip Kilonzo (Pw-2), Wachira (PW-6) closed in and arrested the accused persons. He recovered the envelope containing the treated money from the 1<sup>st</sup> accused and handed it to Ditim Wanyenje Juma Musi (Pw-3). In evidence, Pw-6 identified the envelope produced as exhibit no.6(a). Thereafter, Wachira (Pw-6) and his colleagues escorted the accused persons to Integrity Centre for further processing. He was also assigned the role of preparing the transcripts of the recording at that moment saved in two compact discs. He later invited the complainants to identify the voices as the compact discs bearing the recorded conversation played. He was also assisted by Senior Sergeant Richard Mbithi (Pw-8) to transcribe the portion of the recorded conversation in Kikamba language. In order to ascertain the accuracy of the transcription James Wachira (Pw-6) invited the complainants and Senior Sergeant Richard Mbithi (Pw-8) to listen and compare the recorded conversation with the transcripts before they signed a confirmation certificate. He concluded by producing in evidence the transcript for the video recording as p. exhibit no7 and the transcript for the audio recording at Ankara Food Court as p. exhibit no. 9. In re-examination, Wachira (Pw-6) maintained that he was proficient in Kikuyu language which happens to be his mother- tongue.

17. Senior Sergt Richard Mbithi (Pw-8), a police officer was previously attached to EACC. On 14<sup>th</sup> August 2014 he was requested by the investigating officer to treat the kshs. 140,000/= (produced as exhibit no 4) with APQ chemical. In evidence, he identified the A5 envelope produced as p. exhibit no. 6(a) used to insert the treated money and the A4 envelope produced as p. exhibit no. 6(b) used to secure the A5 envelope and its contents. Pw-8 confirmed that he made Photostat copies of the kshs 140,000/= now produced as exhibit no. 5 and handed over the envelopes carrying the treated money to Philip Kilonzo (Pw-2) in the presence of Elijah Muendo (Pw-1). He also handed over the photocopies of the kshs. 140,000/= notes to the investigating officer for safe custody. On 1<sup>st</sup> September 2014, Pw-8 was requested by the investigating officer to translate the Kikamba part of the audio conversation between the accused persons and the complainants recorded at Ankara Food Court. The transcript was produced by James Wachira (Pw-6) as p. exhibit no. 9. He was also requested to translate the Kikamba part of the video recorded conversation between the 1<sup>st</sup> accused and the complainants recorded on 14<sup>th</sup> August 2014 during the morning. The transcript was produced as p. exhibit no.7. No. 2007022 Sophia Nyambu (Pw-9), is an investigator working at EACC. In August 2014 she was deployed at Integrity Centre, Department of Rapid Response which deals with bribery cases. At the beginning she explained the procedure for receiving reports, the methodology of investigations, the devices and chemicals used in the investigations. On 13<sup>th</sup> August 2014 she received the report no. 46766 recorded by the complainants herein against the 1<sup>st</sup> accused. Before embarking on the investigations, she explained to the complainants the mandate of EACC in investigating corruption offences and specified that the commission interest was only limited to the bribe demand. On 14<sup>th</sup> August 2014, she issued Pw-2 with the silver car key look alike audio- visual recording device. The device was produced as p. exhibit no.30. She also issued Pw-1 with the black mobile look alike audio recording device. The device was produced as p. exhibit no. 31. On cross - examination she explained that the devices do not have serial numbers and could only be identified by their physical appearance. After testing and showing the complainants how to operate the devices, she prepared a certificate dated 14<sup>th</sup> August 2014 for testing and handing over the devices. The certificate was dully signed by the complainants and is produced as p. exhibit no. 3. At the same time Nyambu (Pw-9) prepared a certificate under section 106(b) of the [Evidence Act](#) produced as exhibit no. 26. The certificate was to authenticate her training in operating and the serviceability of the devices ascertained to be in a good working condition. After handing over the devices to the complainants, Nyambu (Pw-9) followed them to Ankara Food Court and stood outside the Hotel. After a short while, the complainants came out while accompanied by the 1<sup>st</sup> accused. Pw-9 trailed the complainants and the 1<sup>st</sup> accused as they walked towards Nyayo House but at some



point retreated. She later picked the complainants after parting with the 1<sup>st</sup> accused and retrieved the recording devices. The investigating officer while at the office played back the devices using the office laptop computer serial no.2CEO510QGW and formed the opinion that there was a demand for a bribe of kshs. 280,000/=. On the premises of the positive outcome of the initial recording, she scaled up the investigations and on the same day at 2:00pm issued the complainants with the same recording devices used during the morning. She also sought the assistance of Senior Sergeant Richard Mbithi (Pw-8) who prepared and issued the Pw-2 with the treated ksh. 140,000/= (exhibit no 4) before leading the team of EACC investigators to the scene at Ankara Food Court. On arrival at the Hotel Pw-9 sat at a table 4-5 metres away from the table occupied by the accused persons and the complainants. She was able to clearly see the four men talk but she could not hear the conversation. Pw-9 also saw Mori Gari Otieno (Pw-7) join the table occupied by the accused persons and the complainants. Upon noticing the pre-arranged signal from the complainants, she moved to the table and found the 1<sup>st</sup> accused in possession of the A5 envelope, p. exhibit 6(a) containing the treated money. She witnessed James Wachira(Pw-6) recover from the 1<sup>st</sup> accused the A5 envelope containing the treated money. She also witnessed Juma Musi (Pw-3) prepare the inventory for the recovered exhibits. Sofia (Pw-9) testified that while at the scene she managed to take hand swabs of the accused persons and Moris Gari Otieno (Pw-7) before the suspects were escorted to Integrity Centre. She supported the evidence of Juma Musi(Pw-3) that the recording of the recovery inventory was partly recorded at the scene of arrest and completed at Integrity centre. She accompanied the complainants to integrity centre and along the way retrieved the recording devices and the A4 envelope exhibit no.6 (b). At the office she ascertained that only the audio recorder issued to Pw-1 had managed to record the conversation at the scene of arrest and recorded further statements from the complainants after identifying their voices when the recorded conversation was played. In addition, she prepared a second certificate under section 106(B)(4) of the *Evidence Act* dated 14<sup>th</sup> August 2014 now produced as p. exhibit no. 28, to authenticate the serviceability of the recording devices after use. Pw-9 added that she used the office HP laptop serial no 2CE0510QGW to download the conversation contained in the audio-visual (video) recording device in a compact disc produced as p. exhibit no 8. She also downloaded the conversation contained in the audio recording device in a compact disc produced as p. exhibit no. 27. Pw-9 prepared a certificate under section 106(B)(4) of the *Evidence Act* dated 3<sup>rd</sup> September 2014 to authenticate the downloading of the conversations from the recording devices into compact discs. The certificate was produced as p. exhibit no 29. The two discs were thereafter handed over to James Wachira (Pw-6) for transcription. At the trial the two compact discs were played before the court. From the audio- visual recording stored in the compact disc p. exhibit no.8, Sofia (Pw-9) was able to identify the image of the 1<sup>st</sup> accused as he was walking by Cardinal Otunga Building and while near Nyayo House. She testified that, at the moment the recording was captured she was following the complainants and the accused persons. The audio compact disc, p. exhibit no. 27 was also played at the trial and Pw-9 was able to show the conversations recorded at 11:54am and the afternoon conversation recorded at 2:53p.m. On cross-examination, Sofia (Pw-9) denied the suggestion that the recorded conversations were edited and referred to the “date modified” displayed on each of the recording which tally with the date and time when the conversation was recorded. The investigating officer identified the transcripts prepared by James Wachira and produced as exhibits 7 and 9. She corroborated the evidence by Wachira (Pw-6), that the complainants on 1<sup>st</sup> September 2014 identified the voices in the recorded conversations contained in the compact discs exhibits no. 8 and no. 27 and signed on the certificates appearing on the transcripts p. exhibit no.7 and p. exhibino.9.

18. The EACC investigators Richard Mbithi (Pw-8), James Wachira Ikuu (Pw-6) and Sofia Nyambu(Pw-9) narrated a detailed account regarding; the testing and issuing of the recording device to the complainants, the receiving of the recording device from the complainant and the retrieving of



the conversation from the device and burning it in a compact disc and finally the transcription and translation of the recorded conversation. The handling of the recording device is well documented in the inventories produced in evidence as exhibits. The transcription and translation of the recorded conversation are authenticated by the confirmation certificates on the face of the document duly signed by the complainants and the EACC investigators. The two compact discs bearing the recorded conversations exhibits 8 and 27 were accompanied by certificates in strict compliance with the statutory requirements of section 106 B (4) of the *Evidence Act*.

