



**Republic v Ngumi (Anti-Corruption Case 5 of 2014)  
[2020] KEMC 1 (KLR) (Crim) (26 May 2020) (Judgment)**

*Republic v Robert Maina Ngumi [2020] eKLR*

Neutral citation: [2020] KEMC 1 (KLR)

**REPUBLIC OF KENYA  
IN THE ANTI-CORRUPTION MAGISTRATE'S COURT**

**CRIMINAL**

**ANTI-CORRUPTION CASE 5 OF 2014**

**LN MUGAMBI, CM**

**MAY 26, 2020**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**ROBERT MAINA NGUMI ..... ACCUSED**

**JUDGMENT**

1. The accused, Robert Maina Ngumi is charged with the following four counts, all under the *Anti-Corruption and Economic Crimes Act*, No. 3 of 2003.

**Count I**

**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.**

2. The particulars being that on the 7<sup>th</sup> of March, 2014 at Boulevard Hotel within Nairobi County, being a person employed by a public body, to wit, Kenya Revenue Authority, as a Manager, Domestic Taxes Department, corruptly solicited for a benefit of Kshs. 15,000,000/- from Winfrida Wanjiku Ngumi as an inducement so as to issue a letter reducing the tax arrears due from her company namely Space and Style Limited from Kshs. 439,987,077.92 to Kshs. 18,609,659.86/-, a matter related to the affairs of the said public body.



## Count II

### **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 11<sup>th</sup> of March, 2014 at Boulevard Hotel within Nairobi County, being a person employed by a public body, to wit, Kenya Revenue Authority, as a Manager, Domestic Taxes Department, corruptly solicited for a benefit of Kshs. 15,000,000/- from Winfrida Wanjiku Ngumi as an inducement so as to issue a letter reducing the tax arrears due from her company namely Space and Style Limited from Kshs. 439,987,077.92 to Kshs. 18,609,659.86/-, a matter related to the affairs of the said public body.

## Count III

### **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.**

4. The particulars being that on the 17<sup>th</sup> of March, 2014 at Boulevard Hotel within Nairobi County, being a person employed by a public body, to wit, Kenya Revenue Authority, as a Manager, Domestic Taxes Department, corruptly solicited for a benefit of Kshs. 15,000,000/- from Winfrida Wanjiku Ngumi as an inducement so as to issue a letter reducing the tax arrears due from her company namely Space and Style Limited from Kshs. 439,987,077.92 to Kshs. 18,609,659.86/-, a matter related to the affairs of the said public body.

## Count IV

### **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.**

5. The particulars being that on the 17<sup>th</sup> of March, 2014 at Boulevard Hotel within Nairobi County, being a person employed by a public body, to wit, Kenya Revenue Authority, as a Manager, Domestic Taxes Department, corruptly received a benefit of USD 1,100 from Winfrida Wanjiku Ngumi as an inducement so as to issue a letter reducing the tax arrears due from her company namely Space and Style Limited from Kshs. 439,987,077.92 to Kshs. 18,609,659.86/-, a matter related to the affairs of the said public body.
6. The Prosecution's case was that accused was an employee of Kenya Revenue Authority (hereinafter referred to as KRA) where he worked as the Audit Manager in charge of Wholesalers & Retailers Sector within the Medium Taxpayers Office when the matters subject of these charges are said to have occurred.
7. It was the prosecution case that KRA was keen on carrying out what it described as in-depth audit of records of the Company known as Space & Style Limited for the years 2008 to 2012 which intention it conveyed through its letter of notification dated 22<sup>nd</sup> August, 2012 (P. exhibit 3). The KRA field team that was tasked to carry out the said audit was from the Wholesalers & Retailers Sector which was being headed by the accused.
8. After the initial visit by the audit team to the Company premises where they examined certain records, the findings of the said in-depth audit were communicated to the Company through a letter from KRA dated 13/9/2013 (P. exhibit 7) that indicated that Space & Style Limited had a tax liability to the tune of Kshs. 439,987,077.92 which findings the Company's Directors disputed.



9. At a meeting on 6/11/2013 called at the request of the Directors of Space & Style Limited held at Forodha House to resolve the contentious issues arising from the said audit; that is the first time the Directors of Space & Style Limited saw the accused come on board. It was the very first time the Directors of Space & Style Limited met him as part of the KRA officials who were attending that meeting. The meeting was also attended by the KRA field audit team comprising of 3 members, Mr. Ng'ang'a, Mr. Kuria and Mr. Olando. The Deputy Commissioner in charge of Medium Tax-Payers Office, Mr. Ronald Omulindi chaired the meeting. The highlight of that meeting was a resolution that an audit review exercise be carried out so as to incorporate additional information from the records that the tax-payer committed to provide.
10. After that meeting however, the Directors were concerned when the Managing Director, Winfrida Wanjiku Ngumi (PW 1) was approached by their Company's former tax agent a few days to the date when KRA field team was expected at the Company for the audit review with a message that the accused wanted to meet her at a private meeting suggesting that the same takes place at the Southern Sun Hotel in Westlands. The Managing Director became suspicious of this conduct and decided make a report to Ethics & Anti-Corruption Commission (EACC). On its part, EACC decided to covertly conduct a continuous observation to discover the real intention behind this proposal that was made to the Managing Director through their former tax agent by the accused.
11. It was the prosecution's case that the first meeting between the accused and the Directors of Space & Style Limited was organized by the former tax agent; Mr. Waweru and it took place at Southern Sun Hotel on 14/11/2013. It served as an introductory meeting between the accused and the Directors of Space & Style Limited. The link man, the Company's former tax agent a Mr. Waweru also attended.
12. Other significant meetings that took place were held at Boulevard Hotel in Nairobi, remarkably on the 7<sup>th</sup> March, 2014, 11<sup>th</sup> March, 2014 and on the 17<sup>th</sup> of March, 2014. It was alleged that in the meeting of 7/3/2014, the accused revealed his intention of soliciting a bribe of Kshs. 15,000,000 in order to facilitate a reduction of the tax liability that had been established following the initial audit exercise that was now the subject of review. The said solicitation, it was alleged was further pursued on 11/3/2014 as he engaged the Directors on the logistics preparing and delivering the enormous bribe. In the meeting of 17/3/2014 the accused was arrested after he received the bribe which consisted of treated 1,100 genuine US Dollars and an additional fake 148, 900 US dollars in exchange of a letter that he allegedly gave out that purported to revise the said tax liability to Kshs. 18,609,659.86/-.
13. That is the brief sequence constitutes the Prosecution's narrative.
14. The accused disputed that narrative describing it as a fabricated set up in his defence which is also set out at length in this judgement.
15. The Prosecution called eleven (11) witnesses to prove the charges.
16. Winfrida Wanjiku Ngumi (PW1) was the Managing Director of Space Style Limited, a Company incorporated on 4<sup>th</sup> April, 2002 as per certificate of incorporation- P. exhibit 1. She also exhibited the Company's pin certificate- P051147545B- P. exhibit 2. She said the Directors of Space & Style were herself, M/s Winfrida Wanjiku Ngumi (PW 1) and Mr. Njama Wambugu (PW 2).
17. She told this Court that a letter by KRA dated 22/8/2012 (P. exhibit 3) is the one that triggered the chain of events that culminated into this case. The said letter was signed by the Deputy Commissioner in-charge of Medium Tax-Payers Office; Mr. Ronald Omulindi (PW 3) on behalf of KRA. It was a notice to Space and Style Limited through the Managing Director (PW 1), communicating KRA's



intention to carry out an in-depth audit of the Company records for the period between 2008 to 2012, both years inclusive.

18. On 24/9/2012, PW 1 wrote to Ronald Omulindi (PW 3) of KRA to inform him that the Company had been subjected to KRA compliance audit on 15/10/2010, 12/8/2011 and 15/12/2010 and attached the relevant compliance checks from Wilson Airport KRA Office that were exhibited before this Court as P. exhibits 5 (a to d).
19. Space & Style Limited wrote another letter on 18<sup>th</sup> October, 2012 (P. exhibit 4) seeking a rescheduling of the in-depth audit activity and at same time communicated the nomination of Mutahi Maranga as its tax agent who would deal with KRA on all tax matters on behalf of the Company.
20. In February 2013, three officers from KRA, Mr. Kuria, Mr. Ng'ang'a (PW 9) and Mr. Olando (PW 4) visited the Company offices to peruse its records. They spent a few days perusing records the Space & Style premises. In that very month of February, 2013, the Company appointed another tax agent known as G.W. Joseph.
21. In the KRA letter dated 11/3/2013 (P. exhibit 6) to the Managing Director Space & Style, KRA sought an additional supply of sixteen documents enumerated in the said letter. PW 1, (the Managing Director) tasked the Company Tax Agent, Mr. G.W. Joseph to handle the issue.
22. On the 14<sup>th</sup> of May, 2013; the Company's Tax agent G.W. Joseph submitted his resignation to the Company and copied the said resignation letter to the Commissioner of Domestic Taxes.
23. Through the letter by KRA of 13<sup>th</sup> September, 2013 – (P. exhibit 7), which was received by Space & Style Limited on 19<sup>th</sup> September, 2013; the findings of the in-depth audit for the period between December 2008 to September, 2013 showing the tax liability outstanding as Kshs. 439, 987, 077.92 was communicated. The letter had among others indicated that the findings were arrived at following meetings held between KRA and the Company's Tax Agent yet from around April, 2013 up to that date of 13<sup>th</sup> September, 2013; according to PW 1, there had been no contact between KRA and the Company.
24. The Company appointed another tax agent, Erastus & Company through its letter of 25/9/2013 (P. exhibit 8) to pursue the matter. The said agent engaged KRA by writing on 26/9/2013 (P. exhibit 9) notifying it about his appointment and seeking more information from KRA especially in regard to the letter dated 13/9/2013 (P. exhibit 7) that conveyed the results of the in-depth audit. He requested for the particulars of interviews of any meetings that had taken place between KRA and the Company's former tax agent or the Company itself as well as many other details he sought to be provided with.
25. In October, 2013 an unusual thing happened according to PW 1. A KRA Officer based at Wilson Airport KRA Office, who went by the name Ken Ochieng visited the offices of Space & Style Limited and requested to see the Managing Director, PW1, Winfrida Ngumi. In a conversation that followed, the said officer informed her that he was aware of the Company's outstanding issue at the Medium Tax Payers Office. He offered to introduce her to his boss based at Wilson Airport KRA Office so that the boss could link her to Mr. Ronald Omulindi (PW 3) of the Medium Taxpayers Office. He asked her to pay a visit to Mr. Okumu. Despite finding the proposal puzzling, she visited KRA Wilson Airport Office as advised by Mr. Ken Ochieng.
26. When she visited KRA Offices at Wilson Airport, true to his words; Mr. Ken Ochieng introduced her to his boss, Mr. Okumu who she met for the first time. Mr. Okumu told her that he was aware of her Company's outstanding tax issue with KRA and explained that he could arrange on how she could



- meet Mr. Ronald Omulindi of Medium Taxpayers Office. They agreed he would organize a meeting. This lunch hour meeting took place at Panafric Hotel on 25/10/2013.
27. PW 1 went to meet them with her co-director, Njama Wambugu (PW 2). Mr. Omulindi and Mr. Okumu came for the meeting. Mr. Omulindi suggested that she needed to write a letter requesting for a formal meeting at the KRA offices, Forodha House. She pointed out that she had already done that in a letter she wrote on 23/10/2013- P. exhibit 13.
  28. After the lunch meeting at the Panafric Hotel, KRA responded to her letter of 23/10/2013- P. exhibit 13. In its letter dated 31/10/2013- P. exhibit 12, KRA invited Space & Style Directors to a meeting with KRA officials at the KRA's Forodha House Offices on 6/11/2013.
  29. At the meeting of 6/11/2013, Space & Style Limited was represented by PW 1 and her co-director Mr. Njama Wambugu (PW 2). On the KRA side, there was Mr. Omulindi, the three KRA field officers namely; Mr. Ng'ang'a, Mr. Olando, Mr. Kuria. For the very first time, the accused (Mr. Ngumi), from KRA came on board. She had not met the accused before this particular meeting. The meeting resolved that the KRA officers would return to Space & Style Limited premises on 15/11/2013 for further review of its records.
  30. However, in the early days of the week that followed just before the agreed date for the review exercise by KRA field Officers; the Company's former Tax Agent who had since resigned way back on 14<sup>th</sup> May, 2013, a Mr. G.W. Waweru called the Managing Director, PWI Winfrida Ngumi. He informed her that he was aware of the outstanding tax demand from KRA and the fact that KRA field officers were scheduled to visit her Company for the audit review on 15/11/2013. He then mentioned to her that Mr. Ngumi (the accused) was his friend and had suggested that he wanted to meet her. He offered to link them in a face to face meeting prior to the date of the review exercise. PW 1 said she found the proposal puzzling but she nevertheless gave him the go ahead to organize the meeting. The meeting was to take place at Southern Sun Hotel on 14/11/2013, one day before the date set for the audit review exercise.
  31. On 13/11/2013, she decided to go the EACC offices to report what she described in her own words as:  

“ ... What I considered to be puzzling events relating to our audit...”
  32. After her report to EACC, an officer called Patrick Mbijiwe (PW 11) was assigned to deal with the matter. She was told to comply with all the requests made by KRA Officers henceforth but always ensure she kept EACC updated of any request that would be made. She was told that she would have to record all the encounters she would have with the KRA officers from that day forward and was introduced to an audio- visual recording device P. exhibit 13 and showed on how to operate it.
  33. The Southern Sun Hotel meeting on 14/11/2013 went on as planned. It began a few minutes past 6.00 P.M. On arrival at the venue, PW 1 found her Company's former tax agent Mr. Waweru who was the organizer of the meeting already there. Minutes later, PW 1's co-director, Mr. Njama Wambugu (PW 2) came and Mr. Ngumi (the accused) followed. She noticed Mr. Patrick Mbijiwe of EACC (PW 11) covertly perched by the pool side closely watching them. She placed the recording gadget on top of the table as they ordered for drinks. They broached the subject of the in-depth audit over some drinks. Mr. Ngumi promised to assist and support them in the review after the scheduled visit by the KRA field officers was carried out.
  34. That meeting ended at around 8.00 P.M. She returned the recording gadget to Mr. Mbijiwe (PW 11).



35. She authenticated the memory card dated 14/11/2013 in which the particular recording was contained and the same was played in court.
36. PW 1 was also shown the 76-page transcript of the video clip between Winnie Ngumi, Njama Wambugu, Waweru and Robert Ngumi for the meeting on 14/11/2013 (P. exhibit 15 a) and she confirmed her signature thereof.
37. The following day on 15/11/2013, the audit review meeting by KRA Field Officers, comprising of Mr. Olando (PW 4), Mr. Kuria and Mr. Ng'ang'a (PW 9) went on at the Company's boardroom. She participated in that meeting as well as her co-director, Mr. Njama Wambugu. She also recorded this particular meeting. She returned the gadget to Patrick Mbijiwe of EACC after the KRA Officers left. She authenticated the memory card containing the recording of 15/11/2013- (P. exhibit 16). The same was played to the Court. After the recording was played, the Court made the following notes:
- “...Conversation starts off clearly. The meeting held jointly between the complainant (PW 1) and her co-director and KRA representatives to review the report prepared earlier by KRA representatives focuses on areas of disparities and explanations on how report was arrived at by KRA personnel as the complainant and co-director explain their points of view on areas of disagreement...”
38. She confirmed she had signed the original transcript of that conversation comprising 52 pages (P. Exhibit 17 a).
39. On 19/11/2013 she testified that her co-director informed her that Mr. Nga'ng'a, who was one of the KRA field officers who had visited the Company to carry out the audit review had called her suggesting that they needed to meet. She did not attend that meeting. After that meeting, her co-director, Mr. Njama wrote a letter responding to the issues raised in the KRA letter of 13/9/2013-P. exhibit 7 seeking more time to address the issues because the Christmas season was approaching. This letter by Njama Wambugu was dated 18/12/2013 (P. exhibit 18).
40. There was nothing else significant that happened until early March, 2014. One early in the morning, on 7<sup>th</sup> March, 2014; PW1 was going to work when her co-director, Njama Wambugu called her and informed her that Mr. Ngumi, (the accused) had called her for an urgent meeting at the Boulevard Hotel which was to take place at 9.30 a.m. It was around 8.30 a.m. She quickly rushed there and found the accused and Mr. Njama already there. In that meeting, she testified that the accused informed them that he had been transferred from Forodha House to the Times Tower and that he was under pressure from his seniors to bring the audit to a closure. He also told them that if the assessment pursuant to that audit was going to be confirmed, it would mean they were going to pay the amount of Kshs. 439,987,077.92 and thereafter dispute the payment. He promised that he could assist them to lower this figure if they could get him 15 million shillings so that he can secure them a letter of assessment with a reduced figure.
41. They told the accused that money was a lot and they were not in a position to raise it on a short notice. They requested for more time and a follow up meeting the following Tuesday which was the 11<sup>th</sup> of March, 2014 to update him. The 7<sup>th</sup> of March, 2014, which was the day they had met, it was on a Friday. On 10/3/2014, which was a day before the next scheduled meeting of Tuesday, 11/3/2014; they went to EACC and briefed Mr. Mbijiwe (PW 11) on what had transpired on 7/3/2014. She was handed over the recording gadget to use in the following day's meeting of 11/3/2014.
42. The meeting on 11/3/2014 took place at Boulevard Hotel at 8.30 P.M. On arrival, they found the accused, Mr. Ngumi waiting. The meeting discussion generally revolved around the 15,000,000



shillings which both Directors indicated they had not raised yet. They also considered the possibilities of to how such a colossal amount of money would be logistically put together and delivered to the accused.

