



**Republic v Njoroge (Anti-Corruption Case 16 of 2019) [2020] KEMC 5 (KLR)  
(Anti-Corruption and Economic Crimes) (9 January 2020) (Judgment)**

*Republic v Caroline Wanjiku Njoroge [2020] eKLR*

Neutral citation: [2020] KEMC 5 (KLR)

**REPUBLIC OF KENYA  
IN THE ANTI-CORRUPTION MAGISTRATE'S COURT  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
ANTI-CORRUPTION CASE 16 OF 2019**

**EK NYUTU, SPM**

**JANUARY 9, 2020**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**CAROLINE WANJIKU NJOROGE ..... ACCUSED**

**JUDGMENT**

1. The accused person is charged with receiving a bribe contrary to section 6(1) as read with section 18(1) of the *Bribery Act*. The particulars of the offence are that on the 1<sup>st</sup> day of March 2017, at State Law Offices, Sheria House in Nairobi City County, within the Republic of Kenya, being a person employed by a public body, to wit, Public Trustee as Clerical Officer, requested for a financial advantage of Ksh 7,000 from Doris Nyamonge Bundi with intent that, in consequence, you would facilitate processing of her late husband's savings, a matter relating to the affairs of the said public body.
2. On the second count, the accused person is charged with receiving a bribe contrary to section 6(1) as read with section 18(1) of the *Bribery Act*. The particulars of the offence are that on the 8<sup>th</sup> day of March 2017, at State Law Offices, Sheria House in Nairobi City County, within the Republic of Kenya, being a person employed by a public body, to wit, Public Trustee as Clerical Officer, requested for a financial advantage of Ksh 5,000 from Doris Nyamonge Bundi with intent that, in consequence, you would facilitate processing of her late husband's savings, a matter relating to the affairs of the said public body.
3. On the third count, the accused person is charged with receiving a bribe contrary to section 6(1) as read with section 18(1) of the *Bribery Act*. The particulars of the offence are that on the 8<sup>th</sup> day of March 2017, at State Law Offices, Sheria House in Nairobi City County, within the Republic of Kenya, being



a person employed by a public body, to wit, Public Trustee as Clerical Officer, improperly received a financial advantage of Ksh 5,000 from Doris Nyamonge Bundi with intent that, in consequence, you would facilitate processing of her late husband's savings, a matter relating to the affairs of the said public body.

#### **THE PROSECUTION CASE**

4. The prosecution called a total of 9 witnesses whose evidence is summarised as hereunder:
5. PW1, Doris Nyamonge Bundi is the complainant herein. Her testimony is that she lost her husband in an accident in the year 2014. He had some savings at the Thika Branch of Equity Bank. The bank informed her that she could only access the money by making a claim at the office of the public trustee. In the year 2016, the complainant commenced the procedures at the office of the Public Trustee by making the relevant application and providing the requisite documents. On 21<sup>st</sup> January, 2017, she was informed by the accused, who was an officer serving her at the office of the Public Trustee, that the process was complete. According to the complainant, the accused requested her to give her Ksh 7,000 so as to prepare a cheque for her. The complainant informed the accused that she did not have that money and that in fact she was having difficulty paying rent and school fees for her children. The accused insisted that the complainant go home and look for the money.
6. When she got out of the office, she met with a man who became concerned when he saw her crying. She explained her predicament to him and he offered to escort her to the Ethics and Anti-corruption commission (herein after to be referred to as EACC) to report the incident. At the EACC, the complainant was given trap money in the amount of Ksh 5,000 in the form of Ksh 1,000 currency denomination. The same was first photocopied and the serial numbers of the notes recorded in an inventory which the complainant duly signed. It was thereafter treated and placed in a half-cut khaki envelope before being handed over to the complainant. she was made to sign on the inner part of the half-cut envelope before the treated money was put inside. The complainant was accompanied by EACC officers to the office of the Public Trustee which is situated on the 3<sup>rd</sup> floor of Sheria house at Nairobi.
7. When she arrived at the office of the accused, the accused asked her in Swahili “umepata ile kitu?” meaning “have you found the thing?” The complainant told the accused that she had “it” and proceeded to hand over the treated money to the accused. The accused then instructed the complainant to sit at the waiting area. It is at that point that the complainant signalled the EACC officers who had been watching the proceedings covertly. They entered into the office of the accused person and recovered the trap money that the accused had received from the complainant.
8. On cross examination, the complainant stated that she first met the accused person at the office of the public trustee on 21<sup>st</sup> January, 2017 and that the accused had been assigned to handle her case. According to the complainant, the accused first requested for Ksh6,000 on that day of 21<sup>st</sup> January, 2017. The complainant could not recall the date she next met the accused. However, upon her mind being refreshed by being shown here witness statement by counsel for the accused, the complainant stated that she first met the accused on 15<sup>th</sup> January 2017 and again on 1<sup>st</sup> March, 2017.
9. PW2, Titus Ng'ang'a Ngugi is a public officer working at the office of Attorney General, department of justice, Sheria house building at Nairobi. He is charged with the preparation of distribution accounts. His testimony is that sometime in the year 2017 a certain person who was in the company of others, introduced himself as an officer from EACC and informed him that they had recovered Ksh 5,000 in drawer that was next to his colleague, the accused person herein. PW2 was shown the money which was



