



**Republic v Mutinda & another (Anti-Corruption Case 16 of 2014) [2019] KEMC 3 (KLR)
(Anti-Corruption and Economic Crimes) (8 January 2019) (Judgment)**

Republic v Felix Nzomo Mutinda & another [2019] eKLR

Neutral citation: [2019] KEMC 3 (KLR)

**REPUBLIC OF KENYA
IN THE ANTI-CORRUPTION MAGISTRATE'S COURT
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION CASE 16 OF 2014**

F KOMBO, SPM

JANUARY 8, 2019

BETWEEN

REPUBLIC PROSECUTOR

AND

FELIX NZOMO MUTINDA 1ST ACCUSED

FREDERICK OMANYA MAREMBO 2ND ACCUSED

JUDGMENT

1. The Accused persons herein are Felix Nzomo Mutinda- (Hereinafter '1st Accused') and Frederick Omanyama Marembo (Hereinafter '2nd Accused'). They both face a total of four Counts preferred under the Anti Corruption and Economic Crimes Act. (Hereinafter –the ACECA)
2. Count 1 in the charge sheet, which is a charge of corruptly soliciting for a benefit contrary to section 39(3) (a) of the ACECA is however not the subject of this judgment, as I did find earlier, in my Ruling of 5/10/2018 that the Accused had no case to answer and dismissed the charge. That left Counts 2, 3 and 4 as the active Counts.
3. The charge in Count 2 is also a charge of corruptly soliciting for a benefit contrary to Section 39(3) (a) as read with Section 48 of the ACECA. It is preferred against the 1st Accused.
4. Particulars to this Count are that on the 3rd day of April 2014, at an unknown place within Nairobi County, being a person employed by a Public Body, to wit, the Ethics and Anti-Corruption Commission, corruptly solicited for a benefit of Ksh 50,000/= from Judith Kashem Omuonyi, as an inducement so as not to cancel an LPO No. 1169783, for the supply of cameras to the Ethics and Anti-Corruption Commission a matter relating to the affairs of the said public body.



5. In Count 3, the 1st Accused is further charged with the offence of corruptly Receiving a benefit contrary to the same section 39(3) (a) as read with section 48 of the ACECA.
 6. Particulars to this Count are that on the 3rd day of April 2014, at an unknown place within Nairobi County, being a person employed by a Public Body, to wit, the Ethics and Anti-Corruption Commission, corruptly received a benefit of Ksh 50,000/= through MPESA from Judith Kashem Omuonyi, as an inducement so as not to cancel an LPO No. 1169783, for the supply of cameras to the Ethics and Anti-Corruption Commission a matter relating to the affairs of the said public body.
 7. The charge in Count 4 is also a charge of corruptly receiving a benefit contrary to the said Section 39(3) (a) as read with Section 48 of the ACECA. It is preferred against the 2nd Accused.
 8. Particulars to this Count are that on the 15th day of July 2014, at Nation Centre along Kimathi Street within Nairobi County, being a person employed by a Public Body, to wit, the Ethics and Anti-Corruption Commission, corruptly received a benefit of Ksh 28,000/= through an agent from Judith Kashem Omuonyi, as an inducement so as not to have her company get disqualified on the list of pre-qualifications of suppliers for the Commission for financial year 2014/2015 , a matter relating to the affairs of the said public body.
 9. The Accused denied all charges on 25/7/2014 and a trial ensued before me from 25/2/2016.
 10. A total of twelve prosecution witnesses have been called in support of the charges. Both Accused made unsworn statements in their respective defences. Neither of them called any other evidence.
 11. At close of trial, Mr Munjla, Counsel for the Accused and Mr Githinji, for the State opted to rely on previous written submissions filed at case to answer stage, save that Mr Githinji had expressed an intention to make an additional oral submission in relation to Defence Exhibit 1, which he had not as at the time of writing this judgment, as directed.
 12. According to the evidence, both Accused worked as Supply Chain Management Officers at the Ethics and Anti Corruption Commission (Hereinafter 'EACC') Procurement Unit. During the period March-April 2014 a duly prequalified firm known as Massatech Ltd owned by Judith Kashem Omuonyi (PW 1- Hereinafter 'the complainant') was issued with three Local Purchase Orders (LPOs).
 13. The three LPO's are dated 24/2/2014 (Pros Exh 1(b)), 3/3/2014 (Pros Exh 1(a) and 4/3/2014 (Pros Exh 3.) Pros Exh 1(a) was for the supply of nine digital video cameras at a value of Ksh. 945,000/-, while Pros Exh 1(b) was for the supply of a safe at a value of ksh. 295,000/-. Pros Exh 3 was for the supply of a Macintosh Workstation at ksh. 930,000/-.
 14. The complainant testified that prior to collection of two of these Orders –Pros Exh 1(a) and (b), the 2nd Accused made a demand of ksh. 520,000/- from her.
 15. She explained that in March 2014 the 2nd Accused called her to collect an LPO, but prior to receipt of the same, he had asked to meet her 'for a talk'. She testified that they met at Oil Libya Petrol Station in Westlands, where the 2nd Accused made the demand, to which she indicated she could only raise ksh. 50,000/-.
- She testified further as follows;
16. That on the following day she again met the 2nd Accused at Ralph Bunche Road, where he received ksh 100,000/- inside her vehicle in the presence of her personal assistant one Terry (not a witness), and a colleague Dominic Wanjala (PW 2). Upon giving the 2nd accused the money, he gave her the two LPOs Pros Pros Exh 1(a) and 1(b).