43. It is the accused who suggested that it should be converted into dollars for ease of carrying. PW 1 explained:

“...He mentioned that we could convert it to US Dollars. It would be easy to carry for portability and could even fit in my handbag. We told him to convert to US Dollars would also take a bit of time and we asked him to give us time to convert the 15,000,000 into dollars...”

44. They thus scheduled another meeting the following Friday which was intended to confirm if they had managed to find the money and converted it into dollars. She returned the recording gadget to Patrick Mbijiwe of EACC. She identified the memory card containing the record of the meeting of 11/3/2014 (P. exhibit 19). It was played to the Court. She also identified her signature on the corresponding transcript that comprised of 25 pages- (P. exhibit 20). After the recording of 11/3/2014 was played to the Court on 2/8/2016; the court made the following remarks:

“...The meeting discusses the issue of huge amount of cash and the question that lingers is how it will be delivered due to bulkiness. The issue of changing it into dollars is floated but abandoned. There is also the issue of security concern...”

45. In a meeting she held with Mr. Njama Wambugu at a hotel within Kilimani Area on 16/3/2014, they discussed and agreed to postpone the date for the delivery of money to following day so that EACC could get on board as they could not raise that money by themselves.

46. The following day, 17/3/2014 they visited EACC at around 9.30 A.M. They met with Mr. Patrick Mbijiwe who introduced them to another officer; Mr. Francis Kamwara (PW 7). He took her through serial numbers of 11 pieces made up of genuine denomination of one hundred US dollar bills (all of 2009 series), amounting to 1,100 US Dollars. They together compared with photocopies that were made of the same. She identified the said genuine US dollar bills in Court by their serial numbers (P. exhibit 21A to 21K). She also identified their photocopies - P. exhibit 22. She identified her signature on the inventory of the genuine dollar bills- (P. exhibit 24). She was also shown a bundle of one hundred denomination fake US dollars' bills (consisting of 1,489 pieces) totaling to 148,900 fake US Dollars - (P. exhibit 23).

47. Mr. Kamwara explained to her that the said notes would be inserted into an envelope he had marked '1.' After the treatment of the notes, envelope '1' was to be inserted into another envelope marked '2'. She was asked to sign the inside of both envelopes and indicate the date. Mr. Kamwara (PW 7) also signed. Mr. Kamwara's instruction was that she should only tear envelope '2' that is, (P. exhibit 25 B) at the point of handing over the money which was contained in envelope '1'-(P. exhibit 25A). She put envelope '2' into which contained envelope '1' (that had the money) into her handbag.

48. She identified the two envelopes marked '1' & '2' i.e. (P. exhibit 25 A & 25 B) in court. Concerning P. exhibit 25B, she explained:

“...It was not in this state when I was given. It was brand new when I was given. I am the one who tore it...”



49. Mr. Njama was the one who was given the recording gadget on that day. Thereafter, PW 1 and her co-director (PW 2) Njama Wambugu got into their car while EACC Officers drove in their own and headed to Boulevard Hotel where they arrived at about 5.30 P.M. There was heavy traffic on the road that day. EACC Offices who were undercover arrived before them and took their positions around the hotel. She noticed some at the parking area and others at the front verandah. PW 1, (Winnie Ngumi) and Mr. Njama (PW 2) sat at a table in the front verandah and waited for the accused, (Mr. Ngumi) to come.
50. When the accused arrived, they engaged in a long general talk and also discussed progress of the matter. Mr. Ngumi, the accused informed them that they had settled on a figure in respect of the tax liability which they would be allowed to pay in installments through postdated cheques that they were to hand over to him in two days' time.
51. Concerning the letter that he was to give to them revising the amount in the audit report, the accused pointed out that since they were in a public place, he could not display it because it was in the official letter head.
52. It started getting late. Mr. Ngumi asked Njama to accompany him to his car and PW 1 followed them. They entered the accused car. The parking area was well lit. Mr. Njama sat on the passenger's seat next to the accused who was in the driver's seat while PW 1 sat directly behind the accused on the back seat. Some light hearted short conversation and some jokes were momentarily shared as PW 1 tore 'envelope 2'-(P. exhibit 25B).
53. Mr. Ngumi, (the accused) then twisted and asked PW 1 to place the same on the car floor next to where she was seated. When she was done, the accused pushed it slightly under the seat where Njama was seated.
54. He then picked an envelope which was on a seat next to PW 1 and handed it over to Mr. Njama (PW 2). Mr. Njama tried to open the envelope but Mr. Ngumi told him he would read it later on. Mr. Ngumi reversed his car and drove towards where PW 1's car was parked. In the meantime, Mr. Njama received a call just as accused was approaching where PW 1's car was parked. Njama stepped out to pick the call and PW 1 alighted too upon seeing EACC Officers who were now hanging about. Mr. Patrick Mbijiwe introduced the officers and apprehended the accused.
55. She handed over envelope 'number 2' plus the letter dated 14/1/2014 - (P. exhibit 26) which she had now managed to go through as the arrest was taking place. The letter was to the effect that the Company's tax liability now stood at Kshs. 18, 609, 659. It showed the author as R. Omulindi. They left the scene soon thereafter.
56. The recording of 17<sup>th</sup> March, 2014 (P. exhibit 27) was played in court after the authentication by PW 1. The Court's remarks after it was played in Court on 14/9/2016 was as hereunder:

“...Initial start characterized by noisy sounds. Eventually female voice that sounds clear is heard. It followed by clear voices of two men who speak at length in Kikuyu and the female interjecting once in a while in either Swahili or English...”

Further observations:

“...The faces of the men and the woman engaged in the conversation are not visible but the area around the chest and hands are clear. Thereafter the conversation proceeds up to the end in clear audible voices. Quality of the recording is ok...”



57. She also identified the transcript of 17/3/2014 with her signature on it (in ref. to P. exhibit 28).
58. On cross-examination by Mr. Kimani Muhoro appearing for the accused, PW 1 confirmed that the matter of tax liability from the said in-depth audit was never concluded because her Company was not served with the final assessment report by KRA after it disputed the initial audit findings. She insisted that her Company did not have any outstanding tax arrears owed to KRA.
59. Concerning Mr. Ken Ochieng who had visited her Company's premises and offered to introduce her to a Mr. Okumu his boss at Wilson Airport KRA Office, who was to in turn introduce her to Mr. Omulindi (PW 3) of Medium Taxpayers Office, she said had known Ochieng prior to that date because he been with the KRA Wilson Office but she had never met Mr. Okumu. She said she agreed to meet Okumu based on the understanding that her Company for tax purposes was now being moved from Wilson Airport KRA Office to a new tax office under Mr. Omulindi. She confirmed that it was Mr. Okumu who paid for the lunch they took during the introductory meeting with Mr. Omulindi. She explained Mr. Omulindi opted not to discuss the audit issues during the lunch hour meeting at the Panafric Hotel by suggesting to her to write a letter requesting for a meeting on the matter at Forodha House KRA Offices.
60. She vehemently denied suggestions put to her by the Advocate for the accused that Mr. G.W.J Waweru, her Company's former tax agent had in his letter of resignation stated that he was resigning because the Company was not providing him with the relevant records for tax purposes. She denied the letter that the defence counsel showed to her as being the one their former tax agent wrote to the Company at the time he resigned as their tax agent.
61. Asked to explain describe the report she presented to EACC, she stated:
- “...At EACC, my first complaint was we had been approached to have a meeting outside the office by gentlemen who were doing our audit. He was in-charge of the team, Mr. Ngumi. He sent Mr. Waweru. I mentioned all the names, straight from Mr. Omulindi. I mentioned Mr. Omulindi, Mr. Ngumi, then officers Olando, Kuria, Ng'ang'a. We had been asked to have a meeting outside the office which was odd...”
62. Asked if she greeted Mr. Ngumi when he arrived for the meeting at Boulevard Hotel on the evening of 17/3/2014, she stated:
- “...I remember we exchanged greetings but I don't recall shaking his hand...”
63. She further explained that she had been instructed not to touch the inner envelope which had been treated and was only in contact with the outer one which she tore at the point she was giving out the money. Asked if the envelopes were sealed, she answered in affirmative. However, upon scrutiny by the Court, which it did at the request of Counsel, the adhesive on the envelope (P. exhibit 25 A & B) did not appear to have been used.
64. She was given two envelopes of equivalent size and asked to demonstrate how the envelopes she received that day looked like at the point she was given them, that is the inner and the outer one. She folded them after inserting one with the money into the other. Asked why she had not sealed them in the same way she had described they were sealed when she received them, she clarified:
- “...It was folded like this. My English might not be so good...I lifted it and tore like this. I removed it by tearing from the side...”



65. She conceded that in the transcript of 11/3/2014 (P. exhibit 20); some sentences in the said transcript were not accurately aligned with the exact speaker of those particular words after listening to that recording. After being taken through some of the specific instance, she conceded:

“...I confirm in those instances the person indicated is not right. There was a lot of conversation; it was difficult to recall all of it. There may have been errors in typing...”

66. Counsel further pointed out that one of her names was Ngumi just like one of the names of accused yet the transcripts had not distinguished which Ngumi was being referred to at any given time, to which she responded:

“...It indicates Ngumi and Winnie...”

67. PW 1 was further challenged on cross-examination to pin-point where in the transcripts the accused asked for the Kshs. 15,000,000; she said:

“...On the transcript, I don't see him asking for money. On the video it is different...”

She then added:

“...On the transcript, I said he did not ask for 15,000,000/-. He asked that it be changed into dollars. He had asked for it on 7/3/2014. The meeting of 7/3/2014 was not recorded...”

68. In re-examination, she asserted that the accused asked for 15,000,000 shillings in order to assist in preparing a letter to reduce the amount in the letter of 13<sup>th</sup> September, 2013 to some reasonable amount. She clarified there was no mix-up due to the name Ngumi which was common to her and accused by stating:

“...In the transcript that we referred to, I am being referred to as Winnie. There is no place I am referred to as Ngumi...”

69. She further re-affirmed that the accused contact with the money came when he attempted to push it under the car seat.

70. PW 2, Mr. Njama Wambugu's evidence in chief was to largely a reiteration of PW 1's evidence in regard to the description of events that culminated into this case. He spoke about the KRA letter of 22/8/2012- P. exhibit 3 that elicited protestation by the Company on ground that it had been undergoing compliance audits, the Company's appointment of Mutahi Maranga to deal with the tax issues raised in that letter, the letter by Mutahi Maranga of 18/10/2012- P. exhibit 4 seeking deferral of audit exercise, the visit by the three KRA field officers namely Mr. Orlando, Kuria and Ng'ang'a who went to the Company premises to inspect the company financial records, the appointment of Mr. Waweru of G.W. Joseph & Associates as the Company Tax agent as well as his subsequent resignation, the letter by KRA seeking specified additional documents through its letter of 11/3/2013- (P. exhibit 6), the letter dated 13/9/2013 that conveyed the in-depth audit findings- (P. exhibit 7), the letter dated 25/9/2013 that appointed Erastus & Co. to be their tax agent- (P. exhibit 8), Erastus & Co letter to KRA of 26/9/2013- (P. exhibit 9); PW 1's letter (CEO) of 23/10/2013 to Mr. Ronald Omulindi of KRA requesting for a meeting- P. exhibit 13 which was however not responded to until the informal meeting organized after a KRA officer based at Wilson KRA Office introduced the CEO to his boss at Wilson Airport whereby the said boss facilitated an informal meeting between the Directors and Mr.



Omulindi at Panafric Hotel and the subsequent invitation for a formal meeting at Forodha House on 6/11/2013 via KRA letter of 31/10/2013-P. exhibit 12.

71. He further confirmed he attended the Forodha House meeting with his co-director, Winfrida Ngumi (PW 1) while attendees from KRA were Mr. Omulindi, Mr. Nganga, Mr. Olando and Mr. Ngumi, (the accused) who he was meeting for the first time. This meeting resolved that KRA officers would go back and carry out a review of records relating to the audit on 15/11/2013.

72. However, before the scheduled review exercise could take place as agreed, something strange happened. The Managing Director that is (PW 1, Winfrida Ngumi) informed him that their former tax agent, Mr. Waweru had called her offering to introduce them to someone within KRA that will assist them in the unresolved tax audit matter. He explained:

“...Why this was strange was that we had another consultant on Board, Erastus & Co. We had not looked for him and we had not consulted him over the matter...It brought us to another level, we were starting to deal outside the office...”

73. The Managing Director thus went and made an initial report to the EACC. He did not accompany the Managing Director (PW 1) when she went to make the initial report.

74. On 14/11/2013, around 6.00 P.M. they passed by the EACC Offices and they were shown how to use the recording gadget as they went to meet with the accused marking the beginning of the investigations into matter. The gadget was then handed over to PW 1, Winfrida Ngumi. EACC Officers went ahead of them. The meeting was at Southern Sun Hotel.

75. Waweru joined them and then Mr. Ngumi, (the accused) whose first encounter had been at the Forodha House meeting. He testified:

“...Waweru said he wanted to introduce us to a gentleman who is a friend and who had said he could sit with us and solve our tax problem. After that introduction, Waweru said he was meeting other people in that hotel and walked away...”

76. After the witness authenticated the recording, the same was played; the Court noted at one point:

“...At 19:17:54, the two men’s faces seated across each other are clearly visible. This continues up to and about 19:23:37...”

The Court further observed, at 19:51:47

“A tall man in a tie is seen approaching the table where the witness and Mr. Ngumi are...” (The witness identifies him as Mr. Waweru).

77. The following day, 15/11/2013 the three KRA field Officers, Mr. Olando, Mr. Ng’ang’a and Mr. Kuria were at the Company premises. He was in that meeting alongside the Managing Director, PW 1, Winfrida Ngumi. The video recording of that meeting was played in court. It showed a meeting taking place in an office set up where participants began trickling at 11:32:46 as per the video’s real time record. The Court after watching and listening to the deliberations remarked that the meeting sounded formal where issues and counter issues were raised and explanations provided. The Court captured the KRA’s response briefly as follows:

“The meeting progresses on a pure formal note. The KRA team asks Mr. Ng’ang’a to start explaining the basis of income tax-tells them the income is surplus revenue from purchases.



They seem to agree that when they looked at the invoices posted in pastel they appeared different from manual invoices and this could have resulted in double posting. They agree they would compare banking with invoices...”

