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### KENYA POLICE CHARGE SHEET

POLICE/CR 021/19 /2010

DATE TO COURT 24/01/2013

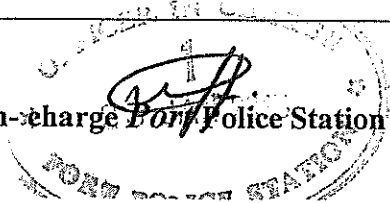
COURT FILE No. ...

O.B. No. 23/21/01//2013

Christian Names in full or Name <b>TOM</b>	Surname or Father's Name <b>WAFULA</b>	Identity Certificate No. <b>13196858</b>	Sex <b>M</b>	Nationality or tribe <b>Kenyan</b>	Apparent Age <b>A</b>	ADDRESS(includ e district and Location where <b>Kakamega</b>
CHARGE COUNT I	<b>CORRUPTLY SOLICITING FOR A BENEFIT CONTRARY TO SECTION 39(3) (a) AS READ WITH SECTION 48(1) OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT No. 3 OF 2003.</b>					
PARTICULARS OF OFFENCE (See Second Schedule of C.P.C.)	<b>Tom Wafula:</b> On 11 <sup>th</sup> day of February 2010, at Fantasy Bar in Mombasa town, within Coast Province, being a person employed by a public body to wit, the Kenya Ports Authority, as a security officer based within Kilindini Port, corruptly solicited for a benefit of Kshs.100, 000/= from <b>Geoffrey Kamau Chege</b> , as an inducement to assist the said <b>Geoffrey Kamau Chege</b> , in an on going investigation, a matter relating to the affairs of the said public body.  <b>(FOR OTHER COUNTS SEE OVERLEAF)</b>					
If Accused Arrested	Date of Arrest	Without or with warrant	Date Apprehension Report to Court	Bond or Bail and Amount	Is Application made for Summons to Issue	
<b>YES</b>	<b>21/01/2013</b>	<b>W/O</b>		<b>On Cash Bail Kshs 5,000/=</b>	<b>/////</b>	
Remanded or Adjourned to						
Complainant and Address	<b>REPUBLIC OF KENYA THRO' EACC</b>					
Witnesses...	<b>1. Geoffrey Kamau Chege. others to be stated</b>		2..... 3.....			
Sentence Court and Date ...	<b>ACC COURT MOMBASA</b> .....If fine paid.....					

24/1/2013

Officer In-charge Port Police Station (MOMBASA)



A/c 1/13

## COUNT II

**CORRUPTLY SOLICITING FOR A BENEFIT CONTRARY TO SECTION 39(3) (a) AS READ WITH SECTION 48(1) OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT No. 3 OF 2003.**

### PARTICULARS:

**Tom Wafula:** On 12<sup>th</sup> day of February 2010, at Fontanela Bar and Restaurant, in Mombasa Town within Coast Province, being a person employed by a public body to wit, the Kenya Ports Authority, as a security officer based within Kilindini Port, corruptly solicited for a benefit of Kshs.100, 000/= from **Geoffrey Kamau Chege**, as an inducement to assist the said **Geoffrey Kamau Chege**, in an on going investigation, a matter relating to the affairs of the said public body.

## COUNT III

**CORRUPTLY RECEIVING BENEFIT CONTRARY TO SECTION 39(3) (a) AS READ WITH SECTION 48(1) OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT No. 3 OF 2003.**

### PARTICULARS:

**Tom Wafula:** On 12<sup>th</sup> day of February 2010, at Fontanela Bar and Restaurant, in Mombasa Town within Coast Province, being a person employed by a public body to wit, the Kenya Ports Authority, as a security officer based within Kilindini Port, corruptly received a benefit of Kshs 17,000/= from **Geoffrey Kamau Chege**, as an inducement to assist the said **Geoffrey Kamau Chege**, in an on going investigation, a matter relating to the affairs of the said public body.

JTD 24/1/2013  
Officer In-charge Port Police Station (MOMBASA)

REPUBLIC OF KENYA  
IN THE CHIEF MAGISTRATE'S COURT AT MOMBASA  
ANTI-CORRUPTION CASE NO. 1 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

TOM WAFULA.....ACCUSED

**RULING**

The accused person Tom Wafula is charged with three counts as follows:

- i. Corruptly soliciting for a benefit contrary to section 39 (3) (a) as read with section 48 (1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.**

The particulars of the offence are that on 11.02.2010 at Fantasy Bar in Mombasa Town, within Coast Province, being a person employed by a public body to wit Kenya Ports Authority as a security officer based at Kilindini Port, corruptly solicited for a benefit of Kshs. 100,000.00 from Geoffrey Kamau Chege as an inducement to assist the said Geoffrey Kamau Chege in an ongoing investigation, a matter relating to the affairs of the said public body.

