

KENYA POLICE

CHARGE SHEET

POLICE CASE NO. 145/244/14
DATE TO COURT. 16/12/14
COURT FILE NO. ACC.28/14

O.B. NO

Christian Names in full or Name CHRISTOPHER KAMAU	Surname or Father's Name NJENGA	Identity Certificate No.	Sex M	Nationality or tribe KIKUYU	Apparent Age A	ADDRESS(inc District and Location where Applicable) NYANDARU/
CHARGE COUNT ONE	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.					
<p>CHRISTOPHER KAMAU NJENGA: On 21st October, 2014 at City Hall wit Nairobi City County, being a person employed by a public body, to wit the Nairobi City County Government, as City Inspectorate Constable, corruptly solicited for benefit of Kshs. 10,000/= from Kelvin Opondo Orwa as an inducement so as to release motor Cycle Registration Number KMDG 880N, a matter relating to affairs of the said public body.</p> <p style="text-align: right;">OTHER COUNTS SEE OVERLEAF <i>[Handwritten Signature]</i></p>						
If Accused Arrested	Date of Arrest	Without or with warrant	Date Apprehension Report to Court	Bond or Bail and Amount	Is Application made Summons to Issue	
YES	26/11/2014	W/O	/////	CASH BAIL 10,000/=	-	
Remanded or Adjourned to						
Complainant and Address REPUBLIC OF KENYA THROUGH EACC						
Witnesses.		1. GEORGE ODHIAMBO OWUOR 2. OTHERS TO BE STATED 3.....			4..... 5.....	
Sentence ...						
Court and Date ...						


Officer in Charge *Capital Hill Police Station*


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 OF THE OFFENCE

CHRISTOPHER KAMAU NJENGA: On 5th November, 2014 at City Hall within Nairobi City County, being a person employed by a public body, to wit the Nairobi City County Government, as City Inspectorate Constable, corruptly solicited for a benefit of Kshs. 15,000/= from **George Odhiambo Owuor** as an inducement so as to release motor Cycle Registration Number KMDG 880N, a matter relating to the affairs of the said public body.

COUNT III

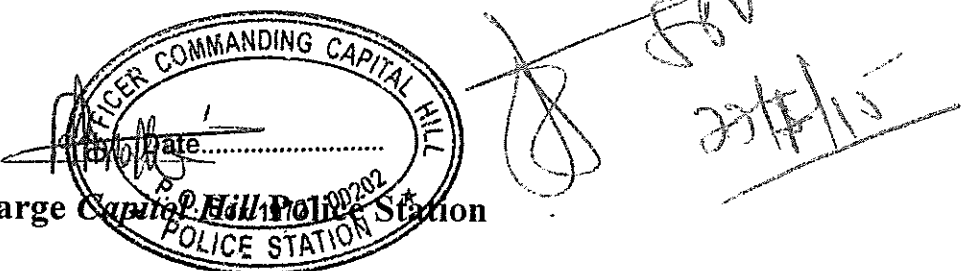
CORRUPTLY SOLICITING FOR A BENEFIT CONTRARY TO SECTION 39 (3) (a) AS READ WITH SECTION 48 (1) OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT NO.3 OF 2003.

PARTICULARS OF THE OFFENCE

CHRISTOPHER KAMAU NJENGA: On 19th November, 2014 at City Hall within Nairobi City County, being a person employed by a public body, to wit the Nairobi City County Government, as City Inspectorate Constable, corruptly solicited for a benefit of Kshs. 15,000/= from **George Odhiambo Owuor** as an inducement so as to release motor Cycle Registration Number KMDG 880N, a matter relating to the affairs of the said public body.

and

Officer in Charge Capital Hill Police Station



COUNT IV

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 OF THE OFFENCE

CHRISTOPHER KAMAU NJENGA: On 24th November, 2014 at City Hall within Nairobi City County, being a person employed by a public body, to wit the Nairobi City County Government, as City Inspectorate Constable, corruptly solicited for a benefit of Kshs. 17,000/= from George Odhiambo Owuor as an inducement so as to release motor Cycle Registration Number KMDG 880N, a matter relating to the affairs of the said public body.

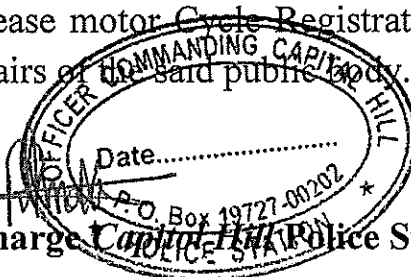
COUNT V

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

PARTICULARS OF THE OFFENCE

CHRISTOPHER KAMAU NJENGA: On 26th November, 2014 at City Hall within Nairobi City County, being a person employed by a public body, to wit the Nairobi City County Government, as City Inspectorate Constable, corruptly received a benefit of Kshs. 5,000/= from George Odhiambo Owuor as an inducement so as to release motor Cycle Registration Number KMDG 880N, a matter relating to the affairs of the said public body.

Officer in Charge **Capital Hill Police Station**



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE COURT
ANTI-CORRUPTION COURT AT MILIMANI LAW COURTS
ANTI-CORRUPTION CASE NO.28 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

CHRISTOPHER KAMAU NJENGA.....ACCUSED

JUDGEMENT

The accused, **Christopher Kamau Njenga**, is facing charges of corruptly soliciting and receiving a benefit contrary to section **39 (3)(a)** as read with section **48(1)** of the **Anti-corruption and Economic crimes Act Number 3 of 2003**.

The first and second counts were disposed of for lack of evidence to prove them and accused acquitted of the same under section 210 of the Criminal Procedure Code in the ruling of this court delivered on **2nd November 2017**.