78. After that meeting, Mr. Njama Wambugu (PW 2) testified that Mr. Ng’ang’a, who was one of the KRA audit team members kept calling him (PW 2) telling him that his bosses were pressing to have the audit closed. Mr. Ng’ang’a requested to meet him at the T.R.M after 5.00 P.M. so that he could update him on what the thinking of KRA team in taking this matter forward was.
79. He informed Mr. Patrick Mbijiwe (PW 11) who told to him to go ahead and meet with Mr. Ng’ang’a. He was also handed over the recording gadget. The meeting took place on 19/11/2013 at a Café on the 1<sup>st</sup> Floor at T.R.M building.
80. Upon Mr. Nga’ng’a’s arrival they held some discussions which were substantially in Kikuyu language. The meeting lasted for between 30-50 minutes. He said in that meeting they agreed that it was necessary to the discuss numbers and bring the matter to a closure because it had persisted for long. When the video clip (P. exhibit 29) which he authenticated was played in court on 19/2/2018, the Court remarked:
- “...Conversation substantially conducted in Kikuyu language. Voices can be heard but no images displayed on the screen. Moments later, amidst conversation, partial image of a man dressed in a white shirt and a Coat is seen seated making a cup of tea but his face is hidden. Conversation is audible and can be followed but there is a bit of background noise. Towards the end, the video turns noisy and nothing comprehensible comes out. The conversation seems distant and muffled for close to 14 minutes...”
81. A transcript of the same-(P. exhibit 30) was also shown to him to which he testified in evidence in chief as follows:
- “...it is a transcript of a video clip between Jama Wambugu and Nganga held on 19/11/2013. It is 29 pages. My signature appears on pg. 29. It has two signatures on the page, i.e. Sicily Mumbi and I...”
82. In this meeting, PW 2 said that Mr. Nganga had disclosed that it was Mr. Ngumi (the accused) who wanted the matter closed. He said:
- “...He said Mr. Ngumi wanted to finalize this matter as soon as possible...”
83. Come the 20/11/2013, PW 2 received a text message from Mr. Ngumi telling him he would like to introduce him to a tax consultant called Mr. Kamau and went ahead to even text the telephone number of the said Mr. Kamau. He informed his co-director, PW 1 Winfrida Ngumi about the said Mr. S.K. Kamau and they arranged to meet him. They met the said S.K. Kamau at the Landmark Hotel in Westlands. The meeting was between Mr. Kamau, Winfrida Ngumi (PW1) and PW 2, but it was a very brief meeting as they were preparing for an overseas trip. It was the first and last time they met with the said Mr. S.K. Kamau.
84. When they returned from overseas, the accused told him that they needed to speed up to bring this matter to an end. In early March, 2014, they held a meeting at Hotel Boulevard along Uhuru Highway, opposite the National Museum. The meeting was early in the morning between Winfrida Ngumi (PW



1), Mr. Ngumi (the accused) and PW 2. In that meeting the accused requested for 15,000,000 shillings. PW 2 said:

“...When demand of 15,000,000 was made on us in the meeting of March, 2014, we were astonished. We were totally surprised. The money was to facilitate closure of the findings dated 13/9/2013. We were told the team that was doing this was demanding money-we felt it was a bribe...we had a consultant on record but the matter was taking a different direction, they were opting to deal with us directly. The Kshs. 15,000,000 was to be paid to Mr. Ngumi, not KRA. When the matter was brought up, we said we did not have it. We said we needed to comprehend how to get it. Mr. Ngumi said he would prefer to be paid in US Dollars since Kenya shillings would have been too bulky. The manner of payment was discussed in a meeting at Boulevard. Since we had reported to EACC, we went and reported the demand to an Officer called Patrick of EACC...”

85. When they visited EACC on 10/3/2014 and reported about the demand of 7/3/14 which they had managed to record, they were told they needed to record the next one since now a specific demand had been made. The meeting on 11/3/2014 at Hotel Boulevard was captured in the video recording. He testified that this meeting mainly dealt with the logistics of how the large sum of money would be procured, converted and delivered to the accused. The outcome of the meeting was that they go and try to look for the money and once they were ready, they communicate with the accused. After that meeting they went and updated EACC about those deliberations.
86. When the video clip of 11/3/2014- P. exhibit 19 was played in Court, the Prosecutor led the witness in confirming if the speakers in the recording vis-à-vis the speakers in the transcript were accurately aligned.
87. PW 2 identified mismatch between the speaker in respect of certain portions in the video conversation and what was indicated as their words against them in the transcript, such as: At pg. 10 of the transcript, 9<sup>th</sup> line from the bottom; the statement “15M dollars, 15 it’s what” he pointed out that the transcription showed that statement as having been made by Mr. Ngumi, but from voice in the video clip, it was him making the statement, not the accused, Mr. Ngumi. Last statement at pg. 10 of the transcript, “even our bank, if say we tell them to pay dollars exceeding 10,000 dollars” the transcript attributed the statement to Mr. Ngumi, but he said it was him, that is Njama who made those remarks. At pg. 11, the 2<sup>nd</sup> line, the statement, “they must, what do we call it? Pro- forma invoice” he said it was his voice and not Mr. Ngumi’s as indicated in the transcript. Pg. 11 line 4; the words “So how do we do it” he said those words were his and not Mr. Ngumi’s as indicated in the transcript. Pg. 11, line 7 from the bottom, the statement; “ee you know a lot of things are very important because, you know even us would want something that we know we have finalized that if we finish, you know it’s like sharing something, you have gone and we have gone nobody tomorrow will hear that, I did, it’s like even you going letter to look money for you” this was his statement and not Mr. Ngumi’s as indicated in that transcript. Pg. 12 line 4 from the top, “in the top office, I told you that” the witness said that was not his voice, but Mr. Ngumi’s. At pg. 13, when Winnie asks, “who is the contact person?” the witness stated that it was Mr. Ngumi who answered at pg. 14 the first line at the top. Pg. 16, line 12 from the top on the translated version, showing Njama remarks “mm and now security is no. 1” he said that statement was not made by him as shown in the transcript but by the accused, Mr. Ngumi. Pg. 23 of the translated transcript, first line from the top, “Mr. Ngumi honestly...” the words were his, not Mr. Ngumi. Pg. 23, line 14 from the bottom the words “We do need that, the matter can never reopen any other time in our future, we need guarantee from, like this matter you people have closed it this matter is good, it cannot be challenged with any other authority and its closed for life” the witness stated that this was his voice, not Mr. Ngumi as indicated in the transcript. Pg. 23 line 6 from the bottom, the



words “mm, and that’s why I said we need to be very sure of that because...” the words were made by him, not Mr. Ngumi as shown in the transcript.

89. When he was shown the transcript of the video clip of 11/3/2014-(P. exhibit 20) he stated:

“...It is the transcript of the video clip between Winnie Ngumi, Jama Wambugu and Robert Ngumi held on 11/3/2014. It is 25 pages. My signature is on pg. 25. It certifies I have read the transcript and confirms it contains the conversation held between myself, Winnie Ngumi and Robert Ngumi held on 11/3/14...”

90. On 14/3/2014, the accused called him and requested that they meet at Java, at the Sarit Centre at 6.00 O’clock that evening. He met the accused who was in company of other people but he was unable to record this meeting. PW 2 described what the accused wanted in that meeting stated as follows:

“...He wanted us to put everything together on Sunday and he proposed at Java next to KTTC just before UN. It was supposed to be in the evening around 6.00 O’clock. I don’t know why he chose Sunday...I avoided meeting Ngumi over the weekend for various reasons. We were not prepared, EACC and ourselves. Sunday was also a tricky day to have EACC officers and for that reason, I avoided communication over the weekend. I informed what had transpired to Winnie...”

91. PW 2 testimony concerning the incident of 17/3/2014 in relation to what was done at EACC in preparation for the impending operation and what transpired thereafter was substantially similar to the evidence of PW 1.

92. He said the accused had earlier on called him and he confirmed to him that they were ready as well as the time and venue of the meeting. When they eventually met and held some discussions, PW 2 asked the accused if he had the letter that he had promised to get them which he confirmed but when he requested to see it, the accused declined saying they were in a hotel and the letter was in KRA logo. He then testified further as follows:

“...After we had a cup of tea and indicated we had the money, we walked to his car. We asked if he had the letter and said everything was in place...”

He continued:

“...It was a Peugeot, gray or silver in colour. It is not one of the very popular makes, I guess 406. Mr. Ngumi opened the car, the driver’s door and I entered and sat on the front left that is front passenger seat. He sat on the driver’s seat. Winnie sat behind him, that is right rear seat. Mr. Ngumi gave me the letter and asked Winnie to put the money on the floor carpet of the car on the left hand side...Winnie put the money on the floor and Mr. Ngumi from the driver’s side stretched backwards to feel the money. He then started driving towards our cars which were parked close to the entrance of Boulevard facing the Boulevard Verandah. I tried to open the letter to read it but he said it was not necessary I could read it later. He drove to where I had parked my car, Winnie’s was next. He drove to the empty parking next to Winnie’s. As he was parking his car, I received a call and I left to pick the call. I left Winnie inside the car. I saw Patrick walk towards the driver’s side of his car. Winnie came out. There was a commotion as accused was trying to drive off but gate was closed. From where we were it was 10-15 metres to the gate...”



93. He returned the recording gadget before they left the scene. He said he gave the letter he had received from the accused to his co-director who took it EACC.

94. On 19/3/2014, they went back to EACC where they reviewed the recordings. The video recording of that day was played in Court and the witness also identified his signature on the transcript- (P. exhibit 28) which during his evidence in chief confirmed as follows:

“...It is 63 pages. My signature is on page 63. Where my signature appears is indicated as follows ‘I Jama Wambugu certify that I have read the above and I confirm that it contains the conversation held between myself, Winnie Ngumi, Waweru and Robert Ngumi on 17<sup>th</sup> March, 2014...”

95. He told the Court that Mr. Waweru was not part of the meeting that took place on 17/3/2014 stating that only the three of them participated in that conversation contrary to the certificate at the foot of the transcript that bore his signature.

96. He asserted:

“...Waweru was not part of it. We were three of us...”

97. Mr. Njama Wambugu (PW 2) was cross-examined extensively by Mr. Elisha Ongoya for the accused person who began by probing the correct spelling of his name. He confirmed that the correct spelling was “Njama” with ‘N’ at the beginning and not “Jama” beginning with ‘J’ as appearing in references to his name in the transcripts before the Court. In the course of cross-examination, he then went ahead and showed him the transcript of 14/11/2013 and asked him to confirm whether the name, was ‘Jama Wambugu’ beginning with ‘J’ or ‘N’ and the witness confirmed it started with ‘J’ and not the ‘N’. He then he was asked if there is a Director going by that name at the Space & Style Limited, to which he responded:

“... ‘Jama’ Wambugu is not the name of any Director of Space & Style...”

98. PW 2 was shown the transcript certificate in the transcript of 15/11/2013 which was signed against the name ‘JAMA WAMBUGU’ without the ‘N’ at the beginning and he equally answered:

“I don’t know “Jama” Wambugu (i.e. referring to Jama without the ‘N’). My name is ‘Njama’ (with ‘N’ at the beginning)

99. He maintained the same position in regard to the transcriptions of 19/11/2013-P. exhibit 30 and 11/3/2014- P. exhibit 20.

100. He also took the witness through a similar trajectory in respect of the name “Winnie Ngumi” appearing in the transcripts instead of full name ‘Winfrida Wanjiku Ngumi’ where in reference to the name Winnie Ngumi in the transcript of 14/11/2013-, he said:

“...The names are ‘Winnie Ngumi’ which is not the name of any Director of Space & Style...”

101. He further probed him on the name “Ngumi” in the transcripts, and reminded him that PW 1 and the accused shared the name as part of their full names; he then asked him if he knew which Ngumi the transcripts were referring to, he said:

“...It is Mr. Ngumi who is being referred to as Ngumi (the accused) ...”



102. However, Counsel put to him that there was nowhere in the transcript where it was explained reference to Ngumi, meant the accused and not PW 1.
103. The witness reaffirmed on cross-examination that he was with his co-director when the demand of 15 million was first made and also the 2<sup>nd</sup> time when the issue featured although he could not while on cross-examination recollect the two dates specifically.
- “...I cannot remember exact the date four years ago. It is not possible for me to remember the exact dates. I gave evidence in Chief and set out the dates and the time the event took place. I confirmed affirmatively what was played. The dates were displayed...”
104. PW 2 stated while on cross-examination that when the report was first made to EACC, a demand of 150,000 dollars had not been made. Asked therefore what prompted the co-director to report, he explained:
- “...the fact that officers were opting to communicate to us directly (i.e. KRA Officers) yet we had appointed tax consultants to deal with them...”
105. Reinforcing same point thereafter when the same question was repeated at a later stage in the proceedings, he restated:
- “...We said officers from KRA who had been dealing with us had declined to communicate to us through letters to them by our tax consultants and had opted to be talking to us directly. We did not find that process in order, that it looked suspicious...”
106. He reiterated that he did not accompany his co-director, PW 1, Winfrida Ngumi the first time she went to report to EACC saying:
- “...It is my co-director, Winfrida Ngumi who reported to EACC for the first time. She was alone when she reported initially...I visited EACC on the 2<sup>nd</sup> visit...”
107. PW 2 denied suggestions put to him by the defence that their former tax agent, Mr. Waweru had resigned because the Company had been frustrating him by not giving him the documents to respond to KRA queries. He disputed the allegation put to him that all their Company’s tax agents, Waweru, Mutahi and also Erastus had been contracted and resigned during the same financial year following their appointment.
108. He also denied knowledge of the fact that the Company had outstanding tax liability of Kshs. 25,216,642.43 in form of VAT and a further Kshs. 33,011,508 as income tax arrears based on its own self-assessment.
109. He confirmed that call logs from his phone were not retrieved for purposes of this investigation.
110. He was then asked using the transcript of 11/3/2014 to pin-point exactly where the demand of 15M was asked by the accused, he stated:
- “...It is a combination of many factors. You cannot take one in isolation...”



111. He went on:
- “...There may be a difference from what is typed and what the tape is. I cannot remember the tape recorded conversation word for word. There is a lot of difference between what is transcribed and what is in the tape...”
112. He was referred to specific portions of the transcriptions which were incorrectly aligned to the speaker of the specific words when compared with the recorded conversation. He affirmed it was position by stating:
- “...Yes, having listened to the audio recording, it is true there are certain discrepancies between what is in audio recording and what is in the transcript...”
113. When asked if what was played in respect to the incident of 17/3/2014 when accused was arrested was accurate, he stated:
- “...What was played tallied with what was in my memory...”
114. He further stated:
- “...I was there, accused was there and there was Winfrida Ngumi...”
115. He was shown transcript of 17/3/2014- P. exhibit 28 and his attention drawn to his attention to the fact that Mr. Waweru was reflected as having been a participant in that meeting severally. He said Waweru was not part of that meeting and could not therefore have been recorded. He stressed:
- “...Yes, Waweru could not have been recorded that time...”
116. He also added:
- “...I did not sign the certificate at page 63...I was not called to authenticate this one...”
117. On re-examination by Ms. Mutellah for the Prosecution, PW 2 was referred to the transcripts (P. exhibits 15 (a), P. exhibit 17 (a), P. exhibit 28 and P. exhibit 30) to which he said although there were inaccuracies pointed out to him in the transcripts; he was not the one who had prepared them but one Cecily Mumbi (PW 10).
118. He was nevertheless categorical that for the recordings played in Court, “...whatever happened in audio-visual recordings took place. I confirm that...”
119. Concerning the name “Winnie” he said the transcripts had the name which corresponded with the name used by PW 1 in an official letter dated 23/10/2013-P. exhibit 13 to Ronald Omulindi by PW 1. He thus clarified:
- “...It is correct to state that apart from using the name ‘Winfrida’ she also uses the name ‘Winnie’ Ngumi...”
120. He also asserted that as of January, 2014, Space & Style Limited had no tax arrears obligations.
121. Cecily Mumbi (PW 10) was working with EACC as an investigator at the time relevant to this case but at the time she was giving her testimony before this Court, she had since crossed over to Kenya Revenue Authority in the same capacity of an investigator.