19. Sofia (Pw-9), in the course of the investigations prepared an exhibit memo form produced as p. exhibit no.19. On 25<sup>th</sup> August 2014 she forwarded to the Government Chemist the exhibit memo form (p. exhibit no. 19) together with a control sample of Anthracene Phenolphthalein Quinine (APQ) powder from EACC laboratory, treated money, envelopes used to carry the treated kshs. 140,000/= notes, swabs collected from the hands of the accused persons and Moris Gari (Pw-7). The exhibit memo form and the items were received by William Kailo Munyao (Pw-4), a Deputy Government Chemist. He holds a master's degree in Analytical Chemist and a BSC. from The University of Nairobi. At the hearing, he explained in details the analysis criteria at the Government Chemist Laboratory. He conducted an analysis of the items received from the investigating officer and prepared the report dated 24<sup>th</sup> September 2014 produced as p. exhibit 24. He confirmed that traces of Anthracene Phenolphthalein Quinine (APQ) powder were found present in both the treated money, envelopes and the swabs collected from the hands of the accused persons and Moris Gari Otieno (Pw-7). In my considered opinion the analyst evidence is in the circumstances satisfactory and established that the accused persons' hands were tainted with the APQ powder an indication that they were in contact with the treated money.
20. Sophia Nyambu(Pw-9), also wrote to the Clerk of the County Assembly of Nairobi to inquire about the accused persons. A reply was made by Jacob Ngwele Muvengei (Pw-5) vide a letter dated 5<sup>th</sup> November 2014. It was established that both accused persons were Member of County Assembly. He produced in evidence lists in respect of the Nairobi City County Assembly committees and their respective membership. From the lists it was confirmed that the 1<sup>st</sup> accused was a member of Planning & Housing Committee while the 2<sup>nd</sup> accused was a member of Transport and Public Works Committee. The lists were produced as p. exhibits no.33 and no. 34. At the trial Pw-5 adduced in evidence a Kenya Gazette vol. CXV No. 45 dated 13<sup>th</sup> March 2013 bearing a Gazette notice no. 3160 confirming the election of the accused persons as Members of County Assembly. The Kenya Gazette was produced as p. exhibit no.32.
21. Moris Gari Otieno (Pw-7), is a Member of County Assembly (MCA) of Nairobi City and the representative of Nairobi West Ward. On 14<sup>th</sup> August 2014 at around 2:00 pm, he was taking lunch at Ankara Food Court in the company of a brother and occupied a table near the entrance. As the MCA was visiting the toilet he noticed the accused persons herein and briefly engaged on a conversation after exchanging hand greetings. The conversation was interrupted by EACC investigators who stormed at the table and ordered the three Members of County Assembly to sit down. He was handcuffed together with the accused persons and escorted to EACC offices at Integrity Centre. He admitted that hand swabs were collected from him. Later, he was released after recording a statement and signing the exhibits recovery inventory (p. exhibit no. 12). On cross-examination the MCA testified that he found his colleagues and two other men sitting at a table near the toilets.

### **1<sup>st</sup> accused unsworn statement**

22. In defence, the 1<sup>st</sup> accused relied on an unsworn statement dated 16<sup>th</sup> June 2021 and filed on 17<sup>th</sup> June 2021. The statement was adopted before the court. He stated that in the year 2013, he was elected as



- the Member of the Nairobi County Assembly for Maringo/ Hamza ward. During his tenure he was a member of the Planning Committee of the Nairobi City County Assembly comprising of 17 members. He gave an account of how the complainants (Pw-1 & Pw-2) contacted him seeking assistance because their market stalls were in danger of demolition. He denied the offences and contended that the charges were framed up with a motive of extortion and based on entrapment.
23. The 1<sup>st</sup> accused, recalled that on 14<sup>th</sup> August 2014, Elijah Muendo (Pw-1) called and sought for a meeting so as to deliver the letters of allotment. According to the accused, he coincidentally met with the complainants at the entrance of City Hall while heading to meet the Commissioner of Immigration at Nyayo House. He was accompanied by his two colleagues and friends and decided to talk with the complainants as they walked towards Nyayo House.
24. The 1<sup>st</sup> accused narrative regarding the conversation was that, after listening to the complainants he called Maurice Gari (PW-7) who had a friend working as a licensed surveyor. Thereafter, the accused informed the complainants about the meeting with Gari(PW-7) and the surveyor at 2:00pm. He also stated that the complainants proposed the meeting venue at Ankara Hotel. On the same day at 2:00pm, the accused persons met with the complainants and Gari (PW-7) at Ankara Hotel. The 1<sup>st</sup> accused stated that he found the complainants already waiting at the hotel and were joined by the 2<sup>nd</sup> accused. Shortly thereafter, Gari (PW-7) and the two private surveyors joined them. The 1<sup>st</sup> accused continued that, he introduced the complainants and in turn Gari (PW-7) introduced the surveyors. During the meeting Philip (Pw-2), opened one of the envelopes he was carrying and handed to the surveyors two letters of allotment which were discredited for not appearing genuine. According to the 1<sup>st</sup> accused, the surveyors suggested that the land issue required planning and resurveying which will incur costs to be paid by the complainants and returned the letters of allotment to Philip (Pw-2) who returned them in an envelope and place three envelopes on the table. The 1<sup>st</sup> accused stated that Philip(Pw-2) exchanged contacts with one of the surveyor. When the men were about to leave the hotel, Philip(Pw-2) indicated that he had carried extra copies of the allotment, pins and identity cards and stretched his hands to handover an envelope to the 1<sup>st</sup> accused. However, the 1<sup>st</sup> accused told Philip to give the envelope to Gari (Pw-7) who was standing next to the surveyors. Soon after the envelope was handed over to Gari (Pw-7), the EACC detectives stormed in and forcefully arrested the accused persons in the midst of a commotion. The 1<sup>st</sup> accused pointed out that the EACC detectives took an inventory of the items recovered at the hotel but failed to include the envelope containing the complainants copies of KRA pin, a copy of Philip (Pw-2) identity card, a sketch plan and copies of allotment letters in the names of the complainants produced as D. Exhibits no. 1(a), (b)(c)(d)(e)(f)(g). The 1<sup>st</sup> accused stated that he was not aware of what was contained in the complainant's khaki envelope alleged to have contained money and was shocked to be confronted with the accusation of receiving money from the people he was assisting in good faith.
25. The 1<sup>st</sup> accused faulted the audio and video recordings of the conversation with the complainants during the first encounter on 14<sup>th</sup> August 2021 for being edited to remove the telephone call he made to Gari (PW-7) and the conversation with his two friends and to add some words allegedly uttered by him which are not true. He maintained that there was no conversation about money during the encounter with the complainants. The 1<sup>st</sup> accused also blamed the complainants and James Wachira (Pw-6) for arranging an entrapment with the aim of extorting money. He believed that although the complainants instigated the charges, the EACC detectives fueled and orchestrated the sting operation leading to the arrest. He took offence with the prosecution firm stand on 3<sup>rd</sup> October 2016 to continue with this case in spite of the request by Elijah(Pw-1) to withdraw the charges. The 1<sup>st</sup> accused blamed Nyambu for failing to investigate Tom Odongo and Atenya who were adversely mentioned by Philip (PW-2). He attacked the prosecution for relying on illegally acquired evidence. The accused asserted



that the EACC detectives coached the complainants and edited the transcripts and the recordings. He explained that the traces of APQ powder discovered in his hands must have been passed at EACC offices when he was given back the envelope containing the complainants' documents. He termed the investigations as un-orthodox and ill intended. According to the 1<sup>st</sup> accused, his voice was not subjected to a voice identification and the prosecution witnesses failed to provide certificates of proficiency for the languages used in the transcription. In addition, the prosecution was blamed for its failure to produce a certificate of safe custody of the exhibits before production in court. In the end, the 1<sup>st</sup> accused lamented that the charges caused him to lose his re-election and to suffer hypertension.

## **2<sup>nd</sup> accused sworn defence**

26. On his part, the 2<sup>nd</sup> accused testified that he deals with electrical merchandise and installation. In the year 2014 he was the elected Member of County Assembly representing Komarock Ward in Embakasi Central constituency. During his tenure he served as member of the Public & Works committee and Budget & Appropriations committee of the Nairobi City County Assembly. The accused stated that on 14<sup>th</sup> August 2014 between 9.30am and 12.30pm he attended two committee meetings and thereafter retired to the County Assembly lounge while waiting for a plenary sitting at 2.00pm. At the lounge, he engaged in a conversation with colleagues before he was invited for lunch at Ankara restaurant by the 1<sup>st</sup> accused. The 1<sup>st</sup> accused mentioned that he was going to meet traders from his ward. On arrival at the restaurant, the accused persons sat on the same table with the complainants. The 2<sup>nd</sup> accused denied that there were introductions and in cross-examination stated that he was able to recognize Philip Kilonzo(Pw-2) who previously in January 2014 while accompanied by youths visited his ward office regarding the allotments. In re-examination, the 2<sup>nd</sup> accused testified that he previously interacted with the complainants through his office before meeting at Ankara restaurant and sat next to Philip Kilonzo (Pw-2). He explained that most of the time at the restaurant he was engaged in a phone conversation with his sick mother but recalled that Philip (PW-2) indicated he had documents and placed a khaki envelope on the table. According to the 2<sup>nd</sup> accused, within a flash of a second EACC detectives stormed in the restaurant and he was placed under arrest and escorted to Integrity Centre. On cross-examination he denied coming into contact with the khaki envelope. He complained that while at Integrity Centre, he was coerced to record a statement.
27. Under cross-examination by the prosecution counsel, the 2<sup>nd</sup> accused testified that the two gentlemen who sat on the next table were responding to the conversation amongst the 1<sup>st</sup> accused and the complainants by way of gestures stated as "ok... yaah". He vehemently denied that he was responding to the conversation. On further cross-examination by Miss Kinget, the 2<sup>nd</sup> accused insisted that he was mostly engaged in a phone conversation with his mother and the only bits of the conversation he heard was about documents. When referred to the documents produced in evidence by the 1<sup>st</sup> accused, he had this to say:

I partly followed the conversation. I did not have the opportunity to open the envelope and therefore I may not authoritatively say that the documents referred by the 1<sup>st</sup> accused (D. Exhibit no.1(a)-(g)) were the documents in the envelope."

