



REPUBLIC OF KENYA



**Republic v Ng'etich (Anti-Corruption Case 18 of 2016) [2019] KEMC 12 (KLR)
(Anti-Corruption and Economic Crimes) (27 August 2019) (Judgment)**

Republic v Jeremiah Kimutai Ng'etich [2019] eKLR

Neutral citation: [2019] KEMC 12 (KLR)

**REPUBLIC OF KENYA
IN THE ANTI-CORRUPTION MAGISTRATE'S COURT
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION CASE 18 OF 2016**

**F KOMBO, SPM
AUGUST 27, 2019**

BETWEEN

REPUBLIC PROSECUTOR

AND

JEREMIAH KIMUTAI NG'ETICH ACCUSED

JUDGMENT

1. The Accused person Jeremiah Kimutai Ng'etich is a Police Constable and employee of the National Police Service who was stationed at Kilimani Police Station at the times material to these charges.
2. Three Counts are preferred herein against him all derived from the *Anti-Corruption and Economic Crimes Act* (Hereinafter 'the ACECA') as follows;
3. Counts 1 and 2 carry the offence of corruptly soliciting for a benefit contrary to Section 39(3) (a) as read with Section 48 of the ACECA.
4. Particulars to Count 1 are that on 17 /10/2016, at Kilimani Police Station within Nairobi County, being a person employed by a Public Body, to wit, the National Police Service as a Police Constable, corruptly solicited for a benefit of Ksh 20,000/= from Boaz Ogola Owiro, as an inducement so as to release motor vehicle registration number KBX 372Q and forbear charging him for an alleged traffic offence, a matter relating to the affairs of the said public body.
5. In Count 2, the particulars are similar save that the alleged offence was committed the day following that in Count 1, namely 18/10/2016 and the amount allegedly corruptly solicited was ksh 15,000/-.
6. In Count 3, the Accused is 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.



7. Particulars are that on the same 18/10/2016, the Accused corruptly received a benefit of ksh 10,000/- from Boaz Ogola Owiro as an inducement so as to release motor vehicle registration number KBX 372Q and forbear charging him for an alleged traffic offence, a matter relating to the affairs of the said public body.
8. The Accused denied the foregoing charges at plea on 8/11/2016 and a trial ensued before me from 3/4/2017.
9. A total of eight prosecution witnesses testified in support of the charges.
10. At close of the prosecution case I called the Accused to his defence in the three Counts. He thereafter made an unsworn statement and produced documentary evidence on 19/3/2019. He did not call any witnesses.
11. It is important to note that prior to making his defence, the Accused had initially elected to remain silent but I later allowed an Application by his advocate Mr Cheboi to vacate the judgment date and grant him leave to defend himself.
12. At close of evidence, Mr Cheboi for the Accused and Ms Kambaga for the State filed written final submissions, which they later chose not to orally highlight.
13. Boaz Ogola Owiro, (PW1) ('the Complainant') a taxi operator and owner of motor vehicle KBX 372Q- a Toyota Probox testified as follows;
14. On the night of 16/10/2016 as he drove along Ngong Road towards Satelite area, his vehicle was hit by another vehicle from the rear. He tried to reach settlement at the scene with the other driver who however insisted that the Police had to be called as his vehicle was company-owned.
15. Two Police Officers from Kilimani Police Station visited the scene of the accident. They arrested him and towed his vehicle to the Police Station.

He described what happened at the Police Station as follows;

... At the Police Station, one of the Officers I heard being referred to as Ng'etich told me to give out money so that I am not put in the cells. Ng'etich is the one in the dock. They told me that I should collect my vehicle the next day. I gave the officers ksh. 2500/-...'

16. That he went back to the Police Station the next day- a Sunday to collect his vehicle but did not find the officers, returning again the following day- a Monday – when he found Mr Ng'etich (The Accused) and described his experience as follows;

...I told him that I had gone for the vehicle. He then asked me how much money I had. He told me that if I gave ksh 20,000/- he would help me not get charged. As I had leased the vehicle and was under pressure from the owner, I decided to go make a report at EACC Offices...'