122. She recalled that Mr. Patrick Mbijiwe (PW 11) who was the investigating officer in this case handed over to her a mobile look alike video camera that had been used to record some conversations plus five (5) micro-memory cards containing the said conversations which she was requested to transcribe and translate the portions of the conversation that were in Kikuyu language into English language.
123. She testified she was competent to translate the Kikuyu language, describing herself as a Kikuyu by birth and by education in the lower primary school up to class 3 having attended Kagumo Primary School. Further, she indicated that she was accustomed to using Kikuyu language in her daily conversations hence she was proficient in the language which she was able to translate to the best of her knowledge, experience and skills.
124. She testified that Winfrida Wanjiku Ngumi (PW 1) who was introduced to her by Mr. Mbijiwe was the one who assisted her in identifying the voices and the visual images in those recordings.
125. She itemized the conversations she transcribed and translated where the translation was needed as follows: The conversation contained in the memory card of 14/11/2013. She transcribed and came up with the transcript PMFI-15 (a) and the translated version thereof- PMFI-15 (b), later she produced them as P. exhibit 15 (a) the original transcript, and P. exhibit 15 (b) the translated version. Conversation contained in the memory card of 15/11/2013-PMFI- 16; She prepared the original transcript PMFI-17 (a) and the translation PMFI- 17 (b) which she produced as P. exhibit 17 (a) and P. exhibit 17 (b) respectively. Conversation in the memory card of 19/11/2013-PMFI-29, she prepared the original transcript PMFI-30 and the translation PMFI-30 (b) which she produced as P. exhibit 30 (a) and P. exhibit 30 (b) being the translation. Conversation of 11/3/2014 contained in the memory card (PMFI-19), she made the original transcript- PMFI-20 (a) and the translation was PMFI-20 (b) which she exhibited as P. exhibit 20 (a) & 20 (b) respectively. Conversation contained in the memory card of 17/3/2014- PMFI 27. She made the original transcript PMFI-28 and the translation was PMFI-28 (b) which she produced as P. exhibit 28 & 29 respectively.
126. She explained that the signature of Jama Wambugu was not in all the transcripts stating that it was only appearing in the transcript of 11/3/2014 and 17/3/2014.
127. Asked she where she got the names “Winnie” and “Jama” which she had used in the transcripts, she elucidated:
- “... ‘Winnie’ in the transcript, it is the short form of Winfrida. Even from the conversation, she is being referred as ‘Winnie.’ ‘Jama’ is the name I got from the conversation...”
128. She was asked in evidence in chief to specify where in those transcripts a demand was made and referred the Court to the transcript of 11/3/2014-P. exhibit 20 (a) & b, which entailed a conversation comprising Winnie Ngumi, Jama Wambugu and Robert Ngumi. She stated:
129. At pg. 10, last line reads:
- “15 million in dollars” it is Ngumi who says that.
- Also, at pg. 11, 2<sup>nd</sup> line from the top; it reads:
- Ngumi: “180 thousand dollars utari ini document”; translated to:
- “180 thousand dollars without any documents”



130. She further picked pg. 19, 12<sup>th</sup> line from the bottom:

Jama: “Now play the goal back to us and its next Monday or Friday...” (Breaks into Kikuyu) which she translated in full as follows:

“...Now also play goal back to us and it is next Monday or Friday, we are done with your issues, this letter in fact, we need to have one meeting, this is the draft it looks like this...”

131. Also pg. 22, 8<sup>th</sup> line from the top of translated version of 11/3/2014-P. exhibit-20 (b)-

Ngumi: mm, that issue was bulkiness timing and security. If we have to do, its money you know will take half, will you be able do you know what implication

Winnie: You know half half at once

Ngumi: mm

132. Asked to point out in the conversation where indication of receipt of the said money is found, she referred to the translated version-P exhibit 28 (b) for the conversation of 17/3/2014 and referred to 13<sup>th</sup> line from the top at pg. 58 all the way to pg. 4<sup>th</sup> line from the top at pg. 63. She read as follows:

Ngumi: Carrying it is very hard

Jama: Very hard

Ngumi: It's hard

Jama: You may even find it hard to drive a car

Pg. 59 – 6<sup>th</sup> line from the top:

Winnie: Me, I want to be offloaded

Ngumi: I can't imagine you are offloading to me

Pg. 63- 4<sup>th</sup> line from the top:

Ngumi: just go and read through it tonight or even tomorrow

133. During cross-examination, she was asked why the name of Waweru was appearing in the conversation of 17/3/2014 yet PW 1, Winfrida Wanjiku Ngumi and PW 2 Njama Wambugu were categorical that Waweru was not a participant in the meeting of 17/3/2014, she replied:

“...I did not insert the name of Waweru on my own volition. I was not under any instruction. The recordings were voluminous and could have been done by mistake. I have never met Waweru. It could have been a mixture of the names, a mistake on my part...”

134. Taken to the transcript- P. exhibit 28 (b), it was pointed out to her she had shown Waweru as having spoken at Pg.1, 5 times; pg. 2, 11 times; pg. 3, 12 times; pg. 4, 10 times, pg. 5, 11 times; pg. 6, 9 times; pg. 7, 12 times; pg. 8, 7 times; pg. 9, 8 times; pg. 10, 10 times; pg.11, 10 times; pg. 12, 10 times; pg. 13, 11 times, pg. 14, 9 times; pg. 15, 9 times and pg. 16, 9 times;



135. To which she composedly declared:

“...It is a minor because it is only the name and not the content...”

136. It was put to her the portions of conversation in the transcript- P. exhibit 20 (b) at lines 2, 4, 13, 15, 17 & 19 were indicated as having been spoken by Ngumi yet Mr. Njama had testified and confirmed that the voice in respect of the said conversation was his, she said it would surprise her. She nevertheless stated that she was assisted by Winfrida Ngumi while doing the transcription and had no prior knowledge of Ngumi, Njama, Waweru or Winnie.

137. Her attention was also drawn to the transcript- P. exhibit 20 (b) pg. 1 in regard to word ‘tax’ which implied that from the translation the people were talking about tax or government revenue. The recording was then played and she was asked to listen keenly, and then asked if what was in the translation relating to that word was accurate. She corrected the statement by stating:

“...The person is saying he used a taxi...” which she said had no relationship with tax. She stated that the omission of “i” in the word was a typo error.

138. Told that on the 18<sup>th</sup> line, pg. 10 of P. exhibit 20 (b) which she had said reads “15 million dollars” and identified the speaker of those words as Mr. Ngumi that it was actually confirmed to be Njama’s words, she remained still for a while and then responded;

“...It could be the same that happened with ‘tax’, may be the words came from Njama...”

139. She was also referred to P. exhibit 28 a & b, pg. 63; line 23 on pg. 62 of the original transcript with the words:

“...Wina cigana we...” asked from the context of what preceded that statement in the document, what it would mean without glancing at her translation first, she said:

“...How many do you have...” but when she looked at the translation in her translated version it read “...How much do you have...”

140. Which she admitted was misleading because from the context the conversation was about the number of copies. She stated:

“...Yes, it is. The whole of this page they are talking about a letter. It can be misleading to say ‘how much ‘in relation to copies...”

141. Her attention was also drawn to a statement in Kikuyu language appearing in the translated version yet it had not been translated. (Speaker number 4 in P. exhibit 28 (b). She said it was an error and indicated that the translation was:

“...just go and read it through tonight...”

142. Asked why the name of Njama was misspelt so many times yet he came for the transcription, said:

“...Even computer sometimes corrects names automatically. They signed a print out. They did not sign in my presence...”



143. Put to her that Mr. Njama had disowned the transcripts, she replied:

“...We prepared the transcript with him. I am not aware it was forged...”

(Referring to P. exhibit 28 (a), she said:

“...He has initialed his signature in what appears as ‘JW’. You can decide to use any initials...”

144. On re-examination, Cecily Mumbi (PW 10) conceded there were some errors in the transcripts but observed that the accuracy can always be ascertained from the recorded conversations which were before the court in their original versions. Asked what may have contributed to these errors, she explained:

“...Volume of the recordings and at times copy pasting of the names could have brought some of the errors noted...”

145. She also clarified that despite the omission of ‘N’ in Njama’s name, he had signed the certificate with the name without the ‘N’.

146. Ronald Omulindi Olwali (PW 3) was the Deputy Commissioner in charge of audit programme in the Medium Tax Payers Office. The Medium Tax- Payers Office was further sub-divided into 4 sectors with each sector under a Sector Manager. The sectors included Wholesalers and Retailers, Services Sector, Construction Sector and a 4<sup>th</sup> one he was not able to recall. They were all headed by Audit Managers who reported to him. The accused, Robert Maina Ngumi was the Audit Manager, Wholesalers and Retailers Sector. Under him, there were teams headed by a Supervisor who was the team leader. The supervisor/team leader reported to the accused.

147. The team leader handling the issues pertaining to Space & Style Company Limited was Mr. Orlando who was supervising two team members, Mr. Ng’ang’a and Mr. Kuria.

148. He explained that there was a procedure in KRA where tax-payers were subjected to a risk profiling framework which had standard parameters for identification of the risk levels relating to a given tax payer. If the risk level of a given tax-payer was determined to be a high risk, an approval by the Audit Manager would be given and which would go to him for further approval and the audit team would proceed against that tax payer.

149. He testified that Space & Style was recommended for audit by the audit team after the risk profiling which he approved and notified the tax-payer about the intention to carry out the in-depth audit through his letter of 22/8/2012- P. exhibit 3. The audit was to cover PAYE, VAT and Withholding tax for the period from July 2008- to 2012 plus Income tax for 2008 to 2009. The Company was required to provide all the relevant financial records by 24/9/2012.

150. On 24/9/2012 the Company responded through a letter dated 24/9/2012 explaining that similar audits had been carried out on the Company. However, according to PW 3, what Space & Style was alluding to was not in-depth audit but compliance checks which was obviously different. He marked the Company’s response to the Sector Manager, Robert Ngumi (the accused herein) asking him to discuss the letter with him with a view to having the tax-payer explained that the issue was not a compliance check but in-depth audit. The accused cascaded it downwards by marking to Mr. Orlando who he asked him to engage and explain the concept of in-depth audit to the tax-payer.

151. The letter of Mutahi Maranga & Associates of 18/10/2012-(P. exhibit 4) then came indicating they were in process of finalizing the audited accounts of the tax-payer for the years in question thus the



- tax payer was not ready for the commencement of the in-depth audit exercise. It sought to have the exercise delayed until the month of November. PW 3, Ronald Omulindi Olwali marked the letter to the accused, Mr. Ngumi and asked him to liaise with the consultant to fix an amicable date. Mr. Ngumi, marked the letter to Mr. Orlando on 22/10/2012, who then wrote back to Mr. Ngumi indicating he had discussed with the taxpayer's consultant, Mutahi Maranga and that they had agreed to conduct the audit on 27/11/2012.
152. The audit team was then dispatched to the ground by the Audit Manager, (the accused). The audit team comprised of Mr. Julius Ng'ang'a, Wyclife Orlando and Paul Kuria compiled an internal document known as settlement proposal report- P. exhibit 31 which is a standard document in all audit cases. It found that tax liability stood at Kshs. 439,987,077.92 based on the records it had perused but went on and cited frustration that the tax-payer had denied them access to pastel programme which had hampered their progress. The entire team signed the settlement proposal report and forwarded it to the Sector Manager, (the accused) who approved it on 29/8/2013 and then transmitted it to PW 3, Mr. Ronald Olwali Omulindi who equally approved it the same day. Mr. Omulindi then communicated the audit findings tax-payer through the letter dated 13/9/2013- P. exhibit 7. Had the tax-payer concurred with the findings, an assessment would have been issued but under the audit manual, a tax-payer has 30 days to dispute the findings.
153. Erastus & Company in a letter dated 26/9/2013- P. exhibit 10 notified KRA that Space & Style had appointed them as tax agents and requested that KRA deal with them in matters tax on behalf of the Company and further sought certain information from KRA. He marked that letter to Mr. Ngumi, (the accused) telling him to invite the tax agent and take him through the findings. Mr. Ngumi (accused) marked it to Mr. Orlando on 27/9/13 to review and discuss with Mr. Ngumi before he met with PW 3.
154. On 23/10/2013, in a letter- P. exhibit 11, Space & Style wrote to him seeking to hold a meeting with him. He granted the request for that meeting via his letter of 31/10/2013-P. exhibit 12, fixing the meeting on 6/11/2013. The meeting went on 6/11/2013. In attendance was Winnie Ngumi (PW 1) & Njama Wambugu (PW 2) from Space & style while KRA was represented by PW 3, Mr. Ngumi (the accused), Wycliffe Orlando, Julius Nganga and Paul Kuria. The tax-payer was seeking to a review of the findings of the audit having agreed to supply additional records which they wanted considered. During the meeting, he nevertheless reminded them that the audit had taken long due to lack of cooperation and several changes made by them of tax agents. The notes of the meeting of 6/11/2013 were produced as P. exhibit 13. On 18/12/13 Space & Style in a letter by Njama Wambugu responded to the issues raised in the KRA letter of 13/9/2013 undertaking to supply all the documents in support of the contested issues. Through its letter of 20/12/2013-P. exhibit 33, KRA wrote back specifying the additional documents it needed to finalize the audit review.
155. He stated that the matter had not been finalized by the time he left the Medium Tax- Payers Office in July, 2014.
156. He stated that on 29/4/2014 he was summoned to EACC to record a statement pertaining to this case. He was showed a letter dated 14/1/2014-P. exhibit 26 which was signed by one "R. Omulindi" and addressed to the Managing Director Space & Style which he denied signing and provided his specimen signatures to the Investigating Officer. He explained:

"...As earlier explained, at this particular time, we had not reached settlement to amend our earlier proposal. The case was still under review and therefore no such document could have been issued by the audit manager or myself, I did not understand the origin of this and I



was taken through the process of verifying if it was under my desk but it was not. Including internal affairs checking my computer and that of my secretary and this was not traced...”

157. On cross-examination by Mr. Elisha Ongoya for the accused Mr. Ronald Olwali Omulindi (PW 3) said the delayed finalization of the audit was contributed to by delay in supplying the documents and frequent changes of tax agents by the Company, Space & Style Limited.

Asked if KRA concluded the tax audit, he stated:

“...By virtue of these investigations, KRA pursuit of this indepth audit was put in abeyance. It is true by law; there is a time limit within which you pursue recovery of tax obligation from the year of income. The time limit is 7 years from the year of income. (in ref. to PMFI-3), Yes, it is the letter confirming intention to carry out in-depth audit. It was 2008- July, 2012... If this has not been received as at August, 2019; the client has been exonerated from tax obligation by operation of law. Sometimes, a legal process can be used to avoid meeting tax obligation...”

158. He stated that no single person had a capacity to reduce the figures in the audit report without going through the requisite approvals levels for concurrence.

159. On re-examination he was asked to elaborate on the time limit for recovery of tax, he said:

“...The time limit to recover tax obligation is 7 years. It is in income Tax; I can get the specific details...”

160. Wycliffe Ochieng Okindo (PW 4) and Julius Mwaniki Ng’ang’a (PW 9) participated in the audit of Space & Style Limited and their testimony was limited to what the team actually did and encountered during that audit exercise. PW 4 emphasized the fact that the team was not given full access to the records. PW 4, said:

“...We were not granted full access to the records of Space & Style. We were not even able to access Pastel Accounting System. The importance of accessing pastel accounting system was because we wanted to tie what was in physical documents to what was in the system. We were suspecting what was in pastel was not captured in the physical documents. We had bumped into a few pastel records of the same date and compared with physical documents, they were different. When they became difficult, we even wrote letters. After all that happened and they were not responding, we did our notice of findings to them...”

170. Asked if KRA has been able to recover that tax from Space and Style, he replied it had not because the audit exercise was never completed and all the files were carried away. However, when it was put to him that tax recovery is time bound by law and thus this matter having taken more than seven years meant that the tax-payer was now immune from paying the tax, his response was:

“...I don’t know if there is a Court case, it would affect that...”

171. Caleb Okoth (PW 6) an investigator with EACC testified that he was enlisted to participate in this operation of 17/3/2014 by the In-Charge, Operations, Mr. Rodgers Akaki. He was informed it was about a KRA Official who was soliciting for a bribe of Kshs. 15,000,000 which the suspect wanted in US dollars. He was introduced to two complainants, Winfrida Ngumi (PW 1) and Njama Wambugu (PW 2). Other EACC officers included in that operation were James Wachira (PW 8), Samuel Mukundi, Rodgers Akaki, Reuben Njagi and Hillary Chepkwony.