- in the form of Ksh 1,000 currency denomination. An inventory of the same was prepared and PW2 was asked to sign on the same.
10. According to PW2, he had worked with the accused for a period of 6 years at the time of the alleged offence. She was an action officer in his section and he had assigned the complainant's file to her for action as he was her supervisor. The file had been brought to him for verification of the details during the initial stages. According to PW2, the file was at the state of execution of discharge before it could move to the payment stage.
  11. On cross examination, PW2 stated that the sitting arrangement at the public trustee office is an open plan layout. The officers sit on a 4-way desk with 4 sitting areas portioned by a divider running across the desks. Each client is served by individual action officer assigned to them. PW2 further stated that the officer who neighbours the desk of the accused person was not present on the material date of the arrest. PW2 was sitting on a separate desk on that material day. PW2 also stated that on 8<sup>th</sup> March, 2017 there was a consent form that was signed by the complainant which he (PW2) signed in witness thereof. The complainant's file was in the final stages of releasing the money to her.
  12. PW3, Samuel Mukundi Njiru is an investigator at EACC. His testimony is that on 8<sup>th</sup> March, 2017 he was approached by his colleague Wachira who requested for his assistance in the investigation of this present case. PW3 learnt from Wachira that the complainant had reported that a clerical officer at the office of the Public Trustee, Sheria house, had demanded for a bribe of Ksh 5,000 from her so as to facilitate the processing of the complainant's late husband's benefits amounting to Ksh 143,908.
  13. PW3 was present when trap money was shown to the complainant and thereafter treated by his colleague Nyagara. He was also present when the complainant was given instructions on how to handle the treated money. PW3 further witnessed as the complainant was inducted on the use of audio and audio-visual gadgets by his colleague Wachira. PW3 participated in accompanying the complainant to office of the public trustee where he and his colleagues took strategic positions. Since the office had transparent partitioning, PW3 saw the complainant enter into the accused person's office. They spoke and thereafter the complainant handed over the treated money to the accused. PW3 and his colleagues thereafter entered into the office of the accused and introduced themselves. His colleague by the name Zilpa wore clean disposable gloves and took swabs from both hands of the accused person. PW3 wore gloves and recovered Ksh 5,000 all in denomination of Ksh 1,000 currency notes from the left-hand side drawer of the accused persons desk. PW3, wore another pair of clean gloves and using cotton wool, took swabs of the drawer where the treated money was recovered in the left-hand side of the accused's desk. PW3's colleague Bernard Juma prepared an inventory of the recovered money which PW3 signed.
  14. PW4, Juma Benard Angwenyi is an investigator at the EACC where he has worked for 7 years. his testimony is that in the year 2017, he was approached by his colleague Wachira to form part of the operation team in the investigation of the case reported by the complainant herein. He was among the EACC officers who accompanied the complainant to Sheria house. He positioned himself strategically and had a clear view of the complainant and the accused as the office of the accused had transparent partitioning. PW4 saw the complainant handing over the treated money to the accused. It is after this action that they advanced towards the accused's desk. His fellow colleague, Mukundi introduced the EACC team to the accused. Mukundi then wore gloves and proceeded to recover the treated money amounting to Ksh 5,000 from the right-side drawer of the desk where the accused was sitting. His other colleague Zilpa took swabs of the accused's hands. PW4 prepared an inventory of the recovered money which he also signed. The accused was thereafter escorted to the EACC office for processing.
  15. PW5, Dennis Owino Onyango is an analyst and the government chemist department. He holds a Bachelor degree of science in Chemistry and Biochemistry from Jomo Kenyatta University of



Agriculture and Technology. He is also gazetted as a government chemist analyst vide gazette notice 6934 dated 12<sup>th</sup> July, 2007.

