



**Republic v Chege (Anti-Corruption Case 5 of 2013) [2020] KEMC 4 (KLR)
(Anti-Corruption and Economic Crimes) (29 May 2020) (Judgment)**

Republic v John Njoroge Chege [2020] eKLR

Neutral citation: [2020] KEMC 4 (KLR)

**REPUBLIC OF KENYA
IN THE ANTI-CORRUPTION MAGISTRATE'S COURT
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION CASE 5 OF 2013**

LN MUGAMBI, CM

MAY 29, 2020

BETWEEN

REPUBLIC PROSECUTOR

AND

JOHN NJOROGE CHEGE ACCUSED

JUDGMENT

1. The accused, John Njoroge Chege was arraigned before this Court on 4th July, 2013 to answer to the following charges:

Count I

2. Corruptly soliciting a benefit contrary to section 39 (3) (a) as read with section 48 (1) of the [Anti-Corruption and Economic Crimes Act](#), No. 3 of 2003.
3. The particulars being that on the 25th day of June, 2013 at Continental House parking yard, within Nairobi County, being a person employed by a public body, to wit, Parliamentary Service Commission, as Member of Parliament Kasarani, corruptly solicited for a benefit of Kshs. 100,000- from Abdirahman Mohamed Abdullahi as an inducement so as to facilitate the payment of Kshs. 3,342,716.77 being Constituency Development Fund Payment for a completed Baba Dogo Secondary School tuition block, a matter relating to the affairs of the said public body.

Count II

4. Corruptly soliciting a benefit contrary to section 39 (3) (a) as read with section 48 (1) of the [Anti-Corruption and Economic Crimes Act](#), No. 3 of 2003.



5. The particulars being that on the 2nd day of July, 2013 at Continental House parking yard, within Nairobi County, being a person employed by a public body, to wit, Parliamentary Service Commission, as Member of Parliament Kasarani, corruptly solicited for a benefit of Kshs. 100,000- from Abdirahman Mohamed Abdullahi as an inducement so as to facilitate the payment of Kshs. 3,342,716.77 being Constituency Development Fund Payment for a completed Baba Dogo Secondary School tuition block, a matter relating to the affairs of the said public body.

Count III

6. Corruptly receiving a benefit contrary to section 39(3) (a) as read with section 48 (1) of the [Anti-Corruption and Economic Crimes Act](#), No. 3 of 2003.
7. The particulars being that on the 3rd day of July, 2013 at Continental House parking yard, within Nairobi County, being a person employed by a public body, to wit, Parliamentary Service Commission, as Member of Parliament Kasarani, corruptly received a benefit of Kshs. 100,000- from Abdirahman Mohamed Abdullahi as an inducement so as to facilitate the payment of Kshs. 3,342,716.77 being Constituency Development Fund Payment for a completed Baba Dogo Secondary School tuition block, a matter relating to the affairs of the said public body.
8. This case came before this Court for retrial following the decision of the High Court in Constitutional Petition Number 21 of 2015. The accused had been acquitted following the termination of the case upon the withdrawal of the complaint under section 204 of the Criminal Procedure Code before the former trial Magistrate, Hon. Peter Ndigwa, Acting SPM. That order of acquittal was reversed by Justice Lenaola of the High Court after a successful Constitutional Petition by the Director of Public Prosecution. The High Court ordered that the case be tried before another Magistrate while maintaining that the matter should be continued from where it had reached. In its orders issued on 16th March, 2016, it decreed:
 - a) I hereby set aside the Learned Trial Magistrate’s decision withdrawing Chief Magistrate Anti-Corruption Case No. 5 of 2013
 - b) I hereby reverse the order for acquittal of the accused Mr. John Chege, the 2nd respondent
 - c) I reinstate the criminal charges in the said case
 - d) Let the case be heard by any Magistrate, other than Hon P.M. Ndwiga with jurisdiction to hear the case where it shall resume where it was stopped by the order of 13th January, 2015 and shall proceed to its logical conclusion...”
9. In compliance with the direction of the High Court that the case continues from where it had reached, this Court took directions under section 200 (3) of the Criminal Procedure Code on 21/2/2017. The accused elected to proceed from where the matter had reached just as had been ordered by the High Court in [the Constitution](#) Petition Number 21 of 2015. He stated:

“...I request that the case proceed from where it reached and call P.W. 2 so that we can start from where we left...”
10. The remainder of the case thus heard by this court.
11. In the year 2012/2013, Abdirahman Mohamed Abdullahi (PW 6) was the Project Manager with Ramagon Construction Company Limited. His main duty was the supervision of the Company’s projects.



12. In November, 2012; Ramagon Construction Company Limited won tender number DWO/KASARANI/CDF/3/2012-2013 for Kshs. 11,819,972 that was awarded by Kasarani Constituency Development Fund (CDF). The tender was for construction of tuition blocks at the Baba Dogo School.
13. Ramagon Construction Company completed the project in May, 2013 as confirmed and it was issued with a certificate of completion dated 31/5/2013- P. exhibit 4 that was signed by the Project Supervisor- J.K. Kariuki and the District Works Officer, Engineer K.D. Wanyoike (PW 1). By the time the project was getting completed, Ramagon already been advanced two payments, to wit, Kshs. 5,747,663.30 paid on 28/2/2013 and the second payment of Kshs. 3,609,915.01 paid on the 3/3/2013.
14. Upon issuance of the completion certificate on 31/5/2013 (P. exhibit 4); Abdirahman (PW 6) begun pursuing the final payment to Ramagon.
15. On 24/6/2013, Engineer K.D. Wanyoike, the District Works Officer wrote a forwarding letter (P. exhibit 1) to the CDF Manager dispatching two payment vouchers constituting the final payment one of which was Kshs. 2, 875, 719.17 (per the voucher, P. exhibit 2) and the other for Kshs. 466,997.60 (per the voucher P. exhibit 3) which was in respect of the retention money. The CDF Manager had in the said letter been requested to process these payments to the contractor and return two copies of the vouchers to the District Works Office.
16. Mr. Abdirahman (PW 6) said he personally went to meet the CDF Manager, Mr. Ntaine (PW 2) at the CDF Offices in Kariobangi on 25/6/2013 and delivered the said documents. During their encounter, Mr. Ntaine (PW 2) advised him to talk to the in-coming Member of Parliament for Kasarani, Hon. John Njoroge Chege over the same. He then gave him the MP's mobile number so that he could call him.

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Abdirahman (PW 6) called Hon John Njoroge Chege at around 2.00 that day and they agreed to meet at the Continental House parking yard.

18. He met him that afternoon as agreed and in his first meeting with John Njoroge Chege (the accused), this is what transpired according to his testimony word for word:

“...I told him about the payment. He then told me to part with some money so that my payment can be processed. He asked for about Kshs. 200,000. I told him I could not raise the money, I required money for my medication because that time I was 2-3 days in hospital. I told him I required money more than he required it. What was concluded was that I go and look for money...I could not imagine I could be asked to pay for work which I had done long time ago. After negotiation, he told me fine, I could go and see him with 100,000 shillings...”
19. Abdirahman said he went and thought about the issue deeply. At the time, he had incurred huge medical bills. He had not paid his doctor and his medical card had run out. He was footing his medical expenses from his own pocket.
20. On 1/7/2013, is when he finally made up his mind to report the matter to Ethics and Integrity Commission (EACC). His case was assigned Mr. Samiji (PW 8).



21. After Mr. Samiji (PW 8) listened to him, he informed him that he needed to ascertain the information he had provided. He thus told him he would have to record his further conversation on that issue with John Njoroge Chege. He stated:

“...Mr. Samiji was giving me the gadget so that he could confirm what I had told him was true...”

22. On 2/7/2013, Mr. Samiji introduced him to a mini-tape recorder (P. exhibit 21) into which was fitted a micro-cassette (P. exhibit 22). He identified the said mini-tape recorder and the micro-cassette by his own signature and the date he put at the time it was handed over to him. He was also inducted on how to operate the micro-tape recorder which he demonstrated before the Court.

23. He left Integrity Centre to go and meet with John Njoroge Chege (the accused). When he called John Njoroge Chege and failed to reach him on phone, he texted him. John Njoroge Chege then responded and told him that they could meet that afternoon at the Continental House. Abdirahman (PW 6) drove to the Continental House and then waited for him at the parking bay.

24. A few minutes later, John Njoroge Chege (accused) joined Mr. Abdirahman (PW 6) in his car. He sat on the front passenger seat. On that day, John Njoroge Chege asked Abdirahman if he had brought the money as well as an additional amount of Kshs. 50,000 for the Committee members. In his own words, he explained this episode as follows:

“...I told him that I did not carry the money with me for I was still looking for it, that is, 100,000 we had agreed upon. For Committee, he was asking for Kshs. 50,000 which he was asking to be paid through a cheque book. The recording gadget was in my pocket and I was recording the conversation... at the end of that meeting, we agreed I bring the money the following day together with the one for the committee...”

25. Abdirahman (PW 6) returned the mini-tape recorder to Mr. Samiji that day at around 4.00 P.M.

26. The following day, the 3rd of July, 2013; he went back to EACC and met with Mr. Samiji who introduced him to another EACC Officer, Sophie Nyambu (PW 7). Sophie Nyambu (PW 7) showed him the Kshs. 100,000 which she then photocopied. They compared the photocopied notes with the serial numbers of the genuine 100,000/- shilling notes that were in 1000/- shilling denomination and confirmed that the serial numbers in the photocopies and the genuine notes tallied. Both PW 6 and Sophie Nyambu appended their signatures on these photocopies. He identified his signature in the photocopies- P. exhibit 20 (i-x) against the date of 3/7/2013. Thereafter, Sophie (PW 7) put the money in small envelope (P. exhibit 10 a) which they both signed on the inner side and also dated 3/7/2013. Sophie (PW 7) then put the Kshs. 100,000 inside and instructed him not to touch it. He then signed the inventory of handing over the money to him- P. exhibit 23. Mr. Samiji re-introduced him to the mini tape recorder and another micro-cassette dated 3/7/2013 which he and Mr. Samiji again signed before it was inserted into the tape recorder.

27. He then went to meet the MP, John Njoroge Chege at Continental House as they had previously agreed. Mr. Samiji and some EACC Officers trailed him.

28. He called the MP, John Njoroge Chege who informed him that he was in Parliament but was going to call him shortly. At around noon, the MP, John Njoroge Chege (accused) emerged. He joined Abdirahman (PW 6) in his car and sat next to him. John Njoroge Chege (accused) then asked him to clear with him. He thus handed over the Kshs. 100,000/- which the complainant asked him to count. He counted and confirmed the amount. He then slid the money into his coat.



29. The accused then asked him to find the money for the Committee and shortly thereafter called the CDF Manager to give him instructions on processing of payments. That is when Abdirahman (PW 6) beeped Samiji to come and arrest the accused. He narrated:

“...We discussed money for the Committee and if I was interested in other works in the constituency, I should consult him. He asked me to prepare Kshs. 50,000 for the Committee. After that he called the CDF Funds Manager, Ole Ntaine to process my payments. I beeped Samiji who was behind the car to come and arrest the Member of Parliament...”

30. At that juncture, Abdirahman (PW 6) returned the envelope and the mini-tape recorder to Mr. Samiji. He was afterwards invited to EACC to confirm the contents of the transcript which he signed after listening to the conversation of 2nd and 3rd July, 2013 which was played back to him. He signed the transcript on 8/7/2013- P. exhibit 24.

31. The audio recordings (P. exhibit 22) and (P. exhibit 5) were played in court. He confirmed that they contained the conversation he had with the accused, John Njoroge Chege on the two occasions, that is on 2/7/2013 and 3/7/2013. Among the key highlights in the two conversations which the Prosecutor led him in his evidence in chief to speak about after the recordings were played in Court as follows:

“In the recording of 2/7/2013, P. exhibit 22, reference to a statement in that conversation captured at page 4 of the transcript- P. exhibit 24, the following statement attributed to the accused: ‘Si mimi nilikuwa nafikiria ni mali umeniletea?’

