



**Republic v Ngatia & another (Anti-Corruption Case 14 of 2019) [2020] KEMC 7 (KLR)
(Anti-Corruption and Economic Crimes) (3 November 2020) (Judgment)**

Republic v Moses Ngatia & another [2020] eKLR

Neutral citation: [2020] KEMC 7 (KLR)

**REPUBLIC OF KENYA
IN THE ANTI-CORRUPTION MAGISTRATE'S COURT
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION CASE 14 OF 2019**

EN JUMA, CM

NOVEMBER 3, 2020

BETWEEN

REPUBLIC PROSECUTION

AND

MOSES NGATIA 1ST ACCUSED

CHRISTOPHER NAIBEY CHEMENG 2ND ACCUSED

JUDGMENT

- 1 The two accused who are police officers and were at the time attached to Athi River Weigh Bridge Police station were arraigned before the Court jointly charged with three counts (I, V and VI) and the 1st accused was separately charged in counts II and III, the 2nd accused was also separately charged in count IV the charges are as follows:

COUNT I: Conspiracy to commit an offence of corruption contrary to section 47(a) (3) as read with section 48(1) of the *Anti-Corruption and Economic Crimes Act* 2003.

The particulars of the offence are outlined that both on 9th day of October 2017 at Mlolongo Weighbridge in Machakos County within the Republic of Kenya, being persons employed by a public body to wit, attached to Mlolongo Weighbridge Police Station, jointly with another not before court conspired to commit an offence of corruption namely receiving a benefit of Kshs. 2,000 from Andrew K. Songony a truck driver of a motor vehicle registration number, KCK 976W ZF 6083 with intent that in consequence you would forbear enforcing Traffic Laws against the said persons



COUNT II: Receiving a bribe contrary to section 6(1)(a) as read with section 18(1)(2) of the *Bribery Act* No. 47 of 2016.

The particulars of the offence are that the 1st accused on the 9th day of October, 2017, at Mlolongo Weighbridge in Machakos County within the Republic of Kenya, being a person employed by a public body to wit, National Police Service as a Police Constable attached to attached to Mlolongo Weighbridge Police Service as a police attached to Mlolongo Weighbridge Police Station, requested for a financial advantage of Kshs. 10,000 from Andrew Kiprono Songony a truck driver of a motor vehicle registration number KCK 976W ZV 6083 with intent that in consequence to forebear enforcing traffic laws against the said person.

COUNT III: Receiving a bribe contrary to section 6(1)(a) as read with section 18 (1)(2) of the *Bribery Act* No 47 of 2016.

The particulars are that the 1st accused on the 9th day of October, 2017 at Mlolongo Weighbridge in Machakos County the Republic of Kenya, being a person employed by a public body to wit, National Police Service as a Police Constable attached to Mlolongo Weighbridge Police Station, requested for a financial advantage of Kshs 10,000 from David Cheruyoit Koech a truck driver for motor vehicle registration number, KCL 184A ZF 6196 with intent that in consequence to forbear enforcing Traffic laws against the said person.

COUNT IV: Receiving a bribe contrary to section 6(1)(a) as read with section 18(1)(2) of The *Bribery Act* No 47 of 2016

The particulars of the offence are that the 2nd accused on the 9th day of October 2017 at Mlolongo Weighbridge in Machakos County within the Republic of Kenya, being a person employed by a public body to wit, National Police Service as a police corporal attached to Mlolongo Weighbridge Police Station requested a financial advantage of Ksh 1,500 from Andrew Kiprono Songony a truck driver for motor vehicle registration number KCK 976W ZF 6083 with intent that in consequence to forbear enforcing Traffic laws against the said person.

COUNT V: Receiving a bribe contrary to section 6(1)(a) as read with section 18(1)(2) of the *Bribery Act* No 47 of 2016.

The particulars of the offence are that both the 1st and the 2nd accused on the 9th day of October 2017 at Mlolongo Weighbridge in Machakos County within the Republic of Kenya, being persons employed by a public body to wit, National Police Service as a police Constable and Corporal respectively received a financial advantage of Kshs. 1,000 each from Andrew K. Songony a truck driver of a motor vehicle registration number, KCK 976W ZF 6083 with intent that in consequence you would forbear enforcing Traffic Laws against the said persons.

COUNT VI: Abuse of office contrary to section 46 as read with section 48(1) of the *Anti-Corruption and Economic Crimes Act No 3 of 2003*.

The particulars of the offence are that both the 1st and the 2nd accused on the 9th day of October 2017 at Mlolongo Weighbridge in Machakos County within the Republic of Kenya, being persons employed by a public body to wit, National Police Service as a police Constable and Corporal respectively attached to Mlolongo Weighbridge Police Station, used your office to improperly confer to yourselves a benefit of Kshs. 1,000 each from



Andrew K. Songony as an inducement to forbear charging them with a traffic offence of over speeding and overlapping, a matter related to the affairs of the said public body.

