

**KENYA POLICE
CHARGE SHEET**

①

POLICE CR. 781/338/2010
DATE TO COURT. 14/6/2012

COURT FILE NAKURU ACC... 1/2012

O.B. NO:

Christian Names in full or Name JOHN ONGALO	Surname or Father's Name LAKU	Identity Certificate No. NIL	Sex M	Nationality or tribe LUO	Apparent Age A	ADDRESS(include district and Location where SIAYA
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CHARGE COUNT 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.
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PARTICULARS OF OFFENCE (See Second Schedule C.P.C.)
JOHN ONGALO LAKU: On unknown date in the Month of September 2010, at District Lands office, Narok, within Narok Township, being a person employed by a public body, to wit, Ministry of Lands and Settlement as the District Land Adjudication Officer, corruptly solicited for a benefit of Kshs 80,000/= from one **Kasaine Ole Esho**, as an inducement so as to facilitate a favourable ruling in a land dispute case number 232 of 2010 Narok, in which the said **Kasaine Ole Esho** is a party, a matter relating to the affairs of the said public body.

[Signature] 14/6/2012

(FOR COUNTS II AND III PLEASE SEE OVERLEAF)

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
YES	14/6/2012	W/O			/////

Remanded or Adjourned to
 Complainant and Address
REPUBLIC OF KENYA THRO' EACC

Witnesses...
 1. **Kasaine Ole Esho**
 And others to be stated.
 2.
 3.
 4.

Sentence ... Court and Date ...
 CM'S COURT NAKURU..... If fine paid..... 5

OFFICER COMMANDING
 POLICE STATION
[Signature]
 Officer In -charge Nakuru Police Station

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2

COUNT II

CORRUPTLY RECEIVING 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.

JOHN ONGALO LAKU: On 27th day of September 2010, at District Lands Office, Narok, within Narok Township, being a person employed by a public body, to wit, Ministry of Lands and Settlement as the District Land Adjudication Officer, corruptly solicited for a benefit of Kshs 60,000/= from one **Kasaine Ole Esho**, as an inducement so as to facilitate a favourable ruling in a land dispute case number 232 of 2010 Narok, in which the said **Kasaine Ole Esho** is a party, a matter relating to the affairs of the said public body.

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4/16/10

COUNT III

CORRUPTLY RECEIVING 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.

JOHN ONGALO LAKU: On 27th day of September 2010, at District Lands office, Narok, within Narok Township, being a person employed by a public body, to wit, Ministry of Lands and Settlement as the District Land Adjudication Officer, corruptly received a benefit of Kshs 40,000/= from one **Kasaine Ole Esho**, as an inducement so as to facilitate a favourable ruling in a land dispute case number 232 of 2010 Narok, in which the said **Kasaine Ole Esho** is a party, a matter relating to the affairs of the said public body.

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.....
Officer In -charge Nakuru Police Station

REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT NAKURU
ANTI CORRUPTION CASE NUMBER 1 OF 2012

REPUBLIC
VERSUS

JOHN ONGALO LAKU.....ACCUSED

The accused herein faces 3 charges under the Anti-Corruption and Economic Crimes Act, No. 3 of 2003, hereinafter the ACECA.

COUNT 1

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

JOHN ONGALO LAKU: On an unknown date in the month of September, 2010, at District Lands office, Narok, within Narok Township, being a person employed by a public body, to wit, Ministry of Lands and Settlement as the District Land Adjudication Officer, corruptly solicited for a benefit of Kshs 80,000/= from one **Kasaine Ole Esho** as an inducement so as to facilitate a favourable ruling in a land dispute case number 232 of 2010 Narok, in which the said **Kasaine Ole Esho** is a party, a matter relating to the affairs of the said public body.

COUNT II

CORRUPTLY RECEIVING 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

JOHN ONGALU LAKU: On the 27th day of September, 2010, at District Lands Office, Narok, within Narok Township, being a person employed by a public body, to wit Ministry of Lands and Settlement as the District Land Adjudication Officer, corruptly solicited for a benefit of Kshs 60,000/= from one **Kasaine Ole Esho** as an inducement so as to facilitate a favourable ruling in a land dispute case number 232 of 2010 Narok, in which the said **Kasaine Ole Esho** is a party, a matter relating to the affairs of the said public body.

