REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

ACEC. APPEAL NO. E004 OF 2021

DENNIS PAUL MANOTI..APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an appeal against conviction and sentence in Milimani

Chief Magistrates Court Anti-Corruption Case No. 27 of 2016

(Hon. Felix Kombo (SPM) on 22nd January, 2021)

JUDGMENT

1. The appellant, Dennis Paul Manoti was charged with three counts under section 39(3)(a) as read together with section 48(1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 (**ACECA**). At count 1, he was charged with the offence of corruptly soliciting a benefit contrary to section 39(3) (a) as read together with section 48(1) of ACECA. The particulars of the offence were that on the 28th day of November, 2016, at City Hall within Nairobi County, being a person employed by a public body, to wit Nairobi City County Government as an Accountant III rates section corruptly solicited for a benefit of Kshs. 6,000,000 from Ramesh Chadra Govin as an inducement so as to facilitate transfer changes on LR number 20273 from Sigma Limited to Taj Mall, a matter relating to the affairs of the public body. The statement of the charge and particulars of the offence in count 2 are similar to count I save that the amount allegedly solicited was Kshs. 500,000.

2. At count 3, the appellant was charged with the offence of corruptly receiving a benefit contrary to section 39(3) (a) as read together with section 48(1) of ACECA. The particulars of the offence were that on the 29th day of November, 2016, at City Hall within Nairobi County, being a person employed by a public body, to wit Nairobi City County Government as an Accountant III rates section, corruptly received a benefit of Kshs. 100,000 from Peter Kebaso as an inducement so as to facilitate transfer changes on LR number 20273 from Sigma Limited to Taj Mall, a matter relating to the affairs of the public body.

3. The appellant pleaded not guilty to the offences and the case proceeded to trial. The appellant was acquitted of the offence charged under count 2 under section 210 of the Criminal Procedure Code on 21st July, 2020. He was put on his defence on counts 1 and 3. He was convicted on these two counts in the judgment of the court dated 22nd January 2021 and sentenced to a fine of Kshs.

750,000 on each count and in default to imprisonment for a period of two years on each count.

4. The appellant was aggrieved by both his conviction and sentence. Pursuant to leave to file his appeal out of time granted on 11th March, 2021, the appellant filed the present appeal in which he raises the following grounds of appeal which are reproduced *verbatim*:

a. The audio evidence used as evidence was improperly admitted to court since it did not have a certificate from the certified government body.

b. The audio evidence used as evidence in court was not audible and therefore fell short of the standard required of evidence.

c. During ruling, the trial magistrate had removed Count 1 from the charges as it involved large sums of money contrary to his previous orders. He therefore returned it later.

d. I have been convicted based on the said Count 1 unfairly as I did not stand full trial with regards to it.

e. Should I have been convicted based on the remaining Counts, the sentence meted upon me would have been far less.

f. The learned Magistrate failed to take into account my mitigation when sentencing me as I was the sole breadwinner of my family which us(sic) currently suffering as a result of my sentence.

g. I am also advanced in age, being 52 years old, and I have health complications, including high blood pressure, a back injury and I am currently Covid-19 positive, which factors the learned Magistrate did not consider.

h. The sentence was therefore excessive as per the charges against me.

i. The Appeal if allowed will have a high probability of success.

5. In his petition of appeal, the appellant seeks four reliefs which seem to conflate his application for bail pending appeal which had been dispensed with and the substantive appeal. He asks the court to allow his appeal as prayed.

6. This is a first appeal. Accordingly, the court is under an obligation to re-evaluate the evidence and reach its own conclusions. In doing so, it must bear in mind that it did not have the opportunity to hear and see the witnesses, which the trial court had- see **Kiilu & another v Republic [2005] 174** and **Okeno v. Republic [1972] EA 32**.

7. The prosecution case against the appellant as it emerged from the evidence of the seven prosecution witnesses is as follows.

8. Ramesh Chandra Govin (PW1), the complainant, was the Managing Director of Taj Mall Limited which was the owner of property number L.R No. 20273 measuring 4.2 acres located in Kyangombe in Nairobi. The company had bought the property from one Mr. Evans Obung'o Matunda in December 2008 at the price of Kshs. 8,000,000. He had been paying the rates for the property from the date of purchase until 2015 when the County Government refused to issue him with a rates demand note. He engaged one Peter (Peter Kebaso Onkengii (PW6) of Land Force Security, a private investigation firm, and through the firm obtained a demand note for the property. The demand note was incorrect as it read Sigma Limited, so he instructed Peter to find a way of rectifying the problem. Peter told him that when he approached the appellant, the appellant demanded Kshs. 10,000,000 but they had negotiated the amount to Kshs. 6,000,000.

