



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

ACEC APPEAL NO 23 OF 2018

VINCENT MBINDO KATHUMO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence in Milimani Anti-Corruption Court Chief Magistrate's Anti-Corruption Case No 1 of 2017 (Hon. L. Mugambi (CM) dated 7th December 2018)

JUDGMENT

1. The appellant was charged in Anti-Corruption Case No 1 of 2017 with the offence of requesting for a bribe contrary to section 6(1) (a) as read with section 18 of The Bribery Act, No. 47 of 2016. The particulars of the offence were that on the 18th day of January, 2017 at the University of Nairobi, Upper Kabete Campus within Nairobi City County, being a person employed in the public service to wit University of Nairobi as a lecturer, improperly requested for a financial advantage of Kshs 2,000/- from Duncan Kibet with intent that he would forgive the said Duncan Kibet for examination irregularities in the Land Forms and Soil Formation unit, a function to which a bribe relates.

2. At count II, he was charged with the offence of requesting for a bribe contrary to section 6(1) (a) as read with section 18 of the said Act. The particulars of the offence were that on the same date, time and capacity as in count 1, he requested for a financial advantage of Kshs 3,000/- from the said Duncan Kibet with intent that in consequence thereof, he would allow him to re-sit the said unit.

3. The appellant faced an alternative charge to count II being agreeing to receive a bribe contrary to section 6(1) (a) as read with section 18 of the Bribery Act. The particulars of the offence were that on the 18th day of January, 2017 at the University of Nairobi, Upper Kabete Campus within Nairobi City County, being a person employed in the public service to wit University of Nairobi as a lecturer, he agreed to receive Kshs 3,000 through M-pesa Account No. 0719799242 from Duncan Kibet with intent that, in consequence, he would improperly award the said Duncan Kibet marks in Land Forms and Soil Formation unit, a function to which a bribe relates.

4. At count III, the appellant was charged with the offence of receiving a bribe contrary to section 6(1) (a) as read with section 18 of the Bribery Act. The particulars of the offence were that on the same date, place and time as well as capacity as in count I and II, he received a financial advantage of Kshs 3,000/- from Duncan Kibet with intent that he would improperly award him marks in Land Forms and Soil Formation unit, a function to which a bribe relates.

5. He was tried and convicted of the offence of requesting for a bribery contrary to section 6(1) as read with section 18 of the Bribery Act, agreeing to receive a bribe contrary to section 6(1) (a) as read with section 18 of the Bribery Act, and receiving a bribe contrary to section 6(1) (a) as read with section 18 of the Bribery Act in the judgment of the trial court dated 7th December 2018. He was sentenced on count 1, 11 and 111 to a fine of Kshs 150,000 and in default, one (1) year's imprisonment. In default of payment of the fine, the sentences were to run consecutively.

6. Aggrieved by both his conviction and sentence, the appellant has filed the present appeal in which he raises twenty grounds of appeal in the Petition of Appeal dated 20th December 2018. He argues, first, that the Trial Magistrate erred in fact and in law by failing to sufficiently consider and take into account his evidence, submissions and authorities. The trial court also misdirected itself in fact and in law by not appreciating that he did not receive the gift or advantage in order to improperly deliver a service. It is his argument, thirdly, that the trial court erred by failing to take into account that he neither acted in a corrupt manner nor was motivated by a corrupt intent as he had already discharged his obligation without anticipation of any bribe, advantage or token of appreciation. He argued, fourthly, that the trial court erred in not appreciating that with the timing at which the gift was sent to PW 7, it was not logical for the complainant's results to be altered as they had been submitted to the Chairman of the Department.

7. The appellant argues further that the trial court erred and misapplied the law in accepting the prosecution argument that he perverted the work of his office to benefit himself by relying on the identification of the voice recorded by Prof Kironchi (PW 3) whom the appellant argues had already been led and informed that the voice recorded was that of the appellant. The court further erred in finding that the defence that he put forward, that the gift was an appreciation, was an afterthought. The trial court also erred in admitting inadmissible evidence, including the recording and transcript produced by the prosecution. It also failed to assess adequately or at all the effect of the fact that the voice on the audio recording was not independently identified as his. The court also erred in failing to find that the appreciation the appellant received was a gift which he passed on to PW 7, and in finding that it was a bribe under the provisions of section 6(1) (a) of the Bribery Act, offered to ensure the improper award of marks to the complainant when the appellant had already discharged his obligations.

8. The appellant further challenges his conviction and sentence on the basis that the trial court erred in finding that he had the legal burden of proving that he was not acting corruptly or was not motivated by a corrupt intent, and in failing to appreciate that a bribe can only be prospective and not retrospective. He charges the court with failing to find that the inconsistencies in the prosecution's evidence cast doubts on its case and in finding that it had proved its case to the required standard. He also impugns the judgment of the trial court on the basis that its assessment of the prosecution evidence did not take into account its effect on his right to a fair hearing. He argues that the trial court failed to frame and determine the correct issues before him, and asks this court to allow his appeal and set aside the judgment of the trial court.