COUNT III

CORRUPTLY RECEIVING 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

JOHN ONGALU LAKU: On 27th September 2010, at District Lands office, Narok, within Narok Township, being a person employed by a public body, to wit, Ministry of Lands and Settlement as the District Land Adjudication Officer, corruptly received a benefit of Kshs 40,000/= from one **Kasaine Ole Esho**, as an inducement so as to facilitate favourable ruling in a land dispute case number 232 of 2010 Narok, in which the said **Kasaine Ole Esho** is a party, a matter relating to the affairs of the said public body.

The accused denies all three charges.

THE PROSECUTION EVIDENCE

Godfrey Mwaura Kigochi (**PW1**) testified that in the year 2010, he was a District Commissioner in Narok. On 27th September, 2010, the accused person who was the District Land Adjudication Officer, called to say that he wished to see PW1 as he was with a certain man. PW1 told the accused that he was in a meeting. He expected to see the accused later. However PW1 learnt that the accused had been arrested.

One Kasaine Ole Esho had a land dispute in which he had appealed to the Minister. He wanted his case to be heard before other, older, cases and he had sought the intervention of the Regional Commissioner who was then pressuring PW1 and the accused to fast track that case.

PW1 had sought advice from the accused who was of the view that the complainant's case be brought forward. On 27th September, 2010 the accused had called to say that the complainant had come to follow up on his case. Later when the accused was arrested, PW1 listened to tape recordings from which he recognized the voice of the accused person.

When the tape was replayed in court PW1 said that one voice had become inaudible while the other one was audible.

The complainant, Kasaine Ole Esho (**PW2**) said that he was from Topoti area. He was a retired chief and Chairman of the Council of Elders, Narok County. The area chief had fraudulently maneuvered some land proceedings in a bid to take over PW2's land which land PW2 had given his son. PW1 visited the Land Adjudication office in pursuit of his complaint. The accused was the Land Adjudication Officer, Narok. Upon learning of the outcome of the dispute, PW2 had lodged an appeal with the Minister. Later, he learnt that the District Commissioner was to arbitrate on the appeal. The adjudication office wrote to the DC to confirm that the land belonged to PW2 and that the status quo should be maintained. PW2 produced certain documents relating to his case, that is; a letter dated 15th February, 1993 (**P exhibit 1**), letter to the DC dated 1st March, 2010 (**P exhibit 2**), letter to the Provincial Commissioner dated 1st March, 2010 (**P exhibit 3**). From the correspondence, the PC had asked the DC to tell the chief to keep off PW2's land (letter dated 5th March, 2010 - **P exhibit 4**). The DC however did not comply with that directive.

Later, PW2 received a letter dated 2nd September, 2010 (**P exhibit 5**) asking him to appear before the DC on 28th September, 2010 for the appeal hearing. He however did not go since he felt that the DC was biased against him in favour of the chief who had snatched his land. He decided to approach the Anti-Corruption Commission. He also approached the accused who promised to sort out the problem.

The accused asked for Kshs 80,000/= so that he and the DC could solve the issue. PW2 felt that the accused and the DC were out to defraud him of his money and his land.

The Ethics and Anti-Corruption (EACC) officers prepared PW2 at Narok town and fitted him with a tape recorder.

PW2 then visited the accused in his office and recorded their conversation. Later he took the trap money to the accused who also called the DC from his office. Upon the accused receiving the trap money (**Kshs 40,000/=**), PW2 went outside and EACC officers stormed in and arrested the accused person. PW2 heard a replay of the tape recordings in court. He said that in the first tape there was a conversation between him and the accused regarding some money. The accused had asked for Kshs 40,000/= which he would share equally with the DC. PW2 further identified the transcripts of the 1st microcassette tape recording (**P exhibit 6**) and that of the 2nd one (**P exhibit 7**).

PW2 said that the Kshs 40,000/= which he gave to the accused person had been given to him by the EACC and that the money was in one thousand shilling denominations inside an envelope. PW2 identified an inventory of the trap money (**P exhibit 10**), photocopies of the trap money (**P exhibit 11**), one half cut khaki envelop (**P exhibit 12**) and the treated money in an envelope (**P exhibit 13**).