17. That the next day after the 2nd Accused had received the ksh 100,000/- she also received a call from the 1st accused, enquiring on the amount she had him, and upon being told, sounded annoyed because the 2nd accused had not told him that he had received any money.
18. That there then followed an exchange of short text messages (SMS) between the 1st and the 2nd accused, which were also forwarded to her. She however did not have these messages in Court.
19. That later she fell back in the delivery of the cameras and sought a 14-day extension from the 1st accused who in turn asked her to send ksh. 50,000/- in order to get it. She stated as follows;

‘... He gave me a safaricom mobile number. I sent ksh 50,000/- to the number he gave me...’
20. That after collecting the third LPO (Pros Exh 3) from the 2nd accused, and while her payment was still pending, she got pressure from the accused to ‘pay the balance’ of the ksh. 520,000/-, adding that the accused threatened her with disqualification in the next pre-qualifications.
21. Upon this, she sought advice from one Mwangi (not a witness) of the EACC ICT Department who advised her to make a report.
22. Following the report, EACC officers were assigned to handle the case, and gave her 28 ksh 1000/- genuine currency notes and 72 fake ksh 1000 papers to make a total of 100,000/-. She identified the genuine currency notes as Pros Exh 4 (i)-(xxviii). A photocopy of the said currency notes (Pros Exh 7) was also made which she verified.
23. She was then shown how to operate a recording device, which she identified in court as (Pros Exh 5) - a Sony Audio Recorder.
24. That on 14/7/2014, armed with the treated money and a recorder, she accompanied EACC officers led by a Mr Waihenya first to the Business Park along Ngong Road, where she was destined to meet the 1st accused, but the 1st Accused failed to answer her calls, then to TRM Mall along Thika Road where she was to meet the 2nd accused, but the meeting aborted because the 2nd Accused then claimed he had information from the 1st Accused that everything was a set-up. The 2nd Accused instead, asked her to send the money by MPESA.

This telephone conversation with the 2nd Accused was recorded.
25. That on the next day 15/7/2014, the 2nd Accused, still determined to get the money told her on telephone that he would send somebody to collect it at Nation Centre.
26. That once again armed with the treated money and her recording gadgets, she proceeded with EACC Officers to Nation Centre, where together with an officer called Karen, she met a lady who she then gave the money. This lady was arrested by EACC Officers inside DTB Bank as she counted the money.
27. The complainant was shown transcripts of audio recordings (Pros Exh 6(a)- and (b) whose content she acknowledged.
28. The prosecution sought leave and played the audio recording in court and she identified her own voice and that of the 2nd Accused in the conversations.
29. During cross-examination by Mr Mungla, the complainant agreed that she the demand of ksh 520,000/- was odd in view of the business amount of Involved-namely ksh. 1.2 million. She stated that she had instructed her personal assistant to give the 2nd accused the money in the vehicle. She was shown the translated transcript (Pros Exh 6(b) at page 6 and agreed that there was no point in the conversation where the 2nd accused asked her for ksh 180,000 while agreeing that at line 13 she was the



- one who referred to 'one eighty'. She was referred to the same page at line 6 and agreed that it indicated that Fred asked for 140.
30. She further stated that she got one Evelyne's telephone number from the 2nd Accused but did not have it because it was a long time. She was referred to the transcript at page 7 and agreed that the 2nd accused says 'let me send someone' and does not give a telephone number. She further stated;
- '...at page 9 Odhiambo called and said he was sent by Fred. He claims that he sent Evelyne...'
31. She was referred to page 8 line 8 in the translated transcript and stated;
- '...I was speaking to Evelyn. Odhiambo sent Evelyne...'
32. She concluded by saying that she had been speaking with the 1st Accused and that the ksh 50,000/- she gave to him was to prevent cancellation of her tender due to delay.
33. Under examination, she maintained that she found the demand for ksh 520,000/- odd as she would not have got anything in view of the contract amount.
34. Dominic Wanjala (PW 2), who described himself as a previous workmate and friend of the complainant testified in agreement with her that he was present when she gave ksh 100,000/- to the 2nd Accused. He stated under cross examination as follows;
- '... I drove to Salama hotel. At the parking lot, Judith instructed Terry to hand over ksh 100,000/- to the accused. I am sworn to tell the truth...'
35. He added that the complainant had told him that the money was to influence the time of supply but did not know what was to be supplied.
36. Livingstone Waihenya (PW 12- hereinafter 'the investigator') testified that he was assigned this case to investigate on 14/7/2014 and was introduced to the complainant whom he interviewed and then prepared a team for an operation.
37. His information was that some officers in the EACC were soliciting money from a supplier for pre-qualification in the financial year 2014-2015.
38. He learnt from the complainant during interview that one of the officers was at the Business Park along Ngong Road waiting to receive the money and arranged an arrest operation
- His further testimony proceeded as follows;
39. He instructed Ms Jackline Makena (PW3) to treat currency notes for the operation. In this regard he obtained ks 28,000/- in genuine ksh 1000/- denominations and 72 fake note papers of ksh 1000/- value. He also inducted the complainant on the use of a digital voice recorder and prepared a team comprising of Reuben Njagi (PW 4) Caleb Okoth (PW 6), and Ms Karen Kiplangat (PW 9), for the operation.
40. He then set off together with his team and the complainant from Integrity Centre to Ngong Road Business Park but when the complainant telephoned the intended suspect, he did not answer the calls.
41. While still on this mission, the complainant received a call from the second suspect and they conversed in a mixture of Swahili, English and Luo language, parts of which he could understand. Specifically he heard the suspect asking the complainant to meet him at Thika Road Mall (TRM). He recorded this conversation.