2. The prosecution called a total of 9 (nine) witnesses in support of the charges herein their version of the cases it is alleged that on 9.10.2017, the accused persons were working as police officers attached to Mlolongo weighbridge police station and with another not before court when they allegedly committed the following;

That they;

- i. Conspired to receive a benefit of Kshs, 2000.00 from Andrew K. Songony.
 - ii. 1st accused requested a Kshs. 10,000 financial advantage from PW1.
 - iii. 1st accused requested a Kshs 10,000 financial advantage from PW8.
 - iv. 2nd accused requested for a financial advantage of Kshs. 1,500 from PW1.
 - v. Both accused each received a financial advantage of Kshs. 1000 from PW1.
 - vi. Both accused improperly conferred to themselves Kshs., 1,000 from PW1, thus abusing their offices.
3. The prosecution's case was set out as per the evidence of the two drivers, PW1 and PW8, an MPESA agent, the EACC arresting officers, the OCS and Deputy OCS Mlolongo weighbridge police station who were at the time the station commanders, her deputy the supervisors senior to the accused persons, and finally the investigating officer.
 4. The prosecution's case was opened by Andrew Kiorono Songony (PW1) who testified that he was at the time of the alleged offence a truck driver with Metro Logistics and that on 9.10.2017, he was from Bamburi cement having loaded cement enroute and destined for Uganda. When they reached Mlolongo opposite total petrol station, he was stopped by two traffic Police officers who alleged that he was over speeding and overtaking. That the said police officers also stopped his colleague David Koech (PW8) who was driving another truck behind him. That one traffic officer told them to drive to Mlolongo weighbridge Police station or give them Kshs, 10,000 so as to proceed with the journey. That pw1 called EACC to complain and was advised by EACC officers to go to Integrity Centre, which he did and lodged a complaint. He was given a recording gadget to record conversations and was oriented on how to use and operate the same. That he went back to Mlolongo weighbridge with the EACC officers. While there, he recorded conversations with the accused persons while the EACC officers were waiting at a distance. That he later, withdrew kshs 2000 from an M-Pesa Agent which he allegedly gave to the accused persons as bribe which they had allegedly demanded. That the accused persons allegedly returned their driving licenses to him. That he subsequently handed back the video recording to the EACC officers and the accused persons were later arrested and charged. He testified that the 1st accused asked for a bribe of Kshs. 10,000 from him.
 4. PW2 one Jackline Munyasia testified that she operated an M-Pesa shop that pw1, identity card number 9425108 withdrew Kshs. 2,000 from her M-Pesa shop at around 6.07 PM on the said date. Her evidence relates to that transaction also that she was asked by EACC officers to record her statement. Her evidence is that PW1 withdrew the ksh 2000 from her mpesa shop.
 5. PW3 a Chief Inspector of police testified that at the marterial time she was the OCS Athi River Weighbridge Police Station, she availed the duty roster for the period between 1492017 and 7102017



- as PEX 5a and 5b respectively and confirmed that both accused were working under her and that they were both on duty on the material date.
6. PW3 said that she was requested by Alex Nyakundi, (PW9) the investigating officer to avail the duty rota. She said that the duty roster does not confirm where a person worked on a particular day. That it is prepared a week before deployment and changes could occur if needs arises. She could not confirm whether the accused persons were on duty at at the scene of crime on 9.10.2017 or not.
 7. Pw4 miss Carolyn Koros an officer attached at EACC, testified that she was asked by PW9 to translate a conversation that allegedly took place between PW1 and Christopher Naibey (2nd accused). The conversation was in Kiswahili, Kikamba and Kalenjin. That she listened to the video recording and prepared both original version that was in Kalenjin as well as the English translated version. She later prepared a certificate to that effect, which was she produced as PEX 2b.
 8. PW5 an Inspector of Police John Musyoki, the assistant to pw3 as the deputy OCS Athi River weighbridge police station at the time said that on 29112017 he was invited to EACC offices by PW9 and a clip was played in which he identified the 1st and 2nd accused but was not able to clearly identify their voices because of interruption and distortion from the background noises he however confirmed that he identified and saw both accused in the video clip. That he signed the certificate of recognition which he produced as PEX 7.
 9. PW6 a Mr Simon Bitok, testified that he is an employee of Safaricom testified that he extracted the the mpesa transaction done by PW1 at PW2's shop and corroborated the evidence of PW1 and PW2 on the said mpesa withdrawal of Kshs 2000 by pw1.
 10. PW7 one Martin Mbuvi testified that he works at EACC, that he accompanied PW9 who is the investigating officer to Mlolongo. That he was asked by PW9 to translate a conversation that allegedly took place between pw1 and both accused. That the conversation was in Kiswahili, Kikamba and Kalenjin. That he listened to the video recording and prepared both original version that was in Kamba and translated it to English version. He later prepared a certificate to that effect, which was produced as an exhibit.
 11. The 2nd complainant David Koech Cheruiyot (PW8), testified that he is also a long-distance truck driver working with Metro logistics. That on the material day 9.10.2017, he was driving his lorry behind Andrew K. Songony(PW1), that they had left Bamburi Cement Athi River and was driving towards Mlolongo on the way to Tororo in Uganda, that he was near Total Petrol station, when he was stopped by two traffic police officers whom he identified as the two Accused persons, who accused pw8 of over speeding and overtaking, that the 2nd accused demanded a bribe of Kshs. 10,000 pw8 and ordered them to drive the vehicles to Mlolongo Police Station but they declined that the police officer confiscated their driving licenses. That pw1 went to report the matter to EACC and left pw8 to look after their vehicles. That he later received his driving license back from pw1 that evening. That the accused persons were eventually arrested by EACC officers and charged. He identified the 2nd accused as the officer who had asked for Kshs. 10,000 from him.
 12. PW9,Alex Nyakundi testified that he is an investigating officer working with the EACC. That pw1 lodged a complaint, PW9N arranged a team of officers to accompany the Complainant to Mlolongo police station on 9.10.2017 and later arrested the accused persons and charged them with the charges before Court. His evidence is that he received a complaint from PW1 that two Traffic Police officers at Mlolongo weighbridge Police station had demanded a bribe of Kshs, 10,000 each in order to forbear charging the complainants with alleged traffic offences. That he met with pw1 at Integrity Centre Nairobi. That he instructed PW1 how to handle and operate a recording gadget and they all left Integrity Centre for Mlolongo weighbridge police station where they arrived at about 14.50hrs, where