PW2 stated that when the accused received the trap money, he had gone out to alert the EACC officers upon which the accused had followed him outside but then the officers had forced him back into the office. The officers had asked the accused to remove his trousers which contained the trap money (black trousers- **P exhibit 17**). There was also some Kshs 20,000/= in the trousers (**P exhibit 14**) for which an inventory was made (**P exhibit 15**). Another inventory was made on respect of the recovery of the Kshs 40,000/= trap money (**P exhibit 16**).

PW2 summed up by saying that the accused had been his friend and had even assisted him previously but that he had been influenced by the chief to act against PW2.

Ali Guyo (**PW3**) was an investigator with the EACC. In September, 2010, he joined a team from Nairobi led by Francis Kamwara (**PW9**) to Narok to attend to an

incident in which a lands officer had demanded for a bribe from a member of the public. He was also with Abdi Ibrahim (**Ibrahim Abdi Hassan- PW5**), Lucas Momanyi and Francis Ndung'u. On 27th September, 2010 he met PW2 in Narok. PW2 was fitted with a tape recorder. PW9 took him through the process. The complainant (PW2) went and met the suspect and came back with the tape that had their conversation.

The tape was replayed. There was mention of a land case and some money. The complainant was then given Kshs 40,000/= in treated money. PW3 witnessed this. He took the money to the accused. The officers trailed PW22 and waited outside for a signal to pounce. They met the accused as he emerged from his office and ordered him to go back where the recoveries were made.

When the tape was played in court, PW3 confirmed that it was the first tape recording which he heard earlier but that the sound quality was not the same.

He also said that while inside the accused's office they had ordered him to produce the money which had been given to him by the complainant. He removed the Kshs 40,000/= plus another Kshs 20,000/= which he claimed as his own. They used the inventory and the photocopies of the money to separate the treated money from that belonging to the accused. An inventory of the recoveries was made which PW3 signed in the presence of the accused. The money was recovered from the accused person's trousers side pockets. PW3 identified the trousers in court (**P exhibit 17**). He swabbed the accused's hands. He produced the swabs of the accused person's left hand (**P exhibit 18**) and that of the right hand (**P exhibit 19**).

William Kai Munyoki (**PW4**) was a Government Analyst with a Bachelor of Science Degree from the University of Nairobi. On 6th October, 2010, he received an exhibit memo from number 57308 PC Lewis Njue Njeru accompanied by:

"A" Khaki envelope containing Kshs 40,000/=

"B" Khaki envelope containing Kshs 20,000/=

"C" Khaki envelope containing right hand swab of John Ongalo Laku

"D" Khaki envelope containing left hand swab of John Ongalo Laku

"E" Khaki envelope containing a half khaki envelope

"F" Khaki envelope containing navy blue trousers belonging to John Ongalo Laku

"G" Khaki envelope containing control sample of APQ powder.

It was desired for him to ascertain whether the contents of the control sample "G" could be detected in the other items.

An examination of the same turned positive. PW4 prepared a report to that effect (P exhibit 21). There were traces of APQ in the tested items.

Ibrahim Abdi Hassan (PW5) indicated that he was an investigator with the EACC. He took part in the investigation of this case. On 26th September, 2010 he was requested to join some investigators to proceed to Narok over a complaint lodged to the effect that a certain lands official had demanded a bribe of Kshs 80,000/= from a former chief. He left for Narok town on the next day. They met the complainant, Kasaine, who was fitted with a tape recorder and briefed on how to operate it. The complainant later returned with the recorded conversation. From the audio record, there was a demand for Kshs 60,000/= which was to be shared between the land official and the area DC who was to chair the dispute deliberations. They fitted (PW2) with a new radio cassette tape and gave him Kshs 40,000/= in treated notes (P exhibit 13) to take to the suspect. The money had been recorded in an inventory (P exhibit 16).

