



REPUBLIC OF KENYA



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**Oguma & another v Republic (Criminal Appeal E012 of 2023) [2024] KEHC 8147 (KLR)  
(Anti-Corruption and Economic Crimes) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8147 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES**

**CRIMINAL APPEAL E012 OF 2023**

**EN MAINA, J**

**JUNE 28, 2024**

**BETWEEN**

**JULIUS ONYANGO OGUMA ..... 1<sup>ST</sup> APPELLANT**

**CHARLES MACHARIA WANJIRU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered  
by Esther Boke (SPM) on 13th April 2023 at Kibera Chief Magistrate's  
Court Sexual offense No. 070 of 2021 Republic vs Evan Gachubi Njuguini)*

**JUDGMENT**

**Introduction**

1. The 1<sup>st</sup> Appellant was charged with two counts of Receiving a Bribe contrary to Section 6(1)(a) as read with Section 18 of the *Bribery Act*; Conspiracy to Commit an Offense of Corruption and Economic Crimes contrary to Section 47A (3) as read with Section 48(1) of the *Anti-Corruption and Economic Crimes Act* and Concealing Evidence under Section 66(1)(c) as read with Section 66(2) of the *Anti-Corruption and Economic Crimes Act*.
2. He was found guilty on Counts II and IV, convicted and sentenced to a fine of Kshs.500,000/- or 12 months imprisonment on Count II and to a fine of Kshs.400,000 or 12 months imprisonment on count IV (Concealing evidence).
3. The 2<sup>nd</sup> Appellant was charged with the offence of Obstruction contrary to Section 66(1) as read with Section 66(2) of the *Anti-Corruption and Economic Crimes Act*; Aiding a Prisoner to escape contrary



- to Section 124(a) of the *Penal Code* and Robbery with Violence, Contrary to Section 296(2) of the *Penal Code*.
4. The particulars in Count II are that: On 28<sup>th</sup> November 2018 at Kabete Police Station, being a person employed by a Public Body, to wit, National Police service as a Corporal attached to DCI Dagoretti, the 1<sup>st</sup> Appellant received a financial advantage of Kshs. 200,000 from Janet Wangu with intent that, in consequence he would release Gong Huan and forbear charging her with an alleged offense of being in Kenya without proper documentation, a matter related to the affairs of the said Public Body.
  5. The Particulars in Count IV are that: On 28<sup>th</sup> November 2018, at Kabete Police Station within Nairobi County, the 1<sup>st</sup> Appellant concealed Kshs. 200,000 which he had reasonable ground to believe was to be used as evidence in an investigation into an offense of corruption under the *Anti-Corruption and Economic Crimes Act* No. 3 of 2003.
  6. The 2<sup>nd</sup> Appellant was convicted in Count V: Obstruction contrary to Section 66(1) as read with Section 66(2) of the *Anti-Corruption and Economic Crimes Act* No. 3 of 2003 and sentenced to pay a fine of Kshs. 400,000 or in default serve twelve (12) months in custody.
  7. The Particulars of Count V are that: On 28<sup>th</sup> November 2018, at Kabete Police Station, without justification or lawful excuse obstructed Ethics and Anti-Corruption Commission Investigators from arresting the 1<sup>st</sup> Appellant by drawing firearms and firing in the air, while the said investigators were effecting lawful arrest, under the *Anti-Corruption and Economic Crimes Act*.
  8. The Appellants filed the Petition of Appeal dated 13<sup>th</sup> December 2023 against the entire judgement and conviction.
  9. To prove its case the prosecution called twelve witnesses who testified as follows:-
  10. PW1, a Human Resource Officer at China J. I. Limited testified that Kelly was an employee of China J. I. Limited and was working as an accountant, who was arrested for working in Kenya without a work permit. PW1, and two other colleagues accompanied Kelly to the Police station, with Kshs. 100,000 given to her for emergency and/or cash bail given by her boss, Tao. She later handed the money back to Pau, her boss, when he came to Kabete Police Station, and was instead given a brown envelope by Pau. A man, not in Police Uniform, that had been at the office during the arrest, asked her to accompany him to a car, which she did, and once inside, she handed over the brown envelope and got out of the car. Once outside, she heard gun shots and ran, after which a person came to her and said, “wameenda na pesa”, whom she learnt later was an EACC Official. She did not know what was in the envelope and was unable to identify the accused as the persons that effected the arrest. She did not remember the Police requesting money from her. She could not recall the faces of the officers who effected the arrest. She did not remember Pau talking to anyone before asking for the envelope given by Tao and handing her the brown envelope. She did not see anyone fire a gun and does not know from where the gunshots came from. The officers were to talk to Gertrude, the receptionist, but she was engaged.
  11. PW2, the Dagoretti Sub-County Criminal Investigation Officer (DCIO) at the time of the incident, testified that when the 1<sup>st</sup> Appellant informed him about foreigners who were not properly documented, they agreed that they would be taken to the Police station. He confirmed that the 1<sup>st</sup> Appellant arrested the Chinese lady. He was informed that the attempted arrest by EACC officers was because of bribery attempt, but the 1<sup>st</sup> Appellant had left the scene. Later when called to record a statement at EACC offices, he was shown a video clip where he identified Motor Vehicle KCG 407M, the official Motor vehicle for DCI Dagoreti County and the 1<sup>st</sup> and 2<sup>nd</sup> Appellants as well as two other officers who were the Appellant’s co-accused in the lower court matter. He confirmed that the video clip he was shown at the EACC Offices was the one being played in Court. After identifying



