



**Republic v Odaya (Anti-Corruption Case 22 of 2018)  
[2020] KEMC 12 (KLR) (23 October 2020) (Judgment)**

*Republic v Nelson Nickson Odaya [2020] eKLR*

Neutral citation: [2020] KEMC 12 (KLR)

**REPUBLIC OF KENYA  
IN THE ANTI-CORRUPTION MAGISTRATE'S COURT  
ANTI-CORRUPTION CASE 22 OF 2018  
LN MUGAMBI, CM  
OCTOBER 23, 2020**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**NELSON NICKSON ODAYA ..... ACCUSED**

**JUDGMENT**

1. The accused, Nelson Nickson Odaya was arraigned before this court to answer to the following charges under the Bribery Act No. 47 of 2016.

Count Receiving a bribe contrary to section 6 (1) (a) as read with section 18 of the Bribery Act No. I 47 of 2016.

2. The particulars are that on the 14<sup>th</sup> day February, 2017 at Luthuli Avenue within Nairobi City County, being a person employed by Extra-group consultant and acting as agents of Tecno Technologies requested a financial advantage of Kshs. 395,000/=from Maston Mwenda Daniel as an inducement to forbear charging him with the offence of having possession in the course of trade, counterfeit goods contrary to section 32 (a) as read with section 35(1) of the Anti-Counterfeit Act 2008 Number 13 Laws of Kenya.

Count Receiving a bribe contrary to section 6 (1) (a) as read with section 18 of the Bribery Act No. II 47 of 2016.

3. The particulars are that on 15<sup>th</sup> day February, 2017 at Luthuli Avenue within Nairobi City County, being a person employed by Extra-group consultant and acting as agents of Tecno Technologies requested a financial advantage of Kshs. 180,000/=from Maston Mwenda Daniel as an inducement to forbear charging him with the offence of having possession in the course of trade, counterfeit goods



contrary to section 32 (a) as read with section 35(1) of the [Anti-Counterfeit Act](#) 2008 Number 13 Laws of Kenya.

Count Receiving a bribe contrary to section 6(1) (a) as read with section 18 of [Bribery Act](#) No. 47 of III 2016

4. The particulars are that on the 16<sup>th</sup> day February, 2017 at Tawi Hotel in Luthuli Avenue within Nairobi City County, being a person employed by Extra-group consultant and acting as agents of Tecno Technologies requested a financial advantage of Kshs. 180,000/=from Maston Mwenda Daniel as an inducement to forbear charging him with the offence of having possession in the course of trade, counterfeit goods contrary to section 32 (a) as read with section 35(1) of the [Anti-Counterfeit Act](#) 2008 Number 13 Laws of Kenya.

Count Receiving a bribe contrary to section 6 (1) (a) as read with Section 18 of the [Bribery Act](#) No. IV 47 OF 2016

5. The particulars being that on the 16<sup>th</sup> day of February 2017, at Tawi Hotel in Luthuli Avenue within Nairobi City County, being a person employed by Extra-group consultant acting as agent of Tecno Technologies received a financial advantage of Kshs. 50,000/- from Maston Mwenda Daniel as an inducement to forbear charging him with the offence of having possession in the course of trade, counterfeit goods contrary to section 32 (a) as read with section 35(1) of the [Anti-Counterfeit Act](#) 2008 Number 13 Laws of Kenya.
6. The summary of the Prosecution case is that the complainant in this case is a businessman dealing with phone accessories. He was operating a shop along Luthuli Avenue in Nairobi. On 13<sup>th</sup> February, 2017 some people who were accompanied by police officers went to his shop and carried out an inspection targeting suspected counterfeit products. Some of the phone accessories from his shop were seized and inventoried. The accused was among the team that carried out the inspection. Thereafter, the accused contacted the complainant offering to assist him in the case. Both the accused and the complainant held some meetings. The complainant established that the accused wanted money firstly, Kshs. 395,000/- which after deliberation he subsequently revised Kshs. 180,000/-. A complaint was filed with EACC by the complainant who was given Kshs. 50,000/= treated money to take to the accused. The accused was arrested after receiving the said amount from the complainant on 16/2/2017 hence the present charges.
7. The prosecution called ten (10) witnesses to prove the above narrative which was reduced into four counts in the charge sheet. The accused vehemently contested the charges through cross-examination of prosecution witnesses and giving sworn evidence in his defence.
8. In his evidence before the Court, Maston Mwenda Daniel (PW 1) told the Court that he trades along the junction of Luthuli Avenue –Munyua junction under a business name that is registered as Jaivy Mobile Accessories. His business deals with mobile phone accessories such as phone batteries, back covers, glass protectors, blue tooth speakers, earphones and the like. He also stated that he mainly sources his products from China.
9. On 13/2/2017 at around 1.00 P.M; five men in company of five armed police officers stormed his shop. Two of the men introduced themselves as the agents of Tecno Company. One was the accused Nelson and another, a Mr. Maingi. Three others introduced themselves as Anti-Counterfeit Agency Officers whose leader was Mr. Odek. They stated that the purpose of their visit was to search his shop for suspected counterfeits.
10. The accused, Nelson went upstairs where he would remove and bring the goods from while Maingi concentrated on removing the products that were on the shelves. They recorded what they had picked



and put it inside a big box. He was requested to sign the inventory dated 13/2/2017, serial number 001401 (P. exhibit 1 (a) & b). As they left, they exchanged their contacts, Odek gave him his mobile number- 0735xxxxxxx. The Tecno agent, Nelson (accused in this case) also gave him his contacts too, 0712xxxxxx

11. As he waited for possible court attendance date, Nelson (the accused) contacted him on 14/2/2017 through the mobile phone. He described the nature of the conversation as follows:

“...He inquired why I had kept quiet yet my goods had been seized. I told him I had no otherwise other than to wait for law to take its course. He told me that was not necessary he can help me out. I asked him how it could be done. He told me he could not talk this over the phone. He said we could meet and talk about the issue over a cup of tea. I told him we can meet...”

12. After about 30 minutes, the accused called him and said he was already at Tawi Hotel, which is about 100 metres from the complainant’s place of business. He went to meet him and found him with Mr. Maingi. They started talking over a cup of tea. The accused pulled out a copy of the inventory and used his mobile phone calculator to work out the value of goods that had been seized. He came up with a figure of Kshs. 395,000/=.

The witness stated:

“...He said that was the amount I was supposed to pay him because if taken to court, I will pay three times that amount...”

13. The complainant informed him he needed to consult with the owner of the business who lived outside the country. He then paid the hotel bill and left.

14. On the following day, 15<sup>th</sup> February, 2017; the accused (Nelson) texted him that he was at Tawi Hotel. The accused was alone this time round and had come to inquire if PW 1 had consulted. PW 1 then told him the figure he had quoted was very high.