Turning to the remainder of the counts, the particulars in respect of count three are that on **19th November, 2014**, at City Hall within Nairobi City County, being a person employed by a public body, to wit, the Nairobi City County as an inspectorate constable, the accused corruptly solicited for a benefit of **Kenya shillings 15,000** from **George Odhiambo Owuor** as an inducement so as to release motorcycle registration number **KMDG 880N**, a matter relating to the affairs of ^{the} said public body.

The description of the accused and the place of commission of the offence remains the same in **counts 4 and 5** except the dates of the alleged offences and the amount subject matter of the charges that are disparate.

In **count four**, the accused is charged with soliciting for a benefit of Kenya shillings **17,000**, from **George Odhiambo Owuor** on **24th November, 2014** as an inducement to release the said motor cycle.

In **count five**, it is alleged that the accused received a benefit of Kenya shillings **5000** from **George Odhiambo Owuor** on **26th November 2014** as inducement to release the motorcycle **KMDG 880N**.

The complainant, **George Odhiambo Owuor (PW1)**, testified that he was in the business of mail delivery services which he ran under a company known as **Quick Data Courier Services**. He had employed **Kevin Opondo Orwa (PW2)** and had assigned him a motorcycle, **KMDG 880N** for making mail deliveries.

On **18th October 2014**, he received a text message from Kevin informing him that he had been arrested along Kenyatta Avenue, near Gulf Bank by Nairobi City County inspectorate and they had impounded the motorcycle. Kevin made a follow-up on his own on **21st October 2014** to seek release of the motor cycle but he was unsuccessful as **Kenya shillings 10,000 demand** was made as a condition for its release. He did not have the said cash that was demanded.

On **5th November 2014**, **George (PW1)** accompanied **Kevin (PW2)** to City Hall and Kevin introduced him to the **accused, Mr. Njenga** with whom Kevin had spoken to previously. The complainant explained **Mr. Njenga (accused)** that he was not in a position to raise the amount of **10,000 shillings** and sought to know if he could be taken to court instead since he expected a reasonable fine of **1000 shillings** and an impounding fee of **2000 shillings** might be imposed.

The accused scoffed at the complainant's suggestion and told him by that date of **5th of November 2014**, he had already incurred Kenya shillings **19,000** calculated at a rate of Kenya shillings **1000** per day starting **18th November 2014** when the motor cycle was seized. The complainant begged the accused to reduce the amount and the accused revised it to

Kenyashillings 15,000 after which the complainant left to look for the money.

On **10th November 2015**, ^{he} went back to City Hall to see the accused with Kenya shillings **12,000** but the accused declined that amount. He decided to seek the assistance from the inspectorate department. He went and spoke to a **Madam Waithera**. The lady checked the records at the inspectorate department for the details of the motor cycle but did not find any entry relating to complainant's motorcycle. She advised that they go and search for it at the records kept by the askaris at the gate. They found it had been entered there. She then advised the complainant to deal with the accused, **Mr. Njenga**.

On **14th November 2014**, the complainant went to see the accused but on that day he was informed that the accused was on off duty. He enquired for his mobile number and was given. He called his mobile line. They spoke and accused told him to see him on **17th November 2014** so that he could assist him. On 17th November 2014, the complainant was not able to go and see the accused.

He instead went to see the accused on **19th November 2014** and the accused questioned why he had failed to go and see him on 17th November 2014 as they had agreed. The accused told him for this failure, he would add **3000/-** shillings as the days were still running and ^{as the tw} **Kshs. 15000/-** instead of **12000/-** they had agreed on phone conversation that the complainant could take on 17th November 2014. That is when the complainant requested the accused to allow him go get the additional amount.

However, the complainant went straight to EACC and lodged a complaint against the accused. At EACC, he was informed that there were no officers immediately available that day and was advised to return on 24th November 2014.

On **24th November 2014**, he went to EACC and he was introduced to a recording device so that he could go and record the conversation with the accused to enable the officers verify his report. He was also inducted on how to operate the recording device.

He went to City Hall and found the accused at the gate screening visitors. He spoke to the accused and the accused told him since he had again failed to go back on 19th of November 2014 as agreed, he would add a further sum of Kenya shillings 3000/- to make the amount **18,000/-** as opposed to 15,000/- they had agreed had he come back ^{with} on 19th November 2014.

The complainant protested that he could not get such a huge amount of money and asked if he could be taken to court but the accused scoffed at the proposal telling him that even if he was charged in court he would still go and pay the amount.

The complainant then asked him if he would be issued with a receipt for the amount that the accused was demanding to which the accused informed him that part of the amount would be receipted ^{but the other} and another part ^{for} for which he would consult with his boss, will not.

At that juncture, the complainant pleaded with the accused to revise the amount downwards and the accused told him to go get 17,000/- shillings. The complainant went back to EACC and returned the recording gadget to an officer by the name Jonathan.

On **26th November 2014**, he went back to EACC. He was introduced to more EACC officers among them **Pauline Munyi (PW8)**. Pauline showed him the currency notes she was preparing for the operation which comprised Kenya shillings **10,000 in fake currency** and a further **5000/- shillings** genuine currency. They together confirmed the serial numbers of the genuine currency which he identified before this court. He also signed a photocopy of the genuine notes, which he again identified before the court. He signed the inventory (**P.Exhibit 6**) confirming the receipt of the said money.

Armed with this money which was inserted in a half-cut khaki envelope (**P.Exhibit 4**), and a recording device (**P. Exh 5**), he set off for the journey to meet the accused with the EACC officers covertly following. On arrival at City Hall, EACC ~~the~~ investigator **Caleb Okoth(PW 5)** closely trailed the complainant as other officers strategically took positions within City Hall.

The complainant switched on the recording device and nonchalantly approached the accused to whom he announced his arrival. The accused

requested a few minutes to finish what he was doing and after a while, he went to the complainant and told him he was now ready to help him.

The accused entered the guard room next to the main gate ~~with~~ and the complainant followed him there. He asked the complainant for the details of the motorcycle which he noted on a piece of paper. The accused then told the complainant that one of his bosses was away but he would still find another one who could help.

