REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

ACEC APPEAL NO 8 OF 2020

PAMELA ZIPPORAH MORIASI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence in Kisii Chief Magistrate's Court EACC Case No 2 of 2017 (Hon. N.S. Lutta (C.M) dated 23rd January 2020)

JUDGMENT

1. The appellant was charged in Kisii Chief Magistrate's Court EACC Case No 2 of 2017 with several counts under the Bribery Act, No. 47 of 2016. At count I, she was charged with the offence of receiving a bribe contrary to section 6(1) (a) as read with section 18(1) and (2) of the Bribery Act. The particulars of the offence were that on the 5th day of October 2017 at Kiogoro Chief's office, Kisii Central Sub-County, within Kisii County, being a person employed by a public body, to wit Ministry of Interior and Co-ordination of National Government as a Chief, Kiogoro Location, she requested for a financial advantage of Ksh. 3,000/- from Hellen Nyanchama Motieri as an inducement to issue the said Hellen Nyanchama Motieri with a letter confirming the beneficiaries to carry out a land succession, a function to which the bribe relates.

2. At count II, the appellant was charged with the offence of receiving a bribe contrary to section 6(1) (a) as read with section 18(1) and (2) of the Bribery Act. The particulars of the offence were that on the 9th day of October 2017, in the same capacity and location as in count I, and for the same purpose, she requested for a financial advantage of Kshs. 3,000/- from the complainant, Hellen Nyanchama Motieri.

3. At count III, the appellant was charged with the same offence. The particulars of the offence were that on the same date, place and capacity as in count II, she received a financial advantage of Kshs 3,000/- from the complainant so as to issue her with the letter aforesaid.

4. The appellant pleaded not guilty to the charges against her. She was tried before the Chief Magistrate's Court and convicted on count 1 in the judgment of the court dated 23rd January 2020. She was sentenced to a fine of Kshs. 60,000/- and in default to serve one (1) year's imprisonment. She was acquitted on counts II and III.

5. Aggrieved with both her conviction and sentence, the appellant has filed the present appeal in which she raises some nine (9) grounds of appeal in her Memorandum of Appeal dated 28th January 2020 as follows:

1. That the Learned Trial Magistrate erred in law and fact in convicting the appellant on count I to pay a fine of Ksh. 60,000/- or in default serve 1 year imprisonment yet the prosecution did not prove its case beyond reasonable doubt.

2. That the Learned Trial Magistrate erred in law and fact in convicting the appellant on count I to pay a fine of Ksh. 60,000/- or in default serve 1 year imprisonment and failed to consider the strong evidence of the defence.

3. That the Learned Trial Magistrate erred in law and fact in convicting the appellant on count I to pay a fine of Ksh. 60,000/- or in default serve 1 year imprisonment by relying on circumstantial evidence, suspicion and unclarified evidence on who put the money where it was found.

4. That the Learned Trial Magistrate erred in law and fact in convicting the appellant on count I to pay a fine of Ksh. 60,000/- or in default serve 1-year imprisonment yet the prosecution failed to prove whether the appellant solicited and received money which fact the Trial Magistrate failed to address.

5. That the Learned Trial Magistrate erred in law and fact by overlooking the fact that the evidence relied on was not watertight to justify a conviction.

6. That the Learned Trial Magistrate erred in law and fact by shifting the burden of proof to the Appellant.

7. That the Learned Trial Magistrate erred in law and fact in convicting the appellant on count I to pay a fine of Ksh. 60,000/- or in default serve 1 year imprisonment on the evidence which evidence was not collaborated by the documentary evidence (sketch map).

8. That the Learned Trial Magistrate erred in law and fact in convicting the appellant on count I to pay a fine of Ksh. 60,000/- or in default serve 1 year imprisonment by failing to consider the strong evidence and submission by the Appellant.

9. The Learned Trial Magistrate erred in law and fact by relying in the insufficient evidence of the prosecution.

6. The appellant further sought and was granted leave to file supplementary grounds of Appeal. In the Supplementary Grounds of Appeal dated 3rd August 2020, she raises the following grounds:

1. That the Learned Trial Magistrate erred in law and fact in

convicting the appellant on count I to pay a fine of Ksh. 60,000/- or in default serve 1 year imprisonment on the strength of a defective charge sheet.

2. That the Learned Trial Magistrate erred in law and fact in considering the transcript as evidence which was not done by a person who is not a professional linguist or an expert in transcription is fatal to the prosecution case.