9. PW1 then reported the matter to the Ethics and Anti-Corruption Commission (EACC) and recorded a statement. EACC gave Peter a recording gadget which PW1 and PW6 went with to the appellant's office and spoke about the matter. The appellant made a demand for Kshs. 6,000,000 and indicated that he required Kshs. 500,000 as deposit in order to rectify the problem. They went back with the recording to EACC offices where they planned to go back to the appellant with the money. PW1 was informed by Peter that the appellant was arrested. The audio recording was played in open court and PW1 identified the voices as those of the

appellant, Peter and himself. A transcript of the audio recording was produced in evidence.

10. Peter Murimi Mureithi (PW2), was a Chief Accountant, Land Rates Department at City Hall. He was approached by EACC officers on 23rd February 2017 to write a statement concerning his deputy, the appellant. He was informed by the EACC officers that the appellant had solicited money in respect of a property for purposes of name change. PW2's evidence was that his department did not deal with change of names as that was a function of the Chief Valuer since 2011, though the function was initially under the Rates Department. EACC officers played the recording in his office but the gadget could not work on his computer so he accompanied the EACC officers to their offices where he listened to the recording.

11. It was his testimony that the recording was very bad and it is only on a small portion that he heard a voice that sounded like the appellant's. He had signed a certificate of voice/ image recognition dated 23rd February 2017. He stated in cross examination that his relationship with the appellant was very harmonious. He did not recognize the entire voice in the recording as most of it was poor. On re-examination, he stated that he was able to recognize some words in the statement as those of the appellant as they had worked together for about one year and they had a harmonious working relationship.

12. Shehe Bakari (PW3), an investigator at EACC, was requested on 29th November 2016 by James Wachira (PW7) to accompany him to the city centre. PW7 introduced him to Peter Kebaso (PW6) who had made a complaint of corruption against an employee of Nairobi City County Government. He was requested to assist with arresting and swabbing the appellant. PW3, one Mr. Abdi Osman and PW 7 went to town centre where the complainant had agreed to meet with the appellant. When they arrived at the city centre, PW6 left them outside and proceeded to the office of the appellant at City Hall. A short while later, PW6 telephoned PW7 and asked to meet him outside the nearby Ankara hotel. PW3 saw PW6 and another man approaching the hotel and therefore moved closer to the entrance.

13. A few minutes later, PW7 informed him that the complainant had sent him a signal asking them to respond. They entered the hotel where they saw Abdi Osman seated at a corner with PW6 and the appellant. They informed the appellant that he was under arrest for receiving a bribe. At that point, the appellant tactfully removed the money from his coat pocket and threw it on the floor. PW7 wore gloves and collected the money from the floor while PW3 swabbed the right and left hands of the appellant and sealed the swabs in a clean marked envelope. PW7 then prepared an inventory of the recovered items, Kshs. 100,000 and a cheque.

14. On cross-examination, PW3 stated that he was not present when the appellant received the money but when they got the signal, they were sure that the appellant had received the bribe. He had seen the appellant throw the money on the floor when they had surrounded him. The cheque was on the table but he did not know who placed it there. It was recovered by Abdi Osman while PW7 recovered the money.

15. Pauline Munyi (PW4), also an investigator at EACC, had treated Kshs. 100,000 in Kshs. 1000 denominations in APQ chemical for the operation. She had given the money in an A5 envelope to the complainant. She identified and produced in evidence the photocopies of the money that she had treated with APQ powder. She stated in cross examination that she had instructed the complainant not to touch the money until a further demand was made by the appellant.

16. Dennis Owino Onyango (PW5), a government analyst, produced a report on the analysis of the exhibits forwarded to him for examination. It was his evidence that traces of APQ chemical were found on all the exhibits forwarded to him for analysis. These were the swabs of the appellant's left- and right-hands, the operation money and the right and left inner pocket and the left upper and left lower pockets of the appellant's grey coat.

17. Peter Kebaso Onkengii (PW6) was the Managing Director of Land Force Security. His company had been given a contract by the complainant to investigate why the complainant, who had been paying land rates on his property, was no longer receiving land rates demands. He was also required to investigate why the complainant had subsequently received land rates demand in respect of his property that showed Sigma Limited as the property owner. PW6 had gone to City Hall where he met the appellant.