He left and shortly thereafter, he came back and asked the complainant for the money. The complainant told him he did not find it in order to give him the money in the open and the accused led the complainant to the guard room next to the main gate. Inside the room, they found two ladies. The complainant asked the accused if he could now give him the money to which the accused responded affirmatively.

He removed the money and handed it over to him. The accused started counting it and then exclaimed that some notes were fake. He passed the money to one of the lady colleagues to confirm if it was real money. The lady after touching described it as a piece of paper.

That time, **Mr. Caleb Okoth (PW 5)** of EACC entered and was soon joined by other EACC officers. The EACC officers introduced themselves and informed the accused and his colleagues that they were now under arrest. EACC officers told them that the money they had just received was theirs and requested for it. The complainant signed the inventory of the recovered money (**P. Exhibit 7**) which the EACC officers prepared. He returned the recording device and they then proceeded to Integrity Centre where he recorded a statement.

In ~~in~~ court, the complainant listened to the recorded conversation (**P. Exhibit 10**) and confirmed that the contents were as per the transcript of 24th of November 2014 (**Exhibit 1(a)**). He also listened to that of 26/11/14 (**P. Exhibit 21**) and confirmed that he signed the transcript in respect of the same (**P. Exhibit 8**). X

On being asked during cross examination by **Mr. Oundu** if the amount demanded by the accused was a benefit or money collected on behalf of the County, the complainant explained:

“Njenga said he was going consult his boss in respect of motorbike and the boss would decide how much would be receipted and how much won't be receipted... At the end I could not tell how much he would eat and how much would be receipted. It was a benefit because when we go to City Hall, they don't ask for money, they ask you to go and pay at cash office.”

On the formal payment process, he said-

“The first process, you go where your motorcycle is impounded, they give you a note, you go to cash office, and you come back with a receipt. The release actually this is done by those who impounded.”

Kevin Opondo Orwa (PW2) testified how on **18th November 2014** he was arrested in the City centre by the county askaris and the motorbike he was riding seized. When he followed up on **21st November 2014**, he encountered the accused who told him that he was required to give **10.000/- shillings** to secure the release of the motor bike. He described how it happened that he started dealing with the accused over this matter, he stated:

“On 21st November 2014... I decided to go to City Hall. I went to see a lady called Muthoni. She deals with impounded bikes. When I talked to her, she said she does not work on Saturday. She said if I was arrested on Saturday I should check at the gate... those records could only be at the gate...I went to the security and asked them the registration number of my motorbike. They checked and found it. It is Christopher Kamau Njenga who attended me at the gate. I asked him to give me the registration of the motorcycle to go to court. He told me that it was too early and the people had not gone to court. He told me if I had 10,000 shillings, I could pay him so that he could give ^{me} ~~him~~ my motorbike. That day I did not have any money. I called George who told me to leave that matter he would come to deal with the issue himself.”

On **5th November 2014**, **Kevin (PW2)** and **George (PW1)** went to City Hall to see Mr. Njenga. On that day, Njenga was at the basement. Kevin introduced George to the accused. When George tried to broach the subject of the motor cycle, the accused preemptorily told him that if it was about the motor cycle he was not ready to discuss it because he had finished with

Kevin. Kevin went away and left George speaking to the accused. Thereafter George told Kevin that Njenga refused to release the motorcycle after George^{after} pleading and offering him 5000/- shillings instead.

Rachael Wanjiru Ndegwa (PW3), a security officer with Nairobi City County government stated that on 26th November 2014, she had been manning the gate and had just taken a lunch break in the guardroom next to the main gate of the City Hall. Her colleague, **Margrate Waceke (PW4)** with whom she ^{was} and been working with was also there taking lunch as well.

As they both went about to take their packed lunch, the accused, Mr. Njenga entered the guardroom busting out twice;

"Hee, hii pesa inakaa namna gani"

This prompted **PW3** to ask the accused to give her the money so that she could check it. She took it and held it against the light that was flickering through the glass window to the guardroom. As she examined it isolating the fake from the genuine notes is when someone entered and declared that that was their money and demanded it back. **PW3** returned it to Mr Njenga. Shortly after, more people came in and introduced themselves as EACC officers. After comparing the money with a photocopy, the hands of the accused and hers were swabbed before being escorted to Integrity Centre where she recorded her statement on what had transpired.

She testified that the EACC played the recorded conversation and in it, she heard the voice of the accused and that of her colleague, Margaret Waceke (**PW4**). She affirmed that the voice was that of the accused by stressing:

"I know Njenga's voice because I stay with him there."

Explaining the procedure for releasing impounded items, she stated:

"When motorbike is impounded, it is not our job to collect money. There is a cash office and there are people responsible for receiving payment in respect of impounded bikes."

The evidence of **Margaret Waceke (PW4)** who was together with **PW3** inside the guardroom when this incident unfolded was substantially similar to the testimony of **PW3**. She equally stated that it was not the duty of the

security officers to collect money in respect of impounded goods or motorbikes.

Later during cross examination she insisted:

“...Njenga should not have touched that money because there is a cash office.”

Samuel Mukundi Njiru, (P.W.10) was the lead investigator in this case. He confirmed that the commission received the complaint against the accused on **19th November 2014** alleging that he was soliciting money in order to release an impounded motorcycle. Since it was on a Friday evening, the complainant was advised to go back to the commission on 24th of November 2014. On that day, the complainant was introduced to a recording device and asked to go and hold a further conversation to enable the EACC to verify the allegations. He produced the said recording gadget as **P. Exhibit 5**.

On analyzing the conversation after the complainant had returned the recording device, it was established that indeed a demand of 15,000 shillings had been made. It was then decided that an operation should ensue.

