



REPUBLIC OF KENYA



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**Republic v Malela (Anti-Corruption Case 18 of 2017)  
[2018] KEMC 101 (KLR) (24 July 2018) (Judgment)**

*Republic v Justina Syonzua Malela [2018] eKLR*

Neutral citation: [2018] KEMC 101 (KLR)

**REPUBLIC OF KENYA  
IN THE ANTI-CORRUPTION MAGISTRATE'S COURT  
ANTI-CORRUPTION CASE 18 OF 2017  
DN OGOTI, CM  
JULY 24, 2018**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JUSTINA SYONZUA MALELA ..... ACCUSED**

**JUDGMENT**

1. The accused faced several charges. The first was that of abuse of office contrary to section 46 of the *Anti-corruption and Economic Crimes Act* No 3 of 2003 as read with section 48(1) of the same Act. The facts were that the accused on the 8<sup>th</sup> day of September 2016, in Nairobi county within the republic of Kenya being a person employed by a public body to wit, the Ministry of interior and co-ordination of National Government as a clerical officer II, used her office to improperly confer to herself a benefit of Kshs 2,500/- from Nahum Syombua Musyoka, as an inducement to facilitate the processing of a birth certificate for Wayne Musyoka Maria, a matter relating to the affairs of the said public body.
2. Alternatively she faced a charge of receiving a bribe contrary to section 6(1) as read with section 17 and 18 of the *Bribery Act* No 47 of 2016. The facts were that the accused on the 8<sup>th</sup> day of September 2016, in Nairobi County within the Republic of Kenya being a person employed by a public body to wit, The Ministry of Interior and Coordination as a clerical officer II, requested for a financial benefit of Kshs 2,500/= from Naum Syombua Musyoka, as an inducement to facilitate the processing of a birth certificate Wayne Musyoka Maria, a matter relating to the affairs of the said public body.
3. In the second count the accused faced a charge of office abuse contrary to section 46 as read with section 48(1) of the *Anti-Corruption and Economic Crimes Act* No 3 of 2003. The facts were that the accused on the 8<sup>th</sup> day of September 2016, in Nairobi county within the Republic of Kenya being a person employed by a public body to wit, The Ministry of Interior and Coordination of National



Government as a clerical II, used her office to improperly confer on herself a financial benefit of Kshs 2,500/= through her Mpesa account number, 0702113032 form Naum Syombua Musyoka, as an inducement to facilitate the processing of a birth certificate for one, Wayne Musyoka Maria, a matter related to the said public body.

4. In the alternative the accused faced a charge of receiving a bribe contrary to section 6(1) of the *Bribery Act* no 47) of 2016 as read with section 18 and 27 of the same act. The particulars were that the accused on the 8<sup>th</sup> day of September 2016, in Nairobi County within the Republic of Kenya being a person employed by a public body to wit, the Ministry of Interior and Coordination of National Government as a clerical officer II, received a financial benefit of Kshs 2,500/= from Naum Syombua Musyoka. She pleaded not guilty in all counts. The prosecution called 5 witnesses.
5. PW1, Naum Syombua Musyoka testified that on 30<sup>th</sup> August 2016, she wanted a birth certificate for her nephew, Wayne Musyoka Maria. She called Lutta (PW2) who told her, he knew Justina Malela working at Huduma centre Kibera. PW2 sent her Justina's number and after one week she called her on 8<sup>th</sup> September 2016. Justina whom she did not know asked to be sent Kshs 3,000/-.The figure was negotiated to Kshs 2,500/= as she could not afford Kshs 3,000/=.PW1 sent her Kshs 2,500/= on the 8<sup>th</sup> of September 2016 via her Mpesa No 0702113032.The accused asked for details and she was sent them through Whatsup. The accused promised her the said certificate the same day in the evening. That never came to be and the accused even stopped receiving her calls. On reverting back to PW2, PW2 advised her to go to Huduma centre. At Huduma centre she was advised by PW3 to report to the integrity centre. At Integrity centre she was introduced to Amos (PW5) who recorded her statement and told her to wait for him to complete investigations. That she had only met the accused twice the second one being in court that day. In cross examination she informed the court that she had known PW2 when she had an issue with her baby and that PW2 was just a friend. That though she knew he did not process birth certificates, PW2 knew someone who could assist. At Huduma centre she was told the accused used to work there but had left. That she knew a form had to be filled and a waiting card issued. That the Kshs 2,500/= was asked by the accused who was a stranger to her. She also did not present any document to accused.
6. PW2, Bernard Chekai Lutta previously worked for an NGO, Konoina Community in Dagoretti. Between 2013 and 2016, he volunteered with the children's department, Kibera. He knew the accused who worked for registration of persons in the adjacent office. He happened to know PW1 who in 2016 had a case of maintenance of a child. PW1 later called him and told him that she wanted a birth certificate for her child.PW2 the referred PW1 to accused and at the same time sent her accused number. Later he was called by Amos an officer from EACC who asked him if he knew the accused of which he confirmed. He was asked to go and make a statement which he did. PW2 identified accused in court. In cross-examination, he informed the court that accused worked with National Registration Bureau and that he knew PW1 in 2016 but not later. He knew accused between 2013 and 2016 and by the time he left, she was still working in Kibera. When he needed a birth certificate for her daughter accused helped her get the same why so he referred PW1 to accused. That PW1 told him she had sent some money to accused who had not given her the birth certificate. He further informed the court that he knew the process of applying for a birth certificate. He also knew that accused had refunded the money.
7. PW3, Alice Shiundu described herself as a civil servant working at Huduma centre Nairobi and staying on Ngo'ng. She received PW1 on 20<sup>th</sup> September 2016 while working as the manager Huduma centre, Kibera. PW1 was complaining about accused who had taken long to process a birth certificate. PW1 showed her exchanges in form of messages and an Mpesa transaction. She then referred her to the EACC. In cross examination, she informed the court that her duties among others were to co-ordinate