the Police officers and motor vehicle, he signed a certificate of image recognition dated 19<sup>th</sup> December 2018 presented to Court as MFI 2. He also produced copies of the Duty Roster on 28<sup>th</sup> November 2018 marked MFI 3 and the Arms Movement Book for 28<sup>th</sup> November 2018 marked as MFI 4. He confirmed that as per the record, all the officers returned their firearms intact. He could not recognize the voices in the EACC voice recording. He provided to EACC, the name of the team leader of the Chinese operation but not of the other officers. He neither heard the commotion nor informed that an officer had fired a gun. He had not conducted an identification parade. He was unaware of the communication between the Chinese lady and the Police Officers.

12. PW3, an investigation Officer with EACC testified that he was informed by his Boss that four police officers had arrested a Chinese lady and were demanding for a bribe to release her. They met with Pau, who explained the story and was given an audio digital recording gadget to record her conversations with the officers, and they followed her to view at a distance. After Pau met the officers, she informed them that he asked for Kshs. 500,000 but she told him that she could only raise Kshs. 200,000. She had been instructed to get the money and give it to PW1 who would then hand it to the officers. The conversation had been recorded on the recorder. They gave her treated money of Kshs. 100,000 from EACC and she was instructed to add it to the Kshs. 100,000 she had, in the same envelope. Pau then joined PW1 and went to meet the officer in the parking yard. Pau passed the envelope to PW1, who both entered the private car parked in the yard. After 5 minutes, they stormed the Motor vehicle when they arrested the officer. Other police officers approached and started to shoot in the air. PW1 ran from the scene. They introduced themselves as EACC officer, but the other police men pointed guns at them and threatened to shoot. They rescued the arrested officer and stopped them from searching the motor vehicle. The suspect threw the envelope with money to the back seat. The DCIO approached the scene, shouted to the officers to stop firing, asked the EACC officers to accompany him to his office, at which point the officers drove away with the private car. They requested the DCIO to call his officers so as to recover the treated money but he said that their phones were off. When asked to identify the officers, the DCIO identified the 1<sup>st</sup> and 2<sup>nd</sup> Appellant only. He identified the arrested officer as the 1<sup>st</sup> Accused and the 2<sup>nd</sup> Appellant as one of the officers who had aided him to escape. In the recorded conversation between Pau and the 1<sup>st</sup> Accused, there was demand for a bribe. In the recording, there was no mention of a police cash bail or bond. Pau added the Kshs. 100,000 in his presence. The 1<sup>st</sup> accused was holding the envelope from PW1 when they stormed the car. He saw him throw the money to the back seat. The envelope containing the money was never recovered. He recalled the 2<sup>nd</sup> Appellant snatching and destroying the identity card of one of the EACC officers. The Motor vehicle the police used to get away had Ugandan Registration. The handcuffs were left with the 1<sup>st</sup> Appellant. He saw the 2<sup>nd</sup> Appellant fire 5-10 rounds. The situation was not friendly to allow them to collect cartridges. The scene had been cleared by the time they left the DCIO office.
13. PW4, an EACC investigator, testified that he was informed about the demand for a bribe from a Chinese national and went to meet the complainant with his colleagues. They then accompanied her to Kabete Police Station and parked where he could see DCI Office and its main entrance. The complainant Pau, went into the DCI office with the recording gadget in the company of PW1, after which they came out in the company of a Police Officer. Pau went to their Motor vehicle and informed them that the officer had agreed to Kshs. 200,000. She was given Kshs. 100,000 and she added Kshs. 100,000 which she put together and handed to PW1. PW1 and the officer entered the car with foreign registration, after which they proceeded to the car, introduced themselves and informed the officer that he was under arrest for receiving bribe. They handcuffed him but while taking him out, other police officers approached while firing their guns. The DCIO then came out and insisted they go into his office despite their request to search the car and recover the money. The DCIO gave them the name of the suspect they had arrested, who was the 1<sup>st</sup> accused and another who was firing, as the 2<sup>nd</sup> accused.