28. No other evidence was called other than what the accused persons said.

## **Submissions**

29. After the closure of the defence case, the prosecution counsel and the advocates representing the 1<sup>st</sup> accused persons filed written closing submissions. On 18<sup>th</sup> August 2021 the parties appeared before the court to high-light their respective submissions summarize below.



30. The prosecution written submissions are dated 17<sup>th</sup> August 2021 and filed on 18<sup>th</sup> August 2021. Miss Mutella, submitted that the prosecution has discharged its burden of proof and established beyond reasonable doubts the charges in counts II and III by the oral evidence of the 9 witnesses, documentary evidence, electronic evidence and the report by the government analyst. She contended that the 1<sup>st</sup> accused unsworn statement was of low probative value and referred to the cases *Mercy Kajuju & 4 Others v Republic* [2009] eKLR, *Odongo v Republic* [1983] KLR 301 and *PMO V Republic* [2009] eKLR.
31. The learned prosecution counsel also referred to section 306(2) of the Criminal Procedure Code and argued that the 1<sup>st</sup> accused written statement was not properly on record. This ground lacks merit. The court record is clear that the 1<sup>st</sup> accused adopted the written statement while at the dock though unsworn a matter that was not objected to by the prosecution.
32. The learned prosecution counsel relied on the decision *Michael Waweru Ndegwa v Republic* [2016] eKLR, quoted with approval in *Betrice W. Mutia v Republic* [2017] eKLR where the Court set out the ingredients for the offences of corruptly soliciting and receiving a benefit under section 39(3)(a) of ACECA.
33. The 1<sup>st</sup> accused written submissions are dated and filed on 18<sup>th</sup> August 2021. Mr. Munene and Mr. Arusei on behalf of the 1<sup>st</sup> accused submitted and maintained that the prosecution case was not proved beyond reasonable doubt against the accused. The 1<sup>st</sup> accused referred the court to the decisions *Gordon Omondi Ochieng v Republic* [2021] eKLR, *PON v Republic* [2019] eKLR, *Philip Nzaka Watu v Republic* [2006] eKLR and *Stephen Nguli Mulili v Republic* eKLR. These decisions follow the celebrated case of *DPP V Woolmington* (1935) UKHL 1 which established the principle and standard on burden of proof in criminal trials as ‘proof beyond reasonable doubt’.
34. The 1<sup>st</sup> accused advocates’ sought to argue that the prosecution failed to prove unto the required standard that the accused solicited for a benefit of kshs. 280,000/= and received kshs. 140,000/=. The advocates attacked the evidence of Elijah (Pw-1) who sought to withdraw the charges and at the trial disowned his statement. Pw-1 exonerated the 1<sup>st</sup> accused from asking for money and receiving the treated money. The advocates pointed out the evidence by Elijah (PW-1) where he stated that Philip (Pw-2) handed over the envelope to Maurice Gari(Pw-7). On a similar issue the advocates submitted that the complainants disowned the recording devices.
35. The 1<sup>st</sup> accused advocates blamed the EACC investigators for coaching the complainants to trap the accused persons. The advocates apprehended that the recorded conversations and transcripts relied upon by the prosecution were altered and /or edited to implicate the accused persons. The 1<sup>st</sup> accused relied on the decision *Charles Muthui Gitonga v Republic* [2010] eKLR, where the Court held that it would be grossly prejudicial to the appellant to be adjudged based on a recorded conversation which was fragmented, noisy, unclear and with missing parts.
36. The 1<sup>st</sup> accused submissions assaulting the voice identification of the accused persons by Jacob Ngwele Muvengei(Pw-5) before the previous trial court is in my view merited. In *Bonface Otieno Odhiambo v Republic* [2018] eKLR the Court was categorical that voice identification must be clear from manipulation such as naming the suspect before the recorded conversation is played. I must add that Pw-5 was recalled before me and no such evidence was entertained.
37. The 1<sup>st</sup> accused submissions attacked the prosecution evidence for being contradictory as regards the soliciting for the kshs 280,000/= and the receiving of the kshs 140,000/=.



38. The 1<sup>st</sup> accused advocates drew my attention to the decisions Mohammed Koriow Nur v AG [2011] eKLR and Lydia Lubanga v Inspector general of Police & 4 others [2016] eKLR and submitted that the prosecution case was based on entrapment. It was contended that the EACC investigators conducted the case as agents – provocateur and coached the complainants to lure the accused persons into a meeting.
39. The 1<sup>st</sup> accused submitted that the sting operation to record and arrest the accused persons was a violation of the accused rights to life, liberty, human dignity expression, information and association enshrined under Articles 26,28 31,32,33,35 and 36 of the Constitution of Kenya.
40. The case Joseph Charo Dzombo v Republic [2019] eKLR where a police officer (P.C Munyao) who was initially soliciting for a bribe of kshs 20,000/= lured the appellant to offer a bribe of kshs. 2,000/= was quoted out of content and is not relevant to the circumstances prevailing in the present case. A similar fate falls on the cases Gideon Makori Abero v Republic [2019] eKLR, and Vincent Mbindo Kathumo v Republic [2020] eKLR which dealt with offences under the *Bribery Act* No. 47 of 2016).
41. The 1<sup>st</sup> accused cited the cases Waita Munyoki v Republic [2018] eKLR, JOO V Republic [2015] eKLR, Elizabeth Waithiegeni Gatimu v Republic [2015] eKLR to explain the meaning of ‘benefit of doubt’ in a criminal trial.
42. Lastly, the 1<sup>st</sup> accused submitted that ‘gathered all together the prosecution tendered evidence which merely raised suspicion’ and should not be relied upon to convict the accused.
43. Both the 1<sup>st</sup> accused and the prosecution referred to the authority Miller v Ministry of Pension [1947] 2 ALL ER 372 to explain the meaning of the phrase “proof beyond reasonable doubt” expressed in the following passage:
- That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible”.
44. Mr Okatch on behalf of the 2<sup>nd</sup> accused associated himself with the submissions made by the 1<sup>st</sup> accused advocates. He referred to the decision Dennis Paul Manoti v Republic [2021] eKLR in support of the position that recording and transcripts on their own are not sufficient to sustain a conviction.
45. The second line of argument taken by Mr. Okatch was that the 2<sup>nd</sup> accused cannot be convicted for the charge of receiving kshs 140,000/= in the absence of evidence that he demanded for the money. Counsel argued that the recorded conversation at Ankara Restaurant borne by the transcript p. exhibit no.9 did not link the 2<sup>nd</sup> accused to the charge in count III. He referred to the decision Esther Theuri Waruiru & another v Republic [2011] eKLR.

### **Issues for determination**

46. Having summarized the prosecution case in support of the charges, the respective defence raised by each of the accused persons and the submissions; the issues for consideration are:
1. Whether the 1<sup>st</sup> accused solicited for a benefit of kshs. 280,000/=.
  2. Whether the 1<sup>st</sup> and 2<sup>nd</sup> accused persons received a benefit of kshs. 140,000/=
  3. Whether or not the prosecution case is based on entrapment.



4. Whether or not the prosecution has established the charges in counts II & III beyond reasonable doubt.

### **The burden of proof**

47. It is well settled law that it is the duty of the prosecution to prove its case beyond reasonable doubt. In the lengthy line of authorities where this principle was re-stated are; Gordon Omondi Ochieng v Republic (supra), PON v Republic (supra), Philip Nzaka Watu v Republic (supra), Stephen Nguli Mulili v Republic (supra) and DPP V Woolmington (supra).
48. In Republic v David Ruo Nyambura & 4 others [2001] eKLR, the principle on burden of proof in a criminal trial was well articulated. The Court held:

The prosecution bears the burden to prove its case beyond any reasonable doubt. It is trite law that the accused person does not bear the burden to prove his innocence. It is our cardinal principle of law that in a criminal case the legal onus is always on the prosecution to prove the guilt of an accused person, and the standard of proof is proof beyond reasonable doubt. The burden of proof therefore lies on the prosecution throughout to prove the guilt of an accused.

49. It is provided in section 107 of the Evidence cap 80 as follows: -

“107

- (1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said the burden of proof lies on that person”

An accused person does not assume any burden to prove his innocence in a criminal case. He is obliged only, if he so wishes, to give an explanation or to raise a defence to the charge, which is probably or possibly true. If he does this, then he discharges his burden of proof and his explanation or defence must be accepted.”