He explained:

“...The Member of Parliament is asking if I brought the money...”

32. On cross-examination by Mr. Wandungi for the accused, he was reminded that on 13/1/2015, he had voluntarily withdrawn the charges against the accused which he admitted. Asked if the DPP had consulted him when his office filed the constitutional petition against the Court’s decision that had allowed his application for the withdrawal, he said the DPP never referred to him. He restated that he swore the affidavit to withdraw the complaint based on his medical condition and religious tenets as the main considerations that made him personally consider terminating the case. He said:

“...One reason was health status. Today I am much better. 2nd were religious tenets...”

33. Asked which religious tenets that contributed to his decision to withdraw the complaint, he said:

“...It was forgiveness...”

34. Asked if it was his decision to come back and testify, he said he came back to testify after the request by the DPP to him testify. He answered:

“...It was voluntary to come and testify after DPP’s request...”

35. Mr. Abdurahi (PW 6) refuted Mr. Wandugi’s suggestion that he was steering the recorded conversation towards ensuring that the accused made statements to implicate himself. He explained:

“...The objective was to confirm what we had discussed the day before...”



36. When he was confronted that the accused did not ask for Kshs. 100,000, he pointed at pg. 4 of transcript, 7th line and responded:
- “...I asked, tumeagana sasa ngapi?” He answers, (Njoroge) “Tuliaganaaa, mia moja”
37. During re-examination he said prior to filing the affidavit seeking to withdraw the charges; he had not consulted with EACC about that intention.
38. Re-affirming that it is the accused who asked him for the money, he also referred to pg. 4, of the transcript, 1st line on the top where the accused had said:
- “Si mimi nilikuwa nafikiria ni mali umeniletea” which he then explained,
- “...Mali was in terms of money for inducement to the Honourable Member...”
39. David Kiboco Wanyoike (PW 1) testified that he was the District Works Engineer with the Ministry of Housing and Urban Development in charge of Kasarani District. His responsibilities included administration and project coordination. He mainly coordinated the team that did the designs, supervision and certification of completed works on behalf of the Ministries and Public funded institutions.
40. He testified that contract number DWO/Kasarani/CDF/2012-2013 involved construction of classrooms and some offices at Baba Dogo Secondary School in Ruaraka which contract was awarded to Ramagon Construction Limited. The client was Kasarani Constituency Development Fund and the beneficiary was Baba Dogo Secondary School.
41. He testified that the contract was completed on 31/5/2013 as per the practical completion certificate (P. exhibit 4) which he issued. Through his letter of 24/6/2013- P. exhibit 1, he forwarded to CDF Manager two payment vouchers that constituted the third payment certificate for processing. These were a voucher for Kshs. 2,875,719.17 (P. exhibit 2) and another which was for Kshs. 466,997.60 (P. exhibit 3) being part payment in respect of the 10% retention money.
42. On cross-examination, he stated that the accused had no role in the payment because that was the responsibility of the CDF office.
43. Douglas Pashet Ntaine (PW 2) was the Fund Account Manager for Kasarani Constituency in the year 2012/2013. After 2013 general election, he became the Fund Account Manager for Roysambu and Ruaraka Constituencies. As the Fund Account Manager, his responsibilities included general administrative duties and advising the Constituency Development Fund Committee.
44. In 2013, the Member of Parliament for Kasarani was John Njoroge Chege (accused) while Roysambu was Ndirangu Waihenya whereas in Ruaraka, it was T.J. Kajwang.
45. He testified that following delimitation of boundaries, Ruaraka Constituency was curved out from the larger Kasarani Constituency. However, before the split, there had been a project at Baba Dogo Secondary School that the former Member of Parliament for Kasarani, Elizabeth Ongoro had begun. Ramagon Construction Company Limited had won the tender whose contract value was around Kshs. 11.8 million. Although the project was in Ruaraka Constituency, there was a direction to the



effect that Constituency Development Projects in the new constituencies were to be managed by the constituencies that had retained the original names. He explained:

“...In this case, the project was in Baba Dogo to be run by new Kasarani Constituency until the old account was closed...”

46. He explained how the payment procedure as follows. The contractor would apply for payment through the CDF Office. * The application would then be forwarded to the Project Manager, who in this case was the Kasarani District Works Officer- Mr. Wanyoike (PW 1). The Project Manager would visit the site, quantify the works and prepare a certificate of payment. * That certificate of payment would have to be forwarded by the Project Manager to the CDF Fund Account Manager. * Constituency Development Fund Committee would then visit the site to confirm the work done. They would meet to approve and minute the decision for payment. * At that point, certificate was now ready to be paid. He testified that he received the certificate of completion dated 31/5/2013-P. exhibit 4 which was forwarded through the letter dated 24/6/2013- P. exhibit 1. Also included were the payment vouchers for the processing of payments. The said documents were from the District Works Officer, Kasarani.
47. He testified that the extra payment came about due to variation/ extra works that was approved in respect to Ramagon. They thus had to seek a re-allocation of funds from another project and this took time to be approved by the CDF Board. That process took time to get the approval and this caused some agitation from Ramagon. Even after approval for the re-allocation of the funds, these funds were not released by the CDF Board immediately.
48. On 3/7/2013, he received a call from the Member of Parliament, John Njoroge Chege (accused) inquiring about the status of payment to Ramagon Construction Company Limited. He explained to him he had received the certificate and also explained the challenges they had faced including the fact that they had obtained approval for re-allocation of funds but had not received the funds.
49. He explained to the Member of Parliament that they could borrow those funds from another project under the old Kasarani Account and reimburse once the CDF Board released the approved funds. He also informed him that it was a requirement that the CDF Committee meet and approve the payments. The Member of Parliament thus advised if the Company had met all the requirements, they should see to it that this issue was addressed.
50. On 5/7/2013, Mr. Samiji summoned Mr. Ntaine (PW 2) to the Integrity Centre where he played some tapes. He could hear the conversation relating to the call that the accused had made to him in the tape-recording.

(ref. to conversation of 3/7/2013-P.exhibit 5). He stated:

“... I was able to recognize the voice of Hon. Member, Hon. John Njoroge Chege. I am not an expert but it sounds like him. It was in respect to a conversation on 3/7/2013...”

51. On cross-examination he stated that the matter that the accused talked to him about that day was procedural. He also stated that during the recording of 3/7/2013, the accused said, “let me call the CDF man, Ntaine’ and from then on, he could hear the questions he had posed to him over the telephone conversation.
52. Corporal Daniel Hamisi no. 69485 (PW 4) told this Court that he was attached to the Safaricom Law Enforcement Liaison Office at the Safaricom Headquarters. His duties included processing of requests from law enforcement agencies requiring assistance in respect of communication data. To facilitate his



- work, he was assigned a user name and a password to enable him access the information required by the law enforcement agencies from Safaricom servers.
53. He produced the authority letter dated 6/6/2017-P. exhibit 14 addressed to the Court from the Safaricom and signed by the Head of Department of Enterprises, Sharon Holi. It indicated he had undergone training on data extraction and analysis and that he was authorized to attend court to testify.
 54. He testified on 9/7/2013 he acted on the EACC's request dated 5/7/2013 whereby information was required on registered users and call data for the period between 3/7/2013 and 6/7/2013 in respect of two Safaricom subscribers, namely number [*****] and [*****]. EACC's letter dated 5/7/2013 was produced as P. exhibit 15.
 55. He extracted the information and found that number [*****] was registered under John Njoroge Chege of identity card number [*****]. Mobile number [*****] was registered under the name of Ntaine Nkere identity card number [*****].
 56. The call records for [*****] for John Njoroge Chege were produced as P. exhibit 16 while those in respect of [*****] for Ntaine Nkere were produced as P. exhibit 17. He testified that on 3/7/2013 at 11:31 a.m., at pg. 15 line 4 of P. exhibit 17, there was an incoming call to Ntaine's number [*****] from John Njoroge's number [*****] which showed the two spoke in a conversation that lasted 134 seconds. In P. exhibit 16, at pg. 18, line 16 from the bottom, the communication on 3/7/2013 was at 11:31:12. There was outgoing call from [*****] to [*****] which indicated that they spoke for 134 seconds.
 57. He produced the certificate under section 65(8) and section 106 (7) of the Evidence Act dated 6/6/2017 as P. exhibit 18.
 58. Sophia Nyambu (PW 7) of Ethics and Anti-Corruption Commission (EACC) testified how the Investigating Officer in this case, Charles Samiji (PW 8) approached her on 3/7/2013 and requested her to treat Kshs. 100,000/- with APQ for a pending operation. The money had been handed over to her by the Investigating Officer. She identified the Kshs. 100,000 in 1000/- shilling denomination by their serial numbers and produced the money in evidence as P. exhibit 7B (1-100). She photocopied that money. She went and compared all the serial numbers of the notes with those in the copies together with Mr. Abdirahman (PW 6). They then both signed and put the date of 3/7/2013 on the copies. She exhibited the said photocopies as P. exhibit 20 (1-10). She prepared the inventory of handing over the money - P. exhibit 23 which both her and Abdirahman M. Abdullahi (PW 6) signed. She put the money in an envelope- P. exhibit 10 (B) that was again signed by both on the inner side of the flap and dated 3/7/2013. She instructed Abdirahman (PW 6) not to touch the money until it was the time to give it to the suspect.
 59. On cross-examination, she confirmed that the photocopies that were supplied to the defence did not bear the signatures. She was asked to by the defence counsel to sample some notes which appeared in the copies that were supplied to the defence namely CS2437977 and DL5464939 which she confirmed were the notes exhibited as P. exhibit 7B 59 & 56.
 60. On re-examination, she pointed that the said notes pointed to her by the defence as appearing in copies supplied to them were also equally reflected in the photocopies exhibited before the Court at P. exhibit 20(2) & (4).
 61. William Kairo Munyoki (PW 3) a Government Analyst with Government Chemist since 1994 told this Court that he is a graduate with a degree in Chemistry from the University of Nairobi.



62. He testified that on 4/7/2013 the Government Chemist received for analysis a number of items that were delivered by Charles Samiji (PW 8) via the exhibit memo form (P. exhibit 6), namely- khaki envelope containing cash money Kshs. 100,000 in genuine currency notes in 1000-shilling denomination. Their respective serial numbers were indicated (as per P. exhibit 7A). There was also khaki envelope with the right hand cotton swabs of John Njoroge inside (later produced as P. Exhibit 8A & B), khaki envelope with the left hand cotton swabs of John Njoroge (later produced as P. exhibit 9A & B), envelope recovered from Abdirahman Abdullahi on 3/7/2013- (later produced as P. exhibit 10A), smaller envelope (later produced as P. exhibit 10 B), khaki envelope with black coat of John Njoroge (later produced as P. exhibit 11A & B), envelope with APQ control sample inside (later produced as P. exhibit 12 A & B). He swabbed the money and retained the swabs. The request was to detect the presence of control sample, APQ in the said items. His findings confirmed the presence of APQ in all the items submitted which included the left inner pocket of the black coat then marked item E, (later produced as P. exhibit 11B). He produced the report dated 5/7/13 as P. exhibit 13.
63. Wycliffe Sirengo (PW 5) an investigator with EACC testified that on 3/7/2013; he was approached by Mr. Samiji together with other fellow EACC officers, Fredrick Mwangi and Francis Wambua to participate in an operation where the Member of Parliament for Kasarani, John Njoroge Chege had, according to initial investigations by the investigating officer demanded a bribe of Kshs. 100,000/- to facilitate payment of Kshs. 3,342,716.77 to a contractor for works done and completed at Baba Dogo Secondary School. The assignment was to accompany the complainant to Continental House where he was going to meet with the suspect. The complainant drove in his vehicle and they followed his car closely behind. At the Continental House, they packed beside his vehicle and took strategic positions so that could see what was happening.
64. He then saw a man who came and entered the complainant's vehicle and sat in the front passenger seat and both started to talk. After a short while, Charles Samiji signaled to him to proceed and make the arrest as the suspect had received the money.
65. They proceeded and introduced themselves and asked the suspect to accompany them to the Commission vehicle. Charles Samiji then asked him to produce the money he had just received and he removed it from the inner left side pocket of his black coat and handed it over to Samiji.
66. Mr. Sirengo then wore gloves and took the swabs of the suspect's both hands. They then drove with the suspect, who he confirmed is the accused before the Court to the Integrity Centre.
67. They compared the monies with the photocopies. The suspect's body guard Peter Mburu was present during that activity. Mr. Samiji prepared the inventory of the recovered money (P. exhibit 19) which they signed. Mr. Samiji also recovered the suspect's black coat (in reference to P. exhibit 11B). In the recording of 3/7/2013, while carrying out the said arrest, he identified his voice where he was telling the suspect to cooperate.
68. On cross-examination Mr. Wandugi for the accused referred Mr. Sirengo to a statement in the recording where Mr. Wambua is captured at pg. 14 of transcript saying "Ukijibu vibaya tutakuhaibisha, tutakuweka pingu" and asked him why those threats were issued. He replied that it was intended to have the suspect cooperate. Asked what would have happened had the suspect refused to cooperate, he said:
- "...If he did not cooperate, he would be handcuffed and embarrassed..."
69. The Investigating Officer, Charles Samiji (PW 8) testified that this complaint was brought to his attention by Rose Caren Githinji on 2/7/2013 through a complaint report filed at the Commission



on 1/7/2013. He then met and interviewed the complainant; Abdirahman Abdullahi Mohamed (PW 6) on 2/7/2013.