17. At EACC he was inducted on the use of an audio-visual recording device (Pros Exh 1). He described the instruction given by EACC Officers as follows;

...They told me to use the gadget to bargain with the suspect. I recall how the gadget was, It resembled an ignition key (Recording Gadget MFI1). I went to Kilimani Police Station where I met Mr Ng'etich. I bargained with him. We reached agreement at ksh. 10,000/-...'



18. That after meeting with the Accused, he returned with the recorded conversation to EACC Offices where it was played back. On the following day at the same offices, an Officer called Joy Kawira gave him treated ksh. 10,000/- in ksh 1000/- denomination currency notes inside an half-cut envelope. He signed on the envelope- (Pros Exh 3) and also a photocopy of the currency notes (Pros Exh 6).

19. He thereafter left in the company of EACC Officers to Kilimani Police Station where he was once again given the recording gadget. He described the events at the Police station this time as follows;

... At the Police Station, I entered as they remained outside. I met Mr Ng'etich inside and we went to the Police Station yard. I removed the money from inside the envelope and gave him. He counted the money and put it at the back pocket. I then beeped Mr Wachira who came with the other officers. They introduced themselves and demanded for the money. He removed it and gave them. All that while my recording gadget was on. It was in my shirt pocket...'

He stated further as follows;

... When the Accused received the money from me, he returned my car keys and insurance certificate which he had retained. The accident had occurred at midnight. The date was 15/10/2016. That would be 15th-16th October 2016. We arrived at the Police Station at 3:00 am on 16/10/2016. I was released after the demand for money. I returned to the Police station Saturday but did not get the officers. I went back on

Sunday. The Accused did not talk to me because I had no money. We negotiated the money on 18/10/2016. That is also when he received the money...'

20. He concluded his testimony by stating that after arrest the Accused was escorted to the office of the Divisional Traffic Officer (DTO) where he remained outside and further that the Accused received the money so as not to charge him for the accident.

21. At the conclusion of his testimony the Prosecution requested to play the Audio-Visual recording in Court which the Court granted.

22. In relation to the recording, he identified the image of the Accused and described the different voices in the recorded conversation as his own, that of the Accused and a lady Owner of a tow Vehicle.

23. Under cross examination, the Complainant agreed that two Police Officers whose names he did not know went to the accident scene. He stated that the Accused demanded for ksh 2500/- which he gave, so as not to be put in the cells. He denied offering a bribe. He stated that he asked for a receipt which was not given. He maintained that Mr Ng'etich demanded for ksh 20,000/- when he met him and that EACC Officers gave him a recording gadget and told him to negotiate with him. He confirmed that his recording gadget was on when he gave the money. He maintained that the Accused had removed the money from the back of his 'jeans' pocket when it was demanded and that he was not searched.

24. Under re-examination, he stated that he had not paid any money when he first met the Accused.

25. The testimony of the Complainant is substantially similar to that given by EACC Officers namely Joy Kawira (PW 2) , Shee Bakari (PW 3), Francis Kamwara (PW 5), Amos Yiankaso (PW 6) and James Wachira (PW 8- 'Hereinafter 'the investigator')

26. Joy Kawira confirmed that at the request of the Investigator, on 18/10/2016, she treated the sum of ksh 10,000/- in ksh 1000/- denomination- Pros Exh 5(i)-(x) with APQ Chemical for an arrest operation,