The officers remained outside the accused's office as the complainant went in. The complainant however did not find the accused. Later in the day, the accused called the complainant to go to his office. The officers followed him. Later, as the accused emerged, from his office he met PW5 outside and inquired if he needed assistance or land. PW5 said that he needed land and engaged the accused in a conversation. His colleagues joined then they told the accused that he was under arrest. They went into the accused's office and demanded that he shows them the money that he had received from the complainant. They recovered Kshs 60,000/= and took an inventory of the suspect money and the money, Kshs 20,000/= belonging to the accused (P exhibit 14). He also said that the inventory of recovery of the treated money (P exhibit 16) was signed by eight people

including the accused. He identified the recovered treated money (P exhibit 13). The accused was taken to Narok police station where he was booked.

Dick James Safari (**PW6**) was a Land Adjudication Officer at Narok at the material time. He said that the accused was his superior. On 27th September, 2010 he was called by a certain person from EACC named Ali Guyo (PW3) who told him that the accused had been arrested and he was needed to go to the accused's office. He did so. There were several people and money on the table. One of the people was Noah Ruto, the driver. PW6 was told that the money on the table was cash that had been used to bribe the accused. PW6 said that he did not record anything that day and that he could not recall the exact amount involved. He said that he did not sign the inventory (**P exhibit 15**) because he did not understand the whole issue. On the next day, the EACC officers went to PW6 with a recorder which was played. However, the conversation was not clear but PW6 indicated that one of the voices belonged to the accused although he was not able to clarify due to the inaudibility.

Upon listening to the tapes in court, PW6 said that he could not recognize the voices in the conversation.

No. 217907 Chief Inspector Francis Kipchojo Kedogo (**PW7**) was an officer attached to the EACC. On 20th September, 2010 he was at Integrity Centre when he received a report from the Commission's report centre of a District Land Adjudication Officer in Narok North who was demanding for a bribe of Kshs 80,000/= from one Kasaine Ole Esho. Mr. Ole Esho had lodged a complaint that the money was meant to facilitate a favourable ruling in a land dispute. PW7 saw the initial complaint report (**P exhibit 22**). He spoke with the complainant then assigned the job to Francis Kamwara to investigate the matter. On 26th September, 2010, the investigating officer constituted a team that comprised Ali Guyo, Ibrahim Hassan, Lucas Momanyi and PW7. They went to Narok where they spent the night. The complainant came at 8.00 am on the next day and he was inducted on the usage of a tape recorder before it was fitted on him. He was to go record a conversation between himself and the suspect.

The complainant came back and the officers listened to the conversation whereupon they established that there had been a demand for Kshs 80,000/= which was negotiated downwards to Kshs 60,000/=.

They then prepared the complainant to go back to the accused with treated money after signing an inventory (**P exhibit 10**). The money was put in a half khaki envelope. They trailed the complainant who shortly came back and said that the suspect was not in the office.

In the afternoon, they went back to the accused's offices. Later, the complainant alerted them that the suspect had received the trap money.

The officers had positioned themselves in the vicinity to prevent any escape. The suspect emerged and headed towards a vehicle nearby. Hassan Ibrahim intercepted the suspect, the accused person. The rest joined in and ordered the accused to move back into his office. In the office, he was asked to produce the money which he had been given by the complainant. The accused's deputy Dick safari and a driver came in. The accused removed the money from his right hand trousers pocket and put it on the table. The officers used photocopies **P exhibit 11**) to identify the treated notes. The accused had an extra Kshs 20,000/= which belonged to him. PW7 made an inventory of the recovered trap money, Kshs 40,000/= (**P exhibit 16**) and another inventory of the Kshs 20,000/= (**P exhibit 15**). The money was put in a khaki envelope (**P exhibit 14**). All persons present, including the accused, his deputy and his driver signed the inventory.

PW7 said that a further search in the accused's yielded Kshs 4,000/= which was supported by an imprest warrant. This money was given to the accused's deputy, Dick Safari. Ali Guyo then did hand swabs on the accused. The accused was escorted to Narok police station where he was released on a cash bail of Kshs 30,000/= and ordered to appear at Nakuru Court for plea.

On 28th September, 2010 the five officers went back to Dick Safari and played the tape recording to him. He did not know beforehand what voices were in the tape but he identified the accused's voice.

Cecily Mumbi (**PW8**) informed the court that she was an investigator with the EACC stationed at Integrity Centre.