70. He established that the complainant was the Project Manager of Ramagon Construction Company Limited. The Company had on 8/11/2012 won the tender to construct tuition blocks at Baba Dogo Secondary School and had completed the job. It had been issued with the completion certificate thereof. Payment was being done through the CDF and already, it had received two payments.
71. Upon submitting the payment certificate in respect of the 3rd payment to the CDF Manager, the complainant was instead referred to the area Member of Parliament, John Njoroge Chege (the accused) who he was told had instructed that he should be consulted before any payment could be processed. On contacting the area Member of Parliament, John Njoroge Chege, he asked the complainant for a bribe of Kshs. 100,000/- to facilitate the said payment.
72. He thus embarked on investigation of this complaint.
73. To ascertain the solicitation, he introduced the complainant to the mini-tape recorder (P. exhibit 22) and showed him how to operate it. The complainant then called the suspect and on failing to reach him, he sent a text and both agreed to meet at 2.30 P.M. at the Continental Hotel. He escorted the complainant covertly. At around 3:00 P.M. he saw a man going to the complainant's vehicle and entered through the passenger door and both had a brief conversation. The complainant then called him and told him they had finished the conversation, he proceeded to the complainant's vehicle and retrieved the recording gadget. When he played back and listened to the conversation, he confirmed that a demand of Kshs. 100,000/- had been made and advised the complainant to go back to EACC the following day.
74. On 3/7/2013, at around 10:00 a.m. the complainant reported back to EACC and Sophie Nyambu (PW 7) prepared and handed over Kshs.100, 000/- treated money to the complainant for delivery to the suspect.
75. Mr. Samiji assembled a team of officers consisting of Wycliffe Sirengo, Francis Wambua and Fredrick Mwangi to assist him in that operation. He also reminded the complainant how to operate the tape recorder.

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The complainant then called John Njoroge Chege and they agreed to meet at the Continental House parking area.

77. At around 11:10 a.m. he saw John Njoroge walking towards the complainant's vehicle in the company of another man whom he presumed was his body guard. He entered the complainant's vehicle and the two engaged in a lengthy conversation.
78. The complainant then flashed his mobile phone which was the pre-arranged signal that the complainant had handed over the money to the suspect, John Njoroge Chege.
79. He instructed Fredrick Mwangi to go and notify the body guard that they were EACC Officers as he, Wycliffe Sirengo and Francis Wambua proceeded to the complainant's vehicle. He introduced the fellow officers to John Njoroge Chege and asked him to accompany them to the Commission vehicle.
80. Inside the vehicle, Wycliffe Sirengo (PW 5) swabbed the hands of the suspect.
81. He asked John Njoroge Chege (the suspect) to hand over the money which he did by removing it from the left inner side pocket of the black coat. They then left for Integrity Centre with him.



82. At the Integrity Centre, the recovered money was compared with the photocopies (P. exhibit 20, i-x) in the presence of the accused and accused's body guard, Peter Mburu and it was found to tally. However, the accused and his body guard declined to sign the inventory of recovered money (P. exhibit 25), which he prepared after that tallying exercise.
83. He also recovered the black coat from the accused, John Njoroge Chege and prepared an inventory of the same P. exhibit 11 B. The accused was then escorted to Kilimani Police Station.
84. On 4/7/2013; he prepared the exhibit memo form (P. exhibit 6) and escorted the Kshs. 100,000 as well as the right and left hand swabs plus the black coat among others to Government Chemist for analysis. The Government Chemist compiled the report (P. exhibit 13).
85. He also wrote to Safaricom on 5/7/13 (P. exhibit 15) seeking the call data from 3/7/2013 in respect of cell phone numbers 0722-316021 & 0722-321562. He received the data and the identification of registered owners of those numbers (as per P. exhibit 16 & 17).
86. He also prepared the transcript in respect of the conversation of 2nd and 3rd of July, 2013 with the help of the complainant, P. exhibit 24. The recordings (P. exhibit 22 & 5) from which the transcript was derived were also played in court during his testimony. He said from that conversation of 2/7/2013- P. exhibit 22; he was able to establish that the accused had held a prior discussion with the complainant before that date of 2/7/2013. He picked out this from pg. 4 paragraph 1 of the transcript- P. exhibit 24, where the accused said:

“ Si mimi nilikuwa nafikiria ni mali unaniletea.”,

then again, on the same page line 4 from the bottom, accused is captured saying:

“ tuliaganaaaa mia moja...”

On receiving, the conversation on 3/7/2010 (P. exhibit 5) shown on pg. 10 of the transcript:

“ Abdirahman: So nikupe kila kitu

Njoroge: Wewe maliza halafu uniulize maswali, hahaha(laughing)

At pg. 11

Abdirahman: How much is that?

Njoroge: This is one hundred.

87. The Investigating officer produced in evidence the various items he personally dealt with in this investigation as described in his testimony above.
88. The Investigating Officer also presented Gazette Notice Number 3159 contained in Special Issue Vol. CXV-45 dated 13/3/2013 which contained the declaration of elected Members of Parliament whereby at pg. 1758 No. 47 Constituency Code Number 280, John Njoroge Chege was declared as elected Member of Parliament –P. exhibit 28.
89. He also produced the complaint report minuted to him on 2/7/2013; being complaint number 41834 dated the 1st of July, 2013- P. exhibit 29.



90. On cross-examination Mr. Samiji's attention was drawn to the affidavit of the PW 6, Abdrihman (DMFI- 1) and asked if he was aware the he had sworn to withdraw this case. He replied that he was aware. Asked what the reasons he had cited necessitating his withdrawal, he said:
- “He had indicated he was sick and wanted to go for medical treatment outside the country and the matter was taking long”
91. He was however reminded he had also cited religious reasons and showed the affidavit that Mr. Abdirahman and confirmed that in the affidavit had also mentioned his religious tenets.
92. Asked why then the matter was before the Court, he explained:
- “Hon. Justice Lenaola of the High Court dealt with the issue. That is why I am here. It is the State that insisted on pushing the case. I have no personal interest; I did not even know the complainant...”
93. Mr. Wandungi for the accused put it to the investigating officer Mr. Samiji that he had coached Abdirahman to entrap the accused. This suggestion was vehemently refuted by the Investigating Officer who replied:
- “No, I had no interest against the accused. I did not coach Abdirahman...”
94. The accused was placed on his defence on 17th May, 2019. He elected to give an unsworn statement. He also indicated he would call 3 witnesses in his defence but he eventually called two.
95. In his unsworn statement, he said that in the year 2013, he was the elected member of Parliament for Kasarani. Prior to 2013, Kasarani Constituency was much bigger as it used to encompass Ruaraka and Roysambu which were hived off from the former larger Kasarani constituency.
96. He stated that the project which forms the subject matter of this trial was in Ruaraka Constituency, that is, Baba Dogo Secondary School.
97. He stated that the role of the Member of Parliament was on CDF matters was confined to convening the first public meeting to elect the members of CDF Committee and to preside over the public hearings when the Committee is gathering the proposals from the public.
98. He said he had no other role in payments since it was the work of the Secretariat to run the affairs of the CDF Committee. He stated that he had no responsibility in signing of the cheques.
99. He explained that Abdirahman was not known to him and to date he has never understood why Abdirahman went to look for him. He pointed out that from the evidence, it was not even shown that the said payment had been withheld by anyone, be it the CDF Office or the Member of Parliament.
100. He said that principally, if one followed the transcript keenly, it was evident that the complainant was the one leading him to speak words concerning that payment so that he could entrap him. He stated:
- “...When you go through the transcript, it is complainant who was leading me to speak words and was looking for me about the payments. He was doing that to trap me to commit a crime...”



101. He also referred to the words by Wambua at pg. 13 of the transcript where Mr. Wambua of EACC is indicated as having said:

“...Ukijibu vibaya, tuta kuhaibisha, tutakuweka pingu na tuta kuhaibisha...”

102. He said those were the threats by EACC Officers when he defied instructions to give them his coat. When he was threatened he gave it out, they put the money inside.

103. He said he never realized that this was a set up to arrest him in a privileged place, that is Parliament grounds, yet in law, a Member of Parliament cannot be arrested in Parliament.

104. He also insisted that the consent to prosecute him from the Director Public Prosecution had not been presented to the Court.

105. He asserted that Abdirahman Abdullahi (PW 6) had even withdrawn this case before the previous trial magistrate. He added that during cross-examination, Mr. Abdirahman stood firm by the contents of his affidavit then.

106. He asserted that he neither solicited money nor did he receive any money from Mr. Abdirahman.

107. He urged the Court to dismiss this case which has tainted his career as a politician in the eyes of the public. He said he has held elective positions for a span of 15 years. In 2002 to 2012 he was the elected Councilor for Kasarani and a stint as a Deputy Mayor from 2008-2009. All this long, he stated that he has never been involved in any crime or stolen from anyone.

108. He stated that for one to accuse you of soliciting money, there must be something you could have done to that person but in this case, there was nothing since he was not a signatory to anything. He said nowhere had the Abdirahman shown he had asked him for his telephone number, instead it was him that was going to him telling him he was sick and needed his assistance.

108. Susan Wanjiku Njenga (DW 1) a resident of Muiki in Kasarani testified that in the year 2013, she was a Constituency Development Committee member and the Secretary of the Committee. She her CDF Committee that was gazetted around August, 2013. Her main responsibility was to convene meetings and take minutes of the Committee. She said the area Member of Parliament and the District Commissioner were ex-officio members whose role supervisory. They did not take part in the decision making of the CDF Committee.

109. She testified at the time their CDF Committee assumed office, Kasarani Constituency had been sub-divided into 3, namely Kasarani, Ruaraka and Roysambu. In that split, Baba Dogo Secondary School went to Ruaraka Constituency.

110. She said her Committee was thus not expected to deal with issues pertaining to Baba Dogo Secondary School. She maintained:

“...The CDF Committee at Kasarani did not have any role in regard to that development... Ramagon who were doing work in Ruaraka were obligated to seek payment from Ruaraka Constituency...”

111. She said Hon Njoroge (the accused) could not influence payments in Ruaraka Constituency and at no time did he approach their Committee to influence it to approve the payment to Ramagon.