- he handed over the gadget to pw1 to record the conversation with the suspects. Further that pw1 later handed over the gadget back to him. That PW1 informed him (pw9) that he had given the suspected officers Kshs, 2,000 which he had withdrawn from the M-Pesa kiosk, that in return he got back pw2's driving license.
13. On being placed on their defence both accused opted to give unsworn testimony, in a nutshell the defence denied committing the offences. The 1st Accused one Moses Ngatia testified that he is employed by the National Police Service number 93959. That on 9.10.2017, he was at Athi River weighbridge performing general duties. That he was assigned to work at the report office to take reports from members of the public during the day, that he performed his duties at the Report office, Mlolongo Weighbridge Police Station.
 14. That during that day, he was approached by P.C Fredrick Ongulia who was performing traffic duties along the Nairobi Mombasa Highway. That P.C Fredrick Ongulia asked him (1st accused) whether he had received a person whom he (PC Ongulia) had arrested along the Highway, he (1st accused) denied. That later P.C Fredrick Ongulia left a driving license with the 1st accused told him to alert him (PC Ongulya) if that person went to the report office. The{ 1st accused described PC Ongulia is tall, slim, a Luhya by tribe, light complexion and that he had a gap to his lower jaw incisor teeth.
 15. That at 6pm on the same day, he handed over the report office duties to P.C Godwin Nguthi and went to his house. At around 6.30PM he received a call from P.C Fredrick Ongulia who asked about the license he had left with him earlier and asked him for it that they met at the report office, where he handed back the license to P.C Ongulia who was in the company of another person whom he identified as PW1. He then left for his house. He disputed the transcript and its content. He denied having received any bribe from pw1.
 15. The 2nd Accused, Christopher Naibey Chemengu, DW2 testified that on 9.10.2017, at around 6.30 pm, he was from his house heading towards report office at the said police station, when he met a person who had been directed to him from the report office. That he was the senior most police officer at the station. That the person enquired from him about two police officers whom he alleged to have arrested him along Athi River Highway earlier in the day. That the person described how one officer looked like, as slender and that one had a gap on the lower jaw teeth, a luhya by tribe. That he called the officer who later came and met with pw1. The officer was PC Fredrick Ongulia. That the 2nd accused left them and went to his house. His evidence is that he was not on duty on that day rather was on standby duty. He disputed the transcript as well as the recording. He denied receiving any bribe from pw1.
 16. The defence version in summary is in line that;
 - i. The two accused persons explained the events of that evening, 9.10.2017.
 - ii. That neither of the accused persons was on traffic duty at the Athi River Nairobi- Mombasa Highway on the said date. That they were not positively identified.
 - iii. They denied having stopped or arrested pw1 and pw8 also denied negotiating for a bribe of Kshs. 10,000.
 - iv. That if both accused were arrested at all, then it was done by PC Fredrick Ongulia who was not charged nor produced as a witness for unexplained reasons.
 - v. That it was PC Fredrick Ongulia is the one who took the driving license from PW8 and there is no account on any driving license being taken from pw1.



- vi. That there was no evidence tendered on the movement of the Driving License of PW1. No incidence highlighted when or how pw1 got back his driving license. No driving licenses were produced in Court.
 - vii. They challenged the credibility of the video recording gadget, the video and transcripts and their inadmissible.
 - viii. They also challenged the certificate signed by PW9 receiving a black audio recorder from pw1 on 9.10.2017
17. The prosecution allegations against the two accused persons is that they demanded a bribe of Kshs, 10,000 each so as not charge pw1 and pw8 with traffic offences of over speeding and overlapping. That both accused allegedly later received Kshs, 1,000 each. They are also alleged to have conspired to commit the crime with another third officer who was not charged. The defence denied all the allegations.
 18. The Prosecution has a burden to discharge and to proof the offences, the prosecution opted not to file closing submissions even so they did not have an automatic right to file closing submissions since the accused persons did not call witnesses. Mr Kithi advocate for both accused filed the defence closing submissions and cited various provisions of the law as well as authorities which this honourable court has duly considered.
 19. Both accused denied demanding nor receiving any bribe and or committing the offences herein, the accused persons are not expected to prove their innocence. The burden of proof rests squarely on the shoulders of the prosecution to establish the charges beyond any shadow of doubt. The prosecution is also expected to establish that
 - i. The accused persons were officers of a public body at the time of the offence;
 - ii. The accused persons received a gratification at the material time;
 20. From their defence admission there was no dispute that both accused persons were police officers serving in the National Police Service and were at that time attached to Mlolongo Weighbridge Police Station and were arrested by EACC officers upon the complaint lodged by the complainants herein.
 21. The honourable court will now consider the following seven issues to determine whether the accused committed the offences or not;-
 - i) Whether the accused persons were positively identified or not.
 - ii) Whether there is evidence that the accused demanded and or received for a bribe or not.
 - iii) Whether there was an element of entrapment or not.
 - iv) The issue of selective prosecution.
 - v) Whether the electronic evidence is admissible or not.
 - vi) Whether the prosecution has proved the case to the required standards.
 - vii) Whether the defence raised reasonable doubt to the prosecution's case.
 22. On the 1st issue of identification the evidence by PW1 alleged that the 1st accused demanded a bribe of ksh 10,000 whereas PW8 alleged that the 2nd accused demanded a bribe of Ksh 10,000 from him, during cross examination they stated that the officer who demand a bribe was Luhya and had a gap between his lower incisor teeth, there is also an admission by the prosecution witnesses that a police