On 26th September, 2010 she was asked by Francis Kamwara (PW9) to treat Kshs 40,000/= in Kshs 1000/= denominations with APQ powder. She photocopied the money and prepared an inventory of the same. She produced the original currency notes (P exhibit 13) as well as an inventory of preparation of the trap money (P exhibit 10). She also produced photocopies of the treated money (P exhibit 11). She placed the treated money in a half cut khaki envelope (P exhibit 12) which she handed to the investigating officer.

Francis Kamwara (PW9) was the lead investigator in this case. He received a complaint from PW2 on 20th September, 2010.

It was with regard to a piece of land which PW2 had given to one of his sons and which a chief of the area was fraudulently trying to acquire. A tribunal case chaired by the accused had ruled in favour of the complainant. However, when PW2 went for the proceedings of the elders, he realized that they had been altered in favour of the said chief. PW2 decided to appeal the case. The appeal was to be heard by the District Commissioner (DC). PW2 showed Mr. Kamwara a letter inviting him for the appeal hearing on 2nd September, 2010 (P exhibit 5). He also indicated that he was not comfortable with the DC hearing the appeal because he doubted his impartiality. He had written a letter to the Provincial Commissioner (PC) on 1st March, 2010 in that regard (P exhibit 3). The complainant had been referred to the office of the Regional Commissioner based in Narok. The complainant had also showed PW9 a letter dated 15th February, 1995 from the Principal Land Adjudication and Settlement Officer, Narok, asserting the complainant's position as regards the land dispute (P exhibit 1).

It is against this background that the complainant (PW2) claimed that the accused was asking for Kshs 80,000/= in order to secure a favourable ruling from the DC. He was to share the money with the DC.

On 27th September, 2010, PW9 and his team met PW2 in Narok and fitted him with a tape recorder that had a micro cassette (P exhibit 23). He inducted PW2 on its use. In court, PW9 produced the micro cassette tapes (P exhibits 8 and 9). PW9 had a certificate indicating that the recorder was in good working condition. The complainant went to the District Lands offices and PW9 saw him enter those offices.

He came back with a recorded conversation between him and the accused person in which the accused had demanded for Kshs 80,000/= which was reduced by agreement to Kshs 60,000/=. PW9 recorded another certificate in the same tape confirming the same.

The tape was played in court and PW9 confirmed that it was the one he had listened to.

PW9 further said that they gave PW2 Kshs 40,000/= in treated cash (**P exhibit 13**) to trap the accused with. The money had been treated in Nairobi and an inventory thereof had been made.

The money was in a half cut khaki envelope. PW9 prepared another micro cassette (**P exhibit 9**) and fitted the tape recording device on the complainant. He was with four other officers. PW2 went to the accused's office and after some minutes came out and said that the accused had gone for a meeting. Later, at 1.30 PM, he called to say that the accused had asked him to rush to his office. The officers followed PW2 to the office and waited outside within the compound. Shortly, the complainant came out and signaled that he had handed the money. The accused came out and was intercepted by PW5. He was requested to go back to the office and was asked to remove the money which he had just received from the complainant. He flashed out Kshs 40,000/= from his trousers pockets and the officers used the photocopies to confirm the recovered trap money. The accused had another Kshs 20,000/= (**P exhibit 14**) which was not part of the trap money. The accused gave out his trousers (**P exhibit 17**) as part of the evidence and made arrangements for other trousers at Narok police station where he had been taken after his arrest. PW9 said that a colleague of the accused, one Safari, had witnessed the recovery but had declined to sign the inventory. The accused's official driver also witnessed the recovery. The accused signed both inventories (**P exhibits 15 and 16**). PW9 also stated that he had advised the complainant to only give out the money but to retain the half cut khaki envelope (**P exhibit 12**). A chemical analysis of the trousers that the accused wore (**P exhibit 17**) later revealed traces of APQ powder.

On 28th September, 2010, PW9 and his team went to Dick Safari and played to him the tape records.

He identified the voice of the accused in the tapes. The DC also identified the accused's voice when the recordings were replayed to him. He however denied having asked the accused to collect a bribe on his behalf.

The complainant later assisted PW9 in preparing the transcripts. PW9 made the certificates in the transcripts. He produced the respective transcripts in court (**P exhibits 6 and 7**). He also produced a letter written by the accused to the DC Narok on 1st March 2010 (**P exhibit 2**).