14. PW5, an EACC Investigator, testified that he requested CCTV footage of a premise in Lavington area, and retrieved the footage for 28<sup>th</sup> November 2018 between 11.45 a.m. and 12.50 p.m. He transferred it to the official drive and then to the official computer and lastly to a DVD which he sealed. He then prepared a certificate under Section 106B of the *Evidence Act*, and handed the DVD and Certificate to the Investigation Officer. Access to the CCTV footage was granted by Pau and she supervised the extraction after which she also signed an electronic certificate dated 30<sup>th</sup> November, 2018, produced as MFI 6. He confirmed that the DVD played in Court is the one he prepared.
15. PW6, an EACC Investigator testified that on 28<sup>th</sup> November 2018 he and his colleagues met Pau at Shell Lavington, held a discussion and she was inducted on how to use a tape recorder. They drove to Kabete Police station and she went into the DCI office. She went back to the car and played the recording, and he heard a demand for Kshs. 200,000 by the 1<sup>st</sup> Appellant. They gave her treated notes of Kshs. 100,000 and she added Kshs. 100,000. Pau handed the envelope with Kshs. 200,000 to Janet who entered a car at the parking where the 1<sup>st</sup> Appellant was waiting and handed it to him. They approached the car, introduced themselves as EACC officers and told the 1<sup>st</sup> Appellant that he was under arrest for receiving a bribe. Other officers approached the car while shooting. He removed his identification card to show that he was an officer from EACC, but one of the police officers took it and tore it. The same officer also took his wallet that had Kshs. 7,000. The DCIO then came out and requested a meeting in his office. The officers took off in the car with foreign plates. The treated notes were never recovered. He identified the 1<sup>st</sup> accused as the one they arrested and the 2<sup>nd</sup> accused as the one who took and tore his identification card. The 2<sup>nd</sup> accused also pointed a firearm at him and told him to lie down.
16. PW7, OCS Kabete Police Station testified that on 25<sup>th</sup> November 2018 he heard gun shots from his office and went outside to find CID Officers, and members of the Public. He was informed that the 1<sup>st</sup> Appellant had been attacked, and that the 2<sup>nd</sup> Appellant fired one shot. He was also informed that EACC officers had come to arrest the 1<sup>st</sup> Appellant. When the DCIO came out, he left him to deal and left the scene. The next day he realized that the issue had not been recorded in the occurrence book and instructed an officer to record. The OB entry was recorded as a shooting incident and the extract produced in Court as MFI 7(b). He then recorded a situation report addressed to the sub-county Police commander, which was produced and marked MFI 8.
17. PW8, who was the In-Charge Armoury at DCI Dagoreti when the incident happened testified that the firearms given to the 1<sup>st</sup> and 2<sup>nd</sup> Appellants on 28<sup>th</sup> November 2018 were returned on 29<sup>th</sup> November 2018 intact with all rounds of ammunition, none was missing.
18. PW9, the receptionist at China J. I. Ltd testified that on 28<sup>th</sup> November 2018 she saw people running towards the Chinese sleeping quarters, and after a while, a motor vehicle leaving the compound. She was informed that Kelly had been arrested. She could not recognize the men that effected the arrest.
19. PW10, a Police officer attached to EACC, testified that he treated Kshs. 100,000 notes using APQ Powder, photocopied the money, and filed an inventory. He inserted the treated notes into a brown envelope and handed it over to the Investigation Officer. The photocopies marked MFI 9 and inventory marker MFI 10 bear his signature and were produced during hearing.
20. PW11, Pau, the Deputy General Manager of China J. I. Ltd at the time of the incident testified that on 28<sup>th</sup> November 2018 she was called from lunch break and informed that Police officers wanted to arrest Kelly for lack of a work permit. PW1 informed her that the Police were asking for Kshs. 1 million to forbear from arresting Kelly. By the time she got to the office, Kelly had already been taken by the police, and two other colleagues accompanied her. She asked the accountant to prepare Kshs. 100,000 to sort out the issue, and it was given to PW1. She preferred PW1 to negotiate with the officers as she



was Kenyan. She later went to Kabete Police Station and tried to negotiate with the Police officer who asked for Kshs. 500,000. She asked a friend to get her the number of EACC, called and reported the incident. She met the EACC officers who gave her a recording device, showed her how to operate it and had her sign a handing over certificate, produced as MFI 12. One of the EACC officials pretended to be her driver while the rest drove behind them to Kabete Police Station. She went into the office and tried negotiating the amount to Kshs. 200,000 with the officer that arrested Kelly and the Police Officer agreed that she would give the money to PW1. She recorded the conversation on the gadget and handed it over to the EACC Officers. She signed the inventory of photocopies of the Kshs. 100,000 from EACC. She put together the Kshs. 100,000 from EACC and the one with PW1, and gave it to her to take to the Police Officer. PW1 and the officer went into a silver car after which EACC officers went to arrest the police officer. There were gunshots, PW1 ran from the scene and one of the officers who had visited their office entered the silver car and drove away.