- officer by the name P.C Fredrick Ongulia was involved in this matter but he was not charged on account of being indisposed as a result the defence has raised the issue of selective prosecution. The defence submission has disputed being at the scene and maintained that they were identified at the dock.
23. From the clip that was played in court and produced as an exhibit, PW1 is seen walking to the said police station looking for two unknown traffic officers and the only description he gave was that the two officers were slim and tall, one with a gap on the lower jaw teeth and probably a Luhya by tribe. From this line of identification, it is plausible that PW1 did not positively identify the officers manning the road who allegedly demanded the bribe from them.
 24. On the 2nd issue of demand and receiving of a bribe, the evidence of pw1 and pw8 is that the two accused were the two officers who flagged them down separately and demanded for a bribe. At some point PW1 and PW8 gave another impression that they were arrested together however Pw1's stated that it was the 1st accused who demanded ksh 10,000 from him while PW8 implicated the 2nd accused as the officer who demanded ksh 10,000 from him.
 25. The accused persons were not arrested on the spot, there was no other evidence other than the oral evidence by PW1 and PW8. It is not however clear whether they were together or seperate. The video clips also does not show money exchanging hands.
 26. On the 3rd issue the defence alleged that neither of the accused demanded for a bribe rather that the prosecution witnesses were out to entrap them and submitted urged the court to examine whether there was an abuse of the criminal justice process, they urged this honourable court to avert the system being brought to disrepute. They cited Article 50(4) of *the Constitution* which provides that evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded. The defence invited the Courts to consider and to determine whether the police went too far or they were acting in good faith.
 27. The defence submission is that Pw1 was a recruited state agent procured to unwittingly entrap P.C Fred Ongulia who had allegedly stopped him in the morning of 9.10.2017 at Mlolongo weighbridge along the Nairobi Mombasa Highway. That PW1 went back in the evening not just as a complainant but this time also as a state agent and made persistent, consistent, continuous and insistent extraction of words from the accused persons. That PW1 had the benefit of hindsight and the courage of back up and had to discharge the assumed duty of a state agent.
 28. Mr Kithi advocate for the defence submitted that the police were encouraging the accused persons to commit an offence and cited the authority of Re-Attorney General's reference No. 3 of 2000 in which Lord Nichollas { held;

'the greater the inducement held out by the police, and more forceful or persistent, the police adventures, the more readily may a court conclude that the police overstepped the boundary; their conduct might as well have brought about commission of the crime by a person who would normally avoid crime of that kind, In assessing the weight to be attached to the police inducement, regard is to be had to the defendant's circumstances, including his vulnerability. This is a recognition that what may be significant inducement to one person, may not be so to another. '
 29. The defence also cited the authority of Mohammed Karion Nur v AG, Pet No. 181 of 2010, Warsame J. summarised the character of entrapment as follows;

'In my view, every law-abiding citizen would likely commit a crime if sufficiently motivated. In determining whether entrapment occurred, it is important to analyse and scrutinize



how much and what manner of persuasion, pressure and cajoling was brought by the law enforcement agent to induce persons to commit crime. Entrapment entails;

- a. The use of one pressure
- b. Creating an unusual motive
- c. Making the crime unusually attractive
- d. Creating an opportunity to commit a crime.
- e. Criminal plan originated by State agents.
- f. Gaining the confidence of the accused by taking reasonable steps to assure that the person was not being set up.
- g. Outrageous police conduct. '

30. The court having evaluated the precedents from superior courts it has equally looked at the evidence on record and noted that there was no evidence to demonstrate the entrapment or encouragement by any of the prosecution witnesses to lure the accused to commit the offences and or how that entrapment was achieved. This line of defence is akin to admission of the charges which is contrary to the defence version which tended to deny the offence.

31. On the 4th issue of selective prosecution, the defence submitted that the preference of charges against the two accused persons while the Investigating officer admitted before court that he had omitted to Charge P.C Fredrick Ongulia who was mentioned and heavily indicted in the matter in inexplicable and discriminatory hence amounts to selective prosecution. That it was also meant to shield the real suspects of this case, that the Court was denied the platform and opportunity to weigh the culpability of the said P.C Fredrick Ongulia or other persons against that of the two accused officers. That this was an abuse of public office by the Investigating officer as well as the prosecution, an abuse of prosecutorial discretion.

32. The defence relied in the authority of *Kuria & 3 Others vs. Attorney General* [2002] 2 KLR 69, in which the High Court held:

“...The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...”