7. This is a first appeal. Accordingly, I am required to re-evaluate the evidence presented before the trial court and reach my own conclusion. In doing so, I am required to bear in mind that I have neither heard nor seen the witnesses, which the trial court had the advantage of doing-see **Okeno v Republic (1972) EA 32 and Mwangi v Republic [2004] KLR**.

8. The prosecution evidence as presented through its eleven witnesses was as follows. On 5th October 2017, the complainant, Hellen Nyanchama Motieri (PW1), had gone to the Kiogoro Chief's Office accompanied by her brother-in-law, Nehemiah Omwoyo Marube (PW2). The purpose of their visit was to obtain a letter for purposes of filing a succession cause. They were asked to wait outside by the Chief. The appellant, the Assistant Chief whom they found outside, asked them to give her Ksh. 4,000/- so that she could issue the letter. PW1 left and the following day, she reported to the Ethics and Anti-Corruption Commission (EACC) offices where she was given a recorder and trained on how to use it. She then went back to the appellant's office where she switched on the recorder. PW1 later returned the recorder to the EACC office. She was given Kshs. 3,000/- treated money in denominations of Kshs. 1,000/-. She returned to the appellant's office and gave her the money, which the appellant took and put in a black handbag. PW1 then called the EACC officers who came and arrested the appellant.

9. The complainant's brother-in-law, Nehemiah Omwoyo Marube (PW2) had accompanied PW1 to the appellant's office on 5th October 2017. At the trial, he was declared a hostile witness and was cross-examined by the prosecution. He stated that they informed the appellant that they did not have any money, and that the appellant was arrested as she prepared to write the letter for the complainant. He did not see any money but he saw EACC officers remove some money from the appellant's office.

10. On 9th October 2017, Shadrack Ombewa Mokua (PW3), an agricultural extension officer based at Kiogoro ward and whose office was next to the appellant's, had gone to the appellant's office and spoken to her, then left. Later the same day, he was summoned by EACC officers to their offices. A recorded clip in which his voice and that of the appellant had been captured was played to him. He identified the appellant's voice in the recording.

11. At the material time, Isaac Barmasai (PW4), the Assistant County Commissioner, Nyandarua South, was based in Kiogoro, Kisii County. On 9th October 2017, an EACC officer had informed him that a Chief had been arrested. He had gone to the appellant's office where she denied having received any money. A search was conducted in a black handbag that was on the appellant's table and Kshs. 2,000/- in denominations of Kshs. 1,000/- was recovered and an inventory of the money done Later, he was summoned to the EACC offices where he identified the appellant from a video clip.

12. On 6th October 2017, Stephen Yatich (PW5), a report analyst with the EACC based at Kisii, had received a complaint from PW1 that the appellant had demanded a benefit of Kshs. 3,000 to write a letter. He had instructed PW1 to return on 9th October 2017. He briefed an officer in the operations department and was given Kshs. 3,000/- in denominations of Kshs. 1,000/- for an operation. He photocopied the money and appended his signature on the photocopies. Thereafter, he treated the money with APQ chemical, took a swab of the envelope the money was placed in and signed the envelope and instructed PW1 on how to use the money.

13. On 7th October 2017, Charles Samiji (PW6), an investigator with EACC, Kisii, was informed by PW5 (Yatich) of a complaint of an alleged request for a bribe by the appellant. The matter was assigned to Robert Korir (PW11) who inducted the complainant (PW1) and gave her a recorder. PW11 (Korir) and Arnold Omwenga (PW9) escorted PW1 to Kiogoro where she recorded a conversation with the appellant and thereafter handed the recorder back to PW11. The recording was played back and PW9 (Omwenga) informed them that a demand of Kshs. 3,000/- had been established.

14. On 9th October 2017, Samiji (PW6) handed over Kshs. 3,000/- to Yatich (PW5) who photocopied and treated it with APQ powder. The complainant was given the recorder and the money in a half cut envelope. PW6, together with PW9 (Omwenga), PW11 (Korir) and PW7 (Marianne Rongo) escorted the complainant to Kiogoro where she had a conversation with the appellant and then 'flashed' (called) them. They proceeded to the appellant's office and introduced themselves. Swabs of the appellant's right and left hands were taken and placed in two different envelopes. PW7 (Rongo) searched the appellant and recovered Kshs. 3,000/- from the side pocket of a black bag.