15. The accused answered that he was willing to assist him and could therefore scale down the amount to Kshs. 180,000/=. He told him to pay that amount the following day by 11.00 A.M. The money was to prevent the complainant from being taken to court. He said:

“...This money he told me it was meant to water down my case so that I am not taken to court...”

16. The witness decided to report the incident to EACC on 16/2/2017. After presenting his complaint, he was referred to Mr. Bakari (PW 10) who recorded his statement.

17. He was introduced to Mr. Mbuvi who showed him how to operate a voice recording gadget (P. exhibit 2). He was to use it to record his conversation with the accused. He signed the inventory of handing over the voice recorder (P. exhibit 3).

18. He was further introduced to another EACC Officer, a lady by the name Zilpa who showed him a bundle of Kshs. 50,000/= in one thousand (1000/=) shilling denomination. She photocopied notes and together they compared the serial numbers of the photocopies against the real notes and an inventory she had prepared. The said amount of Kshs. 50,000/= (P. exhibit 4) was identified by the complainant in court. The money was then treated. He was shown a small khaki envelope (P. exhibit 7) which he was asked to sign. The money was inserted inside the envelope and he was instructed not



to touch it until the time the accused demanded for it. The money was then handed over to him. He signed the inventory of handing over (P. exhibit 5). He also identified the photocopies of the notes- P. exhibit 6.

19. The accused called him and said he was at Tawi Hotel where they had agreed to meet at 11.00 A.M. A team of five EACC investigators followed him. Some officers entered inside the hotel. He found the accused seated with Mr. Maingi. The audio recorder was on. The accused ordered for drinks and discussions on the Kshs. 180,000/= began. He explained:

“...We were talking about money Kshs. 180,000/= and there are some things he was trying to draft there on a piece of paper. He was saying there was some money I was to pay counterfeit officers, others to him. I know any payment whenever there is a dispute has to be official when all parties concerned are present. As we engaged to find out if I had honoured what we agreed, I handed over the money, Kshs. 50,000/=. I then signaled Bakari as we had agreed earlier by flashing his phone. They came and arrested the two suspects...”

20. He handed over the recording device to Mr. Bakari and left for his shop. He identified the inventory of handing over the gadget (P. exhibit 8).
21. He was summoned to EACC the following day, 17/2/2017 where the audio recorded conversation was played and he confirmed the contents of what he had discussed with the accused. He was able to pick his voice, that of Mr. Maingi and the accused whom he had spoken with closely.
22. He went through the transcript and confirmed it was the true account of what he had recorded. He signed the same (P. exhibit 9). The said conversation was played in court and PW 1 confirmed it was the one he had tape-recorded on that day. He wrote a further statement with these details.
23. On cross-examination, he was referred to a portion of the transcript where the issue of an agreement is featured and asked what it was about. He replied as follows:

“...We had not agreed to discuss the agreement...”

Asked how it arose in that meeting, he said:

“...It cropped up during the last meeting...”

24. It was put to him that the accused did not demand any cash directly as he was always talking about depositing the money into the account to which he responded:

“...all this was meant to squeeze money out of me. We had talked with him since February and all along he had never mentioned this process...”

25. Asked if he was aware that accused was an agent of Tecno and he was doing all that on behalf of Tecno, he replied:

“...I am aware accused is an agent of Tecno. I did not know what he was doing was on behalf Tecno because there is no official communication from Tecno...”



26. Asked if there was anything wrong with the accused engaging him as agent of Tecno for an out of court settlement, he replied:

“...It was very wrong. Procedure should have been, I am here as accused, ACA and Tecno. ACA should have called me and it starts from there. That is the right procedure...”

27. It was pointed to him that in the transcript he is the one who unilaterally pushed the cash to the accused without any encouragement from the accused by telling him ‘shika hii’ yet at that moment accused had not asked for any cash from him and his reaction was “nini hiyo?” That even the immediate statement that followed from the complainant, “hii ingine nitakutumia kwa simu, the accused was again not in sync with what was happening at the time and he asked “gani?” which was indicative of someone who had not solicited for it, a suggestion that the complainant denied.

28. Fredrick Chepkwony (PW 3) the Deport Manager at Anti-Counterfeit Authority in charge of Kiang’ombe based ACA deport told this court that his duties are to receive suspected counterfeit goods that have been seized by ACA Inspectors and to release them for destruction when they have been analyzed and found to be counterfeits or back to the owners if they are genuine.

29. He said destruction is done through a Company that has been procured and contracted by ACA.

30. He stated that on 21/2/2017, Inspector Thomas Odek (PW 4) took electronic goods to the deport under inventory number 001401 (P. exhibit 1 a) under the name of Maston Mwenda Daniel ID Number 13251502 which he received at the Deport. He did not play any other role.

31. Antony Koomu Maingi (PW 8) testified that he was one of the Directors with Extra Group Consultants which is a registered company that deals with counterfeit matters. He stated that the Company works as an agent for other Companies. He explained the nature of his Company’s work as follows:

“...A Company like Tecno they have a lot of counterfeit goods in the market. We normally ask them to give us jobs to do surveillance for them in the matters concerning counterfeit. We report to Anti-Counterfeit Agency and the Company Tecno so that they can lay the complaint. I have worked with Tecno Technology since 2016 to date...”

32. Concerning the events of 13/2/2017; he stated that he and the accused went to ACA offices and they got accompanied by ACA Inspector Odek and three police officers. They went to the shop of PW 1, Maston Mwenda and identified themselves. They then carried out inspection and recovered some suspected counterfeit goods. The ACA Inspector, Odek then wrote the inventory of the goods which were seized and taken to ACA Deport in Kiang’ombe. Samples of the goods were removed and taken to Tecno for analysis to determine if the goods are counterfeits.

33. He testified that Mr. Mwenda (PW 1) approached the accused for alternative dispute resolution. Mr. Odaya asked him to join him at Tawi Hotel where Mwenda (PW 1) joined them. There was a short discussion.

34. As the accused gave Mr. Mwenda (PW 1) the agreement to sign, Mr. Mwenda (PW 1) said he did not have a pen yet he was being given a document to sign. He said he could get the pen from his shop. At point, he dipped his hands into his pocket and removed some money and placed it on the accused’s thigh. As he tried to ask what the money was for, PW 1 stood and left. He did not respond. They were then immediately surrounded by people who said they were police officers from EACC. They were taken to EACC Headquarters where he recorded his statement.