18. The appellant told him that the system was closed but he had a way to access it and that he should speak to his client to "support" by paying some money to enable the change of names. PW6 and the appellant had bargained the amount from Kshs. 10,000,000 to Kshs. 6,000,000. PW6 informed his client, the complainant, about the demand. The complainant had informed him that the demand for Kshs. 6,000,000 was illegal and that the land itself had cost Kshs. 8,000,000. PW6 and the complainant reported the matter to the EACC on 28th November 2016.

19. PW6 had returned to the EACC offices where he was given a recording device. He returned with the device to the appellant's office where he recorded their conversation in which the appellant reiterated his earlier demand. He returned the recording to EACC offices, where it was played and the demand confirmed. EACC officers then planned an operation in which they gave him Kshs. 100,000/- which was treated, inside a khaki envelope, and he accompanied them to City Hall where he was to meet the appellant. At City Hall, he left them outside the building, went inside and met the appellant, having already informed him that he had the required money. The appellant told him he could not receive the money in the office and they proceeded to Ankara hotel near City Hall. Inside the hotel which was full, PW6 saw one of the EACC officers. PW6 and the appellant found space next to the said officer, sat and ordered tea.

20. The appellant then asked PW6 for the money and the cheque, and PW6 informed him that he had both. The appellant received the money, which was inside an envelope. He opened the envelope and counted the money, which he found to be Kshs. 100,000. The appellant put the money in his right pocket, and EACC officers came in and arrested him.

21. PW6 identified a cheque leaf for Kshs 214,250/- as the one he had been given by the complainant to take to the appellant. He also identified an inventory for the cheque and an audio recording transcript which he confirmed was the original transcript of his recorded conversation with the appellant. He also identified his signature on the transcript. The audio recording was played to him and he confirmed that the conversation in the recording was between him, the complainant and the appellant. The appellant had demanded Kshs 6,000,000 and a deposit of Kshs 500,000/-.

22. PW6 denied in cross- examination that the complainant had told him to talk about money, his testimony being that it was the appellant who introduced the issue of money. No recording was made at the Ankara hotel where the appellant told him that he would receive the money instead of receiving it at his office.

23. The final prosecution witness was the investigating officer, James Wachira (PW7). He was assigned the complaint by PW1 on 28th November 2016 and he met the complainant PW1 and Peter (PW 6). He related the nature of the complaint as has already emerged from the evidence of PW1 and PW6. He learnt that PW6 was scheduled to meet the appellant the following day 29th November 2016 at City Hall. He prepared an arrest operation team comprising himself, Shehe Bakari (PW 3) and Abdi Osman who was not called as a witness. He had requested Ms. Pauline Munyi (PW 4) to treat, inventory and photocopy Kshs. 100,000/- for the operation. He, PW3 and Abdi Osman. Accompanied PW6 to City Hall where he saw him depart and proceed with the appellant to Ankara hotel. The appellant and PW6 were followed from behind by EACC Officer Osman Abdi.

24. Abdi Osman beeped him from inside the hotel and he joined him. They approached and introduced themselves to the appellant, who removed the money from his coat pocket and dropped it on the ground. PW7 had worn a pair of clean gloves and picked the money while PW3 swabbed the appellant. They thereafter proceeded with the appellant to their offices at Integrity Centre, where PW7 recovered the coat that the appellant was wearing. Abdi Osman also recovered a Diamond Trust Bank (DTB) Cheque leaf dated 29th November 2016 for Kshs 214,250/-. PW7 identified and produced the cheque, its inventory and the coat as evidence.

25. Regarding the transcript of the conversation between the appellant, PW1 and PW6, PW7 had invited PW 2 who worked with the appellant to listen to the recording. PW2 had recognized the voice of the appellant and had signed a certificate of voice recognition.

26. PW7 had transferred the conversation to a computer and recorded it in a compact disc which he identified and produced. He then prepared a certificate under section 106(B) (4) of the Evidence Act (Cap 80) which he also produced in evidence. He confirmed in cross examination that he had not provided a serial number for the recording device. He also agreed that PW2 had stated that much of the recording he listened to was not recognizable.

27. When placed on his defence, the appellant testified that he worked at the Nairobi City Council Rates Department as Deputy Chief Accountant. He was in charge of staff at the Rates section and his duties included signing land rates clearance certificates, issuing rate demand notices, public complaints and co-ordination of staff in the section. The Rates Section did not deal with transfers as this was a function of the Valuation section.