- which money she also inventoried, photocopied and verified with the complainant. She gave the money to the complainant inside a half cut envelope with instruction not to touch it until demanded.
27. Shee Bakari, Francis Kamwara, and Amos Yankaso all confirmed that they accompanied the complainant and the Investigator upon request, to Kilimani Police Station where they arrested the Accused after receipt by him of the treated amount of ksh. 10,000/- in the police station yard. They all testified that the currency was recovered and inventoried in Pros Exh 7. They further testified that they all signed the Inventory alongside the Accused. It is further their joint testimony that car keys (Pros Exh 8) and an Insurance Certificate (Pros Exh 9) were recovered from the complainant.
28. Amos Yankaso testified that he personally recovered the treated money after conducting a search on the Accused; He stated as follows under cross examination;
- ...I did the search. I checked his trouser pocket. I recovered the money on the back right pocket...'
29. On his part, Shee Bakari testified in part on the same matter as follows;
- ...Immediately we introduced ourselves, he removed ksh. 10,000/- from his pocket and handed it over to James Wachira. The person we arrested is in the dock (points)...'
30. His further evidence is that a search was conducted inside the Traffic Base Commander's Office for other items such as a weapon. According to him, at this point, the investigator also recovered Pros Exh 8 and 9 from the Complainant.
31. Francis Kamwara stated as follows under cross examination in relation to recovery of the trap money;
- ... We asked the Accused whether he had received any money from the complainant and he agreed. He removed the money from his pocket. It was loose money. It was ksh 10,000/-...'
32. The Investigator confirmed in his testimony that he arranged the arrest operation involving his colleagues at EACC following a bribery complaint by the complainant which he was assigned to investigate.
33. He met and interviewed the complainant and inducted him on the use of an audio-visual recording device. According to him, the Complainant went to Kilimani Police Station where he had a recorded conversation with the Accused. The Complainant returned the recording which he listened to. He stated as follows in this regard;
- ...I listened and established from the recording that there were two demands for ksh 15,000/- and ksh. 10,000/-which was a downward negotiation...'
34. He referred to the Transcript of the Recording at page 1 and identified lines which according to him confirm the fact.
35. It is after ascertaining the demands as above that he arranged an arrest operation which involved a request to Joy Kawira to treat the operation money.
36. He further testified that at Kilimani Police Station, he received a pre-arranged signal from the complainant and they proceeded and arrested the Accused in the Police Station parking yard.



He described the recovery of the bribe money as follows;

...We introduced ourselves and demanded the money from the suspect. My colleague Francis Kamwara did a search and recovered ksh. 10,000/- from the pocket of the suspect...'

37. His further testimony is that the complainant confirmed the recording as the true conversation he had with the Accused and that he later prepared a transcript of the same (Pros Exh 2). Pros Exh 2 contains a certificate of transcription signed by the Investigator.

38. Further that he played the audio-visual recording to the DTO stating as follows in this regard;

...I played the Video Recording to him and he was able to identify both the image and voice of the suspect. He signed pros Exh 11...'

39. He added that he conveyed exhibits to the Government Analyst who confirmed in a Report that the swabs had traces of APQ Chemical. He stated that he recovered Pros Exh 9- An Insurance Sticker from the Complainant who told him that the suspect had returned them to him and that they were seized when he recorded his statement.

Under cross –examination, he stated in part as follows;

...I received information from the complainant. He told me that he met the Accused on 17/10/2016 who told him to take back ksh. 20,000/-. The complainant said it was bribe money...it is not true that the demanded money was cash bail. Cash bail can be negotiated. Cash Bail would not be ksh 20,000/-...'

40. Daniel Kiplagat Chirichir (PW 5) an Assistant Superintendent of Police and then DTO Kilimani Traffic Base confirmed in testimony that he met with EACC Officers who had arrested one of his Officers. He confirmed that the Accused had a case under investigation at the time.

41. He testified that when he made enquiry from the Accused he told him that he had asked for cash bail from the complainant, who had instead gone to report at the EACC. Further that when he asked EACC Officers why they arrested the Accused in those circumstances, they played for him a Video Recording in his office in which he was only able to identify the image of the Accused but not his voice. He identified Pros Exh 11 as the certificate which he signed in that regard. He agreed that the Video recording had sound but the Accused appeared to be 'murmuring'.

42. When the Video Recording was played back to him again in Court he seemed to change his position regarding lack of sound in the video recording and stated that he heard some people talking but did not know what the conversation was about. He claimed he had heard the words 'niletee kumi', but did not see the Accused open his mouth to say it.

43. Under cross examination he stated that it was standard procedure to ask for cash bail and that there was no fixed amount. He maintained that he heard the words 'niletee kumi' but did not identify the voice.