33. The court further held that selective prosecution may be misused for unfair and unreasonable purposes. It stated;

“...In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute. It is further alleged that the criminal prosecution is an abuse of the court process epitomised by what is termed as selective prosecution by the Attorney General. It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be



manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants disputants parade themselves... “

34. The defence submission is that discretion in this case was exercised with a view to achieving certain extraneous goals, in their view, it constituted an abuse of the legal process and urged this honourable Court to intervene and bring to an end such wrongful exercise of discretion. The defence cited the decision by Lady Justice Wendoh, in *Koinange vs. Attorney General and Others* 120071 2 EA 256 in which the court held:

“Under section 26 of *the Constitution* the Attorney General has unfettered discretion to undertake investigations and prosecute. The Attorney General's inherent powers to investigate and prosecute may be exercised through other offices in accordance with *the Constitution* or any other law. But, if the Attorney General exercises that power in breach of the constitutional provisions or any other law by acting maliciously, capriciously, abusing the court process or contrary to public policy the Court would intervene under section 123(8) of *the Constitution* and in considering what constitutes an abuse of the court process the following principles are relevant:

- i. Whether the criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed;
- ii. Whether the person against whom the criminal proceedings are commenced has been deprived of his fundamental right of a fair trial envisaged in the provisions of *the constitution*;
- iii. Whether the prosecution is against public policy. ”

35. The defence submitted that in the exercise of discretion conferred on the executive, the Court may interfere and intervene in the following situations:

- (1) where there is an abuse of discretion;
- (2) where the decision-maker exercises discretion for an improper purpose;
- (3) where the decision-maker is in breach of the duty to act fairly;
- (4) where the decision-maker has failed to exercise statutory discretion reasonably;
- (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power;
- (6) where the decision-maker fetters the discretion given;
- (7) where the decision-maker fails to exercise discretion;
- (8) where the decision-maker is irrational and unreasonable. As per the decision of Nyamu, J (as he then was) in *Republic vs. Minister for Home Affairs and Others Nairobi HCCC No. 1652 of 2004* (HCK) 120081 2 EA 323.

36. From the admission of the possible involvement of PC Ongulia yet he was not involved in the case either as a prosecution witness or a suspect, leaves the question on the criteria of zeroing in on the accused persons for prosecution while excluding the other possible suspect.



37. On the 5th issue the defence has challenged the defence on the admissibility of the electronic evidence the defence disputed the transcripts or computer print-out and certificates signed by Mr Martin Mbuvi and Ms Caroline Koros under section 106 B (4) of the *evidence Act* and alleged that without a certificate under section 65(8) of the *Evidence Act*, the transcripts are inadmissible. That PW4 and PW7 only own up to have transcribed the script from Kalenjin and Kamba to English version further that their certificates under section 106 B (4) only relates to the part they transcribed, and not transcribe the Kiswahili portions of the transcript.
38. The defence relied on the *Evidence Act* in particular Section 65 which relates to evidence and in particular primary evidence is defined as the;
- (1) Primary evidence means the document itself produced for the inspection of the court.
 - (2) Where a document is executed in several parts, each part is primary evidence of the document.
 - (3) mere a document is executed in counterpart each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.
 - (4) Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original they are not primary evidence of the contents of the original.
 - (5) Notwithstanding anything contained in any other law for the time being in force
 - (a) a micro-film of a document or the reproduction of the image or images embodied in such micro-film; or
 - (b) a facsimile copy of a document or an image of a document derived or captured from the original document; or
 - (c) a statement contained in a document and included in printed material produced by a computer (hereinafter referred to as a "computer printout "), shall, if the conditions stipulated in subsection (6) of this section are satisfied, be deemed to also be a document for the purposes of this Act and shall be admissible in any proceedings without further proof of production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.
39. The certificates were produced in compliance of sub-section (6) which reads;
- (6) The conditions referred to in subsection (5) in respect of a computer printout shall be the following, namely—
 - (a) the computer print-out containing the statement must have been produced by the computer during the period in which the computer was regularly used to store or process information for the purposes of any activities regularly carried on over that period by a person having lawful control over the use of the computer;
 - (b) the computer was, during the period to which the proceedings relate, used in the ordinary course of business regularly and was supplied with information of the kind contained in the document or of the kind from which the information so contained is derived;



- (c) the computer was operating properly or, if not, that any respect in which it was not operating properly was not such as to affect the production of the document or the accuracy of its content;
- (d) the information contained in the statement reproduces or is derived from {information supplied to the computer in the ordinary course of business.

40. It is worthy to look at subsection (7) which provides as follows

- (7) Where, over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period mentioned in paragraph
 - (a) of subsection (6) was regularly performed by computers, whether— (a) by a combination of computers operating over that period; or
 - (b) by different computers operating in succession over that period; or
 - (c) by different combinations of computers operating in succession over that period; or
 - (d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combination of computers, all computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

41. It is important for the investigating officers also to be aware of the provisions of sub-section (8) which is relevant to the instant case which reads;

- (8) In any proceedings under this Act where it is desired to give a computer print-out or statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say—
 - (a) identifying a document containing a print-out or statement and describing the manner in which it was produced;
 - (b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;
 - (c) dealing with any of the matters to which conditions mentioned in the subsection (6) relate, which is certified by a person holding a responsible position in relation to the operation of the relevant device or the management of the activities to which the document relates in the ordinary course of business shall be admissible in evidence.