35. On cross-examination he stated that it was actually the complainant who had approached them for ADR and in fact the purpose of that meeting that day was for him to sign the ADR document arising from the previous discussion with the accused.
36. Thomas Joseph Ramogi Odek (PW 4) testified that he is an inspector with the Anti-Counterfeit Authority (ACA). His duties being inspection of buildings or vehicles where suspected counterfeits are likely to be found, entering them in the inventory and seizing them. This also extends to preparing charge sheets and registering the cases in court.
37. He recalled that on 13<sup>th</sup> February, 2017; His supervisor, Casper Oluoch assigned him a file to investigate counterfeit mobile phones and phone accessories for brand Tecno, Itel and Infinix. The inspection was in carried out in conjunction with agents of Tecno Technologies Limited from a Company known as Extra Group Consultants. These agents were Nelson Odaya (accused) and Antony Maingi (PW 8). He met the agents at the Central Business District and they took them to Jaivy mobile accessories shop. Police Officers attached to ACA were also part of that team.
38. He inspected the shop with Antony and Nelson Odaya(the accused) who assisted him in identifying the counterfeits. He inventoried the suspected counterfeits (P. exhibit 1a & b) and seized them. He explained:
- “...It is the agents of Tecno who were assisting me to determine if the accessories were counterfeits. Some of the products we found were not manufactured or marketed by Tecno...”
39. He took the goods to their office on Dunga Road, National Water Plaza and stored them there as arrangements were being made to move them to their Deport at Kiangombe along Mombasa Road. He personally took the goods to Kiang’ombe ACA Deport on 21/2/2017.
40. He explained that once goods are seized, ACA sends notice of seizure to the brand owners or the Agents notifying them of seizure and where the goods are kept and invite them to inspect the seized goods and collect the samples for further analysis.

He went on:

“...After they have done that, we use that report to confirm if goods are genuine or counterfeit and we inform the suspect of the outcome of analysis report. If goods are original, we return to the suspect minus what was collected as the samples. If samples are returned, we return everything. If the goods are counterfeit, we inform the suspect and inform him of the way forward which involves two ways-

- 1) Matter can be taken to court
- 2) Resolved out of court

We also explain to him what involves out of court settlement which he needs to request formally in writing to ACA and another copy to brand owners or the agents. We have to inform him in that letter that the goods must be forfeited to ACA for destruction and he is the one to foot the destruction amount. We call him to the office and inform him verbally before he writes that letter of request. It is the subject who does the letter himself seeking out of court settlement...”



41. Asked to clarify if an agent can take a suspect through the process of out of court settlement, he was categorical that responsibility is not delegable. He explained:

“...It is me to inform the suspect about outcome of the analysis report and the way forward. We don’t delegate that role as such but in this out of court settlement, the agent or owner of trade mark might be having conditions to be fulfilled...”

42. He testified that from the time goods are seized, ACA has a three-month window during which they can intervene and resolve the matter through an out of court settlement but if that is not possible they take the matter to court.

43. In this particular case, he stated that the suspect did not write to ACA seeking an out of court settlement. He eventually registered the charge on 12/5/2017 under Milimani Criminal Case Number 857 of 2017 where the accused is Maston Mwenda. The case was still pending as at the time of his testimony before the Court.

44. He testified that Nelson Odaya (the accused) called him on 16/2/2017 and requested him to give ACA account details where the suspect would deposit the destruction fees in case they reached an agreement. Pw 4 stated that that was not the correct procedure. He proffered:

“...First of all, I told him I am out of office and I don’t have details off-head. I was in Kajjado. I called back and I wanted to know the purpose. He told me it was concerning goods we had seized from Maston Mwenda. He told me Maston Mwenda was to pay destruction fees. It was not Odaya’s role to inform me. I wanted to know this amount of money which was to be deposited how it was arrived at. The phone never went through so I never inquired how it was arrived at. When he called me, he did not give me a figure of how much was to be deposited as destruction fees...”

45. When he returned to the office, is when he learnt from colleagues that the accused had been arrested together with Antony Maingi (PW 8) by EACC officers while holding a meeting with Maston Mwenda whose goods had been seized.

46. He was summoned to EACC to record a statement. While at EACC, a voice recording at the time of arrest was made and he was able to pick out the voice of Nelson Odaya (the accused) and Maston Mwenda. He signed the certificate of voice recognition dated 26/1/2018 which he produced as P. exhibit 10. He stated that he had worked with the accused and his colleague Antony Maingi for about six months.

47. On cross-examination by Mr. Ashioya for the accused, PW 3 was emphatic that it was unacceptable that the suspect whose goods had been seized was being asked to deposit money into the ACA account without the involvement of ACA itself in that process. He said:

“...I am not comfortable with the amount decided without our knowledge to be paid to our account with no direction from our office. This has to be done in our office by a committee of selected individuals me being one of them and amount calculated in Maston’s presence so that he understands how it is done. It is normally calculated and explained to him how it has been arrived at. What concerns us must be decided by ACA...”

48. He stated that the mandate to charge or forbear charging a suspect belonged to ACA and not the agents or brand owners.



49. Zilpa Awour (PW 2), an investigator with EACC gave a descriptive account of how on 16/2/2017 at about 10.35 A.M. she was requested to prepare Kshs. 50,000 that was to be used in an operation that day. After confirming the serial numbers with complainant, PW 1, Maston Mwenda, by comparing it with an inventory she had drawn and photocopies of the same, she dusted it with APQ and inserted it in a small envelope then handed it over to PW 1 with instruction to him on how to handle it until it was demanded. She produced the photocopy of the said money (P. exhibit 6), the inventory (P. exhibit 5), the treated money Kshs. 50,000/= (P. exhibit 4) and the small envelope (P. exhibit 7). She did not take part in the operation itself. She stayed in the office after completing that task.
50. Kipyegon Kosgei (PW 5), an investigator with EACC testified that he participated in the operation of 16/2/2017 that led to the arrest of the accused at the request of the Investigating Officer, Mr. Shee Bakari (PW 10). He was with colleagues James Wachira and Mr. Bakari.
51. As they entered Nairobi Central Business District at around noon, the complainant Maston Mwenda called the suspect and asked him where they would meet. They agreed on Tawi Hotel along Luthuli Avenue. The EACC investigators, Kipyegon Kosgei and James Wachira entered and took their positions inside Tawi Hotel. Mr. Bakari remained outside.
52. The complainant Mwenda followed and joined two men who were already seated inside the hotel. He engaged in a conversation with the two men and then shortly, he saw the complainant handing over the money to one of the men. Shortly thereafter, Mr. Bakari entered and alerted the two officers to swing into action.
53. Bakari carried out a quick search from one of the men and recovered Kshs. 50,000/-from him. It was Nelson Odaya (the accused). He also recovered other documents from him.
54. The officers could not prepare the inventory inside the hotel since the hotel owner started complaining that customers were being distracted. They went back to the Integrity Centre with the two suspects where Shee Bakari prepared the inventory of the recovered Kshs. 50,000/- P. exhibit 11 and the documents he had recovered from the accused- P. exhibit 12.
55. On cross-examination by Mr. Ashioya, he was asked to tabulate the other documents recovered from the accused constituting P. exhibit 12, which he mentioned were:
  - i) Agreement settlement form between Tecno Telocom Ltd & Dedan Ngumba Kamau stamped by Juma Donaex Advocate
  - ii) Agreement settlement form between Tecno Telecom Ltd (not specified) typed by Juma Donaex Advocate
  - iii) Typed letter ref. request for alternative dispute resolution for Bedan Ngumba Kamau addressed to Brand Manager Tecno Telecom Ltd
  - iv) Handwritten draft ref. request for alternative dispute resolution (not specified) to Brand Manager Tecno Telecom dated 16/2/17
  - v) Typed letter ref: proposal and quotation to investigate suspected counterfeit emass products (brands) in Kenya from Nelson Odaya – Head Administration Extra Group Consultant Ltd to the Management Emass Brand dated 16/2/2017
56. On cross-examination he conceded that the said the documents pointed to the fact that the accused had engaged other persons to settle matters out of court.