44. William Kailo Munyoki (PW 6) a Government Analyst testified that he received exhibits which he described as ksh 10,000 in a khaki envelope (Pros Exh 5 (i)-(x), left and right-hand cotton swabs in khaki envelopes (Pros Exh 12 and 13) under the names Jeremiah Kimutai Ng'etich, a half-cut envelope (Pros Exh 3) and an APQ Control sample in a khaki envelope (Pros Exh 14)

45. The accompanying request was for him to ascertain whether the APQ Control sample could be detected on the conveyed exhibits.



46. He testified that from his examination the chemical was detected on all the exhibits conveyed. He produced his Report in that regard (Pros Exh 15) and the Exhibit Memo (Pros Exh 16)
47. In his fairly lengthy defence, the Accused made an unsworn statement as follows;
48. That he is a Traffic Police Officer based at Kilimani Police Station where his duties include records and investigation of traffic cases.
49. That a non-injury road traffic accident had occurred on 15/10/2016 along Ngong Road involving motor vehicles KBY 168 S Toyota Fielder and KBX 372 Q- Toyota Probox.
50. The Accident scene was attended by accident stand-by Officers PC John Kiiru and Onesmus Maingi who also arrested the complainant, impounded his vehicle and made the entry into the Occurrence Book. They also released the Accused because the accident was non-injury.
51. That On 17/10/2016- he received a telephone call from one Chebon, the driver of the Toyota Fielder vehicle who informed him that the complainant's vehicle was in the Police Yard but the driver had been released and that Chebon wanted the complainant to contact him and therefore asked him to give him (the complainant) his telephone number. On the same day the Complainant returned for his impounded vehicle and found him at the Report Desk. He checked the Occurrence Book and found that he had been assigned to investigate the accident. He gave the complainant the other driver's telephone number and asked him to deposit a cash bail of ksh 20,000/- to secure release of his vehicle.
52. That the complainant agreed and left to look for money but returned saying the repairs were expensive and he could not raise the cash bail. He asked for a reduction and proposed ksh. 10,000/-.
53. That he then asked the complainant for his Driving License and Insurance Cover which the complainant said were in the car and insisted on going to get the money first.
54. That when the complainant returned same day at around 3:30-4:00 pm, he complained of damage to his car and requested him to go and view it at the parking yard, which he did in the company of his in-charge-one Shadrack Chula of Records. (Not a witness).
55. That at the Parking Yard, he asked the Complainant to call the person who towed the vehicle as he noted its bumper was missing and its whereabouts needed to be established.
56. That while at the Yard, he was ambushed by four unknown persons who introduced themselves as EACC Officers. He explained that the Complainant was to get a cash bail receipt and they became hostile and he surrendered.
57. He was taken to his office where his in-charge Shadrack Chula was and where the DTO also found them. His hands were swabbed. He stated that it is EACC Officers who had the money and not him.
58. Further that he was thereafter released on cash bail and the officers also demanded for his trouser and shirt saying they were exhibits, which he did not see in Court.
59. That he continued with investigation and when the Complainant and the other driver did not agree, he charged the complainant in Milimani Chief Magistrates Traffic Case No.22441/2016 where the complainant pleaded guilty and was fined ksh 50,000/- or seven months imprisonment in default. He produced the proceedings as Defence Exh 4. He also produced his Police Inquiry file as Defence Exh 2.
60. Further that the complainant did not raise the fine and came from Prison to testify against him.
61. That he did not have powers to release the vehicle and produced a copy of the Vehicle Release Order dated 26/10/2016 (Defence Exh 1). He further identified the original Occurrence Book extract- Copy



of which is Pros Exh 17 and a copy of the Duty Roster for the week of 14/10/2016-22/10/2016 (Defence Exh 3) which shows his name at item 6 and duty as 'Statements and Abstracts' and also the names of accident stand-by officers as PC John Kiiru and PC Onesmus Maingi.

He finally stated as follows;

...I did not commit the offences before Court. We were still inside the Police station when I was arrested...'