- ii. Corruptly soliciting for a benefit contrary to section 39 (3) (a) as read with section 48 (1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.**

The particulars of the offence are that on 12.02.2010 at Fontanela Bar & Restaurant, in Mombasa Town within Coast Province, being a person employed by a public body to wit Kenya Ports Authority as a security officer based at Kilindini Port, corruptly solicited for a benefit of Kshs. 100,000.00 from Geoffrey Kamau Chege as an inducement to assist the said Geoffrey Kamau Chege in an ongoing investigation, a matter relating to the affairs of the said public body.

**III. Corruptly receiving benefit contrary to section 39 (3) (a) as read with section 48 (1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.**

The particulars of the offence are that on 12.02.2010 at Fontanela Bar & Restaurant in Mombasa Town within Coast Province, being a person employed by a public body to wit Kenya Ports Authority as a security officer based within Kilindini Port, corruptly received a benefit of Kshs. 17, 000.00 from Geoffrey Kamau Chege as an inducement to assist the said Geoffrey Kamau Chege in an ongoing investigation, a matter relating to the affairs of the said public body.

In an effort to establish its case, the Prosecution called a total of twelve witnesses who testified as follows:

**PW-1 Geoffrey Kamau Chege** introduced himself as a director Donhand (EA) Ltd dealing with Clearing & Forwarding based at Pan African Building, Moi Avenue, Mombasa. That in the month of November, 2009, a broker approached him with an offer to clear 6x40ft and 1x20ft containers at the Port. They agreed the price of Kshs. 15,000.00 per container. On 04.02.2010, he wrote to KPA for permission to gain access to the containers. On 07.02.2010, he received a call from a Mr. Waweru that his request had been approved. On 09.02.2010, he went to the Port accompanied by one Hannington Mauka and on arrival at the terminal met one Mr. Juma who told him that the containers were under the Customs Department. He led them to the Customs Department where they met one Mr. Omulo who then appointed a Mr. Mohamed to show them the containers. As the four were viewing the 2<sup>nd</sup> container, met Tom Wafula – a person known to him in the company of 4 or 5 other people. That he had known Tom Wafula as a businessman as he had at one time offered to sell him an empty containers and at one time he had asked for Kshs. 200,000.00 to enable him clear some bags at the Port. It was at this time that he learnt from Juma that Tom Wafula was a Security man. Tom then took the letter that he had. Later, he received a call from Tom asking him to buy some lunch for “vijana” to which he agreed to give Kshs. 5,000.00 which Tom declined that it was too little. He then enhanced it to

Kshs. 10,000.00 which he then withdrew from the bank, met Tom later and handed him. Tom then lured him to the Anti-Corruption Offices and handed him over to Mr. Magomere on the allegation of bribing him with Kshs. 10,000.00. On 10.02.2010 at 9:00am while in his house, he received a call from Tom asking him to meet and iron out the issue and apologized saying that the boys had pushed him to do what he did. On 11.02.2010, he met Tom with another at Reswal at 7:30pm when Tom asked him to give him Kshs. 200,000.00 so as to withdraw the case at the Anti-Corruption. He bargained and they settled for Kshs. 100,000.00 out of which he was to pay a down payment of Kshs. 60,000.00 and the balance Kshs. 40,000.00 to be paid the following Tuesday. On 12.02.2010, he went to the Anti-Corruption Offices and reported to Mr. Magomere and Mr. Mwanika. Mr. Magomere then inducted him on how to use a recording device to capture his conversation with Tom when handing over Kshs. 60,000.00. He identified the recording device which was fitted with a micro-cassette [MFI 2 & 3]. He then called Tom and they met at Fontanela Bar & Restaurant. He then switched on the recording device and told him that he only had Kshs. 20,000.00 and required an hour to get the balance which Tom agreed. He then returned to the Anti-Corruption offices where the recording device was played and confirmed that his voice and that of Tom had been captured. *[The cassette was the played in court. The court however rejected to admit the cassette in evidence because it only captured the voice of the investigating officer giving instructions to the witness].* He was then given a 2<sup>nd</sup> cassette to continue taping his conversation with Tom [MFI-4] and Kshs. 60,000.00 in a brown half-size envelope [MFI-5] given to me by Mr. Mussi. [From here the hand written evidence as done by my predecessor is shown to be missing from pg 8 to 9].