SUBMISSIONS ON NO CASE TO ANSWER

At the close of the prosecution case, the accused through his counsel submitted that a **prima facie** case had not been established against him.

It was submitted that there was no positive identification of the accused's voice in the tape recording; that PW1 and PW6 had not identified the voice of the accused. Further, that the opening certificate did not contain the same words contained in the transcript. On this point, counsel relied on **Patrick Munguti Nunga Vs R (2013) eKLR** and **Levi Matere Chisaina Vs R (2012) eKLR**.

Counsel further submitted that the charge of solicitation could not be proved since the accused was not handling the appeal the subject matter of the dispute. Further that the complainant's allegation that the subject land was number 114 Topoti area was not proved by the documents adduced in court. The defence cited **Gathongo Vs R (2015) eKLR** to make the point that the accused must be shown to have been acting in a certain capacity for solicitation to be proved. It was also submitted that solicitation could not be proved in view of the discredited tape recording. That there was no active enticing or requesting disclosed in the tape recording but rather the voice of a single person referring to a previous conversation on an unknown date which conversation was not in evidence.

Again counsel submitted that the moment solicitation was not established then the charge of "Receiving a Benefit" could not stand. On this he cited **Paul Kipchumba Kiyai Vs R (2013) eKLR**.

Counsel submitted on other issues of fact including failure by the prosecution to call a vital witness and alleged contradictions regarding the recovery of the money.

He further submitted that there was an attempt at enticing the accused, citing the **Levy Chisaina** case (supra) on this point.

It was submitted that Count II of the charge sheet was defective as the particulars did not tally with the charge.

Lastly, counsel stated that failure to comply with Section 35 of the ACECA was fatal, relying on **Esther Theuri and another Vs R (2011) e KLR**. That section states:

“35 (1) Following an investigation the commission shall report to the Attorney-General on the results of the investigation.

(2)The Commission’s report shall include any recommendation the commission may have that a person be prosecuted for corruption or economic crime.”

The prosecution did not respond to the foregoing submissions.

At the close of the prosecution case, the court found that a **prima facie** case had been established against the accused.

THE DEFENCE CASE

The accused gave sworn defence. He called no witness. He denied the charges.

He said that as a District Land adjudication Officer (DLAO) Narok his duties included ascertaining rights and interests on land as well dealing with petitions and also hearing and determining objections.

The first thing he did upon his posting to the Narok office in 2006 was to publish a register for “Topoti” section. He did a notice of the publication (**D exhibit 1**).

Daniel Kipkel having perused the register, filed several Objections; **No.550** (involving plot No. 495- recorded to Kasaine Ole Esho, **No. 560** (plot No. 1284- recorded to Kantet Ole Esho), **No. 556** (plot No. 1286- recorded to Moses Ole Esho), **No. 559**(plot No.1287 recorded to Kasaine Ole Esho), **558** (plot No. 1285-

recorded to Marianyi Ole Esho), and **No.557** (plot No. 1485- recorded to Jackson Ole Esho).

The complainant (PW2) did not file any objection. He however participated in all the objection proceedings as his sons had appointed him to represent them. The accused heard and determined all the objections on 16th November, 2009. He produced the proceedings (**D exhibit 2**) and the adjudication records (**D exhibit 3**). He found in favour of the objectors in plot No. 1485 and part of plot No. 495. The rest of the plots remained to the sons of Kasaine and Kasaine himself. The aggrieved parties were to appeal to the Minister. Kasaine (PW2) filed an appeal, the appeal file was prepared and taken to the Director Land Adjudication for verification in August, 2010 and for transmission to the DC. The accused produced a letter dated 23^{rs} August, 2010 transmitting the file (**D exhibit 4**).

He further said that Kasaine Ole Esho (The complainant) was not an appellant in any of the objections. He had however gone to the accused person's office in February, 2010 asking for maintenance of the *status quo*. The accused did a letter to the District Officer (DO) to restrain Daniel Kipkel from using the land pending the hearing of the appeal. Since the DO did not act, the accused did a letter to the DC dated 1st March, 2010 asking him to restrain Daniel, who was a chief, from using the land (**D exhibit 5**).