57. He stated that the money was passed under the table. It was in the hands of the accused when Shee Bakari recovered it.
58. James Wachira (PW 6), testified that he is an investigator with EACC. At the time of arrest, he was the one who swabbed the accused's right and left hands. He identified the swabs together with the envelopes in where he put each swab after getting it. The said swabs were later produced as P. exhibit 13 a & b and 13 c & d respectively.
59. Simon Nandi Sunguti (PW 7) told this Court that he had worked for 28 years as Government Analyst as at the time of his testimony before the Court. He qualification being a bachelor's degree in Chemistry from Osmania University in India and a Master's degree from Kenyatta University in the same subject.
60. He received five items for analysis on 3/5/2017 from Shee Bakari of EACC via exhibit memo dated 3/5/17 (P. exhibit 14) which had forwarded the right and left hand swabs of Nickson Odaya, brown khaki envelope that was recovered from the complainant, Kshs. 50,000/- in genuine 1000/- shilling denomination and the APQ control Sample. He was required to ascertain whether the contents of APQ control sample could be detected in the items presented for analysis. He did the analysis and confirmed the presence of APQ control sample in all the items presented for analysis.
61. He compiled his report on 26/7/2017 and produced it in court as P. exhibit 15.
62. Joseph Njuguna (PW 9) a Compliance and Brand Protection Manager with Tecno Tecnology Limited testified that his duties among others is to ensure brand protection by following up products that infringe on their trade mark.
63. He stated that on 19/5/2017, Mr. Shee Bakari of EACC visited him at their offices at Cardinal Otunga Plaza, 4<sup>th</sup> Floor. He explained how Mr. Nelson Odaya and Antony Maingi had been arrested while receiving a bribe from Maston Mwenda. He wanted to know if he knew both Mr. Maingi and Nelson Odaya.
64. He explained to him that he knew that both worked for Extra Group Consultants and Tecno had engaged them. He stated:

“...I said I know them and explained they are contracted by our Company to help fight counterfeits in the market. That was all then Mr. Bakari left...”
65. He testified that in case the consultants found someone dealing in counterfeits that touched on Tecno brand, it was up to the consultant to liaise with ACA and seize the goods. It is after the seizure that a report is made to Tecno Technology Limited.
66. Mr. Shee Bakari (PW 10) conducted investigations in this case that gathered the evidence that was presented before this court after this complaint was assigned to him by Assistant Director Rodgers Akaki to investigate. He met with the complainant who narrated the incident to him and took his statement. He ensured that the complainant was inducted on how to use the recording device P. exhibit 2, prepared the inventory of handing over of the said device (P. exhibit 3), and instructed a fellow investigator Zilper Awori (PW 2) to prepare and treat Kshs. 50,000/- operation money to be used in the operation.
67. He also assembled a team of investigators that were to assist him in the operation. That is the team that accompanied him to the CBD for the operation. His description of the actual operation was consistent with the descriptive accounts given other officers who participated in that operation. On the date of arrest, he confirmed he recovered the money from the accused's hand Kshs. 50,000/- (P. exhibit 4). He



- also prepared the inventory of returned audio visual device (P. exhibit 8) and inventory of recovered money –P. exhibit 11 on 16/2/2017 and other documents found on the accused was prepared on 17/2/2017- P. exhibit 12.
68. He retrieved the recorded conversation and loaded it into a CD (P. exhibit 16) which he played to the complainant Maston Mwenda on 17/2/2019. He listened and identified the voices of people that were speaking in that conversation. He said there was a demand where the accused at pg. 3 of transcript line 4 is captured saying:
- Odaya: one fifty si kuna one fifty inabaki...?
69. He also prepared a certificate under section 106 (B) of the Evidence Act on serviceability of the audio device used which was signed on 17/2/2017- P. exhibit 17.
70. He prepared the exhibit memo (P. exhibit 14) and escorted the swabs to Government Chemist for analysis.
71. He recorded the statement of Tecno Brand Manager, Joseph Njuguna (PW 9) who confirmed that the accused is recognized by Tecno as their agents to protect their products from counterfeits in the market. He took statements of other witnesses who gave evidence before the court.
72. He did a company search on Extra Group Consultants on 13/2/2018 and found that the directors are
- i) Antony Maingi Koomu- 600 shares
  - ii) Nelson Odaya- 400 shares
73. He produced the company search certificate as P. exhibit 18. He recommended to charge the accused to the DPP who concurred with the recommendation.
74. On cross-examination, he stated that the voices were confirmed by Maston Mwenda, the complainant and Thomas Odek (PW 4).
75. He was challenged on cross-examination that the accused in the conversation is not asking for money for his own personal use. He responded:
- “...Accused is not an employee of ACA. It would have been fair if there was an employee of ACA. Again if damages were to be paid, there had to be an evaluation. I do not know which criteria they used to come up with those figures. Even then, they would have asked for money for damages for Tecno...”
76. Asked why he charged the accused with allegation that he was to forbear charging the complainant yet the accused could not exercise that mandate on behalf of ACA, he explained:
- “...These were officers in the operation who included the accused before the court...”
77. He confirmed that in the transcript, there is nowhere the accused is seen demanding money though after receiving it he confirmed it was ‘fifty’.
78. The accused was placed on his defence in a ruling delivered by this court on 5<sup>th</sup> July, 2019. On 27/9/2019, the accused gave sworn evidence in his defence. He also told court that he would be calling two more defence witnesses. The defence case was thus adjourned to 5<sup>th</sup> November, 2020 to allow the accused avail the remaining defence witnesses. When the matter came up for further defence hearing



on 5/11/2019, the Advocate for the accused, Mr. Juma informed the court that they had reached a decision to close the defence case.

79. The accused, Nelson Nickson Odaya who is (DW 1) in this case told this Court that he has been a Director at Extra Group Consultants since the year 2016. He described his company as a brand protection company that works with various companies that have trademarks within the Kenyan market. It is situated at NHIF Plaza.

80. He testified that when this case arose, his Company had entered into a contract with Tecno Technologies for brand protection which entailed doing market surveillance, seizure and destruction of counterfeits that infringed on the Tecno products.

