

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION
CRIMINAL APPEAL NO. E011 OF 2025

SUSAN WAMBUI MUIRURI.....APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

*(Being an appeal from conviction and sentence by Hon. I.N. Barasa PM on
19th January 2024 in her Chief Magistrate's Court at Milimani Anti-
Corruption case No. E005 of 2023)*

JUDGMENT

In the lower court, the appellant faced the following two counts;

Count 1- receiving a bribe contrary to Section 6(1)(a) as read with Section 18 of the Bribery Act No. 47 of 2016 particulars being that on the 25th day of April, 2021 at Kasarani Police Station, within Nairobi City County, being a person employed by a public body to wit, National Police Service as an Inspector, she requested for a financial advantage of Kshs 10,000/= from Juma Olunga Wakhayanga with intent that, in consequence, she would improperly facilitate his release and Pamela Kajuju from Police custody.

Count 2- receiving a bribe contrary to Section 6(1)(a) as read with Section 18 of the Bribery Act No. 47 of 2016 particulars being that on the 25th day of April, 2021 at Kasarani Police Station, within Nairobi City County, being a person employed by a public body to wit, National

Police Service as an Inspector, she received a financial advantage of Kshs. 10,000/= via Mpesa into her Mpesa account no. 072xxxxx90 from Donald Odhiambo Okumu with intent that, in consequence, she would improperly facilitate the release of Juma Olunga Wakhayanga and Pamela Kajuju from Police custody.

After trial where the prosecution called 10 witnesses, the court found the appellant guilty and sentenced her as follows;

- 1. In count I, to pay a fine of Kshs 300,000.00 in default serve a prison term of 1 year.*
- 2. In count II, to a fine of Kshs 300.000.00 in default to serve a prison term of 1 year.*
- 3. Mandatory fine of Kshs 50,000.00 being five times the benefit she received pursuant to provisions of Section 18(1)(b) and 18(2) of the Anti-Bribery Act, in default to serve a prison term of 1 year.*

It is against the above conviction and sentence that the appellant has approached this court in this appeal citing the following grounds;

- 1. The learned trial Magistrate gravely erred in law and fact in completely ignoring the appellant's and her witnesses' evidence, her defence, submissions and authorities.*
- 2. The learned trial Magistrate gravely erred in law and fact in failing to find and hold that the right of an accused person to adduce evidence is a fundamental constitutional right to fair trial and therefore not limited under the Constitution of Kenya, 2010.*

3. *The learned Magistrate gravely erred in law and fact in failing to find and hold that the Kshs. 10,000 was part of the debt owed by PW2 to DW2.*
4. *The learned trial Magistrate erred in law and fact in penalizing that the appellant for producing a duplicate police file whose production as evidence was not objected to and was in satisfaction of the law on secondary evidence.*
5. *The learned trial Magistrate gravely erred in law and fact in failing to consider whether the ingredients of the offense of bribery had been proved but instead went on an overdrive to analyze and consider other issues immaterial to the ingredients of the charge.*
6. *The learned Magistrate gravely erred in law and fact in failing to guarantee that the appellant had a fair trial as mandatorily prescribed under Article 25 (c) and Article 50(2) of the Constitution of Kenya, 2010.*
7. *The learned Magistrate gravely erred in law and in fact in failing to hold that the prosecution had not established its case beyond reasonable doubt.*
8. *The learned Magistrate gravely erred in law and fact in purporting to shift the burden of proof from the prosecution to the appellant.*

9. *The learned Magistrate gravely erred in law and fact in ignoring the inconsistencies in the respondent's evidence and massively contradictory evidence to convict the appellant.*
10. *The learned Magistrate gravely erred in law and fact in exhibiting obvious bias and hostility against the appellant and her witnesses for no reason at all culminating into an unfair trial.*
11. *The learned trial Magistrate gravely erred in law and in fact by erroneously recording, analyzing and relying on evidence/averments not adduced by the prosecution witnesses.*
12. *The learned trial Magistrate gravely erred in law and fact in failing to give the appellant the benefit of doubt when the prosecution failed to avail crucial witnesses.*
13. *The learned Magistrate gravely erred in law and fact in relying on conjectures in convicting the appellant.*
14. *The learned trial Magistrate erred in law and fact by issuing a per incuriam judgment.*

This is a first appeal and as it is trite and required of this court, I shall re-evaluate and re-analyse the evidence adduced by the parties in the trial court and come to my own independent conclusion but always keep in mind that I did not take the evidence first hand neither did I observe the demeanour of the

witnesses. This is the established legal position as it was held in ***Ndungu Dennis v Ann Wangari Ndirangu & Eddah Mwihaki (2018) KEHC 8799 (KLR)*** thus;

‘The appropriate standard of review established in these cases can be stated in three complementary principles:

- i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;*
- ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and*
- iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.’*

The prosecution’s case

The first prosecution witness told the court that he was a surgeon employed by Kiambu County Government and that on 24-04-2021, he received a call from one Pamela Kajuju and upon answering, a man spoke from the other side and introduced himself as a police officer in Zimmerman police post. The man told him that Pamela was in custody and the situation required him to be there. He went to the station and met one Garang who was the investigating officer and who told him that Pamela had been arrested for stealing from a wines and spirits shop called Saint Marine.