50. I adopt these authorities in the present case. Bearing in mind the principle on burden of proof, it is the duty of this court firstly, to make a final determination whether the evidence presented by the prosecution witnesses is worthy of credit. Secondly, to weigh the prosecution case against the respective defence raised by the accused persons to establish whether the evidence on record is sufficient to establish the charges beyond any reasonable doubt.

### **Determination**

51. I shall first proceed to examine the following preliminary issues raised in the submissions before determining the substantive aspects of the case:

#### **(1) The 1<sup>st</sup> accused unsworn statement**

52. The guiding principle on the weight to be attached to unsworn statement is established in May v Republic [1981] KLR 129 quoted with approval in the cases Mercy Kajuju & 4 Others v Republic



[2009] eKLR, *Odongo v Republic* [1983] KLR 301 and *PMO V Republic* [2009] eKLR. In *May v Republic* (supra) the Court of Appeal held that:

From all this, we are satisfied that an unsworn statement is not evidence as that expression is generally understood. It has no probative value, but should be taken into consideration in relation to the whole of the evidence.”

53. Guided by the above decisions the unsworn statement made by the 1<sup>st</sup> accused has no probative value. It is persuasive and should be considered together with the prosecution evidence. However, no negative inference can be drawn from the 1<sup>st</sup> accused choice of defence.
54. It is perfectly clear from the record that the unsworn statement relied upon by the 1<sup>st</sup> accused was at variance with the evidence on oath by Moris Gari Otieno (Pw-7) and the 2<sup>nd</sup> accused. At page 2 of the written statement dated 16<sup>th</sup> June 2021, the 1<sup>st</sup> accused stated:

In the afternoon on 14<sup>th</sup> August, 2014 Kilonzo called me again a few minutes to 2pm reminding me of the meeting and requested me not to fail. I promised to meet them then. At the restaurant, I found that Philip and Elijah had already arrived and they were waiting for us. We ordered some refreshments and we were joined by Samuel Irungu, the 2<sup>nd</sup> accused. Maurice Gari and two private surveyors joined us shortly thereafter. I introduced Philip and Elijah and Gari who in turn introduced the two private surveyors. Philip opened one of the envelopes that he was holding and removed 2 letters of allotment and passed them to one of the surveyors. The surveyors studied them and informed that they did not look genuine. They agreed indeed that they had some issues and that is why they sought the assistance to have them regularized. One of the surveyors informed them that they will have to do planning and resurveying which will translate into cost to be paid by them. The other surveyor seconded the same. The letters of allotment were handed back to Philip who returned them in the envelope and placed the three envelopes on the table. Philip exchanged contact with one of the surveyors who gave him his business card. While all this was happening, we were in a conversation with Maurice Gari and Samuel Irungu.”

55. Moris Gari Otieno (pw-7) told the court that on 14<sup>th</sup> August 2014 at around 2.45pm he was at Ankara restaurant taking lunch in the company of his brother and only met the accused persons while on his way to visit the toilets. A proper reading and analysis of the evidence of Gari (Pw-7) is clear; he never mentioned about the private surveyors or the phone conversation alleged in the 2<sup>nd</sup> accused account. Moreover, the matter of the private surveyors never arose during the cross-examination of the complainants and Moris Gari Otieno (PW-7) by the 1<sup>st</sup> accused advocates.
56. The 2<sup>nd</sup> accused never mentioned about the surveyors but talked about two gentlemen who sat on the next table and responded to the conversation by limited verbal gestures, “o.k.... yaah”. From the 1<sup>st</sup> accused statement it is apparent that the surveyors were introduced by Gari (Pw-7) and actively engaged in an exhaustive verbal conversation about the allotment letters. Looking at the 1<sup>st</sup> accused statement, he cleverly introduced through an unsworn statement the issue of the private surveyors and alleged that he told Philip Kilonzo (Pw-2) to give Gari (Pw- 7 an envelope containing extra copies of allotment letters, pins and identity cards while assured that he could not be cross-examined.
57. On account of the foregoing, the question that begs an answer from this court is whether the 1<sup>st</sup> accused was truthful. The short answer is that, obviously the 1<sup>st</sup> accused person treated this court to half-truths and his unsworn statement when evaluated together with all the other evidence on record is of no value.



## (2) Elijah Muendo (PW-1) evidence

58. A matter of concern to this court was the remarks by Elijah (Pw-1) that he was displeased by the manner EACC dealt with the matter and regretted making the report. He told the court that their stalls were demolished, hence their quest to have this case withdrawn at the beginning of the trial. However, the withdrawal was vehemently opposed by the prosecution. It was well within the power of the Director of Public Prosecutions to decline the request made by Elijah (Pw-1) and proceed to prosecute the matter based on the outcome of the investigations. See the decision *Republic v EACC & 2 others ex-parte Stephen Sanga Barawa* [2017] eKLR.
59. I am prompted to observe that Elijah (Pw-1) sudden change of heart long after the investigations were concluded was an afterthought. At the trial, Elijah Muendo (Pw-1) was evasive and reluctant to testify. He withheld the truth under the pretext that he was on a phone call during the walk towards Nyayo House. However, the witness is betrayed by his voluntary participation in reporting the matter to EACC and recording the conversations with the accused persons. On 14 August 2014 at 10.45am the complainants witnessed and signed the certificate produced as p. exhibit no. 3 to confirm the testing and handing over of the recording devices. In addition, on 1<sup>st</sup> September 2014 Elijah Muendo (Pw-1) and Philip Kilonzo (Pw-2) turned up at EACC offices and identified the voices of the accused persons during the transcription of the recorded conversations. The transcripts produced as exhibits no 7 & no. 9 bear corresponding transcription certificates duly signed by the complainants confirming their voluntary participation in identifying the voices after listening and watching the recorded conversations. Philip Kilonzo (Pw-2) in evidence admitted that he agreed with the transcripts and stated:

James Wachira certified that he had made the transcript. A part from [P-MFI -7] ..... you are showing me a transcript of a conversation between I and the accused on 14.8.2014. On top of the transcript is the word “second’ P-MFI-7 is written “one”

60. My signature is on the 2<sup>nd</sup> transcript. It is because I agreed with the transcript. It is in respects of a conversation between Philip Muniyoki Kilonzo, Elijah Muendo Mwau, Njuguna Mwangi and Samuel Irungu Mwangi at Ankara Food Court on 14.8.2014. The transcript has 12 pages.

### Second transcript – Pros-MFI-9

61. After the heading ..... I am the Philip referred to in the transcript. The voices of Morris Gari Otieno and the Restaurant attendant are also there. I signed the transcript at Integrity Centre after going through it. We were told that was the procedure.
62. I was at Ankara Food Court. Our purpose was to give the accused persons the money we had been given at EACC. I confirm I was in that meeting.”
63. The decision *Abel Monari Nyanamba & 4 others* [1996] eKLR is instructive on the value of the evidence given by a hostile witness. The Court of Appeal quoted with approval *Coles v Coles*, *Alowo v Republic* and *Batala v Uganda* and held:
64. In *Coles v. Coles*, (1866) L.R. 1P. &D. 70, 71, Sir J.P. Wilde said: -

“A hostile witness is one who from the manner in which he gives evidence shows that he is not desirous of telling the truth to the court.”



65. In *Alowo v. Republic* [1972] EA at page 324 the predecessor of the Court said: -

The basis of leave to treat a witness as hostile is that the conflict between the evidence which the witness is giving and some earlier statement shows him or her to be unreliable, and this makes his or her evidence negligible.”

66. Again in *Batala v Uganda* [1974] E.A. 402 the said court at page 405 said:

The giving of leave to treat a witness as hostile is equivalent to a finding that the witness is unreliable. It enables the party calling the witness to cross-examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile, and it can be given little, if any, weight.”

The evidence of a hostile witness is indeed evidence in the case although generally of little value. Obviously, no court could found a conviction solely on the evidence of a hostile witness because his unreliability must itself introduce an element of reasonable doubt.” (emphasis added)

67. In the light of the decision in *Abel Monari Nyanamba v Republic* (supra), the evidence of Elijah Muendo (Pw-1) is of little probative worth and can only be relied upon in the following clear instances corroborated by the other prosecution witnesses:

1. On 13<sup>th</sup> August 2014 he made a report to EACC while accompanied by Philip Kilonzo (Pw-2)
2. On 14<sup>th</sup> August 2014 he was issued with an audio recorder on two occasions by Sofia Nyambu (Pw-9) in the presence of Philip Kilonzo (Pw-2).
3. On 14<sup>th</sup> August 2014 he used the audio recorder to tape the conversations with the accused persons made in the morning and in the afternoon.
4. On 1<sup>st</sup> September 2014 he identified voices in the recorded conversations and signed the transcription certificates on the transcripts exhibits no 7 & 9.

### **(3) The claim of contradictions in the prosecution case**

68. Concerning the 1<sup>st</sup> accused contention that the prosecution case bears fatal contradictions, I shall rely on the following authorities:

In *PON v Republic* [2019] eKLR the Court of Appeal cited with approval its earlier decision in *Erick Onyango Ondeng’ v Republic* [2014] eKLR and the Uganda Court of Appeal case *Twehangane Alfred v Uganda Cr. Appeal No. 139 of 2001 (2003) UGCA*,6. These cases are instructive that not every contradiction warrants rejection of evidence.