81. He also stated that he has a background in forensics and investigations and is therefore the one charged with handling investigations on behalf at his company.

82. He stated that on 13/2/2017, he was in a team that comprised Anti-Counterfeit Inspector Thomas Odek and five police officers from the Administration Police. That day they arrested the complainant whom they had reasons to believe was in possession of counterfeit goods that were infringing on his client's trade- mark, Tecno Technologies. Once the goods were seized, the ACA Inspector Thomas Odek took charge of them. He explained that upon seizure, a suspect is also informed what would be the next cause of action.

83. He stated that during the arrest, the complainant was asked to provide a soft copy of the identity card but the ACA Inspector, Thomas Odek could not receive the same because he did not have a smart phone. A suggestion was made that he could send it to the accused line. He explained:

“...After sending the id card, later on he communicated to me. He called me. He told me it had been explained to him by Mr. Odek on the next cause of action. He was informed of a court process once investigations are concluded and also another option, which is ADR. So by virtue of having my number, he called me and said he had decided to go the ADR route...”

84. He explained that this the background that prompted his meeting with the complainant on 16/2/2017 at about 2.00 P.M at Tawi Hotel since the complainant had expressed an interest in settling the matter out of court through ADR. He said:

“...I was meeting the complainant in this case who had expressed interest to settle the matter. There were three people. Mr. Maingi my co-director was there...”

85. He relied on the contents of the audio recording which he said was mainly about the subject of ADR. He referred to Pg. 2 line 4, where he is captured stating:

“...Hii ni agreement...” and testified that at that point, he was referring to the sample agreement.

He went on,

“...when I introduced this agreement, there was a concession, he said ‘mm’. My understanding of that was that he was in agreement. I shared a copy of the agreement with him, I told him it was a sample agreement. I also took him through an ADR letter which I also had a sample of...”



86. He further testified that he called the Investigating Officer, Thomas Odek of ACA to inform him that he had met the complainant who wanted to settle the matter out of court.

87. He explained that the money which the complainant was required to pay was to be deposited at a later date upon writing the ADR request letter and upon reaching an agreement with his client, Tecno Technologies.

88. Expounding on what he meant in the statement where he is captured saying:

“...Ile ya destruction inakuanga 30,000/- tumecalulate hiyo ndio isiende juu uweze kulipa...”

89. He said that was the estimate amount based on the value of goods which is usually deposited into the bank account of ACA.

As to his statement

“...halafu eh, hiyo ingine tutakupea account...” He explained:

“...The other account is for my client, Tecno Technologies. Normally, during ADR we recover costs incurred during operations and this is the amount I was explaining to the client to deposit to my client account...”

90. He admitted that at line 7 of pg. 3, he made the statement to the effect that the complainant was to deposit 180,000 of which 30,000 was to go to the ACA account while the rest 150,000 was to be deposited in the account of Tecno. He stated,

“...I said, ‘180, 180...30,000 kwa account ya ACA hiyo ni ya destruction fees then 150 hiyo ni ya damages ya Tecno...”

91. He nevertheless stated that ordinarily, it was them that would do the valuation based on their price list though ACA was the one which had the final say and the figures could go up or lower.

92. He stated that payment depended on whether the complainant was going to write ADR request or not. He added that at the point of this engagement, the complainant had neither written to him or the authority nor had he signed any agreement.

93. He further stated that at the point the complainant handed over the cash to him, he did not know what it was because they had not discussed any cash payment hence he had not expected what happened. He said,

“...At that point, he handed over something, I did not know what it was. I asked him, ‘nini hiyo’, he did not answer. I asked him that because we had not discussed that he was to hand over anything...”

He said when the complainant said,

“...hii ingine nitakuwekea kwa simu..’ he again asked him ‘...gani..’ which statement he elaborated thus:

“...I asked him ‘gani’ because things were moving a bit faster and I was a bit surprised. We had not discussed any cash money with this complainant neither



had he suggested he had cash on him, that is why I was surprised. We had discussed how money was to be paid in two accounts for the ACA agency and my client...”

94. The accused other line of defence was in reference to the particulars of the charge where it was alleged that he had requested for a bribe in order to forbear charging the complainant. He attacked the allegations on account that he does not have such a mandate.
95. He stated that the complainant was motivated by malice aimed at denting his reputation. He stated that the complainant is presently being prosecuted over the counterfeits that were seized on that day and that he, the accused is a witness in that case being Milimani criminal case number 557/2017. He further said that the complainant has written seeking settlement through ADR but his client has rejected it hence it will go on to full hearing.
96. On cross-examination he was confronted by the Prosecutor Ms. Samitta and asked to explain when payment was to occur, he stated:
- “...It was after he had requested for ADR and submitted to Odek and after agreement between Tecno Technologies and him...”
97. I do not endeavour to reproduce counsels’ submissions at this stage. I will make references to the submissions in the course of my analysis where applicable.
98. At the outset, it is important to set out the law on which these charges are founded as there is an obligation to prove the elements of these offences beyond reasonable doubt that lies on Prosecution.
99. The offence of receiving a bribe is provided for in the Bribery Act, No. 7 of 2016. An understanding of what constitutes bribery as set out in the Act is thus imperative in the matter before the court.
100. The offence of receiving a bribe is set out in section 6 of the Bribery Act, No. 47 of 2016 which has several paragraphs each prescribing specific forms that the offence may be committed as follows:

Section A person commits the offence of receiving a bribe if: -

6 (1)

- a) the person requests, agrees to receive, or receives a financial or other advantage intending that, in consequence a relevant function or activity should be performed improperly by that person receiving the bribe or by another person

The sub-section in the court’s appreciation relates to a situation where the person requests, agrees to receive or receives a financial or other advantage intending to influence or to cause improper performance of the relevant function by himself or by another person.

- b) the recipient of bribe requests for, agrees to receive or accepts a financial or other advantage and the request, agreement or acceptance itself constitutes the improper performance by the recipient of a bribe a relevant function or activity -in the understanding of this court, this applies to a situation where the person, who actually requests, agrees to receive or receives the financial or other advantage knows or believes that his own conduct is in fact an improper performance of the relevant function or activity in question.
- c) In anticipation of, or as a consequence of a person requesting for, agreeing to receive or accept a financial or other advantage, a relevant function or activity is performed



improperly by that person or by another person at the recipient's request, assent or acquiescence.

The 3<sup>rd</sup> scenario is where the person is anticipation of, or as a result of the requesting for, agreeing to receive or accepting a financial or other advantage the person in fact performs or causes another person to in fact perform a relevant function improperly at his request, assent or acquiescence.