9. As the first appellate court, I am under a duty to re-evaluate the evidence and reach my own conclusion. In doing so, I must bear in mind that I have neither seen nor heard the witnesses, which the trial court had the advantage of doing – see **Okeno v Republic (1972) EA 32** and **Mwangi v Republic [2004] KLR**.

10. The prosecution called 9 witnesses, and their evidence was as set out hereunder. PW1, Duncan Kibet (Duncan) was a student at the University of Nairobi, Upper Kabete Campus. On 21st December 2016, his class was sitting an examination in Land Forms and Soil Formation. He entered the exam room with his phone. The appellant, who was supervising the exam, saw the phone protruding from his pocket. He confiscated the phone and his exam papers and asked him to leave the room. Duncan had yet to finish his exam. He was joined by around 20 other students who had also been found with their phones. After the exam, the students followed the appellant to his office. He gave them their phones back but took their phone numbers and told them that they would re-sit the exams in January 2017.

11. Duncan testified that on 17th January 2017, the appellant called him at around 8.30 p.m. and told him to meet him at his office the next morning. When he went there on 18th January 2017 at 10.00 a.m. the appellant told him that in order for the matter to end, Duncan needed to give him Kshs 2,000 for forgiveness and Kshs 3,000 to re-sit the paper, making a total of Kshs 5,000, which he was to get before noon of that day.

12. The appellant also gave Duncan the answer sheet for the Land Forms and Soil Formation paper, which he copied. Duncan then left to get the money demanded. He went to his father's office and narrated the story, and the two went to the office of the Deputy Vice Chancellor (DVC) at the University, Prof. Henry Mutoro (PW5). The DVC referred them to the Central Police Station.

13. Before they left the DVC's office, the appellant called Duncan and Duncan put his phone on loud speaker, and the

conversation was heard by both the DVC and Duncan's father (PW2). The appellant asked Duncan why he was taking so long to get the money. To buy time, Duncan informed the appellant that he was in traffic. Duncan and his father then went to report the matter at the Central Police Station, where they were referred to the Ethics and Anti-Corruption Commission (EACC).

14. At EACC, Duncan narrated his story to Livingstone Waihenya (PW9). While he was narrating the story, the appellant again called him to ask why it was taking so long. He put his phone on loudspeaker and the conversation was heard by his father, Waihenya (PW8) and Mbuvi (PW9). The call was also recorded. Duncan informed the appellant that he had Kshs 2,000 and was looking for Kshs 3,000. The appellant told him that if he had Kshs 2,000, he should take it to Uthiru but if he had Kshs 3,000, he should send it via Mpesa to a number that the appellant would give him in 5 minutes.

15. Waihenya then sent Duncan Kshs 3,000 via Mpesa. The appellant then sent a text message to Duncan's line with the telephone number 0719***** to which he was to send the money. The appellant sent the line through his mobile number 0723*****. Duncan sent Kshs 3,000 to 0719*****. He received a message that he had sent money to a John Saitoti. He then called the appellant and asked if the person he had sent the money to was John Saitoti, and the appellant confirmed that it was okay. This call was also recorded by EACC.

16. Duncan was awarded marks in the Land Forms and Soil Formation unit. He was number 23 out of 48 students, with 62%. He got the mark in the exam that the appellant had given him to copy. Duncan identified the device used to record his conversation with the appellant (P. exhibit 2) and the transcript of the phone conversation (P. exhibit 3). The recording was played in court, the court noting that the conversation was substantially in English, clear and audible, and that the voices could be distinctly heard.

17. Duncan identified his voice and that of the appellant, and he understood the appellant's question in the recording. He understood the question "*You got the 3*" to mean whether he had the Kshs 3,000. He informed the appellant that he got "*only 2*". His testimony in cross examination was that he had arrived late at the exam. His phone, which the accused took, was off. He had taken 5-10 minutes to copy the exam at the appellant's office on 18th January 2018.

18. Julius Rotich (PW2) was the complainant's father. His son had gone to his office at about 11.00 a.m. on 18th January 2017 asking for Kshs 5,000 for facilitation for his lecturer. Rotich narrated the events of 21st December 2016 and 17th and 18th January 2017 as told to him by Duncan. He also confirmed his visit, with Duncan, to the DVC, Prof Henry Mutoro (PW5). While they were in the DVC's office, the appellant kept calling Duncan to demand the money. Duncan had put the call on loudspeaker and Rotich and the DVC could hear the appellant demand money. The DVC referred them to the Dean, Faculty of Agriculture, Kabete Campus. PW2 confirmed that they had gone to report the matter at Central Police Station but were referred to the EACC. He also confirmed the recording of the appellant's call to Duncan at the EACC.

