

**CHARGE SHEET**

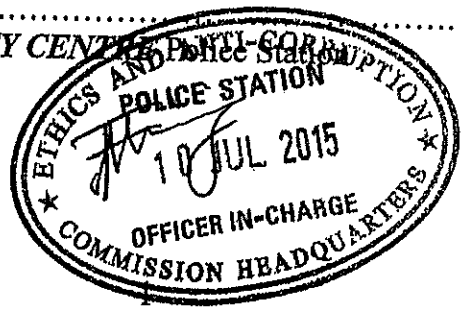
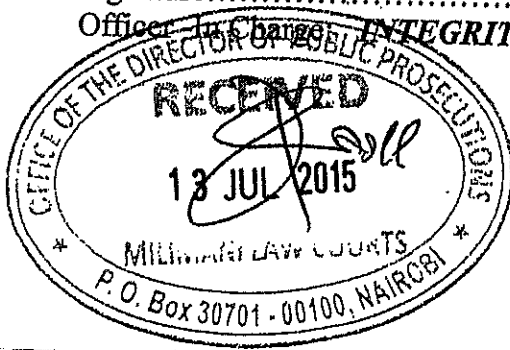
EACC. CR: 148/15/2015  
 DATE TO COURT. 13/07/2015  
 COURT FILE : 14/15

OB/NO.2/2/7/2015

Christian Names in full or Name <b>SAMUEL KIBET</b>	Surname or Father's Name <b>CHERUIYOT</b>	Identity Certificate No.10887482	Sex M	Nationality or tribe KALENJI N	Apparent Age A	ADDRESS(include District and Location where Applicable) <b>BOMET</b>
<b>CHARGE COUNT I</b>						
<b>SOLICITING FOR A BENEFIT CONTRARY TO SECTION 39(3) (a) AS READ WITH SECTION 48(1) OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT NO.3 OF 2003</b>						
PARTICULARS OF OFFENCE (See Second Schedule of C.P.C.)	<b>Samuel Kibet Cheruiyot:</b> On the 9 <sup>th</sup> day of June 2015, at Electricity House in Nairobi County, being a person employed by a public body, to wit, Kenya power as Customer Service Supervisor, Meter Reading section Nairobi South Region, corruptly solicited for a benefit of Kshs. 20,000/- from Peter Odhiambo as an inducement so as to assist him in reconnection of disconnected power supply in his premises, a matter in which the said public body was concerned.					
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	2/07/2015	W/O	///////	OUT ON CASH BAIL 10,000/=		
Remanded or Adjourned to						
Complainant and Address	REPUBLIC OF KENYA THRO' EACC					
Witnesses.	1. PETER ODHIAMBO 2. OTHERS TO BE STATED		3. .... 4. .... 5. ....			
Sentence Court and Date ...	ANTI-CORRUPTION COURT MILIMANI ON ..... If fine paid.....					

*SPM 13/7/2015*

Signature.....  
 Officer in Charge.....



**PARTICULARS OF THE OFFENCE**

**COUNT II**

**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**

**Samuel Kibet Cheruiyot:** On the 2<sup>nd</sup> day of July 2015, at Electricity House in Nairobi County, being a person employed by a public body, to wit, Kenya power as Customer Service Supervisor, Meter Reading section Nairobi South Region, corruptly solicited for a benefit of Kshs. 20,000/- from Peter Odhiambo as an inducement so as to assist him in reconnection of disconnected power supply in his premises, a matter in which the said public body was concerned.

**COUNT III**

**RECEIVING OF 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**

**Samuel Kibet Cheruiyot:** On the 2<sup>nd</sup> day of July 2015, at Electricity House in Nairobi County, being a person employed by a public body, to wit, Kenya power as Customer Service Supervisor, Meter reading section Nairobi South Region, corruptly received a benefit of Kshs. 10,000/- from Peter Odhiambo as an inducement so as to assist him in reconnection of disconnected power supply in his premises, a matter in which the said public body was concerned.