42. The team and the complainant then left Ngong Road and proceeded to TRM but due to traffic delay they got there at around 5:30 pm. At TRM he asked the complainant to call the second suspect who told her that he had waited for long, and also had a hint that she was trying to set him up.
43. He then decided to put off the operation and requested the complainant to report to EACC Offices the next day 15/7/2014 to record statements.
44. On the next day as he recorded the statement, the complainant was telephoned by the 2nd Accused and they had a conversation which he recorded. That during this call the 2nd Accused told the complainant that he would send somebody to collect the money.
45. He once again organized a team that also included Mr Reuben Njagi (PW 4) for an arrest operation. He also instructed Ms Makena to hand over the treated money to the complainant and they left in two vehicles, one of which belonged to the complainant, and in which he rode.
46. That along the way, the complainant received a telephone call from one Evelyn Achieng who told her that she had been sent to collect a parcel from her, adding that she was outside Diamond Trust Bank opposite Nation Centre.
47. At the scene the investigator remained in the complainant's vehicle while the complainant and Karen Kiplangat went towards the bank, followed closely from behind by Caleb Okoth and Reuben Njagi. That from the vehicle, he saw the complainant greeting a young lady and that they both entered the bank together with Karen Kiplangat. That shortly thereafter, he was informed that the lady had received the money and Karen Kiplangat had arrested her. He also learnt that she had recovered the money.
48. The team then returned to Integrity Centre where Karen Kiplangat prepared an inventory and he swabbed and interviewed the suspect. He stated as follows;
- ‘... I swabbed the suspect. On further enquiry from the suspect, she informed me that she was sent by her boss Cleopas Odhiambo to collect a parcel and was given a mobile number 0720-605-262 to call. This number belonged to the complainant...’
49. That the complainant then received a call from Cleopas Odhiambo enquiring whether she had met Evelyn Achieng and what had transpired. Using the number obtained from the call to the complainant, he telephoned Cleopas Odhiambo who went to Integrity centre and he interviewed him. He stated as follows;
- ‘... He told me that his friend Fred Marembo had called him and requested him to send somebody to collect a parcel on his behalf. He also confirmed that Fred gave him the mobile number 0720-605-262 which he gave to his staff member to contact the owner...’
50. Further, the complainant had also told him that the 1st accused had solicited for Kenya shillings 50,000, which she had sent to his MPESA account.
51. He further stated that he recorded a statement from the 1st accused who explained that at times he would seek financial assistance from the complainant.
52. The investigator identified and produced the exhibits identified in this case, including pros Exh 17, a DVD compact disc in which he recorded the audio recordings. He gave the recording to one Caleb Okoth who understood the languages used in the conversation for preparation of a transcript.



53. Later in the course of his investigations, he obtained a Court Order to investigate the MPESA Account of the 1st accused person at Safaricom Ltd and requested for call data and subscriber details on the mobile phones of both accused for the period 1/4/2014 to 20/7/2014.
54. That upon analysis of the data he established there had been communication between the accused and the complainant, and also found Mr Cleopas Odhiambo's two mobile numbers namely 0722-792-986 and 0731-050-311 in the 2nd accused's call data.
55. Finally that the EACC head of Supply chain Management (Robert Kanyi Wachira-PW5) was able to identify the voice of the 2nd accused when he played recordings to him and further the human resource manager confirmed the employment status of both accused at EACC.
56. At the end of his investigation, he compiled the file which was forwarded to the learned DPP, after which he prepared the charges against the accused.
57. Under cross examination, the investigator was shown Pros Exh 6(b) - the translated transcript and agreed that the 1st accused did not make any communication in it. He also confirmed that Cleopas Odhiambo- (PW 8- hereinafter 'Odhiambo') and Evelyn Achieng (PW 10- hereinafter 'Evelyn') had not dealt with the 1st accused. He stated that the money was to be shared between the accused, but agreed this was not in his statement. He also agreed that call data only indicates that there was communication, but not the contents of the communication. He was shown the translated transcript Pros Exh 6(b) at page 6 line 7 and agreed that it was the complainant talking about the money, though according to him this showed there had been an earlier conversation. He agreed that it was Cleopas Odhiambo who had sent Evelyn.
58. Corporal Jacqueline Makena (PW 3), PC Reuben Njagi 9 (PW 4), Caleb Okoth Okoth (PW 6),PC Karen Kiplangat (PW 9) all testified in agreement with the testimony of the investigator that they are EACC Officers who had played various roles in the investigation and arrest operation.
59. Makena (PW 3) identified Pros Exh 4(i-xxviii) as the genuine currency notes that she treated using APQ Chemical. She also produced Pros Exh 7, a photocopy of the said currency notes which the complainant had verified. She placed the treated money in a khaki envelope and had released it to the complainant on two occasions, with instructions to her on how to handle it.
60. Njagi-(PW4), Caleb Okoth (PW6) and Karen (PW9) confirmed that they all took part in the arrest operation of 15/7/2014. Njagi testified that his role was to record calls received and made by the complainant on the way to Nation Centre. He testified that the complainant had received a call from a lady on the way and also, in agreement with Karen's testimony, that she made a call to the lady at the scene. Caleb Okoth and Karen testified that the initial operation on 14/7/2014 to Ngong Road did not materialize and neither did that at TRM, along Thika Road on the same date.
61. Njagi and Caleb Okoth, testified in common that from a strategic point where they had parked their vehicle, they saw the complainant, who was accompanied by Karen, meet a young lady at the scene.
62. Caleb Okoth testified that he saw the complainant give a brown envelope to the lady. He then followed them from behind together with Njagi as the two entered Diamond Trust Bank (DTB). He stated that he saw the young lady whom he later came to know as Evelyn, touch the treated money inside the bank.
63. Caleb Okoth also testified that he was later requested to transcribe the recording which had parts in Luo language and English which he understands. He identified the original transcript he prepared as Pros Exh 6(a) and the translation as pros Exh 6(b).