The record of the typed proceedings show evidence of a witness whose name is not shown as it starts at the middle. But from the List of Witnesses, PW-2 is shown as Hannington Malika. He introduced himself as a Port Clerk with Pacific Enterprises, a Clearing & Forwarding Company. He told the court that on 06.02.2010, he was sent by PW-1 to deliver a letter to one Mr. Makau, the Assistant Terminal Manager, KPA which he

did. On 09.02.2010, he accompanied Pw-1 to the Port where they were arrested by the accused person who confiscated their documents. Later, PW-1 called and asked him to go to the Anti-Corruption offices and record a statement. In cross-examination, he said that PW-1 called him to go and record a statement the evening of the day they had been arrested at the Port.

**PW-3 Francis Mami Waweru**, a security officer at the Port. He told the court that on 07.02.2010 while in his office, one Chege arrived and inquired whether his letter dated 04.02.2010 had been received. He confirmed that it was received on 06.02.2010. He then allowed him to make a photo copy of this letter. After 2 hours, the accused person came and asked him if he was the one who gave the letter to Mr. Chege which he answered to the affirmative. One week later, he was asked by EACC officers to record a statement.

**PW-4 Maj. [Rtd] Mohamed Morowa**, the Head of security, KPA told the court that on 09.02.2010, he had a patrol team composed of Abdulgani Ali, Tom Wafula and Mzee Andrew. Abdulgani told him that one Chege had a letter dated 04.02.2010 [MFI-1] addressed to the MD, KPA seeking to transfer containers 7226673, MIKU 9198588, IMKU 2873309, MSCU 79366783, MSCU 8513541, MSCU 9322600 and TINV 2085920 to High Valve area. The patrol team then told him that Mr. Chege had offered them Kshs. 5,000.00 which he enhanced to Kshs. 10, 000.00 to have the container and the letter released. He advised them to accept the money the arrest Mr. Chege and hand him over to the EACC officers. When checking the system, he found the seven containers removed. The same afternoon, Mr. Chege came and told him that Mr. Wafula was soliciting for money from him and they had met twice. He called the EACC officers who told him that they were aware of the matter and they were handling it. Later, he got word that Wafula had been arrested.

In cross-examination, he denied knowledge that Chege was facing criminal charges of stealing the containers. He had no evidence that Mr. Wafula had received any money from Mr. Chege apart from the Kshs. 10,000.00 which was used to arrest Mr. Chege.

**PW-5 Abdulgani Abubakar Ali**, a security officer, KPA told the court that on 09.02.2010 while on duty at Gate 5 with his colleagues Tom Wafula and Andrew, they stopped a man who he came to know as Mr. Chege and demanded his document. He surrendered a letter [MFI-1] which was demanding the release of seven containers. This letter had no security endorsement. They then escorted him to the head of security [PW-4]. Later, this person called Tom and offered him Kshs. 5,000.00 which he declined. He then enhanced it to Kshs. 10,000.00. They reported this to PW-4 who advised them to arrest him. They then lured him to the Port where he was arrested upon giving them Kshs. 10,000.00 at PW-4's office where EACC officers came and took him away. He did not know how Tom was arrested.

In cross-examination, he conceded that he was surprised that it was Tom who was arrested and charged.

**PW-6 Ishmael Okech Omollo** a Customs Officer, KRA based at JKIA told the court that on 09.02.2010, a person approached him with a letter dated 04.02.2010 addressed to the MD, KPA requesting for the release of some containers from OK warehouse to High Valve Cargo area. Since he had not received his copy of this letter, he advised the bearer that he will not comply. He asked one Mohamed a Customs Staff to confirm the presence of these containers only for Mohamed to tell him that the bearer of the letter had been arrested by KPA security personnel. He did not know what happened to the containers.

At this point, the trial Magistrate Hon. R. Odenyo, [Mr.] SPM ceased to exercise jurisdiction and Hon. D. Ogoti [Mr.]. CM took over. After compliance with the provisions of section 200 (3) CPC, the accused demanded that the trial proceeds from where Hon. Odenyo had left.