112. On cross-examination she was challenged by Ms. Mutellah for the Prosecution that she had exhibited nothing in court to prove that she served as the Secretary of that CDF Committee. She responded:

“...I did not bring the gazette notice. I can confirm because I am giving sworn evidence...”

113. Asked to explain what supervisory role meant, she said at times ex-officio members could call the committee at any time to find out the progress on matters before the committee and which projects had been prioritized.

114. When shown payment documents (P. exhibit 1, 2,3 & 4) and asked to who the District Works Officer had directed to process the payment, she said:

“...The person being requested to pay is the larger Kasarani Constituency, not Ruaraka...”

115. In re-examination however, she maintained that she did not recall their committee discussing the payment to Ramagon Construction Limited.

116. John Mweri Kahoro (DW 2) testified that the accused was his longtime friend. In June, 2013; he was the Office Constituency Manager working under Parliamentary Service Commission. Basically, his role was to link the electorate to their Member of Parliament. He explained:

“...If for instance CDF wants something done by the MP for them, they will find you and explain to you then you can tell the MP what they wanted. There are many projects which require public participation. You are the one to arrange how the public come and meet the Member of Parliament. My main work was to link CDF projects and the Member of Parliament...”

117. He reiterated that the Member of Parliament was not a signatory to the CDF documents and played no role in approving the payments.

118. He also stated that Baba Dogo Secondary School was not in Kasarani but in Ruaraka Constituency. He said as the link between the MP and the CDF projects, he had no knowledge and did not participate in the project at Baba Dogo Secondary School on behalf of the Member of Parliament. He asserted that Hon. John Njoroge was not involved in it. He testified:

“...At no time did the MP tell me to do anything about Ramagon Construction payments in Ruaraka Constituency...”

119. During Cross-examination, he was asked how he was picked for the job of the Constituency Manager and the letter of appointment to that office, he responded:

“...I did not undergo an interview. When you take your papers and they see you are qualified, you work at the discretion of your MP...”

120. Asked about his letter of appointment, he stated:

“...I did not carry...”



121. Challenged that it was difficult to establish that he in fact worked as the Constituency Manager, he replied:

“...You just believe me...”

122. He said he was not together with the Member of Parliament when he was arrested on 3/7/2013.

123. Closing written submissions were made by both the Prosecuting Counsel Ms. Mutellah as well as the Defence Counsel Mr. Wandugi. They orally highlighted the said submission on 19/5/2020. The Court will be making references to the said submissions in the course of its analysis of various issues that came up during this trial.

124. The present offences against the accused are founded on section 39 (3) (a) of the Anti-Corruption & Economic Crimes Act. No.3 of 2003 which provides:

“A person is guilty of an offence if the person-

- a) Corruptly receives or corruptly agrees to receive or solicit a benefit to which this section applies.”

125. The offence is in the category of offences whose heading is:

“Bribery involving agents’

126. In order for an inducement, benefit or reward to be considered as having offended the provisions of section 39, it must be proved that the purpose of the said benefit, inducement or reward, solicited or received was to influence or make the agent to-

- i. do or not do something relating to the affairs of agent's principal; or,
- ii. show favor or disfavor to anything, including any person or proposal in relation to the affairs or business of agent's principal”.

An ‘agent’ for purposes of this category of offences under this part of the Anti-Corruption & Economic Crimes Act is defined under Section 38 to mean a person who in any capacity and whether in public or private sector is employed by or acts on behalf of another person. “Principal” on the other hand is the person who employs an agent or for whom or whose benefits the agent acts.

127. For a charge based on section 39 (3) (a) therefore; it is imperative for the prosecution to prove the following key ingredients beyond reasonable doubt:

1. That accused was/is ‘an agent’, that is, he was at the material time in employment of another, either in private or public sector.
2. There was a solicitation of a benefit, reward or inducement in fact
3. In case of receiving, proof of the fact that accused received a particular benefit, reward or inducement.
4. There was a corrupt intention, that is, demonstration of the fact that the purpose of the said solicitation or the receipt of inducement, benefit or reward by the accused was to influence the accused to do or not do; or to show favour or disfavour to any person in a matter relating to the affairs or the business of his principal /employer.



128. These elements are what the Justice Mativo in *Paul Mwangi Gathogo Versus Republic*, 2015 eKLR

129. Succinctly summed up as under:

“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”.

130. These are the same principles that Justice Mativo once more restated in the case cited by Ms. Mutellah of *MICHAEL WAWERU NDEGWA V REPUBLIC* [2016] eKLR where alluding to the decision of the High Court of Uganda in the case of *Uganda vs Odech Ensio*, he held:

“In order to constitute an offence, the following are essential ingredients; in the first place, there must have been solicitation or offer or receipt of a gratification must have been asked for, offered or paid as a motive or reward for inducing by corrupt or illegal means and secondly, that someone should be acting in the public or private or employed or acts for and on behalf of another person, or confer a favour or ask for a favour to render some service. Carlson Anyangwe in his book “Criminal Law in Cameroon, Specific Offences authoritatively states that to secure a conviction, it must be shown that the accused ‘solicited’ a benefit not legally due.”

131. The accused was at the material time a Member of Parliament. Kenya gazette notice- P. exhibit 28 was produced to confirm this fact. That notification in the gazette suffices to establish that fact even without further additional evidence. The additional evidence that came from witnesses account attesting to this fact was merely supplementary. As a Member of Parliament, I take judicial notice that the accused was an employee of the Parliamentary Service Commission.

132. Consequently, for purposes of section 38 of the Anti-Corruption & Economic Crimes [Act, No. 3 of 2003](#); the accused was an agent of Parliament of Kenya which was his ‘Principal’ as far as the Anti-Corruption & Economic Crimes [Act, no.3 of 2003](#) is concerned.

133. The next issue is to determine if the matter in question fell within the functions/mandate of the accused’s principal, that is Parliament.

134. Ms. Mutellah argued that the accused as a Member of Parliament was a state officer and by dint of article 260 of [the constitution](#) a public officer since the meaning of public officer under the said article also encompasses a State Officer.

135. She thus submitted that in that in any case, the accused was an agent of Government within the meaning of section 38 of the Anti-Corruption & Economic Crimes [Act No. 3 of 2003](#) because he was the exercising powers under Part 2 of [the Constitution](#) on a matter relating to the business or affairs of the Government. As a Member of Parliament, she also argued that he was ex officio member of the Constituency Development Fund Committee.

136. On this issue, Mr. Wandugi argued that there was no evidence whatsoever that was presented to show that the Parliamentary Service Commission had any interest in the matter before the court. He argued that that was a specific allegation on the charge sheet and failure to establish it destroys the Prosecution case. He cited the case of *Okethi Okale and Others vs Republic Criminal Appeal No 179/1964* where the Court of appeal held that all matters that a prosecution sets out in its case must be proven.



137. The matter to which this offence related was payment through the Constituency Development Fund. Was it a matter that fell within the realm of business or affairs of the accused's principal/ employer which was the Parliament of Kenya under which Parliamentary Service Commission fell?
138. The Constituency Development Fund [Act No. 30 of 2013](#) was the precursor to the present Act which was assented to on 15th December, 2015. The present Act is not relevant in the present determination because the offences herein happened before it came into operation. The relevant law then was the Constituency Development Fund [Act No 30 of 2013](#) which was assented to on 14th January, 2013.
139. Under section 4 thereof, it is clear that the fund in question was public fund appropriated by Parliament and disbursed by National Government through the CDF Board to the constituencies in the manner provided for by the Act.
140. Under this Act, the role of National Assembly is quite pronounced. In part V for instance, the Act established the National Assembly Committee on Constituency Development Fund whose functions at section 36 thereof was among others was to oversee the implementation of the Act and to carry out any other functions relevant to the work of the fund.
141. Indeed, under Part VII, the Act established a County Projects Committee where among the members constituting the Committee included Members of Parliament from the County, the County Women Representative and the Governor.
142. Under section 24 (2) (f), the Member of Parliament for the Constituency was an ex-officio member of the CDF Committee.
143. From above overview of the Constituency Development [Act No. 30 of 2013](#) which was applicable at the time, it is apparent that the issue of Constituency Development Fund was a matter that the National Assembly, which was accused principal was directly concerned under section 30. That is an issue law and not of fact to be established by evidence as Mr. Wandugi in his submissions alluded to. In fact, the accused as a Member of Parliament in the Constituency was part of the CDF Committee but as an ex-officio meaning he could contribute by giving ideas or advise but could not take part in voting or decision making.
144. If therefore, it is proved that the accused solicited or received a benefit, reward or inducement so as to influence something to be done or not done; or, in order to show favour or disfavour concerning a matter forming part of the affairs of his principal- (that is the National Assembly then), then the court must find him criminally culpable for an offence of corrupt solicitation, and if he received the benefit, reward or inducement thereof, the court must find him culpable for the corrupt receipt.
145. In any event, even assuming that it was not clear if that mandate fell under the accused Principal, namely, the National Assembly; it is a fact that the accused was a State Officer and the monies in question were public funds. In the circumstances, if there had been lack of clarity as to which Government Department that had charge of these funds, recourse could have been had to section 38 (2) of [Anti-Corruption and Economic Crimes Act](#), No. of 2003 which provides:

“If a person has power under [the Constitution](#) or an Act of Parliament and it is unclear, under the law, with respect to that power whether the person is an agent or which public body is the agent's principal, the person shall be deemed, for purposes of this part, to be an agent for the Government and the exercise of the power shall be deemed to be a matter relating to the business or affairs of the Government.”



146. Where the accused holds and represents himself as capable of executing a function falling within the mandate of his principal/employer to another person for purposes of committing an offence under the *Anti-Corruption and Economic Crimes Act*, No.3 of 2003, yet in reality, he does not have such power in view of his specific job description, under section 50 of Anti-Corruption and Economic Crimes, he cannot put forward a defence that he was limited by the defined scope of his responsibility from carrying out the task in question as long as he held himself out to the person he solicited or received the benefit from in order to commit the crime as being able to carry out the task even when in reality he could not. Section 50 provides:

S. 50- 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.

147. Another issue of law raised was that the charges especially count 1 and 2 are duplex and thus bad in law and should thus be dismissed. On this issue, Mr. Wandugi submitted:

“...Your Honor it is submitted with the greatest respect that the charges are bad in law as drawn. Though the times cited are 25th day of June and 2nd day of July 2013, all the other facts are exactly the same. Even if one is to admit (and there is no admission in this case) that the solicitation was done, it is wholly implausible that the accused solicited for the same thing twice. The alleged transaction your Honor is the same but repeated on two occasions. The allegation tends to show that the matter commenced on the 25th of June and the same (not different) was continued on the 2nd of July. It is not alleged that on the 2nd of July accused changed anything for instance by asking for a different sum, or that the second instance was for a different project with different consideration. The alleged sum solicited is the sum of Kshs 100,000 to facilitate payment of kshs3,342,716,77cts. It is very clear that the mischief here was to expose the accused to the possibility of suffering twice for the same offense in the event of a conviction. Fortunately, no court would fail to notice the obvious mischief but then the charges were before a court which allowed them instead of having declined to admit them as drawn. Because of this very obvious mischief the defence has been placed under a very serious legal dilemma and pleads with this court to make a finding that the accused has been unduly prejudiced. As the two counts relate to the same transaction the court cannot now separate them as the accused has been laboring under the threat of both. The defence prays that the court be pleased to dismiss both counts...”

148. Replying to the above submissions Ms. Mutellah submitted that the Prosecution complied with Section 134 of the Criminal Prosecute Code in framing the charges with clarity and ensured it did not allege the commission of two or more offences in a single charge or count which is what amounts to duplicity. She contended that both Count 1 and Count 2 are not duplex since the charges are distinct in place and time in respect of Count 1 and 2.