He told the police that the shop belonged to him and that he had not made any complaint of the alleged theft and that Pamela worked for him in the shop. He

was taken to the office of the officer in-charge where he found the appellant seated with another gentleman who he did not know. The appellant told him that the shop had been sold to the gentleman, about a month earlier for Kshs 150,000.00. He asked for the agreement and was told that there was none and requested to see Pamela and when he was allowed, she told him that she had borrowed Kshs 150,000.00 from the man but when she could not pay back, he wanted to take the shop forcing her to take away the drinks and then she was arrested.

After meeting Pamela, the witness went back to officer in-charge crime and confirmed to her that he was the owner of the wines and spirits shop and he had business registration and license in his name at which point, the officer asked him to settle the Kshs.150,000/= but he refused. The officer in charge (Susan) instructed the investigating officer to arrest and put him in the cells. After about 2 hours, he was brought back to the office to negotiate with the complainant (Daniel) and pay him his money but he refused and was taken back to the cells. At around 7.00 pm, he was taken by the investigating officer to Susan's office and was told that it was his last chance to negotiate but still refused to negotiate without a sale agreement. He was officially booked into occurrence book and his finger prints were taken and he spent the night in police cells.

In the morning of 25-04-2021 the witness and Pamela were taken to Kasarani Police station where his relatives visited. Susan was there and his relatives negotiated and he eventually agreed to pay back the Kshs.150,000/=. He asked his friend Donald Odhiambo to pay the money since his phone had been confiscated. The Kshs.150,000/= was sent and a withdrawal statement was attached where everybody present signed with the agreement being drafted by Susan.

After signing, Susan told him that he could not be released because it was late and the online occurrence book does not allow the release of an accused person beyond 6.00 pm. Susan asked for Kshs.10,000/= to facilitate the release which the witness asked Donald to send to her and he was released. He was released the same day at between 8.30 pm to 9.00 pm.

PW1 added that he went back to Zimmerman police post where his mobile phone and card had been kept. He found Susan seated with Donald and a lady called Winfred and he was given his mobile phone and car key and he left. After he left, he felt that he had been wronged and consulted his lawyer who lodged a complaint at the Deputy Inspector General of Police Office as well as EACC. He identified the following documents;

1. Letter dated 8-07-2021 from Kibebo & Co. Advocates to EACC about the complaint;
2. Withdrawal statement for the case marked as No. OB05/24/04/2021;
3. Single business permit for Santo Marine Wines and Spirits for 2019;
4. Payment receipt for permit dated 4-10-2019 for Kshs 20,000/=;
5. Alcohol drinks licence No.13974 for Santo Marine Wines & Spirits;
6. A letter dated 25-07-2022 from Nairobi City County and electronic certificate under Section 65 & 106 of the Evidence Act.
7. M-Pesa statement for Donald Okumu Odhiambo's phone number 0720088922 showing transaction of Kshs 150,000/= sent to Daniel Nyaga Muturi on 25-04-2021 at 19:53 hours and Kshs.10,000/= sent to Susan Wambui Muruiri (the appellant) on 25-04-2021 at 1955 hours.

The witness concluded his evidence in chief by stating that Daniel Muturi was the alleged buyer of the business and that the appellant requested for the Kshs.10,000/= to facilitate his release.

In cross-Examination by Mr. Omondi, PW1 stated that at one point, he instructed his advocate to withdraw the complaint. The appellant and the advocate approached him and he felt that he should forgive and instructed his lawyer not to follow up on the matter. He added that Pamela took the Kshs 150,000/= from one Daniel and she sent Kshs.120,000/= from the money. The arrangement with the two had nothing to do with him. He added that he was denied bail and had no way of getting out of the station.

PW1 stated further that, the Kshs.150,000/= was paid by his friend and he had to pay Kshs.10,000/= to the appellant who had asked him to pay the money to secure his release. He insisted that there was a witness who heard her request for the money. When she asked for the money, the witness told Donald to send and confirmed that no money came from him.

The second witness was Pamela Kajuju, a business woman engaged in selling cereals. In August 2021, she used to work in a wines and spirit shop in Zimmerman employed by PW1 from 2019. While she was working at PW1's shop, she met Daniel, a customer who would buy alcohol from her.

PW2 added that she asked Daniel to advance her money to put stock in the shop. He sent the money to her Co-operative Bank account which she could not tell off-head. One time, she went to the shop and was told Daniel had changed the till number of the shop and had instructed that she should not go to the shop. Winfred Kananu asked her if she had sold the shop to Daniel and she took her stock in the shop and put in a friend's shop. The next morning, she was arrested by the police because she had sold the items in the wine and spirits shop. She did not resist and was taken to Zimmerman police post where she was taken into custody. She claimed that she was asked to call Dr. Juma and tell him to come and get her out of the cells but she was not able to as one Garang grabbed her

phone. The said police talked to Juma and told him to come and get her out of the cells.