15. The evidence of PW6 was corroborated by his colleague at the EACC, Marianne Rongo (PW7). Her testimony was that on 9th October 2017 she was asked to assist in a matter relating to a demand for a bribe by a Chief. She and her colleagues had gone to the appellant's office when the complainant 'flashed' them. PW7 had recovered Kshs. 3,000/- in denominations of Kshs. 1,000/- from the outer side pocket of a black handbag. The money recovered tallied with the notes that EACC had given the complainant (PW1).

16. Stephen Yego (PW8), a document examiner working for the EACC at Integrity Centre, had analysed various documents submitted for analysis. These included a letter containing handwritings, documents containing specimen handwriting and signatures of the appellant, and documents containing specimen stamp impressions of the Chief, Kiogoro Location, received from PW11 (Korir). He concluded that the handwriting and signatures had been made by the same author and that the stamp impressions had been made by the same instrument.

17. Arnold Omwenga (PW9) was a driver with EACC who also assisted with investigations. On 9th October 2017, he was informed that a Chief had sought a bribe and had been arrested. Being from the Kisii community, he prepared a translation from Kisii to Kiswahili of the conversation between the appellant and the complainant and prepared a certificate which he produced in court. In cross-examination he revealed that he had a certificate in Biometric Engineering and that he had studied Ekegusii in primary school.

18. Eunice Wamuyu (PW10), a government analyst, had received documents from the forensic branch which included trap money of Kshs. 3,000/- a right and left hand swab of the appellant, a half cut envelope, a black handbag from the appellant and a control sample of the APQ powder. Upon analysis, she had found the APQ powder on the right and left hand swabs of the appellant as well

as on her bag, the envelope and the money.

19. The Investigating Officer, Robert Korir (PW11) was informed on 9th October 2017 that the appellant had requested for a bribe of Kshs. 3,000/-. He inducted the complainant and then escorted her to Kiogoro to meet the appellant and record their conversation. PW11 and his colleagues analysed the conversation and established that the appellant had requested for a bribe, and he set a trap operation. He confirmed the evidence of PW5 (Yatich) that the complainant was given treated money. He also confirmed the evidence of PW6 (Samiji) with regard to the operation and the evidence of PW7 (Rongo) that the money was recovered from a bag. He had collected the swabs of the appellant's hands and placed them in an envelope. He prepared the exhibit memo forms and sent the samples to the government analyst. It was his evidence in cross-examination that he had not prepared a certificate to show that he had issued the recorder to the complainant. He did not get an independent person to transcribe the recording but relied on the transcription by PW9.

20. When placed on her defence, the appellant gave an unsworn statement and called one witness. She denied that she had committed the offence she was charged with. She stated that on 9th October 2017, she returned to the office after her lunch break and found the complainant (PW1) waiting for her. The complainant wanted a letter to enable her carry out succession. As she was writing the letter, some people stormed into the office and accused her of receiving a bribe and recovered the money from a bag that was near the complainant (PW1). She stated that the complainant was her cousin and that she had vowed to teach the appellant a lesson due to a determination that the appellant had made in a boundary dispute involving the complainant.

21. Her witness, Wilfred Nyakeiura, was the Assistant Chief, Nyakiura Location. He stated that on 9th October 2017, the appellant called him and informed him that she had been arrested. She requested him to collect her bag and deliver it to the EACC offices. He found a grey bag in the drawer of her desk and delivered it to her. He stated that the complainant was the appellant's cousin and they have had problems due to decisions that the appellant had made.

22. In its decision, the trial court identified three issues as arising for determination. The first was whether the appellant had been employed by a public body as a Chief; whether she had requested for a financial advantage from the complainant; and whether the financial advantage was an inducement to issue the complainant with a letter to enable her carry out succession. The trial court answered all the issues in the affirmative and rejected the appellant's defence that there was a grudge between her and the complainant.

Analysis and Determination

23. I have considered the record of the trial court, the appellant's grounds of appeal and supplementary grounds of appeal, as well as the respective submissions of the parties. From the written and oral submissions made by her Learned Counsel, Mr. Mongeri, her grounds of appeal are consolidated into four main arguments. The appellant argues, first, that the court erred in relying on a transcription of the conversation between the appellant and the complainant produced by the respondent. She argues, secondly, that the electronic evidence placed before the court was not properly produced, the prosecution not having produced a certificate under section 106 of the Evidence Act. It is also her contention that the court failed to consider her defence, and finally, she contends that the charge sheet against her was defective. The gravamen of her case, then, as it emerges from her main submissions dated 19th May 2020 and her supplementary submissions dated 6th August 2020 is that the trial court erred in convicting her on the basis of insufficient evidence, the prosecution having failed to prove its case against her to the required standard.