149. To augment her submissions that the defence counsel had misapprehended what constitutes a duplex charge Ms. Mutellah referred to the case of *CHERERE s/o GUKULI vs. REPUBLIC (1955) E.A.* in what amounts to duplicity was explained as follows, at pg. 478;

“...Where two or more offences are charged to the alternative in one count, the count is bad for duplicity contravening section 135(2) of the Criminal Procedure Code. The defect is not merely formal but substantial. When an accused is so charged, it cannot be said that he is not



prejudiced because he does not know exactly with what he is charged and if he is convicted he does not know exactly of what he has been convicted...”

150. I wholly concur with Ms. Mutellah submissions on the legal definition of duplicity. Simply put, duplicity is joining in a single count two or more distinct and separate offences. This is not what bothers Mr. Wandugi going by his submissions above.
151. What Mr. Wandugi raised in his submissions is not duplicity but multiplicity. His bone of contention appears to be that the particulars of the same offence have been made subject of two counts, that is, count 1 and 2. Indeed, in his oral highlights of his submissions, he said it does not matter how many times a single narrative is repeated, even if it is repeated a hundred times, it is the same conversation. He argued that what was allegedly discussed on 25/6/2013 was the same thing that was allegedly talked about on 2/7/2013, nothing changed from the amount or even school in question, except the date. He thus opined that this could not be construed as different solicitation. He read mischief against the accused indicating that the intention is to ensure the accused is given multiple punishments basically one offence thus exposing him to double jeopardy.
152. I concur with Mr. Wandugi that charging the same offence twice or in multiple counts can prejudicially increase accused exposure to punishment in case of conviction. That was a keen observation well taken. Charging the accused for several offences of same character whereby the statutory elements are the same and based on facts founded on a continuous or extended transaction leads to a multiplicitous charge. The primary evil of multiplicitous charge is that the accused might be punished twice or severally for what is essentially the same offence. The issue of multiplicity does affect accused understanding of the charge though, unlike duplicity the danger of a multiplicitous charge is double or multiple punishment in case of conviction. I will pronounce myself shortly on whether the charges in this case are multiplicitous.
153. The other formidable legal issue raised related to the withdraw of the complaint by Abdirahman (PW 6) following an affidavit he had presented earlier in Court in support of the withdrawal which was allowed by the trial Magistrate then, Hon. Peter Ndwiga (SPM) but that decision was subsequently overturned by the High Court in Constitutional Petition Number 21 of 2015.
154. Mr. Wandugi submitted that although PW 6, Abdirahman was clearly the complainant in the case as confirmed in his evidence, the Prosecution had continued propagating the theory that the Complainant is the State through the DPP because of the ruling of Honourable Justice Lenaola. He argued:

“... It is not the intention of this submission to seek this court to sit on appeal on that decision, but however the issue is still before this court and hence cannot escape mention. The court will be obliged to have fundamental principle that in all Prosecutions the State is the Prosecutor. On the basis of separation, it would be a violation of the doctrine of separation of powers to hold that the State is both the Complainant and the Prosecutor in its own case. Doing so would amount to flagrant injustice and violation of fundamental principles of the criminal justice System. It would be an affront to the rules of natural justice and the consequence would be to deprive the accused the right of a Fair Trial...this court must answer the question as to whether or not the State had filed any complaint in this matter and whether the alleged benefit was solicited from the State. That is the natural and logical conclusion from the submissions by the State. The matter cannot be considered in any other manner. The answers to those are in the negative and subsequently this court is obligated to acquit the accused for want of that basic evidence...”



155. Mr. Wandugi further submitted that when Abdirahman Mohamed Abdullahi (pw 6) subsequently appeared before this court he in fact confirmed he was the complainant. That while on cross examination he affirmed his earlier testimony that he had no wish to pursue the complaint. He contended that that he confirmed the contents of his earlier affidavit sworn in the 17th of Jan 2014 that had been filed in court. He went on:

“ ... In most telling testimony the witness stated on oath that he stood by his oath as per his affidavit but that he was forced to testify by the DPP. The most immediate that comes to mind is what he was forced to do; that he was forced to testify without his consent is clear. Secondly does the authority of the DPP under Article 157 entitle him to force the witness to testify? Having so forced the witness whether lawfully or not what exactly did the DPP force the witness to state. It is the submission by the defence that the action by the DPP is wholly unacceptable in our present time and age and that this court has a bounded duty to pronounce itself as to the propriety of the DPP’s action...”

156. Ms. Mutellah responded to this issue extensively in her submissions. She was emphatic the definition of a complainant in a criminal case cannot be taken in isolation of Director of Public Prosecution in view of the vital role the DPP plays in the prosecution of criminal matters on behalf the State pursuant to Article 157 (6) of *the Constitution* of Kenya. In that regard, she relied on various authorities starting with the one by Hon. Justice Lenaola in *DPP V. NAIROBI CHIEF MAGISTRATE’S COURT AND ANOR in Petition Number 21 of 2015* which arose out of the orders that had been made by the lower court in this case, where the Judge held as follows:

“ the person reporting the case is a complainant as he “complains” about the crime in the real sense of the word and that the DPP on behalf of the State is also a complainant as the case is commenced in and subsequently sustained in his name. Ultimately then, interpreting of the word complainant to exclude the DPP would be, in this and other cases, detrimental to the ends of justice for the public whom the DPP represents. In this respect, such an interpretation is insupportable in law and I so find...”

157. The case of *REPUBLIC V ETHICS & ANTI-CORRUPTION COMMISSION & 2 OTHERS EX PARTE STEPHEN SANGA BARAWA* [2017] eKLR, where Hon. Lady Justice L.A Achode in a judicial review matter refused to set aside the orders of the trial court which had rejected applicant’s attempt to withdraw the complaint in an anti – corruption case. She remarked:

“ The DPP is not obliged to withdraw a case merely because the Applicant who is one of the witnesses had had a change of heart, if the DPP was of the view that investigations that sprung from his complaint had yielded a sustainable case...”

158. On submissions by Mr. Wandugi who had questioned if the DPP had powers under article 157 to compel a witness to testify against their wish, Ms. Mutellah was categorical that the DPP had no such powers and had not done so. She countered that in fact, PW 6 had informed that he responded to the request of the DPP to come and testify, he did not say he was forced to testify as contended in the submissions by the defence. She submitted that the DPP could apply to Court for witness summons in respect of witnesses who have recorded statements in the matter to testify on behalf of the State but could not force them. She argued that it was the duty of the court to satisfy itself if the witnesses are competent and compellable. In that case, if the Court were so to find, the witnesses had a duty to appear and testify. On this, she also relied on section 144 (1) of the Criminal Procedure Code which provides as follows:



Section 144 (1) of the Criminal Procedure Code:

“If it is made to appear that material evidence can be given by or is in the possession of a person who will not voluntarily attend to give it or will not voluntarily produce it, a court having cognizance of a criminal cause or matter may issue a summons to that person requiring his attendance before the court or requiring him to bring and produce to the court for the purpose of evidence all documents and writings in his possession or power which may be specified or otherwise sufficiently described in the summons.”

159. Further, section 128 of the *Evidence Act*, Cap 80 which states:

“...A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will incriminate, or may tend directly or indirectly to incriminate, such witness.....”

160. On the same, Ms. Mutellah cited the case of Yusuf (2003) 2 Cr App R 32, (16), the obligation of witnesses to testify was emphasized by Rose J in the following words:

“...The role of the courts, in seeking to provide the public with protection against criminal conduct, can only properly be performed if the members of the public co-operate with the courts. That cooperation includes participation in the trial process.... Witnesses who may have important evidence to give must come to court if Formally directed to do so. If they choose to ignore a summons, they are in contempt of court and can expect to be punished because their failure to attend is likely to disrupt the trial process and, in some cases, undermine it entirely. It shall however be up to the trial court to establish whether the applicant is a competent and compellable witness who should testify...”

161. In regard to the affidavit of Mr. Abdirahman (PW 6) Ms. Mutellah submitted the effect of the affidavit was aptly settled in the ruling of Hon. Justice Lenaola High Court *DPP v. Nairobi Chief Magistrate's Court and Anor. Petition Number 21 of 2015*.

162. The Court is persuaded by the submissions of the State on this issue. Justice Lenaola in Petition Number 21 of 2015 went to great length in explaining the standing of the person who files a criminal complaint vis-a-vis the interest of the public. Re-opening the issue now would be inimical to the doctrine of stare decisis.

163. Further, this court wishes to add by way of clarification that in corruption related offences, it is in fact a misnomer to refer to persons who report corruption incidents as the complainants in the sense being victims of those offences. When holistic consideration of the matter is done, it is quite clear that the victims are not necessarily the people who lodge the complaints as such. I will illustrate this point as follows.

164. Contra-distinguished from the ordinary crimes such as offences against the person in which a specific person or his/her property or the immediate family member is the one that directly suffers the consequences of the particular crime, the impact of a corruption offence is not confined to the single person who is confronted with the incident of corruption or his immediate family member. In reality, if the individual were to cooperate, he in fact stands to gain in a give and take arrangement where he/she gets some favours in exchange of the benefit, inducement or reward he gives to the proponent of the corrupt transaction.



165. The public becomes the loser because when those incidents increase the overall reputation and credibility of its Public Institutions or the Society generally is destroyed. That environment will not be conducive for attracting genuine businesses that create wealth and provide employment for the working population. When such businesses are pushed out, competition is curtailed and this denies the public the benefit of competitive prices for quality products in the market. Instead, the public suffers hiked prices as percentages of what goes to the corrupt enterprise is concealed and factored as a hidden cost of production or service.
166. Impunity and injustice is witnessed as crimes are committed with impunity law enforcement agencies enter the mix.
167. Substandard foodstuffs, medicines, vehicles, machines, building materials make to the list of consequences that ordinarily come with corrupt practices and expose large segments of the population to great hazards. Insecurity, wasted taxpayers' resources in substandard works or services, outright theft of public resources, unfairness in recruitment into public service to mention are all possible consequences that could arise from corrupt transactions.
168. Proportionately therefore, it is society that collectively bears the grander yoke of crimes associated with corruption as opposed to a single individual confronted with bribery incident in the long run. The ramifications of such a vices threaten an society's common good compared to an individual interest. It is the interest of the society that is more threatened hence the victim is in fact that society where those incidents are being witnessed generally and not the individual. The Society's interest must therefore be protected by the State. The decision to withdraw a corruption charge therefore cannot be left to the desires of a single individual. It is immaterial whether that individual is the one who squealed or reported incident. As long as the reported crime was investigated, detected brought before the Court, it is no longer a private or personal matter that he can deal with the way he/she wishes. The decision of whether to drop such charges or not can only be made in public interest and not, at the convenience of an individual. Personal hardships, religious tenets or such like reasons cited in the affidavit of Abdirahman are personal matters that do not satisfy criteria of public interest.
169. Indeed, on the same breath, even where it is the DPP brings the application for withdrawal, it can also be rejected if it fails to meet the test of public interest. I thus find no merit in the defence submission that the complainant in this case was in fact Abdirahman. Whether he stood by the contents of his affidavit or not, the public interest in prosecution of such offences must be safeguarded.
170. That said, it was also misleading for the defence to submit that Abdirahman had said in his evidence that he was forced to testify. The Court has read and reread its record and nowhere did it find that assertion. During cross-examination, he neither denied swearing the affidavit nor the truthfulness of the contents therein or even the fact that he had made that application to withdraw the complaint but he also did not say he was forced by the DPP to come and testify. That is an analogy made by the defence that is not borne out of evidence. In cross-examination, it did not succeed in eliciting that information from PW 6. All what PW 6 said was that when he was asked by the DPP to come and testify, he accepted that request. To quote him verbatim, he answered when that issue was put to him:
- “...It was voluntary to come and testify after DPP's request...”
171. Moreover, at no point did PW 6 in his affidavit did he recant the events he was testifying about before the court. As a competent witness with material information that could aid the court search for the truth in the matter before it, Mr. Abdirahman (PW 6) had an obligation to attend court and testify.