19. PW3, Prof Geoffrey Kironchi, the Chairman of the Faculty of Agriculture had been called to the office of the Dean, Faculty of Agriculture, on 19th January 2017. He had found the Dean with EACC offices who informed him they were investigating a lecturer who was soliciting money from a student. They had an audio clip which he listened to. The lecturer was asking the student to take money to Uthiru or send it by Mpesa. PW 3 stated that he could not recognize the voice due to the quality of the recording though the voice sounded familiar. He had taught the appellant and interacted with him regularly, perhaps once or twice a week, and could recognize his voice if he spoke to him directly but when recorded, it was possible or not possible.

20. The evidence of PW4, Samuel Mukundi Njiru, an investigator with EACC, related to the investigations carried out at the Faculty of Agriculture at the University of Nairobi Upper Kabete Campus. EACC had played the audio clip of the conversation between the appellant and Duncan. He had also obtained a DVD containing exam results. In cross-examination, he stated that Prof Kironchi (PW3) and Prof Kamenchu had identified the appellant's voice.

21. Prof Henry Mutoro (PW5), the DVC in charge of Academic Affairs, confirmed that Duncan and his father had gone to his office to report that Duncan's lecturer was demanding Kshs 5,000 from him. That initially, the student was not very clear in his complaint but when his phone rang and Duncan put it on loudspeaker, the DVC heard the conversation. The voice on the other end was threatening the student to pay the money immediately or tell him when he would pay. The DVC had called the Dean of the Faculty of Agriculture to ask him if he was aware of the incident. The student had then received another phone call from the lecturer demanding to know when he would send the money. The DVC had advised Duncan and his father, PW1 and PW2, to report the incident to the Dean, or to the Police and get money from the police and the man would be arrested.

22. Alex Kinyanjui, (PW6) from EACC Forensic Laboratory had undertaken extraction of data from Techno Y35 Imei Number

358898062630061 for mobile data covering 18th January 2017. The date extracted was in respect of mobile number +254723***** which had received the messages from the Techno phone. The messages were communication between the appellant and the complainant.

23. There was also a message on the Techno phone indicating receipt of Kshs 3,100 from Livingstone Waihenya, mobile number 0722*****. Another message on the Techno was from +254723***** containing a mobile number 0719*****. The next message in the Techno was from Mpesa indicating that Kshs 3000 had been sent to John Saitoti on Mobile number 0719*****. The phone examination report preview (P. exhibit 7) and a certificate under section 65(8) of the Evidence Act (P. exhibit 8) were produced. The messages in the phone were from the period 1.51pm to 6.37 pm on 18th January 2017.

24. John Saitoti Lerinto (PW 7) was a waiter at Gachuri Gardens in Uthiru at the material time. His testimony was that the appellant had started drinking at the bar from 4.30 p.m. At 6.00 p.m., he had asked PW7 to assist him with his phone as he was going to be sent money and his phone had a problem. He wanted to receive the money on Mpesa through Saitoti's phone. Saitoti had written down his number, 0719*****, and left the appellant with his phone. He had heard his phone beep and seen that Kshs 1000 had been sent. He had shown the message to the appellant who had informed him that more money would come.

25. Another message, this time for Kshs 3,000, had come. The appellant had told Saitoti to withdraw the money and give it to him, which he did. The appellant then cleared his bill and left. PW7 could not recall the name of the persons who had sent the money to his phone but he identified the appellant as the customer he had dealt with, to whom he gave his phone and the money sent on Mpesa. The appellant was the only customer whom PW7 served, as he was sitting near the counter where PW7 was serving.

26. Livingstone Waihenya (PW8) was an investigator with EACC. The complainant and his father (PW1 and PW2) had been brought to his office from the EACC Report and Data Centre on 18th January 2017 after 5.00 pm. They had a complaint about a lecturer, one Dr Kathumo, who was requesting for a bribe of Kshs 5,000 to allow the complainant to re-sit an examination and award him marks for a paper that he was sitting when he was caught with a phone in the exam room. PW 8 had called an officer (PW9) to investigate the matter. As the complainant was leaving Waihenya's office, he had received a call from the lecturer and the conversation between the complainant and the lecturer was recorded on an audio device after the complainant put his phone on loudspeaker.

27. PW8 could hear the lecturer asking the student why he did not honour the agreement they had for him to take money by noon. He had also heard him tell the student to take the money to Uthiru if he had Kshs 2,000 or send it by Mpesa if he had Kshs 3,000. PW8 confirmed PW1's evidence that PW1 had on PW8's instructions, informed the appellant that he had managed to get Kshs 3,000 and for the appellant to send him the number to which the money was to be sent. The appellant had then sent a text with the number to which the money was to be sent – 0719*****. PW1 then called the appellant to confirm the number. The appellant had confirmed that it was the number and PW8 had sent Kshs 3,000 to the appellant who then sent it to the number which showed the money was sent to one John Saitoti. The appellant then called and confirmed that the money had been received, and that the complainant would be awarded marks. The appellant was then arrested on 19th January 2017 and charged in court. It was his testimony that the appellant was threatening the complainant to take the money before midnight of that day.