**PW-7 No. 61895 Pc. Daniel Masesi**, an investigator with EACC told the court that on 12.02.2010, he was requested by his colleague Aggrey Magomere to assist him in carrying out a trap operation to arrest a KPA security officer who was corruptly demanding Kshs. 60, 000.00 from one

Mr. Chege as an inducement to assist the complainant in an on-going investigation concerning a container he was trying to clear from the Port. Mr. Magomere informed him that they had already handed over Kshs. 17,000.00 [genuine] and Kshs. 43,000.00 [fake] as trap money making a total of Kshs. 60,000.00. He told him further that he had formed a team comprised of Mwachunga and William Sang to the meeting point at Fontanela Bar, Moi Avenue, Mombasa where he and Magomere hanged around. Mr. Mwachunga was monitoring the complainant as he engaged the suspect in a conversation. That once the suspect received the money, Mr. Mwachunga alerted them. They then swung into action and approached the table where they were seated and confronted them. Upon introduction, the suspect dropped the trap money under the table where they were seated. So as to avoid a commotion at the restaurant, they arrested the suspect and led him to the EACC offices where he took swabs from both his hands which he put into two separate envelopes which he marked as Tom Wafula for the left hand which was later marked at the Government Chemist as GCG 1/2010/ JKN [MFI- 9A] and for the right hand GCG 1/2010/JKN [MFI-9B]. He then prepared a swab certificate dated 12.02.2010 signed by the accused, the complainant, Mr. Magomere and William Sang [Exh. 10]. Mr. Magomere then compared the serial numbers of the currency notes with the photocopies which corresponded. This witness then prepared an inventory of the genuine money which the complainant signed as well as the accused and his two colleagues [P. Exh. 8]. He identified the serial numbers of Kshs. 17,000.00 currency notes as **BR 0658118, BW 2727635, BX 4126911, BL 2265406, BA 4418302, BS 9207478, BU 7986137, BS 791765, AY 5385811, BJ 0226528, BJ 2605456, BK 3844401, BE 141484, BK 4927384, BA 6742768, BF 2960105 and BX 2440360** [MFI-7]. Thereafter, he handed the swabs and the certificate to Mr. Magomere to continue with investigations. In cross-examination, he denied knowledge that the complainant had earlier been arrested for bribing the accused with Kshs. 10,000.00 which was handed over to EACC officers. He did not know where this cash was. He conceded that they had visited the accused's home to search for documents to assist them in another investigation.



Thereafter, Hon. D. Ogoti [Mr.], CM ceased to exercise jurisdiction, I took over and when directions under section 200 (3) CPC were taken, the accused elected that the case proceed from where it had reached.

**PW-8 Osborne Nzai Chogo**, a security officer at KPA recalled that on 09.02.2010 while in the office received a call from Abdulgani Ali and shortly thereafter from Tom Wafula both of whom were his junior officers that they had arrested a suspect at Gate 9. He proceeded there but found that they had moved to the Duty Free Shop where he found them with a suspect Geoffrey Chege who had attempted to bribe them with Kshs. 10,000.00. They then called an officer from EACC and after a brief chat escorted the suspect to the EACC offices and handed him over after recording the cash offered as a bribe in an inventory. On 11.02.2010 at around 5:00pm while on his way home with Tom Wafula, they met Geoffrey Chege at Fantasy Bar. Geoffrey Chege asked Tom Wafula to return the documents that he had confiscated from him but he declined and referred him to his Boss. The following day on 12.02.2010, Tom asked him to accompany him to Fontanela Bar where they again met Geoffrey Chege who still insisted that Tom return the documents to him but he declined and referred him to his Boss. He did not hear Tom demand anything from Chege. The following day, he heard that Tom had been arrested. On 09.03.2010, he was summoned to the EACC offices together with Tom where 2 cassettes in respect of their conversation with Chege both at Fantasy and Fontanela Bars were played together with another between Tom and Chege at Fontanela. He denied having recorded in his statement with the Police that Tom demanded from Chege Kshs. 60,000.00 for himself and 200,000.00 for his Boss to secure the release of his documents. Instead, he said that it was Chege who proposed to pay anything so as to secure the release of his documents. Despite being prodded by the Prosecution Counsel, he insisted that he never told the Police as such. Even after the statement was read out to him verbatim, he insisted that whatever was contained therein were not his words. This forced the Prosecution Counsel to stand down this witness to be able to get his handwritten statement because the one he had was typed. When he returned after two weeks, he changed tune and now said that in the