staff, address all complaints and supervise staff. Accused was one of her staff dealing with issuance of identity cards and was answerable to her same as one, Jackline Egesa who also reported to this witness. PW1 told her she had been referred by a man working in that area. By that time the accused had already left the station. She had also received an e-mail not to allow accused to access any Huduma centre in Kenya. She referred the complainant to the EACC and she did not know whether accused refunded the money. She took accused telephone number from PW1 and confirmed the same as accused used to work with them and that she did not instigate her arrest.

8. PW4, Tom Gerald Mboya was a forensic investigator with the EACC. He did forensic examination for both mobile and computers. He was a trained police officer and forensic examiner who also extracted information for investigators for mobile phones that had been seized. On 26<sup>th</sup> September 2016, he received a mobile phone from PW5, a techno-8. It was serial No IMEI35757226207354166I. He extracted data including contacts, call logs, and SMS messages. He used a Celebrite UFED32 serial No 5927654 and obtained a UFED report generated by the machine. It included extracted data which he then copied to a DVD before handing it over to PW5. He prepared a report that was later produced as Pexb1. In cross-examination this witness informed the court that his report only contained text messages
9. PW5, Amos Yankaso was the investigating officer with EACC. His duties involved sting operations, trap operations and general investigation of corruption matters among others. On 29<sup>th</sup> September 2016, he was assigned this matter by his assistant director to investigate. He took down the complainant's statement where she alleged that the accused received money to process a birth certificate. He then took the complainant's phone and subjected it to investigations by way of data extraction which he produced as Pexb2. The extraction was done by PW4. He found that there was a conversation between accused and PW1 and between PW1 and PW2. That in the conversation PW1 wanted a birth certificate processed and she was given accused number by PW2 to assist her process the certificate. PW1 received accused number from PW2 on 30/8/2016 at 9:02pm. On 8/9/2016, PW1 sent a message to accused telling her she had sent the details of the birth certificate to be processed. On the same date, she asked accused whether she would take her the money in the evening as she went for the certificate but accused replied saying "No please tuma nipeane saa hii". Around 11:28 am, PW1 replied saying "sawa" meaning she had agreed. Around 11:53 am on the same day, PW1 sent the money. PW1 had gotten the money from an Mshwari loan as was shown in entry No 1370(Pexb2). At the same time, 11:53 am, an Mpesa message, K188NOOJ04 confirmed Kshs 2,500/= sent to Justina Malela on phone No 0718199998674 on 8/9/2016 at 11:51 am. At 11:56 PW1, sent a message to accused asking "imefika ama". Recipient did not reply. She sent another message "umepata", still no reply. Another entry showed PW1 sending a message to PW2 reading "Si you call her umwabile asinikosee please". That was around 15:27. PW2 replied at 15:35 saying "She is offline" which meant she had switched off her line. At 15:36 PW1 sent another message which read "Do you think she will help me coz she said it will be ready in the evening". At 16:18, the same evening PW1 sent a message to accused which read "PW2 wants to talk to you "anasema anakukol unakuwa mteja". Around 16:19 pm, PW1 sent a message to PW2 she was now online. Entry No 1394 showed that around 17:11, PW1 sent a message to accused asking her "umefikishe wapi", no reply was received. This witness accordingly found accused received money to process a birth certificate, a task she did not do. His report, Pexb2 was dated 23/9/2016. An investigation on the accused phone showed that she received money on 8/9/2016 around 11:51 and it read "Receipt No K188NOOJO4.Funds received from 254702113032.Kshs 2,500/=, Naum Musyoka. He produced the Mpesa records as Pexb3. By the time of the investigation, the accused had been moved from the Kibera Huduma centre to Kasarani registration office. He produced accused employment letter dated 19/1/2009 for the Office of the vice President, Ministry of state for Immigration and Registration of persons. In the said letter, she was being appointed to the