*13 APR 15*

I CERTIFY THIS IS TRUE COPY OF THE ORIGINAL.  
DATED:.....11/11/2016.....  
.....  
CHIEF MAGISTRATE  
ANTI-CORRUPTION COURT  
NAIROBI

ETHICS AND ANTI-CORRUPTION  
POLICE STATION  
10 JUL 2015  
OFFICER IN-CHARGE  
COMMISSION HEADQUARTERS

**REPUBLIC OF KENYA**

**IN THE CHIEF MAGISTRATE'S COURT**

**IN THE ANTI - CORRUPTION COURT AT NAIROBI**

**ANTI - CORRUPTION CASE NO. 14 OF 2015**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**SAMUEL KIBET CHEUIYOT..... ACCUSED**

**JUDGMENT**

The accused Samuel Cheruiyot Kibet is charged with 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 in count 1 are that** on the 9th day of June 2015, at Electricity House in Nairobi County, being a person employed by a public body, to wit, Kenya Power as Customer Service Supervisor, Meter Reading Section Nairobi South Region, corruptly solicited for a benefit of Kshs.20,000 from Peter Odhiambo as an inducement so as to assist him in reconnection of disconnected power supply in his premises, a matter in which the said public body was concerned.

## **Count II**

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 are that** on the 2nd day of July 2015, at Electricity House in Nairobi County, being a person employed by a public body, to wit, Kenya power as Customer Service Supervisor, Meter Reading Section Nairobi South Region, corruptly solicited for a benefit of Kshs.20,000/- from Peter Odhiambo as an inducement so as to assist him in reconnection of disconnected power supply in his premises, a matter in which the said public body was concerned.

## **Count III**

**The accused is charged with** receiving of 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 are that** on the 2nd day of July 2015, at Electricity House in Nairobi County, being a person employed by a public body, to wit, Kenya Power as Customer Service Supervisor, Meter Reading Section Nairobi South Region, corruptly received a benefit of

Kshs.10,000/- from Peter Odhiambo as an inducement so as to assist him in reconnection of disconnected power supply in his premises, a matter in which the said public body was concerned.

### **Prosecution Case**

The complainant Peter Odhiambo stated that on the 1st day of July 2015, he went to the office of the accused Samuel Cheruiyot to have his electricity reconnected. In April, 2015 the complainant had reported that someone had tampered with his electricity supply and subsequently reported to Kenya Power who came to the site and verified the same he further stated that following his report of April 2015. Mr. Njure and Mugambi respectively came on the 3rd day of April, 2015 and reconnected power for one person only. On going back to KPLC offices to complain, Mr. Njure accused the complainant of selling power and then went further to demand Kshs.30,000 to reconnect the complainant's power. The complainant went again to the accused office who also demanded a bribe of Kshs.20,000 for reconnection. Mr. Mugambi according to the complainant, had said he would send a number where the money would be transferred to. The complainant then went to record a statement with EACC.

EACC provided him with a recording gadget and Kshs.10,000 treated and serialized money to give the accused. The complainant met the accused at "bomb blast" where he recorded the conversation with the accused. The EACC then analysed the recording before giving him the treated money.

On Cross-examination by Kanyoko, the complainant stated that he went to the office of Mr. Njure and Mugambi on the 3rd day of June, 2015. Mr. Mugambi demanded no less than Kshs.10,000. The accused informed him said some money would go to Mr. Njure to facilitate reconnection. The complainant wrote a letter requesting the case to be withdrawn as Mr. Njure and Mugambi were not charged. The complainant reported that the accused had collected the money on behalf of (Njure and Mugambi).

At a later stage during the course of trial, the complainant sought to withdraw his complaint saying that his complaint was against Mr. Njure and Mr. Mugambi and not the accused person. Towards this end he wrote several letters seeking to withdraw his complaint. Even indicating

that the money the accused person collected from him was for wiring his premises and not a bribe despite an admission that he collected the money from EACC for entrapment.

PW2 Peter Mureithi is a Security Officer working for KPLC, he confirmed the accused person was an employee of KPLC designated as a technician. He also positively identified the voice in the recording as that of the accused person having worked with him for 18 months. He also stated that he visited the premises of PW1 where power had been disconnected due to unauthorized connection. He also stated that at the complainant's house there was no wiring problem.

PW3 Simon Mugambi is a Security Officer with KPLC. He investigated the complaint of unauthorized connection of power in South B. He also confirmed that the accused was his colleague for the last ten (10) years and was in the meter reading department. He denied having solicited any money from PW1 or having sent the accused to collect a bribe on his behalf.