16. His testimony is that on 21<sup>st</sup> March, 2007 he received an exhibit memo from EACC under the escort of one Joseph Wachira. The memo was accompanying the following exhibits:
  - A. Khaki envelope containing Ksh 5,000
  - B. Envelope containing right hand cotton swab of one Caroline Wanjiku Njoroge
  - C. Envelope containing left hand cotton swab of one Caroline Wanjiku Njoroge
  - D. Envelope containing a swab obtained from right hand side table drawer from public trustee office, Sheria house
  - E. Envelope containing half-cut brown envelope
  - F. Envelope containing a control sample of APQ powder on a cotton swab
17. It was required to ascertain whether the contents of the control sample marked F could be detected in exhibits A, B, C, D and E.
18. PW5, carried out the examination and analysis and found that exhibit F contained a mixture of the following chemicals:
  - i. Anthracene
  - ii. Phenolphthalein
  - iii. Quinine
19. PW5 examined the exhibits marked A to E and found that they had contents of the powder APQ. He prepared a report to that effect which he presented to the court as evidence.
20. PW6, Zilpa Awouri Jagongo, is an investigator at the EACC. She was among the team members that carried out the sting operation upon request by her colleague Wachira. She witnessed, through the transparent partitioning, the complainant handing over the trap money to the accused. It is PW6 who took the swabs of both hands of the accused person. She produced the same before the court as evidence. PW6 also witnessed the recovery of the trap money from the right-hand side drawer of the accused's desk. She also appended her signature on the inventory prepared by PW4.
21. PW7, John Otieno Nyagara is an investigator at EACC. He is the one that was tasked with treating the trap money with a chemical commonly known as APQ. Before doing so, he photocopied the notes, namely Ksh 5,000 in denomination of Ksh 1,000 notes and prepared an inventory of the same. He showed the notes and the inventory to the complainant who after confirming that they were tallying signed on the inventory. PW7 put the treated notes in a half-cut envelope. He instructed the complainant not to touch the money before confirming the demand from the suspect. PW7 produced the inventory, the photocopy of currency notes, the currency notes and the half-cut envelope as evidence.
22. PW8, Alex Kinyanjui is a digital forensic analyst at EACC. On 9<sup>th</sup> March, 2017 he received from one Wachira a mobile phone make Sony Xperia C2005 with instructions to extract the same. PW8 carried out an extraction and prepared a report of the same. According to PW8 the extraction report contains the call logs which he produced in court as evidence.



23. On cross examination, PW8 clarified that he only dealt with the handset and not the mobile service provider. He also stated that the mobile number that was used in making the outgoing calls is not indicated.
24. PW9, Joseph Nelson Wachira is an investigator at EACC. He was assigned to investigate the case at hand. He recorded the complainant's statement on 6<sup>th</sup> March, 2017 where she stated that the accused person had made a demand for a bribe of Ksh 7,000 so as to process her (complainant) deceased husband's savings through the office of the Public Trustee. The amount was however negotiated downwards to Ksh 5,000.
25. PW9 introduced the complainant to a team comprising of his colleagues namely PW3, PW4 and PW6 that were tasked with the sting operation. PW9 inducted the complainant on the use of audio and audio-visual devices. PW7 prepared an inventory of the trap money which the complainant signed. She was given instructions on how to handle the treated money before they all proceeded to Sheria house where the investigators took strategic positions. PW9 had a clear view of the inside of the accused's office as it had a transparent partitioning. PW9 instructed the complainant to give a signal once she had handed over the money to the accused person, After the signal was given, PW9 and his colleagues advanced to the office of the accused person and PW3 introduced the entire team to the accused. PW6 took swabs of the accused's hands while PW3 recovered the trap money from the right-hand drawer of the accused's desk. PW9 asked the accused who her supervisor was and she showed them one Titus Ng'ang'a (PW2). PW2 who was present during the preparation of the inventory of the recovered money signed on the same as a witness. PW9 investigated the M-pesa record of the accused but did not make any unusual finding. He sought and obtained the order to investigate the said account vide miscellaneous criminal application number 718 of 2017.
26. By the close of the prosecution case, the following evidence was produced in court:
  1. Inventory of handing over gadget/money dated 8<sup>th</sup> March, 2017
  2.
    - [a] Ksh 1000 currency note serial number CZ4330662
    - (b) Ksh 1000 currency note serial number DQ2932465
    - (c) Ksh 1000 currency note serial number DF6053752
    - (d) Ksh 1000 currency note serial number EG2030194
    - (e) Ksh 1000 currency note serial number EE1930330
  3. Half cut khaki envelope signed by the complainant on 8<sup>th</sup> March, 2017
  4. Photocopy of the currency notes in (2) above dated 8<sup>th</sup> March 2017
  5. Consent form from the office of public trustee
  6. Inventory of recovered trap money
  7.
    - [a] Right hand swab of Caroline Wanjiku Njoroge
    - (b) Left hand swab of Caroline Wanjiku Njoroge
    - (c) swab from right hand side table drawer from Public Trustee office Sheria house