24. I will begin with the challenge to the charge sheet before considering the issues relating to the sufficiency of the evidence against the appellant.

Whether the Charge sheet was defective

25. The appellant submits that the trial magistrate relied on a defective charge sheet to convict her. She contends that the charge section and the particulars are different as the charge is on receiving a bribe while the particulars describe a request for a bribe. In her view, having acquitted her on count II and III, the court should also have acquitted her on count I.

26. The state's response is that the charge sheet was not defective. Its submission is that requesting for a bribe is an ingredient of the offence of receiving a bribe as can be discerned from section 6 and 7 of the Bribery Act. The respondent cites in support of this submission the case of **Gideon Makori Abere v Republic [2019] eKLR**.

27. I have considered the respective submissions of the parties on this issue. The framing of charges is provided for under section 134 of the Criminal Procedure Code (CPC) which states that:

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

28. At section 137, the CPC provides that:

The following provisions shall apply to all charges and informations, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this Code, not be open to objection in respect of its form or contents if it is framed in accordance with this Code—

(a)

(i) Mode in which offences are to be charged.—a count of a charge or information shall commence with a statement of the offence charged, called the statement of offence;

(ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence;

(iii) after the statement of the offence, particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary: Provided that where any rule of law or any Act limits the particulars of an offence which are required to be given in a charge or information, nothing in this paragraph shall require more particulars to be given than those so required;

(iv) the forms set out in the Second Schedule or forms conforming thereto as nearly as may be shall be used in cases to which they are applicable; and in other cases forms to the same effect or conforming thereto as nearly as may be shall be used, the statement of offence and the particulars of offence being varied according to the circumstances of each case;

(v) where a charge or information contains more than one count, the counts shall be numbered consecutively;

29. The question of validity of charges has been considered in several decisions of our courts. In its decision in **B N D v Republic [2017] eKLR**, the court set out the test to be followed in determining whether a charge sheet is defective:

"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.

The answer from our decisional law is this: the test for whether a charge sheet is fatally defective is a substantive one: was the accused charged with an offence known to law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him" If the answer is in the affirmative, it cannot be said in any way other than a contrived one that the charges were defective." (Emphasis added)

30. In its decision in **Bernard Ombuna v Republic [2019] eKLR** the Court of Appeal stated that:

"The test whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with charges preferred against him and as a result, he was not able to put up an appropriate defence."

31. In **Jason Akumu Yongo v Republic [1983] eKLR** the Court of Appeal held that a charge that is not disclosed by evidence is defective. It stated that:

"In our opinion a charge is defective under Section 214(1) of the Criminal Procedure Code where:

(a) it does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or

(b) it does not, for such reasons, accord with the evidence given at the trial; or

(c) it gives a misdescription of the alleged offence in its particulars."

32. Section 6 of the Bribery Act under which the appellant was charged 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. (Emphasis added).

33. In **Gideon Makori Abere v Republic** (supra) the court considered the provisions of section 6 of the Bribery Act and set out the ingredients therein as follows:

"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 (other) advantage, there must be the mens rea 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."(Emphasis added)

34. I take the view that a reading of section 6 of the Bribery Act demonstrates that requesting for a bribe is an element of the offence of receiving a bribe. In this case, the appellant was charged with the offence of receiving a bribe, an element of which is requesting for a bribe. The charge sheet before the court clearly sets out the statement of the specific offence with which the appellant was charged, as well as the particulars of the offence with which she was charged. The particulars of the offence stated that being a person employed by a public body, she requested for a bribe as an inducement to write a letter for the complainant. It is my finding that the charge sheet in this case was proper. It conformed to the provisions of the CPC with respect to framing of charge sheets, and the appellant was clear with regard to what offence she was charged with. I accordingly find that the challenge to the conviction and sentence of the appellant on the basis of the charge sheet has no merit.

Sufficiency of Evidence

35. The appellant has challenged her conviction and sentence on the basis that the prosecution did not establish its case against her, for various reasons. The evidence presented before the court which I have set out earlier in this judgment shows that the complainant went to the appellant's office to get a letter to enable her file a succession matter in relation to a parcel of land. She was in the company of her brother in law, though the record shows that the brother in law, PW2, was treated as a hostile witness. The complainant's evidence was that the appellant had asked her, in the presence of her brother in law, to give the appellant Kshs 4,000 in order for the appellant to write the letter that the complainant required.