64. Quinto Odeke (PW 11) testified that he was based at the Safaricom Security Department Law Enforcement Section as an analyst.
65. He continued that on 23 July 2014, Safaricom Ltd received an order of court (Pros Exh 12) requiring them to extract MPESA Statement relating to mobile No. 0704-XXX-289 for the period 1/4/2014-31/5/2014.
66. He also testified that according to a letter dated 21/7/2014, (Pros Exh 13) from EACC, his employer had received a request for call data record and subscriber details relating to mobile numbers 0725-XXX-707, 0704-XXX-289, 0720-XXX-590, 0720-XXX-088, 0724-XXX-460, 0726-XXX-206 and 0710-XXX-870
67. In his analysis, he extracted MPESA Statement for mobile no. 0704-XXX-289, registered in the name of Felix Mutinda. According to him the investigators were interested in two transactions, one dated 3/4/2014 showing that the subscriber received ksh. 50,000/- from one Judith Omuonyi of mobile No. 0720-XXX-262. The other transaction was dated 3/5/2014 and showed that the subscriber had received ksh 5000 from the same mobile number. He produced a certified copy of the MPESA Statement- (pros Exh 14)
68. Further testimony by the witness is that in relation to the second request, the investigators were interested in mobile numbers 0704-XXX-289 and 0720-XXX-590 which according to him, are registered in the names of Felix Mutinda and Frederick Marembo respectively.
69. In his analysis in this regard, he established that there had been communication between the two numbers on 3/5/2014, 5/7/2014, and 7/7/2014. He produced the call data record as pros Exh 15(a).
70. In relation to mobile number 0720-XXX-262 registered in the name Judith Omwonyi, he established that the 2nd accused's mobile number had called Judith's number on 14/7/2014 at around 9:33 am. And later on the same date at around 12:18pm. At 12:20 pm Judith's number had called the 2nd accused's number, while the 2nd accused's number had called Judith's number again at 2:19 pm and 4:39 pm. On the next day 15/7/2014, the 2nd Accused had called Judith's number at around 10:44 am, at 10:45 am and Judith's number had called the 2nd Accused's at 10:51am. The 2nd accused's number had called Judith's again at about 1:03pm. He produced the call record as Pros Exh 15(b).
71. Odhiambo testified that on 15/7/2014, the 2nd Accused, his friend of about 7 years whose workplace he knew as EACC Procurement Department had called him and enquired whether he was within Nairobi CBD. He informed the 2nd Accused that he was at industrial area but still enquired what the 2nd accused wanted him to do for him. He stated in testimony as follows;

‘... He told me that he wanted me to collect a parcel for him from Nation Centre, as he was far from town. I asked him whether it was urgent so that I could send one of my workers. He told me that it was okay. I contacted one of the casual workers called Evelyn and instructed her to call a number 0720-XXX-262 which Fred had given me. She was to call the number when she reached Nation Centre. She went to Nation Centre and called the number. She told me that the owner of the number was not there. I told her to wait. Shortly she called me and told me that they had met. I asked her what type of parcel it was. She said it was money in an envelope. I enquired how much it was, she said she had not counted. I told her to proceed to a nearby bank and count. She told me that she had met two persons. The other person was a female ’

72. His further testimony is that Evelyn did not get back to him thereafter and was not reachable on telephone. He called the 2nd and asked him whether he knew the person he had sent. That the 2nd