The witness added that when Juma came, she explained to him what had happened and shortly thereafter, he was put in custody. Juma and her had their fingerprints taken around 4.00 pm and they were told that they would be taken to court. They spent at Zimmerman police post and in the morning, they were taken to Kasarani police station by Susan and Garang where they were placed in the cells. The witness added that she asked the OCS to give her cash bail but he told her that he had been told not to be involved in the case.

PW2 added that Juma called his friend to come and assist them. Donald, Fredrick and Owiti came. They spoke out there and at around 8.00 pm, she was told by Susan to sign a withdrawal of case which she signed and wrote her I/D No. 35120842. After she signed, they were asked to pay Kshs.10,000/= to withdraw the case so that they could be released. She added that they were not at the time in the cells and that she was there when the Kshs.10,000/= was requested.

The witness added that after she was released, she passed by Zimmerman police post where she found Susan and Garang counting money and heard them say that they had managed to extort Dr. Juma after all that time. It was her testimony that she was arrested by Garang, Susan and others in a personal car. She added that they were told that the Kshs.10,000/= was to clear the fingerprints.

PW2 was put on cross-examination and stated that she did not sign any agreement with Daniel Ngaya Mutiri and admitted that she had an intimate relationship with Dr. Juma and she was pregnant for him at the

time. She admitted that the wines and spirits shop was opened for her to help her manage herself and she was the bonafide owner of the shop. She denied selling the wines and spirits shop to Daniel Muturi. She added that she sent Dr. Juma Kshs.120,000/= through mobile phone 072xxxxx11 and when he asked her what the money was for, she told him that it was for the business which he should keep for her.

She added that she had not told Dr. Juma that someone had taken over the shop. She stated further that she went to the shop with Fredrick Onyango to pick the goods as she could access the shop as she had a key. She stated that Daniel deserved to have his money back because she had taken the stock and that she was told to give back the money for the stock. She claimed that she did not know what she signed neither did she know what was going on. She did not know what the agreement was for but Dr. Juma paid the Kshs.10,000/= although he was inside as the money was paid. She insisted that when she went to Zimmerman, she heard them say they had extorted Dr. Juma and she heard them count the money.

In re-examination, the witness changed and stated that she worked for Juma as an employee when they had a relationship and denied that the shop was opened for her. She denied selling the shop and changed again and said that she did not tell Juma what the Kshs 120,000.00 she sent to him was for. She repeated that she did not know what she signed at Kasarani and changed tack again and said that she saw money being counted at Zimmerman police post where Dr. Juma, Susan Muiruri, Fredrick, Donald and Daniel were present. There was light where the counting was being done and the windows had no curtains.

PW3 was Chief Inspector Bernard Ongoro, who was at the time of the offence the OCS Kasarani police station. He told the court that on 25-04-2023, two

suspects by the name Kajuju and Juma were brought from Zimmerman police post to Kasarani police station. The investigating officer in the said case, Inspector Corporal Katuko and the in-charge of the police post Inspector Susan told him that the parties involved in the issue had resolved their difficulties amicably and did not have a complaint about each other and they presented a withdrawal letter to that effect. He identified the withdrawal letter which had been marked as MFI2. He told the court that when suspects are brought in the station, he only came in when they were presented in court and that he never met any of the parties.

He added that, he allowed the investigating officer to release the suspects from custody since there was no pending case. They were released the same day after he issued a release order which he produced as exhibit 8. He stated further that after sometime, Susan sent him Kshs 5000/= to assist him following the demise of his nephew who was a police officer and had passed on in Kitui. He added that the Kshs 5,000/= was not facilitation for the release of the suspects.

In cross-examination, the witness stated that the explanation of the Kshs 5,000/= was given to the investigators in this case and they were satisfied. He was able to produce a signal and a burial permit. He stated that Susan had not made a contribution before and many other officers gave the contribution. He admitted that parties are at liberty to negotiate but they never advise parties on how to negotiate.

He stated further that the suspects did not go to him and he never saw them and that none of the parties lodged a complaint with him that his officers asked for money.

Ambrose Munyoki a data analyst working with Safaricom PLC was the fifth witness. He testified that on 9-80-2021, he received an order in Milimani Chief Magistrate's Court misc. application E2524 of 2021 for extraction of registration particulars and M-Pesa statement for the period between 1-08-2020 and 1-08-2021 of the following mobile phones.

1. 072xxxxx90 registered under Muiruri Susan Wambui of I/D No.24788810;
2. 071xxxxx04 registered under Daniel Ngaga Matiri of I/D No.30573117;
3. 079xxxxx67 registered under Pamela Kajuju of I/D No.1035720842; and
4. 072xxxxx22 registered under Donald Odhiambo Okumu of I/D No.24229220.

He told the court that on 25-04-2021 at around at 19:55 hours, there was a customer transfer from 072xxxxx22 registered under Donald Odhiambo Okumu to 072xxxxx90 registered under Susan Wambui Muiruri of Kshs.10,000/=. At 19.53 hours, there was a customer transfer from 072xxxxx22 registered under Donald Odhiambo Okumu to 071xxxxx04 registered under Daniel Ngana Matiri in the sum of Kshs.150,000/=. He completed by producing documents, statements and certificates in proof of these transactions.