21. PW11 further testified that Kelly was not released immediately but was allowed to leave later after the head of the Kabete station asked for some documents. She confirmed that the transcript before court was the one for the conversation that she had with the Police officer. She signed the transcript and she produced it in Court, marked MFI 14. Later EACC Officers visited their offices to record statements and the CCTV Footage, against which she signed an electronic Certificate and produced as MFI 6.
22. PW12, an Investigator with EACC (the Commission) testified that on 28<sup>th</sup> November 2018, the Commission received a report that some officers at Kabete Police Station had arrested a Chinese National and were demanding for Kshs. 1,000,000 bribe. He constituted a team and asked for Kshs. 1,000,000 treated notes for the operation. The money was treated, photocopied and an inventory made. He met PW11 at Lavington, interviewed her, inducted her on how to use the recording device, compared the treated money serial numbers with the photocopied ones, and asked her to sign the photocopy inventory. He handed over the gadget, PW11 signed the handing over certificate, and they proceeded to Kabete with two Motor vehicles, PW11's and EACC's. On arrival at Kabete Police Station, PW11 proceeded to the DCIO Office with the recording device. She returned to the vehicle and informed them that she had conversed with one of the suspects and he agreed to receive a benefit of Kshs. 200,000, which she recorded. He played the recording and confirmed that there was a demand for bribe. He then handed PW11 the envelope with the treated notes and she added Ksh. 100,000, then she approached their HR, PW1, who was with the 1<sup>st</sup> Appellant and handed her the envelope. PW1 and the 1<sup>st</sup> Appellant went into a parked Motor vehicle. He and his colleagues then approached the Motor vehicle, opened the door, introduced themselves as EACC Officers and handcuffed the 1<sup>st</sup> Appellant. One of the DCIO Officers inquired what was happening and upon explanation, went to call his colleagues who came out of their offices. One of the officers, the 2<sup>nd</sup> Appellant, drew out a pistol and started firing threatening fatal consequences if they didn't release the 1<sup>st</sup> Appellant. The DCIO officers told them to lie down during the shootout. He recalled that PW6 showed the officers his identification, but the 2<sup>nd</sup> Appellant took it and destroyed it. The DCIO approached the scene and asked them to proceed to his office. The DCIO provided them with the names and force numbers of the officers so that they would be summoned by EACC. He informed the DCIO that the money was in the car but he assured them that everything would be okay. As they went into the DCIO office, the officers entered the car in which the 1<sup>st</sup> accused was and drove off. The DCIO tried to call all the accused persons but none was picking his calls. The DCIO then called Kelly, inquired about her working status, and released her while retaining her passport. They informed the DCIO that they had lost Kshs. 200,000, PW6 Work ID and Kshs. 7,000 belonging to PW6. They then headed to EACC Offices to record what has transpired, recorded in the Occurrence Book, and produced in Court as MFI 21. The DCIO Officers were later summoned and their statements recorded. He received the recording gadget and signed an inventory, produced in Court as MFI 13. He downloaded the recording using EACC Computer and



- stored it in the Computer disk produced in court as MFI 15. He prepared a certificate under Section 106B of the *Evidence Act* dated 28<sup>th</sup> November 2018, produced in Court as MF1 22. He also prepared a transcript of the recorded conversation between PW11 and the 1<sup>st</sup> Appellant, marked as MFI 14. PW11 identified the voice of the person she was talking to known as Julius. He replayed the recording to Pau who confirmed that it was a true reflection of her conversation with the 1<sup>st</sup> Appellant, after which he signed the Transcription Certificate. He then went to China J. I. Ltd offices with PW5, were granted access to the CCTV Footage of 28<sup>th</sup> November 2018 and PW5 was allowed to extract the footage. He invited the DCIO, PW2, where he played the footage where the four accused persons were captured going into and out of China J. I. Offices and he identified all the four accused persons and the DCI Dagoretti Official Motor vehicle. PW2 signed the Image Recognition Certificate produced as Exhibit 2.
23. Thereafter, EACC wrote to the National Police Service, requesting the employment information of all the four suspects, which information was supplied. He then compiled the Investigation File and forwarded it to the ODPP who recommended charging of the accused persons before court. He confirmed that the treated money was never recovered.
  24. By the Ruling of Hon. Thomas Nzyoki delivered on 17<sup>th</sup> March 2023, the Court found that a Prima Facie case had been established to warrant the accused person to answer to Charge II, VI. VI and VII (as Charged) pursuant to Section 306(2) as read together with Section 307 of the *Criminal Procedure Code*.
  25. When the court put them on their defence, the Appellants called six witnesses. The 1<sup>st</sup> Appellant testified that on 28<sup>th</sup> November 2018, he indeed arrested Kelly for working at China J. I. Ltd without a work permit and took her to Kabete Police Station. He left her under the guard of another DCI officer and left for another operation in Kawangware which went into the evening. He returned at about 4.30 p.m and went to inform the DCIO about the two arrests. On his way, he saw PW1 and PW11 standing outside the office, and 3-4 men standing a few meters away. On his way to the washroom, the men attacked him, prompting his fellow officers to run towards the scene. He heard gunshots but could not tell where from. Several people gathered and the DCIO was last to arrive, when the men introduced themselves as EACC Officers but were unable to explain their presence. He learnt about the allegations of demanding a bribe from the DCIO which he denied, and later he went to record a statement with EACC. He denied being handcuffed, arrested inside a motor vehicle or receiving Kshs. 200,000 from PW1.
  26. The 2<sup>nd</sup> Appellant corroborated the 1<sup>st</sup> Appellant's evidence on the arrest of Kelly, operation in Kawangware and returning to Kabete at 4.30 p.m. He testified that he was guarding the suspect from Kawangware when he heard gunshots but did not respond. He produced the Cell register, Marked D2-5, where entry no. 47, made at 5.11 p.m. was booking of the Kawangware Robbery suspect. Afterwards, he went to prepare for an identification parade. He only met the EACC officer on his way back to the office.
  27. The 3<sup>rd</sup> accused who was DW-8 corroborated the evidence of the first and 2<sup>nd</sup> Appellants and testified that he was not at the scene during the commotion as he had gone to his house after the Kawangware operation.
  28. DW3 testified that on the afternoon of 28<sup>th</sup> November 2018, he heard the sound of something like a tyre burst from his office, and on coming out, he saw the 1<sup>st</sup> Appellant being searched by unknown people. He testified that the 2<sup>nd</sup> Appellant also came out when the commotion occurred. On cross-examination, he admitted that there was a gunshot.