28. Martin Mbuvi (PW9), the investigating officer, was called by PW8 around 5.20 p.m. on 18th January 2017 and introduced to the complainant and asked to interview him. Before they left, the appellant called the complainant who put the call on loudspeaker and Mbuvi recorded the conversation on a Sony audio recorder. The complainant told the appellant that he needed more time to look for money. The appellant called the complainant several times in the course of his interview with PW9, instructing him how the money should be taken to him. He told him that if he was able to raise Kshs 3,000, he could send it on a number that the lecturer would provide.

29. PW9 confirmed that PW8 had then sent the complainant Kshs 3,000 which he sent to the number given to him by the appellant, 0719*****. The complainant then called the appellant who confirmed that the money had been received and the Mpesa feedback showed the money had been received by John Saitoti. PW9 had gone to Upper Kabete Campus the following day and had played the audio clip for Prof Kironchi and Prof Kamenchu. Prof Kironchi had been able to recognize the voice of the appellant but not the person he was speaking to.

30. PW9 produced Mpesa records for John Saitoti showing receipt of Kshs 3,000 from the complainant. He also produced phone data showing 23 calls between the complainant and the appellant between 2024 hours on 17th January 2017 and 1840 hours on 18th January 2017 (p. exhibit 11) He also obtained from the appellant exam results which showed the complainant was awarded 62% for

the paper on Land Forms and Soil Formation. He also produced a DVD of the exam results (P. exhibit 14). According to PW9, the appellant submitted the results in the early hours of 19th January 2017.

31. At the close of the prosecution case, the court found that the appellant had a case to answer and placed him on his defence. He gave sworn testimony and called one witness.

32. In his defence, the appellant confirmed that the complainant was his student. He had confiscated his phone, along with those of 10 other students, during the Land Forms and Soil Formation examination. He had also confiscated their answer booklets. He had been invigilating the exam with his Master's student, Samuel Mwendwa (DW2).

33. After the exam, the affected students had followed him to his office and asked for forgiveness. He had inspected the phones and found that they had all been switched off, and he returned the phones to the students. He did not tell the students that he had forgiven them.

34. On 10th January 2017, when he was marking the exams, the complainant went to his office to follow up on the incident. The appellant told him that they would follow up on the incident later and for the complainant to leave his contact, which the complainant wrote on a piece of paper. He had texted the complainant on 17th January 2017 asking him to see him the following day.

35. At around 10.00 a.m. on 18th January 2017, his Master's student, DW2, had gone to his office. The appellant asked him to wait as he was finalizing marking the exams and entering the marks in order to submit the marks to the Chairman of the Department. At 11 a.m. DW2 assisted him to carry the answers booklets to the Chairman of the Department for submission. He had been issued with an examination results submission form (D. exhibit 1) by a secretary in the Department. As at 11.30 a.m., the complainant's booklet was not in his hands.

36. The appellant stated that the complainant went to his office at 12.20 p.m. and introduced himself as one of the students the appellant had caught with a mobile phone during the exam in December 2016. He wanted to know the progress of the case. The appellant informed the complainant that he did not have enough evidence to forward the case and had forgiven all the students. After he told the complainant this, the complainant was happy and offered to give the appellant an appreciation as he had been afraid he would be expelled. The applicant told him that he did not need an appreciation but the complainant insisted. The complainant left his office at about 1.30 p.m.

37. The appellant then went for late lunch at Gachuri Gardens in Uthiru at about 4.00 p.m. The complainant called him and insisted that he wanted to give him an appreciation, and that he wanted to send it by Mpesa. Since the appellant did not need the Kshs 3,000 that the complainant wanted to give him as appreciation, he thought he would give it to somebody who needed it, and he thought of the waiter who was serving him, Saitoti (PW7). He requested Saitoti for his number, and the complainant sent the Kshs.3000/=. The appellant confirmed to the complainant that the money had been received. He did not bother the waiter after the money was received at about 6.30 p.m on 18th January, 2017. He left Gachuri Gardens at around 7.00 pm.

38. The appellant denied all the charges against him and asserted that he had already submitted the results to the Chairman of his Department before meeting the complainant and before the appreciation had been sent to the waiter. Confronted with the transcript of his conversation with the complainant, he stated that he could not recall saying the words in the transcript. In cross-examination, he confirmed that he signed the mark sheet on 19th January 2017. He denied that he had insisted on being given the appreciation.