- Accused responded that he did not know her very well. When he suggested that he should report to police, the 2nd Accused asked him to wait for a while and not to report.
73. At that point, he decided to call the 'lady' whose number he still had and learnt from her that she had parted with Evelyn a long while. He called Fred again who told him to wait as he confirmed but did not get back.
74. He then made a decision to report to Police but before he did it, received a call from his wife informing him that Evelyn had called. Shortly thereafter he was called by a Mr Maiva from EACC who enquired whether he knew Evelyn which he confirmed, and was then asked to report to EACC integrity centre the next day. He went as required and recorded a statement.
75. Under cross examination, he stated that the 2nd accused had called him on his mobile number, adding that Safaricom would have the evidence. He confirmed that he sent Evelyn to collect the parcel. He stated that Evelyn told him that she had received the money, however he could not positively confirm that. He agreed that he had not seen her receive the money. He maintained that the 2nd Accused had given him a mobile telephone number when he called him. He did not know whose number it was.
76. Evelyn testified that in July 2014 she was a cashier at a business called Koga Printing Works, where she worked for three months. She confirmed that her boss was Odhiambo.
77. She proceeded that on 15/7/2014 one Dennis a workmate, gave her a telephone number. She was to go and collect ksh 180,000/- from the owner of the number at Nation Centre. She had not been told the name of the owner of the number.
78. At Nation Centre, she called the number and a lady responded. The lady came with another lady and she noticed also, a male who seemed to be with them 'but it was not obvious.'
79. According to her the lady she called asked her whether she was Fred's sister to which she responded in the negative. She stated that she did not know Fred. Further the lady asked her how much money she was to collect and she said it was ksh. 180,000. The lady further enquired about who had sent her, and she said it was her boss Cleopas.
80. She stated in further testimony that the lady then gave her an envelope and she suggested that they could confirm the money at Diamond Trust Bank. She entered into the Bank with the two ladies. She stated that she removed the money from the envelope but noted that some of it did not seem real and turned to ask the lady she had called, but the lady noticed and signalled the other lady, who then introduced herself as a police officer and told her that she was under arrest. She was taken to a vehicle outside the bank, where her hands were swabbed with cotton wool. She was later told to write a statement about the events of that day.
81. Under cross examination, she stated that Dennis a workmate, had given her the number and denied that she was given the number by Odhiambo. She further stated that Dennis had told her that she was to be given money, and that he had further told her to collect the money and deposit it in Odhiambo's bank account. She stated that she had not seen any of the accused persons.
82. In his defence, the 1st accused stated that he had reached agreement with the complainant, who was prequalified to supply electronic accessories including laptops to EACC, to purchase a laptop from her at ksh. 60,000/-.
83. He further stated that he was to make payment at the end of January 2014 upon receipt of salary, through the bank. He however did not get time to go to the bank but had an ATM card and therefore agreed with the complainant to pay her through ATM withdrawals under which he was limited to ksh. 20,000/- per day.



84. It is his further statement that he withdrew ksh. 20,000/- through ATM on 4/2/2014, 5/2/2014 and 6/2/2014, making a total of ksh 60,000/- which the complainant was to collect from his office.
85. He further stated that indeed the complainant collected the amount of ksh 60,000/-and promised to deliver a laptop but had not done so after a month. He therefore decided to demand his money back which she agreed to repay.
86. He then referred to the MPESA Statement (Pros Exh 14) and stated that the ksh. 50,000 that he allegedly solicited was part of the refund. He also referred to the payment of 5000 made on 3/5/2014 and wondered why the complainant would send money to him every month yet he was not her employee, adding that there was something that the court was not told.
87. He added that he followed up on the remaining ksh 5000/- from the complainant which resulted in bad blood. He concluded by saying that he was not barred by any law from doing business with the complainant and produced a copy of a bank statement (Defence Exh 1) which according to him shows that on 8/2/2014, he withdrew ksh 20,000/- within the locality of EACC. According to him, the charges against him are not true.
88. In his defence, the 2nd accused stated unsworn in relation to Count 4 which he faces, that he has never sent anybody to collect any amount of money from anyone, and particularly the complainant.
89. According to him, he only heard the allegation in court, stating that when Evelyne testified, she had confirmed that she had never met him nor spoken with him. According to him, Evelyne never had his telephone contact, and had also testified that one Dennis had sent her to collect the money.
90. He also stated that he had heard Odhiambo confirm in court that he sent Evelyn to collect a parcel and not money. He denied receiving ksh 28,000/- from the complainant, stating that he had not mentioned to the complainant in the recorded conversation, that he needed money. He stated further that he was not part of the team that made pre-qualifications at EACC and could therefore not cancel as it was done by a team, and concluded by saying that the complainant's story had changed from the two LPOs to pre-qualification which is mentioned in Count 4, which he denies.
91. I have carefully considered the entire evidence alongside written submissions on record relied upon by Counsel.
92. It is common ground that the 1st Accused received ksh 50,000/- from the Complainant via MPESA on 3/4/2014. He also received a further ksh 5000/- in the same manner on 3/5/2014.
93. The evidence is also clear that Evelyne (PW 10) received ksh 28,000/- in treated currency alongside a further 72 ksh. 1000/- in treated fake currency papers, for an arrest operation mounted by EACC Officers around Nation Centre- within Nairobi CBD on 15/7/2014. This operation followed a complaint by the complainant. The money was recovered from her and recorded in an Inventory – Pros Exh 9, prepared by Karen Kiplangat of EACC.
94. The prosecution asserts that the ksh 50,000/- which is the subject of the charges in Counts 2 and 3 against the 1st Accused was solicited for and received as a bribe in order to prevent the cancellation of an LPO No. 1169783 indicated in the particulars to be for the supply of cameras.
95. Having examined the LPO (Pros Exh 3), bearing the serial number referenced in the particulars to the charge though, I note that it does not relate to supply of cameras, as the particulars allege, but to the supply of a Macintosh workstation. Another exhibited LPO- Serial No. 1169786 (Pros Exh 1 (a)) is the one that refers to supply of digital video cameras.