29. DW4 testified that about 4 p.m. on 28<sup>th</sup> November 2018, while waiting to speak to the 1<sup>st</sup> Appellant who was on a call, he saw about ten men search and shoot the 1<sup>st</sup> Appellant from the back. When he heard gunshots, he went away.
30. DW7, a DCI officer testified that he had been left guarding Kelly, whom she handed over to the 1<sup>st</sup> Appellant when he returned from an operation at about 4.30 p.m. He had not seen the commotion.
31. DW8, a DCI Officer as well, testified that he had also been instructed to guard Kelly. At around 5 p.m. he had been informed about the arrest of the suspect from the Kawangware operation and he found the 2<sup>nd</sup> Appellant questioning him. When he went outside, he found people gathered, among them the 1<sup>st</sup> accused, and the DCIO invited them to his office. He never heard gunshots.
32. The appeal is premised on the grounds that:-
  - “ 1. That the learned trial Magistrate erred in points of law and in fact by failing to evaluate the evidence as a whole and observe that the prosecution never proved the case beyond reasonable doubt.
  2. That the learned trial Magistrate erred in law and fact by convicting the Appellants on contradictory evidence that was produced at the hearing of the trial court.
  3. That the learned trial Magistrate erred in law and fact by convicting and sentencing the Appellants with the offence of;
    - a. Count II;( 1<sup>st</sup> Appellant Julius Onyango Oguma) receiving a bribe contrary to Section 6(1) (a) as read with Section 18 of the *Bribery Act* No. 47 Of 2016.
    - b. Count IV;( 1<sup>st</sup> Appellant Julius Onyango Oguma) concealing evidence contrary Section 66 (1) (c) as read with Section 66 (2) of *Anti-Corruption and Economic Crimes Act* 2003.
    - c. Count V;(2<sup>nd</sup> Appellant Charles Macharia Wanjiru) obstruction contrary to Section 66 (1) (a) as read with Section 66 (2) of *Anti-Corruption and Economic Crimes Act* 2003.
  2. That the learned trial Magistrate erred in both law and fact by Relying on the audio recording which was inconsistent with the transcript produced as evidence.
  3. That the learned trial Magistrate erred both in law and fact by according undue weight to incoherent and inadmissible recorded conversations as evidence in determination of the charges.
  4. That the learned trial Magistrate erred both in law and fact by rejecting the plausible defense by the Appellants without further explanation.
  5. That the conviction could not have been reached by any reasonable tribunal properly directing its mind on the law and the facts.
  6. That the conviction and sentence cannot be supported by any evidence tendered before the trial court.



7. That the trial court exhibited naked bias and prejudice against the Appellants.”
33. The Appeal which is vehemently opposed was canvassed by way of written submissions. The Appellants were represented by Mr. Mogikoyo and Mr. Ouma Advocates while the Respondent was represented by Miss Ndombi Prosecution Counsel.
34. Learned Counsel for the Appellants submitted that the Appellants are entitled to obtain from this Honourable Court, its own decision on issues of fact and law; that in criminal cases it is upon the State to prove beyond reasonable doubt that the accused is guilty of the crime charged, based upon reason and common sense. Counsel placed reliance on Section 107(1) and (2) of the Evidence Act which provides that:
- “(1) Whoever desires any Court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
35. Counsel contended that the Respondent did not prove the ingredients of the offenses beyond reasonable doubt; that according to the particulars of the offense in Count II, the nature of the alleged bribe is financial, and receipt of the same from Janet Wangu, who testified as PW1; that for the offence of bribery to be complete it was incumbent upon the Respondent to prove that there was a request made to Janet, and that the money was received from her; that there is no dispute that Gong Huang aka Kelly was arrested for working in Kenya and the dispute was whether she was doing so without a valid work permit. She was released by the Director of Criminal Investigations Officer who is the 1<sup>st</sup> Appellant’s superior, and neither she nor her husband appeared in court to rebut the evidence of PW1, that she was not a worker but a wife to one of the engineers. Counsel noted that the testimonies of PW1 and PW2, both Senior officials of China Jiangsu Company limited, conflicted and the conflict was not resolved. Counsel asserted that the arrest of Kelly for working without a valid work permit or special pass and valid passport was not rebutted, thus her arrest was regular and proper. Counsel submitted that in PW1’s evidence, she never mentioned any request for money by the 1<sup>st</sup> Appellant.
36. Counsel stated that there was no evidence to show that the 1<sup>st</sup> Appellant requested for a bribe of Kshs. 200,000 from Janet Wangu; that Janet testified that she had been given Kshs. 100,000 by the Chief accountant, Mr. Tao, who was not called as a witness; that she did not open the envelope to count the money and only Mr. Tao could confirm the amount in the envelope; that the chain of custody of the money from Ethics & Anti-Corruption Commission should have been established to eliminate the possibility of substitution, tampering, mistaken identity, damage, alteration, contamination, misplacing, or falsifying of the evidence. Counsel took issue with PW12’s testimony that he commenced investigations into the matter on 28<sup>th</sup> November 2018, a day before he was officially instructed to investigate the case. Counsel contended that PW12 did not say, on what basis, he requested the Kshs. 100,000 and treatment of the same on 28<sup>th</sup> November 2018, thus the integrity of the notes from the EACC is doubtful. Counsel stated that there was no documentation to show the date and time that the money left the EACC or the person who requested and disbursed it, as would prove that the photocopies presented in the trial court were of the actual money. Counsel stated that none of the other EACC witnesses adduced evidence on how the money was procured. They asserted that the treated notes should not have been considered or given much weight while determining the case.