62. I have carefully considered the foregoing evidence alongside submissions by Counsel.
63. A point in the submissions by the Defence which I should address at this early stage is that there is no indication that the Prosecution obtained the requisite consent to prosecute the Accused as required by Section 35 of the ACECA and did not notify parties.
64. Counsel cited a number of High Court decisions where proceedings initiated without compliance have been quashed. All are based on the decision of the Court of Appeal in Criminal Appeal No. 331 of 2010- Nicholas Muriuki Kanga'ang'i v. Republic .
65. The response to the defence contention in submissions on behalf of the State is that there is no requirement for disclosure of the consent and further that the same was obtained as a statutory requirement and the Accused did not ask for it.
66. I do not think that there is a requirement on the part of the learned DPP to notify the parties that he has granted consent for prosecution. This is with respect, misdirection on the part of Mr Cheboi for the Accused.
67. Because the obtaining the requisite consent is an investigative step and it is mandatory, my view is that the evidence of the Investigator should ordinarily cover it and if so, that should suffice to demonstrate the fact. I have looked at the testimony of the investigator herein and it does not appear to cover it.
68. Though this may be the case, I do not however yet agree with the defence contention that there is nothing to show compliance by the Prosecution with section 35 ACECA. There are other facts, in my view, from which the Court can deduce compliance.
69. It is a fact that this case is directly prosecuted by a representative of the learned DPP acting on his general or specific authority. That in my view is prima facie evidence of his consent under Section 35 ACECA and I so find. There can be no other understanding of the circumstances.
70. As such, the circumstances create a rebuttable presumption which the defence cannot undo by mere allegation. I therefore reject the contention that there was non-compliance with the section in commencing these proceedings against the Accused.

I now address the merits of the case.

71. In relation to Count 1 which is a charge of corruptly soliciting ksh 20,000/- on 17/10/2016, there is no evidence of such solicitation on the alleged date, besides the word of the complainant.
72. The Accused in his defence stated that when the Complainant went to the Police Station on 17/10/2016, to collect his vehicle he asked him to deposit ksh. 20,000/- as cash bail.
73. The evidence by the complainant in relation to what happened on 17/10/2016 is woefully inconsistent.



74. He gives a conflicting account of what happened on that date alleging in one part of testimony that the Accused asked for ksh 20,000/- and in another that the Accused did not talk to him that day because he had no money.
75. In the audio transcript (Pros Exh 2) which relates to an audio visual recording made by him on 18/10/2016, it appears that from the alleged conversation with the Accused, the complainant had no knowledge of any settled amount. He says;
- ...Nijue ni ngapi anaweza akanitumia tutoe gari...
- The Accused then responds
- ...twenty, iyo ni sawa iyo...
- He then launches into a negotiation for reduction of the amount.
76. The Audio transcript's credibility is itself in question and I will address it later in this judgment.
77. Beyond the conflicted testimony of the complainant in relation to what happened on 17/10/2016, there is no evidence of any recorded conversation before the Court for that date to support his allegation of a solicitation for ksh. 20,000/- by the Accused on 17/10/2016.
78. Indeed as far as the 17/10/2016 is concerned, there is only left standing the statement of the Accused to the effect that he asked the complainant to deposit a cash bail of ksh. 20,000/-
79. The foregoing notwithstanding, if it can be said that there was a request for ksh. 20,000/-by the Accused, then the purpose thereof is challenged and I will revisit the issue shortly. I will in the meantime address other issues touching on Counts 2 and 3.
80. Count 2 relates to an alleged corrupt solicitation for the amount of ksh 15,000/- on 18/10/2016, and the audio transcript, appears to expressly reflect this as a downward negotiation between the complainant and the Accused from an initial ksh. 20,000/-.
81. Count 3 relates to an alleged corrupt receipt of ksh 10,000/- by the Accused.
82. There is evidence in relation to Count 3 that the Accused had contact with APQ chemical even as he denied that he received the money. The evidence by the Government Analyst shows that swabs delivered to him by the Investigator contained traces of the APQ chemical used by Officer Joy Kawira to treat the money. The Accused acknowledged that his hands were swabbed and the investigator testified that he did it.
83. The evidence also shows that the Accused, amongst others, signed Pros Exh 7- the Recovery Inventory on 18/10/2016.
84. As relates to the contention that the Accused 'received' the money as alleged against him in Count 3, there is an important issue that emerges from the evidence and which is also raised by defence submissions relating to differing witness accounts on the recovery of the alleged bribe money. Further as relates to its alleged receipt, there is nothing besides the evidence of the complainant, barring the fact the swabs obtained from the Accused showed traces of APQ.
85. From the excerpts of evidence I have highlighted above, evidence from the complainant and amongst EACC Officers, all who were at the scene at the same time was incredibly inconsistent in its description of circumstances under which the treated money was recovered from the Accused.



