



**Kimathi v Republic (Criminal Appeal E201 of 2022)
[2024] KEHC 6582 (KLR) (24 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6582 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E201 OF 2022**

LW GITARI, J

MAY 24, 2024

BETWEEN

JAMES LEWIS KIMATHI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant herein was charged with three counts as follows: -

i. Count 1

Receiving a bribe contrary to section 6 (1) (b) of the *Bribery Act*, as read together with section 18 (1) thereof.

Particulars of the offence are that on or about the 24th day of August 2018, at the premises of the Nanyuki Law Courts in Nanyuki Town, in the County of Laikipia within the Republic of Kenya, you requested for a financial advantage of Kshs.10,000 from Christopher Waichahi Muhari, which request constituted the improper performance of your functions as a Clerical officer employed as such in the Judiciary and Stationed at Nanyuki Law Courts.

ii. Count II

Receiving a bribe contrary to Section 6 (1) (b) of the *Bribery Act*, 2016 as read together with section 18 (1) thereof.

Particulars of the offence are that on or about 24th day of August 2018, at the premises of the Nanyuki Law Courts in Nanyuki town, in the County of Laikipia within the Republic of Kenya, you accepted a financial advantage of Kshs.10,000 from Christopher Waichachi Muhari, which acceptance constitutes the improper performance by you of your functions as a Clerical officer employed as such in the Judiciary and stationed at Nanyuki Law Courts.



iii. Count III

Abuse of office contrary to Section 46 as read with Section 48 of the [Anti-Corruption and Economic Crimes Act](#), 2003.

Particulars of the offence are that on or about 24th day of August, 2018 at the premises of the Nanyuki Law Courts in Nanyuki town, in the County of Laikipia within the republic of Kenya being a Clerical Officer employed as such by the Judiciary and stationed at Nanyuki Law courts, you used your office to improperly confer a benefit of Kshs.10,000/= upon yourself which Kshs.10,000 comprised of money obtained and received from Christopher Waichahi Muhari.

2. The Appellant was tried, convicted and sentenced as follows;

James Lewis Kimathi Ngai is convicted under section 215 of the [Criminal Procedure Code](#) of counts 1 and 2 both being the offences of receiving a bribe contrary to section 6 (1) (b) as read with section 18 (1) of the [Bribery Act](#), 2016 and count 3 being the offence of abuse of office contrary to section 46 as read with section 48 of the [Anti-Corruption and Economic Crimes Act](#), 2003. He was sentenced to pay a fine of Ksh.40,000/- on each count in default one year imprisonment on each count.

3. The appellant being dissatisfied with the said conviction and sentence moved this court vide a petition of appeal dated 22nd December, 2022. The grounds include:

1. That the Conviction was against the weight of evidence.
 2. That the learned magistrate erred in Law and in fact in convicting the appellant based on contradictory and inconsistent evidence and on the basis of a defective charge sheet.
 3. That the learned magistrate erred in law and in fact in finding that the prosecution proved their case beyond reasonable doubt yet the prosecution failed to prove the ingredients of the offence of receiving and accepting a bribe.
 4. That the learned magistrate erred in Law and in fact in shifting the burden of proof to the accused.
4. When the appeal came up for hearing, the court gave directions on filing of submissions which all the parties complied with.
5. In his submissions, counsel for the appellant submitted on the issue of a defective charge sheet.
6. The counsel submitted that the learned magistrate convicted the appellant based on an offence that he was not charged with. The counsel further submitted that the appellant was never charged with receiving and or requesting for a bribe on the 23rd August 2018. That he is only charged with requesting for and accepting a bribe on 24th August 2018. That it was therefore wrong for the magistrate in his judgement to refer to the events of 23rd while convicting yet the appellant was never charged with any such offence on that particular day.
7. It is the Appellant's submission that one cannot be convicted based on a charge and or offence that does not exist as was the case herein. That besides the trial magistrate observed that the conversation of demanding for a bribe on 23rd was not recorded and they wonder on what basis he stated in his judgement that the complainant PW4 proved that on 23rd August 2018 that he requested for a bribe of Kshs.10,000