69. The reality of a trial process was captured in *Joshua Amakol v Republic* [2019] eKLR. The Court held:

The fact that there was contradiction in evidence by one witness that cannot defeat the rest of the witnesses’ evidence which is well corroborated and consistent to the extent that there was no recording done.”

70. The Court continued:

“In any litigation or trial, there are bound to be contradictions or inconsistencies by witnesses who are human beings and therefore prone to forget or mistaken some evidence.



Unless such contradiction is glaring as to occasion a miscarriage of justice, a court should give it least consideration in favour of the interest of substantive justice.” (Emphasis added)

71. In *Republic v Mukawa & 2 others* [1989] KLR 281, the Court held that a witness may be believed in one aspect and yet disbelieved in another.
72. Looking at the prosecution case, except for the hostile witness Elijah (Pw-1), none of the remaining eight (8) witnesses gave a reason to this court to doubt his/ her credibility. I do not accept the suggestion by the 1<sup>st</sup> accused that the prosecution case bears substantive contradictions. There is no evidence to support such conclusion. This court is bound to observe the interest of substantive justice and therefore declines the invitation to reject the prosecution evidence on account of the allegation of contradictions claimed by the 1<sup>st</sup> accused, a matter likely to occasion a miscarriage of justice.

### **Analysis of the evidence**

73. I shall turn to consider in more details the evidence presented against the accused persons.
74. The charges in Counts II & III are mainly founded on the testimony of Philip Kilonzo (Pw-2) and the recorded conversations made on 14<sup>th</sup> August 2014. Transcripts of the recorded conversations were produced as p. exhibit no.7 and p. exhibit no. 9. It is not disputed that on 14<sup>th</sup> August 2014 the complainants met with the accused persons. Elijah Muendo (Pw-1) and Philip Kilonzo (Pw-2) initially held a conversation with the 1<sup>st</sup> accused person as they walked towards Nyayo House. The second meeting was at Ankara Restaurant when the complainants held a conversation with both accused persons. On both occasions, EACC investigators covertly watched the complainants and the accused persons. In defence, the accused persons admitted meeting with the accused persons but disputed the context of the recorded conversations. The subject of the morning conversation was the demolition of the complainants’ stalls at Saika market. From the conversation the 1<sup>st</sup> accused was to assist the complainants in stopping the demolition of the stalls. Philip Kilonzo(Pw-2) had previously met with the 1<sup>st</sup> accused on 11<sup>th</sup> August 2014. On 14<sup>th</sup> August 2014, Pw-2 spent adequate time with the 1<sup>st</sup> accused. It is pertinent to observe that the 1<sup>st</sup> accused was clearly visible in a video clip of the recorded conversation played in court.
75. There is evidence that Philip Kilonzo (Pw-1) was familiar with the 1<sup>st</sup> accused and in the circumstances best suited to identify his voice on 1<sup>st</sup> September 2014 during the transcription of the recorded conversation. Recently, in *Pamela Zipporah Moriasi v Republic* [2021] eKLR, Mumbi Ngugi, J (as she then was) dealt with a scenario where the complainant identified the appellant’s voice in a recorded conversation during transcription and the competency of a witness to interpret mother tongue. The learned Judge rendered herself that:
  42. In this case, the evidence before the trial court was that PW9 was well conversant with the Ekegusii language. He was from the Kisii community and having studied the language in primary school, he was able to write and speak the language fluently. There was no challenge during the trial to the transcription on the basis that it had errors, was incorrect or was an inadequate reproduction of the conversation between the appellant and the complainant. Unlike the situation in the case of *Boniface Otieno Odhiambo v Republic* (supra) relied on by the appellant, there was no question of voice identification by the witness who did the transcription. It is my finding and I so hold that the challenge to the conviction and sentence on the basis that the transcription was not done by a ‘professional linguist’ in Ekegusii is without merit.



43. In closing on this point, I must observe that it would impose an onerous burden and virtually render prosecutions impossible if there was a requirement, as the appellant suggests, that one needs to be a ‘linguist’ in order to translate a document or conversation from our multiple languages to English or Kiswahili.
44. The appellant’s final argument in relation to the transcript is that there was no-one to identify the appellant’s voice to PW9 as he transcribed the recordings. It seems to me that this is an untenable argument. From the evidence of PW9, he translated the recording from Ekegusii to Kiswahili. In doing so, he was not required to know that it was the appellant’s voice that had been captured on the recording. The appellant’s voice had been identified for the EACC officers by the complainant and PW3 when he was called to the EACC offices. The fact that there was no one to identify the appellant’s voice during the translation does not in any way invalidate the translation produced.” (Emphasis added)
76. From the foregoing, shall adopt the reasoning of Mumbi Ngugi, J in this case and find no fault in the identification of the accused persons’ voices by Elijah Muendo(Pw-1) and Philip Kilonzo (Pw-2) during the transcription.
77. It is crucial to refer in details to the recorded conversations. The initial recorded conversation made on 14<sup>th</sup> August 2014 began with a statement by the 1<sup>st</sup> accused in kiswahili asking the complainants to talk as they walk since he was expected by the PC for a meeting. At page 1 of the transcript P. exhibit no.7 the conversation was as follows:

Njuguna: twende tukiongea

Elijah: (on phone) nitakupigia

Njuguna: Niko na mukutano na PC, twende tukiongea, tukiongea

Philip: Mm tukiongea

Njuguna: Mm

Elijah: wacha alipe chai iko hapa basi, kaa hapo

Njuguna: Wacha alipe tukiongeanga

Elijah: sawa

Philip:Ee

Njuguna: Tunangojewa na PC” (emphasis added)

At page 2 of the transcript P. exhibit no .7 it is clear that the 1<sup>st</sup> accused was going to meet the PC at Nyayo House and stated:

Njuguna: Ee, nataka kwenda Nyayo House kwa ofisi yake”

78. The 1<sup>st</sup> accused at Page 3 of the transcript p. exhibit no 7 informed Philip Kilonzo (Pw-2) that he had just received a call from the Chairman of “Planning” Atenya and told him to put the matter on hold for a while so that they could meet. The conversation went on as follows:

Njuguna: Hata chairman amenipigia tu saa hii hii hii

Philip: Chairman

Njuguna: Yule wa planning



Philip: Ee,ee

Njuguna:Ngoja uone , anaitangwa Atenya Philip: Mm Nthenya?

Njuguna: Atenya County rep, siunaona, county rep Atenya

Philip: Ooh okay okay

Njuguna: Nilimwambia tu jana a hold kidogo

Philip: Mm

Njuguna: Ndio tukuwe tumepatana na wewe”

79. At pages 3 and 4 of the transcript p. exhibit no.7 the 1<sup>st</sup> accused repeatedly mentioned about the demolition of the 1<sup>st</sup> accused building in the following words:

Njuguna: Wewe unakaa unataka iyo nyumba yako ibomolewe

.....

Njuguna:Aai wewe unataka ibomolewe”

80. The 1<sup>st</sup> accused at page 5 of the transcript p. exhibit no.7 said he had told Muendo(Pw-2) about “soo tatu” which the Philip (Pw-2) understood to mean “elfu mia tatu” meaning three hundred thousand. He also stated that the committee members were 22 plus a minister.

81. At pages 6 & 7 of the transcript p. exhibit no.7 the 1<sup>st</sup> accused stated that ‘Kenya Power’ had complained but asserted that his committee was the authority in charge of recommending a demolition. He stated at page no. 7:

Njuguna:Lakini sisi committee ya planning Philip: Mm

Njuguna: Sisi kama kamati

Philip: Mm

Njuguna: Ndio tunaandika recommendation

Philip: Mm

Njuguna: Ndio tunaweza bomolesha

Philip: Mm

Njuguna:Unanielewa”

82. At page 7 & 8 of the transcript p. exhibit no.7, the 1<sup>st</sup> accused explained to Philip Kilonzo (Pw-2) in detail the argument how the planning committee was going to defeat the ‘Kenya Power’ complainant and stated:

Njuguna: Lakini they have been complaining about hiyo way

leave

Philip: Mmh

Njuguna: Ee, ati wanajenga, kwanza mwingine amenjenga mpaka

manyumba za mawe

Philip:Mmh



Njuguna: that has been the complain  
Philip: Yeah,  
Njuguna: sasa tukasikilizana na chairman Philip: Mmm  
Njuguna: hawa ni wafanya biashara, Kenya Power inge –react, hizo days  
Philip: Mm  
Njuguna: You know  
Philip: Mm  
Njuguna: When you were still constructing they could have acted on it,  
Philip: Mmm  
Njuguna: wanielewa  
Philip:  
Mm  
Njuguna: so why complain now?  
Philip: Mm  
Njuguna: That’s our argument  
Philip: Mm, mm  
Njuguna: Wanielewa?  
Philip: Mm  
Njuguna: So unajua huwezi argue hivyo Philip: MMM  
Njuguna: Na hii kamati wa recommend hivyo, Philip: Mm  
Njuguna: Na hakuna kitu, hao wenyewe hawasemi vile wanataka”

83. At page 9 of the transcript, the 1<sup>st</sup> accused mentioned about the previous visit by the planning committee at the site and at page 10 expressly stated that each committee member and the minister should be given a share of the money so as to clear the matter. He stated:

Hakuna haja tuchukue pesa nusu,  
.....  
Halafu kesho tena  
.....  
Kuwe na mambo ingine  
.....  
You know, afadhali kila mtu apewe yake yake .....  
Mpaka waziri ambaye ni minister wa, anaitwa Odongo ....  
Tumalize hiyo mambo  
.....