172. It was submitted on behalf of the defence that section 35 of the *Anti-corruption and Economic Crimes Act* Number 3 of makes it mandatory for prosecution to have the DPP's consent. Counsel pointed out that whereas in the instant case the prosecution insisted that such consent was given and the Investigating officer PW 8 testified he obtained the consent via email, the defence was not supplied with that email even after the court allowed it. Instead, the Prosecution applied for Review of the order of this court and Lady Ongundi set aside this Court's order. The consequence was that the said email though testified to by a prosecution witness was never disclosed. As such no evidence whatsoever was led to satisfy section 35 of the *Anti-Corruption and Economic Crimes Act* no. 3 of 20013. Mr. Wandugi cited the case of ESTHER THEURI VS REPUBLIC)2011) EKLR in which he submitted that the court of appeal held that failure to comply with that section was fatal to the Prosecution case after applying the reasoning in the case of Nicholas Muriuki vs Att General. He thus submitted that in the absence of any report having been exhibited and the said email having been concealed, the Prosecution failed to satisfy the duty imposed by S 35 hence the entire prosecution must fail.
173. In response to these submissions, the Prosecution submitted that it was rightly pointed out by Hon. Lady Justice Hedwig I. Ong'udi in the Anti – Corruption and Economic Crimes Division Revision No. 15 of 2018 – R Vs. John Njoroge Chege [2018] eKLR at page 7 that “it is not every document or statement referred to by a witness that must be produced.” That further she observed,
- “...The case has been prosecuted by the DPP throughout. This clearly shows that the DPP approved his prosecution otherwise the DPP would not have sent his officers to come and prosecute. The email is said to have contained the approval by the DPP. So what is the issue the Respondent wishes to raise about the email...”
174. Ms. Mutellah contended that Section 35 of *Anti-Corruption and Economic Crimes Act* No. 3 of 2003 does not create a duty on the part of the Prosecution to produce any form of consent of the DPP in court. She reasoned that the section merely requires that upon the conclusion of an investigation, a report on the results of such investigations should be forwarded to the DPP with the EACC's recommendations indicating whether or not the person should be prosecuted with any corruption or economic crimes.
175. She maintained that PW8 confirmed in his testimony before this Court that the provisions of Section 35 were complied with because he had submitted a report on the results of his investigations to the DPP. She observed that the recommendations of EACC in respect to the report under Section 35 were not binding upon the DPP who makes independent decisions upon the review and perusal of the evidence in the inquiry file as to whether or not a person (s) should be prosecuted with any corruption or economic crimes as per Article 157 (10) of *the Constitution*.
176. In respect to the case cited by Defense of ESTHER THEURI WARUIRU & ANOTHER V REPUBLIC [2011] EKLR, the Prosecution submitted that although the same is a Court of Appeal case, it is distinguishable for reason that the offences in Esther Theuri Waruiru were committed in 2005, the investigation of corruption and economic crimes were being undertaken by the Kenya Anti – Corruption Commission under the repealed Prevention of Corruption Act Cap 65 whereas in the present case the offences were investigated by the Ethics and Anti – Corruption Commission under the Ethics and Anti-Corruption *Act No. 3 of 2003* which is a different statutory regime. Under the old the statutory regime, from which the case of Esther Theuri arose, the repealed Prevention of Corruption



Act explicitly provided for the consent of the Attorney General at section 12 distinct from the case under the present law. She quoted the said section 12 which provided then that:

“ 12. A prosecution for an offence under this Act shall not be instituted except by or with the written consent of the Attorney – General.”

177. She argued that despite it being a court of appeal decision, this court is not bound by the decision in Esther Theuri case (supra). She augmented her submission by citing another authority where the decision was effectively distinguished and a decision by the Court of Appeal where it subsequently cautiously avoided to reaffirm the earlier decision in Esther Theuri Waruiru when confronted with that issue in later case. Ms. Mutellah cited the case of STEPHEN MBURU NDIBA V ETHICS & ANTI – CORRUPTION COMMISSION & ANOTHER [2015] eKLR

178. Where one of the issues that was brought up for determination by the court was contravention of Section 35 (1) of *Anti-Corruption and Economic Crimes Act* No. 3 of 2003. The Court of Appeal decision in Criminal Appeal No. 48 of 2008, Esther Theuri Waruiru & Another Versus Republic was cited in urging the Court to find that the criminal case against him was premature. The court, distinguishing the decision reasoned:

“...In the Court of Appeal judgment in Criminal Appeal No. 48 of 2008, Esther Theuri Waruiru & Another Versus Republic that was cited by the learned counsel for the applicant... the legislature was categorical in this provision that a prosecution under the Prevention of Corruption Act, Chapter 65 must be preceded by a written consent from the Attorney General; its intention is very clear from the outset and there is no doubt that any prosecution without such a written consent would have been fatal. There is no similar provision in the Anti-Corruption Act. Section 35 of the Act which the Court of Appeal compared with Section 12 of the Prevention of Corruption Act has nothing to do with the consent to prosecute any offence under the Anti-Corruption & Economic Crimes Act, 2003 but only deals with reports to the Director of Public Prosecutions on the investigations undertaken by the Anti-Corruption Commission. Such reports shall include information on the outcome of the investigations and any action taken upon it, which in my view includes but not limited to arresting and charging suspects pursuant to Section 32 of the Anti-Corruption Act. It must also be noted that there was no provision in the Prevention of Corruption Act similar to section 32 of the Anti-Corruption & Economic Crimes Act, 2003 and I would opine that the existence of that provision legislation is an additional reason against any attempted analogy between Section 12 of the Prevention of Corruption Act, Chapter 65 and Section 35 of the Anti-Corruption Act; in the context of the current anti-corruption legal regime there is no comparison between the two either in form, substance or in effect. One thing that is also clear from the judgment of the Court of Appeal is that the Court never made any reference at all to section 32 of the Anti- Corruption Act; neither was there any discussion of the constitutional provisions of articles 157(6) (b) and 157(12) on the exercise of powers to prosecute by the other persons or authorities such as the Anti- Corruption Commission. It could be that these provisions were not brought to the attention of the learned judges since, in any event, Mr Monda for the state conceded the appeal; I am of the humble view that had these provisions been urged the learned judges would not have interpreted section 35(1) of the Anti-Corruption & Economic Crimes Act in isolation and would have probably come to a different conclusion. The Court would certainly not have declared that the powers of the Attorney General in Section 12 of the repealed Prevention of Corruption Act, Chapter 65 were retained in Section 35 of the Anti-



Corruption & Economic Crimes Act, 2003 law because as noted such a declaration would be inconsistent with the provisions of section 32 of the of the Anti- Corruption & Economic Crimes Act, 2003 which clothe the Director and investigators of the Commission with powers not only to investigate and arrest but also to charge. Such express provision was never found in the Prevention of Corruption Act, Chapter 65 and it could not have been included in the law that succeeded that Act for cosmetic or superfluous purposes. Much as this court is bound by the decisions of the Court of Appeal by virtue of the doctrine of stare decisis, its decision in Esther Theuri Waruiru & Another Versus Republic (ibid) can be distinguished and validly be departed from for the reasons I have given...”

179. She went on to cite the case of where SUSAN MBOGO NG'ANG'A V ATTORNEY GENERAL (SUED FOR AND ON BEHALF OF THE CHIEF MAGISTRATE'S COURT, NYERI LAW COURTS) & 2 OTHERS [2018] Eklr where the Court of Appeal was called upon to make a determination as to whether criminal proceedings in an anti- corruption case should be halted because section 35 of ACECA was not complied with. The court of appeal was being urged that the trial court had ignored the doctrine of stare decisis by failing to follow decision of the Court of Appeal in Nicholas Muriuki Kangangi vs. AG and Esther Theuri Waruiru & another vs. R (supra).

180. The Court of Appeal reasoned thus -

“...There remains the questions whether the Judge erred in refusing to follow the decisions of this Court... In the present case, the Judge observed that in the two decisions of this Court that were cited to him, Section 35 of the *Anti-Corruption and Economic Crimes Act* was interpreted without reference to two other provisions in the Act and without regard two constitutional provisions and the Judge was therefore of the view that the decisions of this court were distinguishable. Whether this Court would have reached a different conclusion in Nicholas Muriuki Kangangi vs. AG (above) and Esther Theuri Waruiru & another vs. R (above) had reference been made to Section 32 of the Anti-Corruption and Economic Crimes is a different matter. We do not, however, construe the decision of the lower court as purporting to have overruled this Court...”

181. It thus clear from the above exposition that the decision of Esther Theuri Waruiru(supra) which counsel for the defence urged me to follow in regard to section 35 of the Anti-Corruption Act is doubtful in view of the Court of Appeal's reluctance to assert its own authority on the issue. Consequently, I will follow the distinguishing decision and other authorities that have subsequently come up which further depart from the Court of Appeal decision in Esther Waruiru on that issue.

182. In the High Court Revision No.3 of 2016; REPUBLIC VERSUS JOSEPH KOECH SIRMA & 5 others; which emanated from the decision of the Anti-Corruption Court that had ordered the Prosecution do furnish the report to the defence, The High Court commented on reports prepared under section 35 of the ACECA as follows:

“...The investigation report is an assessment prepared by investigating officer of material gathered during investigations and does not form part of evidence referred to in article 50(2) j of *the Constitution*.”



183. In yet another decision from the High Court, KENNETH CHEGE KABETU VERSUS REPUBLIC- ANTI-CORRUPTION CRIMINAL APPEAL NO.10 OF 2016 Justice Ongundi while speaking to the matter of investigation reports under section 35 of ACECA observed:

“There is no provision for giving consents because once DPP recommends prosecution; it’s that office of DPP that prosecutes. The DPP cannot therefore give itself consent to prosecute.”

184. It is also apparent that this prosecution was conducted on behalf of DPP by a Senior Prosecution Counsel from Office of Director of Public Prosecutions. by Pursuant to section 22 (2) of Director of Public Prosecutions Act, that by any means is a Prosecution by the DPP.

185. Under section 22 (2) of Director of Public Prosecution’s Act, it is provided:

“Any power or function performed under this Act by, prosecuting counsels or members of staff of the office shall be deemed to have been performed by the Director.”

186. The fact that the report under section 35 of ACECA was not exhibited in Court is not fatal.

187. In any event, that issue was directly canvassed before the High Court in Revision Number 15 of 2018 and the decision of this Court ordering the supply of the said document to defence was dismissed by the High Court. I cannot question the wisdom of the High Court which I am being impliedly invited to do. I will let the matter rest.

188. I shall now delve into the evidential issues, that is whether solicitation and receipt has been established beyond reasonable doubt in regard to the charges preferred against the accused.

189. Count 1 and 2 are about soliciting while count 3 is on receiving.

190. In regard to solicitation on 25/6/2013 and 2/7/2013, the evidence comprised of the testimony Abdirahman (PW 6) was briefly rendered as follows.

Abdirahman (PW 6) said he personally went and met with the CDF Manager, Mr. Ntaine (PW 2) at the CDF Offices in Kariobangi on 25/6/2013 and delivered the aforementioned the final payment certificate and the two payment vouchers comprising of the payments he expected to receive. During the said encounter, he said the CDF Fund Manager Mr. Ntaine (PW 2) advised him to talk to the new Member of Parliament for Kasarani, John Njoroge Chege who then gave him the MP’s mobile number so that he could call him. Abdirahman (PW 6) called the Hon MP, John Njoroge Chege at around 2.00 that day and they agreed to meet at the Continental House parking yard. He met him that afternoon as agreed. This was his first meeting with John Njoroge Chege. When he explained the payment he was following up, the accused told him to part with some money so that his payment can be processed. At first he asked for 200,000 but the complainant told him he could not raise the money because he required money for his medication as at the time he was in and out of hospital. After some negotiation, the accused agreed to take 100,000/- shillings.