8. The Appellant's counsel urged the court to find that the magistrate convicted the appellant based on a charge and or based on evidence for which no offence was charge and quash the conviction and set the appellant at liberty.
9. The Appellant submitted that the counts based on the two dates was not proved by the prosecution. That the evidence the prosecution was relying on to prove that the appellant indeed accepted a financial advantage of Kshs 10,000 was an audio recorded conversation, transcripts and the evidence of the government chemist.
10. It is the Appellant's submission that the audio recorded conversation and the transcripts the court rightly found them to be of no probative value because they were never produced in evidence and also because when the audio was played in court PW4 the complainant said it did not contain a conversation of the accused requesting for a bribe from him.
11. The Appellant submitted that the evidence of the government chemist that the swabs taken from the appellant contained APQ powder meaning that he indeed received the said financial advantage was also made worthless and of no evidential because the said exhibit that is the money used to trap the appellant was interfered with by the complainant. That PW4 admitted touching the said trap monies before allegedly handing them over to the appellant. The exhibit was handled by more than one person making it impossible to believe that only the finger prints of the appellant were on those swabs if at all. Once an exhibit is interfered with any evidence related to it loses evidential and probative value. The Appellant relied on the case of *Malumbo VS Director of Public Prosecutions* [2011] 1 EA 230.
12. The Appellant submitted that he urged the court to be guided by above finding and find that the witness exhibit was tampered with by the complainant who admitted touching the money despite having been warned not to do so thus tampering with the said exhibit and therefore the evidence of the expert witness cannot be relied upon to convict because the exhibit was handled by more than one person and the finding of the expert does not resonate with the evidence adduced particularly that of the complainant who said he touched the money despite being warned not to. That act of tampering with the exhibit by mishandling it rendered the evidence of the expert witness useless and of no probative value and the magistrate ought not to have relied on it to convict as he did in the judgement.
13. The Appellant further submitted that prosecution have a duty to prove that the evidence collected or being collected from a scene of crime is not tampered with and in this particular case the complainant has admitted to tampering with the exhibit despite being cautioned not to.
14. It is the Appellant's submission that, that piece of evidence loses evidential value due to tempering with and cannot be used to sustain a conviction as was done by the magistrate herein.
15. The Appellant submitted that it was wrong for the magistrate to rely on the government chemist report yet there was clear evidence of tampering with the said evidenced and he urge he court to so find and acquit the appellant and set him at liberty. The Appellant relied on the case of OJ Simpson case wherein the DNA samples that were tampered with and any report and or documentation that came out of it was rightly rejected by the court and led to the acquittal of OJ Simpson.
16. The Appellant submitted that having rejected the audio recorded conversation, the transcripts and also having found that there were indeed contradictions in the evidence of the witnesses the court chose to rely on the sole evidence of the complainant to convict.



17. It is the Appellant's submission that the court cannot look at evidence selectively. That all the evidence produced and or adduced in a criminal trial form a chain linking one to another and where the link is broken then doubt arises.
18. The Appellant submitted that having eliminated the other very crucial evidence linking he appellant to the offences charged, the court was left with the testimony of the complainant which the court said was not rebutted and the court found to be credible.
19. The Appellant submitted that he held a different view and submitted that the other evidence that was rejected by the court is what the court ought to have used to discredit the evidence of the complainant.
20. The Appellant submitted that the learned magistrate erred in law and in fact in looking at the evidence of PW4 in isolation and rejecting all other evidence. The evidence rejected by the court particularly the audio conversations poked holes on the evidence of the complainant and made his evidence not trust worthy. For example, when the audio recording was played in court the complainant was unable to identify the content and voices and was unable to prove thus that a demand for KHS 10,000 was made by the appellant to the complainant.
21. It is the Appellant's submission that the credibility of the evidence of the complainant is further weakened by failure by the prosecution to produce in evidence the video that recorded the recovery process and no good explanation was given for not producing that video. That the author of that video was not able to understand why the investigating officer failed to produce it and or include it as part of evidence.
22. The Appellant submitted that failure by the prosecution to call a crucial witness and or adduce crucial evidence is fatal to the prosecution's case. That failure by the prosecution to produce into evidence the video showing the recovery of the money and arrest of the appellant was fatal to the prosecution's case and leaves an inference that if that evidence was produced it would have been favorable to the case of the accused. The Appellant relied on the case of *Patrick Kathurima VS Republic, Bukonya & Others vs Uganda*.
23. The Appellant submitted that the contradictions and inconsistencies in the case of the prosecution have the effect of weakening the case and affecting the credibility of the testimony of the complainant in this case.
24. The Appellant submitted that in this particular case the contradictions in the case of the prosecution particularly with respect to the second count of accepting a financial advantage were not minor and or of no relevance. That the EACC officers who went to arrest the appellant gave conflicting evidence of where they found the appellant before the arrest, some said inside court two, others said he was arrested while at the court corridors and to make matters worse the video recording the recovery was not produced. That if indeed this was not entrapment then why give conflicting evidence of something as simple as where and how the appellant was arrested and or how he received the alleged bribe.
25. The Appellant submitted that the learned trial magistrate relied on the evidence of a single witness and that is PW4 the complainant in convicting yet nowhere in his judgement did he caution himself before receiving such evidence. The Appellant relied in the case of *Abdala Bin Wendo & Another vs Republic* (1953) 20 EACA.
26. The Appellant submitted that its quite clear that the evidence of a single witness needs other evidence to corroborate it before one can convict. That in this particular case the other so-called evidence was of no probative value and could not corroborate the evidence of the single witness to sustain a conviction.