A team of EACC officers to carry out the operation was put in place consisting of: **Caleb Okoth (PW5), Francis Wambua (PW6), Patrick Mbijiwe (PW7) and Pauline Munyi (PW8)**. These officers testified before this court as to the roles they each played in that investigation.

Pauline Munyi (PW8), prepared and treated ^{MV5} trap money with APQ chemical. She took the complainant through the procedure of handling the money to avoid contamination until it was delivered. She produced as exhibits, the inventory of handing over the money to the complainant- **P. Exhibit 6**, the half-cut khaki envelope where the money was carried- **P. exhibit 4** and the photocopy of the genuine currency notes- **P. Exhibit 3**.

On his part, **Caleb Okoth (PW5)** stated that on the date of arrest he was the officer that closely trailed the complainant when he went to meet the accused so as to deliver a bribe demand. He said that he actually witnessed the complainant giving out the money and the accused receiving it since he was standing next to a glass window and had a clear view of the inside of

the guardroom where the accused and the complainant were exchanging the cash.

He explained:

“I could see them through the transparent window that enabled me to see inside. I saw the complainant handing over trap money to the suspect.”

It is at this juncture that he alerted his colleagues who joined him and effected the arrest.

Francis Wambua (PW6) introduced the EACC officers just before carrying out the arrest. He recovered money **P. Exhibit 2 (a-e)** and the employment card of the accused **P. Exhibit 11**. He also made the inventory of recovered money- **P. Exhibit 7**.

Samuel Mukundi Njiru (PW10) swabbed hands of the accused and the lady the officers had found scrutinizing the money, **Rachel WanjiruNdegwa (PW3)**.

Mr. Samuel Mukundi Njiru(PW10), the lead investigator in this case produced in evidence the CD containing the recorded conversation between the complainant and the accused the accused on 24th November 2014 as **P. Exhibit 10**. He also produced the CD containing conversation between the accused and the complainant on 26/11/2014, the day of arrest as **P. Exhibit 21**. He produced the original transcript of the conversation of 24/11/14 as **P. Exhibit 1(a)** and the translation thereof as **P. Exhibit 1(b)**. The transcript for 26/11/2014 was **P. Exhibit 8**, transcription certificate **P. Exhibit 9**. Other exhibits included exhibit memo form that forwarded items for analysis to the government chemist- **P. Exhibit 12**, APQ chemical control sample- **Exhibit 25**, certified copy of traffic marshal register that showed the subject motor cycle was confiscated on 18/10/14 for obstruction - **P. Exhibit 26**, certificate under section 106 B (4) of Evidence Act- **P. Exhibit 22** among others.

On cross examination, the investigating officer explained that although the complainant had indicated in his report that the initial bribe demand took place on 18th October 2014, it was not until 19th November 2014 that he went to report the same.

The investigator further clarified that only the conversation of 24th November 2014 was translated because it was in Swahili, Luo and Kikuyu languages and that the one of 26/11/14 did not require translation as it was in English and Swahili. He said he translated Kikuyu which he understands whereas Caleb Okoth (PW2) translated the Luo language.

As to the participation of the complainant in the translation, he staunchly denied that the complainant was involved in the translation and asserted that the complainant's role was only limited to identifying his own voice. He said:

"The complainant is a Luo. He only assisted in identifying his voice. His participation was limited to voice identification."

Catherine Serah Murambi (PW9) the government analyst with 15 years' experience testified that she received the exhibits forwarded via exhibit memo form (**P- Exhibit 12**) for analysis at the government chemist on the 6th January 2015. Among the items for analysis was genuine shillings 5000 in 1000/- shillings denomination, the right and left hand swabs of the accused (**P. Exhibit 16 and 17**) as well as those of Rachel Wanjiru Ndegwa (PW3)- (**P. exhibit 14 and 15**). There was also the APQ chemical control sample- **P. Exhibit 19**.

She analyzed items presented and made findings to the effect that presence of APQ had been detected in the items forwarded. She prepared a report on **30th March 2015** which she produced in a court as **P. Exhibit 20**.

On **29th November 2017**, the accused herein gave an unsworn statement of defence. The accused acknowledged that he works for Nairobi City County Inspectorate.

He stated that on **18th October 2014**, a motor cycle was impounded and a record of the incident was entered in the relevant occurrence book.

On **21st November 2014**, Kevin Opondo (PW2) went to enquire about the motorcycle which he wanted released to him. The accused informed him that he would be required to pay impounding charges which he calculated and told him the amount.

On **5th November 2014**, **Kevin (PW2)** and **George (PW1)** went looking for the accused whom they found at the City Hall gate. George explained that he was the owner of the motorcycle and that he had been away attending his grandmother's burial. He then sent Kevin away telling him that he would now handle the matter.

The accused told him that other than the amount of money he was required to pay as impounding charges; he was also required to produce a logbook as evidence of ownership before the motorcycle could be released to him. After that, George left.

He resurfaced on **19th November 2014** and once more enquired how much he was required to pay. On this day, the accused directed him to his superior so that he could be told how much he was to pay and also get a receipt for any amount paid. That is a time George exclaimed that he would do everything possible to repossess his motorcycle and accused countered that was alright for so long the relevant procedures were followed.

George reappeared on 24th of November 2014. Again he asked how much he was required to pay. The accused informed him that it was **17,000 shillings**. George said that he would come back the following day but he came the day after.

He found the accused screening people at the entrance to City Hall and informed him he had come.

The accused referred him to his boss so that it would be informed how much he was to pay but he declined. The accused finished screening visitors and entered the guardroom where George followed him. He calculated the amount George was required to pay then George flashed out the money and handed it over to him.

On touching the money, the accused suspected it was not genuine. Two of his colleagues were with him and he gave one of them to confirm if it was genuine currency notes or not. That is when EACC officers arrived and announced they were now under arrest.

The accused asserted that he did his work procedurally as was expected of him and insisted that any impounded vehicle or motorcycle cannot be released from City Hall without the relevant charges being paid.