- (d) control sample of APQ powder on a cotton swab
8. Exhibit memo to the government chemist form dated 21<sup>st</sup> March 2017
  9. Government analyst report dated 19<sup>th</sup> April 2017
  10. Exhibit memo form to EACC forensic laboratory dated 9<sup>th</sup> March, 2017
  11. Extraction report in respect of extraction carried out by PW8
  12. Application in miscellaneous criminal application number 718 of 2017
  13. Letter from the office of the Attorney General dated 21<sup>st</sup> March, 2017
  14. Letter of offer of appointment dated 9<sup>th</sup> February, 2008
  15. Letter of appointment dated 29<sup>th</sup> August, 2008
  16. Letter of confirmation of appointment dated 13<sup>th</sup> October, 2009
  17. Data capture form for bank account record in respect of the accused herein.

### **THE DEFENCE CASE**

27. In her defence, the accused person Caroline Wanjiku Njoroge (DW1) gave a sworn statement and called one witness.
28. The accused stated that she works as a supervisor in the office of Public Trustee under the office of the Attorney General. She stated that the complainant is known to her as she had visited the office of the Public Trustee in pursuit of her deceased husband's funds. According to her testimony, a client is required to come with a death certificate to claim the benefits of a deceased person. The matter is thereafter gazetted. A letter is then written to the Deputy County Commissioner to furnish the office of the Public Trustee with a list of heirs to the estate of the deceased. If there is money in the bank, a letter is also written to the bank requesting them to forward the money to the public trustee. After the cheque is brought from the bank, a receipt is issued and filed. A summary certificate is thereafter prepared.
29. Before a file goes to the final accounts section where the accused worked, it is first handled by the registry and the legal section. The complainant's file was forwarded to the accused on 2<sup>nd</sup> March, 2017 whereupon she did the accounts. According to the accused, she first saw the complainant on 8<sup>th</sup> March, 2017. Ordinarily, a client starts from the registry where they fill a service order form. The registry staff check the service order form and identify the person who has been dealing with the particular file. Since the accused is the one that had been assigned the complainant's file, the complainant was directed to her by the registry staff. She came directly where the accused was sitting and handed over to her the service order form. The accused took the document and shook the complainant's hand before inviting her to sit down on the accused's left side.
30. The accused retrieved the file from the file storage and proceeded to explain to the complainant the account which is a summary of the amount, the deductions and the interest earned. The complainant thereafter signed a discharge form and a long certificate. On being asked if she was comfortable being paid via M-pesa she consented. It is at that point that the accused rose from her desk to go and fetch the M-pesa form that the complainant was required to sign. Upon returning to her desk, she saw people and there was a commotion.



31. It is the testimony of the accused that on the material date of her arrest, the complainant had been sitting on the left side of the accused's desk and she is the one that had access to the left side drawer. It is further her testimony that she (the accused) does not use the left side drawer. The money in question was recovered from the left drawer and it was inside an envelope. The accused never touched the money. The accused denied having demanded for any money from the complainant nor having any meeting with her to discuss money. The accused further stated that she had never met the accused prior to 8<sup>th</sup> March, 2017.
32. The accused further denied having signed any document to show that she had surrendered her mobile phone to the investigating officer.
33. The accused produced the following documents in her defence:
  1. Statement of account in respect of Doris Nyamonge Bundi
  2. Discharge form
  3. Letter dated 27<sup>th</sup> September, 2019 written by Manegene & Co. advocates and addressed to the Public Trustee requesting the office to supply the original file that is the subject matter of this case.
  4. Letter dated 11<sup>th</sup> October 2019 from the Public Trustee to the Manegene & Co advocates attaching the certified contents of the file
  5. Contents of the file in Public Trustee Administration Cause No. 47 of 2016 in respect of Justine Nyarogi Makori.
  6. Cash bail receipt No. 1013908 issued by EACC on 23<sup>rd</sup> October, 2017
34. DW2, Joyce Anyango Ondoro is a clerical officer at the Public Trustee office and a colleague of the accused person herein. Her testimony is that on 8<sup>th</sup> March, 2017 she was sitting in the office on the opposite side of the accused when a client walked in and sat at the desk next to the accused. According to DW2, the desk is normally not occupied by any officer. The accused and the client talked for a moment and then the accused rose up to go and pick a document. It is at that moment that DW2 saw the client put an envelope on the left-hand side of the accused's drawer. When the accused person returned to her desk, a group of people entered the office and there was a commotion. They asked the accused person for the envelope. One of the people in the group retrieved the envelope from a drawer. The people asked the accused where her boss was and she pointed to Titus. Titus was called and the envelope opened and money retrieved from it in his presence.
35. It is the testimony of DW2 that she did not see the accused person receiving money from the client and neither did she see the accused touching the envelope.