96. As both LPOs are before the court I take it that the reference to LPO No. 1169783 is nothing more than a mistake that does not vitiate the charge against the 1st Accused.
97. In her evidence, the complainant stated that the 1st Accused asked her to send ksh 50,000/- when she sought extension of delivery time for the cameras by 14 days. She explained that she feared that the tender may be cancelled for non-delivery. She also told the Investigator the same thing but the evidence of the investigator has scant details as to when and where the alleged solicitation occurred.
98. The complainant also testified that the 1st Accused gave her a mobile telephone number to which she sent the money. The 1st Accused acknowledges that he received the money which therefore confirms this fact. Call data evidence adduced herein also shows that the 1st Accused's mobile number had made calls to that of the complainant. He has said nothing in this regard in his defence and the only conclusion is that he made the calls to the complainant.
99. However, according to him, the money was part of a refund for ksh 60,000/- which he had paid to the complainant to purchase a laptop. He explained that he had withdrawn three amounts of ksh 20,000/- each from his ATM on 4/2/2014, 5/2/2014 and 6/2/2014, making a total of ksh. 60,000/- which the complainant subsequently collected from his office. According to him, she failed to deliver the Laptop after a month's wait and agreed to refund him the money. Accordingly, the complainant sent him ksh 50,000/- on 3/4/2014 and a further ksh 5000/- on 3/5/2014. Bad blood thereafter developed when he sought the remaining ksh 5000/-
100. His explanation for resorting to ATM withdrawals is because he found no time to go to his bank.
101. He produced a certified copy of a Bank Statement Defence Exh 1 to support his contention that he made ATM withdrawals.
102. I have examined the said copy of Bank Statement and it does indeed show withdrawals of ksh 20,000/- on 5/2/2014 and 6/2/2014 but not 4/2/2014. It also shows many other withdrawals for the same amount throughout the month of February 2014.
103. In his defence, the 1st Accused does not state when the complainant allegedly collected the ksh 60,000/- or where the missing ksh 20,000/- was withdrawn from.
104. The LPO cited by the complainant (Pros Exh 1(a) shows that it was approved on 4/3/2014. The complainant testified that it was one of two that she received from the 2nd Accused in March 2014. There is therefore general agreement between the date on the document and the testimony by the complainant. From the MPESA Statement produced herein (Pros Exh 14), it would be about a month from the date of the LPO and the date when the complainant sent ksh 50,000/- to the 1st Accused.
105. An examination of the cross-examination of the complainant does not show that the above allegation by the 1st Accused, relating to the purchase and repayment for a laptop was put to her by the 1st Accused. While indeed in her testimony the complainant did refer to a laptop sale transaction, she was clear it was with the 2nd Accused, who she said she met for that purpose.
106. It then seems clear to me that the allegation in the statement by the 1st Accused relating to purchase of a laptop from the complainant is nothing but an afterthought.
107. This conclusion is further reinforced by the evidence of the Investigator, who testified that he recorded a statement under enquiry from the 1st Accused, and that his explanation for the amount of ksh 50,000/- was that he occasionally sought financial assistance from the complainant. In his defence, the 1st Accused has made no reference to this statement.



108. According to Defence Exh 1, the 1st Accused's Account is held at Co-operative Bank, City Hall Branch, and although much may not turn on it, I found his claim that he did not get time to go to his Bank a bit odd.
109. While it does show some ATM withdrawals, Defence Exh 1 does not fully support the 1st Accused's claim that he withdrew ksh 60,000/- on the dates he alleges.
110. Whereas in relation to the laptop that the complainant sold to the 2nd Accused, a Delivery Note (Pros Exh 2) is exhibited in Court, the 1st Accused has presented no document to support his allegation that he purchased a laptop from the complainant.
111. I think it is appropriate to hold for a moment, consideration of the case against the 1st Accused at this point and to revisit it after the evidence relating to the charge facing the 2nd Accused.
112. The charge against the 2nd Accused in Count 4 is that he corruptly received through an agent, the amount of ksh 28,000/- as a benefit from the complainant so as not to be disqualified from the EACC list of pre-qualified suppliers for the financial year 2014-2015.
113. The complainant testified that having had an initial encounter with the 2nd Accused, when she gave him ksh 100,000/- in order to receive the first two LPOs herein after making an 'odd' demand of ksh 520,000/-, the 2nd Accused later called her to collect a third LPO (Pros Exh 3), and that thereafter, the 1st and 2nd Accused together ramped up the pressure on her to 'pay the balance from the ksh 520,000'.
114. She testified that his demand was accompanied by a threat of disqualification from the next supplier pre-qualifications. According to her, it is this pressure that led her to consult and make a complaint against the Accused. The investigator confirmed the complaint in his testimony.
115. The investigation of her complaint entailed audio recordings of telephone calls that were played in Court and the transcript is admitted herein as pros Exh 6(a) and (b). These audio recordings were done by the Investigator and Njagi (PW 4), who also heard parts of the conversations.
116. The recorded audio comprises conversations between the complainant and the 2nd Accused. In his unsworn statement, the 2nd Accused did not question his participation in those conversations, although he made other denials.
117. Careful perusal of the translated transcript (Pros Exh 6(b)) highlights two important things, besides being proof of the telephone calls themselves. One is that the name of the 1st accused features prominently in the conversations and is repeatedly referenced by the complainant and the 2nd Accused.
118. For instance, at page 2 of the transcript, at line 6 from top, the 2nd Accused states;

'... Am very surprised with what Felix told me...'

He proceeds at line 21 from top on the same page as follows;

'...But Felix was telling me that it is like ah..Fred I don't trust Judy nikama ah..Judy anataka kutuseti na hizo pesa, nikamuuliza what..i was calling him...'

He later states at the same page at line 6 from bottom;

'...When he picked, he told me that he was called by somebody who informed him that Judy want to set you up...'



119. The 2nd Accused further states at page 3 line 13 from bottom as follows;

‘...Then the thing I asked him is that the ones have given him why is she not setting us, the ones you had given him he called you ulimpea ngapi? fifty (50) Fred umenipea ngapi? Hundred (100) he is the one who saidthat you told him to come here, then he did come’

At page 4 line 12 from top the complainant states;

‘...Yah! and you know if I want to set Felix I sent him money on MPESA fifty thousand (50,000/-) Are you aware?’