The advocate for the accused, **Mr. Oundu** in his written closing submissions powerfully and eloquently submitted that the prosecution's case must inevitably collapse for various reasons which he pinpointed in his submissions.

Firstly, he observed that the charges lacked sufficient particulars thereby contravening section 134 of the Criminal Procedure Code. He pointed out that the charges did not have adequate particulars and the accused could not answer to such charges. Considering they proceeded to full trial as such without any amendment, this renders the trial null and void. He argued that if one has to wait for evidence to be adduced for him to properly understand the charge that is highly prejudicial. *He posited that although in the present case, the benefit solicited or received is explained to have been intended to induce a release of motorcycle registration number KMDG 880N, the particulars did not state "what detriment or prejudice" the release will cause and to who.*

He noted:

"The detriment or prejudice and the victim are crucial for soliciting or receiving be an offence under ACECA NO. 3..."

Apart from the above submission, counsel took issue with the manner the prosecution had used various instances of negotiations and used them as the basis of setting out distinct ~~of~~ offences running into several counts instead of treating it as one transaction.

He opined, and I quote:

"Right from count 1 to 4, the parties were actually negotiating over the same subject and it is only the last figure that can be alleged to have been solicited. It is clear from the evidence the figure arrived at on instance number one (the subject matter of charge in count one) was revised on what is changed as count two which was in turn revised to make number

three and finally number four... I humbly submit in the circumstances, the soliciting allegation ought to be and is only one and not four.”

Mr. **Oundu** went on to submit that the prosecution had also failed to prove beyond reasonable doubt that the accused was seeking money for himself rather than collecting lawful dues. He further contended that the trap money was recovered from someone else and not the accused.

He invited the court to consider that the accused did not attempt to pocket or conceal the money stating that it is highly unbelievable that one would openly receive a bribe as if it was tax or school fees and openly scrutinize it in the presence of other people. He maintained that such behaviour is inconsistent with someone who is receiving a bribe.

Counsel also faulted the transcripts and audio evidence relied upon by the prosecution insisting that due procedure was not followed in gathering this kind of evidence and this rendered it unreliable and of no value to the prosecution case. He argued that the complainant was involved in translation and identification of voices which exposed it to dangers of fabrication as there a very high risk of temptation to make sure things went in his favour. It was also counsel’s stand that the equipment used was not tested to ascertain that the tape was empty and that it was in a proper working condition. He also argued that the officers who did the translation did not provide a certificate of competence in the languages translated; and while at it, counsel remarked:

“Being a member of a community that speaks a particular language is not enough.”

To buttress these submissions, Counsel attached three precedents, namely:

1. NICHOLAS MURIUKI KANGANGI VERSUS ATTORNEY GENERAL-
HIGH COURT JUDICIAL REVIEW MISC APPL. 642 OF 2008
2. MUTHIORI VERSUS REPUBLIC (KRL)
3. LUKE OUMA OCHIENG – HIGH COURT CRIMINAL APPEAL
NO.226 OF 2005.

In his closing written submissions dated **16th January 2018**, the prosecution counsel, **Ndungu Steven Githinji**, by and large regurgitated the testimonies

of the witnesses and since I have already set it out in my review of the case at the onset, I find it undesirable to do so once more. He attached no authorities in support of his submissions either.

I will first consider the pivotal issues of law ventilated by counsel for the accused in his submissions and also one critical issue apparent in one of the authorities attached.

The issue raised through the authority of **NICHOLAS MURIUKI KANGANGI VERSUS ATTORNEY GENERAL MISC. APPL 642 OF 2008** relates to reports of investigations recommending prosecution for corruption and economic crimes that were required to be forwarded to the Attorney General.

This is an issue that counsel had raised at the time of deciding if the accused has a case to answer and this court overruled his objection. Without belabouring the point, I wish to point out that as stated in my ruling then, the present case cannot be invalidated on that account only.

In a recent case, **High Court Revision No.3 of 2016; REPUBLIC VERSUS JOSEPH KOECH SIRMA & 5 others**; the Judge commented on reports prepared under section 35 of the ACECA and held that these reports are not matters of evidence to be proved at a trial. She remarked:

“...The investigation report is an assessment prepared by investigating officer of material gathered during investigations and does not form part of evidence referred to in article 50(2)j of the Constitution.”

In yet another recent decision from the High Court, **KENNETH CHEGE KABETU VERSUS REPUBLIC- ANTI-CORRUPTION CRIMINAL APPEAL NO.10 OF 2016**; Justice Ongundi while speaking to the matter of investigation reports under section 35 of ACECA observed:

“There is no provision for giving consents because once DPP recommends prosecution, it's that office of DPP that prosecutes. The DPP cannot therefore give itself consent to prosecute.”

In my own ruling that I delivered placing the accused on his defence and where the issue was raised of reports under section 35 of ACECA had been raised; I observed:

"...It is not contested that this prosecution is being made or conducted on behalf of DPP. Under section 22 (2) of Director of Public Prosecution's Act, it is provided:

"Any power or function performed under this Act by, prosecuting counsels or members of staff of the office shall be deemed to have been performed by the Director."

In this matter, the DPP through the State Counsel is the prosecutor...

The fact that the DPP is the one conducting the ^{investigation} is the clearest indication indeed that the investigation was brought to his attention as required and he took the further action of taking it to court. To hold otherwise is legally untenable."

I thus consider the issue of the reports under section 35 of ACECA to be a non-issue as I have demonstrated. It was also sufficiently addressed ⁱⁿ the ruling and I reiterate that is of no effect in this trial.

The other salient legal issue raised by Mr. Oundu was that these charges are defective and he cited two reasons for this proposition.