He was cross-examined by the counsel for the appellant and stated that the order he had produced were not dated but it was valid for his use. He confirmed that the difference time in the two transactions was 2 minutes.

PW5 was Fredrick Yabuya Shiundu who told the court that on 24-04-2021, during the day, he received a call from Donald Okumu who asked him if he knew Dr. Juma Khayanga had been arrested. On the 25-04-2021, Donald asked him to accompany him to Kasarani police station where Dr. Juma was detained

and when he arrived at Kasarani, he found Dr. Juma's wife, his two family members and Donald.

The witness added that Dr. Juma had been arrested together with his worker Kajuju. Dr. Juma told him that he was called that his worker had been arrested and when he went to the police station, he was also arrested. They saw Susan and were told that Dr. Juma had received money. Dr. Juma said that he had received money from Kajuju from the business. The witness added that Susan told them that the money had been received for the sale of the shop. Dr. Juma confirmed he had not sold the shop.

PW5 added that Daniel came and said that he was the one who was to buy the shop from Kajuju and he insisted on being paid the money upon which Susan confirmed and they contributed money and gave Donald who sent to Daniel. They then entered into an agreement which they signed at 7.00 pm. He continued and stated that Susan said that they had made her do a lot of work since morning after which Donald was authorized by Dr. Juma to send money to Susan. The two were later released.

He told the court in cross-examination that Dr. Juma was his cousin and friend and he did not have relationship with Pamela. He added that Susan said that she had worked and she could not go empty handed and that they sent money and then the agreement was prepared. Donald was to be paid his Kshs.150,000/= but he could not speak to the ownership of the shop.

PW6 Donald Okumu, a civil servant told the court that on 24-04-2021, he received a message from Dr. Juma who informed him that he had been arrested and was being held at Kasarani police station. The following day, he went

straight to Kasarani police station and made inquiries and confirmed that Dr. Juma was being held there for stealing.

He added that he met family members and asked to see Dr. Juma. He asked Juma about the business and he explained upon which he went to the OCS who told him that the case was being handled by Susan, the in-charge of Zimmerman and he did not want to get involved. Susan came and they went into one of the rooms where Dr. Juma and Pamela were brought.

The witness added that Dr. Juma had hinted to him that he was supposed to pay Kshs.150,000/= for the shop and alcohol demanded in the case. They agreed to pay the Kshs.150,000/- to Daniel to enable Dr. Juma to get out and handle the case when he was out. Since at the moment he had only Kshs.70,000/=:, one Edward Shiundu agreed to raise Kshs 50,000/=: . He asked Edward to transfer the money to his phone so that they could make a single transaction. A withdrawal letter was done which all those present signed after the money was sent. He added that he sent Kshs 150,000.00 to a number he was given after he received Kshs.80,000/=:.

He stated further that after Daniel confirmed receipt of the money, Susan said that she was done with Daniel's work and asked about hers. Dr. Juma asked us to sort out Susan because he was tired. The witness then sent Susan Kshs.10,000/= through a number she gave him. After he sent the Kshs.10,000/=:, they were released and left the station. The witness added that after that, he went to Kisumu and Susan called and told him that Dr. Juma had reported to the authorities.

In cross-examination, the witness stated that he didn't ask Daniel how much was supposed to be paid and that he was not aware that Daniel told Fredrick that

he was owed kshs.160,000/=. He added that the instructions to pay came from Dr. Juma and it was only Pamela who could confirm whether she took money from the shop.

He was emphatic that the agreement was made then they paid the money and that they signed the agreement before the money was paid. He added that Susan raised an issue with the time Dr. Juma was being released and claimed that there was an issue with the online release. He concluded that the money to Susan came after the agreement.

The next witness was Edward Shiundu Okehi who told the court that on 25-04-2021 around 2.00 pm, he was called by Donald Okumu, his cousin who informed him that Dr. Juma had been arrested. He took a motor bike to Kasarani police station and confirmed that Dr. Juma had been arrested as he found him there. He was told that Dr. Juma had been involved in theft of a shop or items from a shop and the owner of the shop wanted Kshs.150,000/=. He added that he had Kshs.80,000/= in his phone and Donald asked him to send the money to him to carry out the transaction. He sent the money to Donald Okumu who paid Daniel Kshs.150,000/=.

It was his further testimony that Susan then said that she could not have worked for free and requested for Kshs 10,000/= upon which Dr. Juma told Donald to send Susan Kshs10,000/=. The money was sent to Susan after which Dr. Juma was released. He added that he was there when Donald paid Kshs.10,000/= to Susan after Susan gave Donald her mobile number.

PW7 was put on cross-examination where he testified that Susan told him that if Dr. Juma did not pay the money, his medical license would be cancelled. He also said that the money was sent after the agreement had been made. He added

that Susan said that she could not work for free and she wanted to be paid Kshs.10,000/= then Dr. Juma told Donald to pay. He stated further that Susan said that if she was not paid, the doctor would not get out.