86. Looking at it, it is not clear who recovered the money. Is it Mr Kamwara as the Investigator testified, or is it Mr Yankaso as he stated himself. And how was the treated money recovered? Did the Accused remove it from his trouser pocket and hand it over as Shee Bakari and the Complainant testified, or did Yankaso recover it after a search as he testified, or did Mr Kamwara recover it after a search as the Investigator testified?
87. These inconsistencies cast serious doubt on where the money was at the point of recovery, which further casts doubt on the allegation that the Accused actually received it.
88. Moreover, the Accused in his defence made a claim that the trouser that he wore on that day and his shirt were recovered by EACC Officers. There is no Inventory in this regard and the items are not produced. The Accused has consistently made this claim and the Court at some point issued summons against the Investigator who denied that the items were seized. The denial was not a very convincing rebuttal of the Accused's claim as it is the common practice in EACC Investigations to recover clothing that is likely contaminated with APQ chemical in similar circumstances.
89. Another matter of concern is that there seems to be no existing video recording of the recovery when it happened, even though the complainant states in his evidence that his Audio Visual Recorder was running at the time EACC Officers made recovery. The Audio transcript (Pros Exh 2) is suspiciously scant on details of the conversations during that recovery.
90. There is also no video or audio recording of what transpired at the time when the complainant was allegedly handing over the treated money to the Accused. There is equally nothing recorded in relation to the complainant's claim that upon receipt of the treated money from him, the Accused gave him back his Insurance Sticker and car keys which had allegedly been seized. As regards this alleged seizure, the complainant's evidence lacks clarity as to the point after his arrest when it happened.
91. The evidence of the Investigator is that he 'recovered' the car keys and Insurance sticker from the complainant, but the evidence is scant on the point at which they were seized from him, and precisely by who.
92. In relation to the recording, I find it highly improbable that there was no conversation at all, which could have been captured by his recorder, during the process of handing over the money by him and alleged return of the other allegedly seized items by the Accused. I also find it suspicious that crucial points of his interaction with the Accused during the arrest operation went unrecorded.
93. The audio transcript for clip 2 completely misses the point at which the complainant handed over the money or received his car keys and insurance sticker while indicating capture of other conversation allegedly held at the parking yard, which raises great suspicion about its reliability, although in his oral evidence, the complainant stated that the Accused received the money, counted and pocketed it.
94. The Accused's statement and the testimony of the complainant are in agreement that they were at the parking yard when the alleged corrupt transaction took place.
95. This is indeed confirmed in clip 2 of the Recording and its audio transcript which is clear that the conversation happened in the parking yard. It is also clear that the conversation involved three people, the other being the lady owner of a tow vehicle.
96. There is no evidence called from the owner of the tow vehicle who ought to have witnessed the alleged receipt of the bribe money and return of the car keys and insurance sticker to the complainant.