Kuliko kesho tena tuanze tena”

84. At page 11 & 12 of the transcript the 1<sup>st</sup> accused while responding to the Philip Kilonzo(Pw-2) request for a reduction of the sum asked embarked on a calculation on how the sum of kshs 280,000/= was to be shared and stated:

Tukitoea, kuna two twenty sindio

.....

Hiyo ni ya committee members

.....

Sawa maanake they are twenty-two

...

We are assuming everybody gets ten thousand

...

Ndio tumalize hiyo problem

.....

Halafu uongezee waziri

....

Waziri utampatia ngapi?

.....

Unajua siku hizi kuna cabinet

....

Kama bunge

.....

Waziri utampea ngapi?

.....

Mpatie hata fifty

.....

Sindio?

.....

Halafu chairman juu yeye ni senior kuliko wengine .....

Tumuongezee kumi

.....

The most should be at least two eighty

.....

Yeah that's why I was calculating



.....

Unanjua

.....

hakuna haja tufanye kitu

.....

Kesho tena, tena upate delegation ingine hapo”

85. The above calculations by the 1<sup>st</sup> accused were followed by an assurance to Philip (PW-2) that he was going to call the area MCA, the 2<sup>nd</sup> accused herein and he urged the complainant to come with money. At page 13 the conversation continued as follows:

Philip: sasa mki, tukimalizana tuseme tu tumewapatia hiyo pesa mnataka, tuko sure aje sasa hatutaona mtu mwingine amekuja hapo kusema

Njuguna: Sisi ndio committee

Philip: Kama unajua sasa, na Irungu?

Njuguna: Irungu hawezi kuja

Philip: kwa nini?

Njuguna: kwa sababu sisi ndio kamati

Philip: Mmm

Njuguna: Hata akileta kisirani, hata naeza muita

Philip: Mm

Njuguna: Ndio uamini

Philip: Si hata mzuri umuite tumalizane

Njuguna: Wewe jitayarishe na mfuko

Philip: Mmm

Njuguna: Kuja na pesa

Philip: Eeh

Njuguna: Mimi niite Irungu nimwambie sisi kama kamati

Philip: Uite Irungu na uite ile committee vile ilikuwa tumalize hiyo maneno kabisa na wanihakikishie hapo

Njuguna: Now, saa ngapi? Naita chairman, mko wagapi Philip:Ee

Njuguna: Unajua ni vizuri kuita, huwezi kuja tena na delegation kubwa

Philip:Lakini ni uite hata chairman na nani, na MCA was hapo ndio at least

Njuguna: Na Irun a MCA na chairman basi, saa ngapi

Philip: Eee nyinyi watatu

Muendo: (on phone) Hallo, ni nani? Nenga dakika ta thirty ningugukunia Jose please. (Meaning; Give me about thirty minutes I will call back Jose please)



Philip: Si ata saa nane ni sawa?

Njuguna: Saa nane, tupatane wapi, na si, unajua hawa ni watu serious?

Philip: Saa nane ni sawa lakini umekubali ni two eighty, sindio?

Njuguna: Leta mia tatu

Philip: Aa elfu mia tatu?

Njuguna: Na sasa huyo MCA hata ngiri kumi hatakula?

Philip: No, wee chukua two eighty

Njuguna: Unajua it is very important to,

Philip: No, chukua two eighty at least hiyo mkubwa hiyo sawa?

Njuguna: Haya saa ngapi?

Philip: Saa nane

Njuguna: saa nane?"

86. At the end of the conversation at page 15 of the transcript the 1<sup>st</sup> accused proposed to Philip that they should meet in Town at Ankara Restaurant where they had met in the morning. He stated:

Njuguna: Sawa, saa nane on the dot hapo tulikuwa"

87. Philip Kilonzo (Pw-2) was categorical that the 1<sup>st</sup> accused asked for a bribe of kshs. 280,000/= . On cross examination he maintained this position. His evidence is corroborated by the recorded conversation. There is no doubt from the video clip of the recorded conversation played before the court and the transcript p. exhibit no 7, that the 1<sup>st</sup> accused expressly requested from Philip kilonzo(Pw-1) a bribe bargained and finally agreed at kshs 280,000/= to be shared amongst the members of the planning committee and the minister. The 1<sup>st</sup> accused represented to Philip (Pw-1) that the Planning committee was capable of making a favourable recommendation to stop the demolition and thus defeat 'Kenya Power' complaint. The 1<sup>st</sup> accused justified the demand for kshs. 280,000/= by narrating a calculation for the share of each member, the chairman and the minister. It is evident from the conversation that the money was to be delivered on the same day in the afternoon at Ankara Restaurant. In addition, the 1<sup>st</sup> accused agreed to bring the 2<sup>nd</sup> accused and Atenya at the meeting to assure the complainants that the problem will be conclusively resolved.
88. Having carefully listened to the recording it is my considered finding that the 1<sup>st</sup> accused advocates suggestion to the complainants during cross-examination to the effect that, "the recorded conversations were altered and or edited" are unfounded. A keen listening of the recorded conversations manifests; back ground noise, conversations of third parties and interruptions by third parties. Ordinarily, these features will be missing on an edited conversation prepared for the purpose of perfecting a specific version. This case stand distinguished from Charles Muthui Gitonga v Republic (supra) where the recorded conversation was fragmented, noisy, unclear and parts were missing.
89. The value of the electronic evidence comprising of the recorders, the DVD compact disc the audio compact disc, the transcripts and translations are aide memoire and corroborate the testimony of the Philip Kilonzo (Pw-2) on what transpired during the 1<sup>st</sup> encounter with the 1<sup>st</sup> accused and the 2<sup>nd</sup> encounter with both accused persons. See Norbet Oluoch Obanda v Republic [1983] eKLR. At present, the use of technology in crime investigations and court proceedings is enacted under part VII- Electronic Records of the *Evidence Act*, Cap 80 Laws of Kenya. In this case, the recording devices,



compact discs bearing the recorded conversations and the transcripts were accompanied by certificates prepared by Sofia Nyambu (Pw-9) under section 106B (4) of the *Evidence Act*. See p. exhibits no. 28 and no.29. The certificates authenticated; the serviceability of the recorders, the serviceability of the laptop computer used to download the recorded conversation, the authorized user of the laptop computer and the process of downloading and storing the recorded conversations in compact discs. The complainants spend a considerable amount of time with the accused persons on 14<sup>th</sup> August 2014 and therefore were familiar with their voices. At the trial the compact disc. P. exhibit no 8 bearing the recorded conversation was played and the complainants positively identified the 1<sup>st</sup> accused person who was visible as he talked. The chain of custody of the exhibits was well documented in the inventories produced in evidence and explained by the investigating officer, Sofia (PW-9)

### **The law and ingredients of the charges**

90. The offences of corruption under Counts II and III are founded on the provisions of section 39(3)(a) as read with section 48(1) of Anti- Corruption and Economic Crimes *Act No. 3 of 2003* (ACECA).

A person is guilty of an offence if the person- Corruptly receives or corruptly agrees to receive or solicit a benefit to which this section applies.”

91. The key ingredients for the offences under section 39 (3) (a) were spelt out by Mativo, J in Paul Mwangi Gathogo v Republic [2015] eKLR as follows:

The main ingredients of the offence are 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 gratification other than legal remuneration, that gratification should be as a motive or reward for doing or forbearing to do, in exercise of his official functions, a favour or disfavour to any person”.

92. Dealing with the same issue, in Michael Waweru Ndegwa v Republic [2016] eKLR, the Court summarized the ingredients of the offence of corruptly soliciting for a benefit in the following terms:

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.”

93. In this context to prove the charge of corruptly soliciting for a benefit the prosecution must establish the following elements:

1. The accused must be acting as an agent of a public institution or body.
2. The accused must have corruptly or through illegal means requested and/or offered a gratification other than lawful remuneration.
3. The motive of requesting and /or offering the benefit is to induce another person to confer a favour or ask for a favour to render services in his official capacity.

94. The positions of the accused persons as elected Members of County Assembly was established by the Kenya Gazette special issue dated 13<sup>th</sup> March 2013, notice no. 3160 produced by Jacob Ngwele Muvengi (Pw-5) as p. exhibit no. 32. In the interpretation provided under Article 260 of the Constitution, the accused persons were public officers and state officers. For purposes of section 38



of the Anti-Corruption & Economic Crimes Act, No. 3 of 2003 (ACECA), the accused persons are deemed agents of Nairobi City County Government as elected leaders and thus the County was in that capacity the “Principal”.