Next was Samuel Atodo Kakuko, an officer of police working in Zimmerman police post. He testified that in the morning of 23-04-2021, he was called by the report office and informed that there was a case of stealing that had been reported. He found the complainant who told him that there was a shop selling alcohol which he had bought from the owner and it had been broken into at night.

He called his colleague Moses and they went to the shop. The in charge of Zimmerman police post had not arrived. They went to Zimmerman and found the door had been locked. The security men there told him that the owner of the shop had come to pick his things.

The complainant told him that there was a lady who was the owner. A Mr. Langat came in a vehicle registration number KCQ 060B a Toyota Vanguard on hire which took them to the scene. They found that 3 people had taken the stock including Kajuju and they went back to the post. After several searches and follow-ups, they arrested Kajuju and went with her to Zimmerman with her small child.

This witness claimed that Kajuju called and told him that her husband who turned out to be Dr. Juma knew where the items were. She called Dr Juma and they spoke. The witness gave Dr. Juma their locations and with his vehicle and parked at the compound.

He was instructed by Susan to investigate the case and he received statements and took finger prints. The following day, Kajuju confirmed that Dr. Juma had the goods and they went to Githurai to inquire if there were places where the goods could be found.

He added that at around 3:00 to 4:00, he was called by one Kisera who told him that the family of Kajuju wanted to speak to the complainant. The family told him that Kajuju had agreed to go and establish the recoveries of the exhibits. At about 6.00 pm in the evening Susan called and told to him to go with the file to the Kasarani police station where he found Susan, Dr. Juma, Kajuju and their families. Around 8.00 pm, he gave out the file. There was a letter on the table which they signed.

The witness stated that he heard Juma asking Mr. Muturi if Kshs 150,000.00 had gotten to the account. He stated further that when he was investigating, the amount claimed was Kshs. 160,000/=. He added that he went to OCS and told him that the case had been withdrawn and he was ok.

The witness claimed that the money for the taxi was sent to Susan for transmission to Langat. Susan told him to call Langat and when he did, Langat told him to come the next day. Langat came the next day and Susan gave him cash. It was his testimony that, the complainant had asked for an uber in vain then they called Langat who had a car hire. He stated further that the Kshs.10,000/= was to be paid to Langat.

In cross-examination, the witness stated that he was nicknamed Garang and he knew Kajuju by virtue of the business she was running. He confirmed that he was the investigating officer in the case and stated that he prepared the file which he identified in court. He was shown a skeleton file and confirmed that it

was what he had compiled. He added that Mr. Langat came with a Vanguard KCG 060B as the station vehicle was out of the work and the only means was for the complainant to facilitate the movement. The driver who was engaged for two days had to be paid. He also confirmed that he gave his statement and the number of the driver to the investigating officer. He maintained that the driver was paid Kshs 10,000.00 and stated that he did not know if there was a bribe.

Pressed further, the witness stated that the release of the suspects could be sanctioned by OCS and not anyone else unless he was not in the station. He added that on that day, Susan could not release the suspects if the OCS was available and even if the OCS was not available, Susan did not have the authority to release.

The 9th witness was James Kimani Ngaya. He told the court that on 27-09-2021, he was called by an officer of EACC by the name Eric Vinga who asked him to report to their offices for the reasons that they were investigating his motor vehicle registration number KCG 060B registered to their company Supersite Properties Limited. He went to the officer's office on 1-10-2021, where he was told that the vehicle was under investigations as some people were saying that they hired it. He added that on 24-04-2021, the vehicle was under his custody and he had never lent it out to any person or company.

He maintained under cross-examination that he bought the motor vehicle in 2018 and no one else had even driven the vehicle except him. He could not recall going anywhere on 24th and 25th April, 2021.

Paul Vinya, an Investigator at EACC was the tenth witness. He stated that on 19-07-2021, the Commission received a complaint letter from Kibebo & Co.

Advocates against Susan Mururi, an officer at Zimmerman police post. The letter forwarded another letter referenced RNK/202/JOW/1 dated 29-04-2021 addressed to the Deputy Inspector General of Police on a complaint against the same Susan Muiruri.

The witness interviewed the complainant, Dr. Juma Olunga Wakhayanga, on 2-08-2021. The witness being the investigating officer narrated what the other witnesses had told him and how he recorded their statements and gathered evidence. He added that he summoned the appellant to report and explain her receipt of Kshs.10,000/= where she explained that she was paid facilitation fee when other officers were visiting the scene of break-in- at Zimmerman.

He made reference to OB extracts from Kasarani police station and Zimmerman police post including OB number 64/25/2021 which stated that prisoners were released under the instructions of Chief Inspector Ongoro by corporal Kakuko. The rest of the evidence related to the appellant being an employee of the police service.

He added that the Kshs 10,000.00 received by the appellant in her mpesa account was a bribe in order to release Pamela Kajuju and Dr. Olunga from police custody. He added that the allegation that the monies paid were for the taxi expenses was a fabrication as there was no way an accused person can facilitate a police station travel. They could not facilitate a police officer to visit a scene.

When he was placed on cross-examination, he stated that the OCS had the final say in a station and that the OCS released the prisoners. He however sated that any senior officer at the station can release in the absence of the OCS.