172. After the processes of treating the money which was done by Mr. Francis Kamwara (PW 7), they proceeded to Boulevard Hotel where the suspect had indicated he would meet the complainants. He witnessed the complainants entering and sitting near where he was seated. After a short-while, the complainants were joined by another person who he came to learn was the suspect and now the accused before the Court.
173. After chatting for some time they stood up and walked towards a car that was at the parking bay. They entered the car and it began driving towards the gate. It stopped next to the complainant's vehicle. By then EACC Officers had taken strategic positions ready to carry out the arrest. Njama Wambugu (PW 2) alighted while holding a document and making a call. Mr. Mbijiwe (PW 11) moved fast, turned off the ignition and took the car keys from the suspect. He then introduced the EACC investigators and the suspect also introduced himself.
174. A search of the accused vehicle was done and from the floor, left back seat, Caleb Okoth (PW 6) recovered 1,100 genuine dollar currency notes and another 148,900 which was fake dollars. The recovered notes had been treated earlier in the day and handed over to the complainants. He also recovered the black car mat where the money had been placed. The money was in brown khaki envelope. He also recovered another khaki envelope from Winfrida Ngumi. He prepared the inventories of the recovered items which were signed by all the officers present. The accused declined to sign. They included Inventory of the recovered treated money-P. Exhibit 45, Inventory of recovered car floor mat for M/v KBA 120Z - P. exhibit 46, Inventory of the envelope from Winfrida Ngumi-P. exhibit 47.
175. Francis Kamwara (PW 7) treated with APQ chemical the 1,100 genuine US Dollars bills on 17/3/2014 as well as fake 148,900 US Dollars all in 100-dollar denomination and handed the over the same to the complainant Winfrida Ngumi for purposes of this investigation on strength of an inventory which she signed. He also photocopied the genuine notes- P. exhibit 22 and had the photocopy signed by him and the complainant. He put the genuine dollars in a "A3" envelope which he marked 'no. 1' from the inside using a marker pen. Both him and the complainant signed it and dated it 17.3.2014. He then inserted the genuine dollars, P. Exhibit 21 (a) to (k) and also the fake dollars-P. exhibit 23 into the envelope- P. exhibit 25 (a) and applied APQ chemical on the outside of that envelope- P. exhibit 25 (a).
176. He then picked another envelope and marked it '2' from the inner side, (witness displayed this to the court). Both he and Winfrida Ngumi (PW 1) signed and dated it 17/3/2014. He inserted envelope 1 (P. exhibit 25 a) into envelope marked '2'- P. exhibit 25 (b). He instructed the complainant not to tamper with the money until the time she was going to hand it over to the suspect on demand. She was also to remove envelope '1'-P. Exhibit 25 (a) and give it to the suspect and retain envelope '2'- P. exhibit 25 (b).
177. He then handed over the photocopy- P. exhibit 22 and the inventory- P. exhibit 24 to Patrick Mbijiwe (PW 11).
178. Asked how he sealed the envelopes during cross-examination, he responded:
- “...There was no specific seal, I only folded 'envelope 1' in a way to fit into 'envelope 2'- not specific seal...”
179. Another EACC Officer who participated in this operation was James Wachira (PW 8) whose testimony was how he took part in the arrest. He signed the inventories prepared at the scene after the said arrest. Asked in cross-examination if the complainants and the suspect shook hands when the suspect came and joined them on the date of arrest, he answered in the affirmative.



180. Stephen Tukei (PW 5) an analyst with Government Chemist Department for six years with a Bachelor of Science degree in applied Chemistry testified on behalf of his departed colleague, Marion Njeri Chege who had carried out the examination of the items forwarded for analysis at the Government Chemist.
181. He produced a certified copy of the memo from the Government Chemist Department dated 12/11/2018 concerning the demise of Marion Njeri Chege- P. exhibit 49.
182. He testified that the exhibit memo- (P. exhibit 36) was received at the Government Chemist on 30/4/2014 from Patrick Mbijiwe (PW 11). It forwarded for examination a number of items which included an envelope containing 1,100 genuine US Dollars plus 148,900 fake US Dollars, khaki envelope indicating it was recovered from Winfrida Wanjiku Ngumi (P. exhibit 37); Khaki envelope recovered from the suspect car KBA 102 Z by Caleb Okoth- (P. exhibit 38), the right hand and left hand swabs of the suspect Robert Maina Ngumi (P. exhibit 39 & P. exhibit 40), black car mart from suspect car KBA 120 Z- (P. exhibit 41) and the control sample for APQ chemical- P. exhibit 42. The genuine US Dollars as well as the fake US Dollar notes were also swabbed at the Government Chemist and the swabs for the said dollars were kept in an envelope- (P. exhibit 43).
183. The request to the Government Chemist was to ascertain the presence of APQ in the exhibits forwarded for examination. Marion Chege did the analysis on 12/5/2014 and her findings confirmed the presence of APQ in all the above items that were submitted for examination at the Government Chemist via the exhibit memo- P. exhibit 36. He produced the Government analyst report as P. exhibit 44.
184. He admitted on cross-examination that if the complainant hands had come into contact with APQ and she then came into contact with the suspect's hands, presence of APQ can be detected in the hands of the suspect.
185. Patrick Mbijiwe (PW 11) carried out the investigations into this case. He testified that this matter was assigned to him on 13/11/2013 but the same could not be immediately booked in the EACC records for the following reasons:
- “...Before investigation, a forward complaint was filed by the complainant. The complainant came to our Office and my supervisor, Rodgers Akaki Asst. Director of Operation called me and introduced me to the two complainants- Winnie Ngumi and Njama Wambugu. What we discussed was put in writing. We treated the matter as covert investigation and we went on up to 17/3/2014 when it came up clearly accused had made a demand. That is the time the report was put in our system. It is the same day we effected the arrest. Why I did not capture the report on 13/11/2013 is because the case was sensitive and once a report is put in the system, many people are accessible to this information which could leak the information and also considering the security of the complainants. It involved huge amount Kshs. 15 million and the person involved was heading a Department. People who were carrying audit interact with our officers in other matters. We decided to keep it secret until when he demand was clear and executable within the shortest period. This report was captured in our system on 17/3/2014, complaint report number 44855. It was given priority level of ‘very high...”
186. He produced the said complaint report dated 17/3/2014 as P. exhibit 54.
187. Describng how he conducted these investigations, he stated that he asked the complainants to avail the tax records so that he could confirm the issues pertaining to arrears owed to KRA. She availed all the requisite documents including letters exchanged between Company and KRA on the issue of in-depth audit the following day, on 14/11/2013.



188. To ascertain what was exactly going on between the complainants and the KRA Officials, he decided to have recordings of the KRA officials in any engagement they would have with the complainants. He introduced the complainant to the mobile look-like device (P. exhibit 13) which he fitted with memory card and showed her how to use it.
189. During all the meetings the complainants would hold with the KRA Officials they inform him so that he could release the recording device to them to record their deliberations. The Investigating Officer and some other EACC Officers would hang around the vicinity of the meeting under cover. He testified:
- “...All the time the recording was done, I was with the complainants. I accompanied them in all said dates and I would take back the recording device...”
190. The first meeting that surveillance was done was on 14/11/2013 at around 8.00 P.M. He was accompanied by fellow EACC Investigators, Martin Mbuvi and Sophie Nyambu. It was at Southern Sun Hotel in Westlands. He described that episode as follows:
- “ ... I also took a seat opposite where they were seated. From where I sat, I saw a gentleman who joined the complainant who I came to learn later was Mr. Waweru, the former tax agent of the complainant. After the talk Mr. Waweru moved to another seat, a distance from where the complainant was seated. Another person came and met Waweru whom they went and greeted the complainant together. This person is the one in Court. Then Waweru left. It was 8.00 P.M. in the evening. During the meeting until the end, it was Robert Ngumi, Winnie Ngumi and Jama Wambugu who sat until the end of the meeting...”
191. He explained once that encounter between the complainants and the accused was over, she returned the recording gadget to him. The following day in the morning he and his colleagues listened to the conversation which was a mixture of Kikuyu, Swahili and English. He said he understands the three languages well. He stated the conversation was about the audit with the Company wondering why KRA wanted to do the audit yet there was another which was on-going.
192. There was another meeting the following day at the Company Offices which was attended by some KRA Officers. He and his colleague Martin Mbuvi closely watched that meeting from a room opposite where the meeting was taking place. It was recorded by the complainant, Winnie Ngumi and when the meeting ended at around noon he retrieved the gadget from her. The meeting was conducted in English and Swahili. From the recording, KRA was confirming it had conducted the audit but another meeting was needed since most of the documents from the Company had not been provided.
193. The next meeting that he furtively observed together with another EACC colleague one Sophie Nyambu was on 19/11/2013 at the TRM along Thika Road. It was between Njama Wambugu (PW 2) and Mr. Ng’ang’a of KRA. He had given Njama Wambugu the recording device and showed him how to operate. He was unable to keep vigil closely because they moved to two different places and the place was also very noisy with lots of movement of the people. When he listened to the conversation after getting back the device, he discovered it was entirely in Kikuyu language. Not much about tax arrears was discussed; it mainly dealt with how assistance can be offered in the future.
194. On 10/3/2014, Njama Wambugu (PW 2) called him and informed him that on 7/3/2014, the accused had ambushed him with a meeting at Boulevard Hotel and had no opportunity to contact him. That in the meeting the accused had informed him he could find a way of reducing the tax arrears to a minimal level and have the Company issued with a letter to that effect. He told him to record the next encounter because they had agreed to meet again on 11/3/2014.



195. On 11/3/2014, EACC officers who included the Investigating Officer escorted the complainants under cover to Boulevard Hotel for a meeting that took place between 7.30 to 8.40 P.M. They met with the accused Robert Ngumi. When the meeting ended and Robert Ngumi (the accused) left, he repossessed the recording gadget from the complainant and on the morning of 12/3/2014, he and his colleagues listened to the recording of that meeting. The conversation confirmed what the complainants had reported about the meeting of 7/3/2014. He explained:
- “...What was captured that particular day was confirmation of what was discussed on 7/3/14- that the confirmation of issuing the letter after giving out 15 million to KRA officials...It discussed how to change 15,000,000 Kshs. into dollars to reduce bulkiness and also security, how it would be carried out from the bank. Entirely, it was logistics of how to handle the money up to the place Robert Ngumi would receive it...”
196. The meeting also agreed that once the complainants were through with the modalities, they would call the accused to confirm the same. He told Mr. Njama to ask the accused for time to organize.
197. On 14/3/2014, Mr. Njama (PW 2) called the Mr. Patrick Mbijiwe and informed him that they had spoken agreed with the accused to meet on 17/3/2014. On 17/3/2014, the complainants went to EACC. They asked to confirm to the accused the money was ready so that he could tell them the place they would meet him.
198. The accused said they would meet at Boulevard Hotel and that is when the Investigating Officer, Mr. Mbijiwe (PW 11) went to his boss who issued with 11 pieces of genuine 100-dollar denomination bills plus another 1489 pieces in fake dollars of 100 denominations, totaling 148,900 to be used in the operation. That money was then treated by Mr. Francis Kamwara (PW 7) who took the complainants on how to handle until the time of it was delivered.
199. That evening, EACC Officers who included James Wachira (PW 8), Martin Mbuvi, Caleb Okoth (PW 6) and the Investigating Officer Mr. Patrick Mbijiwe escorted the complainants to Boulevard Hotel where the EACC officers entered and took out their positions before the complainants. The complainants arrived and sat with the accused at the verandah and ordered for tea. They stayed there up to around 7.30 P.M. and then rose from their seats and started moving towards the parking yard. The team of EACC Officers immediately swung into action. He followed them and saw them enter inside Motor vehicle KBA 120Z.
200. The vehicle began leaving the parking yard towards the main gate where it was blocked by Caleb Okoth who directed the accused to a parking yard. EACC officers moved there. He introduced EACC Officers and arrested the accused. They proceeded to search the vehicle and made recoveries which were exhibited before the Court. Besides what Caleb Okoth recovered which in evidence already, the Investigating Officer recovered the staff identification card of the accused staff card number-89029154 in the name of Robert M. Ngumi- P. exhibit 50.
201. He thereafter prepared the exhibit memo dated 30/4/2014 which he used to forward the recovered items to the Government Chemist for analysis. He received the Report-P. Exhibit 44, on 20/5/2014.
202. A letter from KRA dated 14/1/2014 (P. exhibit 26) addressed to Managing Director Space & Style referenced ‘Findings of in-depth audit and demand of tax therefrom’ which the accused had given to Njama Wambugu (PW 2) while inside the car that night was recovered. It indicated that tax liability to KRA had been reduced to Kshs. 18, 609, 659.86.
203. It was signed off by one “R. Omulindi”. The Investigating Officer called the person who was purported to have signed the letter, the then Deputy Commissioner Audit, Medium Tax-Payers Office. He



disputed having signed the letter. He thus took his specimen signatures and known handwritings (P. exhibit 34, i-iv & P. exhibit 35, i-ii) and escorted them to the CID Forensic Laboratory via the exhibit memo dated 2/5/2014- (P. exhibit 51) on 9/5/2014. The document examiner, Chief Inspector Geoffrey Chania of Forensic Document Examination at Directorate of Criminal Investigations compiled the document examination report – P. exhibit 52 which confirmed that the disputed signature had no comparison with the specimens and the known signatures of Ronald Omulindi (PW 3).

204. He handed over the memory cards to Cecily Mumbi (PW 10) to transcribe.
205. He produced the certificate of serviceability of the video recorder number 15082123 pursuant to section 106 (B)(4) of the *Evidence Act* dated 6/5/2014- P. exhibit 53 and the said audio-visual device as P. exhibit 13. Others were memory cards for the aforesaid meetings, P. exhibits 14, 16, 19, 29 & 27 respectively. The notes of KRA meeting of 6/11/2013-P. exhibit 32, staff card of accused- P. exhibit 50 among others.
206. During cross-examination Mr. Mbijiwe was confronted with what he had recorded in his witness statement on events of 13/11/2013 at the 3<sup>rd</sup> paragraph where he stated he had interviewed both complainants in which the last sentence in the said paragraph indicated “they were complaining a KRA official was demanding a benefit of 15 million from them.” Asked if the later portion was accurate, he said it wasn’t ‘to the extent it states by 13/11/2013 a KRA official had demanded Kshs. 15 million’. He said he recorded his statement on 2/5/2014 and denied a suggestion by Counsel for the accused that the 15 million was a premeditated figure that was captured even before the alleged solicitation, he explained:

“...They did not give any figure. They complained because the issue had been taken out of office to the hotels and they suspected bad motive on the part of officials. That is when they thought things were not proper. If you look at their statements, you will confirm they did not record any figure...that time they did not know who would eventually demand because they were dealing with a team of KRA officials...”

207. Mr. Mbijiwe (PW 11) on cross-examination it was put to him that Njama Wambugu (PW 2) had disputed signing the transcript of the conversation of 11/3/14- (P. exhibits 20 a & b). He maintained that he was certain that PW 2 had signed it because he personally took those transcripts to him to sign. He said:

“...I took the transcripts to Winnie’s office to sign and later, I took to Mr. Njama in his office. Yes, the transcripts were signed at the offices of Space & Style...”

208. During cross-examination on the transcripts; the Investigating Officer conceded that they were not well done. He nonetheless said even if the transcripts were inaccurate, all the original recordings from which they were transcribed had been disclosed and had nothing had been hidden from the defence. In fact, when challenged that there are parts of translation that were not correct and this meant unfairness to the accused, he said:

“...The translation has some few omissions. It is not unfair because he has the CDs’, he is a Kikuyu and he can understand it...”

209. The Investigating Officer revealed that when he charged the accused, he had relied on what was in the recording because by the time the accused was arraigned, the transcriptions were not yet ready. He said that while correcting the error in the translated transcript- P. exhibit 20 (b) pg. 8, 2<sup>nd</sup> line from the



bottom which he said was Mr. Ngumi's statement, not Mr. Njama as indicated in that transcript. This statement was as follows: "You know the figures are known"

He explained:

"...It is Mr. Ngumi who said that as per recording. You remember I charged the accused before this document was done. It is a statement confirming the figure which was discussed on 7<sup>th</sup>..."

210. He was cross-examined at length on the transcript of 17/3/14-P.exhibit 28 (original) & 29 (translation) which apparently had a Mr. Waweru in it. He confirmed Mr. Waweru was not in that meeting which he had an opportunity to watch since it also coincided with the date they did they had the operation and arrested the accused.
211. Asked if he witnessed the accused and the complainants shaking each other's hand that day, he said they might have although he did not personally see that part.
212. The Investigating Officer (PW 11) admitted that there was no inventory of P. exhibit 26 which was a letter handed over by the accused to Mr. Njama moments before the accused was arrested.
213. The Investigating Officer stated that he was unaware of the interest of the former Commissioner General of KRA, Mr. Njiraini in the Space & Style Limited where the newspapers had been reporting a battle he has waged against Mr. Njama Wambugu (PW 2) to kick him out of the Company.
214. He further stated that he was not privy to any scheme to get the accused out of the way because he was an obstacle for insisting on recovery of tax when the Company was being fronted for a tax waiver.
215. The accused gave an unsworn statement of defence in which he stated that he was employed by KRA in 1989 as a clerical officer. He got several promotions and as at the time of his exit in 2014, he was in the level of an Assistant Commissioner.
216. He had a stellar performance in his work such that he emerged the best officer countrywide for exceeding his targets by collecting the highest amount of revenue in three consecutive years, to wit, 2010, 2011 and 2012.
217. He further told this Court that from the time he was employed to the point he was relieved his duties; he had never been subjected to any disciplinary proceedings be it internally or externally.

PARA 218. He termed the allegations against him before this Court as fabricated lies.