## **PROSECUTION SUBMISSIONS**

36. I have perused the submissions filed by the prosecution. They have relied on the case of Michael Waweru Ndegwa vs. Republic Criminal Appeal No. 290 of 2010 (2016) eKLR the High Court in Nyeri stated that in order to constitute an offence of solicitation 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 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.



## DEFENCE SUBMISSIONS

37. The defence has submitted that count 1 of the charge has not been proved on the ground of contradictions on the date of the offence and the amount that was purportedly demanded from the complainant. It has further been submitted that count 2 has not been proved on the ground of contradiction on the amount alleged to have been requested from the complainant.
38. On the issue of the envelope containing the treated money, it is the contention of the defence that the same was not sealed and therefore the APQ chemical could have leaked onto the complainant's hand and thereafter found its way onto the accused hands.
39. The defence has also submitted that there is a contradiction on the date that the complainant alleges to have reported the matter to EACC.
40. On the issue of the call logs, it has been submitted by the defence that the same do not show the number of the accused person and therefore there is no nexus between the call log and the accused person.

## THE LAW

41. Section 6 of the *Bribery Act* defines the offence of receiving a bribe as hereunder:
  1. A person commits the offence of receiving a bribe if —
    - a. the person requests, agrees to receive or receives a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly whether by that person receiving the bribe or by another person;
    - b. the recipient of the bribe requests for, agrees to receive or accepts a financial or other advantage and the request, agreement or acceptance itself constitutes the improper performance by the recipient of a bribe of a relevant function or activity.
    - c. in anticipation of or as a consequence of a person requesting for, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly by that person, or by another person at the recipients' request, assent or acquiescence.
  2. For purposes of subsection (1) (a) and (c) it shall not matter—
    - a. if the recipient requests for, agrees to receive or receives or intends to request for, agree to receive or to accept the advantage directly or through a third party; or
    - b. if the advantage is or is intended to be for the benefit of the recipient or another person.
  3. For purpose of subsection (1) it shall not matter whether —
    - a. the recipient is performing the function or activity;
    - b. the person giving the bribe knows or believes that the performance of the function or activity is improper; or
    - c. where a person other than the recipient is performing the function or activity, whether that person knows or believes that the performance of the function or activity is improper.



## ISSUES FOR DETERMINATION

42. In the light of the charges that the accused person is facing, the prosecution must therefore establish the following ingredients:
1. Did the accused person make a request for a financial advantage?
  2. Did the accused person receive a financial advantage?
  3. Was there an intention by the accused to improperly perform a function as a consequence of the request or receipt of the said financial advantage?

## DID THE ACCUSED PERSON MAKE A REQUEST FOR A FINANCIAL ADVANTAGE?

43. COUNT 1 The particulars of the offence on the first count are that on the 1<sup>st</sup> day of March 2017, at State Law Offices, Sheria House in Nairobi City County, within the Republic of Kenya, being a person employed by a public body, to wit, Public Trustee as Clerical Officer, the accused person requested for a financial advantage of Ksh 7,000 from Doris Nyamonge Bundi with intent that, in consequence, she would facilitate processing of the complainant's late husband's savings, a matter relating to the affairs of the said public body.
44. For purposes of proving count 1 it is important that the prosecution prove the aspect of an actual request for money made by the accused person. This aspect of the offence can be deduced from the conduct of the accused before, during and after the offence.
45. It is the testimony of PW1, that she went to the office of the public trustee on 21<sup>st</sup> January 2017 where she met the accused person who informed her that the process was complete and she would be given a cheque. The accused requested PW1 to part with Ksh 7,000 so that the accused person could give her the cheque. It is on this same day that PW1 reported the matter at EACC with the aid of a well-wisher to whom she had narrated her predicament. On cross examination, PW1 reiterated that she first met the accused on 21<sup>st</sup> January, 2017 even though she had been to the office of public trustee a number of times prior to that date. Still on cross examination, and on being shown her witness statement, the accused changed her oral statement and stated that she first met the accused person on 15<sup>th</sup> January, 2017 and again on 1<sup>st</sup> march 2017. She further stated that she reported the matter at EACC on 1<sup>st</sup> of March, 2017. PW1 also stated that it is on 1<sup>st</sup> March, 2017 that the accused requested PW1 to give her Ksh 6,000.
46. According to PW1 when she reported the matter at EACC she was told to return on a Monday as they did not work over the weekends. This clearly shows that the report was made on a Friday. The complainant nevertheless conceded on cross examination that she could not recall the dates clearly
46. In State of U.P.V Naresh & Others SC India Cr. App. No. 674 of 2006, the Supreme Court of India persuasively stated: -
- “In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely errors of memory due to mental disposition such as shock and horror at the time of occurrence.
47. Where omissions amount to a contradiction, creating a serious doubt the truthfulness of the witness and other witnesses also make material improvement while depositing in the court, such evidence cannot be safe to rely upon.



48. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the Prosecution case, should not be made a ground on which the evidence can be rejected in its entirety.”
49. Further in Philip Nzaka Watu Vs. Republic [2016] eKLR the Court of Appeal observed:
- “However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this court, some inconsistencies in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses.
50. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”
51. The Court of Appeal in Joseph Maina Mwangi Vs. Cr. Appeal No. 73 of 1993 held as follows: -
- “In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”
52. The contention by the defence that there is a discrepancy as to the date of the offence in count 1 and the testimony of the complainant can thus be explained by the lapse of time, the infallibility of human recollection, as well as looking at the prosecution evidence in its entirety.
53. The prosecution has produced a call log extracted from the accused person’s mobile phone showing that she communicated with the complainant as shown hereunder:



#	Type	Party	Date	Time	Duration
1	Outgoing to	0702696667	1 <sup>st</sup> March 2017	2.59pm	43 seconds
2	Outgoing to	0702696667	1 <sup>st</sup> March 2017	5.36pm	0 seconds
3	Outgoing to	0702696667	1 <sup>st</sup> March 2017	5.47pm	0 seconds
4	Missed from	0702696667	1 <sup>st</sup> March 2017	6.27pm	0 seconds
5	Missed from	0702696667	1 <sup>st</sup> March 2017	6.41pm	0 seconds
6	Outgoing to	0702696667	1 <sup>st</sup> March 2017	8.00pm	1 min 53 seconds
7	Outgoing to	0702696667	2 <sup>nd</sup> March 2017	5.49pm	45 seconds
8	Outgoing to	0702696667	4 <sup>th</sup> March 2017	9.39am	1 min 33 seconds
9	Incoming from	0702696667	6 <sup>th</sup> March 2017	12.40pm	58 seconds
10	Outgoing to	0702696667	6 <sup>th</sup> March 2017	12.56pm	1 min 54 seconds
11	Outgoing to	0702696667	6 <sup>th</sup> March 2017	4.51pm	49 seconds
12	Outgoing to	0702696667	6 <sup>th</sup> March 2017	6.15pm	0 seconds
13	Outgoing to	0702696667	8 <sup>th</sup> March 2017	10.49am	8 seconds
14	Outgoing to	0702696667	8 <sup>th</sup> March 2017	1.13pm	9 seconds
15	Outgoing to	0702696667	8 <sup>th</sup> March 2017	2.29pm	9 seconds



54. I have confirmed that the number 0702696667 belongs to the complainant as it appears on the Consent to making of payment through M-pesa (produced as P. EXH. 5) that she signed on 8<sup>th</sup> March 2017 when she visited the public trustee office. The same number also appears on the service order forms produced in this court as exhibits produced as D.EXH 5 (h), (i), (j), (t), (s) and (v) respectively. They were filled by the complainant on the various occasions that she visited the office of the public trustee.
55. The contention by the defence that the call log does not disclose the telephone number of the accused person is explained by the evidence of PW8 who is a digital forensic analyst. He is the one who carried out the actual extraction of data from the accused person's mobile phone. The mobile phone was forwarded to him by PW9 through an exhibit memo form dated 9<sup>th</sup> March, 2017 (produced as P.EXH.10).
56. PW9, testified that he personally took possession of the accused person mobile phone make Sony Xperia C2005 IMEI 358099056735699. I have perused the exhibit memo form and noted that the mobile phone was taken from the accused by PW9 at the time of her arrest on 8<sup>th</sup> March, 2017 at Sheria house. PW8 stated that the calls in the call log were made using the mobile handset belonging to the accused person.
57. It is clear from the call log that on 1<sup>st</sup> March, 2017, the accused called the complainant four times the last call having been made at 8.00pm which is way past working hours of a public office. The court takes judicial notice that the office of the public trustee is a public office with working hours of between 8.00am to 5.00pm. There is no demonstration that the nature of work that the accused person was discharging in respect of the complainant's file necessitated making of call past working hours. For this reason, it is safe to make an inference that the calls were to prevail upon the complainant to comply with the request for money made by the accused person based on the circumstantial evidence presented before the court.
58. The Court of Appeal in the case of *Sawe –Vs- Republic* [2003] KLR 364 at page 372 held:
- “In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden, which never shifts to the party accused.”
59. The three tests of circumstantial evidence which are well set out in the case of *Abanga Alias Onyango V. Rep CR. A NO.32 OF 1990(UR)* at page 5 as follows:
- “It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:
- i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
  - ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;



- iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

60. From the foregoing, I find that the 4 phone calls that the accused person made to the complainant with on 1<sup>st</sup> March, 2017, three of which were past working hour, one being as late as 8.00pm point to the guilt of the accused in making a request of a financial advantage. I also find that there is no reasonable hypothesis explaining the said phone calls. Looking at the cumulative evidence of the call log, it is evident that the accused followed up with numerous phone calls to the complainant on 2<sup>nd</sup>, 4<sup>th</sup> and 6<sup>th</sup> March 2017 which fell on Thursday, Saturday and Monday respectively. Similarly, some of these calls were made past working hours and one was on a non-working day. COUNT 2 The particulars of the offence on the second count are that on the 8th day of March 2017, at State Law Offices, Sheria House in Nairobi City County, within the Republic of Kenya, being a person employed by a public body, to wit, Public Trustee as Clerical Officer, the accused person requested for a financial advantage of Ksh 5,000 from Doris Nyamonge Bundi with intent that, in consequence, she would facilitate processing of the complainant’s late husband’s savings, a matter relating to the affairs of the said public body.
61. The complainant stated in her evidence that when she entered into the office where the accused person was stationed, the accused asked her whether she had brought the money. The complainant informed her that she had only managed to raise Ksh. 5,000. It is at that point that she handed over the treated money to the accused person while it was inside the envelope. I am satisfied that the complainant is a credible witness as her testimony has been corroborated by the evidence of the EACC officers namely PW3, PW4, PW6 and PW9 who witnessed the money changing hands through a glass partition where they had a clear view of the accused and the complainant.
62. The prosecution has therefore proved beyond doubt that the accused did make a request for money on 8<sup>th</sup> March, 2017.

#### **DID THE ACCUSED PERSON RECEIVE A FINANCIAL ADVANTAGE?**

63. Evidence has been adduced to show that the accused person did receive the money handed over to her by the complainant at the public trustee office. The complainant stated that on reaching the accused desk, the accused asked her whether she had the “thing”. The complainant answered in the affirmative and proceeded to hand over the money to the accused who took the same. This evidence has been corroborated by PW3, PW4, PW6 and PW9 who had a clear view of the accused office through a glass partition. Each of them, saw the complainant handing over the treated money to the accused. It is at that point that they entered the office and the money recovered by PW3 who stated that he recovered the money on the accused left-hand side of the drawer. And inventory of the recovered money was prepared by PW4. He confirmed that the serial numbers on the notes matched those that were treated and given to the complainant to hand over to the accused. I have looked at the handing over inventory produced as P.EXH 1 as well as the recovery inventory produced as P.EXH.6. I have also looked the photocopy of notes that was done prior to the money being handed over to the complainant (produced as P.EXH.4). I am satisfied that the serial numbers of the notes march in all the three documents mentioned above.
64. PW7 stated that he treated the trap money with APQ chemical. PW3 recovered the treated money from the accused person’s desk drawer and thereafter took swab of the drawer where the money had been. PW6 on the other hand took swabs of the accused person’s hands. These swabs were forwarded to the government chemist where a government analyst, namely PW5 confirmed that APQ was present



in the swabs from the desk and from the accused person's hands. This is therefore a confirmation that the accused person did get hold of the treated money handed to her by the complainant.

65. I am satisfied that the evidence of the witnesses corroborates sufficiently and that indeed the accused person did receive money from the complainant.
66. The contention by the defence that the APQ had leaked from the envelope onto the complainant's hand and therefore accidentally came into contact with the accused is far-fetched as it has been shown by PW7 that he trained the complainant on how to handle the treated money. He specifically warned her against touching the money directly. PW7 thereafter placed the treated money in a half-cut envelope. This evidence by PW7 is corroborated by PW1 who confirmed that she had received some training on how to handle the money with a specific warning not to touch it directly. I am satisfied that the evidence of these two witnesses is credible.
67. Equally far-fetched is the defence contention that the complainant framed the accused with the present offences by placing the envelope containing the treated money in the accused desk drawer. Nothing has come out in the course of the testimonies of witnesses both in their evidence in chief and on cross examination to show that there was any bad blood between the accused and the complainant to warrant a trumped-up charge. It is therefore an afterthought for DW2 to state that she saw the complainant placing an envelope in the desk drawer of the accused as independent evidence as shown that not only did the accused request for money, she actually went ahead to receive it when it was handed to her by the complainant in the clear view of eye witnesses.