Firstly, he argued that whereas the solicitation is alleged to have been intended to induce the release of motorcycle KMDG 880N, it had ^{not} stated what detriment or prejudice the release will cause and to who. He submitted that the lack of these particulars offended section 134 of the criminal procedure code. He then added:

"... That the detriment or prejudice and the victim are crucial for soliciting or receiving to be an offence under ACECA No.3..."

With due respect to counsel's submission, I find it difficult to accept the submission that an offence of solicitation or receiving under section 39 (3) as read with section 48 (1) of ACECA must reflect the prejudice or detriment suffered and by who.

Counsel should appreciate that this is an offence of corruption which is consummated when one obtains illegal gratification as a motive or reward for inducing him to do or not to what he is legally obliged to perform.

The receipt of benefit or reward as a motive of inducing one to do his legally bound duty completes the offence and it is immaterial to prove that any particular person or victim was injured, suffered a loss, detriment or prejudice because the victim here is a greater public which is a consumer of the services that person is required to render.

The second aspect on defectiveness of the charge according to counsel was to the effect that the prosecution had isolated several instances which were purely negotiations over the same issue and treated them separately as distinct offences forming different counts, that is, counts 1, 2, 3 and 4 instead of one offence taking into account that the parties were merely negotiating over the same subject matter.

To determine if two or more offences are materially or fundamentally the same, it is important to underscore the fact that that this question cannot be determined by examining the legal characteristics of the offence only and simply saying for instance, **“they are all offences of corrupt solicitation.”**

It must be understood that a charge constitutes both a set of facts as well as the legal characteristics that define the offence because a charge comprises of certain facts that offend some defined legal specifications.

It means therefore facts may disclose various offences even under one section if there are distinctive features in those facts such as when the event occurred or variations in the subject matter itself. What determines if a charge is considered similar are the facts that are captured in the particulars.

In the present case, although the 1st to 4th counts are offences of corruptly soliciting a benefit, a keen scrutiny reveals that the offences are alleged to have occurred on different dates and even the amount of solicitation varies.

Whether or not these solicitations actually occurred as alleged is a matter of evidence to be determined after a trial and not a preliminary matter to be decided by a cursory glance focusing on how the charge is framed. Although the statement of the offence shows that the same section of law was

offended, the dates of the alleged offence and subject amounts in the four counts differ thus setting them apart. I thus overrule this submission as well.

The other issue touched by counsel in his submission concerned the transcript and the ensuing translation.

To begin with, he submitted that the complainant was involved in the translation. I have carefully examined the evidence on record and I have found that this submission is misleading.

During cross-examination of the lead investigator, P.W.10, Samuel Mukundi Njiru, Counsel delved into this issue by asking him whether the complainant was involved in the translation. PW10, denied it vehemently. He answered:

“The complainant is a Luo. He only assisted in identifying his voice. His participation was limited to voice identification.”

Counsel’s submission that the complainant participated in translation is therefore not substantiated by evidence on record.

Counsel further said that the complainant was involved in the identification of voices but as indicated in the above quoted verbatim account in the testimony of the investigator, the complainant was only involved in identifying his own voice during transcription and not during translation.

In fact, it is **PW3 Rachael Wanjiru Ndegwa**, a colleague of accused who confirmed that the said recording was played to her and she identified the voice of the accused. She asserted, and I quote:

“... I received the call, I asked who it was and he said he was from Integrity Centre and he wanted me to go there with my colleague Margaret Waceke... When I went there, I was shown a tape and it was played for me to listen... I then heard Njenga’s voice in the tape but I could not tell who he was speaking with.”

Again, the submission by counsel that the complainant was involved in identification of voices other than his very own is misguiding.

Counsel further argued that the device used was not tested to ascertain that it was empty and in good working condition. He also stated that the

translators did not give a certificate of competence in the languages they translated.

For the umpteenth time, I find this submission to be misstating the evidence. The certificate produced pursuant to section **106 B (4)** of the Evidence Act- **P. Exhibit 22**; paragraphs 3 and 4 thereof; state as follows:

Para 3: That on 24/11/2014 at 11.00 a.m. I tested the serviceability of the digital Sony voice recorder by recording conversation and playing it back.

Para. 4: That upon testing the serviceability of the aforementioned digital voice recorder device and ascertaining its serviceability, I instructed George Odhiambo Owuor on how to operate the same after which subsequently recorded a conversation between him and Christopher Kamau Njenga as evidence by the Ethics and Anti-Corruption Commission.

It is thus apparent that there is no merit in the submission that the equipment was not tested before the commencement of the recording as the above paragraph 3 in the certificate confirms it was done.

It was also the submission of the counsel that there was neither closing certificate nor opening certificate in the tape itself but a reading of section 106B (4) of the Evidence Act reveals that the form of certificate contemplated under that section was produced certifying compliance with all the conditions spelt out there-under. There is no condition that specifies that for a tape to be valid must be shown to contain an opening and closing certificate in the tape itself. That is imposing peripheral conditions that are not provided for under the requisite section.

Concerning the translation, the defence counsel submitted that the officers who did the translation did not provide a certificate of competence in the languages translated.

I have keenly examined the translated transcript **P. Exhibit 1 (b)** and its preamble proclaims as follows:

“... We have made the transcript both the original and translated to the best of one knowledge and skills. The conversation was in English, Kiswahili,

Kikuyu and Luo. Samuel confirms that I am (sic) proficient to all other than Luo which was translated by Okoth.

Proficiency means competence or skill hence in the preamble, they are simply professing that they are competent in those languages indicated. It was up to counsel to put this claim ^{competence} and skill in any particular language to test during cross-examination which in my view was ^{discredited}.

Mr. Oundu also contended that the prosecution had not succeeded in proving that the accused had asked for money for his own benefit as he was collecting the money lawfully. He further argued the money was not recovered from him.

This submission touches on the question of proof and I find it appropriate to consider the same as part of evaluation of the entire evidence.