219. He explained that KRA started in-depth audit on Space & Style Limited in the year 2013. The audit was to cover the period between 2008 - 2012.
220. The accused was the one leading the audit team which included Mr. Olando (PW 4), Mr. Kuria and Mr. Ng'ang'a (PW 9) but they all answered to Mr. Omulindi (PW 3) who was a Deputy Commissioner.
221. He stated that this was a very difficult audit for the reasons that:

tax payer had refused to cooperate they did not get all records taxpayer kept changing accountants and tax agents until there was loss of track

222. Consequently, it was difficult to conclude the audit and raise the tax assessment. He explained that before an assessment is raised; everything else is just working figures.



223. He stated that by the close of business on 17.3.2014; Mr. Njama (PW 2) called him and invited him for a cup of tea at Boulevard Hotel. On arrival, he found him in the company of Winnie Ngumi (PW 1) although Njama (PW 2) had not told him he will be accompanied by someone else.
224. The accused and Njama (PW 2) chatted generally as they took tea while Winnie (PW 1) was sipping wine. It is Mr. Njama who paid the bills.
225. He had parked his car at the entrance but the complainants' car was far off at the gate. As they dispersed, they boarded accused's car so that he could drop them at the place where they could get to their car.
226. Mr. Njama sat on the front passenger seat (co-driver) and Winnie sat on the left rear passenger seat. The car was a right hand drive; hence Winnie was right behind Mr. Njama.
227. He then drove them and parked next to their car so that they could alight.
228. It is at this point that seven (7) men confronted him. They introduced themselves as EACC Officers and began ransacking his car for everything including documents and money; they even found his employment card.
229. They then claimed they had found a parcel on the rear right seat next to where Winnie was sitting which, they said, contained dollars that the accused had just received as a bribe.
230. His hands were swabbed using a liquid. He also observed that they were recording of everything they recovered in an inventory.
231. He was then taken to Kileleshwa police station where he spent the night until the following day when they took him to EACC Headquarters.
232. His statement was recorded and then he was granted a Police Board to attend court on 20/3/2014.
233. He stated that the parcel which was found in his car was brought by Winfrida Ngumi (PW 1) who left it on the floor of his car without his knowledge or consent. He stated that he had not had discussed anything about that particular parcel with her.
234. The accused said he took plea on 20.3.2014.
235. He termed the accusations against him as false; pointing out that even in the transcripts before the Court, it could not be pointed where he had asked for a bribe. The Investigating Officer could not show any time he called or even texted the taxpayer asking for a bribe.
236. He also stated that the transcripts were full of errors and fabrication where conversations were manipulated to make him look bad.
237. Concerning the letter, he said to have authored which was produced in Court, he explained it was never recovered at the scene of his arrest as it was not part of the inventory of documents that were recovered at the scene.
238. He said subsequent to his arrest, a lot has come to the surface concerning the Company which is now widely reported in the press.
239. He stated that his former Commissioner General, John Njiraini is fighting Mr. Njama (PW 2) for a share of the Company, a fact that had been reported in the Daily Nation Newspaper of 4.3.2019 and 29.3. 2019. A similar story had also been reported in the Business Daily Newspaper of 5.3.2019 and 6.8.2019.



240. According to the stories in the newspapers, the former Commissioner General of KRA was to help Space and Style Limited avoid payment of tax in exchange of shareholding in the Company.
241. The accused believes he was set up in that grand scheme of things because when he was arrested; that tax audit was abandoned. The assessment was never issued following the directions of Mr. Njiraini and without assessment; no tax can be recovered.
242. It thus meant that ledgers were not debited with the amount of tax arising from the said audit.
243. He explained that according to the Income Tax, Act; it requires raising of tax within seven (7) years hence assessment for year 2008; should have been raised by 2015. The one of 2009, should have been raised by 2016; for 2010, by 2017 and 2011 by 2018 and for 2012, by 2019.
244. The accused explained that the Company fights begun in 2018, which meant the obligation to Mr. John Njiraini by the Company, had now come to fruition. He stated that this was a case where people schemed to set him up. That group, he said included his former Commissioner General so that he could gain shareholding in the Company and by using these criminal proceedings and the EACC, he has achieved his objective.
245. The accused stated that the fights have spilled over to the courts whereby Civil Suit Number 194/2018 has been filed by Mr. Njama against Mr. Njiraini for taking over Mr. Njama's shareholding and throwing him out of the Company.
246. The accused stated that he did not resign from KRA; he was sacked. He urged the Court to acquit him because he was just a civil servant doing his honest public service responsibilities but a group of individuals set him up so that they could achieve what they wanted.
247. He stated that he neither demanded nor received any money from the Space & Style Directors.
248. At the close of the defence case on the 13<sup>th</sup> of February, 2020; the Defence Counsel Mr. Elisha Ongoya told this Court that the defence was to make a fifteen minutes closing argument prompting the Court to schedule the matter for submissions on 5/3/2020 at 2.00 P.M. Come this day, Mr. Otieno Mudany holding brief for Ms. Manegene & Mr. Ongoya for the accused communicated to the court that they would be relying on their submissions made by the defence at the close of the Prosecution case. On her part, Senior Prosecution Counsel, Ms. Mutellah requested to put in her written final submissions. She filed her written final submissions dated 10/3/2020. The Court fixed the judgement date to be on 17/4/2020 but due covid 19 pandemic court sittings were suspended making the delivery of judgement not possible. Following further directions, the matter was given the subsequent judgement date by notice to the parties hence today's delivery.
249. I will be making references to the submissions by both sides as and where necessary as I decide various issues which arise for determination in this judgement.
250. 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-

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



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

‘Bribery involving agents’

251. 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-

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

252. 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.

253. 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:

That accused was/is ‘an agent’, that is, he was at the material time in employment of another, either in private or public sector.

There was a solicitation of a benefit, reward or inducement in fact

In case of receiving, proof of the fact that accused received a particular benefit, reward or inducement.

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.

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

255. The employment of the accused by Kenya Revenue Authority was established. His staff card number 89029154- P. exhibit 50 which was recovered from him during arrest showed that he was an employee of Kenya Revenue Authority. Besides, his immediate superior, Mr. Ronald Omulidi Olwali (PW 3) testified before this Court and confirmed accused’s employment with KRA, by stating that at the time, the accused was performing duties of Audit Manager in charge of Wholesalers & Retailers Sector which was under the Medium Tax-Payers Office that the said Mr. Ronald Olwali Omulindi (PW 3) headed.

256. Additionally, the accused in his unsworn statement of defence acknowledged that he was working for Kenya Revenue Authority until the year 2014 when he was relieved of his duties.



257. Consequently, for purposes of section 38 of the Anti-Corruption & Economic Crimes [Act, No. 3 of 2003](#); the accused is/was an agent of Kenya Revenue Authority as his employer and therefore Kenya Revenue Authority was in that capacity his 'Principal' as far as the provisions of the Anti-Corruption & Economic Crimes [Act, no.3 of 2003](#) are concerned.

**The next issue is to determine if the matter in question fell within the functions/mandate of the accused's principal.**

258. The mandate to assess and collect revenue due to the Government of Kenya is a responsibility of the Kenya Revenue Authority. This is as per the Kenya Revenue Authority Act, Cap 469 which establishes the Kenya Revenue Authority. In its preamble it declares:

“...An Act of Parliament to establish the Kenya Revenue Authority as a central body for the assessment and collection of revenue, for the administration and enforcement of laws relating to revenue and to provide for connected purposes...”

259. The involvement of Kenya Revenue Authority in the affairs of Space & Style Limited, whose directors were PW 1, Winfrida Wanjiku Ngumi and PW 2, Njama Wambugu was explained by PW 3, Ronald Omulindi to have been informed by the need to carry out an in-depth audit of the Company's financial records in order to ascertain the amount of tax liability that should have been paid by the said Company in the period between 2008-2012. That exercise was commenced pursuant to a letter from KRA dated 22/8/2012- P. exhibit 3. The process was expected to finally conclude with tax assessment report indicating the amount of tax Space & Style was required to pay. That activity was thus part and parcel of the mandate of Kenya Revenue Authority as per [Kenya Revenue Authority Act](#), Cap 469 hence a matter that related to the affairs of Kenya Revenue Authority, a public body that the accused worked for.

260. If therefore, it is proved that the accused solicited or received a personal benefit, reward or inducement so as to influence him to do or not do; or, to show favour or disfavour concerning a matter relating to the affairs of his principal- namely, Kenya Revenue Authority, then the court must find him criminally culpable for an offence of corrupt solicitation, and if he received a personal benefit, reward or inducement thereof, the court must equally find him guilty of corruptly receiving the same.

261. According to the Anti-Corruption & Economic Crimes Act, once it is proved that an accused held himself out or represented himself as capable of performing a function that falls within the mandate of his principal or employer to another person for purposes of committing an offence under the [Anti-Corruption and Economic Crimes Act](#), No.3 of 2003, yet in reality, he does not possess such power in line with his specific responsibilities in that organization; under section 50 of Anti-Corruption and Economic Crimes, he cannot put forward a defence that he was limited by the defined by the scope of his responsibilities from carrying out the task in question as long as he held himself out to another in that manner for purposes of soliciting or receiving the benefit in contravention of the Act

Section 50 provides:

S. SUBPARA 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-

SUBPARA 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.



262. Before I embark on the actual analysis of the evidence touching on actual proof of the elements of the offence, there are a quite a number of other evidential issues touching on credibility of evidence generally or purely legal issues although brought out through cross-examination of witnesses or alluded to by the accused in his unsworn statement or simply submitted to which I considered worthwhile to address first.
263. During cross-examination of the witnesses from KRA, particularly, PW 3 Ronald Olwali Omulindi, the defence elicited information to the effect there was statutory limit for recovery of tax. That it has to be recovered within seven (7) years. That there was thus a real probability that the complainants devised this case to achieve that objective of not paying tax because the period for demanding the tax has since elapsed. In his unsworn statement, the accused also emphasized that position as one of the undeclared motives behind his persecution.
264. In his submissions, Counsel for the accused referred to that factor in advancing the same argument, terming these proceedings against the accused an abuse of the criminal justice process commenced with the sole aim of defeating the process of recovering the said tax.
265. Nonetheless, neither PW 3, Ronald Omulindi who spoke about the existence of statutory limit while on cross-examination, the accused who reiterated it nor counsel who submitted on the same provided this court with the relevant statutory provision to back their standpoint on the said statutory limit for recovery of tax. When the same issue was put to Wycliffe Olando (PW 4), a witness from KRA, his response unlike that of Mr. Omulindi was a bit guarded, he said:
- “...I don’t know if there is a Court case, it would affect that...”
266. The Prosecution did not specifically respond to that line submission except that during re-examination of Mr. Omulindi (PW 3), the Prosecutor had asked him about the specific statutory provision which he said was in the *Income Tax Act* but he could not cite the exact provision at that moment.
267. Being an issue of law, the Court found it necessary to verify the same. The Court combed through the *Income Tax Act*, the *Tax Procedures Act* as well as the *Kenya Revenue Authority Act* in search of the specific legal provision on statutory limit for recovery of tax at 7 years but did not come across any.
268. Indeed, the closest the Court came to was a provision under the Tax Procedures Act under section 23 that obliges any person to maintain documents required under tax law to enable tax liability to be readily ascertained for a period of five (5) years with an additional requirement under section 23 (3) (b) thereof, that if such a document or record is necessary for a proceeding commenced before the end of five year period, the person is required to retain such document or record until the proceedings are completed. The implication of section 23 (3) (b) is that there cannot be a time limit for completing a tax audit if the process has been commenced within the prescribed period. Once the audit process has started, it remains open until it is completed. It is thus legally inaccurate and misleading to be told that the audit process which had been commenced is incapable of being finalized and have the tax assessment determined because the tax payer stands exempted from paying tax purportedly since the said tax should have been recovered within the seven-year period. This audit process was commenced within the five-year period but a dispute arose before the final tax assessment could be issued. The matter legally is alive and it is the understanding of this court that it is still capable of being followed through to completion according to section 23 (3) (b) of the *Tax Procedures Act*.
269. It was also submitted reference being made to evidence elicited during cross-examination of witnesses from Kenya Revenue Authority that is, PW 3 and PW 9 that the amount arrived at in the findings of in-depth audit- P. exhibit 13 could not be reduced by the accused alone without the entire team’s



concurrence and other approvals. That may be correct according to KRA procedures but it cannot assist the accused escape culpability if he held himself out as having been capable of doing anything relating to his principal for purposes of committing an offence under the Act.

270. Section 50 of the Anti- Corruption and Economic Crimes which I adverted to earlier as I began my analysis 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.

271. It was also submitted that there was omission to bring certain forms of evidence. It was argued that despite the prosecution witnesses evidence that there were many calls and texts that were exchanged between the accused and the complainants; the prosecution did not present evidence of those texts or call logs before the Court. This particular submission fails to appreciate that, it is not the crowd or army of evidence that matters in a case but the satisfactoriness of its quality and not the quantity. Indeed, as jurists say, evidence is to be "weighed and not counted."

272. Further, in his highlights, Mr. Elisha Ongoya submitted that PW 1 was an agent provocateur. He argued as follows:

"...The Court should not forget that the case was instituted at the instance of agent provocateur- that is agent of the state who is actually dispatched to go and provoke somebody to commit an offence...I submit that evidence of agent provocateur should be treated with highest form of caution from the fact finder..."

273. I have taken the trouble to find out the proper meaning of agent provocateur.

274. Black's Law Dictionary 12<sup>th</sup> Edition ascribes two meanings to this word; firstly, it means an undercover agent who instigates or participates in, crime, often by infiltrating a group suspected of illegal conduct to expose or punish criminal conduct. The second meaning is that of someone who entraps another, or entices another to break the law, and then informs against the other as a law breaker especially someone hired to encourage people who are working against the Government to do something illegal so that they will be caught.

275. In the case of MOHAMED KORIOU NUR VS ATTORNEY GENERAL, Petition No. 181 of 2010 (2011) eKLR Justice Warsame, quoting R vs. Mack (1988) 2s. CR. 903 explained the concept of 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 ..."

276. For defence of entrapment to be raised, it has to be demonstrated that the offer to commit the crime was initiated and encouraged by the State itself or by a State agent or a private citizen directly working for State agent, commonly referred to as 'derivative' agent. That agency relationship must however be established before the defence can be successfully pleaded.



277. Where the instigation is solely done by a private citizen, the defence of entrapment cannot be sustained. The American jurisprudence in this area is quite advanced. In the American case of Newman Vs. United States 28 F. 2d, 681 it was held:

“...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...”

278. Similarly, in another case 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...”

279. Moreover, for the defence of entrapment to succeed, it must be demonstrated that accused was in the first place unwilling or reluctant to commit the offence in question were it not for the persistent encouragement, threats or even intimidation by the State agent which eventually made him to cave in. Justice Warsame in Mohamed Kurior Noor case (supra) held that the following factors must be considered in determining if there has been entrapment by the Investigating Agency:

1. Whether the conduct of the state agent induced the offence
2. Whether the state agent had reasonable grounds for suspecting accused was likely to commit the particular offence or similar offence and the agent was acting in the course of investigations
3. Whether before the inducement the accused had intention of committing the offence or similar offence if an opportunity arose in absence of state agent
4. Whether the offence was induced as a result of persistent opportunity, threat, deceit, offers of reward or other inducement that would not necessarily be associated with commission of the offence.

280. Consequently, if a criminal plan were to be presented to an accused who readily jumps into the opportunity, that would demonstrate he had an already willing mind to commit that offence and the defence of entrapment may as well not succeed.

281. In Keith Jacobson Versus United States- Supreme Court of United States 505 U.S. 1962, it was held:

“...in their zeal to enforce the law, however, Government Agents may not originate a criminal design, implant in an innocent person mind the disposition to commit a criminal act, and then induce the commission of crime so that Government may Prosecute...where Government has induced an individual to break the law and the defence of entrapment is at issue, the Prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to being approached by Government agents...”