27. It is the Appellant's submission that the audio recording was not produced and the complainant was not able to tell the court the contents of the audio and or confirm that a bribe had been requested for.
28. The Appellant further submitted that the evidence of the government analyst cannot be relied upon because of tampering by the complainant himself of the exhibit which was the money that was treated with APQ powder.
29. The Appellant urged the court to be guided by the authorities to find so and allow the appeal, quash the conviction, set aside the sentence and set the appellant at liberty and or refund the fine paid.
30. The respondent submitted on the brief background of the matter. The respondents submitted that the conviction and sentence should be upheld and the said Petition of Appeal; be dismissed for the following reasons. That the prosecution proved their case against the Appellant beyond reasonable doubt and to assert to the contrary is misleading and erroneous. Further the charges proffered therein were proper and lawful as noted by the trial magistrate.
31. The respondent further submitted that the prosecution proved their case beyond reasonable doubt by ensuring that the ingredients of the offence were established during the trial i.e the appellant solicited and received a benefit corruptly. The Respondent relied on the case of *Mwangi vs Republic* (2015)eKLR.
32. It is the respondent's case that though the trial court found no probative value in the audio recording, transcription and certificate of transcription that were produced as PEXH-13,2 and 3 there was no discrepancies found in the oral evidence given by the complainant, PW4 as the same was supported by further evidence.
33. The respondent further submitted that It is further not in dispute that the Appellant was found with the treated money as evidence provided by PW5 who confirmed that she treated the money PEXH 3 (a-j), envelope PEXH 4with APQ and which the Appellant's received as evidenced by the APQ residue found on his hands-on swabbing by PW7 were also found to contain the same. The said position is supported by the Government Chemist Report dated 7th, September 2018 produced as PEXH 7.
34. It is the respondent submission that the issue of PW4 having touched the treated money is of no consequence to the issue of the APQ chemical being found in the Appellant's hands. That the defence never provided any alternative theory to disprove or allude as to how the same was found in the Appellant's person and they further submitted that there was no tampering.
35. The respondent submitted that the Trial Magistrate's reasoning to find the Appellant guilty of the offence was sound and was rightly informed by evidence tabled by the prosecution who proved their case beyond reasonable doubt.
36. The respondent further submitted that on the issue of reliance of one witness to convict the Appellant they submitted that the Prosecution called 10 witnesses and they each gave an account of what transpired on the fateful day and PW4 was a star witness but he was not the only witness as alleged by the Appellant and more so PW6, PW7 and PW8 inconsistencies were minutes but did not outweigh the evidence of PW4. The respondent relied on the case of Philip *Nzaka Watu vs Republic* (2016)eKLR.
37. The respondent submitted that the decision to exclude the audio recording was discretionary on the prosecution but having noted that it was played in court and the trial court made its observations with regard to its content.
38. It is the respondent submission that the Appellant chose to keep silent as provided under section 211 of the *Criminal Procedure Code* and which was well within his rights during the trial.



39. The court has carefully considered the submissions filed herein by the respective parties and the grounds of appeal. It has also re-evaluated and re-analyzed the evidence that was adduced before the trial court.
40. The issues for determination as I can deduce are:
- i. Whether the Conviction was against the weight of evidence.
 - ii. Whether the trial magistrate convicted the Appellant based on contradictory and inconsistent evidence.
 - iii. Whether the prosecution proved its case.

Whether the Conviction was against the weight of evidence.