120. The second point is that although there is no clarity in the conversations about the amount, the 2nd accused actively pursues the complainant to send money to him but seems hesitant to personally meet her to collect it.

For instance at page 4 line 7 from bottom the 2nd Accused states;

‘...You just send me. Mi nimeenda anyway, just send to the M-pesa the number nimekutumia me I don’t have any issue with you I don’t trust you. If I’m a bad person I would have not told you...’

At page 6 Line 6 from top the 2nd Accused states;

‘...Ata in fact you can send me in fact the hole (sic) that 140/- send that person give you the number (sic)...’

The complainant then states at line 8;

‘...Aaah okay! So I send for the money (sic) through M-pesa you gave me.’

To which the 2nd Accused replies;

‘...Yaah! send it’

121. From the conversation there seems to be an agreement that the complainant should send the money via M-pesa. Then she states as follows at line 10 from bottom at page 6, which evidently throws a spanner into the 2nd Accused’s works;

Judith: Hallo Fred I have forgotten the phone am using cannot send you unless ee it is still new and have not activate M-pesa I had changed I’m using iPhone now...’

Fred: Mmmh

Judith: now you have with you two options, either the day you would be willing to meet me and see face yangu uchukue nini yako ama ungoje nikisa activate ndio nikutumie gani ndio unadecide ama tuonane uchukue pesa yako saa hii niko town..... One eighty thousand. Unadhania town nitapata float ya one eighty wapi?

The conversation at a further point then proceeds as follows;

Judith: Ei, hiyo ata kuongea ni hard. Okay sasa what do we do? Tell me, nikuje nikuone ama utanitafuta...’

Fred: Uko wapi?

Judith: Mimi niko town.



Fred: Town na wapi?

Judith: Niko hapa Nation Centre, hapa Nanak House

Fred: Let me send someone.

122. The conversation then continues between the complainant and a person named Eveline as follows;

Judith: Habari yako?

Eveline: Nzuri

Judith: Wewe ndio umetumwa na Fred sindio?

Eveline: yaah.

....

Judith: Mimi naitwa Judi

Eveline: Mi naitwa Eveline

Judith: Eech

Eveline: Yaah

Judith: We ni sister yake?

Eveline: Nnn nafanya kazi na yeye

Judith: Aaah, Hio ni poa

Eveline: Mmmhahaha. Mmh

Judith: Hhhh.. Sasa ndio hii pesa

Eveline: Ha? Ni how much

Judith: Alikuambia one eighty?

Eveline: Sawasawa.

....

Judith: Alikuambia ...kwa nini yeye mwenyewe hakuja kuchukua.

Eveline: Hakuja amenituma..

123. From here the conversation between the complainant and Evelyne continues until they enter into a bank to count the money.

124. The conversation then continues between the complainant and Odhiambo as follows;

Odhiambo: Msha toka na yeye ama bado mko?

Judith: Mi nimeachana na yeye

Odhiambo: Oooh, umemuacha wapi?

Judith: Hapo tu town

Odhiambo: Ooh, hamkuingia kwa bank?

Judith: Nilimalizana na yeye mimi nikamuacha.



....

Judith: Na wewe ni nani?Aha? Ea, Mimi Mimi ndio nilie niliambiwa na nani.....nikutumbe hukoUliambiwa na?

Judith:

Odhiambo:

Odhiambo: Si umejua. Ulitumwa nanani?

Judith: Nilitumwa na Fred.

Odhiambo: Yaah!

125. In her testimony, Evelyne claims that she was sent by one Dennis, her workmate to collect ksh 180,000/-. She does agree that Odhiambo was her boss. In his testimony, Odhiambo makes no mention of Dennis. He states that at the request of his friend the 2nd Accused, he sent Evelyne to collect a parcel. His evidence is that the 2nd accused had referred to it as a parcel. He only learnt that it was money from Evelyne.
126. On his defence, the 2nd accused denies sending anybody to collect anything on his behalf. He instead suggests that it is Odhiambo who sent Evelyne to collect a parcel. He also says that it was a parcel and not money.
127. On her part, the complainant was clear that the 2nd accused told her that he would send somebody to collect the money. Later she was called by Evelyne who told her that she had been sent by Fred. Her version finds support in the testimonies of EACC officers Njagi, Karen Kiplangat and Okoth.
128. In his testimony, the investigator stated that he interviewed Evelyne who told him that she had been sent by her boss Odhiambo, who had also given her a mobile phone number to call the person she was to meet.
129. Odhiambo testified that he obtained the number that he gave Evelyne from the 2nd Accused. Subscriber Evidence called from Safaricom confirmed that the number 0720-XXX-262 is registered in the complainant's name.
130. The 2nd accused did not indicate in his defence that he telephoned Odhiambo. However, call data evidence availed in court, shows the 2nd accused had Odhiambo's telephone numbers.
131. After considering the evidence, I find Odhiambo's version of the events is well corroborated in the testimonies of the investigator, the complainant, and EACC Officers who went to the scene. It is also well corroborated in the audio recording pros Exh 6(b), whose contents are in agreement with the testimony he gave in court.
132. On the other hand, the evidence by Evelyne does not accord with the recorded conversation that she had with the complainant. From the conversation, she states in response to enquiry by the complainant that she was sent by Fred-the 2nd Accused. She made no reference of Dennis to the investigator when he interviewed her nor to the complainant during the conversation, yet it was her testimony in court that the said Dennis told her to collect the money and deposit it in the account of Odhiambo. She did not during the testimony, provide any details of that Bank account.
133. She seemed to have known at the time, that she was to collect money, and the amount thereof- namely ksh 180,000/-, a matter that Odhiambo had no knowledge of, going by his testimony. Looking at the conversation, it is clear that she personally knew the 2nd accused.