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conversation between Tom and Chege on 11.02.2010, Tom asked Chege to part with Kshs. 200,000.00 so as to secure the release of his documents. They negotiated and settled at Kshs. 100,000.00 which Chege offered to pay by two instalments on 12.02.2010 and again on 16.02.2010. On 12.02.2010, he accompanied Tom to Fontanela where they met Chege and Tom demanded from him the first instalment of Kshs. 60,000.00. Chege asked for 40 minutes. This witness then went to the office and reported to his Boss Maj. Moroa about Tom's activities on 11.02.2010 and also on 12.02.2010. He concluded by saying that he was able to recognize his voice and that of Tom from the cassettes that were played to them on 09.03.2010 at the EACC offices.

In cross-examination, he insisted that they had previously arrested Geoffrey Chege and handed him over to the EACC officers and could not understand how it now turned the other way round and Tom was arrested.

**PW-9 Ditim Juma Musi** stated that on 12.02.2010, he was requested by his colleague Aggrey Magomere to treat Kshs. 17,000.00 in denomination of 1000 currency notes to be used as trap money in an operation. He also gave him 43 pieces of fake currency notes. He made photocopies of the genuine and fake currency notes which he signed together with the complainant. He then treated both the fake and genuine notes with APQ chemical and thereafter prepared an inventory which they also signed. He then stashed the notes into a half size khaki envelope and handed the same to the complainant.

In cross-examination, he could not tell whether and swabs were taken from the suspect who handled the treated notes.

**PW-10 Alfred Mwachuga** told the court that on 12.02.2010, he received a complaint from Geoffrey Kamau Chege that a security officer at KPA was demanding for a benefit of Kshs. 100,000.00 in order to assist him in a matter that was being investigated by EACC. His colleague Mr. Magomere then introduced the reportee to a recording device to use in recording his conversation with the suspect. Later the two met at Fontanela Hotel and sat at a table and this witness sat at a table about 7m away. Thereafter,

they returned to their offices where they played the recording device. Thereafter, they formed a larger team and returned to Fontanela with the reportee to handover the money. He sat at a separate table from the reportee. The reportee was joined by the suspect. He then saw the reportee give the suspect an envelope from where the suspect removed the notes whose denomination he did not identify. He then signaled his colleagues who were outside. They entered and together confronted the suspect who then dropped the money. They introduced themselves and the suspect then picked the money and handed it over to Mr. Magomere. They then arrested him. He identified the person they arrested at the accused.

In cross-examination, he conceded that the statement he recorded with the police was dated 10.03.2009 but which he said was a topographical error as the correct date was 10.02.2010.

**PW-11 Yahya Hamisi Maingu** of the Government Chemist, Mombasa told the court that an Exhibit Memo dated 17.02.2010 by C.I. Aggrey Magomere being 5 khaki envelopes marked A containing Kshs. 17,000.00, envelope marked B containing a cut envelope marked C containing a right hand swab of Tom Wafula and D containing a left hand swab of the same person and EF containing a control sample of APQ powder. It was desired to establish whether the exhibits contained the APQ substance. Upon analysis, they tested positive for APQ substance and then marked as GCG 1/2010 JKN for identification and a report dated 29.03.2010 prepared.

**PW- 12 C.I. Aggrey Magomere** who was the investigating officer told the court that on 12.02.2010 while in the EACC offices Mombasa, his superior officer Mr. Mohamed tasked him to investigate a complaint by Mr. Geoffrey Kamau Chege who was present. He told him that Tom Wafula a security officer the KPA had called him on 11.02.2010 and demanded a bribe of Kshs. 100,000.00 in order to assist him in a case where he had been arrested for bribing him Kshs. 10,000.00. He then trained Mr. Chege how to operate a recording device which he then loaded with a micro cassette to go and record his conversation with Tom. They then left to Fontanela Bar where the reportee made the suspect who was with