42. The explanation in subsection (9) is also relevant and important in a case of this nature which states as follows;

- (9) For the purposes of this section
 - (a) information shall be deemed to be supplied to a computer if it is supplied in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;



- (b) information shall be deemed to be supplied in the ordinary course of business if the information was obtained, received or supplied with a view to it being processed, stored or retrieved in the ordinary course of business; and
 - (c) a document shall be deemed to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any other appropriate equipment connected to such computer.
43. The mandatory conditions to be satisfied stipulated in subsection (5) in respect of a computer print-out namely;
- a) The computer print-out containing the statements must have been produced by the computer during the period in which the computer was regularly used to store or process information for purposes of any activities regularly carried on over that period by a person having lawful control over the use of the computer.
 - b) The computer was, during the period to which the proceedings relate, used in the ordinary cause of business regularly and was supplied with information of the kind contained in the document or of the kind from which the information so contained is derived.
 - c) The computers were operating properly or, if not, that any respect to which it was not operating properly was not such as to affect the production of the document or the accuracy of the content.
 - d) The information contained in the statement reproduced as is derived from information supplied to the computers in the ordinary cause of business.
 - e) The certificate to authenticate a computer printout as statement for proposal of admissibility is evidence forwarded under section 65(8) of the *evidence act* which states.
44. The certificate to authenticate a computer printout or statement for purposes of admissibility is evidence found in Section 65(8) of the *Evidence Act* which states;
- (8) In any proceedings under this Act where it is desired to give a computer print-out or statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say—
 - (a) identifying a document containing a print-out or statement and describing the manner in which it was produced;
 - (b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer; dealing with any of the matters to which conditions mentioned in the subsection (6) relate, which is certified by a person holding a responsible position in relation to the operation of the relevant device or the management of the activities to which the document relates in the ordinary course of business shall be admissible in evidence.
45. It was in compliance of the above provisions of the law that PW4, PW7 and PW9 prepared and executed the certificates which they produced to this court as exhibits.
46. Mr Kithi Advocate further submitted that the rationale behind the strict criteria on admissibility of computer print outs and statements in the *Evidence Act*, was to safeguard the information supplied to a computer and thereafter reproduced or derived from the computer. Which makes electronic



evidence easily prone to tempering and manipulation without being detected. He urged the court to consider the vortex of technological changes or advancement. He stated that the *Evidence Act* mandates a special procedure for electronic records because printed copies of such information are vulnerable to manipulation and abuse.

47. He cited the authority W. Musyoka J. in *M.N.N v E.N.K* 120171 eKLR as well as *Republic vs. Barisa Wayu Matuguda* (2011) eKLR, where a compact disc (CD) was made from CCTV footage, and the court held that where information is stored in a computer such as a CCTV camera, which is then produced or copied to the optical device, such as a CD, should be treated as documentary evidence and is admissible. The court stated that —

'Any information stored in a computer... which is then printed or copied... shall be treated just like documentary evidence and will be admissible without the production of the original. However, section 106B also provides that such electronic evidence will only be admissible if the conditions laid out in the provisions are satisfied... The provision makes it abundantly clear that for electronic evidence to be deemed admissible it must be accompanied by a certificate in terms of section 160B Such certificate must be signed by a person holding a responsible position with respect to the management of the device. without the required certificate this CD is inadmissible as evidence.'

48. The defence also challenged that both certificates of Alex Nyakundi that is for handing over certificate of the audiovisual recorder and receiving back audiovisual recorder, were not under sections 106B. Also challenged the certificate PW9 made under section 106B (4), dated 19th December 2017, as hearsay, that it ought to have been made and executed either in full or in part by pw1. The defence Advocate submitted that the transcripts are neither dated nor signed and challenged their authenticity. He urged the courts not to admit them into evidence nor rely on the electronic evidence which he said was manipulated and its authenticity and integrity was in question.
49. This honourable court does concur that PW1 ought to have been involved in the execution of the gadget hand over certificate, it is guided on the law and cited authorities and finds that the certificates of transcription by PW4 and PW7 to be proper and admissible.
50. The defence challenged that the prosecution did not sign any certificate on the Kiswahili part, that the Kiswahili part of the transcript remains was not translated. However the languages of this honourable court is both Kiswahili and English languages unlike the High Court and other superior courts whose language is exclusively English, the elevation of Kiswahili language to a national language status is provided for in the current Constitution.
51. On the 6th the prosecution has proved the case to the required standards the burden of proof rests on the prosecution section 107 (1), section 107(2) of the *evidence Act* provides that when a person is bound to prove the existence of any fact the burden of proof lies on that person.
52. Under Article 19 of *the Constitution* which safeguards Rights and Fundamental Freedoms in the Bill of Rights to individuals safeguards;
- i. The accused persons are presumed as innocent until proven guilty under Article 50 2(a)
 - ii. Evidence obtained in a manner that violates any right and fundamental freedom in the Bill of Rights shall be excluded if, the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice. (Article 50(4)). On the 7th and final issue whether the defence raised reasonable doubt to the prosecution case. The two accused denied committing the offences, they both denied being at the scene and pleaded



alibi defence. They also the identification evidence. Having pleaded not guilty and denied the offences the onus of proof lies with the prosecution.

53. Whether the defence raised reasonable doubt will be considered hand in hand with the fact that the burden of proof so placed upon the prosecution and remains with them throughout the trial. It does not shift to the accused persons, even if the accused persons were placed on their defence. The prosecution is expected to prove both the mens rea and the actus reus. If there is a failure by the prosecution to establish the case to the required standards or the defence raises doubt to the prosecution case will result in an acquittal.
54. This honourable court will now consider whether the prosecution has established each of the six counts to the required standards;
55. On the 1st count, this court has considered the defence submission that in conspiracy charges, there must be a common agreement to which all of the alleged conspirators (accused) are privy. Any agreement to commit the crime, must be communicated to the other party or parties.
56. Black's Law Dictionary, 9th Edition at pg. 35 defines conspiracy as;