There was a lull in the matter until 16th August, 2010 when the Regional Commissioner, Mr. Naftally Mugania called the accused to his office asking why he was not addressing the issues raised by Mr. Kasaine (PW2). The accused explained that the appeal was pending before the gazetted District Commissioner and that he had done his part. The Regional Commissioner (RC) produced a letter written by PW2- who was in the office- and who felt that the RC was the right person to hear his appeal (**D exhibit 6**). However the accused advised that as per the law only the gazetted DC could hear the appeal.

The file was taken to Nairobi and returned to the DC who was to hear the appeal on 28th September, 2010. The accused said that his duty ended on the day the file was forwarded to the DC by the director. He produced the hearing notice dated 2nd October, 2010 (**D exhibit 7**).

The accused stated that he was not aware of any land case number 232 of 2010. He only heard (PW2) referring to plot No. 114 which was recorded to Paul Sokoine and Kekuta Sokoine and was not the subject of any objection before the accused. He further produced an adjudication record for entries on 26th May, 2006 **(D exhibit 8)**.

On 27th September, 2010, the accused worked for 8.00am to 1.00pm. He was serving a team of about six elders from Mau Division, Enoosupukia area. After lunch, at about 2.00 pm, the accused went to a kiosk outside the gate to buy bottled water. He had called Ruto his driver who was in town with the vehicle to come and show him how then new ignition switches were placed. Ruto came and the accused followed him to the parking. He showed the accused how the driver's door operated. As they moved to the next door, a middle aged man approached the accused saying he wanted to know how he could acquire land. The accused told him that if the land was registered then he should inquire from the lands registry next door. However, if the land was not registered then the client was to go to the adjudication office together with the owner of the land. Two other persons joined in succession. The third person flashed and identification card from his pocket and said that he was from the EACC and that the accused was under arrest for taking money from an old man. A fourth person joined them and they asked to come to the accused person's office. He led them to his office, opened the door and sat on his chair. One of the men, a Mr. Momanyi told the accused;

"You are under arrest. Yours is simply to wait as we work on you."

He had been with Mr. Abdi, Mr. Guyo and Kedogo. Mr. Kamwara came later as Mr. Momanyi worked on the accused. The accused had a coat, tie and blue trousers. He had Kshs 20,000/= in his pockets. Mr. Momanyi frisked the accused's pockets where the Kshs 20,000/= was and removed Kshs 40,000/= from the other pocket which Mr. Momanyi had prior. In total, the officers placed Kshs 60,000/= on the table. Mr. Kedogo (PW7) who had been at the visitors' table opened a briefcase and removed photocopies of the money allegedly found on the person of the accused person. The accused together with Ruto compared the photocopies to the Kshs 60,000/=.

The accused said that he had been tricked by Mr. Ruto into touching the money. The officers took swabs of the accused's hands.

The accused denied receiving Kshs 40,000/= from PW2 or talking to him on the phone on that day. He also said that he had been intimidated into signing the inventories that were produced in court. He had been told that he would be detained if he did not sign. He was only confirming that the officers had come with their cash Kshs 40,000/=.

The accused further said that he had not been searched at the parking lot. Further, that the search team found Kshs 11,000/= being an unsurrendered imprest together with an imprest warrant in the office.

At the time the money was being removed from the accused person's pockets, Noah K. Ruto, the driver, was present. However, the prosecution did not call him as a witness nor record his statement. Mr. Safari (PW6) came later after the inventory had been made. He did not sign the inventory.

The accused was taken to Narok police station and released on a cash bail of Kshs 30,000/=.

He said that his voice was not in any of the tapes played in court. He also pointed out that the charge in Count II was one of 'Receiving a Benefit' whereas the particulars alluded to "Soliciting".

CLOSING SUBMISSIONS

At the close of the defence evidence, counsel for the accused reiterated his earlier submissions as well as the evidence given by the accused.

In reply, the prosecutor submitted that the evidence given by the prosecution witnesses was credible and cogent. There was clear evidence of identification. In as much as the accused was not handling the appeal, there was evidence from (PW2) that the accused had undertaken to influence the results of that appeal. There was evidence (from PW1) that he made a call seeking to influence the officers who were handling the appeal. Further, there was overwhelming evidence of receiving.