134. Although she repeatedly referred to Dennis in her testimony, he is not a witness in this. Everything attributed to him by her is therefore worthless hearsay.
135. The record does not also reflect well on Evelyn. It shows that she had refused to cooperate with investigator even after having recorded a statement, and it took compulsion through a warrant of arrest by this court for her to attend and testify.
136. Taking her evidence and conduct in this matter, I have concluded that Evelyn (PW 10) was not a candid witness, and did not tell the court the whole truth. Her failure to mention Dennis to the investigator in this matter following her arrest suggests that she introduced this angle in her testimony in an effort to disassociate the 2nd accused from her assignment at Nation Centre. She had however already made it apparent in the conversation with the complainant that she knew the 2nd Accused and was likely in conversation with him as well.
137. Her lack of honesty is also reflected in her conversation with the complainant when she tells her that she worked with the 2nd Accused, unbeknown to her that the complainant had interacted with him at his workplace.
138. It is not far-fetched to venture then, that her knowledge of the 2nd Accused is also what made her withdraw co-operation with investigator in this matter and attempt to evade making testimony.
139. From the evidence hereinabove, it is therefore made clear that the 2nd accused in a bid to obfuscate his intentions, procured his friend Odhiambo to collect a bribe on his behalf, which he also cleverly disguised as a parcel. It is for this reason that he did not want Odhiambo to make a report relating to Evelyn, to Police. He also kept Odhiambo waiting for him to make a 'confirmation' that he never did and never communicated back. He purported to Odhiambo that he barely knew the complainant, yet he had by then met and dealt with her, both within his EACC office in the procurement Unit and outside.
140. Call data records produced herein show in agreement with the evidence by the complainant that the 2nd Accused's mobile number had numerous outgoing and incoming calls to that of the complainant, especially on 14th and 15th July 2014 when EACC Officers executed the arrest operation.
141. The Audio recordings before Court were of those calls and the 2nd Accused has been identified as one of the speakers in those conversations, making it clear that he was the maker of those calls.
142. The audio evidence presented in court as seen hereinabove, also shows and corroborates that of the complainant that the 1st and 2nd accused persons worked together in relation to the events that culminated in the receipt of treated money by Evelyn.
143. I now pick consideration of the 1st accused case from where I had left it.
144. From the entirety of evidence, as seen, it is now further clear that the 1st Accused's allegation that the ksh 50,000/- he received was a refund following a failed laptop purchase from the complainant, is wholly implausible and far-fetched.
145. It is also clear from the audio evidence that the complainant send the 1st Accused ksh 50,000/- by way of Mpesa in circumstances that are very different from those he describes in his defence. It is further clear that the 2nd Accused received ksh 100,000/-, although it is not the subject of a charge. Both amounts were received in the transaction relating to the three LPOs issued to the complainant's firm, and which had been the subject of the 'odd' demand for ksh 520,000/- by the 2nd Accused, and in the knowledge of the 1st Accused.



146. I find based on the testimony by the complainant, which is well corroborated in the audio recording, that in fact the 1st accused did solicit and did receive a bribe in the sum of ksh 50,000/- from her.
147. As such the charges in Counts 2 and 3 are proved against him beyond all reasonable doubt.
148. In relation to the 2nd accused, and based on the foregoing analysis, I find that the evidence clearly demonstrates that he was the intended beneficiary of the monies received by Evelyne, which he actively pursued, but seemed to develop cold feet, when his accomplice the 1st accused raised alarm bells relating to a possible set-up.
149. As such I find that he used Odhiambo, as a conduit for the intended bribe, but Odhiambo who was not personally available at the time, in turn sent Evelyne for collection of what the 2nd Accused had described to him as a 'parcel'. At all material times, Odhiambo and Evelyn were respectively acting at his direct and indirect instance and on his behalf, and therefore as his agents.
150. I find that the receipt of the bribe by Evelyne did not break the chain of causation that weaves its way to the 2nd accused person.
151. The 2nd Accused in his defence raised the prospect that because he had no role in the process of pre-qualification of suppliers, he would likely not have had a reason to receive a bribe from the complainant in the terms of charge in Count 4. This contention however flies in the face of section 50 of the ACECA which provides as follows in part;
50. Impossibility, no intention, etc., not a defence
- In a prosecution of an offence under this Part that involves a benefit that is an inducement or reward for doing an act or making an omission, it shall not be a defence—
- a) that the act or omission was not within a person's power or that the person did not intend to do the act or make the omission;..
- b) ...
152. I have found that the evidence before Court shows he made a solicitation and did in fact receive a bribe. I am satisfied that the procurement from which the charges herein resulted was properly a matter relating to the affairs of EACC.
153. I therefore reject the 2nd Accused's defence herein and do find that the charge against him in Count 4 is proved beyond all reasonable doubt.
154. In the end, I Convict the 1st accused in Counts 2 and 3, and the 2nd accused in Count 4 hereof, under section 215 CPC

R/A 14 Days

FELIX KOMBO

SENIOR PRINCIPAL MAGISTRATE

DELIVERED IN OPEN COURT THIS 8TH DAY OF JANUARY 2019