97. Taken together, all the matters I have highlighted above cast doubt on the veracity of the allegation in Count 3 that the Accused in fact 'received' the treated bribe money as alleged, the presence of APQ chemical on his hands notwithstanding, and notwithstanding that he signed the Recovery Inventory.
98. It would have helped a great deal if the process of recovery of the alleged bribe money from the Accused was clearer and was not itself shrouded in mystery.
99. I now finally address the key issue in this case which relates to the question whether the money allegedly solicited and received by the Accused was in fact a bribe.
100. In his defence, the Accused has also taken the firm position that the amount alleged against him as a bribe was intended as cash bail and this is a key point of determination in this case in relation to Counts 2 and 3.
101. As seen hereinabove, the Investigator testified that it is the complainant who told him that the amount involved was a bribe. The investigator's own reason for agreeing with the complainant appears to be based on the amount itself, and little else.
102. He contends that cash bail amount could not be ksh 20,000/- but does not state the basis for that contention. On his part the complainant seems to have concluded so because the money was not received in the office and was not receipted.
103. The complainant testified that the alleged exchange of money happened at the parking yard which fact, as already seen, has support in the audio visual recording in clip 2.
104. In his defence, the Accused explains how he got to the parking yard, by stating that the complainant alleged that his vehicle had damage which he wanted the Accused to examine. The Accused told the complainant to call the person who towed the vehicle, and her presence at the scene and the subject of discussion is confirmed by the recording in clip 2.
105. This lends credence to the statement by the Accused and renders the statement by the complainant to the effect that the Accused went to the parking yard solely to collect the bribe money incredible.
106. It appears to me that the complainant lured the Accused to the parking yard and the possible reason will become clearer herein below. In my view therefore there is no iota of credibility in his statement trying to justify the alleged receipt as a 'bribe' because it 'happened in the parking yard'.
107. The Accused on his part stated that the amount requested was for cash bail. He did not deny that he was at the Police Station parking yard when it was alleged to have been received but insisted that he was ambushed and arrested before he could process a receipt.
108. His Boss the DTO at Kilimani Police Station (PW 5) while not expressly confirming that the money was for cash bail, did not rule it out. Granted that the evidence by this witness left quite a bit to be desired, the State, having called him, seemed to turn against him, by submitting that he 'kept contradicting himself' which I found unusual. It will suffice to say that his evidence did not do much to aid the State's case.
109. I have examined the audio transcript and Recording to see whether there is any support for the theory advanced by the prosecution that the amount could not have been cash bail and found nothing.
110. Thus while the audio transcript is clear about a negotiation between the Accused and the complainant where agreement is reached at ksh 10,000/-, from an initial amount of ksh 20,000/-, there is nothing to suggest the purpose of the amount. It does not appear that any investigation was done to rule it out the contention that it was intended for cash bail.



111. The evidence shows that the Complainant had the money with him when he went to the Kilimani Police Station parking yard with the Accused, although as already seen, the circumstances of exchange of the money between the two are murky and undocumented.
112. Moreover if the Accused did in fact receive the money within the parking yard if at all, I would agree with him that this was still within the Police station and that per se does not suffice to show that it was received as a bribe. In any case the evidence indicates that it is the complainant who lured him to the parking yard.
113. The Accused's explanation that he had no opportunity to issue a receipt does not, in the circumstances of his arrest, appear implausible. It does not also appear that any investigation was done to rule such an intention out.
114. There is an important issue that arose from the testimony of the complainant that I must address at this point.
115. He testified in part that he was asked by EACC Officers to go and 'negotiate' with the suspect. From the recorded conversation, he actually did and proposed the amount of ksh. 10,000/- which is what he finally obtained as trap money.
116. Counsel for the defence addressed the decision in *Mohamed Koriow Nur v Attorney – General* [2011] eKLR. which is the local locus classicus on the defence of entrapment. Two passages from this decision are pertinent starting at page 13 of 31 where an English decision in *R V Mack* [1988] 2S .C.R 903 is cited as follows;
- ...Entrapment occurs when (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bonafide inquiry, and (b) although having such a reasonable suspicion or acting in the course of a bonafide enquiry, they go beyond providing an opportunity and include the commission of an offence...'
117. And at page 15 of 31 where an American decision *The People of the State of New York v Edward . Isaacson – Court of Appeals of New York*, 44 N.Y 2D 511(1978);
- ...That even when entrapment is not established, the Court may be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar them from invoking judicial process to obtain a conviction...'
118. It is my view that although faced with a legitimate complaint, the EACC Investigator went too far in requiring the complainant, whom he had issued with with an Audio-Visual Recorder, to negotiate the alleged initial bribe afresh with the suspect and by virtue of that, became himself mired in the complaint and incapable of undertaking an independent investigation.
119. The likely result of this would be that the complainant would thereafter manoeuvre the conversation with the suspect towards a desired end in line with the instruction by the Investigator, in order to ensure arrest, and in the process compromising the credibility of the recording obtained.
120. In this case, it may indeed be that this is the reason why the complainant drew the accused out of the office to the parking yard so that he would later allege as he did in this trial, that the treated money was received outside the office.