39. DW2, Samuel Mwendwa Musyoki, confirmed that the appellant was his Master's Project supervisor. He had assisted him in invigilating the Land Forms and Soil Formation exam. He confirmed that the appellant had caught 10 students with phones during the exam and had confiscated the phones. The students had followed the appellant. The appellant had checked the phones and found that none was switched on and he returned all the phones to the students. DW2 next met the appellant in January 2017 when he went to consult him on his project. He had gone there at about 10.00 a.m. on 18th January 2017. The appellant had requested him at around 11.00 a.m. to carry the booklets to the Chairman's office, which he did. He stated that no-one went to the appellant's office between 10.00 a.m. to 11.00 a.m.

40. After considering the evidence before it, the trial court concluded that the appellant had not been able to shake or raise any doubt in the strong evidence adduced by the prosecution. He found that it was improper use of his office for personal gain

amounting to corruption to demand money from his student to forgive him over an exam irregularity, allow him to re-sit the exam and award him marks under dubious circumstances. He accordingly found the appellant guilty as charged under counts 1, 11 and 111, hence the present appeal.

Analysis and Determination

41. I have read and considered the record of the trial court in this matter, the appellant's grounds of appeal and the respective submissions of the parties on the matter. In his submissions dated 10th June 2020, the appellant has asked the court to determine three issues:

- i. Whether the appellant requested for a bribe with intent to improperly perform a public function;**
- ii. Whether the trial court properly convicted the appellant without proper voice identification in the audio clip;**
- iii. Whether there was sufficient evidence to convict the appellant on the 'appreciation' received by PW 7.**

42. In submissions in response, the respondent argues that the evidence it tendered was overwhelming and it proved the three counts against the appellant. It also addresses itself to the three issues identified by the appellant. In this analysis, I will consider each of these issues and the respective arguments of the parties before rendering my decision on each issue.

Whether the appellant requested for a bribe with intent to improperly perform a public function

43. The appellant submits that the requirements of section 6(1) (a) and section 7(1) have not been satisfied by the evidence presented before the trial court. He contends that from the wording of the two sections, one has to request, receive or agree to receive a financial or other advantage, and there must be the *mens rea* that by so receiving the advantage, some function or activity should be improperly performed by that person or by someone else; and finally, that the function must be of a public nature or of such a nature as carried out by a public officer.

44. The appellant concedes that at the material time, he was a public officer performing a public duty. He disputes, however, the contention that he demanded a bribe from PW 1 to forgive him for an examination irregularity, to allow him to re-sit the Land Forms and Soil Formation Unit examination, and to award him marks in the said unit.

45. The appellant further concedes that he was in contact with the complainant on the material day, and that the complainant went to his office on the issue of the alleged examination irregularity incident of 21st December 2016. He submits, however, that he did not ask for a bribe as alleged, and that he did not ask for or receive or anticipate to receive a bribe for the purpose of acting corruptly. The appellant submits that in his evidence in cross-examination, the complainant admitted that there was no mention of him re-sitting the exam, no mention of the true purpose of the money, and that the nature of the alleged agreement is not clear. The complainant had also stated that there is no mention of the true purpose of the money.

46. The appellant submits that the true purpose of the money cannot be construed to be for the purpose of acting corruptly. It is his submission that by the time the complainant allegedly sent the money, the appellant had already submitted the marks for the examination. He cannot, therefore, be held to have submitted the marks after having received the bribe. Nor, he submits, can he be held to have conducted himself corruptly in anticipation of receiving a bribe. It is his submission that he had already submitted the marks of the rest of the 20 individuals who had been caught, alongside the complainant, with their mobile phones during the examination. There is no explanation or reason why the appellant opted to single out the complainant for the alleged bribe. In any event, according to the appellant, the money allegedly sent to his agent had no impact on his conduct. He had submitted, or would have submitted, the marks of the complainant whether or not the money was sent. He asks the court, if it finds that the money allegedly sent to him is inconsequential to the submission of the marks of the complainant, to find in his favour.

47. The appellant submits that an analysis of the evidence of PW 2, PW 3, and PW9 suggest that the submission of the complainant's marks, if dependent on the bribe, would demonstrate that the appellant acted corruptly. His submission, so far as I understand it, is that there was no mention that if the appellant did not get the bribe, he would not submit the complainant's marks, so the appellant did not act corruptly. It is his submission that nobody heard him request for money from the complainant as an inducement to forgive the complainant for an examination irregularity, or as an inducement to allow him to re-sit the unit in

question. He submits that the complainant himself confirmed on cross-examination that the appellant did not specifically ask for a bribe to allow him to re-sit the exam, there was no mention of the true purpose of the alleged bribe, and the nature of the alleged 'agreement' is not clear. The complainant assumed that the money he sent to PW7 was a bribe on behalf of the appellant, but the assumption by the complainant should not be a basis for convicting him.