36. The complainant had reported the demand for the payment to the EACC, a fact that was confirmed by the witnesses from the EACC. She had been given a recorder to record her conversation with the appellant, and thereafter, money treated with APQ powder. She had given the money, Kshs 3,000 in denominations of Kshs 1,000, to the appellant. The money had been recovered

from a bag in the appellant's office. The analysis report produced by PW10 following analysis of items given to her by PW11, including swabs of the appellant's hands, showed that the appellant's hands and bag were tainted with the APQ powder that had been used to treat the money. In my view, the totality of the evidence presented before the trial court established, beyond a reasonable doubt, that the appellant requested and received from the complainant a benefit as charged in count I.

37. The appellant has also challenged her conviction on the basis that the trial court erred in relying on the transcription produced in evidence by the prosecution. It is her submission that for a recording to be transcribed, the person transcribing should be a professional linguist who has studied and has been awarded a certificate as a linguist. The appellant contends that the Investigating Officer, PW11, did not get an independent person to transcribe the conversation between the complainant and the appellant. Instead, he relied on PW9 whom the appellant contends was an incompetent person to transcribe the video and audio recordings as he was not proficient in Ekegusii having only studied the language in primary school. It is her submission that in the circumstances, there was a possibility of an error in the transcription.

38. In a further challenge to the transcription, the appellant contends that during the transcription, there should have been a person who was familiar with the appellant's voice to identify her voice while PW9 was transcribing the recording. The appellant relies on the case of **Boniface Otieno Odhiambo v Republic [2018] eKLR** on voice identification in which it was held that:

58. Voice identification like any other form of identification must be clear from any error, form of manipulation for the court to rely on it. In visual identification at an identification parade the witness must never be allowed to see the suspect before he/she proceeds to the parade. The witness should never be given hints on who the suspect is and how to identify them before the parade.

59. In my view, the same standards apply to the kind of identification PW7 was undertaking. From his evidence, it is clear that he was properly briefed by the OCS (PW5) and the lead investigator (PW10) on why he had been called to the Integrity Centre and the person who was under investigation. After being briefed, PW10 told him he was going to listen to an audio recorder.

60. To my mind, that already gave him a hint on what he was expected to say. It appears that when he heard the telephone numbers in the audio recorder, he noted them down, consulted his phone and found that the number belonged to the appellant. In cross-examination, he says "The numbers assisted me identify the voice." What about if the mobile number belonged to somebody else, what could have been his reaction" Could he have been able to identify the voice as belonging to the appellant" No one knows.

61. In his evidence in-chief at page 23 lines 4 – 6, he says, when the audio was played, he heard communication and telephone numbers given. He recognized the voice of the appellant and PC Muthini and he signed a certificate confirming the two officers' voices. In cross examination, he states at page 24 line 11 that he did not identify the other voice which voice then had he identified as PC Muthini's and why had he signed a certificate to that effect as stated"

39. The respondent counters that the challenge to the conviction on the basis of the transcription is an afterthought as the appellant had an opportunity to cross-examine PW9 on the transcripts during the trial. Further, that PW9 prepared and signed a certificate of translation stating that he was proficient in Kiswahili, English and Ekegusii, which was not objected to by the appellant. The complainant (PW1) had also signed a certificate confirming that the contents of the translation were the same as the recording.

40. My understanding of the appellant's complaint is that PW9 was not a professional linguist and was therefore incompetent to translate the recording from Ekegusii to Kiswahili. The question that arises then is whether there is a requirement in our law that a translation should be undertaken by a professional linguist. This question arises in particular where the interpreter is conversant with the language that he is interpreting. In his decision in **In re Estate of Veronica Njoki Mungai (Deceased) [2017] eKLR** Musyoka J observed that:

"It emerged from the trial that the deceased was not conversant with English, the language of the will, and it fell upon Ruth Nyokabi Njoroge, the attesting witness, to explain to her the contents in her language, Kikuyu. Two issues were raised here by the objectors; the first is as to why is it that it was the secretary rather than the advocate doing the translation in Kikuyu for the testatrix. The objectors did not cite to me any law that would suggest that the translation ought to be by the advocate personally. I see nothing wrong with an advocate asking any of his assistants familiar with the language of the testator to offer an interpretation. The second issue was as to a certificate of translation. Again, no statutory provisions have been cited to me to support the contention that there ought to be a translation certificate." **(**Emphasis added**)**