41. The accused was convicted of counts I, II and III. He was charged with receiving a bribe contrary to Section 6(1) (a) as read with Section 18 of the Bribery Act No. 47/2016. Section 6(1) provides:
- “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”.
42. Section 7(1) defines what is construed to be a relevant function or activity to include a function of a public nature or any function carried out by a state officer or public officer pursuant to his or her duties. From the wording of the two provisions quoted, one can conveniently distil in summary the ingredients of the offence as firstly, one has to request, receive or agree to receive a financial or advantage, there must be the mensrea that by so receiving some function or activity should be improperly performed by that person or by somebody else and lastly the function must be of a public nature or of such a nature carried out by a public officer.
43. The prosecution led evidence of 10 witnesses of key importance is the evidence of PW2 and PW4.
44. PW1 testified as Andrew Kariuki And he was working at Meru Law Courts as a clerk.PW1 testified that in August,2018 he was working at Nanyuki Law Courts.
45. PW1 stated that he heard a clerical was arrested by Anti-corruption people who called him to their Nyeri office to record a witness statement.
46. PW1 testified that he knew the Appellant for one and a half years. That he was a judicial staff working at Nanyuki Law Courts.PW1 further testified that he had no personal differences or bad blood with him.
47. PW2 testified as Catherine Serah MugambI a designated government analyst.PW2 stated that her duties are examination of exhibits from the office of DCI, National police service. She makes reports and give evidence in court as an expert witness.
48. PW2 stated that on 3rd September 2018 she received an exhibit from Ethics and Anti-Corruption (EACC) of Kenya accompanied with an exhibit memo form. That the exhibits were itemized as follows a-e which entailed a right hand swab(cotton wool swab of the Appellant, the second was a left hand cotton wool swab of the Appellant, third was cash money of Kshs.10,000/ in Kshs 1,000/= denomination, that is ten notes which were genuine currency notes with serial numbers as per exhibit memo form. That she did swabbing of the notes with the sole intention of confirming if there was any APQ pended contamination of the said notes.



49. PW2 produced the exhibit memo form marked Amf1 2(a), cotton wool swab marked as PMF1 2 (b) and its envelope MF1 2 (c), the left hand swab marked MF1 2 (d) and its envelope containing the swab marked MF1 2 (e) and the ten notes of Kshs 1,000/= denomination (MF1 3(a)-f inside the envelope marked MF1 4.
50. PW2 also produced half of an envelope cut by half marked MF1 5 (a) and (b) and the last item was APQ chemical powder marked MF1 6 (a) and MF1 6 b and Khaki envelope marked MF1 6 (c).
51. PW2 testified that they received an examination request to ascertain whether the APQ powder could be detected in any of the other items A to D. PW2 further testified that she did analysis on the 4th September, 2018 and her conclusion was that APQ sample item E was found to be a mixture of the above 3 compounds. That the mixture of the said sample was detected in following samples A, B, C and D which was the right hand swab of the Appellant, left hand swab of the appellant, money and the half cut envelope respectively.
52. PW2 produced the report marked P ex 7.
53. PW3 testified as Gladys Muthoni Muthiora an executive Assistant, Nanyuki Law Courts. PW3 stated that on 24th August 2018 she was called from her office by her colleague, one Mwenda and she was informed that the Appellant was in the process of being arrested by EACC officers.
54. PW3 stated that she proceeded to court 2 and she met the accused seated and there were three officials from EACC and they were interrogating him and she could see they were counting currency notes. That she asked what was happening and she went to call the head of the station.
55. PW3 stated that she was given a recorded tape of a conversation and she recognized the Appellants voice from the conversation. That she had known the Appellant for 2 years and his voice was familiar to her. She produced a certificate of voice recognition marked P Exh 10.
56. PW4 testified as Christopher Waicahi Muhari and he was a farmer. PW4 testified that in July 2018 her sister came home and asked him to give her his title deed for purposes of posting bond for her husband. That they went together the next morning to Nanyuki court.
57. PW4 stated that they entered into the court's office and she produced his title deed and gave it to the officer who said that it is not what he wanted. He advised him that he brings a copy of the I/D card, KRA pin, title deed photo copy and the land to be valued and they bring a search certificate and a chief's letter.
58. PW4 further stated that on 22nd August 2018 they returned to Nanyuki court with the documents accompanied by her sister. They entered the office and met an officer called Kariuki to whom they handed the documents and he confirmed they were okay.
59. PW4 testified that the officer called Kariuki told them that a letter had to be written and taken to the Lands offices and upon returning at 2.00 PM he told them a letter was written and what was left was for it to be signed and they went home that day.
60. PW4 stated that on 23rd August 2018 upon their return they met KAariuki who informed them that the letter was signed that the office had few officers and he asked them to await the arrival of other officers. PW4 testified that upon returning 2 pm he told them he will show them one officer who will assist them. That Kariuki introduced them to another officer.