department of Civil Registration, Pexb4. He also found that PW1 had requested PW2 who could assist her process a birth certificate for her niece. PW2 then connected her to Accused who had assisted one of his friends to get a birth certificate. The birth certificate was never processed. He also called the accused who went to the EACC and recorded her statement. In cross examination, this witness indicated that PW1 informed him that she had sent particulars to accused by Whatsup. That the message in entry No 1361 by accused that read “tuma saa hii nipeane” meant it was to be given to someone, though it did not say how much. That in his statement, he mentioned that the money was to be transmitted to Kyalo. He established that the accused worked for the National Registration bureau and not civil registration. That the money in question Kshs 2,500/= was refunded to PW1 on 14/3/2017 before the case was brought to court. By that time he had concluded the investigation.

10. In her defence, the accused confirmed that she knew the charges facing her. She worked for the National Registration Bureau, at Kasarani as a senior Clerical Officer, performing duties among others, registering adult Kenyans and issuance of identity cards. She confirmed having received a call from PW1 who had been given her number by PW2 on 8/8/2016. The issue was to assist PW1 process a birth certificate for her nephew. She informed PW1 that they only dealt with issuance of identity cards and referred her to a freelance clerk called Kyalo who had an office at AGIP house which floor she did not know. One week later PW1 called her telling her that Kyalo had not processed the documents. That PW1 sent her Kshs 2,500/= whose purpose she did not know and that Kyalo had asked her to submit the necessary documents. She confirmed having worked with PW2, who worked at the children’s department at Kibera. She met PW1 in court. She knew PW3, though she had never worked in the department of birth certificates. That there existed bad blood between her and PW3 because accused used to work so efficiently. That PW1 neither sent any documents to her nor was the Kshs 2,500/= meant to be a bribe. That on 14/3/2017, she returned money to a stranger who had sent her the money (Dexb1). Kyalo could not process the documents because PW1 did not supply the documents. She denied that her phone was ever examined and that she could not confirm the particulars in Pexb1. By the time she was answering the charges, she had already refunded the Kshs 2,500/=. PW2 also lied that she had assisted him, though in cross examination she stated that she actually assisted PW2 process a birth certificate for his friend. That she referred PW1 to Kyalo though at Huduma centre Kibera, there was a desk for registration of births and deaths. Further that PW2 knew that accused knew somebody who worked at the civil registration office. She insisted that PW1 was a stranger to her. The above is the evidence upon which this court is required to find out whether the prosecution has proved its case against the accused person beyond all reasonable doubt.
11. The prosecution submitted in their final submissions that from their evidence they had satisfied the elements of the charge of abuse of office against the accused person. In her submissions just like in her defence, accused denied ever working at the civil registration desk and ever having issued birth certificates. According to her, on receiving a call from PW1, she told her she did not process birth certificates and referred her to a person she named Kyalo, a freelance clerk. That though she received Kshs 2,500/= from PW1, she did not know what the money was meant for and it was not a bribe. She referred to PW1 as a stranger whom she refunded the money to on the 14<sup>th</sup> March 2017 after the stranger asked for a refund. She never received requisite documents from accused for the processing of a birth certificate.
12. From the above evidence the following are the points for determination;
  1. Whether the offence of abuse of office contrary to section 46 as read with section 48(1) of ACECA Act No 3 of 2003 was brought out.
  2. Whether the accused requested for a bribe and whether the accused received a bribe contrary to section 6(1) as read with section 18 and 27 of the Bribery Act No 47 of 2016.



3. Whether the statement of accused was recorded voluntarily.

**1. Whether the offence of abuse of office contrary to section 46 as read with section 48(1) of ACECA Act No 3 of 2003 was brought out.**

13. PW1 narrated how she obtained the accused mobile number from PW2 in order to be assisted to obtain a birth certificate for her niece one, Wayne Musyoka. She obtained the number on 30<sup>th</sup> August 2016. After one week she called accused on 8<sup>th</sup> September 2016. After explaining to her why she called, accused asked for Kshs 3, 000/= and promised to deliver the same by that evening. The figure was negotiated down to Kshs 2, 500/= which PW1 sent on the same day. The accused then went mute. In his evidence PW5 produced Pexb1 and Pex2. I have looked at the said documents. From Pexb2, at entry No 1099, PW1 received accused number from PW2 on 30/8/2016 at 9:02pm. Pex1, 2 and 3 indicate there was exchange of messages between PW1, PW2 and PW3. She did not answer nor respond to any calls or messages from PW1. I find as a fact that there was communication between PW1, PW2, and PW3.