The evidence presented in this case comprised of oral testimony, electronic evidence in form of audio recording, the transcripts emanating therefrom, material evidence as in money recovered, and the expert evidence of the government analyst among others. This evidence must be considered alongside the statement of defence by the accused in determining if the prosecution has discharged the legal burden of establishing the charges against the accused beyond reasonable doubt or not.

Section 39 (3) (a) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 on which the offences facing the accused are founded states:

“A person is guilty of an offence if the person-

- a) Corruptly receives or corruptly agrees to receive or solicit a benefit to which this section applies.”***

The offence is the category of offences under the heading:

“Bribery involving agents”

In order for such *inducement, benefit or reward* to be considered legally offensive, section 39[1] makes it clear that the object of the benefit, inducement or reward solicited or received should have been intended on influencing the agent to-

[a] do or not do something in relation to the affairs of agent's principal, or

[b show favour or disfavour to anything including any person or proposal in relation to the affairs or business of agent's principal".

As to who is "an agent" section 38 defines "An agent" to mean a person who in any capacity and whether in Public or Private Sector is employed by or acts on behalf of another person; "principal" on the other hand is the person who employs an agent or for whom or whose benefit the agent acts.

For a charge founded under section 39 (3) (a) therefore; it is imperative for the prosecution to prove the following ingredients beyond reasonable doubt:-

1. That accused was/is an agent, that is, the accused was/is in employment of some person or body.
2. That the inducement, reward or benefit in question was intended to influence him to do or not do; or to show favour or disfavour to any person on a matter relating to the affairs or the business of his principal or employer.
3. That the accused in fact solicited the particular benefit in question (incase he is charged with soliciting).
4. That accused received the particular benefit charged (where he is charged with receiving)
5. That the solicitation or receipt of the aforesaid benefit was done corruptly or with a corrupt intent.

These elements are what the Judge in

Paul Mwangi Gathogo Versus Republic, 2015 eKLR

Succinctly summed up in the following words:

“The main ingredients of the offence are the accused must be acting in any capacity, whether in public or private sector, or employed by or acts on behalf of another

person, that he must be shown to have obtained or attempted to obtain gratification other than legal remuneration, that gratification should be as a motive or reward for doing or forbearing to do, in exercise of his official functions, a favour or disfavour to any person”.

There is no dispute that the accused works for the Nairobi City County Government. He himself acknowledged this fact, besides; his employment identity card(**P. Exhibit 11**)which was recovered from him and produced before this court confirmed his employment as a city constable with the Nairobi City Inspectorate Department. He is therefore *an agent* of the Nairobi City County Government and for purposes of section 38 of the ACECA;the Nairobi City County Government is his *Principal*.

The matter to which this case relates was one that involved enforcement county government laws and a *traffic marshal register (P. Exhibit 26)* was being maintained by accused employer/principal for recording violations detected and action taken. This matter thus fell within the affairs of accused principal.

If it is established that accused solicited or received any inducement, benefit or reward to influence him to do or not do any work falling within the scope of his employer’s responsibilities other than his lawful remuneration, the court must find him culpable.

I will consider **count 3** first. The particulars of **count 3** are that on 19th November, 2014 at City Hall within Nairobi City County, the accused solicited **Kshs. 15000/-** from the complainant as an inducement so as to release motor cycle registration number **KMDG 880N**, a matter relating to the affairs of the said public body.

The oral account of the complainant on this issue was that previously, while speaking on phone to the accused after he had found that he was on off duty when he went to see him on 14/11/2014, they settled that he could take to the accused Kshs. **12, 000/-** on 17/11/2014 the day accused was to resume work. However he did not go on that date but instead went on 19/11/2014; the accused told him to add Kshs. 3000/= to make it **15,000/=**. That is when he decided to go and make a report to EACC.

On his part, the accused stated in his statement of defence that when the complainant met him on 19/11/14; he enquired from the accused how much he was to pay as impounding fee for the motor cycle and he advised him to go and get the information of how much was payable from the in charge of the accused and also obtain a receipt on payment.

Concerning **Count 4**, the allegation was that the accused solicited kshs. **17,000/=** on 24/11/14 from the complainant so as to release the motor cycle KMDG 888N.

The testimony of the complainant on this issue was that following the report he made to EACC on **19/11/14**; he had now been fitted with a recording gadget which he used to record that demand. He stated that the accused told him since he had failed to go back on 19/11/14; he was to add another Kshs. 3000 to make it 18,000/-

He protested the additional sum that accused was asking for and suggested that he be taken to court instead but the accused told him even if he was to be taken to court, he would still pay that amount. He asked him if he will get a receipt and the accused informed him a portion of the money would be given a receipt but not all. The complainant thus pleaded with the accused to reduce the amount and that is when the accused asked him to go fetch for **Kshs. 17000/-**.

In his statement of defence, the accused acknowledged he met the complainant on **24/11/14** and informed him to pay Kshs. 17,000/- which was the impounding charge due to the County Government but the complainant said he will pay the following day.

From the oral testimony of the complainant and accused own statement of defence, it is not in contest that the two met on 19/11/2014 and also

on 24/11/14. The issue of money was also discussed but the point of departure between their accounts is the reason behind the demand for this money.

Besides the oral narrative in court, there is also the content of the tape recording which shows the accused vividly discussing the specific amounts mentioned in the charge sheet as he spoke to the complainant.

With regard to Kshs. 15,000/- alleged in count 3, the translated transcript (P. Exhibit 1 b), although recorded on 24/11/14; evidently captures the accused suggesting that such a figure had in fact been discussed earlier on. *At pg. 29 line 5* from the bottom, the accused is captured remarking:

Njenga: Fine, fine, uko na pesa ngapi so far? Na usiniambie uko na fifteen, usijaribu kusema fifteen kwa sababu wakati wa fifteen iliisha.