95. In count II, the 1<sup>st</sup> accused was charged for soliciting a financial benefit of kshs. 280,000/- from the complainants on 14<sup>th</sup> August 2014 with the intent to influence the decision of the Planning and Housing committee of the Nairobi City County Government with regard to the demolition of stalls at Saika market. The term “Benefit” is defined in Section 2 (1) of ACECA to mean:

benefit” means any gift, loan, fee, reward, appointment, service, favour, forbearance, promise, or other consideration or advantage. “

96. The conversation appearing on the transcript p. exhibit 7 gives credence to the testimony of Philip Kilonzo (Pw-2) who mainly talked with the 1<sup>st</sup> accused when a bribe of kshs. 280,000/= was demanded.

97. According to section 50 of the Anti-Corruption & Economic Crimes Act no 3 of 2003, once it is proved that an accused held himself out or represented himself as capable of performing a function that falls within the mandate of his principal or employer to another person for purposes of committing an offence under the Act but he does not possess such power as per his specific responsibilities in that institution he cannot raise a defence that he was limited by the defined scope of his responsibilities from carrying out the task in question as long as he held himself out to another in that manner for purposes of soliciting or receiving the benefit in contravention of the Act.

98. Section 50 of ACECA enacts:

In Prosecution of an offence under this part that involves a benefit that is an inducement or reward or doing an act or making an omission, it shall not be a defence-

- a) That the act or omission was not within a person’s power or that the person did not intend to do the act or make the omission.” (Emphasis added)

99. The prosecution evidence in support of the request for ksh 280,000/= is expressed in both English and Kiswahili. There is evidence that the money was meant for the function stated in the particulars of the offence in Count II. I am convinced that there was repeated and explicit demand for ksh. 280,000/=. It is borne out by the recorded conversation and the evidence of Philip Kilonzo (Pw-2) that the money was to be shared amongst the members of the Planning committee and a minister so as to forebear the demolition of the complainants’ stalls at Saika market. Having carefully evaluated and examined the conversation, I am satisfied that there was a request for Kshs. 280,000/= and the words “two eighty in the context of the conversation meant a bribe of ksh 280,000/=. Philip Kilonzo (Pw-2) account of the conversation with the 1<sup>st</sup> accused is in my view credible and trustworthy. In all circumstances of this case Philip (Pw-2) account remains the best evidence to establish the charge in count no. II and is well corroborated by the electronic evidence in the form of video recording, audio recording and transcripts.

100. Turning to Count III, the prosecution relied on the testimonies of the complainants (PW1 & PW-2), Ditim Wanyenje Juma Musi (Pw- 3), James Wachira Ikua (Pw-6) and Sofia Nyambu (Pw-9). The EACC investigators and Philip Kilonzo (Pw-2) mutually corroborated each other as regards the arrest of the accused persons and the recovery of the treated money during the operation at Ankara restaurant. The recorded conversation appearing on the transcript p. exhibit no.9 and the government chemist report further corroborates the testimonies of the above witnesses.



101. The recorded conversation transcript p. exhibit no. 9 manifests that on 14<sup>th</sup> August 2014 at 2:00pm the 1<sup>st</sup> accused turned up at Ankara Restaurant accompanied by the 2<sup>nd</sup> accused to meet the complainants. The 1<sup>st</sup> accused explained to Philip Kilonzo (Pw-2) that the Chairman was unable to attend the meeting and as a measure of caution requested that the talks be held with all cell phones switched off to avoid being recorded. He was conscious that he could be recorded and at page 3 of the transcript p. exhibit no. 9 stated:

Eeh lazima watu wazime simu

.....

Mimi siongeangi bila

.....

(LAUGHS)kesho utapata hii ii (LAUGHS) hee hee (LAUGHS) ukifikiria ulikuwa unasaidia watu

.....

Ujipate uko kwa shida tena ingine

.....

Mtu ameenda kukuseti

.....

Ama nyinyi niwa kuseti”

102. At page 4 the 1<sup>st</sup> accused complained against Philip Kilonzo (Pw-1) explanation that he had brought less money and stated:

kama haiko vile tulisema

....

Hata hakuna haja ya kuchukua maanake chairman nimemwambia

.....

Naenda kuchukua this amount

.....

Nimemwambia

.....

nimemwambia hata huyu tunaenda kuchukua two eighty .....

Sasa nikianza kuipeleka nusu

.....

Nitaenda kumwambia nini na kitu yote tunaongea na wewe”

103. The conversation ended at page 11 with the money changing hands under the following talk amongst the accused persons and the complainants:

Njuguna: next week



Philip: eeh sawa  
 Njuguna: patia tu Irush  
 Philip: nipatie Irush eeh? (pause) kuna document zingine zangu  
 Irungu:mm  
 Philip: iko sawa  
 Elijah: si iko poa?  
 Irungu: sawa  
 Philip:chonjo? Poa  
 Njuguna: Mheshimiwa pia, eeh  
 Philip:poa  
 Elijah: sawa”

104. In Michael Waweru Ndegwa v Republic [2016] eKLR, the ingredients for the offence of receiving a benefit were spelt as follows:

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.”

105. The accused persons and Morris Gari (Pw-7) were arrested at Ankara Restaurant by James Wachira Ikua (pw-6) on the spot. Sofia Nyambu (Pw-6) witnessed the arrest of the 1<sup>st</sup> accused and the recovery of the treated money. She collected hand swabs of the Morris Gari [PW-7] and the accused persons. The report from the Deputy Government Chemist (Pw-4) returned a positive finding that Morris Gari [Pw-7] and the accused persons hand swabs were contaminated with APQ powder. Philip Kilonzo (Pw-2) testified that he passed the envelope containing the money to the 2<sup>nd</sup> accused to hand over to the 1<sup>st</sup> accused. In the end James Wachira (Pw-6) recovered the treated money supplied by EACC from the 1<sup>st</sup> accused person.

### **Entrapment**

106. The gravity of the decision Mohamed Koriow Nur v Attorney General [2011] eKLR regarding the illegality of entrapment as a method of investigation cannot be ignored. However, the facts of this case are clear that the EACC investigators did not instigate nor procure the commission of the offence in counts II & III. There is evidence the investigators were moved by the independent formal complaint lodged on 13<sup>th</sup> August 2014 by Elijah(Pw-1) and Philip(Pw-2). It is with respect that I hold, the facts of Mohamed Koriow Nur V Attorney General [2011] eKLR are distinguished from the present case. In Nur case a state agent planned and induced the petitioner to commit the crime unlike in the present case where the 1<sup>st</sup> accused made a request for a bribe and proceeded to collect the same while accompanied by the 2<sup>nd</sup> accused. In Lydia Lubanga v Inspector General of Police & 4 others [2016] eKLR which bears similar circumstances as this case, Nyamweya, J. distinguished lawful undercover investigations and entrapment in the following passage:

However, a distinction needs to be made between legitimate undercover investigation as accepted methods of police investigation and entrapment. The Court has defined entrapment as a situation where the officers involved whether members of the security forces



or persons acting on their instructions do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is to provide evidence and institute a prosecution.”

107. The learned Judge went on to state:

In the present Petition the Respondents claim that the Petitioner had already solicited the money that she describes as a gift, and that they acted upon a complaint made by the person who was to provide the said gift. The Respondents have in addition identified the provisions of the law that create possible offences arising from the Petitioner’s conduct namely section 14 of the *Leadership and Integrity Act* and section 50 of the *Anti-Corruption and Economic Crimes Act* 2003. The Petitioner admits to knowing and receiving the said money from the said complainant, but alleges that it was not solicited but was a token of appreciation for a successful land transaction she had completed. In the circumstances I do not find that there was any entrapment of the Petitioner, given that she has indicated that she was a willing participant in receiving the money that is the subject matter of the criminal charges that have been instituted against her, and therefore had an intention of receiving the same. All the Respondents did in the circumstances that are said to constitute entrapment was to document the receipt of the said money, and they did not lure, incite or instigate the Petitioner in any manner to receive the said money.”

108. The totality of the evidence analyzed above is that the 1<sup>st</sup> accused denial of the charge in count III is dislodged by consistent and direct evidence. Considering the recorded conversation and the overall conduct of the 1<sup>st</sup> accused, it is logical and reasonable that he had the disposition to commit the offences in Counts II & III. The 1<sup>st</sup> accused on 14<sup>th</sup> August 2014 held a lengthy conversation with the complainants on two occasions. It is evident that he negotiated the bribe money to kshs. 280,000/= . On the same day in the afternoon the 1<sup>st</sup> accused while accompanied by the 2<sup>nd</sup> accused met with the complainant at Ankara Restaurant ready to receive the bribe money. The investigating method involving recording of the conversation and treating of the money with APQ chemical are justified in the circumstances of this case. It is the finding of this court that the instant case was not based on entrapment and the arrest and prosecution of the 1<sup>st</sup> accused person was lawful.

109. This brings me to the submissions that the 1<sup>st</sup> accused rights were violated. I find that, without any evidence to support the existence of entrapment the allegation is misplaced and has no merit. From the chain of events, the 1<sup>st</sup> accused was caught red-handed with the treated money which sealed a strong case for the offences in counts II & III against him.