48. The respondent submits that there was sufficient evidence to prove that the appellant asked for a bribe from PW1. The evidence of PW1 was that the appellant had called him to his office and on 18th January 2017 at 10:00 a.m. and asked him for the bribe, and he even told him to get the money before noon. The appellant had continued to request for the money through phone calls. The call data from Safaricom (P. exhibit 11) in respect of phone number 0723***** registered in the appellant's name showed 23 entries of calls between the appellant and PW1. The calls were made on 17th January 2017 and 18th January 2017, and it was through these calls that the appellant requested for the bribes.

49. The respondent produced P. exhibit 3, the transcript of the recorded conversation in which the appellant can be heard demanding a bribe from PW1. The respondent submits that the conversation was heard by PW2, PW3, PW8 and PW9 as PW1 put his phone on loudspeaker. It is the respondent's submissions that in the audio clip, the appellant could be heard asking the complainant whether he "got 3", and the complainant responds that he got "only 2".

50. The respondent further submits that the evidence of PW5, who overheard the conversation from PW1's phone which was on loudspeaker, was that the person asking for money from PW1 was talking in a threatening way, and he was asking PW1 to pay the money immediately or tell him exactly when he was paying the money. The respondent also noted that PW8, who also overheard the phone conversation while in his office at EACC, could hear the person calling asking PW1 why he did not honour the agreement by bringing the money by noon. According to PW8, the person went on to tell PW1 that he should take the money to him before midnight or else he will regret the consequences. A DVD recording (exhibit 4) of the conversation between the appellant and PW1 had been produced in court and the court had noted that it was clear, audible and coherent.

51. The respondent submits that the ingredients of the offence of requesting for a bribe were proved beyond reasonable doubt. Even though the appellant received the bribe after he had sent the exams results, he still committed an offence. The respondent submits that according to section 6(1)(b), the request and acceptance of the bribe itself constituted an offence. After PW1 sent the money to PW7's phone number via MPESA, he called the complainant who acknowledged that he had received the money. The acknowledgement was enough proof of acceptance of the bribe.

52. The respondent refers the court to the case of **Paul Mwangi-vs-Republic C.A. (2010)** which it submits set out the ingredients of the offence of soliciting and receiving a bribe as follows:

"In order to constitute an offence three things are essential; in the first place, there must have been solicitation or offer or receipt of a gratification. Such 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. According to the respondent, all the elements set out in the above case were satisfactorily proved by the prosecution in this case.

54. I have considered the respective submission of the parties on this issue. Section 6 of the Bribery Act provides as follows:

(1) A person commits the offence of receiving a bribe if —

(a) 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;

(b) the recipient of the bribe requests for, agrees to receive or accepts a financial or other advantage and the request, agreement or acceptance itself constitutes the improper performance by the recipient of a bribe of a relevant function or activity.

(c) in anticipation of or as a consequence of a person requesting for, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly by that person, or by another person at the recipients' request, assent or acquiescence.

(2) *For purposes of subsection (1) (a) and (c) it shall not matter—*

(a) *if the recipient requests for, agrees to receive or receives or intends to request for, agree to receive or to accept the advantage directly or through a third party; or*

(b) *if the advantage is or is intended to be for the benefit of the recipient or another person.*

55. Section 7 of the Act provides that:

(1) *For the purposes of this Act, a function or activity shall be construed to be a relevant function or activity if —*

(a) *it includes —*

(i) *any function of a public nature;*

(ii) *any function carried out by a State officer or public officer, pursuant to his or her duties;*

....

(b) *It meets one or more of the following conditions —*

(i) *that the person performing the function or activity is expected to perform it in good faith;*

(ii) *that the person performing the function or activity is expected to perform it impartially; and*

(iii) *that the person performing the function or activity is in a position of trust by virtue of performing it.*

56. The evidence presented before the trial court which I have set out above in brief shows that the appellant was a public officer, a lecturer at the Faculty of Agriculture of the University of Nairobi Upper Kabete Campus. The complainant was his student whom he had found with his phone during an exam on 21st December 2016. He had confiscated the phone and the exam papers. The student had followed him, with other students in a similar situation, to his office. The appellant had found that the phones were switched off, had returned them to the students, including the complainant, but had taken the students' numbers.

57. The evidence further shows that on 17th January 2017, the appellant had called the complainant at about 8.30 p.m. and asked him to go to his office the following day, which the complainant had done. The evidence of the complainant is that he had been asked for Kshs 2,000 for 'forgiveness' for the exam irregularity and Kshs 3,000 in order to re-sit the exam. He was required to produce the money by noon of that day.