another person Mr. Chogo [PW-8]. After he recorded the conversation, they returned to the EACC offices where the cassette was played and confirmed that indeed a demand for a benefit of Kshs. 100,000.00 was made and agreed to by two instalments of Kshs. 60,000.00. Thereafter, his colleague Ditim Musi treated trap money being Kshs. 17,000.00 currency notes of 1000 denomination and 43 fake currency notes of the same denomination with APQ powder and then photocopies taken. They then gave the same to the reportee together with another recording device and they returned to Fontanela. This witness remained outside with Mr. Masesi as the reportee entered with Mr. Mwachunga who signaled them when the trap money was received. This witness then pounced and found the suspect holding the wad of notes which he dropped but later picked and handed over to him. They then arrested him and escorted him to their offices where Cpl. Masesi took swabs from both his hands which he put in an envelope and prepared a swab certificate together with the inventory which they all signed. Later, this witness prepared an Exhibit Memo and escorted the swabs, treated money and the control sample to the Government Chemist for analysis. Upon analysis, a report was received confirming that indeed the accused person came into contact with the trap money. He later prepared a transcript of the conversation from the micro cassettes. That upon completion of investigations, he charged the accused person.

In cross-examination, he denied having received Kshs. 10,000.00 that had been offered by the complainant herein to the accused as a bribe. He however conceded that the accused had earlier arrested the complainant herein for the offence of offering him a bribe of Kshs. 10,000.00 and handed over to the EACC officers together with the exhibit.

The case for the prosecution was closed at this point.

I wish to start this ruling where the investigating officer left in his testimony. He admitted that prior to the lodging of the complaint that gave rise to this prosecution, the accused person had arrested the complainant herein for bribing him with Kshs. 10,000.00 and handed him over to the EACC officers together with the exhibit for investigation and

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The case for the prosecution was closed at this point.

I wish to start this ruling where the investigating officer left in his testimony. He admitted that prior to the lodging of the complaint that gave rise to this prosecution, the accused person had arrested the complainant herein for bribing him with Kshs. 10,000.00 and handed him over to the EACC officers together with the exhibit for investigation and

I now turn to the charges that the accused person is charged with. All the three charges are for corruptly soliciting and receiving a benefit contrary to section 39 (3) (a) of the Anti-Corruption and Economic Crimes Act. A benefit under the Act means **“an inducement or reward, or on account, for an agent or forbearing from doing something with respect to the affairs or business of the agent’s principal; or showing favour or disfavor to anything, including a person or proposal, in relation to the affairs of the agent’s principal”** [Underlining mine].

For the offence under section 39 of the Act to succeed and be taken to have been established, it must be proved that the accused was an agent and was acting in relation to his principal’s business.

From the charge sheet, the accused is referred to a person employed by a public body to wit Kenya Ports Authority. He is therefore an agent of Kenya Ports Authority. For the charges to hold, his actions must be for or in connection with the affairs of his principal to wit Kenya Ports Authority. The charge sheet goes to state that the action for which the benefit was solicited and received was in relation to an on-going investigation. This was supported by none other than both the complainant and the investigating officer that the purpose for which the benefit was sought and received was to assist in a complaint which the accused had lodged against the giver at the EACC. The accused person is not an employee of EACC. He is an employee of the Kenya Ports Authority which is a state corporation with the responsibility to maintain, operate, improve and regulate all scheduled seaports along Kenya’s coastline among other related functions as stated under section 12 of the Kenya Ports Authority Act Cap. 391 Laws of Kenya. The Authority has no mandate to investigate any offence more specifically an offence of corruption such as the one the accused person herein is charged with. Such mandate is bestowed on the EACC. The accused person herein is not an employee of EACC whose duty it was to investigate and commence possible prosecution of the accused person’s accuser herein. The accused person is alleged to have solicited and received a benefit from his accuser so as to assist him in an on-going investigation that was being carried out by EACC. So, whatever that was going on was in relation to the affairs of EACC and not the affairs of his principal Kenya Ports Authority. The three counts that the accused person is charged with cannot therefore stand.



possible prosecution. He did not tell the court what became of that complaint. Indeed the EACC can choose not to investigate any complaint lodged with them but this must be done in accordance with the provisions of section 25 of the Anti-Corruption and Economic Crimes Act, Cap. 65 Laws of Kenya which provides as follows:

*"If the Commission receives a complaint concerning corrupt conduct on the part of any person and the Commission declines to investigate or discontinues its investigation before the investigation is concluded, the Commission shall inform the complainant in writing of its decision and the reasons for the decision."* [Underlining mine].