PW4 Ditim Musi, PW5 Livingstone Waihenya and PW7 Caleb Okoth are investigators with EACC working as a team with Mr. Mbuvi, the Investigating Officer. They treated Kshs.10,000 which was handed over to PW1 the money was placed in a brown envelope and after inducting PW1 they proceeded to Nairobi CBD near Electricity House where the accused person met with PW1. PW1 recorded the conversation and after concluding there was a bribe demand they handed over the Kshs.10,000 to PW1. PW5 spotted the accused in a conversation with PW1 outside development house in Nairobi and once PW1 sent the agreed signal the officers arrested the accused. The accused person resisted arrest and a struggle ensued. After search PW5 recovered Kshs.3000 in the accused pockets. He immediately took a swab on the accused hands. The accused revealed that the trap money was taken by his friend during the struggle at the point of arrest. They called the person who came to their vehicle and handed over the Kshs.10,000 earlier handed over to PW1. An inventory was prepared confirming the recovery. PW6 Peter Chinga indeed confirmed that he is the one who handed over the money to EACC.



PW8 Martin Mbuvi conducted investigations, collected the evidence and produced the relevant exhibits. PW9 Catherine Marambi is a forensic analyser she examined the swab test from the accused person hands, brown khaki envelope and cash (Kshs.10,000 in Kshs.1000 denominations) and confirmed that they all had the APQ powder. A report was prepared and produced in evidence.

**In his defense case**

The accused stated that he was an employee of KPLC and that between the months of March and July 2015, Peter Odhiambo frequented his office complaining of power disconnection. He further stated that Peter Njure and Mugambi were demanding for bribes from the complainant. He dispatched two technicians to PW1 residence who brought back a report indicating the wiring was poor. He issued a defective installation note. Three days later Mr. Odhiambo came to enquire from him where he could get a suitable contractor. He recommended Gilbert Rotich whom he knew prior. They negotiated the price and eventually the complainant told him to pay Kshs.10,000 as down payment and the balance to be paid later.

On 2nd July, 2015 the accused person gave him the money and he was arrested. He also stated that in the recording they were talking about the electrician Gilbert Rotich and that the money was for wiring. On cross examination, he stated that he does some business on the side including selling timber and doing installations. He also stated that he mentioned to Peter Odhiambo that the money was for wiring. The accused was acting as an intermediary because he knew Peter Odhiambo (the client) and Gilbert Rotich (the technician).

PW2, Gilbert Rotich stated in his evidence that Peter Odhiambo contracted him to do some wiring in his residence and he quoted Kshs.25,000. On 2nd July, 2015 as he waited for the down payment, he was informed that the accused had been arrested. He also stated that he had many contracts with KPLC. Subsequently, the wiring was done.

**At the close of the defense case:**

- It is admitted that the accused was an employee of KPLC;
- That PW1 resided in South B area and power at his residence had been disconnected

- That KPLC staff demanded for a bribe of Kshs.20,000 or Sh.30,000/-
- It is also admitted that the accused reported the bribe demand to EACC
- That the complainant PW1 was given a recording device to record his conversation with the accused
- That the complainant received Kshs.10,000 from EACC in denominations of Kshs.1,000
- That PW1 handed over that money to the accused on 2nd July, 2015
- That, the money was subsequently handed over to PW6 Peter Gateere
- That EACC recovered the said money from PW6
- That the money was bearing the same serial numbers as the money that was handed over by PW6
- That indeed the money had been handled by the accused whose left hand swab tested positively for APQ powder.

**The issues for determination are;**

- a) Whether the money was for wiring of PW1 premises

- b) Whether the accused person was soliciting for a bribe from pw1
- c) Whether on 9th June, 2015 the accused solicited for a benefit
- d) Whether the charges are brought under repealed law.
- e) Whether the accused was induced into committing a crime he would not have ordinarily committed.
- f) Whether the voice in the recorder demanding for a benefit belonged to the accused person

PW1 was categorical that the Kshs.10,000 he handed over to the accused had been over to him by EACC and that before he gave it to the accused he had recorded the conversation. He knew that the EACC was investigating the accused person for soliciting a bribe. In the recorded conversation, the demand for a bribe is evident. The accused person defense that the money was for wiring is therefore not tenable. In his conversations with PW1 he clearly stated that the money was a bribe to facilitate reconnection of power. He stated in his evidence in chief that the money was to be taken to Mr Njure. Ofcourse Njure and Mugambi dispute that they were recipients of the bribe. But at this juncture what

is relevant was the demand and receipt of a bribe; which from the evidence of PW1 has been established.