191. When Abdirahman (PW 6) who was heavily burdened by huge medical bill having exhausted his medical card thought intensely about the whole issue, he made up his mind to report the matter to EACC which he did on 1/7/2013. His case was then assigned Mr. Samiji (PW 8). Mr. Samiji (PW 8) listened to him then informed him that he needed to ascertain the information he had stated. He thus told him he would be required to record further conversation with John Njoroge Chege on that matter. He was thus introduced to a mini-tape recorder (P. exhibit 21) on 2/7/2013 into which was



fitted a micro-cassette (P. exhibit 22). He left EACC to go and meet with John Njoroge Chege (the accused). When he called him and failed to get him, he texted him. John Njoroge Chege responded telling him that they could meet that afternoon at the Continental House. Abdirahman (PW 6) drove to the place and waited for him at the parking bay. A few minutes later, John Njoroge Chege (accused) joined Abdirahman (PW 6) in his car. He sat on the passenger seat. On that day, John Njoroge Chege asked Abdirahman if he had brought the money as well the additional amount of Kshs. 50,000 for the Committee members. He was able to capture their conversation of 2/7/2013 on tape. It was played in court and he identified the same. Later, Mr. Samiji was able to transcribe that conversation which was in Swahili and the same was also produced in Court. Mr. Samiji (PW 8) the Investigating Officer in this case told court that on this date, he had accompanied Mr. Abdirahman covertly and he actually saw the accused join Abdirahman in his car where he sat in the front passenger seat. Both had a conversation and after he left, he went and retrieved the recording gadget. He listened to the recording and established there was a demand which informed his decision to invite the complainant the following day to mount the operation which led to the arrest of the accused.

192. In his unsworn statement of defence the accused explained that, Abdirahman (PW 6) was not known to him and to date he has never understood why he went looking for him because even going by the evidence before the court, the payment which he expected to receive had not been withheld by anybody, neither by the CDF Office nor by the Member of Parliament. He further stated that if one followed the transcript keenly, it was evident that the complainant was the one leading him to speak some words concerning the payments with a view to entrapping him.
193. He also stated that his role of the Member of Parliament in CDF matters was limited to convening the first public meeting to elect the members of CDF Committee and to preside over the public hearings when the Committee is gathering the proposals from the public. He said he had no other role as the rest was up to the Secretariat to run the affairs of the CDF Committee. He stated that he was not allowed to sign the cheques. He further stated that for one to be accused of soliciting money, there must be something that the person can do for that person but in this case, there was nothing since he was not a signatory to anything.
194. Two witnesses were called by the defence Susan Wanjiku Njenga (DW 1) stated that she was a Constituency Development Committee member and the Secretary of the Committee. She the Committee was gazetted around August, 2013. Her evidence was thus immaterial since she was not a CDF Committee member at the time of the alleged offences that is 25/6/2013, 2/7/2013 and 3/7/2013. The other witness was John Mweri Kahoro (DW 2) who testified that the accused was his longtime friend. In June, 2013; he was the Office Constituency Manager working under Parliamentary Service Commission. However, there was proof of that employment even by the slightest means. When challenged by the Prosecutor on that issue he stated:
- “...You just believe me...”
195. Moreover, his evidence was of general nature, he was not involved or anywhere near the accused on the said dates. All he said was that he used to be the link between the Member of Parliament and the constituents and he could not recall dealing with this matter which was a matter in Ruaraka Constituency. The evidence of the two defence witnesses was thus not useful in this determination. That leaves only the unsworn statement of the accused.
196. Submitting on evidence in respect of count 1 and 2, Mr. Wandugi argued that the evidence on record with regard to the events of the 25th of June 2013 and 2nd July 2013 is solely from PW 6 which he said was evidence by a single witness and thus the Court should take all the necessary caution to ascertain that such evidence is solid and if doubtful refuse to rely on it.



197. He submitted that although the prosecution had placed great reliance on the contents of the transcript P. exhibit 24, a close scrutiny of the contents of the transcripts reveals the same does not at all prop prosecution case. Firstly, he pointed out that there was actually no recording for 25/6/2013 hence it was PW 6's word against the accused and thus the recordings can only be relevant in count 2 and 3, but even then, the recording was unreliable and of no evidential value.
198. Secondly, he argued that the recordings were surreptitiously made by PW 6 on the instructions of the Investigating Officer who is PW 8 on the 2nd and 3rd of July 2013. That according to evidence of PW 6, he was expressly instructed by the Investigating Officer to deliberately steer the conversation towards the subject of money and PW 6 did as advised. This, Mr. Wandugi argued completely destroys any attempt by the prosecution to try to incriminate the accused using the transcript as the investigating Officer exceeded his role in the conduct of this investigation. That is because he deliberately set out to lead the accused into a trap. For this reason, it Mr. Wandugi submitted that the evidence of the transcript must be thrust aside.
199. Notwithstanding his submissions in the foregoing, he further submitted that in any case, the contents of the transcripts did not in the least implicate the accused. That PW 6 had considerable difficulties following the transcript when it was played in court because large portions were completely inaudible while other large portions were blank yet he testified that the one played to him at the EACC offices was very clear. Counsel thus contended that the recording that was brought to court was not authentic rendering the impression that the recordings had been doctored. It was thus the defence contention that the evidence of the transcripts is totally unreliable.
200. He further argued there were parts of the recording that are out rightly blank, other parts were inaudible. Consequently, according to counsel the court does not have the benefit of the entire recording due to these problems the court cannot be certain as to the entire content. At the same time the court cannot opt to rely on the clear parts hence the only option left to the court is to wholly disregard the contents on transcripts.
201. On the issues submitted to by the defence to the effect that the recordings were not audible hence the transcript cannot be trusted, Ms. Mutellah for the Prosecution submitted that the recording gadget and the cassette were produced as exhibits before the Court. They played during the testimony of Douglas Pashet Ntaine Nkere (PW2), Wycliffe Sirengo (PW5), Abdirahman Mohamed Abdullahi (PW6) and Charles Samiji (PW8) and the court had an opportunity of listening to those recordings. She insisted that contrary to the defence submissions they were clear and audible.

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She refuted the submission by the defence counsel that throughout the entire episode, it was PW 6 who steered the conversation towards the subject of money by repeatedly raising the issue in an effort to entrap him. She pointed out that at pg. 3, 2nd line from the bottom for instance, there was a clear entry point in which it is the accused evidently pursuing an earlier request for a bribe. As for the actual solicitation, she referred the court to the specific words used in the conversation at pg. 4 of the transcript- P. exhibit 24.

203. The Prosecution further submitted that the accused was not induced or coerced in any way by any law enforcement officer to commit a crime as the issue of Kshs. 100,000 did not originate from any state agents but from the accused himself when he solicited for a benefit from PW6. She relied on the



case of MOHAMED KORIOU NUR VS ATTORNEY GENERAL (2011) eKLR which defined entrapment as follows:

“Entrapment occurs when (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bonafide inquiry, and (b) although having such a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and include the commission of an offence

204. The issue of whether or not the tape-recordings (P. exhibit 22 & 5) and the transcript (P. exhibit 24) are reliable as evidence in this case was heavily attacked by the submissions by the defence as demonstrated. The Prosecution on the other hand insisted that the tape-recordings were played before this Court and were clear and audible.
205. It is indeed correct to say that the recordings were played severally during the testimony of those witnesses mentioned by the Prosecutor. They were produced as exhibits together with the corresponding transcript. It is also correct that some portions of the conversation in the recording were faint. However, listening to the conversation as it was played in Court and looking at the cross-examination that was directed towards this issue, it was clear to me the effect of this on the quality of the entire recording was insignificant. The conversation was in Swahili. I was able to follow it extensively and taken together with the direct oral evidence of the complainant in this case, it made the context and my understanding of this case clearer. In fact, words like Mhh, Ehee, a..., when listening to them in the normal conversation as opposed to when written appeared to make sense, it was either signaling the understanding of an issue, or simply giving cue to go on with the discussion and so on. I would thus disagree with the defence counsel’s assessment that the tape-recordings were ‘completely inaudible and largely blank’ and hence must be discarded. The parts that are said to have been faint or blurred were negligible.
206. Consequently, solicitation was not only discernible from the evidence of PW 6 alone. The tape-recordings particularly P. exhibit 22 and transcript P. exhibit 24 had corroborative evidence. In regard to identification of voice, that is neither here or there, besides Prosecution witnesses attesting to that fact, including PW 2 Douglas Ntaine who was called by the accused on his mobile phone and who confirmed the conversation which they had was as shown in the transcript, the accused during his defence or cross-examination did not raise any contention concerning the voice not being his. Moreover, in his defence he seemed to say listening to the conversation he was being entrapped. How then would he contest the issue of voice now?
207. After carefully going through the transcript of the conversation of 2/7/2013 however, it is clear to me that what appeared in the conversation of that day is an extension of what had happened before, which as described in evidence of PW 6 and which I accept was the continuation of their discussion of 25/6/2013. For instance, when in the conversation of 2/7/2013 at pg. 4 line 7 from the bottom PW 6 asks, Abdirahman: So tumeagana sasa ngapi? Which is in English translates directly to, ‘So what have we now settled on?’ which evidently is a question directed at a discussion happening around when the conversation is taking place; the accused responded in the past tense, he replied ‘Njoroge: Tuliaganaaaa, mia moja’; meaning, ‘We settled on one hundred.’ Even listening to the actual conversation, one could tell that it was not a mistake of the proper tense was reference to what had happened much earlier which gave credence to the testimony of PW 6 about there being a previous discussion that took place before that date. I will shortly consider what one hundred in context of this case refers to.



208. Another indication that this was a continuation of a previous discussion and not an initiation of a new thing is the excerpt of the conversation at pg. 3 line 2 from the bottom to pg. 4 line 1 at the top, after what appears to be a general talk, the accused brings up the issue, this conversation goes like this:

“Njoroge: Eheee, umefika wapi sasa

Abdirahman: Eee

Njoroge: Si mimi nilikua nafikiria ni mali umeniletea

Abdirahman: Eee Mali nimali nitaleta

209. Clearly, the way that conversation goes here indicates that the accused was expecting something from PW 6 and does not shy away from reminding him about it. ‘Mali’ in Swahili means ‘property’ but in the context of this case it must be construed narrowly in conjunction with all the oral testimony of PW 6.

210. The accused tendered a defence of entrapment. He stated that a look at their conversation showed that that PW 6 was steering the discussion towards money so as to entrap him a fact that is also amplified through his Advocate submissions.

211. Black’s Law Dictionary, 12th Edition defines entrapment as follows:

Entrapment: -

1. A law enforcement officer’s or government agent’s inducement of a person to commit a crime, by means of fraud or undue persuasion, in an attempt to cause a criminal prosecution against the person.

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The affirmative defence of having been so induced. To establish entrapment (in most states), the defendant must show that he or she would not have committed the crime but for the fraud or undue persuasion.

212. Legally, the defence of entrapment is permitted not because the accused is justified or excused by reason of having been induced to commit a crime, but because the Court believes an innocent person has been induced by officers of the law to commit crime in order that he be prosecuted. Courts frown on what is evidently “state-created crime” because such prosecution would be unfair.

213. Indeed, Justice Warsame in Mohammed Kuriow Nur Vs. AG (2011) EKLRL, held that entrapment is a complete defence and it does not matter that the evidence against the person is overwhelming or that the guilt was undisputed. The court must refuse to convict an entrapped person not because his conduct falls outside the prescription of the statute but because even if his guilt is admitted, the methods and manner employed on behalf of state to bring the evidence can’t be countenanced.

214. To succeed in establishing the defence of entrapment, the person relying on the defence must be able to demonstrate that whoever induced or entrapped him was an either an officer of the state or agent of such officer.

215. In the United States where the jurisprudence on entrapment is well developed there are many judicial decisions of persuasive value that this court came across that buttress the legal stand-point that entrapment by a private citizen does not suffice as a defence to a criminal charge.