In the inventories and tape recordings, which were audible, as well as from the oral evidence, there was proof of soliciting. PW1 identified the accused's voice from the audio recording and he had said that the voices were clear. The alleged contradictions could not collapse the case.

On the issue of the erroneous reference to the land case number as 232 instead of 114 in the charge sheet, the prosecutor said that this was a typo that was curable.

ISSUES FOR DETERMINATION

I summarize the main issue thus; in view of the totality of the evidence and the rival submissions, have the prosecution proved the three respective charges, or any of them, against the accused person beyond reasonable doubt?

FINDINGS AND REASONS

SOLICITATION

The prosecution case hinges on two tape recordings which were the basis upon which PW8 prepared treated currency (**P exhibit 13**) and handed it to PW9 who set out together with his colleagues to trap the accused person. The tape recordings together with the oral evidence of PW2 were the basis of the charges relating to solicitation. PW2 stated;

"Later I approached the accused herein who promised to sort out my problem. He then demanded that I organize for some money in the sum of 80,000/= so that he and the DC could solve my problem."

The said problem was an appeal which PW2 had lodged against a land case decision that did not go his way. The appeal was to be heard by the DC on 28th September, 2010 (**P exhibit 5**).

Under cross examination however, PW2 said that the accused had demanded for a bribe of Kshs 60,000/=. This contradiction in the amount of money demanded by the accused is material (See **Patrick Munguti Nunga Vs Republic (2013) eKLR**). The two tape recordings whose transcripts were produced in court (**P exhibits 6 and 7**) should have provided some clarity on this matter.

All the prosecution witnesses who heard the recordings in court said that they were not clear. PW1 in his evidence in chief indicated that he had recognized the voice of the accused when the tape was played to him. Under cross examination, PW1 said that he had told the investigators that the voice sounded like that of the accused but he was not certain of that. Moreover, he stated under cross examination;

"I did not hear then and now in the tape that there was a demand for a bribe."

Similarly, PW6 said under cross examination that he had been given the idea that the voice was that of the accused and that he was to confirm upon listening to the tape. He reiterated under reexamination by the prosecutor that he had been led in his recognition of the voice in the tape.

In **Levi Matere Chisaina Vs Republic (2012) eKLR**, it was stated that;

"...the prosecution was bound to avail an independent witness to confirm the voice on the recording."

In view of the foregoing, the evidentiary value of the tape recordings and of the transcripts is diminished. It is not enough for a witness to state that they heard particular details in a recording, which details cannot be verified in court from the sound of the actual audio record.

Secondly, the court laid out the ingredients of the charge of Solicitation in the case of **Paul Mwangi Gathongo Vs R (2015) eKLR**, one of which in the present context, is that the accused must be acting in a capacity as to be able to confer a favour in the exercise of his official function.

The prosecution submitted that in as much as the accused was not handling the appeal- as well demonstrated in his defence- he had undertaken to influence the results. However, this position was contradicted by PW1 who said that he had refused to grant PW2' s request to hear his case ahead of older appeals and thus PW2 was disgruntled with him.

② I conclude that the charge of Soliciting for a Benefit as laid out in Count I has not been proved beyond reasonable doubt.

As regards Count II, the same is stated as **"CORRUPTLY RECEIVING 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 charge particulars however allege that the accused **"solicited for a benefit of Kshs 60,000/= from one Kasaine Ole Esho..."**

This variance between the particulars and the statement of offence cannot be cured by the provisions of section 382 of the Criminal Procedure Code as the two relate to totally different charges.

I find as well that for the above reasons, the charge in Count II cannot stand.

RECEIVING

As regards Count III, the court in **Patrick Munguti Nunga Vs R (2013) eKLR** stated as follows;

"The Appellant having been acquitted of the offence of corruptly soliciting for a benefit, then the offence of corruptly receiving a benefit could not stand."

I adopt the holding of the judge in that case and find that the charge in Count III has also not been proved to the required standard.

In conclusion, the accused is acquitted of all three charges under section 215 of the Criminal Procedure Code.

Judgement dated, signed and delivered in open court at Nakuru



G.H ODUOR CM

24/12/17

Mr Ogolla for the accused

Mr Sargonyo for the state

Present

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certify that this is a true copy of the original