28. Regarding the facts forming the basis of this case, the appellant testified that an officer called John Aura had told him that he had been sent to collect a rates demand notice for land reference number is 20273. He had checked and found that the rates account for the property had been suspended. However, only properties with large arrears get suspended and the property did not have large arrears. It had arrears of Kshs. 214,000/= so he decided to give Aura the bill for the property, which read Sigma Limited. (Defence

Exh-5).

29. The appellant testified that the said John Aura had thereafter introduced him to a Mr. Kebaso (PW6) who wanted to follow up on the matter, and the appellant had referred him to the office of the Chief Valuer. Later that evening, PW6 called him and told him that his boss wanted to come to the office which he accepted as his office was a public office. PW6 had visited him in the company of a man of Asian origin and he explained to him that he did not do transfers in his office. PW6 had returned to his office and offered to buy him tea at Ankara hotel which he accepted. While at the hotel, PW6 spoke on his phone and then told him that he had been called in the office asked if he could leave the cheque (Defence Exh-8) with him.

30. As he removed the cheque which he also tried to give him, he saw that the envelope had money. He did not understand why he was giving him the envelope as they had not discussed money so he refused to take the money. PW6 threw the money at him and it fell on the floor. That is when two men came, informed him that they were EACC Officers and arrested him. The money had been recovered from the floor but he was not given an inventory to sign, nor did he sign the inventory for a coat.

31. The appellant stated that he got the APQ powder because PW6 had physically greeted him, or he got it when receiving the cheque which was in the envelope. He produced various letters to show that after he dealt with the issue of rates, the issue of transfer was taken by the office of the Chief Valuer as his office never dealt with transfers. He denied having demanded Kshs. 500,000/= or receiving Kshs. 100,000/= as the money was on the ground. With respect to the certificate of voice and image recognition, his evidence was that there was no confirmation of who the identifier was, and that ‘they’ were trying to block him from getting into ‘that office’.

Analysis and Determination

32. As the trial court noted in its judgment, the appellant was charged under the provisions of section 39 of ACECA as read with section 48 of ACECA. Section 39 was repealed by section 23 of the Bribery Act, No. 47 of 2016, which came into force on 13th January 2017. Section 6 of the Bribery Act created similar offences as the repealed section of ACECA but with enhanced penalties. The trial of the appellant was conducted, in accordance with the transitional provisions in section 27 of the Bribery Act, as though it had been initiated under the provisions of the Act.

33. In his submissions dated 22nd March 2021, the appellant submits that the two remaining grounds of his appeal are as follows:

1. A declaration that the learned Magistrate erred in law and fact by convicting the Appellant on the basis of a charge he did not stand full trial for.

2. A declaration that the learned Magistrate erred in law and fact by admitting the uncertified electronic evidence to court record.

34. The issues that arise for determination from the appellant’s grounds of appeal and the respective submissions of the parties can therefore be summarized as follows:

i. Whether the audio-recording was properly admitted into evidence;

ii. Whether there was sufficient evidence to sustain a conviction;

iii. Whether the appellant was convicted on a count that he did not stand trial for;

iv. Whether the sentence meted upon the appellant was excessive.

Whether the appellant was convicted on a count that he did not stand trial for

35. I will begin with a consideration of this issue as the response thereto emerges clearly from the record of the trial court. The

appellant's argument is that he was convicted on a count that he did not stand trial for as the trial court had acquitted him on count 1 and ruled that he had a case to answer on count 2 and 3. In its judgment, the trial court had noted that the appellant and the respondent had both submitted that the trial court had acquitted the appellant on count 1 at the case to answer stage, but had found he had a case to answer on count 2 and 3. I have read the ruling of the trial court following the close of the prosecution case. As observed by the trial court in its judgment, its ruling dated 21st July 2020 on whether or not the appellant had a case to answer is clear that the court had acquitted him on count 2 under section 210 of the Criminal Procedure Code but had placed him on his defence on Counts 1 and 3. This ground of appeal is therefore, in my view, devoid of merit.

Whether the audio-recording was properly admitted into evidence

36. The appellant submits that the audio recording was not properly admitted as evidence for three reasons. He contends, first, that the audio recording was of very poor quality and inaudible and most parts of the conversation could not be recognized with certainty, a fact that he argues was admitted by PW1 and PW2 during the trial. He notes that when the recording was played in court, PW1 stated that the voice of the appellant was very low and that there was a lot of background noise thus confirming that the recording was not clear. It is his submission that the trial court erred in law in convicting him solely on the basis of the inaudible audio recording despite having referred to it as inaudible.