Concerning the second issue, the court had a chance to listen to the conversation on 2nd July 2015 and in that conversation there was a clear demand for a bribe. PW1 in his evidence in chief corroborated this evidence. In the recording the accused confirmed that the money was a bribe that he would have to share with his colleagues.

Concerning the 3rd issue the officers from EACC, stated that; Upon establishing there was a demand for a bribe, they gave PW1 treated money. PW1 in his testimony stated that upon meeting the accused person on 2<sup>nd</sup> July he handed over the Kshs.10,000. In his defense the accused person does not dispute receiving the Kshs.10,000 save that the accused testified that the money was to be transmitted to Gilbert Rotich who was doing wiring for PW1. The source of funds undisputedly was EACC. There is testimony from the three EACC investigators corroborated PW1 could it be that PW1 was conning EACC to make them fund wiring for his house? I think not. The evidence suggests otherwise. Obviously, in the course of trial PW1 had a change of heart and blamed

Mr. Njiru and Mugambi as the KPLC officers who solicited for a bribe. But the overwhelming evidence clearly shows that it was the accused person who solicited for a bribe. Mr. Mugambi and Njiru are not trial and therefore it will be premature to speculate whether the money was to be shared with them.

Concerning the next issue, the accused submits that the charges were brought under a repealed law. In support of this argument the accused person cited High court petition 227 and 230/2009 George Joshua Okungu & another vs the CM Anti corruption court and Another. In that petition the High court stated in Order IV that "**As anti corruption and Economic Crimes Act, 2003 (No. 3 of 2003), no longer exists, we wish to make no orders in respect thereof or related thereto**". I have had an opportunity to peruse the decision of the superior court and I note that the validity of Act No 3 of 2003 was neither canvassed nor adjudicated upon in great detail. The preamble of the Anti-corruption and Economic Crimes Act Cap 65 provides "**An act of parliament to provide the prevention, investigation and punishment of corruption, Economic crime and related offences and for matters incidental**

thereto and connected therewith (Act No 3 of 2003, Act No. 7 of 2007, Act No. 10 of 2010, Act 22 of 2011, Act No 12 of 2012, Act No. 18 of 2014). In the transitional provision of the Anti corruption and Economic Crimes Act the only repealed legislation is the prevention of corruption Act Cap 65. In the interpretation and General provisions Act Cap 2 Sec 23 provides

*"1. where in a written law a reference is made to another written law, that reference shall, except where the context otherwise requires, be deemed to include a reference to the last-mentioned written law as it may from time to time be amended.*

*(2) Where a written law repeals and re-enacts, with or without modification, a provision of a former written law, references in another written law to the provisions so repealed shall, unless a contrary intention appears, be construed as reference to the provision so re-enacted'.*

From the above stated provision and case law it is clear that Act No. 3 of 2003 was not repealed but rather incorporated into Cap 65. In accordance with interpretations and general provision Act, the provisions

of Act No. 3 of 2003 should be construed as references to Cap 65. The only questions arising would therefore be whether in failing to mention Cap 65 in the charge sheet the accused would be prejudiced or embarrassed or unable to comprehend the nature of the offences he was facing. And it is my considered view that the omission did not prejudice the accused person in any manner whatsoever. It would have been better if the charge referred to Cap 65 as is stated in the current legislation. The reference to Act No. 3 of 2003 in the heading of the charge would not on its own render the charge defective. Neither is it a charge under a repealed law as contended by the accused person.

I *will* now deal with the issue of entrapment; the accused person submits that the defence of entrapment is a complete defence. He further submitted that it was not the role of the state to lure the accused person into committing the crime, and therefore the evidence of the accused person was collected illegally. He further submitted that *mens rea* was not established and therefore no offence could have been committed. The accused relied on the case of **Mohammed Noor VS AG Petition No. 181 of 2010**. In that case the superior court set out what constituted



entrapment that would render the evidence inadmissible the ingredients are:-

- a) The use of one pressure
- b) Creating an unusual motive
- c) Making the crime unusually attractive
- d) Creating an opportunity to commit a crime
- e) Criminal plan originated by state agents
- f) Gaining the confidence of the accused by taking reasonable steps to assure that the person was not set up
- g) Outrageous police conduct; persistence for the accused to commit the offence.