2) For purposes of sub-section 1 (a) and (c) it shall not matter

a) If the recipient requests for, agrees to receive or receives or intends to request for, agree to receive or to accept the advantage directly or through a third party;

The court's understanding of this sub-section (2) (a) of section of 6 is that if a 3<sup>rd</sup> party is involved to be agent in the transaction, then both the principal and the said 3<sup>rd</sup> party, each shall be regarded as the agent of the other, meaning the one for whom bribe is requested for or received on his behalf and the third party who requests are both liable for the actions of each other.

b) If the advantage is intended to be for benefit of recipient or another person

Likewise, under section 6 (2) (b), the one who requests, agrees to receive or receives such financial or other advantage cannot exonerate themselves just because they were not to benefit from such financial or other advantage in question as long as the object of the financial or other advantage was to cause or did cause a relevant function to be performed improperly by reason of such financial or other advantage that is involved.

3) For purposes of sub-section 1, it shall not matter whether-

a) the recipient is performing the function or activity

The effect of section 6 (3) (a) is that it does not allow anyone to escape culpability on the basis that they were not actually empowered to execute the particular activity or function for which a bribe was requested or received.

b) the person giving the bribe knows or believes that the performance of the function or activity is improper

This means the motive or state of mind of the giver is irrelevant if the financial or other advantage results in improper performance of relevant function.

d) Where the person other than the recipient is performing the function or activity, whether that person knows or believes that the performance of the function or activity is improper.

This is a situation where the one canvassing for a bribe or even receiving it might be doing it behind the back of the person who is actually performing the function or activity, the fact that person performing that function or activity is oblivious that there has been requesting or receiving the bribe will



not be a ground for the person requesting or receiving the financial or other advantage to defeat his prosecution under section 6.

To fully appreciate section 6, it must be read together with the succeeding section 7 because this is where you get the meaning of two phrases used in section 6, that is, ‘relevant function’ and ‘improper performance of function or activity’ is provided..

Section 7 provides:

“For purposes of this Act, a function or activity shall be construed to be a relevant function or activity if-

- a) It includes:
  - i) Any function of a public nature
  - ii) Any function carried out by a State Officer or Public Officer, pursuant to his or her duties
  - iii) Any function carried out by a foreign public official, pursuant to his duties
  - iv) Any activity connected to business
  - v) Any activity performed in the course of a person’s employment, and
  - vi) Any activity performed by or behalf of a body of persons whether corporate or otherwise
- b) It meets one or more of the following conditions:
  - i) that the person performing the function or activity is expected to perform in good faith
  - ii) that the person performing the function or activity is expected to perform it impartially; and
  - iii) that the person performing the function is in position of trust by virtue of performing it.

101. From the reading of section 7 above, what comprises relevant function is thus as explained in section 7 (1) (a). Section 7 (1) (b) lays out the conditions which must be met in performance of relevant function or activity, hence doing the contrary due to a financial or other advantage is what should be taken as improper performance of a given relevant function or activity.

“Improper performance” thus occurs when the expectations laid down under section 7 (1) (b) are defeated due to influence the financial or other advantage in question has in the performance of the relevant activity or function. The effect being to make the person executing the relevant function or activity to depart from applying the tenets of good faith, impartiality or conducting themselves with a character of a person in position of trust while in performing such relevant function or activity.

102. By way of conclusion therefore, the offence of receiving a bribe under section 6 (1) that is relevant in this determination can succinctly be described as requesting, agreeing to receive or receiving a financial



or other advantage to influence the improper performance of relevant function or by reason of which a relevant function is improperly performed. Relevant function is also not restricted to functions of public nature only; the list is extensive. It includes: a function of a public nature function carried out by a state officer, pursuant to his or her duties, any function carried out by foreign official pursuant to his or her duties, any activity connected with business, and or any activity performed by or on behalf of body of persons whether corporate or otherwise. Private interests are thus covered as well.

103. Since the Act sets out a general criteria for determination of whether a ‘relevant function or activity’ has been performed properly by making reference to good faith, impartiality or if it is done in accordance of what is ordinarily expected of a person in a position of trust; It follows therefore the responsibility lies with the Court to consider any given factual situation that comes before it against this criteria to determine objectively whether or not the acts complained of amount to improper performance of relevant function or activity by the person charged.
104. Additionally, in Black’s Law Dictionary, Tenth Edition ascribes the following meaning to the word ‘improper’:
1. incorrect, unsuitable or irregular
  2. fraudulent or otherwise wrongful
105. Consequently, if something is demonstrated to have been done with a fraudulent or dishonest intention, it constitutes improper conduct.
106. In the submissions of the defence, Mr. Donnex Juma Advocate for the accused argued that the accused was neither an employee nor an agent of the Anti-Counterfeit Authority (ACA) which is the body that is charged with enforcing the *Anti-Counterfeit Act* including carrying out prosecution hence it was monumental misconstruction to allege that the accused forbore to charge the said Maston Mwenda Daniel as purported in the charge sheet.
107. I concur that the charge sheet alleges that the accused requested for the alleged amount so as to:
- forbear charging him with the offence of having possession in the course of trade, counterfeit goods contrary to section 32 (a) as read with section 35 (1) of the *Anti-Counterfeit Act*, No. 13 L.O.K’
108. There is nothing wrong the particulars as framed since they are consistent with the evidence adduced. The evidence that came out is that the accused who is a registered agent under the ACA Act requested for the money and promised to ensure that if the complainant paid, the intended prosecution of the complainant would be stopped. The allegations are thus in tandem with the evidence. That is what the Prosecution set out proof, the basis for making the request for the money. The testimony of the complainant asserted that position as follows:
- “...This money he told me it was meant to water down my case so that I am not taken to court...”
109. As for the submission that the accused was neither an employee of ACA or its agent, and could thus not execute such a mandate under the Act, that submission lacks merit in view of section 6 (3) (a) of the *Bribery Act* which does not regard one’s lack of mandate to undertake a function to which a bribe relates as ground for defence to a charge under section 6(1) of *Bribery Act*. The fact that such a person that made the request for a bribe has no capacity execute the particular activity or function to which the bribe relates is immaterial.



110. Section 6 (3) (a) provides:

For purposes of sub-section 1, it shall not matter whether-

a) the recipient is performing the function or activity

111. The main complaint that flows from the prosecution evidence on record is that the circumstances under which the accused made the request from the complainant to deposit money was against the applicable procedure under the law with the sole objective to gaining financial advantage thereby constituting improper performance of the relevant function or activity which offended section 6 (1) (a) of the *Bribery Act*.

122. Reading the submissions of the Prosecutor, Ms. Samitta, it is discernible that the complaint of the State against the accused is the fact that he made the request for deposit of money to the complainant by openly perverting reality of the written law whereby he exercised a mandate that did not belong to him to ensure that the request for payment of money by the complainant was fulfilled. That the mandate he was exercising was solely meant for the Executive Director of ACA.