He also said that Gideon Langat could not be found and the only information he had was the registration details of the vehicle. He stated further that Mr. Kakuko confirmed that they moved with the motor vehicle KCG 060B. He admitted that a sum of Kshs 10,000.00 was not unreasonable.

When asked about Daniel Nyaga Matiri, he said that he called him to authenticate the documents but he totally declined and he realized that he had been instructed by the appellant not to visit the witness. He concluded by stating that it did not matter whether the money was refunded or not as the offence of bribery had already been committed.

The appellant's case.

After the appellant was put on her defence, she elected to give a sworn statement. She told the court that on 24-04-2021 at around 8.00 am, she went for a security meeting together with community policing personnel within Githurai ward which was held at Roysambu primary school which ended at 2.00 pm after which she proceeded to her work station at Zimmerman police post where she found the case of shop breaking had been reported. She was told that her deputy, Corporal Samuel Kakuko was aware of the incident and was handling the matter and he had visited the scene and arrested one suspect Pamela Kajuju who was then at the waiting area of the reception.

She added that from the inquiry file, it was established that Pamela Kajuju had sold the shop to Daniel Matiri at Kshs.150,000/= and later on went ahead and negotiated a sale of fridge and she was given Kshs.10,000/= through Equitel. Once the initial report was made at the police post, Corporal Kakuko begun the inquiry and he talked to Daniel Matiri who confirmed that he was ready and willing to take the officers to be sure where the offence was committed.

She added that the investigating officer, with the consent of Daniel Matiri opted to hire a taxi to facilitate them with the logistic of the inquiry leading to the alleged area where the suspect was residing. She stated that she was aware that a certain motor vehicle was used for mobility where the complainant Daniel Matiri had talked to the taxi driver and agreed on the mode of payment and the timing of the payment once the assignment was done.

The appellant added that, immediately the decision to detain the suspect was made, she raised the duty officer for Kasarani police station which was their parent station and informed him that she had 2 suspects to be taken Kasarani police station. The officer confirmed that the one and only motor vehicle under his custody was on an assignment at regional headquarters on quick response unit. The suspects were collected in the morning of 24th/25th April 2021, by a motor vehicle from Kasarani Sub- County.

She continued by stating that she had no powers over suspects who were under the sub-division of Kasarani police station once they moved to a police station. In her words, the one and only person who could release them was the OCS Kasarani.

She added that on 25-04-2021, she had a security meeting with the OCS on covid-19 security measures from 12:00 noon and arrived at Kasarani police station at 11:45 am and proceeded to the meeting venue in the conference room. The meeting went on up to 4:45 pm. As, she was about to leave the station, she received a phone call from a lady who had reported a case at Zimmerman, asking to see her at Kasarani. At Kasarani, a gentleman called Jeff came and informed her that he was a relative to Dr. Juma and that they were in communication with the complainant in the case and they had opted to settle the

matter. She got to know that the whole day, the family was at Kasarani police station and had already communicated with the complainant and came up with a decision to withdraw the matter after the payment of the alleged amount.

The appellant stated further that she spoke with Jeff and four other men came in and she conducted the investigating officer Corporal Kakuko to come to Kasarani police station with the police file and reach the complainant so that they could come and settle the matter as agreed. She added that there was a withdrawal statement written by Daniel Matiri on 25-04-2021.

She confirmed the payment to Daniel Matiri through M-pesa on 25-04-2021 at 19:53 hours of Kshs.150,000/= and another one to her number 072xxxxx90 on 25-04-2021 at 19:55 hours to cater for the taxi driver and expenses incurred on 24-04-2021 as they had agreed with the taxi driver and also with the parties through Jeff. A statement of withdrawal was signed by a total of 7 people all present including her and Corporal Kakuko, Dr. Juma and Kajuju.

The appellant stated that the suspects were released by Corporal Kakuko as directed by OCS. She alleged that she later paid Langat the money due to him as she had cash in her drawer. The payment was made in her office in presence of Corporal Kakuko. She stated that the transactions came first then the withdrawal agreement.

In cross-examination, she maintained that the Kshs.10,000/= was payment for the taxi. She alleged that Daniel Matiri requested Corporal Kakuko to source for the taxi and when Daniel Matiri talked with the taxi driver, he agreed on the terms of payment to be done after the completion of the assignment. She was not present during the investigations but she was emphatic that Daniel Matiri and the investigating officer informed him of the conversation. She denied that

Corporal Kakuko negotiated with the taxi driver. At this point, the court noted that the appellant was being elusive into responding to the questions by the prosecution.

The appellant added that the Mpesa funds for the transaction of Kshs 10,000.00 for 25-04-2021, were received from Donald Odhiambo Okumu who was directed by the complainant to send to cater for the expenses of the operation.

The appellant called Daniel Nginya Matiri as her witness. The said witness said that on 24-04-2021 at around 9:00 am, he was called by Winnie who he had employed. Winnie told him that she had opened the shop and found it empty. He went there and witnessed that the shop was empty and suspected Pamela Kajuju because she was a friend to Winnie and she had employed Winnie earlier. He added that Pamela who was the owner of the business was pregnant and she wanted to sell the shop to him upon which they signed an agreement dated 15-03-2021. He stated that the transaction amount was Kshs.150,000= and at the bottom of the agreement, he paid another Kshs.10,000= for a fridge. He made first payment through Co-operative Bank and the second through Equity number 0794xxxxx67 to Pamela Kajuju's account.