The law is very clear how the Commission should have proceeded when it decided to discontinue the accused person's complaint against his accuser in the present prosecution. The Commission should have informed the accused of its decision in writing and give reasons for such decision. This seem not to have been done here. When the accused person lodged his complaint against his accuser herein to the Commission whose duty it is to investigate and possibly commence prosecution, he had a legitimate expectation that his complaint was to be handled fairly and in accordance with the law. If his complaint was found wanting and incapable of sustaining a prosecution, the Commission was under a duty to inform the complainant as such in writing. This is what is required of a good administrative action free from abuse. It was therefore unfair for the Commission to deviate from this course as set out not only by the law that creates it but also by Article 47 (2) of the Constitution of Kenya, 2010 which provides:

***"If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action".***

When the accused person herein lodged his complaint against his accuser herein to the Commission, he was entitled to a fair and just treatment by the Commission. So, before the same Commission turned against him, it was mandatory that he be explained in writing why his early complaint against his accuser was not being pursued. I find the decision by the Commission to turn and now charge him to be arbitrary and an act of unfair treatment. The Commission utterly abused its powers.

I now turn to the charges that the accused person is charged with. All the three charges are for corruptly soliciting and receiving a benefit contrary to section 39 (3) (a) of the Anti-Corruption and Economic Crimes Act. A benefit under the Act means “an inducement or reward, or on account, for an agent or forbearing from doing something with respect to the affairs or business of the agent’s principal; or showing favour or disfavor to anything, including a person or proposal, in relation to the affairs of the agent’s principal” [Underlining mine].

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In arriving at the foregoing decision, I have been guided by the decision in the case of *Isango v Republic [1968] EA 140 (Georges, J)* held that to establish such an offence, it must be proved that the accused person had corruptly taken money for doing or forbearing from doing some act in relation to the principal's business. The appellant was an official of a ruling party and had been convicted for having taken a bribe for forbearing to arrest the complainant on a charge of theft. The conviction was quashed on appeal on finding that the arresting or taking into custody is not part of a cell leader's business in relation to his principal, the ruling party. It was found that when the appellant threatened to arrest the complainant for theft, he was not acting in relation to his principal's affairs or business as it was not the business of the ruling party to arrest and prosecute citizens.

Similarly in the present case, when the accused solicited and received the alleged bribe from the complainant, he had promised to assist him in the ongoing investigation which was being carried out by EACC. EACC was not his principal. His principal was Kenya Ports Authority. It was not the business of Kenya Ports Authority to investigate and prosecute the complainant. So, the accused cannot be said to have been acting in relation to his principal's affairs or business. The three charges must therefore fail.

Further, the actions of the accused person were said to have been captured in a recording device. This device is what formed the backbone of the charges before court. However, when the prosecution attempted to introduce these devices in evidence, they were rejected by the then trial magistrate. That is when the case before court met its Waterloo. These recording devices were to this case what a vertebral column is to the human body without which the body has no support and cannot stand still. When these recording devices were rejected, the charges remained hopeless. Whatever remained cannot form a basis of a successful prosecution.

From the foregoing, it is my opinion that even if the accused person is placed on his defence and he elects to remain silent, no conviction can ensue. In the upshot, I find that the prosecution did not place before me sufficient evidence to require the accused person being put on his defence. Accordingly, I dismiss all the three counts and acquit the accused person under section 210 CPC. He be set at liberty forthwith unless otherwise lawfully being held. The surety is discharged. The 17 Kshs. 1000

currency notes that were produced herein as P. Exh. 11A be restored the investigating officer and the 43 fake currency notes that were produced herein as P. Exh. 11B be forfeited to the Governor of Central Bank of Kenya for destruction as by law provided. Right of appeal is fourteen (14) days.



HON. H. NYAKWEBE,  
PRINCIPAL MAGISTRATE.

CERTIFICATE:

This ruling read, signed by myself and delivered in open court this 11<sup>th</sup> day of June, 2018 in open court in the presence of: C/A: Mr. Hamisi; Prosecution Counsel: Ms. Maina, the accused person and Mr. Okuthe Advocate for the accused person.



HON. H. NYAKWEBE,  
PRINCIPAL MAGISTRATE.

11.6.2018

Mr. Okuthe:

I apply to be supplied with certified copies of the proceedings and the Ruling.



Ms. Maina:

I also apply to be supplied with a copy of the Ruling.