“...An agreement by two or more persons to commit an unlawful act coupled with an intent to achieve the agreement's motive, an (in most states), action or conduct that furthers the agreement; a contribution for an unlawful purpose...”
57. In Archibald Criminal Pleadings, Evidence and practice (Sweet and Maxwell) at page 3025 and 3026, observes as follows;

“...The offence of conspiracy cannot exist without the agreement, consent or combination of the two or more persons.... So long as design rests in intention only it is not indictable, there must be an agreement...”
58. The defence also cited Halsbury's laws of England Volume 25 Criminal Law at paragraph 73 expresses;

“...it is not enough that two or more persons pursued the same unlawful objective at the same place as in the same place; it is necessary to show a meeting of the minds, a consensus to effect an unlawful purpose. It is also not, however, necessary that each conspirator should have been in communication with each other”.
59. The prosecution relied on evidence of pw1, pw8, transcript and audiovideo clip that were produced in court. The defence submitted that the transcripts are not admissible and do not aid these charges in all the counts further that the prosecution failed to establish the ingredients of common intention or agreement.
60. Although the prosecution alleged that, the two accused persons agreed to solicit Kshs. 2000= from pw1. The viva voce testimony by pw1 does not support the conspiratorial set up to amount to a common intention. PW1 testified that, he dealt with the one officer who stopped him and another officer stopped PW8.
61. The defence challenged the transcript using one name such as Ngatia not using full name of the people further that no good reason was given for not using the full names for proper identification. The conversation with the script also indicates the 1st accused talking about raising money to pay in court.
62. PW5, Inspector Musyoka, had worked with the accused as his colleagues and juniors at work and at his command. They interacted far more than the complainants did with the accused or the investigating



officer. Not even the transcript EACC translators. PW5 and the Accused interacted on daily basis. The accusations here, as against the accused persons are in the alleged words spoken between them and PW1, which words ought to be clear and voices identifiable and without doubt as to their authenticity. PW1 and PW8 are certainly the prime accusers. The EACC is a mere statutory agent receiving and processing the accusation. That the evidence shows that it is PW4 and or PW7 who both printed the transcript, but neither of them knew the voices of the Accused persons, to identify it from a crowd of many other persons talking while PW5 failed to identify their voices.

63. The defence submission is that from the transcript, pw1, cajoled and intended albeit without success to disarm the accused persons of their fidelity, care and caution towards him or their respect for the rule of law to pronounce words that would entrap them. That he had the forbearance, an advantage, skill, zeal, security and intent bestowed on him by the Investigation officer. That there was design, antecedent backing, deliberations and determination, however in terms of pecking order the accused persons were the office holders and Pw1 as a civilian had no authorities over the accused persons.
64. Counts II, Count III, Count IV and Count V are of similar nature of offence of receiving of bribery contrary to Section 6(1) as read with Section 18(1) (2) of the *Bribery Act* No. 47 of 2016.
65. The defence also cited the authority of Mativo J. in the case of Michael Waweru Ndegwa —vs- Republic [2016] eKLR in which the Judge held;
- ‘In order to constitute an offence, the following are essential ingredients; in the first place, there must have been solicitation or offer or receipt of a gratification must have been asked for, offered or paid as a motive or reward for inducing by corrupt or illegal means and secondly, that someone should be acting in the public or private or employed or acts for and on behalf of another person, or confer a favour or ask for a favour to render some service.’
66. When PW1 went to the police station the accused persons were not at work, it was past 6.30pm. Pw1 went seeking for the arresting officer and in the process talked to a number of officers. It was already late, there had been change of guard. The accused were not on duty but were merely called upon to assist P.C Fredrick Ongulia to return the driving licences to pw1. The tables were turned on them and they were charged.
67. Benefit is defined in Section 2 (I) of the Act as follows: -
- “benefit” means any gift, loan, fee, reward, appointment, service, favour, forbearance, promise, or other consideration or advantage.
68. The essential ingredients of the offence are that the accused must have received a benefit as defined above, that it must have been received corruptly as an inducement to bring about some given results in a particular matter, that the benefit must not be legally due or payable.
69. The Accused persons did not have powers to make decisions on the case of the PW1 and PW8 to forbear any charges or afford him any advantage. The Accused did not know what the Complainant and his Colleague had been arrested for.
70. There was no independent voice identification that would corroborate the alleged voice identification of the accused persons to point out the allocation voice to individual names against the words allegedly spoken. Voice evidence in trials; whether the sound of prosecutions audiovisual recording is safe identification of accused's voice. Multiple decisions have warned about the reliability of voice evidence in criminal cases.