He reported the theft to Zimmerman police post where an officer he referred to as Garang told him that he wanted to go to the shop to see what had happened. The officer requested him to get a taxi and he asked him if he could link him up with a taxi. The officer linked him up with a certain taxi driver whom he knew. He claimed that he only knew one name of the driver as Langat. They went searching for Pamela in several places and she was arrested.

On 25-04-2021, he was called by Garang that he was needed at Kasarani police station and when he got there, he was told that Pamela was ready to give him

the stock she had taken. She confirmed so but later changed. Later, he was told that the family of Juma, who was the husband to Pamela wanted to talk to him. he demanded to be given his products or be refunded the money he had sent to Pamela. They agreed that they would pay him and he would withdraw the case upon which he wrote the letter of withdrawal. He was to be refunded Kshs.160,000= with Kshs.150,000= to his Mpesa and Kshs.10,000= to the officer who called the taxi driver.

This witness alleged that he directed the one sending money to pay the taxi money Susan since he did not want to go back to Kasarani police station. At the time of writing the letter, the transaction had been completed. He added that when he was called by EACC, he explained to them the same story.

In cross-examination, he told the court that the taxi driver was paid by Susan and that he was the one who directed the money to be sent to Susan. He maintained that he was to incur charges for the taxi. He alleged that he talked to the taxi driver through Garang's phone and the money was sent immediately after he received his.

Analysis and determination

This court directed on 4-06-2025 that the appeal shall be disposed of by way of written submissions and gave directions as to the filing of the submissions. The appellant filed her submissions dated 3-06-2025 while the respondent did not file any submissions for reason it did not explain.

Before I go to the analysis of the evidence, I note that in this matter and others which came before it, the charge sheet makes reference to the Bribery Act which does not in fact exist. What we have is Anti-Bribery Act Chapter 79B of the Laws of Kenya.

Having read the submissions and the judgment of the court alongside the evidence adduced by the parties, I form opinion that there are some facts which are not in contest. These are; the appellant was in charge of the police post where the case of theft had been reported by DW2 resulting to arrest and detention of PW1 and PW2; DW2 on one hand and PW1 and PW2 on the other hand reached an agreement that the amount in question be settled amicably upon which the complainant withdrew the complaint; Kshs 10,000.00 was sent to the appellant by Donald Okumu (PW6) on instructions of PW1 and that the PW1 and PW2 were released from custody following release order of the OCS of Kasarani police station (PW3).

The main issues in contention in the matter and in this appeal was whether the appellant requested for Kshs 10,000.00 so that she could release PW1 and PW2 from custody and whether the said sum was received for purposes of facilitating that release.

In her judgment, the trial Magistrate properly framed the issue just as I have done. As it will come out later in this judgment, the following contents of the judgment are key to determination of the issues in this appeal. That is, the court observed and rightly so that PW2 was arrested by PW8 who was driving a civilian vehicle in the company of other officers from Zimmerman; the trial court held that there was no evidence that the Kshs 10,000.00 was sent to the appellant on instructions from DW2 and PW8 was not truthful and had committed perjury.

The appellant has extensively submitted on the trial court's finding on the agreement for sale of the wine and spirit shop and authenticity and admissibility of the police file and its contents. I find this line of submissions off the course

and the Magistrate's findings on these documents irrelevant to the issues in the case. The issue before the court was not what transpired between PW1, PW2 and DW2. The case before the trial court was demand and receipt of bribe by the appellant. The said documents and events may have been relevant in analysing the basis of where the parties had come from but in my view had no probative value as far as the charges the appellant was facing were concerned.

The appellant has submitted that the trial court was wrong and selective in finding that PW8 was not truthful and the prosecution also noted that PW8's evidence was fabricated and cautioned him prompting him to quickly retract. It is true that the court in its judgment made that finding. I have looked at the proceedings especially the testimony of PW8 and I do not see where the prosecution cautioned PW8 prompting him to retract. The closest I can see to that position is where the prosecution interjected PW8's testimony and told him that what he was stating was not in his statement. This is not the same as cautioning the witness that he was not telling the truth. What he was stating may not have been in his statement but that does not translate to perjury or being untruthful. I therefore agree with the appellant that the Honourable Magistrate was wrong in that aspect.

Having said the above, I will proceed to analyse whether the evidence adduced by the prosecution was heavy enough to return a verdict of guilty. Section 6(1) (a) of the Anti-Bribery Act under which the appellant was charged in both counts provides as follows;

'A person commits the offence of receiving a bribe if the person requests, agrees to receive or receives a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly whether by that person receiving the bribe or by another person.'