282. That said, the ultimate responsibility of determining if there has been entrapment lies with the court. It must evaluate the response of the accused to the instigation, if any, and weigh it against how an average law abiding public servant in his position would ordinarily have reacted to the given the circumstances in order to decide if the actions were entrapment that amounts to abuse of criminal justice process.
283. At the point the complainant went to report the incident, it is because she found the request by the accused to meet her privately in a hotel setting to be an improper contact and highly suspicious taking into account the fact that the accused was one of the high-ranking KRA officials involved in the audit dispute pitting KRA and her Company. She made an individual decision to report because she was suspicious of the motive. EACC received the report and decided to covertly follow up on the issue with a view to unearthing if there was any ominous motive. In doing so, EACC did not just zero in on the accused alone, but for every KRA official who met with the complainant from there on, their deliberations would be recorded. Other than providing the recording gadget to capture those deliberations and EACC officers covertly watching as the meetings between the complainants and KRA officers taking place, after which they would immediately retrieve the gadget to listen to the content; there is no evidence either from the complainant or by way of cross-examination that EACC officers coached the complainant to implant into the accused the idea of committing the offence. In cross-examination of the Investigating Officer, no questions were even directed at him with regard to any such instruction.
284. With due respect to Mr. Elisha Ongoya therefore, the branding of PW 1 as ‘an agent provocateur’ is not borne out of evidence on record. There was no proof either explicitly or impliedly adduced by the defence or elicited on cross-examination that PW 1-Winfrida Wanjiku Ngumi was an undercover agent working for the law enforcement agency, that is, EACC or the fact that she was she hired as an agent by a law enforcement officer to instigate the accused to commit crimes the accused would not have otherwise committed. There was reasonable ground for suspecting that accused was likely to commit an offence since his conduct as a public officer in charge of a team that was auditing the complainant’s Company raised serious ethical concerns at the moment. EACC’s entry into the matter was bonafide to ascertain the real intention behind the accused’s move.
285. The inquiry by EACC was triggered by PW1- Winfrida Wanjiku Ngumi’s report. The fact that a citizen who has made a report goes ahead to assist in the investigation that leads to detection of an offence does not make him or her an agent of that Investigative Agency or the State.
286. Merely providing the accused with an opportunity to achieve his objective by letting the complainant cooperate so that the accused can execute that intention does not constitute entrapment.
287. It was also contended by the defence that the allegation to reduce the amount of tax liability by the specific amount of Kshs. 18, 609, 659. 86 indicated in the particulars of the charge was not contained in any witness statement, initial report or even the investigation diary.
288. However, the Prosecution in reply submitted that the reason why the accused was demanding for the 15 million shillings was for him to issue a letter reducing the tax liability, which letter he gave out on 17/3/2014 (P. exhibit 26) purporting to reduce the amount tax liability by the said amount.
289. From the evidence on record, the exacerbation of the issues between Space & Style Limited and KRA was when the letter of 13/9/2013 – P. exhibit 7 which conveyed the findings of the tax audit indicating liability of Kshs. 439, 987, 077.92/- was released. The complainants heightened the efforts for the review of the said amount of tax liability after receiving the letter containing the said audit sum.
290. From their evidence, PW 1 and PW 2 testified that in their engagement with the accused, he promised to facilitate the reduction of tax to a reasonable amount in letter that he was to secure for them, indeed,



they did not allude to any specific sum. The reduction of the amount was the overriding purpose. They even testified that when he finally gave them the letter- P. exhibit 26, on 17/3/14 and PW 2 attempted to read it, the accused stopped him telling he would read it later.

291. The indication specific amount of reduction was thus revealed after the arrest of the accused when the letter he gave was recovered on 17/3/2014- P. exhibit 26. At the point the charges were being preferred, this amount was included in the charge which is part of the evidence relied upon in this case and the said letter attested to by the complainant in evidence. The amount was thus supported by evidence led in substantiate the charges. The failure to mention it specifically in the prior statements of the witnesses is understandable since at that time it had not been disclosed, all they knew and what they told this court by then was accused would get them a letter revising the tax liability to a reasonable amount. The mention of the specific amount which is premised on the said letter does not affect these validity of the charges.

#### **Whether the meeting of 7/3/14 and 11/3/2014 take place as attested by PW 1 and PW 2?**

292. The accused neither acknowledged the happening of the meetings of 7/3/14 nor the one of 11/3/14 in his statement of defence. He did not provide any counter narrative about his presence there or otherwise. He only conceded being in the meeting of 17/3/2014, which was the day he was arrested.
293. It is the responsibility of the prosecution to provide proof of facts it relies on to support the charges against the accused, the accused is not even obligated to say anything. The legal position is that whoever alleges must prove, and in a criminal case such as this, the proof is beyond reasonable doubt.
294. In the defence submissions, it was apparent that its standpoint concerning those meetings and deliberations thereof was that participation of the accused was not proved. It was pointed in the defence submissions that there was no independent witness who was called by the Prosecution to positively identify the voice of the accused in the recordings to place him in those meetings other than PW 1 who had an interest in the matter.

Mr. Elisha Ongoya submitted:

“...Your honour, in the present case, PW 10 and PW 11 testified that it was the complainant who identified the voice of the accused person; there was no attempt at all, to introduce an independent person to identify the voice of the accused despite the fact that the co-workers were witnesses for the prosecution. The lack of an independent witness has resulted in a myriad of admitted statements attributed to the accused person. The complainant had an interest in this matter and therefore to mislead the translator and the Court. The entire case is premised on the contents of the transcribed and translated version and we urge the Court to dismiss this suit for lack of proper certificate of confirmation of voice and/or proper identification of accused voice in the recordings...”

295. He also ruled out the fact that the accused was visually identified and indicated that when the clips were played in court, no one could be identified, let alone the accused.
296. In response to this submission, the Prosecution countered that the recordings were audio-visual and thus and speakers could be picked from the images. Further, it was argued for the Prosecution that since the meetings were happening between the accused and the complainants, the complainants were best placed to identify the person they were actually conversing with. In this regard, the Prosecution relied on the case of *Esther Theuri Waruiru & Anor Versus Republic (2008) eKLR* where the Judge



found that the complainant could suitably do the identification having taken part in the conversation. She quoted the following passage in the judgement:

“...So who else should have been called to corroborate the evidence, when P.W. 1 was in fact a participant in the conversation and her evidence as to what went on between the two appellants, herself and P.W. 2 (the director) is corroborated by the evidence of P.W. 2. Surely, the Prosecution could not have ‘created’ an independent witness, when the event involved those four individuals...”

Part of the submissions by the defence was, (to quote):

“...The entire case is premised on the contents of the transcribed and translated version and we urge the Court to dismiss this suit for lack of proper certificate of confirmation of voice and/or proper identification of accused voice in the recordings...”

297. In my view, this is not correct. Other than the transcripts and the translations, there was also the direct/oral evidence by prosecution witnesses, the opinion evidence of an expert and other forms exhibits, including the original recordings.

298. The issue of lack of ‘an independent witness’ was also canvassed with regard to identification of the voice of the accused. It is the humble position of this court that evidence of a witness cannot be perfunctorily rejected simply on the ground that she is ‘interested.’ It is still possible to find such a witness credible or her evidence can as well be corroborated by other forms of evidence presented. If the path suggested by the defence was the rule, many genuine cases will be thrown out leading to gross miscarriage of justice. Each witness’s evidence must be assessed by the court carefully to determine its creditworthiness.

299. In the instant case, PW 1-Winfrida Wanjiku Ngumi had cumulatively met the accused at the KRA Offices at Forodha House on 6/11/2013. Another undisputed encounter was on the 17/3/2017 which accused also alluded to in his defence. During those occasions she held conversations with the accused over a sizable period of time and had an opportunity of hearing him speak. Further, despite submissions that the faces were not visible in all the recordings; for the meeting of the 14/11/2013 the court recorded observation after watching the clip during the testimony of PW2, Mr. Njama Wambugu as follows:

“...At 19:17:54, the two men’s faces seated across each other are clearly visible. This continues up to and about 19:23:37...”

300. PW 1, Winfrida Ngumi said she was in that meeting as well.

301. Clearly therefore, there were three clear encounters which she had interacted with the accused, leaving out those that the accused did not talk about which are now subject to proof. I am certain that this exposure to the accused sufficiently acquainted her with his manner of his speech as well as voice as to accurately recognize the accused by his voice in the recordings.

302. Furthermore, other than the testimony of PW 1 and PW 2 in respect of those meetings, for the meeting of 11/3/2014 and 17/3/14 at Boulevard Hotel, and the one of 14/11/2013 at Southern Sun Hotel, the investigating officer, Mr. Patrick Mbijiwe, PW 11, testified that on 14/11/2013, 11/3/2014 and 17/3/2014 where recording was done, he was secretly witnessing those meetings take place, a fact confirmed by PW 1 and PW 2, as he would get back the recording device containing the recording device soon thereafter. In all the meetings he observed, the one of 14/11/2013, that of 11/3/2014 and 17/3/2014; he confirmed that the accused attended.



303. Njama Wambugu (PW 2) also testified he attended all the meetings and confirmed the presence of the accused in them.
304. The accused did in his unsworn statement of defence neither denied nor confirmed his presence in these meetings, in fact he did not speak about them, and relevant to this case in particular is the meeting of 7/3/14 and subsequent one 11/3/14. This is despite the prosecution witnesses' emphatic assertion that these meetings happened and he was present. There was thus no evidential dispute introduced by the defence about this assertion other than in the submissions where it was implied that his presence was not proved because his voice in the recordings of the alleged meetings was not proved by an independent evidence who identified his voice. The issue of his absence in the said meetings was not contested on cross-examination neither was the lack of identification by voice challenged through cross-examination nor in his unsworn statement of defence.
305. In any case, I have found that there was sufficient exposure between him and PW 1 through several meetings they had held prior to PW 1 being called to pick out his voice. She was already conversant with accused voice as to be able to identify it correctly.
306. The finding of this court therefore is that those meetings took place and the participation of the accused has been established as attested by the Prosecution evidence on record.
307. That said, one of the defence assertions was that KRA was unable to complete the tax audit and issue an assessment because of the unwillingness or refusal by the complainants to produce the required documents. This was elicited from cross-examination of Ronald Omulindi (PW 3) and amplified by the accused in his statement of defence. It was vehemently disputed by PW 1 and PW 2. For a moment, let it be supposed that the Directors of Space & Style were unwilling or reluctant to provide the records. Did that leave Kenya Revenue Authority without any option other than whine in frustration? Kenya Revenue Authority is statutorily empowered with many options at its disposal under the [Tax Procedures Act](#) including the power to apply for warrants of search and seizure, institution of criminal proceedings for failing to comply with the notice to provide the required documents to KRA among many other measures. Neither of such actions was taken, nor is there any evidence that it was being contemplated. In my view, the reluctance by the complainants to provide the records may not really have been the issue that delayed the completion of that review exercise. The prominently questionable ethical concerns that accused exhibited and which my view are circumstantially relevant may have reasonably played their part as well.
308. I must now consider the prosecution's evidence of solicitation vis the accused's defence to determine if corrupt solicitation has been established against the accused beyond reasonable doubt or not in counts 1, 2 and 3.
309. The prosecution relied on the direct oral testimonies of PW 1- Winfrida Wanjiku Ngumi and PW 2- Njama Wambugu who testified that the solicitation of Kshs. 15,000,000 was made to both of them at an early morning meeting called by the accused at the Boulevard Hotel on 7/3/2014. That demand was to enable the accused assist in reduction of tax liability of Kshs. 439,987,077.92 which had been communicated to the Company via the KRA letter of 13/9/2013- P. exhibit 7 based on the findings of the in-depth audit. The follow up to this meeting was held on 11/3/2014 where according to evidence of PW 1 and PW 2 the modalities of procuring the bribe money and conversion of the same into dollars for ease of portability in order to delivery to the accused were thrashed out. The last crucial meeting was on 17/3/2014 where delivery actually done and after which the accused was promptly arrested.
310. Besides the descriptive oral accounts rendered in the testimony of PW 1, Winfrida Wanjiku Ngumi and PW 2, Njama Wambugu the prosecution also relied on the audio-visual recording of the meetings of



11/3/2014 and 17/3/2014 to augment the oral evidence. There was also evidence it was the accused who first made contact with the Directors of Space and Style to lay ground for the eventual solicitation. She recorded the initial meeting of 14/11/2013 and the one of 11/3/2014. The one of 17/3/2014 as well as others in which they met other KRA officials over this matter were recorded and those clips were played before this court.

311. In his unsworn statement, the accused termed the allegation that he solicited for the money as a fabrication. He did not utter a word in his statement of defence to specifically deny the meeting of 7/3/14, or subsequent one of 11/3/2014 which the Directors of Space & Style Limited indicated were the first two meetings where they made the demand. He talked about the meeting of 17/3/14 where he conceded he met the Directors of Space & Style but denied the narrative they had given through their testimony. He said on 17/3/14, it Njama Wambugu who invited him for a meeting and had not indicated he was to be accompanied by anyone else. They had some tea as PW 1 was taking some wine. Later, they rose to leave and he lifted them in his car which was nearer so that he could drop them at theirs was packed a distance towards the gate. At the point he was dropping them, he was surrounded by EACC Officers and arrested and his vehicle was searched. A parcel was found in his car with dollars which he believed was dropped there by PW 1.

Submitting on evidence, Mr. Elisha Ongoya contended:

“...Count 1, the alleged meeting was unrecorded meeting. Essentially, it is the word of the complainant against the accused that’s all. That is what is called threadbare evidence...”

312. The Prosecutor, Ms. Mutellah in her final submissions argued that the defence had failed to rebut the evidence adduced by the Prosecution against the accused. She pointed out that the accused did not offer any evidence in rebuttal. That he gave an unsworn statement which legally is of no evidential value. She quoted the case of *Mercy Kajuju & Others Vs. Republic (2009) EKLK* which explained the place of unsworn statements in criminal case where it was held as follows:

“...Little weight will consequently be given to an unsworn statement. That is the disadvantage in an accused person electing to make unsworn statement. A few cases will illustrate the point. In *Amber May vs. Republic (1999) KLR 38*, the High Court held that unsworn statement has no probative value notwithstanding the provisions of section 211 (1) of the Criminal Procedure Code...”

313. Further in *PMO Vs. Republic (2019) EKLK* where it was held that

“...An unsworn statement is not, strictly speaking, evidence and rules of evidence cannot be applied to unsworn statement. It has no probative value, but it should be considered in relation to the whole evidence. Its potential value is persuasive rather than evidential. For it to have any value, it must be supported by evidence recorded in the case...”

314. It is this court’s understanding that when Prosecution has adduced admissible evidence and discharged its evidential burden as to existence of certain material facts, whereby the accused is placed on his defence, there is a corresponding evidential burden (not the legal burden) that shifts to the accused to rebut the same. Evidential burden is not the burden of proof, it is a burden of raising, on the evidence in the case, an issue as to the matter in question fit for consideration by the court. It means if the accused does not adduce evidence in opposition that can sufficiently raise doubts in the prosecution case, he runs the clear risk that the Prosecution’s case will succeed. However, as a matter of law, the accused is fully entitled to even refuse to give evidence and because it is the Prosecution which bears the legal burden of proof, the Court has a duty to consider the Prosecution’s case as a whole in the light of



standard of proof. The existence of evidential burden on the part of the accused does not therefore relieve the Prosecution the burden of proving the facts beyond reasonable doubt which is discharged upon consideration of the case as a whole.

315. Although an unsworn statement is of no evidential value, it is useful when considered alongside other evidence on record whether elicited either by cross-examination or adduced on behalf of the party who seeks to rely on it or when it is simply offered to supply a missing link. The fact that the accused has opted to rely on an unsworn statement or remain silent should thus not excite the Prosecution because the burden of establishing the case against the accused beyond reasonable doubt still rests on the Prosecutor throughout the trial and must be determined upon conclusion of the entire case. Failure on the part of the accused to discharge the evidential burden leaves him highly exposed to the risk of the case being decided against him but it is not automatic that the case against must succeed, though when evidential burden is not discharged, the chances of conviction are high. The court has a duty to evaluate the entire evidence and determine if the case has been proved to the required standard.
316. On the issue of reliability of transcript evidence to substantiate the solicitation; the defence submitted that there was evidence of misleading content in the transcripts and the translations, the introduction Mr. Waweru in the transcripts of meeting of 17/3/2014 yet he was not participant in that meeting, misalignment of the speakers in the conversation in the transcript in relation to the recording, disowning the certificates bearing the signatures in the transcript by PW 2, misspellings of the name of PW 2 and the like.
317. As for the transcripts and the translations thereof, I must concur with the defence submissions that transcripts were admittedly very ineptly done. In fact, even the transcriber herself, Cecily Mumbi (PW 10) conceded that there many errors in those transcripts. Consequently, in this determination, the court has decided to abandon the evidence of transcripts and the corresponding translations but retain the original recordings thereof. Consequently, the transcripts consisting of P. exhibits 15 a & b; 17 a & b; 30 a & b; 20 a & b and 28 & 29 will not be referenced to by the Court in this determination. The court can only refer to the original video clips played in this court being P. exhibits 14, 16, 30, 19, and 27 which were distinctly produced as evidence in their own right to the extent that the court was able to independently comprehend the contents.
318. These original recordings were a mixture of Kikuyu, English and Swahili. It is thus a fact that the said video clips were not entirely in official languages of the Court which is either English or Swahili. In some recordings however, the Court was able to decipher the general flow of the conversation where the language used was substantially Swahili or English and even went on to make its own remarks after the recording finished playing even before any explanation was received from the witness. For instance, after the recording of 14/11/2013 was played during the testimony of PW 1, the Court's remarks just after it was played and before the witness could be questioned about that particular recording was as follows:

“...Recording begins with somewhat inaudible first few sentences but substantially gets clear after a short while. The discussion revolves around a report which is the basis of the contention. Some parties allege there was double posting of entries upon migrating from manual to computerized data thereby leading to misleading data and misleading consequential report...”