37. Counsel also took issue with the evidence of PW12 who testified that the demand for bribe was made to PW11 as per the tape-recording transcription; that PW11 testified that he had seen the officers who arrested Kelly from their offices, and that she had negotiated the bribe down from Kshs. 1 million to Kshs. 200,000. Counsel contended that PW11 testified that the 1<sup>st</sup> Appellant was the officer who demanded the money directly from her yet this was not possible given that the 1<sup>st</sup> Appellant was a stranger to her and it was not possible for her to recognize his voice. Counsel made reference to the testimony of PW2 who had worked with the Appellants for eight (8) months but was not able to recognize their voices in the recording. They argued that if PW2 who was familiar with the Appellants could not recognize their voices, then PW11 and PW12 could not either. Counsel relied on the case of *Boniface Otieno Odhiambo v Republic* [2018] eKLR where the court stated:-

“Voice identification like any other form of identification must be free from any error, form of manipulation for the Court to rely on it.”

38. Counsel further submitted that the transcript (EXB 14) is unclear in most parts, and the reproduction does not have a demand for money by the 1<sup>st</sup> Appellant as there is no mention of “shillings” save for “I have only 200 . . . Can you offer 200 . . .”, thus it cannot be inferred that the 1<sup>st</sup> Appellant demanded for Kshs. 200,000.
39. Counsel stated that there was no evidence that the money was received by the 1<sup>st</sup> Appellant. Counsel contended that PW1 did not reveal the identity of the person she gave the money to; that evidence of how the Kshs. 100,000 from China Jiangsu and that from EACC was put together to make Kshs.200,000 was contradictory and that PW1 testified that she could not ascertain the content of the envelope that she handed over in the car.
40. In regard to Count IV, Counsel submitted that PW6 testified that once they approached the vehicle where the 1<sup>st</sup> Appellant was, and told him that he was under arrest, he threw the money in the back seat; that PW6 did not explain why they did not retrieve the money after handcuffing the 1<sup>st</sup> Appellant; that none of the EACC officers testified that they saw PW1 hand over the money to the 1<sup>st</sup> Appellant and that the 1<sup>st</sup> Appellant could not have driven while hand cuffed.
41. On the 2<sup>nd</sup> Appellant’s conviction, Counsel submitted that there was no evidence that the 2<sup>nd</sup> Appellant interfered with the arrest of the 1<sup>st</sup> Appellant and thus the charge of obstruction cannot hold. Counsel asserted that the evidence of drawing of the firearm was given by PW2 and PW8, who confirmed that the 2<sup>nd</sup> Appellant returned the firearm intact; that the Arms Movement Book was produced as Exhibit 4, confirming 15 ammunition given to the 2<sup>nd</sup> Appellant were also returned. Counsel submitted that it was proved that the pistol was not used and that therefore the allegation that the 2<sup>nd</sup> Appellant drew his gun and fired in the air was not proved. Counsel stated that there was no sufficient evidence to support the conviction and the sentence imposed against the 2<sup>nd</sup> Appellant on Count IV and thus the appeal ought to be allowed.
42. To support their submissions Counsel relied on the following cases:*Republic v Nicholas Kamwanjara Mwachia & 2 Others* – HCCRA 5 OF 2020*Republic V Dennis Langat & Anor* HCCR C No. 3 of 2019*Boniface Otieno Odhiambo v Republic* (2018) eKLR



## The Respondent's Submissions

43. Miss Ndombi, Learned Counsel for the Respondent submitted that as was held by Onyiego J, in the case of *Gideon Makori Abere v Republic* ACEC Cr. Appeal No. 19 Of 2018 [2019] eKLR the ingredients of the offense of bribery are 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.....

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.”