41. More relevant for present purposes is the decision of Ngaah J in **Nancy Ng'endo Mburu v Republic [2018] eKLR** in which the court considered the probative value of a transcription from Kikuyu to English and observed that:

"The recordings were played in court and the learned trial magistrate who had the advantage, which I do not have, of hearing them concluded that a bribe demand had not only been made… but also that it had been received. He appreciated that the transcript of the tape recordings had not been signed but that, this, in itself, was not fatal to the prosecution case. There is nothing on record that suggests that the learned trial magistrate misdirected himself in this regard and therefore I have no reason to fault him for the conclusions made upon hearing the recordings; as noted, he heard the recordings which were translated from Kikuyu language to English language. No evidence was led to demonstrate that the translation was improper or was not reflective of the contents of the conversation between the appellant and the complainant. Although the transcriptionist did not sign the transcription, he owned it in his testimony and gave an explanation, which in my view was sufficient, that he did not deliberately omit to sign the transcription but was an oversight on his part."

42. In this case, the evidence before the trial court was that PW9 was well conversant with the Ekegusii language. He was from the Kisii community and having studied the language in primary school, he was able to write and speak the language fluently. There was no challenge during the trial to the transcription on the basis that it had errors, was incorrect or was an inadequate reproduction of the conversation between the appellant and the complainant. Unlike the situation in the case of **Boniface Otieno Odhiambo v Republic** (supra) relied on by the appellant, there was no question of voice identification by the witness who did the transcription. It is my finding and I so hold that the challenge to the conviction and sentence on the basis that the transcription was not done by a 'professional linguist' in Ekegusii is without merit.

43. In closing on this point, I must observe that it would impose an onerous burden and virtually render prosecutions impossible if there was a requirement, as the appellant suggests, that one needs to be a 'linguist' in order to translate a document or conversation from our multiple languages to English or Kiswahili.

44. The appellant's final argument in relation to the transcript is that there was no-one to identify the appellant's voice to PW9 as he transcribed the recordings. It seems to me that this is an untenable argument. From the evidence of PW9, he translated the recording from Ekegusii to Kiswahili. In doing so, he was not required to know that it was the appellant's voice that had been captured on the recording. The appellant's voice had been identified for the EACC officers by the complainant and PW3 when he was called to the EACC offices. The fact that there was no one to identify the appellant's voice during the translation does not in any way invalidate the translation produced.

45. The appellant has also challenged her conviction on the basis that the prosecution did not produce the electronic evidence properly. The basis of this argument is that the prosecution failed to comply with section 106B of the Evidence Act requiring the production of a certificate where electronic evidence is relied on. She submits further that the certificate should have been signed by a competent person responsible for the electronic instrument and that the certificate must identify the original electronic record, describe the manner of creation and the particulars of the device. This, she submits, was not done by the Investigating Officer, PW11.

46. In its response on this issue, the respondent submits that section 106(4) of the Evidence Act was complied with. It is its submission that the audio visual transcriptions (Exh.9 a and b) and the CD (Exh. 10) were properly admitted as evidence and the requisite certificate (Exh. 21) prepared by the Investigating Officer, PW11, who was a competent manager of the audio visual recorder. In any event, according to the respondent, the appellant failed to raise the issue of production of the certificate in court and therefore the submission was an afterthought.

47. I have considered the parties' submissions on this point. I have also considered the record of the trial court. I note that in his evidence, the investigating officer, Korir (PW11) testified with respect to the audio and video recording, and the transfer of the video to a CD. He also produced, among other documents, a certificate marked as exhibit 21. In the circumstances, I find that the challenge to the conviction and sentence on the basis that a certificate under section 106 of the Evidence Act was not produced is without merit.

48. The appellant has also argued that the trial court failed to consider her defence. The appellant's defence was that there was a grudge between her and the complainant. I note that the trial court did consider her defence but concluded that based on the evidence on record, it was not satisfied that the prosecution of the appellant and the evidence adduced against her occurred because there was a grudge between her and the complainant.

49. I have found that the challenge to the conviction and sentence on the basis that the charge sheet was defective is without merit. I have also found that the challenge on the basis that there was no evidentiary basis is also unsupported, it is also my finding that the contention that the trial court disregarded the appellant's defence is without merit, In the circumstances, it is my finding and I so hold that the present appeal is without merit. It is hereby dismissed and the conviction and sentence upheld.

Dated Signed and Delivered Electronically this 21st day of April 2021

MUMBI NGUGI

JUDGE