In this instant case the demand for a bribe was reported by PW 1 to the EACC on 1st July 2015. Subsequently, investigators recorded the conversations between PW1 and the accused and it is their evidence that once demand was established they proceeded with the entrapment operation. The ingredients of entrapment that would render the evidence obtained inadmissible, as pointed out by the superior court was clearly absent.

- For the accused to commit the offence it was not because of any instigation. It was by virtue of his frame of mind.
- The filing of a formal complaint did provide a sufficient and reasonable basis for a *bonafide* enquiry.
- After considering the nature of the offence whose detection is difficult due to secrecy involved in commission of such offences, employment of proactive techniques to discreetly detect the offence and gather evidence becomes necessary. The action of the EACC cannot be said to have been facilitating in the commission of a crime, neither did they make the crime attractive.

This case is clearly distinguishable from the case of **Mohammed Noor** and more specifically the criminal plan was not originated by state agencies, in this case the investigators of EACC. It was reported by PW1 who is not a state agent.

Concerning the issue of voice recognition, it was the accused persons submission that the testimony of a voice expert ought to have been called. Pw1 in his evidence stated that the conversation as captured by the voice recorder exb.1 and transcribed in exb 8 did take place. This evidence was corroborated by PW2,3,7 and 8. In his defence the accused does not dispute that the conversation took place save that he explained

the purpose of the money was different. In any event part IX of the evidence act does not make it mandatory to call for the evidence of a voice expert. The witnesses already before court have stated that they had known the accused for a long time and could recognise his voice; which evidence has not been disputed.

I will now determine the issue of the evidence linking the accused persons to soliciting a benefit on 9th June 2015; the investigation officer stated that 1st July 2015 he met PW 1 who reported that Samuel Cheruiyot had been demanding for benefit before reconnecting power. The conversation was recorded. The Investigating Officer stated that on 2nd July 2015 PW1 was given treated money. There is no circumstantial evidence showing that the accused solicited for a benefit on the 9th June 2015. The evidence adduced refers to incident that took place on 1st and 2nd July 2015.

I am therefore of the considered view that there is no case established against the accused proving that he solicited for a benefit from Peter Odhiambo on the 9th day of June 2015 and I shall acquit him under Section 215 of the CPC in regards to Count I.

As concerning counts II and III, having determined the issues arising I am satisfied that the case against the accused person has been proved to the required standards. The defence he raised is not tenable in these circumstances. I therefore find him guilty as charged in counts II and III and convict him according under Section 215 of the CPC.

**KENNEDY BIDALI [MR.]**

**CHIEF MAGISTRATE**

**1.11.2016**

Mr. Kanyoko holding brief for Kisilu

M/S Mutellah holding brief for Kanyuira for the state

**Ms. Mutellah** – The accused is a 1<sup>st</sup> offender. The offence is serious and the court should consider the effects of the crime under S.48 of the ACECA.

**Mitigation by Kanyoko**

Accused is a 1<sup>st</sup> offender. Accused is remorseful. During this period he has learnt a lot. He is remorseful. He is a father of four (4). He is the bread winner. May the court have mercy on him. He has had a positive

attitude and conducted himself well. He can reform. On the issue of seriousness all offences are serious. The accused deserves an opportunity.

**Court** - Bearing in mind that the accused is a first offender and the mitigation. The penalty prescribed under Section 48 is a fine not exceeding one million shillings or imprisonment not exceeding 10 years or both. I shall sentence accused as follows:-

**Count II** to pay a fine of Kshs.150,000/= in default one year imprisonment.

**Count III** to pay a fine of Kshs.150,000/= on default one year imprisonment.

Right of Appeal 14 days.

I CERTIFY THIS IS TRUE COPY OF THE ORIGINAL. DATED: 9/11/2016
KENNEDY BIDALI CHIEF MAGISTRATE ACCUSED

**KENNEDY BIDALI [MR.]**

**CHIEF MAGISTRATE**

**1.11.2016**