“...The *Anti-Counterfeit Act* provides an avenue to settle disputes out of Court. Section 34A of the *Anti-Counterfeit Act* states that the suspect is expected to write formally in the prescribed form to the Executive Director of ACA and request for the matter to be dealt with. The Executive Director Reviews and issues the order. Section 34 (3) of the Act gives the Executive Director to make the final order. Therefore, the accused person had no authority to attempt to settle the matter with PW 1. Though the power of attorney by Tecno Technologies gave the accused person power to seize and settle all the matters pertaining to counterfeit goods, the Act is clear that only the Executive Director has power to settle matters out of Court...”

113. The Investigating Officer, while under cross-examination brought out this position too. He took the view that the accused had no basis making a decision with regard to the settlement of the matter for which he was asking for payment from the complainant in settlement. He stated:

“...Accused is not an employee of ACA. It would have been fair if there was an employee of ACA. Again if damages were to be paid, there had to be an evaluation. I do not know which criteria they used to come up with those figures. Even then, they would have asked for money for damages for Tecno...”

114. Mr. Thomas Joseph Ramogi Odek (PW 4) the ACA Inspector who had led the operation that seized the complainant's goods also took issue with the accused's unilateral conduct to carry out the settlement process to the extent that he was even making a decision on what was to be paid to ACA, yet ACA was not involved in his intrigues. The accused had even the audacity to inquire from him the ACA account where the money for ACA was to be deposited yet he did not even know how the said amount that was to be deposited was arrived at. He said:

“...I am not comfortable with the amount decided without our knowledge to be paid to our account with no direction from our office. This has to be done in our office by a committee of selected individuals me being one of them and amount calculated in Maston's presence so that he understands how it is done. It is normally calculated and explained to him how it has been arrived at. What concerns us must be decided by ACA...”



115. In my view therefore, the issue before me is the accused appropriating to himself a mandate he did not have under the ACA Act and seeking money to be paid by the complainant most which he wanted deposited in his principal's account.
116. As submitted by Ms. Samitta, under section 34A of the *Anti-Counterfeit Act*, it is the Executive Director of the Anti-Counterfeit Authority who is mandated to undertake the process of dealing with a criminal matter under the ACA Act otherwise than through the court, it is not a mandate for an agent of a brand owner or even the brand owner himself.

The said section provides:

Section 34A- Compounding Offences:

- 1) Subject to section 2, the Executive Director may, where satisfied that any person has committed an offence under this Act in respect of which a fine is provided for or in respect of which anything is liable to forfeiture, order such person to pay a sum of money, not exceeding the amount of fine to which the person would have been liable if he or she had been prosecuted and convicted for the offence, as he may deem fit, and the Executive Director may order anything liable for forfeiture in connection with the offence be forfeited.
  - 2) The Executive Director shall not exercise the powers under sub-section (1) unless the person admits in the prescribed form that he or she committed the offence and requests the Executive Director to deal with such offence under this section.
  - 3) When the Executive Director makes any order under this section-
    - a) The order shall be in writing and shall have attached to it the request of the person to the Executive Director to deal with the matter
    - b) The order shall specify the offence which the person committed and penalty imposed by the Executive Director.....
117. From the conversation captured in the transcript between the accused and the complainant on 16/2/2017 at Tawi Hotel, it is crystal clear that the accused arrogated to himself the roles donated to the Executive Director of ACA. He went ahead and not only assessed the amount which the complainant was to required pay but also announced the said amount as Kshs. 180,000/ telling him that if he deposited this money in accordance with his instructions, Kshs. 30,000 into ACA Account and 150,000/- into Tecno Account and a copy of the agreement was forwarded to ACA and then his case will be over. He did not inform him that ACA had any role in the matter apart from receiving and keeping the said agreement. He behaved as though he was the beginning and the end in that settlement process. That was grossly misleading and trying to take advantage of the complainant's vulnerability and against the set out procedure under the ACA Act.
118. The conversation at pg. 3 (iv) of the transcript, 6<sup>th</sup> line from the bottom is relevant to the above conclusion, it proceeds as follows:

Maston: mmmmmmmmmh sasa kuna kitu uliniambia the other day, uliniambia nikikupea that amount all this one will go down, this is what you told me

Odaya: Kesi imeisha



Maston: Imeisha?

Odaya: Imeisha

Maston: nikikupatia

Odaya: Siii one eighty

Maston: One eighty k?

Odaya: thirty thousand unalipa Tecno, unalipaa...anti-counterfeit then the other one fifty unalipa Tecno then agreement tunaenda tunaweka kwa anti-counterfeit

Maston: kwa ofisi zao huko?

Odaya: enheee na wewe unabaki na copy na sisi tunabaki na copy na hivo ndivo huwa inafanyika

119. The Advocate for the accused submitted as follows:

“...the accused submits that that the accused, PW 1, and PW 8 met on the day of arrest with a view to taking PW 1 through the process as he brought samples of the letter of ACA requesting for ADR and the draft sample of the agreement to be used thereafter...”

120. This submission flies in the face of the above transcript conversation.

121. This conversation is clear evidence that the accused was not merely making a suggestion using a sample as submitted by his Advocate, it was a done deal, he wanted the complainant sign the request and agreement immediately. The succeeding conversation also proves that. Pg.3 (v)line 7 from the top:

Maston: I think the best way ya nini...ni ku type...si ndiyo?

Odaya: enhee utamaliza ku type fast?

Maston: kama alternatively I'll get a photocopy niachiwe nikitype...oooh I need to sign? Si ndio?

Odaya: you need to...to sign...so kile kitu important hii ukini signia si ni agreement.

Hii pia ni lazima iwekwe juu ya agreement is a result of this ...but if you can do a handwritten mi sioni shida...ama wewe unaonaje? Uko poa?

122. The hurried manner and finality with which the accused was hell bent to conclude this matter without bringing ACA on board to ascertain first what the complainant was required to pay was wrongfully fraudulent. It was clearly contrary to the provisions of the Act and also against the evidence of ACA Inspector Joseph Ramogi Odek (PW 4) who testified on the steps that should have been followed. According to Thomas Joseph Ramogi Odek (PW 4), it was premature to engage with the complainant even before brand owners were invited to collect a sample of the seized goods to examine and then file back a report to confirm the status on authenticity of those goods.

123. The accused defence, and even his Advocate's submission that in the meeting of 16/2/2017 he was merely explaining and showing a sample agreement to the accused was also contradicted by PW 8, Antony Koomu Maingi, a co-director with the accused at Extra Group Consultants who stated on cross-examination that the complainant who had approached them for ADR and in fact the purpose



of the meeting that day was for the complainant to sign the ADR document arising from the previous discussion with the accused. He stated:

“...the purpose of that meeting was for the complainant to sign ADR document from previous discussion with Mr. Odaya...”