216. In the American case of Polski Vs. United States 33 F. 2d 686;



It was held:

“...An essential element of entrapment is that the acts charged as crimes were incited directly or indirectly by officers or agents of Government...It is not entrapment that one has been induced by some other person other than a person acting for Government to commit a crime, even if he would not otherwise not have committed it and even if the person inducing him commit it intended to later betray him to the Government...”

217. The above legal elucidation does not however mean that Courts should condone abuse of the criminal justice process. A distinct line must be drawn between what is, and what is not an abuse of criminal justice process. There are two scenarios.
218. The first instance is, as it were, where a law enforcement officer or an agent working in cahoots with such an officer be it be a private person or not, (for so long as the agency relationship can be proved), induces an accused into committing an offence despite some resistance on the part of the accused of getting involved being demonstrated but for the persistent actions of law enforcement officer or agent, he finally succumbs into engaging in crime. An entrapment defence is clearly available because the conduct of the law enforcement officer or the agent went beyond merely providing him with an opportunity.
219. Where however, the accused readily jumps into a suggestion to commit the crime without any demonstrable hesitancy or after very minimal persuasion or none at all, the defence will not be available as this is indicative of an already existing intent to commit the offence and all he wanted was an opportunity to execute that intention which he took advantage of.
220. The second scenario is that of a private citizen not acting as a law enforcement agent. If the accused goes ahead and commits an offence that has been suggested or induced by a private citizen without the involvement or participation of the law enforcement agency, the accused cannot raise entrapment as a defence but that too is a principle too wide to be left unchecked by the court. There must be instances when that must not be allowed to avoid flagrant abuse of criminal justice process.
221. If the private citizen suggestion or inducement to commit the offence to the accused and the accused's willingness to participate in that offence was secured before reporting him to the law enforcement agency; a plea of entrapment by the accused based on the enticement by the private citizen should not succeed because that in itself is not action that can be traced to the State. In the words of Newman Vs. United States 28 F. 2d, 681;

“...The Government is not bound by acts of persons who have never been, or in fact ceased to be its agents. And whether the doctrine of entrapment is made to rest upon the theory of estoppel, or upon consideration of public policy, or upon some other ground, it can be invoked only where the Government, through its officers or agents are chargeable with inducing the commission of the offence...”

222. However, if the private citizen inventively makes a report against an accused person to the law enforcement agency then after that report, is when he starts to plant the idea of crime in the accused to committing the offence by persistent encouragement in spite of demonstrable unwillingness on the part of the accused, allowing that kind of conduct on the part of the Law Enforcement Agency would be acquiescing on the abuse of criminal justice process because it can objectively discern such origination. That said, the ultimate responsibility to determine if there has been entrapment lies with the court which should evaluate the response of the accused to the instigation by the private citizen by



weighing it against how an average law abiding citizen would ordinarily react under circumstances and decide if there was abuse of the criminal justice process.

223. In this case, the defence of entrapment is not premised on the fact that PW 6 was a law enforcement officer or an agent of a law enforcement officer to instigate the accused into committing the offence in question. There is no proof, either explicitly or impliedly that PW 6 was a law enforcement officer or an agent of a law enforcement agency or officer with instructions to instigate the accused into committing these offences. Merely reporting a complaint and assisting in detection of the offence does not make one an agent of the State.
224. What the defence alleges is that from the point EACC entered into the matter is when PW 6 began to steer the accused manipulatively into committing the crime so that he could be arrested. The defence counsel argued that the investigating officer, PW 8 Charles Samiji coached PW 6 to go and steer the conversation towards money. That insinuation was strongly refuted by Mr. Samiji when put to him on cross-examination who insisted that he never knew PW 6 before nor the accused to motivate him to do that.
225. That court does not find that submission correct because as already pointed out by the Court, there is clear indication that this was a continuing discussion and is apparent that by the time EACC entered into this matter; both PW 6 and the accused were already engaged in a discussion along those lines. It was continuation of an on-going arrangement, not an origination from the point the report was made. The law enforcement agency, that is EACC, was thus not there during the origin of that conversation between PW 6 and the accused. It is evident the discussion had been started before report was made to EACC.
226. The defence of entrapment cannot thus succeed taking into account that the incident of solicitation occurred long before the Law Enforcement Agency came into the picture. All what Investigating Officer tried to find was if there was merit in that complaint. He secretly had the conversation between the accused and PW 6 recorded to ascertain the truth of the complaint. Use of such investigative techniques is necessary to detect offences of this nature that are committed in great privacy and are difficult to detect. At the conclusion of his inquiry he detected an offence. I find neither the Investigating Officer nor EACC for that matter went beyond the mandate that is required in investigating such crimes. What was done was merely to provide the accused an opportunity to commit the crime he had clearly formed an intention to commit from the time he instructed that people pursuing payments for projects be directed to him first.
227. Taking the direct oral evidence of PW 6 as well as the recorded conversation referred to already, it is clear to me beyond peradventure that there was solicitation of one hundred thousand shillings in this case. Even though the defence made a lot of heavy weather on the affidavit he swore at the point he had indicated wanted to withdraw the case, at no point did he say that his report to EACC was not truthful. All he said was the reason that drove him to seek the withdraw was his ill-health, the delay of the case and his religious tenets which he explained in cross-examination as his decision to forgive. On whether it was hundred thousand shillings, the transcript captures the accused saying ‘tuliaganaaaa mia moja’, that evidence cannot be taken in isolation, it must be taken together with the oral evidence of PW 6, I accepted his evidence as a credible witness, it meant Kshs. 100,000/- thousand.
228. On the basis of the foregoing findings therefore, I do find there is credible evidence to support the fact of solicitation in count 1. As for the 2nd count, I find that what happened on 2/7/2013 was not independent of what had transpired previously on 25/6/2013. Evidence in the recording support the oral evidence of PW 6 concerning the events of 25/6/2013; it was not a new demand but an affirmation of what had actually been agreed upon. To show the solicitation was corruptly intended, one needs to



look at pg. 5 of the transcript where discussion on what else PW 6 is expected to provide takes place and accused indicates that when he does that, he will call the CDF person and the matter will be sorted out but hints that it was PW 6 had knotted himself.

229. In regard to count III, the offence of receiving, the accused defence was that the money was planted on him. He said it is EACC officers who put the money in his coat after threatening him to surrender his coat to them.
230. For the Prosecution, PW 6 testified that he had given the money to the accused. He stated that it was after the accused received and counted it that he beeped the EACC officers who came and arrested him. The version of the complainant is supported by the tape-recorded conversation of 3/7/2013 and the transcript of the conversation thereof. There is the portion of the conversation where PW 6 tells the accused to count the money and the accused acknowledges that it one hundred thousand. That is before EACC officers come into the picture. That portion of the conversation at pg. 10 goes as follows:

“ Abdirahman: So nikupe kila kitu

Njoroge: Yea

Abdirahman: Kila kitu

Njoroge: Mhh

Abdirahman: Wewe nikupe elfu ngapi

Njoroge: Wewe maliza halafu uniulize hiyo maswali, hahaha (laughing)

Abdirahman: Eehh

Njoroge: uniulize kama ume maliza, Napiga simu tukiwa na wewe hapa

Abdirahman: Okay

Njoroge: Mhhh

Abdirahman: Ensure you tell me, count the money.

At pg. 11,

Abdirahman: How much is that?

Njoroge: This is one hundred

Abdirahman: One hundred?

Njoroge: Mhh

Abdirahman: One hundred million?

Njoroge: Mhh

Abdirahman: One hundred million?

Njoroge: One hundred thousand

Abdirahman: Hundred

Njoroge: Hundred thousand

Abdirahman: Very good

Njoroge: So leta cheque ya Committee



231. Moreover, the issue of money being stashed into accused coat by EACC officers was an afterthought. It never featured at all during cross-examination of any of the EACC Officers.
232. The accused defence that he had no capacity to sign cheques or make payment to PW 6 is view of section 50 of the *Anti-Corruption and Economic Crimes act* irrelevant. In any case, this assertion by the accused that he had no form of influence over the CDF Committee is contrary to his conduct on that date of arrest or listening to his conversation of the previous day where he sounded confident that he will pull the right strings. Immediately after receiving the treated 100,000 before PW 6 alerted the EACC officers to come and arrest him, he made a telephone call to PW 2, Douglas Pashet Ntaine. The accused called Ntaine and he can be heard instructing him that he should write him the cheque.
233. The fact therefore that the accused solicited Kshs. 100,000 on 25/6/2013 which fact he continued to assert on 2/7/2013 as captured in the recording of 2/7/2013 has been established beyond reasonable doubt. As already pointed out, I will not consider the incident of 2/7/13 as an independent transaction because having the two will make them multiplicitous.
234. The fact of receiving the money has been established. This is not only discernible from the statements made by the accused in the tape-recorded conversation of 3/7/2013 but also from the direct oral evidence of PW 6 who I considered credible and further, the presence of APQ chemical in in hand and swabs of the inner pocket of his coat which was examined by the Government Chemist.
235. The solicitation and the said receipt was corrupt in nature as accused was seeking a personal gratification to enable a payment from public coffers that was lawfully due to the Company associated with PW 6 to be made.
236. I thus find count 1 and 3 proved beyond reasonable doubt by the Prosecution and convict the accused accordingly under section 215 of the Criminal Procedure Code. He is only acquitted in count 2 under section 215 of the Criminal Procedure Code for reasons already stated.

JUDGMENT READ IN OPEN COURT THIS 29TH DAY OF MAY, 2020.

L.N. MUGAMBI

CHIEF MAGISTRATE

29.5.2020

SENTENCE

I have considered the litigation so eloquently put the counsel for the accused, Mr. Wandugi. That accused has had a long public service career where he has contributed to various matters of public development as a leader both as a councillor and Member of Parliament. That due to this case, his political career would be adversely affected going forward. That he is a family man with children in school and wife to support and father, he is a 1st offender who deserves another chance to relook at his life for he has greatly learnt from this experience.

The state on the other hand has urged this court to mete out a deterrent sentence considering that accused was a public officer, to wit, Member of Parliament who preyed on a disabled man who was sickly by demanding bribes for him.

As correctly pointed by the defence counsel, equality before the law is a constitutional guarantee, there is no law for the rich and poor. I would thus be wrong to punish the accused based on his status as opposed to the offence he committed. Sentencing principles encourage that 1st offender should be given a second chance to reform particularly where they have shown remorse. In this case, although the accused solicited and received kshs. 100,000/= he did not benefit from that crime. The money was recovered and produced in court as an



exhibit. He is a family man and his children and spouse depend on him. I quite agree that his conduct as representative of the people was wrong.

He also preyed on a sickly man who was pleading with him for payment. Having considered all these factors, the court considers it fair and reasonable in meting out this sentence to give him an option of a fine in hope that, as indicated by his advocate, he will seize the opportunity in change and use is position of influence to preach against the vice of corruption.

He is sentenced as follows:

Count 1:

Accused to pay a fine of kshs 650,000/= (six hundred and fifty thousand) in default one (1) year imprisonment.

Count 11:

Accused to pay fine of kshs six hundred- fifty thousand in default serve (1) year imprisonment. In default of payment of fine, sentences shall be consecutive. Right of appeal 14 days.

L. MUGAMBI

CHIEF MAGISTRATE

29/5/2020

Mr. Wandugi:

I have two applications. I apply for typed copies of proceedings and judgment.

Secondly, accused deposited a sum of ksh 400,000/= in court. I urge the court to order that the same be applied as fine so that he has to pay the balance to serve his freedom.

M/s Mutella: we have no objection.

Court:

Typed copies of proceedings and judgment be supplied to the defence counsel, Mr. Wandigi as prayed on payment of court fees.

Further, the application to apply kshs. 400,000/= four hundred thousand deposited as cash bail in court via original receipt No. 0388682 dated 4/10/16 is allowed (original receipt submitted and given to court assistant Erick Mugane).

L. MUGAMBI

CHIEF MAGISTRATE

29/5/2020