44. She submitted that the prosecution led evidence to show that the 1<sup>st</sup> Appellant was a police officer attached to the Directorate of Criminal Investigations at Kabete Police Station: that he was on patrol duties on the 28<sup>th</sup> November 2018 and that while on patrol, he informed his senior in command that he had received information that there was a Chinese national who was working for Jiangsu International Company without the proper documents. Counsel stated that the prosecution adduced evidence that the said Chinese lady (Goan Huan) was arrested and taken to Kabete Police station as per the evidence of Pw1 who followed her to the station; that PW11 the Deputy General Manager was informed about the arrest by their receptionist (PW9) and that the prosecution led evidence through the CCTV footage produced in evidence to show the identity of the Appellants alongside other police officers. Counsel submitted that from the transcript produced in the trial court as (EXB 14) and the CD as (EXB 15) the court made a finding that indeed the 1<sup>st</sup> Appellant requested for a bribe in order not to charge Goan Huan (Kelly). Counsel stated that the offence of bribery was proved to the required standard.
45. Regarding the 2<sup>nd</sup> Appellant, Counsel submitted that there was evidence that he was present when the EACC officers attempted to arrest the 1<sup>st</sup> Appellant after he was handed a brown envelope by PW1. Counsel explained that according to PW7, the Officer Commanding Station, he heard a gunshot after which there was a commotion and when he went to establish what had transpired, he (PW7) was informed that EACC officers were trying to arrest the 1<sup>st</sup> Appellant and that the 2<sup>nd</sup> Appellant had obstructed the arrest. Counsel contended that this fact evidence was corroborated by the testimony of PW2 who was the DCIO; Counsel asserted that the inconsistencies highlighted by the defense are not substantial and do not go to the facts and evidence proving the case. To support this submission, Counsel relied on the case of *Richard Munene v Republic* [2018] eKLR but asserted that it is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witnesses that is fatal to its case; that it is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.
46. Counsel argued that looked at in totality the evidence was consistent and the minor contradictions in the oral testimony tendered by the witnesses did not occasion prejudice to the Appellants.



47. Counsel further submitted that the sentences meted upon the Appellants were not excessive as alleged and were within the provisions of the law.
48. Counsel urged this court to uphold the conviction and the sentences and dismiss the appeal in its entirety as it lacks merit.

### **Issues for determination**

- i. Whether the offenses against the Appellants were proved beyond reasonable doubt.
- ii. Whether the sentences imposed by the lower court were excessive.

### **Analysis and Determination**

49. I have carefully evaluated the evidence adduced in the lower court as is my duty as the first appellate court, careful of course, to keep in mind that I did not see or hear the witnesses myself.
50. It is not in dispute that at the material time the Appellants were police officers attached to the Directorate of Criminal Investigations. It is also not in dispute that they arrested a Chinese National for working without a permit and took her to Kabete Police Station.
51. The elements for the offences of soliciting and receiving a bribe were enunciated in the case of *Paul Mwangi Gathogo vs Republic* [2015] eKLR where the court stated: -

“The main ingredients of the offence are the accused must be acting in any capacity, whether in public or private sector, or employed by or acts on behalf of another person, that he must be shown to have obtained or attempted to obtain gratification other than legal remuneration, that gratification should be as a motive or reward for doing or forbearing to do, in exercise of his official functions, a favour or disfavour to any person”.
52. The above elements were restated by Mativo J, (as he then was) in the case of *Michael Waweru Ndegwa —vs- Republic* [2016] eKLR when he stated: -

“In order to constitute an offence, the following are essential ingredients; in the first place, there must have been solicitation or offer or receipt of a gratification must have been asked for, offered or paid as a motive or reward for inducing by corrupt or illegal means and secondly, that someone should be acting in the public or private or employed or acts for and on behalf of another person, or confer a favour or ask for a favour to render some service.”
53. Section 2 (I) of the *Bribery Act* defines benefit as follows: -

“benefit” means any gift, loan, fee, reward, appointment, service, favour, forbearance, promise, or other consideration or advantage.”
54. In this case the prosecution was required to prove beyond reasonable doubt that the 1<sup>st</sup> Appellant who admittedly was a Police Officer in the Public service solicited for a benefit or reward for the purpose of foregoing to charge Kelly, a foreign National, for working in Kenya without a work permit.
55. The prosecution produced a CD containing an audio conversation between the 1<sup>st</sup> Appellant and PW11 (EXB15) and a transcription of the conversation (EXB 14). The trial court found the audio was clear, although defense Counsel alleged it was not.