58. The evidence further shows that the appellant called the complainant several times on that day. The conversation was overheard by PW2 and PW5, the complainant's father and the DVC of the University. Another conversation, also demanding that the complainant should send the money, was overheard by PW8 and PW9, officers from EACC. The evidence shows that the appellant sent a number to the complainant's number, and the complainant sent Kshs 3,000 to that number. The amount was withdrawn by PW7, whose testimony was that he withdrew the money and gave it to the appellant.

59. It is, in my view, incontrovertible that the appellant demanded and received a bribe from the complainant. It is noteworthy that he does not deny his contact with the complainant, or that he sent him PW7's number, or that PW7 received the amount at issue. The data from Safaricom and Mpesa records show the telephone calls between the appellant and the complainant, and the receipt of the money on behalf of the appellant. While the appellant stated in his defence that the complainant insisted on giving him an appreciation, he did not put this to the complainant in cross-examination, but only raised it at the defence stage. I am therefore in no doubt that the response to the first issue is that the appellant requested for a bribe with intent to improperly perform a public function, and was properly convicted of the offence.

Whether the trial court convicted the appellant without proper voice identification

60. The applicant submits that he was convicted without proper voice identification in the audio clip. He argues that PW 3, Prof Geoffrey Kironchi, had already been led and informed that the appellant was being investigated by EACC and that the voice recorded was that of the appellant. It is his submission therefore that the trial court misapplied the law in accepting the prosecution's arguments on matters of fact and evidence that the appellant perverted the work of his office to benefit himself. His submission is that the evidence of PW3 is inadmissible to the extent that it prejudices his right to a fair trial.

61. The appellant notes that PW3, his immediate supervisor, who had worked with him since 2008, was unable to recognize his voice in the audio clip. Except for the complainant, no other prosecution witness could connect the person talking in the audio clip with him, and without the evidence of PW3, PW4 and PW9, the evidence of the complainant regarding the voice of the appellant is uncorroborated. He relies on the case of **Patrick Munguti Nunga vs. Republic (2013) eKLR Cr. Appeal No. 123/2011** to submit that where voice identification is in doubt, then there is no corroboration of the complainant's evidence and there was therefore insufficient evidence to convict him. The court stated as follows in that case:

“The element of “demanding” is very material in cases of this nature. It is not just getting a tape recording and calling the complainant (an interested party) to identify the voices. In the case of LIBAMBULA -V- REPUBLIC [2003] KLR 683 at page 686 the Court of Appeal held that;

“Normally, evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, the witness was familiar with it and recognized it and the conditions obtaining at the time it was made were such that there was no mistake in testifying to it that which was said and who said it”. See CHEGE -V- REPUBLIC [1985] KLR 1.

62. The appellant also relies on the case of **Gideon Makori Abere v Republic (2019) eKLR** on voice identification in which it was held that:

“Offences relating to corruption attract grave consequences including loss of employment and even loss of future opportunities for employment. Reliance on uncorroborated evidence tainted with suspicion and doubt would be an affront to the well-known principles of criminal law regarding the burden of proof and the responsibility of the prosecution to discharge the same....”

63. In submissions in response, the State argues that the person whose voice was recorded on the audio clip was the appellant. The respondent refers to P. exhibit 11, the Safaricom call data report, which confirms that mobile number 0723***** was registered in the appellant's name. It was this number that he used to call PW1 several times to demand the bribe. There is evidence that there was a conversation between 0723***** belonging to the appellant and 0715***** belonging to PW1. The evidence of PW7, whose number was used by the appellant to receive the money, showed that the appellant had requested to use his phone to receive some money. PW7 confirmed that he received Kshs 3,000 from 0715***** which belongs to PW1. PW7 had identified the appellant as the person who used his phone to receive the money from PW1. P. exhibit 10, the Mpesa records produced in court, clearly show that the money was sent to the phone number that was provided by the appellant, which belonged to PW7. PW7's number was provided to PW1 by phone number 0723***** which was registered in the appellant's name.

64. The respondent notes that the appellant had admitted in his defence that he communicated with PW1 when he sent him PW7's number so that he sends the money. This, the respondent submits, is proof that the voice on the video clip belongs to the appellant.

65. The respondent distinguishes the facts of this case from the case of **Gideon Makori Abere v Republic** (supra) relied on by the appellant. It notes that in that case, the appellant was acquitted because the witnesses could not identify his voice and there was no corroboration of PW1's evidence. In this case, PW1's evidence was corroborated by PW2, PW3, PW8 and PW9 who heard the appellant asking for a bribe from PW1. The evidence of PW1 is further strengthened by the testimony of PW7 whose phone number was used to receive the money.

66. I have considered the respective submissions of the parties on this issue. The appellant hinges his argument on the evidence of PW3, Prof. Kironchi, who said in his testimony that he had known the appellant for many years as his student and then as a colleague. He could recognize his voice if the appellant spoke to him directly, but that 'it was possible or not possible' to recognize

the appellant's voice when it was recorded. One senses a reluctance on the part of PW3 to confirm that he recognized the appellant's voice, though from the evidence of PW9 in cross-examination, PW3 and Prof. Kamenchu had recognized the appellant's voice when the audio clip was played to them at the Dean's office.