121. In conclusion therefore and in my view, the Investigator herein went beyond providing an opportunity for the suspect to finish the alleged reported offence and in effect, the instruction to 'negotiate' led the complainant himself to make counter offers of bribery amounts, a matter that the law does not countenance.
122. The Investigator then preferred these charges against the Accused based on the contents of the negotiation, which he himself initiated through the complainant.
123. Going by the principles in Mohammed Koriow Nur, the outcome of that stage-managed negotiation was nothing short of entrapment and I so find.
124. A further problem touching on the credibility of the audio transcript is that the Investigator actually made it himself, as he admitted in his evidence.
125. Being himself interested in the outcome of the case, the Investigator ought to have obtained independent transcription of the recording.
126. I was unable to verify the contents of the transcript at the point of writing this judgment because Pros Exh 10, a DVD Disc into which the Investigator testified he had downloaded the Audio-Visual Recordings that were played in Court, showed no content when I attempted to play it on two different computers, a matter that I found strange.
127. In his defence, the Accused brought his own documentary evidence which shows that he was not the person who arrested the complainant and impounded his vehicle. It appears in Pros Exh 17, that a PC Maingi and PC Kiiru made an OB hand-over entry of their 'stand-by' duties at 07:20 hours after following the entries relating to the traffic accident in question.
128. As Defence Exh 3 item 6 shows, the Accused was during the week in question assigned the desk duties of 'statements and abstracts'.
129. Defence Exh 2 shows that he is not the one who ultimately released the vehicle. He stated that he had no power to release the vehicle, to which the State countered with a submission that he could not plead impossibility due to the provisions of section 50-ACECA.
130. I would agree that it may not have mattered whether he could release it or not, but there is simply no evidence that it had been placed under his custody by the impounding officers namely PC Maingi and PC Kiiru.
131. This therefore raises serious doubts on the complainant's statement that the Accused demanded the bribe of ksh. 20,000/- to release the vehicle.
132. Proceedings in Traffic case No. 22441/2016 show that the Complainant was ultimately charged at the end of investigations contained in his Inquiry file- Defence Exh 2- with the offence of careless driving c/ s 49 of the *Traffic Act*. I agree with the Accused's statement that this is not a minor offence and requires investigation. It is therefore not unreasonable, and is common for suspects facing such to be bailed pending completion and charge.
133. The prosecution submitted that the charge followed a botched process at bribery by the Accused but while there is evidence by the Accused via Defence Exh 2 that the matter was under investigation prior to the traffic charge against the Complainant, there is no evidence to support the contention by the State.
134. Although the prosecution in its submission has highlighted that the Accused gave an unsworn statement, nothing adverse should be said about his choice. I am also satisfied that the statement by the



accused and the documents he produced do respond to the evidence adduced by prosecution witnesses in this case.

135. Finally, the credibility of the complainant was not helped by his concession under cross-examination that he paid a bribe of ksh. 2500/- on the night of his arrest namely 15-16/10/2016 ostensibly to secure freedom spending a night in the Police cells.
136. He only raised the matter of allegedly having asked for a receipt for this amount under cross examination, when he denied that the payment was not a bribe.
137. It is clear that he did not make any report at EACC in relation to this amount. It is not clear who actually received the amount because he stated that he gave it to the 'officers' while insisting that it was demanded by the Accused, who as evidence shows, was not involved in his arrest and detention of his vehicle.
138. All said and done and for all the above reasons, I have come to the conclusion that the charges preferred herein in Counts 1, 2 and 3 against the Accused must fail.

I therefore acquit him of the same under section 215 CPC.

R/A 14 Days.

FELIX KOMBO

SENIOR PRINCIPAL MAGISTRATE

DELIVERED IN OPEN COURT THIS 27TH DAY OF AUGUST 2019