71. The Court was not given the actual recording. The Audio gadget, exhibit 1, did not have content. This original content is important since it would be the only raw unadulterated form of evidence without movement through computer gadget. This would have been ideal for audit and verification, there is doubt as to the transmitted or translated information.
72. Inspector Musyoki PW3's evidence is that it was impossible to discern the sounds. He could not identify the voices of the accused persons. He had worked with them for a long period of time and was called as an independent and reliable witness to identify the voices of the accused persons as an independent witness. The two officers who transcribed the audiovideo Carolyn Koros and Martin Mbuvi did not know the persons talking in the videoaudio they relied on Alex Nyakundi as stated in paragraph 5 of the certificates section 106 B (4) of both Carolyn Koros and Martin Mbuvi yet they could not identify the officers who stopped PW1 and PW8.
73. The defence submitted that P.C Fred Ongulia was called by the 2nd accused who in turn called the 1st accused and that the 1st accused gave P.C Fred Ongulia a driving license that he had left with him earlier in the day. This evidence was not controverted by the prosecution.
74. On count VI is founded on sections 46 and 48 of ACECA. The definition in the penal section 46 reads:
- Abuse of office
- A person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence.
75. For an offence to be established under section 46 ACECA it must be shown that: -
1. The person accused was a state officer occupying a public office within the meaning of Article 260 at the time of commission of the offence.
 2. The person accused must have used his/her office to confer a benefit and that the nature of the benefit must be disclosed.
76. A public officer is defined by section 2 of ACECA as:
- “public officer” means an officer, employee or member of a public body, including one that is unpaid, part-time or temporary;
77. The defence also raised issue that no evidence was led to demonstrate that two accused persons together with another not before Court acted in concert to commit the alleged offences. That the prosecution did not lead evidence on how the arrest was done since the accused persons were not arrested the scene of crime.
78. In *John Nduati Ngunu v Republic* [2016] eKLR, the Court held, 'Once again, this Court has repeatedly stressed that:
- “Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification ". See *Wamunga v Republic* [1989] KLR'



79. PW 5 was not able to identify the voice of either of the accused person that from the transcript, this court has considered the High Court authority by Lady Justice Ongudi in ACC Appeal No. 1216 Samuel Kibet Cheruiyot -Vs- Republic. In that authority when the clip was played the purpose of the money that had exchanged hands were very clear.
80. The 1st accused explained that he was at the report desk at Athi River police station, performing general duties and receiving reports from members of the public. During the day, he was approached by P.C Fredrick Ongulia who was performing traffic duties along the Mombasa-Nairobi highway who asked him whether he had received any person or information on a person whom he had made an arrest along the highway. That P.C Fredrick Ongulia later left a driving license with him (1st accused) to keep and was asked to alert him (P.C Ongulia) if anyone came looking for it. That at 6 pm, he left the report desk and handed over report desk duties to P.C Godwin Nguthi. He went to his house. About 6.30 pm, he was called by Fredrick Ongulia who asked about the license, and requested that they meet at the report office which they did. P.C Godwin Nguthi was with a person whom the 1st accused later learnt was PW1. He disputes the contents of the video and the transcripts and denied uttering the words attributed to him.
81. The 2nd accused also said that he was not on traffic duty, rather on standby at the station on 9.10.2017, that at around 6.30 pm, he had just come from his house towards the report office when he saw a person directed to him by office personnel to him. He was the senior most officer at the station. He enquired about two officers whom he alleged had arrested him along Athi River Highway. He described how they looked like. One was slender with a gap on the lower jaw and a Luhya by tribe.
82. In the instant case the clip was not clear and the deputy OCS did not attribute any utterance in the clip to the accused. In this case the description of the traffic officer by PW1 did not fit the accused persons and the alleged money was not recovered from either of the accused persons. The accused having denied being at the scene or demanding a bribe from PW1 and PW9 this honourable court finds some doubts raised by the defence in the prosecution's case.
83. The accused persons were not arrested on the spot. The investigating officers and all other EACC officers did not see the accused person on 9.10.2017 and did not arrest them immediately. The identification of both accused at the road that morning has also not been established.
84. It was the duty of the prosecution to establish the case against both accused beyond any shadow of doubt. The Identification was therefore not clear or positive hence creating the question on the identity of the officers allegedly involved. Notably, the tribe and appearance of the accused persons was not to the officers described by pw1. Neither is their dental formation matching the description given by pw1
85. This honourable court is agreeable with the defence submission that where exculpatory evidence is presented to the Police or Investigating officers in the course of investigation but they deliberately ignore it leads to the inescapable conclusion that the police neglected to make use of the information which was available to them, before instituting proceedings. There was evidence on the involvement of P.C Fredrick Ongulia who ought to have been involved in this trial
86. The key evidence that the accused demanded a bribe was not established as the prosecution evidence attributes the accused to have merely seen by PW5 he did not identify their voices either by default or deliberately the audio visual recording that was played in court did not help much for want of collaborative evidence from PW5.
87. Considering the entire evidence on record this honourable finds that the prosecution failed to establish the case against the accused to the required standards, the defence raised reasonable doubt, this court



will resolve the lingering doubts in favour of both accused persons in count I, count II, count III, count IV and count V herein, having failed to establish count I,II,III,IV AND V, count VI subsequently fails. The accused persons are therefore entitled to the benefit of doubt in all the charges herein, they are accordingly found not guilty in all the six charges herein and are hereby acquitted under section 215 CPC.

14 Days right of appeal is hereby explained

HON. E. JUMA

CM

3. 11.2020

JUDGMENT DATED, DELIVERED AND SIGNED IN OPEN COURT, THIS 3RD DAY OF NOVEMBER 2020.

In the presence of:-

The accused: 1st accused

2nd accused

Def Advo:

The state.

This 3rd day of November, 2020

HON. E. JUMA

CM

3. 11.2020

Mr. Kithi – I am thankful to the court for the lengthy and comprehensive Judgment. I pray for a certified copy of the Judgment, and that the cash bail be refunded.

HON. E. JUMA

CM

3. 11.2020

Miss Oleyo – I also pray for certified copies of the proceedings and Judgment.

HON. E. JUMA

CM

3. 11.2020

Court – The state to be provided with certified copies of the Proceedings and Judgment. The defence to be supplied with a copy and certified Judgment upon the payment of the requisit charges. The cash bail to be refunded to the depositors.

14 days RA explained.

HON. E. JUMA

CM

3. 11.2020