56. There were certificates of the handing over and receiving of the recorder and the recording was done under the watch of the EACC Officers. The trial court also found that there was uncontroverted evidence that PW1 met with the 1<sup>st</sup> Appellant when she accompanied Kelly to the Police station and she was visibly seen talking to the officers on the CCTV footage. PW7, the OCS, was able to positively identify the Appellants in the scene. The trial court therefore came to the conclusion that since several witnesses had placed the appellants at the scene. They were indeed at the scene.
57. On my part, I find it a fact from the evidence that the 1<sup>st</sup> accused negotiated for a bribe, and made steps to receive it from PW1. The audio (CD EXB 15) and the transcript corroborated the evidence of PW1. Contrary to the submission by Counsel for the Appellants the audio was very clear and it is supported by the transcript. PW1 recognized the 1<sup>st</sup> Appellant's voice. She had had a conversation with him and I am satisfied that she did so even though an officer who had worked with the Appellants could not. It is my finding That all the elements of the offence were proved beyond reasonable doubt as the 1<sup>st</sup> Appellant was acting in his capacity as a Police Officer in the Public Service, employed by the Government of Kenya; he demanded to obtain money that was not his legal remuneration, as a reward for forbearing to charge a foreign national for working illegally in Kenya, in exercise of his official functions, so as to confer a favour to that foreign national.
58. I find that the 1<sup>st</sup> Appellant's intention to receive the bribe is supported by the fact that while he admitted to having arrested Kelly, he had not booked that arrest in the Occurrence Book. The fact that he continued to detain her until evening, while engaging PW1 and PW11 is also very telling. His explanation that he was waiting for instructions from the DCIO is not convincing. Even after the DCIO arrived he did not seek to consult him but instead went ahead to receive money from PW1.
59. There is evidence that when the DCIO called the EACC officers to his office the 1<sup>st</sup> Appellant remained outside. PW5, PW6, PW7 and PW11 testified that once they were in the DCIO Office, the 1<sup>st</sup> Appellant got into the car that had the money together with the 2<sup>nd</sup> Appellant and fled the scene. Thereafter, he was unavailable on phone. It was the DCIO (PW2) who gave the names of the Appellants to the EACC Officers. Seeing that the treated notes were never recovered, and that the 1<sup>st</sup> accused fled the scene when the EACC officers were having a meeting in the DCIO's Office, the prosecution was not able to prove that the 1<sup>st</sup> Appellant actually touched the notes. It is my finding however, that that was not fatal to the prosecution's case. There is evidence beyond reasonable doubt that he requested for the money and that it was in fact paid to him although the money was not recovered. I find therefore that the offence charged in Count II was proved beyond reasonable doubt and that the conviction thereof is sound.
60. In regard to Count IV, the trial Court found that there was evidence that the 1<sup>st</sup> Appellant received a bribe while in the parked car. When the EACC Officers approached to arrest him, he sounded an alarm and his colleagues came to his rescue and once the DCIO went into his office with the EACC officers the Appellants got into the car and drove away. The trial court found that the Kshs.200,000 which should have been an exhibit and hence crucial evidence got lost as a result hence this amounted to concealing evidence.
61. On my part it is my finding that by shouting and screaming, the 1<sup>st</sup> Appellant intended to attract the attention of his colleagues so that they could go and rescue him and that they indeed did so by driving the vehicle away with him inside. It is my finding that he took part in concealing the evidence even though he himself did not drive the vehicle as he could obviously not have done so in handcuffs.
62. The 2<sup>nd</sup> Appellant appeals against the Conviction for the offence of Obstruction contrary to Section 66 (1) ( a ) as read with Section 66 (2) of the [Anti-Corruption and Economic Crimes Act](#).



63. Section 66 (1) ( a ) of the *Anti-Corruption and Economic Crimes act* 2003 provides:

“No person shall—without justification or lawful excuse, obstruct or hinder, or assault or threaten, a person acting under this Act.”

64. The 2<sup>nd</sup> Appellant provided an alibi during the hearing. DW1 and DW7 in their testimonies, removed the 2<sup>nd</sup> Appellant from the scene of the arrest. The prosecution witnesses however, all placed the 2<sup>nd</sup> Appellant at the scene, with PW6 recalling that it was the 2<sup>nd</sup> Appellant who shot in the air, damaged his identification card and took his wallet containing Kshs. 7,000. The alibi defence was not raised in the first instance as would give the prosecution an opportunity to investigate it. Be that as it may I have considered it carefully vis a vis the rest of the evidence and in my view it was not convincing. This incident occurred in circumstances where the witnesses can be said to have been in a position to clearly see what happened. There is no doubt at all that there were shots even though the exact gun that fired the same was not identified. PW11 identified the 2<sup>nd</sup> Appellant as the person who shot in the air, and the person who took the identification card from PW6, destroyed it, took his wallet, and ordered the EACC Officers to release the 1<sup>st</sup> Appellant at gun point. As a matter of fact, the witnesses did not know the 2<sup>nd</sup> Appellant and it was provided by the DCIO, when he was asked to name the persons who were at the scene. It is my finding that the witnesses called by the 2<sup>nd</sup> Appellant were not truthful witnesses. Their motive was not to assist the court to arrive at a just decision but to save their friend. In my view the charge against the Appellant was also proved beyond reasonable doubt.

65. Having looked at the sentences prescribed for the offences for which the Appellants were convicted I am not persuaded that the sentences meted by the trial court were excessive. A fine of Kshs. 500,000 or a term of imprisonment for 12 months compared with the prescribed sentence of Kshs. 5 million or imprisonment for ten years can only be described as lenient but not excessive. Similarly, a fine of Kshs. 400,000/- which is what was imposed in Count IV is not excessive in view of the prescribed sentence of Kshs.500,000 or five years’ imprisonment. The court did also take the circumstances of the offences into account.

66. The upshot is that this appeal has no merit. The same is dismissed. The convictions and sentences imposed by the trial court are upheld.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 28<sup>TH</sup> DAY OF JUNE 2024.**

.....

**E N MAINA**

**JUDGE**