67. The testimony of PW3 that he did not recognize the appellant's voice, however, in my view, does not mean that the evidence of PW1 that it was the appellant who was calling him and demanding a bribe could not be relied on for lack of corroboration. It was overwhelmingly supported by other prosecution evidence. The appellant called the complainant several times using his phone. He was placed on loudspeaker on at least two occasions. He was heard by at least five witnesses, the complainant, his father, the DVC and two EACC officers. The conversations were recorded by EACC officers. The trial court observed that the conversation in the audio clip played in court was mostly in English, clear and audible.

68. The applicant has relied on the case of **Gideon Makori Abere v Republic** (supra). I believe that, as submitted by the respondent, that case is clearly distinguishable from the facts of this case. It turned only on voice recognition, but as I have set out above, there was so much more evidence to link the appellant to the offence, including his own admission that he sent the number to which the money was sent, that there can be no doubt that it was the appellant who called the complainant several times to demand that he sends the money. In the circumstances, it is my finding that the appellant was properly identified as the person who was demanding money in the audio clip presented before the court.

Whether there was sufficient evidence to convict the appellant on the 'appreciation' received by PW 7.

69. The appellant submits that there was insufficient evidence to convict him for the 'appreciation' received by PW 7. He had, in his defence, explained the events of 18th January 2017 when he had finished marking the exam, entering the marks and submitted the exam results to the Chairman of the Department, PW3, Prof. Geoffrey Kironchi. The complainant's marks and answer booklet were among those already transmitted to PW 3. The appellant submits that PW 9 had simply assumed that since the appellant confirmed receipt of money to PW7's Mpesa account, the money was for the benefit of the appellant for services offered. His submission is that receiving money in itself does not disclose any offence, and that it is corruptly receiving it as a benefit that is an offence.

70. The appellant submits that the prosecution did not co-relate the 'appreciation' received by PW 7 with the function that the appellant had already performed. The answer to this contention by the respondent is that the evidence of PW7 proves that indeed the appellant received the bribe. PW7 testified that he had received the money, withdrawn it and then handed it over to the appellant. The appellant's defence that he gave the money to PW7 is doubtful and unbelievable. The respondent submits that it is clear that the appellant used PW7's phone to receive the money because he was trying to conceal evidence that he received the money which was a bribe he had asked for from PW1.

71. The respondent submits further that according to section 6(2) of the Bribery Act, a person commits an offence under section 6(1) even if he receives the bribe through a third party. Receiving the money through PW7 does not exonerate the appellant from the offence which he committed. Indeed, his defence was full of admissions and the prosecution was able to prove that the appellant requested for and received a bribe of Kshs.3,000 from PW1 in order to allow him to re-sit and award him marks in Land Forms and Soil Formation examination.

72. I have considered the parties submissions on this issue. The appellant claims that the Kshs 3,000 sent to the Mpesa account of PW7 was 'appreciation'. The word 'appreciation' is defined in the Oxford English Dictionary as '*Recognition and enjoyment of the good qualities of someone or something.*' So what the appellant claims as his defence is that he did not want money from the complainant; he did not demand a bribe; he did not communicate with the complainant 23 times; he did not ask the complainant to send money to the Mpesa account of PW7 because he wanted the money, but because the complainant insisted on sending him money as an appreciation. I note that the only time the appellant raises the question of the money being an 'appreciation' is at the defence stage. At no point during the prosecution case did he raise it, nor did he cross examine the complainant on it.

73. This case demonstrates, as observed by the trial court, the dismal moral chasm into which we have fallen as a society. The appellant, a lecturer holding a position of authority and responsibility requiring that he opens the mind of those under his charge, abuses his position to intimidate and obtain financial gain from his students. The evidence before the trial court which this court has analysed above shows that far from wishing to 'appreciate' the appellant, the complainant was an intimidated student, wishing to resolve an exam irregularity and re-sit his exams, who is subjected to a demand for a bribe by his lecturer. The evidence shows that the appellant was overheard by no less than five witnesses threatening the complainant to produce the money before 'midnight',

either to take it to Uthuru, or send it by Mpesa. The money was received through the Mpesa line of PW7 and PW7 withdrew it and gave it to the appellant. The question of 'appreciation' did not arise at all. Indeed, it is noteworthy that the appellant did not raise the question of giving the money to a needy member of society when he cross examined PW7. The trial court, in my view, properly convicted the appellant as charged.

74. I therefore find no merit in this appeal. It is hereby dismissed and the conviction and sentence upheld.

Dated Delivered and Signed at Nairobi this 30th day of September 2020.

MUMBI NGUGI

JUDGE



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