### **Receiving a bribe without soliciting**

110. It is the contention of the 2<sup>nd</sup> accused that he only accompanied the 1<sup>st</sup> accused to Ankara Restaurant for lunch. Mr Okatch submitted that the charge of receiving kshs. 140,000/= was untenable against the 2<sup>nd</sup> accused. In the absence of evidence that the 2<sup>nd</sup> accused solicited for money from the complainants this court is left with the evidence by Philip Kilonzo (Pw-1) and James Wachira (Pw-6) that the envelope containing the treated money was passed to him to hand over to the 1<sup>st</sup> accused.

111. I have taken into account the two authorities cited by Learned counsel Mr. Okatch namely:

Patrick Munguti Nunga v Republic [2013] eKLR. Ong’undi, J expressed herself as follows:



“May I add that receiving money in itself does not disclose any offence. It is the corruptly receiving it as a benefit that is an offence”

112. The Court of Appeal in *Esther Theuri Waruiru & another v Republic* (supra) inter alia questioned whether the appellants could be charged for receiving a bribe without a demand.
113. In *Mary Moraa Angwenyi v Republic* [2018] eKLR, Ong’undi, J resolved the benefit of doubt in favour of the appellant who had not asked for money but was followed by the complaint to her office with treated money.
114. This question of law was the subject of the appeal in *Peninah Kimuyu v Republic* [2014] eKLR. The Court of Appeal at the onset of its judgement expressed the matter in the following terms:

This finding brings into sharp relief the point of law that we are called upon to determine and which finds expression in the appellant’s memorandum of appeal in various formulations: can a person be convicted of an offence of receiving a benefit contrary to Section 39(3) (a) of the Act if gets acquitted of soliciting that very benefit” Put another way, can one be guilty of receiving if he did not solicit under the provision” (Emphasis added)

115. The Court of Appeal in *Peninah Kimuyu v Republic* (supra) finally rendered that:

It seems quite clear to us that Section 39(3) of the Act does not at all create an offence of strict liability. There is no deeming of criminal culpability from the mere fact of receipt of a benefit, itself an often contentious issue as the facts of this case show. It cannot have been the intention of Parliament and it be surmised from a plain reading of the provision, that once it is shown that an accused person had some money on him, then he must have been bribed.

116. Were that the case, nothing would be easier than for sums of money to be conveniently placed within the possession and control of persons who never demanded, solicited or knew about it and thereby secure their automatic conviction on charges of receiving bribes.
117. The conduct proscribed by Section 39(3) (a) is simple to discern from the provision itself:

- “a) A person is guilty of an offence if the person...
- b) corruptly receives or solicits or corruptly agrees to receive or solicit a benefit to which this section applies.” (our emphasis)

The receipt must be corrupt to be criminal. It is upon the prosecution to establish every element of the offence and for this particular one it must be shown that where a person did receive a benefit, he did so corruptly. That is why the element of bribery has to be established and the way to go about it, where a person is charged with both a solicitation and receipt in a single transaction must be by a demonstration that what was received had been solicited or demanded and then given as an inducement for the doing or not doing of something in relation to the affairs of the accused person’s Principal, in this case the Kenya Police. It must follow that if that essential connection is not made, (or it is merely alleged but not proved) between the receipt and a prior demand or solicitation, the element of corruption in the receipt remains unfulfilled and so there cannot be a valid conviction entered. The situation would be different of course, where the receiving is not tied to the charge of solicitation which case other evidence of corruption in the receiving would suffice.”



118. Philip Kilonzo (PW-2) is the key prosecution witness in respect of the charge of corruptly receiving a benefit the subject of count III. He had possession of the treated money secured in the envelopes produced as exhibit no. 6(a) and (b). In evidence at page 72 of the proceedings he testified:

Mbithi told us to meet Njuguna and give him the money in the small envelope. I carried the money. We were back to Ankara Hotel. We were accompanied by officers from EACC- Mbithi, Nyambu, Wachira and others who I do not remember. Mr. Njuguna and the 2<sup>nd</sup> accused Samuel Irungu came. I gave the money to Mr. Njuguna then they were arrested. The 2<sup>nd</sup> accused is Irungu. He was the area MCA for our ward- Komarock ward. I knew him. He just came with the 1<sup>st</sup> accused. The EACC officers told us to scratch our heads after giving the money as a signal that the deal was done.”

119. At page 73 PW-2 continued:

Another man came initially we were four. I don't recall that other man. He had just entered the hotel and said hi to us. He knew both accused persons. He greeted them and greeted us but he did not introduce himself. It is then that I had scratched my head the EACC officers arrested both suspects. The money had been given to Njuguna.

Mr. Irungu did not talk”

120. On cross-examination PW-2 at page 90 stated:

At Ankara Restaurant, I gave the envelope to the 2<sup>nd</sup> accused person. I gave one envelope the small one and remained with 2 envelopes.”

121. On the same page PW-2 stated:

When I gave the envelope, I put it on the table and stood up to go. I did not give it to the 3<sup>rd</sup> MCA who was released. He was concerned to know what was there. The envelope was received by the 2<sup>nd</sup> accused person temporarily and.... I saw his hand trying to reach it. Both he and the other MCA who was released went for it.”

122. James Wachira (Pw-6) recovered the treated money. At page 146 of the proceedings he stated:

As they talked I saw the complainant Philip Kioko hand over a khaki envelope to Njuguna Mwangi. Samuel Irungu is the 2<sup>nd</sup> accused in the dock....

I recovered the trap money from Njuguna Mwangi when we had identified ourselves, the suspect had stood up. Gari had started shouting saying that he was not aware of what was happening and that he was just coming to the hotel to relieve himself. I handed over the treated money to my colleague. It was in an envelope

Njuguna Mwangi was just holding the envelope. I handed it to Mr Musi to confirm the same from the photocopied money we had carried.

I can recall the envelope I handed over. It was an A5 khaki envelope. It was indicated as the envelope recovered from Njuguna Mwangi to James Wachira. It is this one [PMFI-6(A)]. The envelope had the cash.”



123. At page 168 Pw-6 repeats:

I recovered from Njuguna Mwangi an A5 envelope. It had the treated money. I have it. It is kshs. 140,000/= [PMF-4]. I handed it over to my colleague Juma Musi to compare with the photocopied money we had at the office...”

124. The foregoing manifests that the 2<sup>nd</sup> accused and Gari(Pw-7) at some point briefly touched the A5 envelope containing the treated money (p. exhibit 6(a)) either while the envelope was placed on the table or when it was passed by Philip Kilonzo (Pw-2). It is evident that the envelope and the money finally settled with the 1<sup>st</sup> accused.

125. The facts of the present case as regards the 2<sup>nd</sup> accused involvement in receiving the envelope containing the treated money are distinguished from Michael Waweru Ndengwa v Republic [2016] eKLR, where the appellant demanded, received and counted the money.

126. Taking all this evidence and the law into account, I am inclined to entertain doubt in my mind; whether the 2<sup>nd</sup> accused in the circumstances had conceived the intention to ‘corruptly receive a benefit’. In effect, this court is bound to take the ‘path of caution’ so as to ensure that an innocent man is not condemned without full-proof evidence and shall therefore grants the 2<sup>nd</sup> accused the benefit of doubt. I must agree with Mativo, J words in Elizabeth Waithiegeni Gatimu v Republic (supra) that the 2<sup>nd</sup> accused is entitled to the benefit of doubt as of right but not as a show of grace.

### **Disposition**

127. In conclusion, having carefully evaluated the evidence on record, the submissions and the relevant law, I thus arrive at the following conclusion:

1. I hold that the prosecution adduced overwhelming evidence and has established beyond any reasonable doubt the charge in Counts II as against the 1<sup>st</sup> accused, Njuguna Mwangi. Accordingly, I find the 1<sup>st</sup> accused guilty and convict him as stipulated in section 215 of the Criminal Procedure Code, Cap 75 laws of Kenya.
2. That there is sufficient evidence and the prosecution has proved beyond any reasonable doubt the charge in Counts III as against the 1<sup>st</sup> accused, Njuguna Mwangi. As such I find the 1<sup>st</sup> accused guilty and convict him pursuant to section 215 of the Criminal Procedure Code, Cap 75 laws of Kenya.
3. That the prosecution has failed to establish the charge in count III as against the 2<sup>nd</sup> accused, Samuel Irungu Mwangi. Therefore, the 2<sup>nd</sup> accused is found not guilty and is hereby acquitted in accordance with section 215 of the Criminal Procedure Code, Cap 75 laws of Kenya. He shall be set at liberty forthwith unless otherwise law fully held.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF AUGUST 2021**

**THOMAS T. NZYOKI**

**CHIEF MAGISTRATE**

In the presence of:

Court Assistant: Mercy Nyabuto

Prosecution Counsel: H. Mutella



1<sup>st</sup> Accused: present

2<sup>nd</sup> accused: present

Defence advocates: Mr. Munene for the 1<sup>st</sup> accused

Mr. Arusei & Miss Kinget for the 1<sup>st</sup> accused

Mr. Wamukoya holding brief for Mr. Okatch for the 2<sup>nd</sup> accused.