**WAS THERE AN INTENTION BY THE ACCUSED TO IMPROPERLY PERFORM A FUNCTION AS A CONSEQUENCE OF THE REQUEST OR RECEIPT OF THE SAID FINANCIAL ADVANTAGE?**

68. The *bribery Act* at section 7 defines a relevant function or activity to which a bribe relates as:
- i. any function of a public nature;
  - ii. any function carried out by a State officer or public officer, pursuant to his or her duties;
  - iii. any function carried out by a foreign public official, pursuant to his or her duties;
  - iv. any activity connected with a business;
  - v. any activity performed in the course of a person's employment, and
  - vi. any activity performed by or on behalf of a body of persons whether corporate or otherwise.
69. Further, the relevant function or activity must meet one or more of the following conditions:
- i. that the person performing the function or activity is expected to perform it in good faith;
  - ii. that the person performing the function or activity is expected to perform it impartially; and
  - iii. that the person performing the function or activity is in a position of trust by virtue of performing it.
70. Proof has been adduced by the prosecution to show that the accused person is a public officer employed as a clerical officer at the state law office. I have seen the letter of appointment dated 29<sup>th</sup> August, 2008 produced as P.EXH. 15.
71. I have also taken judicial notice that the office of the public trustee administers estates of deceased persons where the gross value does not exceed Ksh. 500,000. It is therefore a function of a public nature.



72. PW2 who is an officer at the office of the Public Trustee charged with preparation of distribution accounts. He is also the immediate supervisor of the accused person herein. His testimony is that is the one who allocated the complainant's file to the accused for action. The prosecution has therefore proved that in handling the complainant's file, the accused was doing so pursuant to her duties. It is therefore expected that she would discharge her duties impartially and in good faith. The complainant on the other hand had a reasonable expectation that she would be served efficiently and expeditiously.
73. I have perused the public trustee file No. 47 of 2016 and noted that the complainant instituted the proceedings on 30<sup>th</sup> July, 2015. She was eventually paid her dues on 13<sup>th</sup> March, 2017. The proceedings took 1 year and 7 months. During this period, the complainant visited the public trustee offices a number of times going by the service order forms in the file. I have established that this time was consumed in the normal procedures for such matters and more so in correspondence between the office of the public trustee, the office of the deputy county commissioner, Marani Sub County, Kisii county in establishing the heirs of the deceased estate. The complainant therefore had reasonable expectation that after this lengthy period of time she would be paid her dues at the close of the proceedings. When therefore the accused made a request for money so as to release the payment to the complainant, she breached the reasonable expectation of the complainant who had sought the service of a public office. For this reason, the accused improperly performed a function of a public nature, which she was required to perform in good faith and impartially, pursuant to her duties as a clerical officer at the office of the Public Trustee at the material time relevant to this case.
74. From the foregoing, I find that the prosecution has proved its case beyond reasonable doubt on all the charges against the accused person and I convict her accordingly pursuant to section 215 of the Criminal Procedure Code.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS OF 2019**

**E.K NYUTU**

**SENIOR PRINCIPAL MAGISTRATE**

**MITIGATION**

Beyo – The accused is a first offender.

**E. K. NYUTU**

**SENIOR PRINCIPAL MAGISTRATE**

**9.1.2020**

Court – The court has taken note that the accused is a first offender. The court is also has considered option that there is need for a deterrence sentence so as to serve as a reason for other like minded public officers who are tasked with the onus of serving the members of public.

For this reason, the accused is hereby fined a fine of Kshs.100,000/= in default 12 months imprisonment on each count.

**E. K. NYUTU**

**SENIOR PRINCIPAL MAGISTRATE**

**9.1.2020**

Court – R/A 14 days

**E. K. NYUTU**



**SENIOR PRINCIPAL MAGISTRATE**

**9.1.2020**

Beyo – Pray for cash bail deposited in court by accused and Bail converted to part-fine.

**E. K. NYUTU**

**SENIOR PRINCIPAL MAGISTRATE**

**9.1.2020**

Court – Cash bail deposited to accused vide receipt No.446556 dated 14.6.2019 in the amount of Kshs.60,000/= [Sixty Thousand] is hereby converted as part of the fine.

**E. K. NYUTU**

**SENIOR PRINCIPAL MAGISTRATE**

**9.1.2020**