It is interesting that the charge sheet cited the same Section of the law for the two counts which means that the two counts were basis of the same offence. Drawing of the two counts based on the same Section of the law with intertwined chain of events was in my view inappropriate and a duplication. The appellant has however not raised this issue although she was fined for each of the count which in my view means that she was punished twice for the same offence. In this appeal, I will therefore treat the conviction as that of either of the counts with the result that if I find the appeal unmerited, one of the sentences must as a matter of law be quashed.

It is evident from the provisions of Section 6(1)(a) of the Anti-Bribery Act that for the prosecution to prove the offence, there must be evidence that the accused demanded or requested for a bribe or he received the same as a facilitation for improperly performing an official duty. The trial court in reaching the decision it did on this count stated that the appellant was actively involved in the activities that led to the withdrawal statement, payment of Kshs 150,000.00 and even received the Kshs 10,000.00.

I do not find anything wrong in parties negotiating settlement in a criminal case which has already been reported to the police as long as the same is on free will. In my examination and analysis of the prosecution's witnesses, there was no evidence and the prosecution witnesses did not suggest that the PW1 and PW2 were coerced in the negotiations. It is on record that the investigating officer in the matter was PW8 and he was called by one Kisela who informed him that the family of PW1 and PW2 wanted to negotiate.

PW1 and PW2 did not mention the appellant as having been involved in the negotiations and it was not for the court to fill that gap in evidence. All that was

mentioned about the appellant was that after payment of the Kshs 150,000.00, she allegedly asked about compensation for her work. No witness stated how much the appellant asked for. The appellant denied having said so and DW2 who was said to be present corroborated this position. It must be noted that PW1, PW2, PW4, PW5, PW6 and PW7 were all friends or partners in one way or the other. Whereas DW2 may have been expected to support the appellant, it must be appreciated that the burden of proving these allegations was on the prosecution. In that case the allegations remain the prosecution's witnesses' word against the appellant's.

It is also on record that by the time the appellant allegedly asked for bribe, PW3 who was the person with authority to release had already issued a release order and I doubt that the appellant would have defiled this order. The trial court observed that, the fact that it took time for the PW1 and PW2 to be released after the order of PW3 pointed to the appellant demanding bribe before she released PW1 and PW2. I find this to have been an assumption which did not hold water. It is clear that the payment of the Kshs 10,000.00 was within two minutes after the Kshs 150,000.00 was sent to DW2. That period of time does not support the hypothesis advanced by the trial court.

Having said this, I hold that the trial Magistrate erred in finding the appellant guilty in the first count. It was upon the prosecution to prove that the appellant demanded or requested for the bribe and not for the appellant to prove that she did not demand the bribe. The burden of proof remains with the prosecution throughout the trial and at no time is an accused person expected to prove their innocence. Honourable Justice R. Nyakundi restated this position in law in ***Republic v Silas Magongo Onzere alias Fredrick Namema (2017) KEHC 1213 (KLR)*** when he held that;

‘In our criminal justice system there is no duty on the accused to prove anything on the allegations of a criminal nature filed by the state in a court of law. That burden of proof of an accused guilt rests solely on the prosecution throughout the trial save where there are admissions by the accused person.’

The second count appears to me to have been premised on the actual receipt of the bribe. In my view, the mere fact that money was transferred to the appellant’s number by PW6 does not mean that the same was a bribe. There must be evidence linking the money to bribery and which must follow from a request or offer. Under this Section, it does not matter whether the appellant asked for the bribe. All that is required is proof that she received a bribe for a facilitation of an official act.

However, it must be shown that in receiving the money, she was aware that the same was being given to influence her in releasing PW1 and PW2. As indicated before, there is consensus that the Kshs 10,000.00 was received within a span of two minutes between after Kshs 150,000.00 was sent to Daniel. There is no mention of any negotiations between the appellant and the witnesses who were present that the amount would be sent in order to secure release PW1 and PW2.

PW6 told the court that PW1 told him that he should send Kshs 10,000.00 to the appellant because he was tired. Neither PW1 nor the other witnesses told the court how the genesis and settlement of the said Kshs 10,000.00 began and was reached. PW8 told the court that he was the one who negotiated for the taxi. DW2 confirmed that he was the one who instructed PW6 to send money to the appellant for the taxi. The appellant and PW8 testified that the money reached the taxi driver which may be doubtful but it is clear that PW2 was arrested using a civilian car and obviously the same was to be paid for.

The above is not to say that members of the public should facilitate movement or operations of the police but I believe that there is nothing wrong when a member of the public voluntarily takes the initiative as long as the benefit of the facilitation does not go to the pockets of the police officers. In my view, there is a doubt created in this scenario which must go to the benefit of the appellant. I believe that the trial court dismissed this line of defence because she had already held that PW8 who largely testified on this aspect was not truthful. I have already held that the Magistrate was wrong in making such a finding. If she had not done so, her mind would not have been inclined to dismissing the defence.

The conclusion of the above is that I find this appeal merited and the same is allowed. The convictions and sentences of the trial court are hereby set aside and replaced with an order acquitting the appellant under Section 215 of the Criminal Procedure Code.

Dated signed and delivered at Nairobi this **14th** day of **November** 2025.

B.M. MUSYOKI
JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Mr. Ogada for the appellant and in absence of the respondent.