61. PW4 testified that the officer took them to the court room that was empty and had no activities going on there at the time and he told them if they wanted to be assisted they were to pay him Kshs 10,000/ so that they can take the title deed to the Lands Registry at Nyeri and Nyandarua.
62. PW4 stated that at that time he was with his cousin one Stephen Kariira Mwangi, he told the officer to allow them to walk outside to talk to her sister on whether she will be able to pay that money. PW4 further stated that her sister said she could not pay because she did not have that money. That they returned to the said officer and told him that her sister did not have that money. That the officer said if they did not have kshs.10,000/ they forget about being helped.
63. PW4 stated that they decided to go to Nanyuki Huduma Cente to the Anti-Corruption desk. They reported that there was an officer who was demanding for a bribe unfairly and they gave them a recorder and showed them how to operate it and the officers sent PW4 to the said officer. PW4 produced the audio recorder marked MF1 11 and they were sent to the said officer to ask him some questions. That they went to the said officer and asked him to reduce the money he was demanding and he was adamant and he replied if they did not have the whole money the work could not be done.
64. PW4 testified that he switched off the recorder and returned to the Anti -Corruption officer who asked for the recorder to listen to the conversation they had.
65. PW4 further testified that they listened to the recorder and they gave them Kshs 10,000 and it was inside a small envelop marked MF1 5 (a) and they were advised not to touch inside because the money was treated.
66. PW4 stated that they gave them back the recorder. That upon return to court, they met the said officer and he took them to an empty court room. They gave him the money and they went outside. The anti-corruption officers entered and arrested him.
67. Having looked at the evidence of pw4 it is clear that on 23rd August 2018 the Appellant requested for a bribe of Kshs 10,000 from PW4 to facilitate the verification of the complainant's title at the Nyeri Lands Registry. The Appellant requested for a bribe a second time on 24th August 2018 when the Appellant turned down pw4's request for a reduction of the bribe amounts from Sh.10,000/-
68. It is common ground that the said title deed verification exercise comprises the doing of an act which the accused would do in proper performance of his duties.
69. PW4's evidence is corroborated with the evidence of pw2 who testified to the effect that money and the cotton swabs taken from the palms of the appellant after his arrest and recovery proved the cotton swabs contained the same chemical that was used to treat the money. That was sufficient proof that the Appellant received the bribe just before his arrest. Further the evidence of the prosecution witnesses was not rebutted since the appellant opted to remain silent.
70. To that end am persuaded that the prosecution proved its case.

Whether the trial magistrate convicted the Appellant based on contradictory and inconsistent evidence

71. I opine that the evidence of PW1, PW2, PW3 and PW4, PW5 and PW6 was consistent. However, the evidence of PW6, PW7 and PW8 surrounding the circumstances of the arrest of the Appellant and recovery of the money may give the accused the benefit of doubt that he was not in the room when the money was recovered. Not every contradiction or discrepancy in the evidence of witnesses goes to the root of the prosecution case.



72. However, I agree with the holding of the trial court when it stated that as much as there may have been some contradictions in the prosecution's case, the same did not vitiate the its case.

73. I am guided by the case of *Twebangane Alfred Vs Uganda*, Crim. App. No 139 of 2001, [2003] UGCA, 6 it was held that it is not every contradiction that warrants rejection of evidence. As the court put it:

“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”

74. Similarly, in the case of *Erick Onyango Ondeng' vs. R* [2014] eKLR, the Court held as follows:

“The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyze that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers.”

75. In *Dickson Elia Nsamba Shapwata & Another v. The Republic*, CR. APP. No. 92 Of 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view I respectfully adopt:

“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”

76. In the circumstances of this case, and considering the prosecution evidence as a whole, I find no material contradiction that would vitiate the trial of the appellant

Whether the prosecution proved its case.

77. The prosecution led evidence of 10 witnesses0 wherein PW4 was the star witness wherein he firmly testified that the appellant asked him a bribe of Kshs. 10,000 to facilitate verification of PW4'S title deed at the Nyeri Lands registry. The evidence was corroborated with PW2 who was the government analyst who upon the analysis of the items submitted by the police confirmed that indeed the appellant received the bribe. That notwithstanding, that was not rebutted by the appellant. Further eight (8) other witness corroborated PW4's evidence and am persuaded that the trial court finding was correct and I have no reason to disturb it. The Appellant's appeal has no merit and consequently it is dismissed.

78. It is so ordered.

DELIVERED, DATED AND SIGNED AT MERU THIS 24TH DAY OF MAY 2024.

L.W. GITARI

JUDGE