124. Earlier, he had also confirmed in his evidence-in-chief that just before arrest took place, the accused had just given Mr. Mwenda, the complainant in this case, the agreement to sign. He said:

“...As Mr. Odaya gave Mr. Mwenda agreement to sign, Mr. Mwenda said he does not have a pen as he was given the document to sign...”

125. The accused prided himself before this court as having handled matters relating to counterfeit goods since 2013, which translates to almost 4 years of experience and knowledge in that field by the time of this incident. He stated:

“...I have handled other matters with respect to counterfeit goods before. They are so many, since 2013. There are many that I have resolved through ADR...”

126. With an experience that ran into four years in the field, it is safe to presume that the accused was conversant with the laid down requirements in undertaking such a settlement process under the Act. In any event, ignorant of law in itself does not afford any excuse for any act or omission which would otherwise constitute an offence unless knowledge of the law by the offender is expressly declared to be an element of the offence which not the case here.

127. Consequently, when he was taking the complainant through a hurried route in which he unilaterally decided and asked complainant to pay Kshs. 180,000, of where he only knows how the amount was arrived at and without the approval of ACA, the accused was being dishonest. He even encouraged him to sign an agreement while fully aware it was premature as no report confirming the genuineness or otherwise of the seized goods had been done by brand owner and forwarded to ACA. The driving motivation behind the accused actions was to intentionally mislead the complainant to part with his money, the biggest chunk of which he instructed was to deposit in the account of accused's principal. The accused was an agent of Tecno Technologies Limited, hence the claim that amount was not being deposited directly into the accused account is preposterous as both accused and Tecno can be regarded as an agent of the other for purposes of section 6 of the *Bribery Act*. The benefit to the accused could either be direct or indirect under such arrangement.

128. Section 6 (2) of the *Bribery Act*, states

For purposes of sub-section 1 (a) and (c) it shall not matter

a) If the recipient requests for, agrees to receive or receives or intends to request for, agree to receive or to accept the advantage directly or through a third party;

The purpose of sub-section (2) (a) of section of 6 is that if a 3<sup>rd</sup> party is involved as an agent in the transaction, then both the principal and the agent, each shall be regarded as the agent of the other, meaning the one the for whom bribe is requested for or received on his behalf and the third party who requests are both liable for the actions of each other.

129. From the evidence reviewed, the accused deliberately perverted the law for purposes inducing complainant to pay money, of which 83.3 % was meant for a principal whose private interests he was advancing as his agent.



130. Even if the complainant had expressed his wish to settle this matter through ADR to the accused as stated in accused's defence, the accused should not have dishonestly resorted into taking advantage of him through manipulation and encouraging him to seal a deal behind the scenes to principally benefit his principal contrary to the laid down procedure of handling disputes as required under the law. It is clear from the evidence in this case that:
- i) It was not the responsibility of the accused to calculate the amount payable but that of Anti-Counterfeit Authority through the Executive Director
  - ii) That at point, it was even premature to reach a decision on settlement since the brand owner had not been invited to collect the sample for purposes of examining it and had not thus filed a report on the status of the seized goods- i.e. whether they were genuine or not.
  - iii) The complainant had not made a written request of guilt/or settlement to the Executive Director and a decision to that effect had not been made hence it was dishonestly misleading to ask the complainant to sign an agreement and require him to deposit money into ACA account or Tecno account
  - iv) His encouragement of the complainant to seal a deal with him in absence of ACA reeks of bad faith on his part.
131. It is the finding of this Court that the accused knew all along the limits of his role as an agent of a brand owner under the ACA Act but he dishonestly chose to assume the powers of Executive Director of ACA under the ACA Act by determining and requesting the complainant to pay Kshs. 180,000; money that had no approval of ACA as required by the law, and which the biggest chunk of it, namely Kshs. 150,000/=, equivalent to 83.3% was according to him supposed to be deposited into an account of his own principal. This court is accordingly persuaded that the overriding object behind the actions of the accused in explicitly disregarding the clear provisions of the law was to manipulate the complainant in order to gratify a private interest of his principal by ensuring that the complainant deposited the money into his principal's account. This is a manifestation of greed and lack of good faith in his dealing with the complainant hence his actions constituted improper performance of the relevant function or activity which goes against the provisions of section 6 (1) (a) of the *Bribery Act*.
132. The request made by the accused for Kshs. 180,000/- on 16/2/2017 as reflected in the transcript and captured in count III thus infringes section 6 (1) (a) of the *Bribery Act* as the intention of the accused was to cause improper performance of the relevant function or activity under the ACA Act by encouraging and dishonestly diverting the complainant from the laid down process with the aim of giving his principal some financial advantage or gain. The prosecution evidence has satisfied me by beyond reasonable doubt with regard to the guilt of the accused in count III.
133. I find him guilty of count III and convict him accordingly.
134. Unlike count III where the complainant's evidence of their deliberations is corroborated by the contents of the transcript, in count I & II it is only the complainant's oral account in support of the two counts. I am guided by the reasoning that since offences relating to corruption attract grave consequences including loss of employment and loss of future opportunities for employment, reliance on uncorroborated evidence as a basis for entering a conviction ought to be discouraged. In the two counts therefore, I will give the accused a benefit of doubt and acquit him under section 215 of the Criminal Procedure Code.
135. In Count IV, which alleges the accused received Kshs. 50,000/-; a thorough scrutiny of the transcript produced as an exhibit in this case reveals that the discussion between the accused and the complainant



had settled on depositing the agreed amount of Kshs. 180,000/- in two accounts that accused was to provide. The accused had instructed that Kshs. 30,000 was to be put in the ACA account and 150,000 was to go to Tecno account. At the point the complainant handed over Kshs. 50,000/- in cash to the accused while telling him “shika hii...wacha nitye”; , it is evident that the accused had not anticipated to receive any money in form of cash payment from the complainant at that particular moment despite having sealed a deal for Kshs. 180,000; the agreement was that the money would be deposited in the account as already explained. The accused response “nini hiyo?” which appears in the transcript confirms that the action of the complainant was not anticipated in accused mind at that moment.

136. Cash payment was not part of the discussion at all. Even if the accused touched that money, it cannot be said that he received it knowingly in the furtherance of the agreement they had just reached since the mode of delivery was not that cash payment would be made. I acquit him of count IV as well.
137. In the final analysis, the accused is found guilty and convicted of count III under section 215 of the Criminal Procedure Code for requesting payment of Kshs. 180,000 of which the largest percentage, 83.3% was to be applied towards satisfying the private interests of his principal under circumstances that explicitly violated the provisions of ACA Act thereby constituting improper performance of the said function or activity through manipulation of the complainant in order to derive a financial advantage for the benefit of his principal, a clear breach of section 6 (1) (a) as read with section & 7 and section 18 of the [Bribery Act](#).

**JUDGMENT READ, SIGNED AND DELIVERED IN OPEN COURT THIS 23RD DAY OF OCTOBER, 2020.**

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

**CHIEF MAGISTRATE**