37. The appellant submits, secondly, that the recording does not indicate who made the offer to give funds and for what purpose. Further, that the recording was transcribed in the absence of PW6 despite his having recorded the conversation. The person who transcribed the recording therefore did so on speculation and guesswork as the voices were unclear.

38. The appellant further submits that he never mentioned the amounts of Kshs. 6,000,000, Kshs. 500,000 or Kshs. 100,000. It is his case that these amounts were mentioned by PW6 and there was a possibility that the amounts were to be paid to PW6 for his own benefit. There was no evidence that he solicited a bribe from the complainant.

39. The appellant has argued, finally, that the audio recording was inadmissible as the manner in which it was retrieved was not in compliance with section 106B of the Evidence Act; that the manner of retrieval could not be identified and there was no certainty that the recording was not altered, there was no model, serial number or KEBS certificate of the gadgets used as there was no Certificate of Extraction required under section 106B. He cited the decision in **MNN v ENK [2017] eKLR** in support.

40. The respondent submits in response that the audio-visual recording was properly admitted under the provisions of section 106 (B) of the Evidence Act. It argues that PW1 was able to identify the voices in the audio recording as being the voices of the appellant, PW6 and the complainant. It further argues that PW2 had stated that he was able to identify a small portion of the appellant's voice as he had worked with him for about one year. PW7 had given a detailed explanation on how he prepared the transcript and transferred the information into a computer and recorded it on a compact disk which was produced in evidence. A certificate under section 106 B was produced in evidence and therefore the audio recording was properly admitted. The respondent relied in support on the decision in **Libambula v Republic [2003] eKLR**.

41. I have considered the respective submissions of the parties on this issue, as well as the evidence adduced before the trial court. The recording at issue was made by PW6, who, together with PW2, were able to identify the voice of the appellant from the recording. PW2 had worked with the appellant for about a year and was able to recognize the voice of the appellant from a section of the recording as the appellant's voice was familiar to him. The recording had been transcribed by PW7, the investigating officer, who testified that he had transcribed the recording in the presence of PW6 who identified the voices.

42. I note that the recording was played in court during the trial. The trial court observed that the recording was reasonably audible save for some parts which had a lot of background noise. PW2 was able to identify the voice of the appellant, who was his junior in the Rates Department of the City County. It is noteworthy that no objection was raised by the appellant, who was represented by Counsel at the trial, to the admission of the recording, and the objection now does appear to be an afterthought.

43. The appellant has also challenged the admission of the recording on the basis that there was no certificate produced under section 106(B)(4) of the Evidence Act. I note, however, that in his evidence, PW7 produced a certificate (exhibit 16) which complied with the general requirements of section 106 (B)(4). The appellant submits that the certificate did not indicate the serial number of the recording gadget on the certificate. With respect to the certificate, section 106(B)(4) provides that:

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any matters to which conditions mentioned in subsection (2) relate; and

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

44. In my view, the certificate produced by the investigating officer in this matter complied with the requirements of section 106(B)(4). The response to the first issue therefore must be in the affirmative.

Whether there was sufficient evidence to sustain a conviction

45. This issue calls to question the sufficiency of the evidence adduced before the trial court. From the submissions dated 22nd March 2021 on behalf of the appellant, the issue of the sufficiency of evidence revolves around the admissibility of the recording and transcript of the conversation between the appellant, PW1 and PW6, the presence of APQ powder on the appellant, and whether or not the appellant requested for a bribe from the complainant to rectify the name in the Rates Department with respect to the complainant's property.

46. I have considered the evidence that was adduced before the trial court with respect to the alleged demand for a bribe. I note from the transcript that there was a conversation between the appellant, the complainant and PW6. The appellant's voice was identified by PW2 and PW6 when the recording was played in court.

47. In its decision, after analyzing the evidence, including the recording and the transcript of the conversation between the appellant, PW1 and PW2, the court came to the conclusion that taken as a whole, the conversation showed an express and explicit demand for a bribe.

48. Having considered the evidence adduced before the trial court, I agree with its findings on this point. The complainant had an issue with the name on the rates demand note for his property. He enlisted the services of PW6 to establish what the problem was. Upon meeting the appellant with the complainant, the conversation captured in the recording and the transcript ensued.