**2, Whether the accused requested for a bribe and whether the accused received a bribe contrary to section 6(1) as read with section 18 and 27 of the *bribery Act* No 47 of 2016.**

14. PW5 testified that on 8<sup>th</sup> September 2016, at around 11:53 am, PW1 sent the money to accused. At the same time, 11:53 am, an Mpesa message, K188NOOJ04 confirmed Kshs 2,500/= sent to Justina Malela on phone No 0718199998674. An investigation on the accused phone showed that she received money on 8/9/2016 around 11:51 and it read “Receipt No K188NOOJO4. Funds received from 254702113032.Kshs 2,500/=, Naum Musyoka. He produced the Mpesa records as Pexb3. This evidence was not controverted and I find as a fact that the accused received Kshs 2,500/= form PW1. She explained the circumstances under which she sent the Kshs 2500/= to the accused. The accused responded that the accused was a stranger to her. That accused never gave her any documents and that accused returned the money on 14<sup>th</sup> March 2017, pursuant to a request form PW1. PW5 testified and satisfied the court that the accused was an employee of the Ministry of State for Immigration and Registration of persons. This is the ministry responsible for registration of persons. The court finds that issuance of birth certificate under the said ministry was a public duty. This piece of evidence was not controverted either. Hence I find as a fact that the accused requested for a bribe to perform a public duty.

**3, Whether the statement of accused was recorded voluntarily and whether refund of Kshs 2,500/= to PW1 absolved the accused form PW1’s complaint.**

15. The issue of the statement of accused being involuntary was raised in defence. I cannot treat the said submission by the defence otherwise than to treat it as an afterthought, which I do. This issue was not raised anywhere in the trial. According to my finding that evidence is not worthy of any credit.

16. In the case of *Harry Amwai Etemesi v R* (1997) eKLR, the court found the case against the accused person a clear case. The judges observed as follows and I quote,

“.....The appellant as the cashier of Kenya Breweries Ltd, Kisumu Branch, owed the company a duty to account for all the money received on its behalf. The appellant was on 10th August 1992 asked to account for all the money he was shown to have received on account of his employer but failed to do so. A rebuttable presumption was raised that he had stolen the money. The onus was on him to rebut this presumption. He could do so either by producing the money or showing how the money had been applied, if at all for the



benefit of the employer. He was given an opportunity to do so on 10th August 1992, but he failed to do so. We agree that at that point, the offences charged were complete”.

17. By the time accused received the Kshs 2,500/= from PW1, the offence of receiving was complete. In this case the prosecution demonstrated that accused knew who the sender of the money was thought but accused went ahead to describe PW1 as a stranger. The evidence available demonstrated that PW1 only needed a public duty to be performed which the accused took advantage of.
18. On whether accused requested for money, PW1 narrated to the court how she obtained the accused mobile number from PW2 in order to be assisted. She got accused’s mobile number on 30th August 2016. After one week she called accused. After explaining to accused why she called, accused asked for Kshs 3, 000/= and promised to deliver the same by that evening. The figure was negotiated down to Kshs 2, 500/= which the accused sent on the same day. In the case of *Maina Ndirangu v R* (Criminal Appeal No 48 of 1997, NRB), the Court of Appeal relied on the cases of *Rex v Kipkering Arap Koske* (1949) EACA,135 and *Simon Musoke v R* (1958) 715 and held that circumstantial evidence against the appellant excluded co-existing circumstances which would weaken or destroy the inference of guilt and also irresistibly pointed to the appellant as having committed the offence convicted for. I also do find that after considering the evidence by PW1, the evidence strongly points to the fact that accused requested for a bribe in order to perform a public duty.
19. Consequently I find that the republic proved its cases against the accused person beyond all reasonable doubt in the alternative counts to both count I and Count II for the charges of requesting for a bribe receiving a bribe contrary to section 6(1) as read with section 17 and 18 of the [Bribery Act](#) No 47 of 2016 and is convicted u/s 215 of the [CPC](#) Cap 75 LOK.

**DATED AND DELIVERED IN OPEN COURT THIS 24<sup>TH</sup> JULY, 2018**

**D.N.OGOTI**

**CHIEF MAGISTRATE**

**24. 7.2018**