With respect to the figure in **count 4**, it is also manifest from the transcript that 17000/- shillings was mentioned and asked for by the accused. **At p.g. 44** the *last line on that page* in the translated transcript, **P. Exhibit 1 b**, the accused says:

Njenga: Ukuje na seventeen asubuhi.

The issue of the accused asking the complainant for the monies as particularized in count 3 and 4 is thus established.

The next question to decide is whether the money he was asking for from the complainant on the two occasions as demonstrated was for the payment of monies lawfully due to the Nairobi County Government as impounding fee or whether he was demanding it corruptly. This is where there is divergence between what accused stated in his defence and the prosecution.

Once more, I have to visit the transcript to find out if it sheds any light on what the purpose of the said money was.

At p.g. 30, from the bottom line onwards, the remarks therein provide a useful inkling as to the accused state of mind at the time he was asking the

complainant for the money. The conversation between and the complainant flows as follows:

Odhiambo (complainant): Inaenda kwa risiti ama hiyo ni yako ya kunywa chai

Njenga (accused): Eeh,mm?

Odhiambo: Iyo eighteen?

Njenga: Aah ingine nitaandika

Odhiambo: Utaandika ngapi?

Njenga: Nitajua tu bora kwanza ukue nayo

In the above excerpt, the accused is obviously cagey when asked whether he would treat all the money he is demanding as official by causing a receipt for the entire sum to be issued. He lacks straightforwardness and transparency which in my view is inconsistent with an innocent mind.

At pg 32, the accused is more blunt; when the complainant asks:

Odhiambo: Na hiyo eighteen utanipea risiti?

Njenga: Si yote

Further at pg. 3, line 11 from the bottom onwards, the accused becomes more direct. The conversation unfolds as follows:

Njenga (accused): Nipelekee mkubwa

Odhiambo (Complainant): Eeh

Njenga: Nimwambie vile tutasaidia huyu mtu akubali, akikataa utakuja ukuje ulipe zikiwa zote, nitakurudishia zote, sitakula hata dululu, siwezi kula kabla pikipiki haijatoka, nitaomba niende tu kwa mkubwa nimwambie mkubwa hapa kuna shida ya mtu ako na abcd tusaide huyu, tulipe hii tubaki na hii

The above evidence which was recorded on tape and is reflected in the transcript of the conversation exposes the intentions of the accused and

displaces the defence that his intention of asking for the money from the complainant was honest and sincerely intended to pay for impounding charges only.

He was not only soliciting the money for his benefit but was also in cahoots with others that he referred to vaguely as “*mkubwa*”.

In any event, it was clarified by both PW3 and PW4 who used to work with the accused in their testimony that accused was not even supposed to ask for the money in the first place as such payments are only done in the cash office.

As was held in Mwangi Gathogo Versus R (2015)eKLR:

“It is corruption to ask for any benefit not legally due in order to do one’s appointed duty”

The totality of this evidence has proved beyond reasonable doubt the guilt of the accused in **count 3** and **4** and I convict him on these two counts of soliciting accordingly.

In **Count 5**, where the accused is charged with receiving the benefit, Mr. Oundu’s submission on this issue was as follows:

“It is the prosecution’s case that the trap money was not recovered from accused person but somebody else. The explanation offered is that accused walked into a room holding the currency note dating (sic) that the man had given out fake currency and gave the same to his colleagues to check. There is no allegation there was any attempt to conceal or hide the currency and fake notes. By its very nature, receiving a benefit is a serious offence. It is not normal that a person receiving a benefit or bribe in layman’s language, will receive the same in crowded place (main gate city hall) and openly as if it was tax or school fees and then go ahead to openly scrutinize the same in presence of other people and even allow them to do the same. This behaviour will not be of a person receiving a benefit knowingly.”

Although Counsel points out that the money was recovered from someone else, evidence shows it was Rachel Wanjiru Ndegwa (PW3). It was plainly obvious that it is the accused that gave it to Rachel who was not in any way part of that transaction merely came into the picture when accused asked

her to confirm if it was real money or not. That's how Rachel found herself in the mix up unexpectedly. The fact that it is the accused who received the money first is overwhelmingly supported by the evidence on record. Besides the complainant stating that it is he that he gave the money, **PW 5, Caleb Okoth** who had been closely trailing the complainant and watching from a vantage point saw him receive it. The swabs done on his hands and analyzed by the Government analyst (**PW9- Catherine Serah Murambi**) confirmed presence of APQ in the swabs taken of accused's hands which proves he came into contact with the money.

Besides, the transcript of **26/11/ 2014(P. Exhibit 8)** manifestly shows the accused asking to be given the money and soon thereafter complains that he has been given fake money.

At pg. 2, line 12 from the top, the accused says:

Njenga: Eeh lete hiyo pesa, naenda kwake nimwambie

At pg 4, line 2; the accused remarks:

Njenga: Hii ni fake

Same pg line line 10 from top:

Njenga: unaniletea pesa za aina hii?

The claim by the accused that he only asked the complainant to pay lawful charges due to the City County has already been laid bare by evidence on record to be a smokescreen he is using to cover his corrupt motives and which the court has seen through and rejected. His conduct of holding the money he had just received publicly and openly does not imply his innocence as submitted by his advocate. In the transcript the accused is captured displaying a devil may care attitude telling the complainant who was about to give him the money at **Pg 3, last line of transcript of 26/11/2014 (P. Exhibit 8);**

Njenga: Hatufichani sisi hapa

I find that the prosecution has thus proved **count 5** against the accused beyond reasonable doubt and similarly find him guilty and convict him accordingly. The import of this judgement is that the accused is convicted on **counts 3, 4 and 5.**

Judgment read in open court in presence of **accused,**

Anthony J. [Signature] For the state
Mr Oundu Advocate for the accused.
[Signature] Court assistant.

[Signature]
L.N. MUGAMBI [MR.]
CHIEF MAGISTRATE

DATE 2/3/18