49. By themselves, the recording and transcript would not have been sufficient evidence to sustain a conviction against the appellant. However, the evidence before the trial court shows that on the day following the recording of the conversation, PW6 visited the appellant at his office, and together they went into Ankara hotel. PW6 testified that he gave the appellant Kshs. 100,000 which he had been given by EACC after it had been treated with APQ powder. The appellant received the money but when confronted by EACC officers, he threw it on the floor.

50. An analysis by PW5 of various exhibits given to him, including swabs of the appellant's hands and his coat, showed that they were tainted with the APQ powder that had been used to treat the money. The appellant argues that the powder got onto his hands because he greeted PW6 and the powder got onto his hands as a result. The totality of the evidence, however, including the fact that the powder was not only on his hands but also on his coat; the recording, and the evidence that he received the envelope with the money from PW6 establishes that he did indeed solicit and receive a bribe from the complainant as charged in count I and 3.

Whether the sentence meted upon the appellant was excessive

51. The final issue for determination relates to the sentence imposed on the appellant. In his submissions, the appellant argues that *"The sentence meted on the accused was therefore excessive in light of the shortfalls or the whole trial process and the mitigations put in by the Accused during trial"*. It is not clear from the submissions precisely how the sentence imposed on the appellant is excessive. The appellant was charged with offences under section 39(3)(a) as read together with section 48(1) of the ACECA on 7th December 2016. Section 39 was subsequently repealed by the Bribery Act which came into force on 13th January 2017.

52. The penalty prescribed under section 48 of ACECA is as follows:

48. (1) A person convicted of an offence under this Part shall

be liable to—

(a) a fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both; and (b) an additional mandatory fine if, as a result of the conduct that constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss

(2) The mandatory fine referred to in subsection (1)(b) shall be determined as follows— (a) the mandatory fine shall be equal to two times the amount of the benefit or loss described in subsection (1)(b); (b) if the conduct that constituted the offence resulted in both a benefit and loss described in subsection (1)(b), the mandatory fine shall be equal to two times the sum of the amount of the benefit and the amount of the loss.

53. Section 18 of the Bribery Act provides penalties to be imposed upon conviction under the Act as follows:

(1) An individual found guilty of an offence under section 5, 6,

or 13 —

(a) shall be liable on conviction, to imprisonment for a term not exceeding ten years, or to a fine not exceeding five million shillings, or both; and

(b) may be liable to an additional mandatory fine if, as a result of the conduct constituting the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss.

(2) The mandatory fine referred to in subsection (1)(b) shall be determined as follows—

(a) the mandatory fine shall be equal to five times the amount of the benefit or loss described in subsection (1)(b);

(b) if the conduct that constituted the offence resulted in both a benefit and loss described in subsection (1)(b), the mandatory fine shall be equal to two times the sum of the amount of the benefit and the amount of the loss.

54. In determining the sentence against the appellant, the trial court stated as follows:

"The punishment for the offence was greatly enhanced and stiffened in the Bribery Act of 2016 at section 18. All matters considered, I sentence the accused under the said section as follows; - He is granted non-custodial sentence of fine and is hereby sentenced to pay a fine of Kshs. 750,000/- in each count. Total fine is therefore Kshs.1.5 million (One million, five hundred thousand only). In default, he shall suffer imprisonment for a period of two years in each count."

55. Sentencing is within the discretion of the trial court, and an appellate court will not interfere with the exercise of such discretion unless it is demonstrated and found that the court, in exercising its discretion, acted on a wrong principle or overlooked some material factor or imposed a sentence that was manifestly excessive. In **Shadrack Kipchoge Kogo v Republic Eldoret Court of Appeal Criminal Appeal No. 253 of 2003**., the Court of Appeal stated that:

"Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred"

56. In the present case, the appellant has not demonstrated that the trial court, in reaching its decision on sentencing, exercised its discretion wrongly, applied the wrong principles, or that the sentence is manifestly excessive. The penalty under section 18 of the Bribery Act being a term of imprisonment not exceeding 10 years and a fine not exceeding Kshs 5 million, I take the view that the penalty imposed on the applicant is not excessive but is reasonable in the circumstances. The trial court imposed a non-custodial sentence, a fine of Kshs 750,000 on each count, and in default of payment a term of imprisonment. The sentence, in my view, is in accord with the provisions of the Bribery Act.

57. In the result, I find no merit in the appellant's appeal. I therefore dismiss the appeal in its entirety and uphold both the conviction and sentence.

Dated, Signed and Delivered electronically this 28th day of April 2021

MUMBI NGUGI

JUDGE

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