319. As for the meeting of 11/3/2014; the subject of count 2, the Court noted the following immediately after it was played during the testimony of PW 1;
- “...The meeting discusses the issue of huge amount of cash and the question that lingers is how it will be delivered due to bulkiness. The issue of changing it into dollars is floated but abandoned. There is also the issue of security concern...”
320. Clearly, even without the aid of the transcripts and the translation, the Court was able to a generally discern the subject matter of the above meetings by its own perception without the benefit of the said transcript or the translation.
321. That general overview noted by the court about the recording of 11/3/14 was what was strongly amplified in the oral testimonies of PW 1 and PW 2 who gave an explicit and complete account of the deliberations of that meeting in their oral testimonies before the court. PW 1 and PW 2 indicated this meeting happened as a follow up of the meeting of 7/3/14 in which the accused had stated his demand of 15,000,000 on this date they were discussing the logistics of how they would acquire the same and have it converted into dollars for ease of delivery to him on the appointed date.
322. In his unsworn statement, there was no specific mention made about these two meetings which the Court has already found as a fact the accused participated in. The evidence by the two Prosecution witnesses, PW 1 & PW 2 which implicated him with solicitation of 15,000,000 shillings during the meeting of 7/3/14 where he was actually in thus went uncontroverted. There was no evidential dispute with regard to prosecution’s account concerning the accused during those meetings. The accused defence raised no issue against which the court could consider as against the prosecution’s narrative against him yet he was in the meeting. In essence, the defence did not discharge its evidential burden in regard to those particular incriminating facts against the accused during the said meetings.
323. I find no tangible reason on record distrust the evidence of PW 1 and PW 2 in that regard either. Going by their evidence therefore, the court finds as proved beyond reasonable that the accused did in fact solicit the 15,000,000 shillings during the meeting of 7/3/14, hence the subsequent meeting of 11/3/14 which they can be heard in the recording discussing the challenges of how to put the large amount of money together, change it into dollars and deliver it where among others, the issue of security during its delivery also comes up.
324. I have looked at the particulars of count 2 and 3. The particulars of counts 1, 2 and 3, are similar except for the date only. The amount, the venue, the complainant and the alleged purpose of the bribe is the same. That means the solicitation was the same albeit repeated several times on different dates. Does that constitute different crimes yet they are based on a single extended transaction? Charging the same offence with same statutory elements arising from facts relating to a single continuing transaction in more than count might increase the accused exposure to multiple criminal sanctions. It suggests accused has committed more than one crime several times when in reality is not correct. The court must thus exclude and acquit the accused in counts 2 & 3 on grounds that two counts are multiplicitous.
325. I will consider the evidence in respect of count on receiving of the said amount corruptly.
326. It was pointed out in the submissions of the defence that there were material discrepancies especially concerning the description of how the treated money was enveloped so as to be used for this operation.
327. It was submitted that there was inconsistency between the testimony of PW 1-Winfrida Wanjiku Ngumi and that of Mr. Francis Kamwara (PW 7) on the sealing of the envelopes. It was pointed out in the submissions that PW1 had insisted when questioned during cross-examination in respect to P. exhibit 25 a & b if the same was sealed by asserting that, “I am sure they were sealed” but even this



Court confirmed that gum/adhesive was still intact. That Francis Kamwara (PW 7) who prepared the said envelopes said the envelopes were not sealed, but in quick turnabout said he had stapled but again said, “I don’t think I stapled”.

328. I must say that it is not every discrepancy that affects the trustworthiness of a witness. If a discrepancy does not touch the core of the case, it must be disregarded. Moreover, a witness might be uncertain in some aspects his testimony or even somewhat exaggerate his/her evidence. It does not mean the entire evidence from that witness is untruthful and should be thus be thrown out. The court can assess it and rely on it if corroborated in material aspects.

329. Looking at the above response given by PW 1 during cross-examination and Mr. Kamwara’s apparent flip-flop while describing how he prepared the two envelopes used to ferry the money; it also imperative to remember that sometimes, and this happens quite often, that when a witness is subjected to rigorous cross-examination in which the finest of the details are probed with a tooth comb, it is naturally possible for any man or woman relying on his/ her power of human recollection to provide some discrepant details in some aspects of the testimony. It does not mean they are lying. In any case, it was evident Mr. Francis Kamwara (PW 7) whom I watched Mr. Kamawara very closely, struggled to remember the exact details in order to give this answer truthfully. This is even apparent in his response where he stated:

“I don’t think I did any stapling but I folded the first envelope and put it into envelop ‘2’.  
It was not stapled...”

330. I don’t find his response as having been calculated to deceive.

331. As for PW1, she eventually explained herself on the same issue after she was challenged to demonstrate how the two envelopes looked like, that is the inner and the outer one, (P. exhibit 25 a & b) when they were handed over to her. She took them and folded them and asked why she had not sealed them because she had earlier indicated they were sealed, she clarified:

“...It was folded like this. My English might not be so good...”

332. The accused defence on the issue of having received the money was that the parcel with the dollars was placed in his car by PW 1 when he offered to give them a ride in his car to the gate where their car was parked. That she did that without his knowledge or consent.

333. However, the Prosecution evidence is different. PW 1 and PW 2 testified that all along the accused was aware about the money which they had discussed and agreed they would deliver to him that day. That it was the accused who had suggested that the 15 million shillings be converted into dollars to make it more portable. Besides, it was prosecution witnesses account that it was the accused who directed PW 1 on where to place the money in the vehicle and even twisted in order to feel it with his left hand then pushed it under the front left seat where PW 2 was seated.

334. Swabs taken from the accused hands at time of arrest tested positive for the APQ chemical. This is the chemical PW 7, Francis Kamwara of EACC had used to treat the money and the envelope in which the money was inserted. The Government analyst, PW 5- Stephen Tukei produced the Government Analyst Report-P. exhibit 44 which confirmed there were traces of APQ chemical found in the right and left hand swabs of the accused- P. exhibit 39 & 40.

335. The defence submitted this finding did not signify accused contact with the money. In cross-examination the defence had sought to know if the bearer of the money, PW 1 shook hands with the accused that day. PW 1 said she remembered exchanging pleasantries with the accused but could not recall shaking his hands. However, PW 8 James Wachira one of the EACC Officers who had



participated in the operation that led to arrest the accused that day said he saw them shake hands. The defence then by way of correlation submitted:

“...According to PW 1, the accused had touched the treated money using left hand. According to PW 5, Stephen Tukei...the exhibit marked CI was right hand swab of the suspect...How did the said powder find its way on the right hand which was not the hand that would have touched treated money, if we believe evidence of PW 1?

The answer lies in the evidence of PW 8-James Wachira Ikua who in cross-examination on 25.10.2018 revealed a handshake between PW 1 and accused when they met at Boulevard Hotel. This would mean PW 1 herself had contact with the treated money on the way from EACC offices to Boulevard Hotel prior to meeting the accused contrary to the instruction. This evinces legendary determination to implicate the accused for ulterior purposes...”

336. In this submission, the defence ignored the fact that the Government analyst, PW 5- Stephen Tukei besides indicating that there was presence of APQ in the right hand swabs of the accused, he also testified that the left hand swabs of the accused Robert Maina Ngumi, (marked C2- P. exhibit 40) too were found to have traces of APQ powder. This is the hand accused used to feel the money according to PW 1 and PW 2. Inviting the Court to infer by way of speculation that the PW 1 came into contact with APQ while on her way to Boulevard hotel which she then transferred to the accused upon shaking his hand is pure hypothesis. PW 1 clearly testified when she was given the envelope and slid it in her handbag, the only time she came into contact with it is when she removed it, tore it by the side while inside the accused’s car. The fact of the complainant having exposed herself to APQ in contravention of the instructions given to her was neither established by any evidence adduced nor elicited through of cross-examination, it is not factual conclusion. I have no reason to doubt that she never complied with instructions not to touch the money until it was time to deliver it.

337. The fact of the accused having touched the money is corroborated by the presence of APQ chemical control sample in the hand swabs obtained from him. That therefore confirms the testimony of the complainant materially.

338. The allegation by the accused that they went with the complainants to his car for purposes of giving them a ride to their car which was parked far away at the gate is just but an afterthought. When the two complainants testified in court, they were not confronted with that allegation despite giving different version that they went with him to his car after indicating to him that they had the money they wanted to off-load to him. PW 2 stated:

“...After we had a cup of tea and indicated we had the money, we walked to his car. We asked if he had the letter and said everything was in place...”

339. In the book Murphy on Evidence, 14<sup>th</sup> Edition at pg. 663, the author writes:

“...Where a party’s case has not been put to witnesses called for the other side, who might reasonably be expected to be able to deal with it...The implication of the question is that the party is fabricating evidence in the witness box, because if he had ever mentioned the matters in question to his legal advisers, then they would have been put on his behalf at the proper time...”

340. Moreover, I find it difficult to believe the accused story that he was framed up. Firstly, this investigation appears to have taken such a long time, many meetings other meetings had taken place, not just with the accused but also with other KRA Officers who were involved in the audit review exercise. It included



the accused's superior, Ronald Olwali Omulindi (PW 3), Mr. Ng'ang'a (PW 9), Mr. Olando (PW 4) and Mr. Kuria, all officers of KRA. EACC never took any action against the accused for holding the first meeting of 14/11/2013 with the Directors of Space & Style because it turned out to be an introductory meeting that was nothing inculpatory in the same. No criminal charge was preferred against other KRA officials who met with Directors of Space & style Limited in the course of this inquiry. Why would EACC be keen to charge the accused in order to scuttle the tax recovery and not any other KRA official? As a matter of fact, the first time ever the Directors of Space and Style laid eyes on the accused was in the meeting held at Forodha House on 6/11/2013, a fact not disputed by the accused. There is no history of any known hostility between them and the accused after that. The allegation that some people sat and planned to set him up is a sham.

341. Contrary to accused assertion that he was framed, it is evident that he authored his own misfortune. It is a fact that he was a high-ranking Public Officer, an Assistant Commissioner in Charge of the Wholesaler and Retailers Sector from which a small team of KRA field Officers was formed and tasked to audit the Complainant's Company for tax purposes. He dispatched an emissary to reach out to the Managing Director, PW 1-Winfrida Wanjiku Ngumi and started engaging the the two Company Directors in private night meetings in hotels well aware the Department was auditing the said Company to recover colossal amount of tax. In a lone ranger style, he went on holding several of those meetings with Directors of the Company discussing the on-going audit over tea and snacks or other drinks. This conduct on the part of the accused raises serious ethical and integrity questions that pours cold water on his claim that he was a hardworking and an honest civil servant who became a victim of a shadowy scheme. In my view, an average hardworking and honest civil servant could not have carried himself in the manner displayed by the accused in this case. I doubt his sincerity when he describes himself as a hardworking and honest civil servant taking into account his conduct.
342. There was evidence that the solicitation and the receipt of that benefit was intended to enable the accused assist the complainant's Company to be issued with a letter reducing the tax liability which he actually issued, (although fake), the consideration being greasing the accused hands with a personal benefit of Kshs. 15,000,000 which was to be converted in US Dollars. Evidence has shown that it was asked for, provided and received.
343. In the final analysis therefore, I am satisfied there enough evidence by the prosecution to establish corrupt solicitation and receipt of the alleged amount in both counts 1 and 4 beyond reasonable doubt.
344. I thus find him guilty in counts 1 & 4 and convict him accordingly.
345. The accused is acquitted in counts 2 and 3 under section 215 of the Criminal Procedure Code for reasons provided in the judgement already. He is convicted in counts 1 & 4 under section 215 of the Criminal Procedure Code.

**JUDGMENT READ, SIGNED AND DELIVERED IN OPEN COURT THIS 26TH MAY, 2020.**

**L.N. MUGAMBI (MR)**

**CHIEF MAGISTRATE**

**26.5.2020**

**26.5.2020**

Coram: L. N. Mugambi [Mr.] CM

Prosecutor – M/s Gitau for the State

Court Assistant – Brenda



Accused – Present

Otieno Mudany I hold brief for Elisha Ongoya and M/s Manegena for accused.

M/s Gitau for the state – Present

Court - Judgment read in open court this 26<sup>th</sup> day of May, 2020

**L. N. MUGAMBI [MR]**

**CHIEF MAGISTRATE**

**26.5.2020**

Otieno Mudany for the Accused -

The accused is a family man. Four people depend on him, 3 Children and the wife. The accused is a 1<sup>st</sup> offender. He has never been found culpable for any other offence.

The accused developed diabetes and pressure due to this case and he is on treatment for it. It wont be proper to subject him to custodian sentence considering that he suffers from diabetes and high blood pressure.

We are living in the worst times especially due to Covid-19 pandemic if we consider the health of accused. It wont be proper to subject him to custodial sentence. Accused has been faithful to court process, he has never failed to attend any session.

In that case we plead for a non-custodial sentence or preferably a lenient fine deductible from cash bail.

That is all.

M/s Gitau for the State-

It is true accused person is a 1<sup>st</sup> offender. Prosecution is also alive to the fact we are living in a precedented times of Covid -19.

However, court must consider offences of corruption were committed by accused which he must be punished accordingly.

A deterrent sentence must therefore be meted as the court deems fit but when also to serve as a lesson to all Public Officers.

That is all.

**L. N. MUGAMBI [MR]**

**CHIEF MAGISTRATE**

**26.5.2020**

Sentence -

The accused is a 1<sup>st</sup> offender. It has been submitted on his behalf that he suffers from Diabetes and High Blood Pressure although no medical records have been provided.

The accused is also a family man with dependents who depend on him for support. However, as submitted by the prosecution, M/s Gitau, accused committed a serious corruption offence. Due to his personal greed, the state may have been denied an opportunity to collect huge amount of taxes at an appropriate time.

Nevertheless, the court is alive to the fact that the moment that the case is being decided is a difficult one. As I deliver this sentence the is actually sitting under a tree due to threat posed by Covid 19 crises.



Considering the accused has a pre-existing health condition, it might seriously endanger his life if he is not given an option of non-custodial sentence.

I must concede, that if it were in normal time, the sentence given to accused would have been much more stiffer taking all these considerations into account, accused is sentenced as follows:-

Count 1

Fine of Kshs.1,000,000/= [One Million] in default serve [18] Eighteen Months imprisonment.

Count IV

Fine of Kshs. 1,000,000 [One Million] in default serve [18] Eighteen Months imprisonment. Sentence shall be consecutive.

R/A 14 day.

**L. N. MUGAMBI [MR]**

**CHIEF MAGISTRATE**

**26.5.2020**

Otieno Mudany Advocates -

The accused had deposited a cash bail of Kshs. 1.5 Million [ One Million, Five Hundred Thousand].

We request the court to allow the accused to deposit the balance of Kshs.500,000/= [Five Hundred Thousand] to make a total amount of Kshs.2,000,000/=.

I am informed he did not carry his medicine.

M/s Gitau – We are not objecting to 1.5 Million being used to pay part of fine. The rest of cash be paid in cash.

Due to his medical condition, he can be remanded at Capital Hill, Unfortunately, EACC are not here.

The Police can allow him to be brought all the things he may need today.

Court – Applicant to utilize One Million, Five Hundred Thousand [1,500,000] deposited as cash bail via receipt No.0135871 dated 20.3.2014 is allowed.

As requested, accused may be remanded at Capital Hill Police Station for the night until since it is now late.

If by tomorrow 27.5.2020 he will not have raised the balance of fine he shall be committed to prison.

Police allow his relative to take him his medical supplies for the night.

**L. N. MUGAMBI [MR]**

**CHIEF MAGISTRATE**

**26.5.2020**

